



By Eric F. Greenberg, Attorney-at-law

Plastics Liability Paradigm Shift

We might be witnessing a revolution in ways to place legal blame on plastic packaging companies. In late September, California filed a lawsuit against Exxon Mobil over package recycling, and it's a new kind of attack.

According to the state's attorney general, Rob Bonta, "For decades, Exxon Mobil has been deceiving the public to convince us that plastic recycling could solve the plastic waste and pollution crisis when they clearly knew this wasn't possible." He also asserted that the company "falsely promoted all plastic as recyclable, when in fact the vast majority of plastic are not and likely cannot be recycled, either technically or economically."

The state claims the company's intentionally false statements and other actions led to pollution. California accuses Exxon Mobil, a top maker of substances used for making plastics, of creating a public nuisance; polluting water and natural resources; putting out false or misleading advertising including environmental marketing; and unlawful, unfair, or fraudulent business practices.

This California case attempts to present a new and different paradigm for imposing legal liability on large corporations. For those old enough to remember, this case has echoes of the actions against tobacco companies in the 1990s, in which the companies were alleged to have legal liability for causing the health problems related to smoking. (Those cases resulted in a settlement between 46 U.S. states and four tobacco companies where the companies paid hundreds of billions of dollars that would, for example, cover healthcare costs for smokers.)

The facts alleged in the government's court filing recite the history of the company's public statements and actions around plastics recycling. It's very detailed and reads more like an NGO's list of grievances about the plastics industry rather than a legal pleading against a single company.

For example, California's filing describes the history of "chasing arrows" plastic resin identification coding, adopted into law in many states, and says Exxon Mobil and others "created and promoted the chasing arrow symbol despite knowing that it was deceiving the public into thinking that all plastics are recyclable." Yes, there is confusion among some members of the public about exactly what the chasing arrows symbol means, but this lawsuit is asserting that the confusion was purposefully intended by the industry.

The state also complains about the company's promotion of "advanced recycling," which it says the company has described and explained to the public in misleading ways. According to a statement by attorney general Bonta, the company's advanced recycling program "is nothing more than a public relations stunt meant to encourage the public to keep purchasing single-use plastics that are fueling the plastics pollution crisis."

The state's legal filing seeks, according to Bonta's statement,

to get the company "to end its deceptive practices that threaten the environment and the public," and also "seeks to secure an abatement fund, disgorgement, and civil penalties for the harm inflicted by plastics pollution upon California's communities and the environment."

News reports indicate that the company responded to the lawsuit by criticizing the state government, saying "They failed to act, and now they seek to blame others. Instead of suing us, they could have worked with us to fix the problem and keep plastic out of landfills."

In recent years, new laws have emerged that impose extended producer responsibility (EPR), by making packaging makers or sellers responsible for the ultimate disposition of their products, were something of a departure from the traditional roles companies have played in the marketplace. The lawsuit against Exxon Mobil, and a similar one filed last year against PepsiCo by New York State, can be seen as aiming at the same target—solid waste pollution—from a different angle: Rather than make companies responsible for the disposal of their packaging, these lawsuits attempt to make a company responsible financially for the consequences of failures of packaging to be disposed of correctly because, they allege, the company caused those consequences through deceptive means. So this new case's allegations can be seen as trying to impose extended producer responsibility on packaging companies without first making a new law imposing such responsibility on them, and instead trying to shoehorn the situation into existing bases of legal liability, such as prohibitions against false advertising or pollution.

It'll be interesting to see, as this case proceeds, whether the state will be able to prove all the factual assertions it is making. After all, it makes a number of assertions that specifically accuse the company of *intending* to defraud or mislead the public. Do they have evidence of internal deliberations at the company showing that it knew the company's assertions were false? Is the state going to prove fraud with evidence of consumers who say they bought products in single-use plastic packaging *because* they thought the package was recyclable when it was not?

Also, even assuming the state can prove the company made intentionally false or misleading statements to the public, it's not immediately clear how those statements are causally connected to pollution by plastic containers. I think the state would have to prove that the company's actions caused the pollution, and it seems to me there are numerous other factors that lead to pollution, including the actions of governments, the effectiveness of private collection recycling systems, and individual citizens' behavior.

Plastic waste pollution is an obvious problem that needs solving. Certainly, no one can be in favor of the massive clumps of discarded plastic containers that show up in our oceans and rivers. But governments and the public are both going to have to act to do so, ideally in cooperation with one another. **PW**

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