Climate Change Litigation in Massachusetts and Coronavirus Conflation

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Massachusetts Attorney General Maura Healey’s lawsuit against ExxonMobil is based on a crucial central claim: the company misled shareholders and customers about the threat that climate change poses to the world.¹ The AG filed its original complaint in federal court on October 24, 2019 and submitted an amended version on June 5, 2020.

The latest filing by the AG’s office underscores the fundamental weakness of any attempt to use courts of law to hold any single entity responsible for a global crisis. In particular, the decision to inject the COVID-19 coronavirus directly into the ExxonMobil litigation reveals the political nature of the lawsuit and a willingness to make extreme arguments – for example, that the global pandemic that had claimed the lives of more than 135,000 Americans and in excess of 8,100 Massachusetts’ residents as of mid-July is somehow relevant to the climate change lawsuit – in support of indefensible legal arguments.

The recent legal history of climate change litigation reveals the basic impotence of state and local officials when they decide to use courts of law in furtherance of political agendas, in this case policymaking associated with reversing the effects of global warming. In recent years, the attorney generals of Massachusetts and New York launched investigations of ExxonMobil regarding claims associated with climate change and filed suit. Nine American cities and counties have also sued fossil fuel companies, seeking compensation for alleged climate change damages².

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In 2018, the Manhattan Supreme Court dismissed the New York State Attorney General’s lawsuit against ExxonMobil outright. Justice Barry Ostrager, who wrote the majority opinion in the case, called the litigation “hyperbolic.” The court held that Exxon’s internal practices regarding its evaluation of economic costs arising from emerging and future regulation of greenhouse gas had no impact on “the company’s financial statements and other corporate books and records,” both which were central allegations in the shareholder fraud charges.

In its complaint, the New York AG argued that ExxonMobil kept two “sets of books” regarding the cost of climate change – one for public audiences (financial disclosures), the other for internal audiences (climate studies.) According to the NY lawsuit, ExxonMobil used the former to downplay the effects of climate change on its financial performance and the latter to detail potential consequences of global warming.4

The New York AG argued that, by failing to publicly emphasize the findings of its internal climate studies, ExxonMobil overestimated the value of its assets by trillions of dollars, thereby putting shareholders at risk of massive losses in share value. Justice Ostrager ruled with authority, finding that the NY AG presented no evidence whatsoever that a single shareholder had been misled. In his ruling, the judge stated that ExxonMobil had not made “any material misrepresentations” that would have misled a reasonable investor.5 In sum, the court held that Exxon did not break any laws by preparing studies of climate change for internal use.

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5 Ibid.
The outcome of the New York trial and similar verdicts in climate cases brought by the cities of San Francisco and Oakland, CA\(^6\) serve as clear indicators that resources expended to file climate change lawsuits against fossil fuel producers are risky at best and arguably folly. Further, the illogical arguments that led to dismissal of the NY state case are directly applicable to the Commonwealth’s suit, specifically because the latter case rests on the same two central claims that failed in the former.

In Massachusetts, the Attorney General reacted to the New York verdict with defiance. While New York officials announced that it would not appeal the verdict,\(^7\) a spokesperson for Healey boldly declared “we will continue to fight.”\(^8\) The amended complaint filed in June confirms this intent while revealing the political foundation of a lawsuit paid for with precious taxpayer resources.

On pages 79 and 80 of the amended complaint, AG Healey’s staff attempt to correlate the impacts of the COVID-19 pandemic with those associated with climate change. Notwithstanding the likely perception that an elected lawmaker is using a deadly virus to further a political agenda, the filing states: “The coronavirus pandemic also illustrates how, as ExxonMobil has long known, changes in expected global fossil fuel demand—like those that would accompany the economic disruptions from physical impacts of climate change and the adoption of policies limiting greenhouse gas emissions—can imperil the economic value of the fossil fuel industry, and of ExxonMobil itself, to the detriment of ExxonMobil investors.”\(^9\)

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\(^7\) Climatedocket.com, January 13, 2020, climatedocket.com/2020/01/13/new-york-ag-exxon-climate-fraud/


To be sure, the COVID-19 pandemic has had negative impacts on fossil fuel interests, including a brief period in April where crude future prices fell into negative territory. Fossil fuel prices remain below pre-January levels. Of course, the persistent impacts of business interruptions created by the COVID-19 virus continue to harm the overwhelming majority of business interests around the world, Exxon Mobil’s short-term performance included.

This is not a new development. Fossil-fuel providers have been and always will remain vulnerable to market disruptions. As such, does the insertion of COVID-19 into the Massachusetts case represent anything meaningful in terms buttressing that case? Healey’s own reasoning proves the opposite.

In the amended complaint, the AG claims the coronavirus pandemic is a “harbinger” of broader problems that lie ahead for Exxon and other fossil fuel producers. Left unsaid, the same argument reflects equally on green energy. A recent report by the Center for American Progress observed that “with the rapid spread of COVID-19 across the nation leading to a historic health and economic crisis, the renewable energy industry . . . is suffering from the same uncertainty and impending job losses as many other sectors.” It is ironic that one organization heavily quoted in the AG’s amended complaint, the International Energy Agency (IEA), recently acknowledged the same concern, stating that “the Covid-19 pandemic is having a major impact on energy systems around the world, curbing investments and threatening to slow the expansion of key clean energy technologies.”

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By any measure, it is obvious that the novel coronavirus has no relevancy to the Commonwealth’s flimsy claims against ExxonMobil. The only conceivable rationale to explain why an elected Attorney General would ever allow a direct invocation of the global pandemic within any litigation is the potential to score political points or garner media headlines.

From a legal perspective, the Attorney General cannot escape the central weakness of the climate complaint: it relies on an absurd premise. In the view of Healey, fossil fuel producers lied to investors about the inevitable demise of their companies to take advantage of shareholders. Of course, this perspective assumes that ExxonMobil shareholders forever remain blithely unaware that any changes in terms of market conditions, government regulations, technology or business practices will diminish the value of stock. By employing this illogical line of thinking, the Attorney General promotes the conclusion that oil companies expect to abandon fossil fuel reserves, leave shareholders on the hook for billions of dollars in lost market value, and pocket remaining profits.

The application of sound reasoning emphasizes the opposite. There is no version of the future that can be predicted with accuracy. There is no legal scenario where an investor can expect guaranteed shareholder earnings.

For their part, fossil fuel producing companies continue to make substantial investments in the renewable energy sector. Concurrently, the overwhelming body of existing evidence points to a 20- to 30-year transition period within the energy sector before the scale and volume of renewable energy development in the United States can begin to supplant energy presently created by use of fossil fuels. In fact, the

Organization of the Petroleum Exporting Countries (OPEC) maintains worldwide demand for crude oil will increase by 15.8 million barrels a day (mb/d) by 2040. The Commonwealth’s complaint does not consider any of this evidence.

In recent years, a great deal of public attention has focused on the Commonwealth’s offshore wind energy development push, with contracts issued for installation of 1,600 megawatts (MW) of clean energy generation by 2025. An earlier offshore energy endeavor known as “Cape Wind” provides, perhaps, the most relevant case to expose the ludicrousness of Massachusetts’ climate change lawsuit.

Beginning in 2001, Cape Wind – projected at a cost of $2.6 billion – promised development of 130 wind turbines in Nantucket Sound. The project developer sought funding and government approval for more than a decade while enjoying the backing of every leading environmental organization in New England. By 2012, Cape Wind appeared to be a “done deal” after the state legislature and administration of former Governor Deval Patrick convinced leading electric distribution companies to sign purchase power agreements (PPAs) under which the utilities’ customers would purchase nearly 80 percent of the facility’s energy output. Less than three years later, the utilities pulled out of the PPAs, citing the project’s inability to secure financing. The initiative was permanently abandoned by project backers in late 2017. The residual fallout of Cape Wind’s demise – including loss of 468 megawatts of energy in a state that needs to develop new sources of electric generation – reverberates to this day.

As Cape Wind illustrates, every aspect of the energy industry, regardless of its underlying operational elements, represents a risk to shareholders.

When assessing all available information, there is only one, inescapable conclusion about the Commonwealth’s climate change litigation: it is based on belief, not evidence. There is no compelling proof that ExxonMobil faces any immediate, or even long-term prospects of declining sales as a result of climate change. The stark picture painted by Attorney General Healey within the ExxonMobil lawsuit cannot be supported by fact because there is no way to conclude that the future will bring about the utter demise of fossil fuel use.

Accordingly, the addition of the COVID-19 pandemic into Massachusetts’ climate change lawsuit is merely offensive without providing a useful legal argument. The conflation of the coronavirus and climate crisis, both misleading and far-fetched, bespeaks a mindset in which, like inspector Javert in Les Misérables, the Attorney General is prepared use any argument, however absurd, that allows for leveraging the justice system in pursuit of political gain.

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