

## Green Groups Blast Exxon's 'Tortured' Appeal Of \$14M Award

By Clark Mindock

Law360 (October 8, 2021, 3:38 PM EDT) -- Environmental groups have told the Fifth Circuit that ExxonMobil Corp. is engaging in a "tortured and unsuccessful attempt" to wriggle itself out of a \$14 million verdict for pollution violations at a Texas facility.

The Sierra Club and Environment Texas Citizen Lobby Inc. on Thursday pushed back on the energy giant's recent argument that a June U.S. Supreme Court decision undermines the standing of the groups' members to sue and be compensated for damages under the Clean Air Act.

The ruling, *TransUnion LLC v. Ramirez*, clarified what constitutes concrete harm for the purposes of Article III standing in order to recover statutory damages. The groups say that the ruling is far from being a game changer for Exxon and that it doesn't undermine their standing to sue over the pollution.

They said Exxon's reliance on the ruling managed to conflate the "claims" with "violations" and "injuries in fact" with "traceability," and argued that it had been long established that the environmental groups have Article III standing.

Instead, the supplemental brief was hoping to undermine a lengthy legal process, the environmental groups said.

"Exxon's supplemental brief is most notable for what it does not do: It does not contest, much less identify any clear errors in, the additional factual findings made by the district court; it does not present any intervening authority on the issue of injury, traceability, or Clean Air Act penalty factors; and it makes no showing that the district court abused its discretion in applying the penalty factors," the groups said. "Instead, Exxon tries to contort the injury-in-fact holding of *TransUnion* into a change in settled law on traceability, and it rehashes arguments already rejected by this court in its interim opinion or in its earlier decision in this case."

The suit revolves around alleged CAA violations at an Exxon refining and chemical complex in Baytown, Texas, where the environmental groups and their members have alleged that the company released millions of pounds of air pollution.

This is the third time the case has made it before the Fifth Circuit and follows an initial appearance in which the appeals court revived the groups' suit after U.S. District Judge David Hittner originally awarded nothing to the groups after trial. The circuit said then that the judge abused his discretion when considering some of the factors in the Clean Air Act's penalties and incorrectly analyzed some of the groups' claims. On remand, the groups reduced their requested amount of penalties from \$642 million to about \$40 million.

On remand, Judge Hittner found that the groups had adequately pleaded standing and ordered Exxon to pay nearly \$20 million in civil penalties. The case was then **remanded again** by the Fifth Circuit, with the court instructing the district court to take a better look at whether the members of the groups had sufficiently shown that their injuries were traceable to Exxon's conduct.

The district court then reviewed and revised its ruling, finding fewer violations and cutting the amount owed by Exxon to roughly \$14 million.

Exxon then filed its latest arguments, saying the TransUnion case should inform the court's opinion. That decision, related to the Fair Credit Reporting Act, was issued in June and found that only plaintiffs concretely harmed by defendants can establish Article III standing to seek damages against a private defendant in federal court. Exxon claimed that, far from having concrete injuries, the plaintiffs had instead taken a list of publicly available records that Exxon was required to submit to various agencies, compiled incidents into a spreadsheet and sued over them. When asked to show direct injuries, Exxon said the plaintiffs merely backfilled that information.

Exxon and counsel for the environmental groups didn't immediately respond to requests for comment Friday.

Circuit Judges W. Eugene Davis, Gregg J. Costa and Andrew S. Oldham sat on the panel for the Fifth Circuit.

The Sierra Club is represented by Philip H. Hilder of Hilder & Associates PC and Joshua R. Kratka of the National Environmental Law Center.

Exxon is represented by Russell S. Post, Eric J.R. Nichols, Fields Alexander, Robert D. Daniel and Bryon A. Rice of Beck Redden LLP and Albert R. Axe and Keith A. Courtney of McGinnis Lochridge.

The case is Environment Texas Citizen Lobby Inc. et al. v. ExxonMobil Corp. et al., case number 17-20545, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Juan Carlos Rodriguez. Editing by Rich Mills.