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<https://www.wsj.com/articles/should-fossil-fuel-companies-bear-responsibility-for-the-damage-their-products-do-to-the-environment-11574190219>

JOURNAL REPORTS: ENERGY

Should Fossil-Fuel Companies Bear Responsibility for the Damage Their Products Do to the Environment?

Those in favor say the companies knew the damage their products were causing; those against contend that climate change is a matter for public policy, not courts

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The oil-and-gas industry has faced a barrage of lawsuits in recent years from cities, counties and states across the U.S. seeking damages for the costs they say they have incurred as a result of climate change.

Some lawyers are going after big oil firms for securities fraud, saying they knew for decades that climate change posed a material risk to their businesses but failed to fully disclose the danger to investors. Other lawyers are arguing that extracting and selling oil and gas is a public nuisance because it leads to greenhouse-gas emissions, which in turn results in the harmful impacts of climate change.

No suit has been successful yet, and some have been thrown out in federal court. But a handful have been allowed to move forward.

Those who believe the oil-and-gas industry bears some financial responsibility for the damage caused by climate change say that in much the same way that tobacco firms hid the dangers of smoking from consumers, fossil-fuel companies foresaw the harm their products would cause yet did nothing to avert it or warn the public.

Opponents reject that comparison, saying fossil fuels, unlike tobacco, are essential and used by everyone. Reducing emissions isn't a matter for the courts, they contend, but an issue of public policy.

Justin Gundlach, an attorney at the Institute for Policy Integrity at the New York University School of Law, argues that fossil-fuel companies should be held accountable for their damaging contributions to climate change.

Linda Kelly, senior vice president, general counsel and corporate secretary at the National Association of Manufacturers, makes the case against that.

YES: These Companies Knew the Damage They Were Causing

By Justin Gundlach

When companies produce and sell harmful products, even if the full extent of the danger isn't initially clear, they should pay to help remedy the damage done.

One example of this principle in action is the 1998 Tobacco Master Settlement Agreement, in which the cigarette industry agreed to pay billions of dollars to states in perpetuity to help address smoking-related public-health costs. Another is the Superfund law enacted in 1980, which imposes liability for the improper disposal of hazardous substances even if disposal occurred before 1980.

There is nothing special about fossil-fuel companies or their products that should protect them from this general rule when it comes to the damaging contributions they have made to climate change. Quite the contrary. The biggest fossil-fuel companies anticipated with startling accuracy in the early 1980s how much their products would increase the amount of carbon dioxide in the atmosphere. They also anticipated that this would cause dangerous rises in temperatures and sea levels, among other things. But, as recent [judicial opinions](#) issued by federal courts have said, those companies foresaw harm, yet did nothing to avert it, engaging instead in marketing and lobbying campaigns to discourage consumers and governments from grasping the link between fossil-fuel consumption, greenhouse-gas emissions and climate change.

Some will argue that it isn't fair to saddle an industry with liability for supplying the world with a product it demanded and used extensively. After all, they say, we currently rely on fossil fuels in myriad ways, and they literally fueled economic development.

The economic benefits of burning fossil fuels must, however, be measured against a number of costs, including the terrifying cost of potential climate instability. And contributions to these costs by corporations and individuals have been unequal in ways that matter when it comes to deciding who should bear financial responsibility for them.

Consider that individuals who rely on fossil fuels for electricity and transportation generally do so not because they choose to but because of choices made by others

years or even decades before about the designs of the electricity grid and highway system. Yes, individuals have choices, but in our society those choices are structured.

There are several ways fossil-fuel companies might be made to pay for climate change, some involving the courts and others involving legislatures or regulatory agencies.

For example, a court, citing violations of securities law for failing to disclose to investors the threats that climate change poses to assets and revenue, could order fossil-fuel companies to pay fines and issue special disclosures. Or, citing common-law principles, a court could order one or more companies to compensate plaintiffs for harms suffered. Meanwhile, governments—state or federal—could adopt fees that channel money from fossil-fuel sales to climate-change adaptation initiatives, or to support for nascent industries that can replace fossil-fuel-dependent technologies. These and other approaches aren't mutually exclusive.

While the present ubiquity of fossil fuels across economic sectors doesn't absolve fossil-fuel companies from having to pay for the damage those products have done to the climate, it does potentially complicate the task of determining how and to what extent they should be made to do so. Notable complications include what to make of past or existing government licenses and the presence of other companies in the supply chains through which fossil fuels pass. But here again, the Tobacco Master Settlement and the Superfund statute show that we've dealt with similar challenges before.

Solutions must be arrived at carefully so that the consequences that follow are viewed as legitimate by the public. Whatever challenges are involved in arriving at those solutions shouldn't be mistaken for reasons to let fossil-fuel companies off the hook.

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Carbon Weighting

Two measures of CO₂ and greenhouse-gas emissions

Sources: International Energy Agency (global); Environmental Protection Agency (U.S.)

NO: Climate Change Is a Matter for Public Policy, Not Courts

By Linda Kelly

For 150 years, oil, gas and other energy products have given us electricity, powered our factories, fueled our transportation systems, heated and cooled our homes, increased American economic independence and improved living standards worldwide.

So, when assessing whether energy manufacturers should now be liable for climate change, a federal judge in California recently asked this key question: “Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?”

The answer, as federal [Judge William Alsup ruled](#) in dismissing a climate-change lawsuit, is no.

Fossil fuels are legal, highly regulated and—whether or not some want to admit it—still essential to modern life. The cities filing these lawsuits along with the staunchest anti-fossil-fuel activists would be hard-pressed to conduct their daily activities without using these products. They, like the rest of us, rely on these fuels, even as they seek compensation from their producers.

It is neither fair nor productive to scapegoat a single industry, especially one already working toward innovative solutions. Just as we have all contributed to the problem of climate change, it is our shared responsibility to figure out how to continue economic and societal progress, while reducing greenhouse-gas emissions.

Federal courts have repeatedly dismissed these attempts to assign liability over climate change. They have recognized that solving climate change isn’t a liability matter for the courts, but an issue of public policy for Congress and the executive branch. Our legal system doesn’t contemplate liability for making lawful products that work exactly as intended—and there is no doubt these products are fueling American families and businesses as intended.

To try to get around this fact, creative plaintiff lawyers and environmental activists came up with a novel litigation concept: file claims for local governments and others alleging that marketing and selling of fuel, even though necessary and beneficial to modern life, is nevertheless a legal “public nuisance”—that is, it is an unreasonable interference with a right common to the general public. Public-nuisance theory, though, has nothing to do with regulating global energy supply. And the notion that these communities are entitled to financial compensation, while using the very products their lawsuits demonize, is nonsensical. Piecemeal lawsuits are particularly

counterproductive. They undermine the ability of policy makers to address climate change, and they could push manufacturing overseas where there is less attention to emissions.

It is time to stop pursuing efforts that make headlines but won't make a difference. That includes making irrelevant claims that energy companies have somehow engaged in misleading campaigns related to climate change. These arguments are meant to distract media and public attention from the fact that the lawsuits have no merit. Public-nuisance cases have nothing to do with one's public or political discourse.

Instead of playing this disingenuous blame game, and allowing profit-seeking plaintiffs' lawyers to drive our federal energy policy, we should take steps to enact policies that will speed and promote innovations to address this shared global challenge.

Climate change is a defining challenge of our time, and manufacturers seek to lead the way through innovation. We also recognize that the causes and impacts of climate change are complex, which is why our organization has called on policy makers to enact legislation addressing climate change and to re-engage on the international stage to secure a fair climate agreement.

Manufacturers are at the table, working with leaders of both political parties. Notably absent are the plaintiffs' lawyers and activists seeking to turn this shared global challenge into a litigation issue.

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