Legal Opinion Letter

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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

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EXXONMOBIL V. NEW YORK CITY: JURY AWARDS WINDFALL IN CASE INVOLVING FEDERALLY-PERMITTED GAS ADDITIVE

by
Jeffrey S. Moller

Before deciding to use methyl tertiary butyl ether (known as "MTBE") in its motor gasoline, Exxon did its typically thorough and meticulous study. It called upon its in-house experts of every relevant stripe, graduates of the top chemical and environmental engineering schools in the country, to assess the potential impact of MTBE upstream and down: supply issues; consumer pricing issues; logistics issues; waste water discharge; automobile performance; compatibility with pipelines, seals, and tanks; air emissions from tanks; piping and automobiles; hydrogeologic fate and transport; biodegradability; human health effects; environmental toxicity; and on and on. Only after examining all of these issues, gathering information on MTBE's characteristics from reliable sources, or doing its own studies, did Exxon decide that it would be appropriate to utilize MTBE rather than ethanol, higher levels of benzene or other components in order to satisfy the requirement of the U.S. Environmental Protection Agency (EPA) to eliminate lead from gasoline. Several years later, when the U.S. Congress decreed that gasoline sold in the most densely populated areas of the country must contain a minimum amount of an "oxygenate," Exxon again did its homework and concluded that not only would MTBE be an appropriate compound to use, but it was really the only oxygenate compound which could be used, except in the corn-growing regions, without disrupting the country's fuel supply and driving up prices at the pump.

Meanwhile, the EPA, fully cognizant of MTBE's salient characteristics and in the midst of presiding over a federal program to deal with the deterioration and leakage of underground gasoline storage tanks throughout the country, presided over a negotiated rulemaking process to craft regulations with respect to so-called Reformulated Gasoline with full knowledge that MTBE would need to be used by every major refiner in order to comply. Government documents show that EPA (and Congress) knew that MTBE would be the predominant oxygenate of choice for every major refiner, largely because there was not at that time nearly enough ethanol to oxygenate the fuel supply, and what ethanol did exist was very difficult and expensive to get to the nation's coasts, where much of the reformulated gasoline was required to be sold. At the same time, EPA was evaluating the potential public health risk associated with the increased use of MTBE. In 1997, based upon the extensive and comprehensive human health effects studies which EPA and the industry agreed should be performed, EPA decided that it was not necessary to prescribe a federal maximum contaminant level ("MCL") for MTBE in drinking water. EPA instead issued only a non-binding "aesthetic" guideline, suggesting a level of contamination which would prevent water users from detecting an unwanted odor or taste.

Jeffrey S. Moller is a partner in the Philadelphia office of the law firm Blank Rome LLP.

So why did a federal court jury decide more than fifteen years later in *In re MTBE Prods. Liability Litig.*, 739 F. Supp. 2d 576 (S.D.N.Y. 2010),[*] that Exxon (now ExxonMobil) should be liable to pay the City of New York over $100 million for the contamination, or potential contamination, at levels well below any state MCL or federal aesthetic guideline of six long-abandoned drinking water wells in Queens? If the gasoline had escaped from tanks owned and operated by other companies or individuals, all of whom had known that releasing a single drop of gasoline was against the law, why was ExxonMobil found to be responsible? Given the jury's agreement that there were no other viable alternatives to MTBE under all the circumstances, what could ExxonMobil have done differently? How should ExxonMobil or any other company act in the future?

Good questions all. Perhaps it is as simple as this – such a verdict can only be reached when a lay jury is allowed to toss aside the professional judgment (after painstaking objective deliberation) of numerous state, federal, and international experts as to the levels of compounds which actually present meaningful risk to public health or harm to a water supply. A jury composed partly of people who might be served the drinking water in question and are citizens of the plaintiff municipality should perhaps not be given the opportunity to second guess the EPA, the New York State Department of Environmental Protection, and the World Health Organization's International Agency for Research on Cancer. Perhaps the doctrine of federal preemption, which has grown and been adapted to various circumstances since first recognized, could have been applied so that liability under state common law theories would not befall a company which had merely utilized a chemical which complex and well-designed EPA regulations were specifically and knowingly crafted to allow. And perhaps the common law concepts of causation which ordinarily require direct proof that a defendant's particular product had actually caused the plaintiff's harm ought not be stretched and altered beyond its traditional bounds in order to effectively eliminate the need for such proof.

Was the minimal potential contamination of abandoned wells in Queens a problem that really needed to be fixed? If Exxon ever has to cut a check to the City of New York, will the City actually use the money to construct treatment facilities for wells it admittedly will never use except for short durations in emergency situations? (It is well known that New York gets 100% of its drinking water from upstate sources via aqueducts and has no need to utilize wells drilled into the aquifer underlying the highly developed and industrialized Borough of Queens.) Why would the City spend millions of dollars to treat water to "non-detect" for MTBE when neither state or federal safe drinking water laws require it to do so, when no water customer has ever detected an unpleasant odor or taste in the water and when that same water contains numerous other man-made and naturally occurring contaminants which the City has never decided to eliminate? The smart money says it won't. Like so many other municipalities in the U.S. which have alleged existing or threatened MTBE contamination and have managed to wrest settlement moneys from unpopular oil companies in the face of one adverse legal decision after another, the City of New York is likely to treat the money as a windfall and find a way to use it to fix pot holes or remove next year's snowfall.

[*]The case is now pending oral argument on appeal to the U.S. Court of Appeals for the Second Circuit, No. 10-3145. For more on the arguments before the court *see On the Merits: City of New York v. ExxonMobil*, WLF ON THE MERITS, June 2011, available at http://www.wlf.org/publishing/publication_detail.asp?id=2253.