
Souter Causes Stir With Footnote in 'Exxon' Case

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The footnote was easy to miss. It began on page 27 of *Exxon Shipping Co. v. Baker*, issued by the Supreme Court on June 25, and it ended on the next page.

But Justice David Souter's footnote 17 has reverberated around law schools, leading Hugh Young, a lawyer involved in [the landmark punitive damages case](#), to predict that "it is going to become the great mystery footnote of the decade."

Souter, author of the opinion that struck down a \$2.5 billion punitive damage award in the Exxon Valdez case, wrote the footnote to point to "a body of literature" that documented the unpredictability of punitive damages. The footnote went on to mention studies written by the likes of [Cass Sunstein at the University of Chicago](#). Then on page 28 came the money quote: "Because this research was funded in part by Exxon, we decline to rely on it."

Though two amicus curiae briefs had cited the studies mentioned by Souter, neither told the Court that they were funded by Exxon. And since Exxon won the case, why was Souter going out of his way, seemingly, to disparage research that supported his concern about the unpredictability of jury awards? The justice did not elaborate.

Richard Hasen, law professor at Loyola Law School in Los Angeles, spotted the footnote right away and described it as "troubling" and "unfortunate" on his [Election Law blog](#). There are times, Hasen said, when litigants pay for necessary empirical studies in litigation -- election cases included -- and now Souter was casting doubt on their credibility.

Over at the [Concurring Opinions blog](#), Temple University law professor David Hoffman wrote that he was "fairly shocked" by the footnote, which he called a "deep shot" against Sunstein and others who have done jury research.



Sunstein, for his part, says he took no offense from the footnote. Reached by e-mail overseas, Sunstein said that Souter "is right not to rely on work partly funded by a party." Sunstein added, "I thought his opinion was excellent -- especially his emphasis on the problem of unpredictability."

And Charles Lifland, a partner with O'Melveny & Myers who has counseled Exxon in the Exxon Valdez case for years, says, "I don't believe Justice Souter was expressing skepticism about the research." Instead, Lifland says he thinks Souter distanced himself from it "for appearance's sake," even as he acknowledged that he agreed with it.

Stanford Law School professor and Davis Wright Tremaine partner Jeffrey Fisher, who argued the case for Alaska fishermen seeking damages from Exxon, said in an interview that he was surprised by the footnote. The studies Souter mentioned did not hide the fact that they were funded by Exxon, Fisher acknowledged, and "we hoped the justices would find out." But he did not feel it was appropriate to point it out in his own briefing. Fisher says he is glad that a justice or law clerk with "a particularly attentive eye" read the studies and learned of the Exxon connection.

"As soon as the [original \$5 billion] jury verdict came out in 1994," says Fisher, "Exxon set out to fund a lot of research, so they could seed the academic literature as the appeals worked their way up the system." The aim was to show appeals courts how inconsistent juries were in deciding on punitive damage awards.

The Exxon-funded research, some of which presented the same hypothetical case before several mock juries, has been part of the narrative of the Exxon Valdez tort litigation for years. A 1999 article in the *National Law Journal* reported that Exxon had funded several of the studies it cited in its appeal before the 9th U.S. Circuit Court of Appeals. Sunstein said then he had only received travel expenses for his study, which was published in the *Yale Law Journal*, and that he had retained editorial control.

In 2005, William Freudenberg, a University of California-Santa Barbara sociologist, published an article in which he detailed conversations with an official of an unnamed company who asked him to write papers that would show how punitive damages "are not a very good approach." Though Freudenberg did not mention Exxon by name, he does not dispute articles by others that have said Exxon was the company he was writing about. "What Exxon was trying to do was shape the academic literature," Freudenberg said last week.

Lifland, the lawyer for Exxon Mobil, calls that "an overstatement." He says the company wanted to "stimulate quality research, but we didn't stop anyone from writing what they wanted to write." Lifland adds that the same research was cited favorably by the Court in the 2001 punitive damages decision *Cooper Industries v. Leatherman Tool Group*.

The two groups that cited the studies at issue in Exxon were the Washington Legal Foundation and the Product Liability Advisory Council.

The foundation's Richard Samp says he found the footnote "flattering. They actually took the trouble to read the studies." Samp says it is understandable that the Court would "go out of its way to say it was not influenced by research whose impartiality could be questioned."

Hugh Young of the advisory council says the footnote is "peculiar," but adds, "I wouldn't take it as a slap in the face. You don't have to worry about Exxon buying out the *Yale Law Journal*."