

Three Firms. One Trial Team. \$3 Billion on the Line for Exxon Mobil

By Ross Todd

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This is the first column in a two-part series.

Rare is the corporate defendant that is willing and able to take a securities fraud class action to trial, let alone one with \$3 billion potentially on the line.

There have been more than 7,000 securities class actions filed in the U.S. since the start of 1996 by the count of Kevin LaCroix over at “The D&O Diary”—about as authoritative a source as you’re going to find on the topic. According to LaCroix, only about 30 have gone to trial.

So, what possessed the folks at Exxon Mobil Corp. to let a Dallas jury decide earlier this month whether the company and three former executives—chairman and CEO Rex Tillerson, CFO Andrew Swiger and Controller David Rosenthal—defrauded investors through public statements about Exxon’s Canadian oil sands and Rocky Mountain gas operations?

Well, for one, the company had pulled together the defense counsel version of an all-star squad. Lead trial counsel Tom Melsheimer, a native Dallasite, brought his team from King & Spalding, Dan Toal and a team at Paul, Weiss, Rifkind, Wharton & Garrison had been living with the case since it was filed back in 2016. A team signed on from **Latham & Watkins**, led by **Scott Thomas** in Texas, a partner of Melsheimer’s as recently as



Courtesy photos

L-R: Daniel J. Toal of Paul Weiss, Scott C. Thomas of Latham & Watkins, Thomas M. Melsheimer of King & Spalding.

earlier this year, when both practiced at Winston & Strawn.

On top of that line-up, there was a track record. Before trying those claims before a federal jury—and landing a defense verdict earlier this month—those disclosures already had been tested in court. More than half a decade ago, Toal and his colleagues at Paul Weiss, led by trial legend Ted Wells, had already tried a closely related case brought by the New York Attorney General under the state’s Martin Act—that time to a judge in state court.

“Paul Weiss was the was the lead team from the beginning of the New York AG’s case,” said

Melsheimer, tracing the origins back to the investigation and the 2019 bench trial that the Paul Weiss team won—a win that landed Litigator of the Week honors for Toal, Wells and their then-colleague Justin Anderson, who is now in-house at Exxon.

That earlier win—and the experience that came with it—set the foundation for the follow-on securities class action filed in Texas that, unlike the Martin Act case, would be tried to a jury.

“This one, if it wasn’t dismissed, it was going to get tried,” Toal said, tying that posture directly back to the earlier New York proceedings.

By the time the Dallas case reached trial, the core Paul Weiss team that had lived with the dispute for years was joined by Melsheimer and Thomas, who had successfully defended Mark Cuban against insider trading claims from the U.S. Securities and Exchange Commission more than a decade ago. They were brought on as a fresh set of eyes to help translate a dense securities and accounting case into something a jury could absorb.

The result was a hybrid team—anchored by lawyers who had already tried the issues in front of a judge and supplemented by trial lawyers brought in to help present the case to lay jurors.

There were advantages to both perspectives.

Paul Weiss had what Toal described as “an opportunity to know every, every detail” after years in the case, including familiarity with many of the same witnesses from the New York trial. But that depth of knowledge came with a challenge as the case moved to a jury setting.

“That can be a vulnerability too, because you’re so deeply enmeshed in it,” Toal said. “It’s helpful to get people who have not been living the case ... to see how different responses and different facts resonate.”

That dynamic—bench trial veterans paired with lawyers seeing the case closer to how jurors would—helped shape how the defense approached trial. At the center of that effort was Wells, who, at age 76, did not take a stand-up role

at trial, but remained deeply involved in shaping the defense.

“He was the coach,” Melsheimer said. “He coached me and Dan and Scott, and played a key role in helping us hold our defense.”

Wells’ influence, the lawyers said, was both strategic and personal.

“He was a very steady hand throughout,” Melsheimer said. “He had great suggestions, great commentary.”

It also showed up in the tone he set for the team during trial.

“He’s got this exuberance,” Thomas said. “He was dancing in the work room ... He brought everybody up.”

For Toal, who has worked with Wells for more than two decades, the Dallas trial reflected a different kind of role for one of the country’s most prominent trial lawyers.

“Tom was the lead trial lawyer here,” Toal said, noting the interplay between Wells and Melsheimer. “Seeing the two of them work together was a real treat ... seeing them bounce ideas off of one another.”

The collaboration extended beyond Wells and Melsheimer. By trial, the lawyers said, three firms were effectively operating as a single team—something Thomas described as a “virtual firm.”

Responsibilities were divided pragmatically rather than by firm. “We knew Tom was going to open and close, and then we kind of broke things out by issues,” Thomas explained.

“If it made sense for Dan to do something, then Dan was going to do it,” he said. “No one had their thing that they didn’t want anyone to wrest away from them.”

That flexibility was evident outside the courtroom as well. Dan Toal recalled that the collaboration quickly blurred firm lines in practice. “You might have seen a Paul Weiss partner working with a Latham partner and a King & Spalding associate,” he said. “We were just trying to figure out together the best way to communicate these concepts.”

Defending a Securities Class Action With Company Witnesses and Common Sense

By Ross Todd

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This is the second in a two-part series about ExxonMobil's defense win in a federal securities class action trial in Dallas earlier this month. You can find part one *here*.

There are reasons defendants are generally uncomfortable taking securities class actions before a jury.

When securities fraud claims have survived a motion to dismiss, summary judgment and class certification, the dollar figures at stake can be astronomical.

Materiality. Falsity. Scier. Causation. Defenses that were an advantage during the pleadings phase of the case can make even the best trial lawyers sound mealy-mouthed when they try to stack them one on top of the other and present them to a jury.

But for the lawyers defending Exxon Mobil Corp. in a high-stakes federal case in Dallas, settlement was never a fallback. The case was destined to be tried once claims that Exxon misled investors about its Canadian oil sands and Rocky Mountain gas operations this past decade survived the pleadings.

"This case was going to be either one of three things," said Tom Melsheimer of King & Spalding, the lead trial lawyer on the Exxon team that secured a defense verdict earlier this month. "It was going to be dismissed by the judge, the plaintiffs were going to surrender, or we were going to win a trial." Melsheimer tried the case alongside colleagues at Paul, Weiss, Rifkind, Wharton & Garrison and **Latham & Watkins**, with appellate counsel from Haynes and Boone.

Exxon Mobil's posture drove the approach. Dan Toal, a leading member of the Paul Weiss team that had previously tried and won a closely



Credit: Harry Green/Adobe Stock

ExxonMobil corporate sign outside of their headquarters in the Asia-Pacific, Kuala Lumpur, Malaysia.

related case brought by the New York Attorney General under the state's Martin Act, said Exxon's willingness to take the case to trial was "emblematic of the company."

"If it hasn't done anything wrong, it really wanted to vindicate its reputation," Toal said. He described a defense strategy that focused not only on financial exposure but on "the reputation of the company and the people at the company who did the work."

Rooting the Defense in Company Witnesses

In that prior New York case—a bench trial in state court—the state didn't have the burden of proving up Exxon's intent to defraud like the plaintiffs in the Texas case did. Melsheimer and Latham's **Scott Thomas** said that much of the defense presented to the Dallas jury focused on intent. The defense kept returning to the idea that people at the company—including former chairman and CEO Rex Tillerson, former CFO Andrew Swiger and former Controller David Rosenthal, who were also defendants in the case—were doing their level best to follow the rules.

Thomas said the company witnesses were effective at telling that story. “These folks were invested. They believed back then they were doing it right. They believed today they did things right,” he said.

Melsheimer added that “nobody was going to win the case on some SEC rule, or an accounting classification, or some commentary from Society for Petroleum Engineers.”

“This was going to be won on intent and state of mind,” he said.

The plaintiffs team actually called former Exxon CFO Swiger as their first witness. Thomas said that the fact that many of the witnesses had testified before in the New York case prepared them to face hostile questioning. He added that under those circumstances, it’s important for witnesses to answer questions from both sides without changing appearance and tone between lawyers. “It’s like in baseball: The other team gets to go at bat in the first inning,” he said. “In the bottom half, we’re going to get up, and you’re going to tell your story. So, don’t worry ... the time will come.”

From the outset, the team made clear what they wanted jurors to focus on: the credibility of company witnesses. “We wanted the jury to take the measure of the men and the women that they were going to hear from,” said Toal, noting that the company witnesses had a combined 386 years of experience at Exxon. The approach paid off, even if jurors didn’t master the technical details of the oil and gas business. “I can’t say by the end of the trial that the jurors knew the nuances of the proved-reserve test or the three-step impairment test,” said Toal, referring to some of the complex accounting issues raised during the trial. “But I think they certainly knew that people who came before them were working hard, trying to follow the rules, trying to get to the right answer.”

Melsheimer framed the difference between the case the two sides put on in blunt terms.

“We had eyewitnesses. They had paid witnesses,” he said.

And in a trial that he described as “a race to credibility,” he concluded, “they lost that race.”

The defense also leaned heavily on a core legal concept that translated well into common-sense language: hindsight.

“You can’t commit fraud by hindsight,” Toal said, describing a key instruction secured after Nina Cortell and Jason Jordan of Haynes and Boone and Audra Soloway of Paul Weiss took the lead for the defense team at the jury charge conferences. The hindsight issue became a central theme in Melsheimer’s closing, with him repeating the word nearly 20 times.

The defense reinforced that theme visually as well as verbally. Melsheimer described using a board in closing that listed “what fraud is not”—things like hindsight, mistakes and differences of opinion—allowing him to “refer to that over and over again.”

The team leaned on another practical tactic by narrowing the evidentiary landscape during closing arguments to the key documents that pointed toward a defense verdict. “There were hundreds of exhibits ... but we felt like there were 15 that mattered,” Melsheimer said. The team put together a poster board describing those 15 that was displayed throughout closings.

At bottom, the defense leaned on credible witnesses and a narrative jurors could understand.

“If you have good witnesses and good documents, and you have jury instructions that you can weave into your narrative, that’s what every defendant’s looking for,” Melsheimer said.

The outcome, the defense lawyers suggest, may offer a broader lesson for defendants weighing whether to try similar securities cases.

“I think this experience ... reaffirms everybody’s faith in the jury system,” Toal said. “If you have a compelling case and a compelling narrative, you can win these cases.”