



Can New York City hold the world's largest oil companies liable for deceptive greenwashing under the City's Consumer Protection Law? The Appellate Division, First Department took up that interesting question recently, and held that the City's complaint alleging that the oil companies deceptively advertised to New York City customers did not pass muster. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

FIRST DEPARTMENT

TORTS, NEW YORK CITY CONSUMER PROTECTION LAW

City of New York v Exxon Mobil Corp., 2026 NY Slip Op 05851 (1st Dept Oct. 8, 2026)

Issue: Did New York City state deceptive trade practice claims against multinational oil companies under the City's Consumer Protection Law for alleged product and corporate greenwashing?

Facts: After New York City's federal court suit against the defendant oil companies "for climate change under state law theories of public nuisance, private nuisance, and trespass" failed, the City filed this action for alleged deceptive trade practices related to the defendants' advertising practices. In particular, the City alleged that the defendants engaged in deceptive product greenwashing by "misrepresenting the climate impacts of various gasoline products sold at their branded service stations in the City. In a bid to reassure consumers that purchasing these products is good for the planet, ExxonMobil, Shell, and BP advertise them as 'cleaner' and 'emissions-reducing,' but fail to disclose their harmful effects on the climate." The City also alleged that the defendants engaged in deceptive corporate greenwashing by "exaggerating their investments in clean energy resources and inflating the climate benefits of their natural gas products and investments in alternative energy sources. The aim of these statements, the complaint alleges, is to portray defendants as leaders in the fight against climate change, even though their products are the primary driver in causing it, on the theory that today's consumers are more likely to buy from companies that are perceived to be environmental stewards."

Defendants moved to dismiss the City's complaint for failure to state a claim, among other things. Supreme Court granted the motions, holding that "the City's theory was that each product greenwashing statement was misleading, not because it was false, but *because* it fails to disclose the material fact that the fossil fuel product emits substantial quantities of greenhouse gases that contribute significantly to climate change. However, the City cannot succeed on this theory where the City's own allegations concede that the connection between fossil fuels and climate change is public information." Thus, the court concluded, "[t]he City cannot have it both ways by, on one hand, asserting that consumers are aware of and commercially sensitive to the fact that fossil fuels cause climate change, and, on the other hand, that the same consumers are being duped by Defendants' failure to disclose that their fossil fuel products emit greenhouse gases that contribute to climate change. In this respect, the City's allegation that Defendants 'conceal the central role of fossil fuels in causing climate change' is not cognizable where the City has otherwise conceded widespread public awareness of this information."

With respect to the corporate greenwashing claim, the court held that "the complaint did not sufficiently allege that the statements were 'made in connection with the sale' or 'offering for sale' of 'consumer goods or services,' because none of the clean alternative energy products referenced in the statements were sold to consumers, either in New York or anywhere else. Because the corporate greenwashing statements lacked any nexus to a consumer good sold in New York City, the second cause of action was also dismissed."

Holding: The Appellate Division, First Department affirmed. The court held that "the City's claim is that defendants' advertising of their improved products is deceptive and misleading because, while the statements about the products extol their beneficial effects, they fail to state that these products, which are manufactured from fossil fuels, will still produce carbon emissions when used, thereby contributing to climate change. This claim of deceptiveness conflicts, however, with the premise of the entire action, namely, that the general public, regardless of level of sophistication, is now well aware of the fact that the use of fossil fuels results in greenhouse-gas emissions and is the primary driver of climate change." Indeed, the court noted, "the City does not claim that any challenged statement is false. The statements, in their full context, are comparative in nature, informing consumers that use of the improved gasoline products will produce fewer carbon emissions than other gasoline products. Nothing in the statements could lead even an incautious consumer to understand defendants to be representing that the environmental impact of use of the new products to power private vehicles would be comparable to the impact of taking public transportation, bicycling, walking, or using electric or hybrid cars."

The court concluded, "all of the product statements attacked by the City make plain that the advertised products are gasolines and claim only that the use of these improved gasoline products has the potential to produce fewer carbon emissions than the use of other gasoline

products. Not even the least sophisticated consumer could be led to believe that, by using the advertised gasoline products, he or she would be able to drive a vehicle without producing a significant amount of emissions. The claim of deception here is therefore . . . implausible.” Therefore, “as a matter of law, the product statements at issue do not constitute a deceptive trade practice within the meaning of the CPL because they do not have ‘the capacity, tendency or effect of directly or indirectly deceiving or misleading consumers.’”

The court also held that the corporate greenwashing claim failed because “[t]he City does not allege that defendants sell to consumers any products or services based on the alternative technologies referenced in the challenged corporate greenwashing statements. Neither has the City brought to our attention any court decision in which a corporation’s statements about itself solely for purpose of branding or public relations, without connection to the sale of any particular goods or services to consumers, have been held to run afoul of the CPL.” Indeed, the court noted, “[t]he CPL’s limitation of its scope to statements made ‘in connection with the sale . . . or in connection with the offering for sale . . . of consumer goods or services’ distinguishes it from the state consumer protection statute, which extends to ‘deceptive . . . acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.’ Similarly, the CPL is narrower in scope than the consumer protection statutes of other jurisdictions that are not limited to statements made in connection with a specific consumer transaction.” Therefore, the court concluded that the City failed to state claims against the defendants.

SECOND DEPARTMENT

CRIMINAL LAW, PREDICATE FELONY

People v Gardner, 2026 NY Slip Op 05809 (2d Dept Oct. 7, 2026)

Issue: Does the United States Supreme Court’s decision in *Erlinger v United States* (602 U.S. 821) require, under all circumstances, a jury, rather than a judge, to determine whether a defendant committed a predicate felony within the limitations period set forth in the second felony offender and second violent felony offender statutes before a sentence is imposed?

Facts: After defendant agreed to plead guilty to “one count of criminal possession of a weapon in the second degree . . . in exchange for . . . a term of imprisonment of seven years to be followed by five years of postrelease supervision,” the People advised Supreme Court that defendant had a previous felony conviction for criminal possession of a weapon. The defendant confirmed that he was previously convicted of a felony, but although both convictions were violent felonies, “the court determined that the defendant must be sentenced as a second felony offender rather than a second violent felony offender.” The court then sentenced defendant to the agreed-upon sentence.

Thereafter, “the defendant moved pursuant to CPL 440.20(1) to vacate his sentence, contending that resentencing was required because there was a discrepancy between the order of commitment, which indicated that he was convicted as a second felony offender, and the sentence imposed during the sentencing proceedings, when the Supreme Court did not specifically indicate that it was sentencing the defendant as a second felony offender. In response, the People contended that the defendant had been sentenced as a second felony offender, but agreed that he should be resentenced because the court should have sentenced the defendant as a second violent felony offender rather than a second felony offender. However, the defendant argued in a supplemental affirmation that the court could not resentence him as a second violent felony offender because there was a question as to whether the defendant’s prior conviction occurred within 10 years of the commission of the instant offense and that the issue had to be determined by a jury, rather than a judge, in accordance with *Erlinger v United States* (602 U.S. 821). According to the defendant, the court was prohibited from empaneling a jury for this sentencing question under CPL 400.15(7)(a), which provides, in relevant part, that where the defendant controverts an allegation regarding his status as a second violent felony offender, a hearing ‘must be before the court without jury.’”

The court “granted the defendant’s motion to vacate his sentence and resentence him as a first-time violent felony offender. The court found that, pursuant to *Erlinger*, a jury was required to make the necessary findings to determine whether the defendant was a second felony offender, violent or otherwise. As to whether a jury could be empaneled for that purpose, the court found that it was prohibited from doing so under CPL 400.15(7)(a) and that it lacked such authority under Judiciary Law § 2-b(3). Consequently, the court determined that the defendant would be resentenced as a first-time violent felony offender, but that the agreed-upon sentence of a term of imprisonment of seven years followed by five years of postrelease supervision remained proper.”

Holding: The Second Department reversed. Under the Sixth and Fourteenth Amendments, the constitutional right to a jury trial requires a jury to determine the facts constituting the elements of a crime, but judges still have substantial “discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.” But what constitutional protections “apply at sentencing when the People seek to enhance a defendant’s sentence beyond the range prescribed by the statute under which the defendant was convicted,” such as under the persistent felony offender statutes?

Looking first to the United States Supreme Court’s holding in *Apprendi v New Jersey* (530 U.S. 466), the Second Department noted that the Supreme Court has held, “other than the fact of a prior conviction, any fact that increases the prescribed range of penalties for a crime must be submitted to a jury, and proved beyond a reasonable doubt. A narrow exception to the *Apprendi* rule exists: a judge may properly determine, without a jury, that the defendant was previously convicted of a crime—the fact of prior conviction. This is because a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees, and a defendant’s recidivism—a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence—

does not relate to the commission of the offense.” Thus, the Court of Appeals has consistently held that “a jury need not make findings as to whether the defendant is subject to New York’s predicate felony offender statutes.”

The United States Supreme Court’s recent decision in *Erlinger v United States*, in which the Supreme Court held that a jury, rather than a judge, must decide whether “predicate offenses are committed on occasions different from one another” for a sentence enhancement under the Armed Career Criminal Act, did not undermine the constitutionality of New York’s predicate felony offender sentencing enhancement scheme, the Second Department held. As the court explained, “[t]he provision of the ACCA at issue in *Erlinger* is fundamentally different than any provision of New York’s second felony and second violent felony offender statutes in that the ACCA requires a factual determination about the defendant’s actions and the circumstances surrounding the manner in which the predicate offenses were committed Conversely, the tolling calculation under the subject predicate felony offender statutes does not involve an inquiry into the underlying facts that led to the predicate convictions. Rather, the court is required to determine the dates that a defendant entered and was discharged from a correctional facility upon serving a prior sentence. These ministerial calculations do not implicate any factual determination as to the defendant’s actions during a prior crime of conviction and are akin to the fact of prior conviction To protect the rights of a defendant during sentencing as a predicate felony offender, New York’s procedural rules provide for a hearing before the judge when the defendant controverts an allegation in the predicate felony statement. That is all that is required—the Constitution does not entitle a defendant to a jury determination on the issue of whether a predicate offense was committed within 10 years of the commission of the instant offense, including any calculation regarding the periods during which the defendant was incarcerated.” Therefore, the court held, the trial court “erred in holding that a jury was required to make a finding as to whether the prior sentence was imposed not more than ten years before commission of the felony of which the defendant presently stands convicted.”

CasePrepPlus | October 16, 2026

© 2026 by the New York State Bar Association

To view archived issues of CasePrepPlus,
visit NYSBA.ORG/caseprepplus/.