In Liability Cases, Oil Companies Argue Climate Change is Your Fault

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By Jennifer Dorroh

One question keeps popping up as U.S. courts begin to wrestle with climate liability cases that have been filed across the country: Are oil companies that drill for, process and distribute fossil fuels responsible for climate change, or does the blame fall on consumers who use these fuels as energy and release carbon dioxide emissions that warm the atmosphere? Does their use of the product ultimately make consumers, rather than the oil companies, responsible for sea level rise and melting glaciers?

This question arose most recently in a federal court's dismissal of two California cities' suits against five oil companies. Having benefited since the Industrial Revolution from modernization and advancement powered by coal and oil, wrote U.S. District Judge William Alsup, "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 lawyers representing San Francisco and Oakland did not appear ready with a quick answer in Alsup's hearing, and a similar void happened when Judge John Keenan asked a similar question in the hearing on a motion to dismiss New York City's liability lawsuit earlier this month. Other experts, however, say the question itself makes the false assumption that consumers had a choice.

"Consumers aren't demanding fossil fuel energy, they're demanding energy," said Peter Frumhoff, director of science and policy at the Union of Concerned Scientists. "Polls show that people really want clean energy. But the choices we make are constrained by the options available to us, which have been constrained by the oil companies' lobbying for subsidies and against emissions limits, and by their recalcitrance to invest in clean energy."

"But for the actions of these companies and their friends in Congress, consumers would have very different energy choices today," he said. "Imagine if, when Exxon and other fossil fuel energy companies first knew about the effects of emissions on climate change, they had come clean about the risks, accepted limits on emissions and invested in clean technologies. Imagine the choices we would have today."

Instead, he noted, Exxon actively sought to deceive the public. According to a major report by UCS in 2007, the oil giant spent nearly $16 million "to fund skeptic groups and create confusion around the certainty of global warming." There is significant evidence that the funding of denial groups has continued, and Massachusetts and New York are each investigating whether Exxon committed fraud under state laws.

Alex Davis, who studies the behavioral foundations of public policy, likened Exxon's deception on climate change to that still used by tobacco companies. "The main issue is whether there was sufficient evidence available, and if they shared what they knew with the public. Were they profiting off people's ignorance rather than profiting off their willingness to make a trade-off?" said Davis, an assistant professor at Carnegie Mellon University's Department of Engineering and Public Policy.

Even if there had been no efforts to mislead the public, the notion that consumers have demanded fossil fuels doesn't hold up, Davis said. "It's not the responsibility of the individual consumer to say, 'Well, I've done my lab tests and come to the conclusion that the costs outweigh the benefits,' " he said. "These are very complicated questions and systems."

"If you place clean energy in front of people as an option, they say, 'We want it and we're willing to pay more for it. But it's implicit that they even have the information. Unless they're aware of available alternatives, they'll go with the cheapest option."

The issue of consumers' role in climate change comes up in climate liability suits because "finding an activity a nuisance requires balancing the benefits of the activity against its harm," Michael Burger, executive director of the Sabin Center for Climate Change Law at Columbia University, wrote in an email. "So at some point, the role of fossil fuels in benefiting consumers is likely to come into play."

Judge Alsup "did not actually balance the harms and benefits of fossil fuel extraction, marketing and consumption. He raised the issue, but said he didn't need to settle it because he could dismiss the case on other grounds," Burger said.

If future cases do perform a cost-benefit analysis, courts shouldn't start their tally with the dawn of industrialization, Davis said. "During the industrial revolution, we were ignorant of the costs. But once society knew there were costs, [the companies] were liable. The degree to which you can attribute costs is a difficult question, but that doesn't mean those costs are zero."

Major studies have emerged in recent years tying fossil fuel companies to the emissions their products have created and the percentage of global warming that has resulted from each. The Carbon Majors report used data to determine that 71 percent of modern global warming was driven by 100 companies.

Another reason the question of consumer rights is invoked is that "consumers are polluters, and that may inhibit some plaintiffs in some cases," Burger said. "In the New York case, defendants have argued that NYC's use of fossil fuels means it has 'unclean hands, and therefore can't bring a nuisance claim."

Keenan, the judge in New York City's climate liability case, asked whether the city had benefited from fossil fuel use or had itself contributed to climate change. The city announced it plans to divest its portfolio of shares in fossil fuel-based industries. It does use fossil fuel-powered police cars and fire trucks.

"The notion that New York City has dirty hands is ridiculous," Frumhoff said. "Every municipality would choose clean energy if they could, but we're decades behind where we could have been if the fossil fuel companies had not maintained an iron grip on our energy policy."