

Exxon Prevails in a Major Climate Change-Related Legal Battle, But Many Questions Remain Unanswered

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Earlier this week, the New York Supreme Court handed Exxon Mobil Corporation a resounding win following a twelve day bench trial and testimony from eighteen witnesses in the first major climate change-related lawsuit to be tried to verdict in the United States, in *People of the State of New York v. Exxon Mobil Corporation*. That said, Exxon Mobil prevailed with a narrow victory, and the majority of issues concerning potential climate change liabilities have yet to be decided.

The New York Attorney General's Case and the Court's Decision

At trial, the New York Attorney General argued that Exxon Mobil engaged in securities fraud in violation of New York General Business Law § 352 *et seq.* (the "Martin Act"), and Executive Law § 63(12) (the attorney general dropped two other fraud claims shortly before trial). In order to prove a Martin Act violation, the Attorney General had to show that Exxon Mobil misrepresented or omitted a material fact (*i.e.*, one as to which "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act"). As interpreted by the court, conduct that violates the Martin Act also violates Executive Law § 63(12) if it is repeated or persistent.

In this case, the attorney general alleged that, between 2013 and 2016, Exxon Mobil made misleading disclosures in two publications and at two investor presentations concerning how it planned to manage the risks of climate change and related regulation. The attorney general charged that Exxon Mobil's proxy cost of carbon assumption in those public statements, which was used to assess future demand for its products, was inconsistent with its internal use of a different cost assumption to evaluate specific investments that would emit greenhouse gases. In other words, the attorney general argued that Exxon Mobil told its investors and the public that it was using one measure for the proxy cost of carbon, but actually used a different measure internally for its own purposes.

On December 10, 2019, in a 55-page opinion, the court held that the attorney general proved neither the existence of a misrepresentation (or omission) nor materiality.

According to the opinion, there was no misrepresentation, in part, because Exxon Mobil had disclosed the existence and use of both metrics and it was clear that they were distinct in their applications. The court found that the alleged misstatements were not material, because there was no proof that they affected Exxon Mobil's balance sheet, income statement, or any other financial disclosure. The court questioned the attorney general's focus on Exxon Mobil's far-reaching public projections for proxy costs and greenhouse gas costs in 2030 and 2040, holding that "[n]o reasonable investor during the period of 2013 to 2016 would make investment decisions based on speculative assumptions of costs that may be incurred 20+ to 30+ years in the future with respect to unidentified future projects." Additionally, the court noted that the attorney general said it would call as witnesses investors who claimed to have been misled but failed to do so.

Will *New York v. Exxon Mobil* Have a Major Impact on Climate Change Litigation?

Not by a long shot. Importantly, the New York Supreme Court emphasized early on in its opinion as follows:

Nothing in this opinion is intended to absolve Exxon Mobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil fuel products. Exxon Mobil does not dispute either that its operations produce greenhouse gases or that greenhouse gases contribute to climate change. But Exxon Mobil is in the business of producing energy, and *this is a securities fraud case, not a climate change case.* (Emphasis added).

In fact, direct climate change cases, like those referenced by the court, are heating up around the country. Many assert tort theories of liability, such as products liability (including failure to warn and design defect), negligence, nuisance, trespass, and impairment of public trust resources, among others. The judgment in *New York v. Exxon Mobil* has no preclusive effect on these types of cases.

Moreover, *New York v. Exxon Mobil* may actually help plaintiffs refine their claims, including claims based on alleged misrepresentations, and their strategy against Exxon Mobil and other fossil fuel producers. For example, in *Commonwealth of Massachusetts v. Exxon Mobil Corporation*, filed in late October 2019, the Massachusetts Attorney General, while asserting similar claims concerning Exxon Mobil's use of a proxy cost of carbon, also asserted claims for violation of the Massachusetts Consumer Protection Act, M.G.L. c. 93A, based on the allegation that Exxon Mobil has known since the 1970s that its use of fossil fuel products would have potentially catastrophic effects on humanity. The Massachusetts Attorney General also asserted that Exxon Mobil intentionally misled Massachusetts consumers, through advertising and promotional materials, about the existence and dangers of climate change and by "greenwashing" its own products and its role in contributing to climate change.

Similarly, in a pair of derivative suits filed in Texas federal court in May 2019, *Montini v. Exxon Mobil Corporation* and *Colditz v. Exxon Mobil Corporation*, the plaintiff investors assert claims against Exxon Mobil, as well as its officers and directors, for violation of federal securities laws, breach of fiduciary duty, waste of corporate assets and unjust enrichment. The factual allegations in these cases span well beyond Exxon Mobil's use of a proxy cost of carbon in its public disclosures. The plaintiffs also claim damages not in the form of inflated stock prices, but from harm to Exxon Mobil's goodwill and business reputation, as well as exposure to billions of dollars in potential liability for violations of state and federal law. Simply put, Exxon Mobil won a battle, but it is still left fighting a multi-front war.

Implications for the Insurance Industry

Notwithstanding Exxon Mobil's victory in *People of the State of New York v. Exxon Mobil Corporation*, insurers should continue to monitor the developments in climate change suits closely. Although the pending climate change cases target major fossil fuel producers like Exxon Mobil, Chevron, and Shell, if plaintiffs successfully hold these defendants liable, follow-on suits are likely to be filed against major carbon emitters. Indeed, policyholder efforts to pursue coverage can be expected to intensify with any climate change claimant successes.

If you would like to know more about these issues and how they may impact your underwriting and claims-handling, please contact John Anooshian (anooshianj@whiteandwilliams.com; 215.864.7005) or another member of our Insurance Coverage and Bad Faith group.

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