

# PUBLICATION

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## In ExxonMobil Battle over Indemnity, Texas Supreme Court Considering Review of Privilege Issues

February 14, 2013

**In the coming days, the Texas Supreme Court will decide whether to uphold the protection of communications regarding an environmental lawsuit in Louisiana that ExxonMobil contends are privileged.**

In 2009, Exxon Mobil sued Trade Exploration Corp. and others in Harris County for indemnification concerning three Louisiana cases. Last summer, on defendants' motion, the trial court compelled production of two privileged documents between ExxonMobil's in-house counsel, attorneys, and corporate representatives leading up to the first settlement in *M.J. Farms, LTD v. ExxonMobil et al.* (Seventh Judicial District Court, Louisiana). Last fall, the 14th Court of Appeals directed the trial court to vacate that order.

In the dispute now before the Texas Supreme Court, defendants contend that an inquiry into ExxonMobil's good faith includes an inquiry into the subjective beliefs of the company and its lawyers -- as reflected in their communications about the settlement. As a result, they seek production of attorney-client communications under the offensive-use doctrine, which in Texas generally prohibits a plaintiff from using a privilege as a sword -- rather than a shield -- to protect outcome determinative information (not otherwise available to defendants) from discovery.

A decision from the Texas Supreme Court on defendants' petition, which will be either a denial or request for more briefing, is expected imminently. If the Texas Supreme Court requests more briefing and ultimately grants defendants' petition, then the trial court's decision to divulge the two privileged ExxonMobil documents would be reinstated.