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What NY And Mass. Exxon Climate Suits Mean For Other Cos.

By **Alana Rusin** (December 3, 2019, 3:29 PM EST)


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On Nov. 7, closing arguments wrapped in the trial of People of the State of New York v. ExxonMobil Corp. The case, which asserts that Exxon Mobil engaged in securities fraud, was the culmination of a multiyear investigation by the New York attorney general's office into the alleged disconnect between Exxon's internal accounting for the effects of climate change on its business ventures versus the proxy cost of climate change disclosed to its investors.

On Oct. 28, just as the New York case was starting trial, the Massachusetts attorney general's office announced it was filing its own suit against Exxon, alleging broad violations of the Massachusetts consumer protection act. What will the new focus on consumer protection act claims mean in the weeks and months ahead for publicly traded companies that are concerned about their exposure when it comes to climate change?

Focus on Exxon Mobil

In 2015, reporting by Inside Climate News[1] and the Los Angeles Times (in conjunction with Columbia University's Energy & Environmental Reporting Project)[2] revealed that Exxon has been at the forefront of climate change research since the late 1970s, funding its own internal science as well as outside experts at Columbia University and the Massachusetts Institute of Technology.

These reports claimed that, while on the one hand, Exxon was internally using sophisticated climate change modeling to predict that Arctic ice sheets would significantly retract by this decade, making drilling in Canada's Northwest Territories financially viable, it was simultaneously discrediting climate change science in the public realm.

For example, the reports found that Exxon's CEOs repeatedly stated at annual shareholder meetings that climate change models were inaccurate, and that scientific evidence was inconclusive or did not support the notion that humans' burning of fossil fuels was driving climate change. At the same time, Exxon was relying on those same models to plan its investments and acquisitions based on the certainty of a changing climate.

This reporting spurred New York and Massachusetts into action. In November 2015, former New York Attorney General Eric Schneiderman opened an investigation into Exxon, followed in April 2016 by Maura Healy, the attorney general of Massachusetts.[3] Exxon vigorously fought these investigations by filing multiple lawsuits throughout the country, from the Massachusetts Superior Court to a U.S. district court in Texas, seeking to enjoin the civil investigative demands.

Despite pressing its appeals all the way to the U.S. Supreme Court, Exxon ultimately turned over millions of pages of documents to the New York and Masschusetts attorneys general. Additionally, company employees provided substantial testimony about Exxon's internal and external approaches to the risks of climate change.

New York's Approach: Securities Fraud

The New York attorney general's office framed its case against Exxon narrowly. New York argued that Exxon committed securities fraud under New York's Martin Act, the state blue sky law, as well as common law and equitable fraud.

Its central argument was that Exxon was committing fraud by publicly telling its shareholders that it was assuming a significant cost of $80 per ton of carbon dioxide (what Exxon calls the "proxy cost for carbon"), to account for likely government-imposed regulatory costs on fossil fuel production and investment — all while it was privately making risky business decisions without applying that proxy cost.

This was supported by testimony from an activist investor and from economic experts, to support the state's estimation that Exxon's internal risky decision-making resulted in an approximately $1.6 billion loss to investors.

The New York attorney general's office surprised the court in its closing arguments, when it voluntarily dismissed its common law and equitable fraud counts, which would have required the state to prove that Exxon intended to deceive investors, and that investors relied upon the deception to their detriment. In contrast, the Martin Act claims only require the state to prove that fraud occurred without either intent or reliance.[4]

This points to some weaknesses in the evidence presented to support the state's case. Justice Barry Ostrager, a former high-profile business litigator at Simpson Thacher & Bartlett LLP, who presided over both the litigation challenging New York's investigation and the ultimate trial, has promised to issue a decision by early December.

Massachusetts: Expansive Consumer Protection Claims

The outcome of the New York case will provide some valuable lessons for the recently filed Massachusetts action. This is particularly true with respect to Justice Ostrager's future rulings as to whether Exxon failed to internally apply its proxy cost of carbon, and, if he finds such a failure, whether New York proved what effect the failure had on the stock price.

However, the Massachusetts complaint lays out a much bigger case over its 211 pages than the one New York made. Massachusetts claims that Exxon was engaging in a public misinformation campaign about the risks of climate change, while it was funding science that established the certainty of human-generated climate change.

The Massachusetts case also alleges that Exxon engaged in greenwashing, i.e., advertising of its petroleum products as a solution to, not a cause of, climate change.[5] In doing so, Massachusetts alleges that Exxon violated the Massachusetts consumer protection statute, Massachusetts General Laws Chapter 93A, and its accompanying regulations, by misleading both investors and mere consumers of their petroleum products with respect to the impact of fossil fuels on climate change, and climate change-driven risks to Exxon's business.

The Massachusetts complaint points to specific external communications from Exxon over decades to support its allegations that the company engaged in unfair or deceptive trade practices, including:

- Placing advertorials in the New York Times, which cast doubt on climate science;

- Funding lobbying and PR groups such as the Global Climate Coalition and the Global Climate Science Communications Team to further sow doubt about climate science; and

- Promoting Synergy and Mobil 1 products as solutions for combating climate change.

Interestingly, as with suits under the Martin Act, an enforcement action by the Massachusetts attorney general's office brought under Section 4 of the Massachusetts consumer protection statute requires only a finding that a defendant violated 93A or its regulations (which include a regulation specifically prohibiting false advertising). It does not require a showing of intent or harm to the consumer in order to obtain injunctive relief.

Injunctive relief could be wide-ranging here, including requiring warnings on petroleum products, similar to the surgeon general's warnings found on cigarette packaging. However, the monetary relief of $5,000 per violation the state requests in this case is only available if it can show that Exxon knew or should have known that it was willfully violating 93A.

However, unlike in the New York case, which will be decided in a matter of weeks, the Massachusetts case is likely to be litigated well into 2020 and beyond.

Takeaways for All Publicly Traded Companies

Although the resolution of these cases is of particular interest to energy companies, all publicly traded companies should be following these lawsuits, as they boil down to three key questions that affect a wide swath of industries:

- How are companies accounting for the risks of climate change?

- How are companies then communicating their assessment of climate change risks to shareholders?

- What brands are companies building around their sustainability in the face of climate change, and does that branding hold up to scrutiny under consumer protection act claims?

With respect to public disclosure of climate change risk, the U.S. Securities and Exchange Commission issued rather murky guidance in 2010[6] as to when companies must disclose climate risk to their investors. For example, the SEC guidance states that “registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents.” That language is highly discretionary, without providing clear mandates to companies to disclose physical risks of climate change.

And in practice, the SEC is not currently driving companies to strengthen their climate change disclosures.[7] In fact, the SEC opened its own investigation into Exxon’s climate change disclosures in 2016, but ultimately decided in 2018 to take no action. The SEC’s inaction on climate change is possibly part of what is driving these state-level lawsuits.

If the New York or Massachusetts verdicts come out against Exxon, they could lead to heightened disclosure obligations. Therefore, to mitigate against future liability, publicly traded companies of all stripes, including the energy sector, financial firms and real estate investment trusts may wish to proactively evaluate how they are internally assessing the risks to their businesses based on climate change, and how consistent their internal messaging is with the external disclosures they are making to their shareholders and the public.

Similarly, if Massachusetts’ novel claims are ultimately vindicated, companies will need to think through their advertising strategies around sustainability. For example, within the automotive industry, how accurate are advertising campaigns about the “green” vehicle models within a fleet? How responsible are automotive companies for guiding consumer tastes, and mitigating the effects of climate change, through accurate advertising? Similarly, might the construction and development industries be responsible for driving demand for green buildings?

Although these questions do not yet have answers, if Exxon is found to be responsible for misleading consumers and investors in the Massachusetts case, then other sectors should consider their own exposure vis-a-vis consumer protection acts.

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[1] https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken.

[2] https://graphics.latimes.com/exxon-arctic/.

[3] https://www.mass.gov/lists/attorney-generals-office-exxon-investigation.

[4] https://www.law360.com/articles/1218053/ny-drops-half-its-exxon-fraud-case-at-climate-trial-s-close.

[5] https://www.mass.gov/lists/attorney-generals-office-lawsuit-against-exxonmobil.

[6] https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[7] https://www.law.georgetown.edu/environmental-law-review/blog/leaving-investors-in-the-dark-the-secs-growing-silence-on-guidance-related-to-the-business-and-legal-developments-on-climate-change/.

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