The Saga Over MTBE Continues, Takes New Turn

By James W. Bryan

Methyl tertiary butyl ether (MTBE) is a chemical compound which has been widely used as an octane-enhancing fuel additive in gasoline for motor vehicles since the mid-1980s. It has also become the scourge of soil and groundwater contamination in many parts of the United States, and federal class action litigation over MTBE has recently taken a new turn.

Background

MTBE was designed as a replacement for lead in gasoline in order to reduce air pollution from auto emissions. In 1990, Congress amended the Clean Air Act to mandate the use of reformulated gasoline (RFG) in certain areas of the country with serious smog or ozone problems (42 U.S.C. §7401 et seq).

The legislation required reformulated gasoline to contain certain levels of oxygen. MTBE and ethanol were the primary oxygenates used to meet the requirements (USEPA MTBE Fact Sheet No. 1, January 1998). While the use of MTBE has helped to reduce air pollution over the years, "it has also caused widespread and serious contamination of the nation's drinking water supplies." (Federal Register: March 24, 2000 (Vol. 65, No. 58) at 16094).

Unlike other components of gasoline, MTBE dissolves and spreads readily in the groundwater underlying a spill site, resists biodegradation, and is difficult and costly to remove from groundwater. Low levels of MTBE can render drinking water supplies unpotable due to its offensive taste and odor. At higher levels, it may also pose a risk to human health.

In July 1999, a federal Blue Ribbon Panel on MTBE and Oxygenates in Gasoline issued recommendations on ways to maintain air quality in emissions while protecting water quality by reducing the use of MTBE in gasoline (Federal Register: July 17, 2001 (Vol. 66, No. 137), at 37156). In July, the USEPA implemented adjustments in the standards for reformulated gasoline in the Chicago and Milwaukee areas so as to promote the switch from MTBE to ethanol. *Id.*

Class Action Litigation

On Aug. 20, the Federal District Court in the southern district of New York permitted the bulk of a large class action litigation by private well-owners to go forward against 20 petroleum companies (In re MTBE Products Liability Litigation, 2001 WL 936210 (S.D.N.Y., August 20, 2001)). For the most part, the court denied defendants' motion to dismiss. Although the decision is unpublished, the particulars of this case are illustrative of the complexity of MTBE litigation and offer a clear roadmap for future litigation.

a) The Plaintiffs. Five class action lawsuits had been consolidated in multidistrict litigation in the New York District Court. The class actions have been brought on behalf of private well owners seeking relief from contamination or threatened contamination of their wells. The well owners are located in 17 states: California, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Wisconsin and Virginia.

b) Allegations. In essence, the plaintiffs are alleging that the petroleum company defendants knowingly caused the widespread contamination of groundwater as a result of their use of MTBE in gasoline. *Id. at 1.* The allegations recited throughout this article are merely allegations, untested under the heat of discovery and trial, and one should read the allegations with a healthy dose of skepticism. However, for the purposes of the motion to dismiss, the court was required to assume the facts as alleged were true.

Plaintiffs alleged that the defendants were aware of specific incidents of MTBE groundwater contamination as early as 1980, were aware of scientific studies describing the dangers of MTBE, and publicly disputed the scientific studies but privately acknowledged their validity. Plaintiffs alleged that the defendants conspired to mislead the USEPA and the public in an effort to convince them of the desirability of increasing concentrations of MTBE in gasoline.

The plaintiffs alleged that in 1987 the industry's MTBE Committee provided (a) information to the USEPA representing that MTBE was only slightly soluble in water, that potential environmental exposure to MTBE was low, and that MTBE had excellent biodegradation characteristics; and (b) information to the public that MTBE gasoline spills had been dealt with effectively.

c) No Standing for Plaintiffs With Only Threatened Contamination. The petroleum company defendants argued that certain New York and Illinois plaintiffs whose wells had no detected contamination or had yet to be tested for contamination lacked standing to sue in federal court because they had no injury-in-fact. The court agreed.

For the "nondetect" plaintiffs, the court stated that "notwithstanding the somewhat alarming nature of these general allegations, they are insufficient to demonstrate a 'clearly impending' harm directed towards Bauer and McMannis." *Id. at 9.* For the "no-test" plaintiffs, the court stated that although the allegations indicate that there is some chance that Mr. La Susa's well may be, or may become, contaminated in the future, "[f]ederal jurisdiction cannot lie if the alleged injury is merely 'an ingenious academic exercise in the conceivable.'" *Id. at 10, quoting, Friends of the Earth Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 156 (4th Cir.2000).* This ruling was the main victory for the defense.

d) State Law Claims not Preempted by Federal Law. Defendants asserted that plaintiffs' state law claims were both expressly preempted and conflict preempted by the pervasive scheme of federal clean air laws and regulations and should be dismissed. The court disagreed.

With regard to the express preemption argument, the court stated that a review of the text of the Clean Air Act's preemption provision, as well as the CAA's purpose and legislative history, did not support defendants' position. *In re MTBE Products Liability Litigation, at 11.*

The court noted that the purpose of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. §7401(b)(1), and the reformulated gasoline program ("RFG") was enacted to further this purpose. *See Oxygenated Fuels Assoc. v. Pataki, No. 00-CV-1073, 2001 U.S. Dist. LEXIS 7590, at *3 (N.D.N.Y. May 18, 2001).*

Rejecting the defendants' argument of express preemption, the court found that the plaintiffs' claims concern the contamination of groundwater caused by the use of MTBE and this concern is not "intertwined" with the primary concern of the CAA and the RFG program—the concern over and protection of our air resources. *In re MTBE Products Liability Litigation, at 12.*

With regard to the conflict preemption argument, the petroleum company defendants asserted that finding them liable for using MTBE, one of a limited number of federally approved oxygenates, would present an obstacle to the achievement of the federal objectives of the CAA and the RFG program and thus plaintiffs' claims should be preempted by federal law. *Id. at 13.*

Defendants further argued (a) that at this time there are no practicable alternatives to MTBE sufficient to satisfy the oxygenate requirements of the RFG Program, (b) that plaintiffs have not alleged there are any such practicable alternatives, and (c) that plaintiffs' proffered rule—i.e., that defendants are liable for using MTBE and are therefore obligated to use another oxygenate—would seriously undermine the objectives of the CAA and the RFG Program. *Id. at 14.* However, because plaintiffs alleged that safer alternatives to MTBE exist, the court concluded it could not address this issue on a motion to dismiss—whether such alternatives are practicable and have been available for use in the RFG Program was a question of fact. *Id.*

e) Primary Jurisdiction Argument Rejected. Requesting the Federal District Court to dismiss or abstain on the basis of primary jurisdiction, defendants asserted that plaintiffs' claims raise many complex technical and policy issues which are within the expertise and discretion of various environmental agencies who are currently working to address these issues. *Id.*

Defendants argued that each such agency has in place the programs to provide plaintiffs with the essential relief they seek—testing, the provision of clean water, and/or remediation (although plaintiffs are also seeking actual and punitive damages). *Id.* They argued that court-ordered relief would threaten the hope of obtaining a uniform and consistent response to MTBE groundwater contamination from gasoline releases above ground and underground. *Id.*

The court was not persuaded. It noted that plaintiffs' claims, for the most part, are state tort law claims and while the issues may require some technical analysis, the issues are "legal questions that fall within the conventional experience of judges, not administrative agencies." *Id. at 15.*

The court stated that although the USEPA and various state environmental agencies are investigating MTBE contamination of groundwater and considering policy options for possible rulemaking or legislation, none of these agencies are addressing the specific issues raised by plaintiffs' common law claims and such issues are not squarely within their expertise. *Id. at 16.* The specific relief sought by plaintiffs is not provided by the administrative agencies, concluded the court, nor does such relief appear to be forthcoming in the near future. *Id.*

f) Collective Theory of Liability Allowed. Plaintiffs alleged that because they could not specifically identify which defendant caused which contamination, they were entitled to invoke one of the recognized collective theories of liability—market-share liability, alternative liability, concert of action/conspiracy liability, or enterprise liability—as a basis for imposing liability upon all of the defendants. *Id. at 17.* The defendants argued that these theories did not fit the circumstances of each action. Under choice-of-law principles, the federal district court had to predict how the high court in each relevant state would resolve the issue.

For the class represented by the California and New York plaintiffs, the court found that these states have adopted the market-share liability theory, whereby a plaintiff harmed by a fungible product that cannot be traced to a specific manufacturer may recover damages from a manufacturer or manufacturers in proportion to each maker's share of the total market for the product. *Id.* According to the court, the allegations of the New York and California plaintiffs supported the application of the market-share theory and the class plaintiffs were permitted to proceed.

For the class represented by the Florida plaintiffs, the court found that the Florida Supreme Court has adopted the market-share theory, but only in the negligence actions and only where the plaintiff proves it made a genuine attempt to locate and identify the responsible manufacturer. *Id. at 20.*

Also the Florida high court has adopted the concert of action/conspiracy theory in cases where a defendant commits a tortious act in concert with another or pursuant to a common design, or gives substantial assistance to another knowing that the other's conduct constitutes a breach of duty. *Id. at 18.* The court thus allowed the Florida class plaintiffs to proceed on these theories.

For the class represented by the Illinois plaintiffs, the court found that the allegations of plaintiffs would only fit under the Illinois-adopted concert of action/conspiracy theory. *Id. at 20.* The court noted a split in jurisdictions over whether the theory can apply when the plaintiff cannot identify which defendant is the cause-in-fact of injury. *Id. at 28.*

In conjunction with the conspiracy claim, the court concluded that the plaintiffs have sufficiently alleged that defendants committed tortious acts pursuant to an understanding and common plan and accordingly, without further discovery, it would be inappropriate to exclude the concert of action theory as a possible basis of liability. *Id.*

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g) Negligence and Strict Liability for Design Defect. Plaintiffs' causes of action for design defect and negligence are based upon the same alleged design failure—the use of MTBE in gasoline. *Id. at 20.* The court applied the risk-utility balancing test to determine whether under plaintiffs' allegations gasoline with MTBE was defectively designed by defendants, such test being as follows:

"A product is defective when, at the time of sale or distribution, it...is defective in design...A product...is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." *Id., citing Restatement (Third) of Torts: Products Liability §2(b) (1998).*

The court recited plaintiffs' allegations of defendants' knowledge of the unreasonable dangers, defendants' conspiracy to conceal the dangers, the existence of safer alternatives, defendants' knowledge of the alternatives and their availability, and the proximate cause between defendants' introduction of gasoline containing MTBE into the stream of commerce and the contamination of their water wells. *In re MTBE Products Liability Litigation, at 21.* The court found these allegations sufficient to state a claim for both strict liability for design defect as well as negligence. *Id.*

h) Failure to Warn. Plaintiffs asserted a separate cause of action for failure to warn. The court stated the applicable rule of law:

"Whether a cause of action for failure to warn is based in negligence or strict liability, a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known...In cases brought against manufacturers and suppliers for injuries resulting from the use of hazardous materials or other unreasonably dangerous products, courts have generally held that such manufacturers owe a duty to warn foreseeable users of the latent dangers of the product." *Id. (citations omitted).*

Defendants argued that these claims must fail because (1) any duty defendants had to issue warnings runs exclusively to foreseeable users of a product and plaintiffs' injuries are not premised on their own foreseeable use of gasoline containing MTBE; and (2) plaintiffs' theory of proximate cause is impermissibly speculative. *Id. at 22.*

The court was not persuaded by the defendants' argument. The court ruled that plaintiffs' allegations were sufficient to show that the harm suffered by the plaintiffs was a foreseeable result of defendants' placement of gasoline containing MTBE in the marketplace and that defendants owed plaintiffs a duty to issue warnings when marketing and/or selling such product. *Id.*

According to the court, if plaintiffs can prove that the failure to issue warnings would have affected the market's acceptance of MTBE, or caused gasoline containing MTBE to be treated differently with respect to the handling, storage, emergency response and/or environmental clean-up, they may be able to demonstrate that defendants' failure to warn proximately caused their injuries. *Id. at 23.* Thus, the failure to warn claim survived the motion to dismiss.

i) Public Nuisance Claim. The court allowed plaintiff's claim for public nuisance. A public nuisance is "an unreasonable interference with a right common to the general public." *Id., quoting, Restatement (Second) of Torts §821B(1).* "One must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." *Id. §821C(1).* Defendants argued that they cannot be held liable for public nuisance because they had no control over the product at the time it was released onto property of plaintiffs. *In re MTBE Products Liability Litigation, at 24.* However, the court stated that a party is subject to liability for public nuisance caused by an activity, not only when the party carries on the activity but also when the party "participates to a substantial extent in carrying it on." *Id. at 24, quoting Restatement (Second) of Torts §834.*

The court listed the allegations sufficient to establish defendants' participation and assistance in creating a nuisance: knowledge of the dangers of the product, failure to warn anyone, misrepresentation of MTBE's chemical properties, and active conspiracy to conceal the threat caused by MTBE. *In re MTBE Products Liability Litigation, at 25.* The court further concluded that according to the allegations plaintiffs' injuries are "plainly distinct in both degree and kind" from those suffered by the general public: unlike the plaintiffs much of the general public is served from surface water that is not susceptible to the problems caused by MTBE to groundwater, and public water supplies that rely on groundwater are monitored for safety, unlike plaintiffs' private wells. *Id.*

j) Deceptive Business Practices. The New York plaintiffs brought a claim for violation of the deceptive business practices statute, NY GBL §349. In order to assert such a claim, the court stated that plaintiffs must generally allege that (1) defendants engaged in conduct that is deceptive or misleading in a material way; (2) the deceptive conduct was "consumer-oriented"; and (3) plaintiffs have been injured "by reason of" defendants' conduct. *Id. at 26, quoting, Karlin v. IVF America, Inc., 93 N.Y.2d 282, 293 (1999).* Finding that neither the text of the statute nor case law establishes the requirement of a commercial transaction with a consumer, the court noted that the critical question under § 349 is "whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor." *In re MTBE Products Liability Litigation, at 27, quoting, Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir.1995).*

According to the court, the alleged conduct of defendants affects the public interest in New York and is sufficiently consumer-oriented to state a claim under the statute. *In re MTBE Products Liability Litigation, at 27.* The court allowed the claim to go forward.

k) Civil Conspiracy. Plaintiffs brought claims for civil conspiracy. In each of the relevant jurisdictions a claim for civil conspiracy is not an independent tort, but rather a derivative claim of an underlying substantive tort. *Id. at 29.*

The elements of civil conspiracy are: (1) an agreement to participate in an unlawful act or a lawful act in an unlawful manner; (2) an overt act performed in furtherance of the scheme; and (3) an injury caused by the overt act. *Id.* Acknowledging the rule that parties cannot conspire or agree to commit negligence, the court nonetheless found plaintiffs' allegations sufficient to survive a motion to dismiss. *Id.*

The court was persuaded by the allegations that defendants' failure to warn was willful, defendants conspired to market a product they knew to be unreasonably dangerous and intentionally misrepresented and suppressed information about MTBE, and that they marketed the alleged defective product intentionally. *Id.*

Defendants argued that plaintiffs failed to sufficiently allege an unlawful agreement because at most plaintiffs' allegations merely demonstrate that the defendants engaged in "parallel activity"—allegations insufficient to support a civil conspiracy claim or concerted action liability. *Id. at 30.*

The court disagreed, primarily because plaintiffs alleged that defendants formed joint task-forces and committees such as the MTBE Committee for the specific purpose of suppressing or minimizing information regarding MTBE hazards and defendants engaged in joint activity to deceive the government as well as the public regarding these same dangers. *Id.* The court did not require the plaintiffs to allege the specific facts surrounding the conspiracy at this stage of the litigation where the necessary information may be within the knowledge and control of the defendants. *Id.*

Conclusion

This class action litigation, *In re MTBE Products Liability Litigation, 2001 WL 936210 (S.D.N.Y., Aug.20, 2001),* is a long way from being over, and in the end many of the above allegations are likely to be proven unsubstantiated. However, MTBE product liability litigation is here to stay for a number of years. ■

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