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The Safe-Harbor Provision for Methyl Tertiary Butyl Ether (MTBE)

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Summary

Methyl tertiary butyl ether (MTBE) is a fuel additive in wide use throughout the United States. Due to leakage from underground storage tanks and other sources of exposure, MTBE has been found in the drinking water supplies of several states. The current version of omnibus energy legislation, S. 2095, now before the Senate, as well as additional legislation such as S. 791, H.R. 3940, and H.R. 2253, provide for the eventual discontinuation of the additive but do not provide parties associated with MTBE with any special protections from liability. Other legislation, including the conference-reported version of the Energy Policy Act of 2003, H.R. 6, contains a safe-harbor provision protecting any potential defendant, such as MTBE manufacturers and distributors, from products liability claims. Additionally, the provision includes language applying the safe-harbor retroactively, potentially barring several pending lawsuits. Liability related to MTBE contamination remains controversial and is likely to again become the subject of debate. Accordingly, this report analyzes the legal implications of the safe-harbor provision found in the most recent version of H.R. 6. This report will be updated as necessary.

The legal status of methyl tertiary butyl ether (MTBE) is currently at the forefront of the debate over the future of U.S. energy policy. MTBE is a petroleum fuel additive that has commonly been in use since the 1970s and is now primarily used as a fuel oxygenate. The current version of omnibus energy legislation, S. 2095, now before the Senate provides for the eventual discontinuation of the additive, but does not provide parties associated with MTBE with any special protections from liability. The conference-reported version of H.R. 6, the predecessor to the bill now under consideration, contains a safe-harbor provision exempting all potential defendants from liability associated with “defective product” claims for fuel additives, including MTBE, and fuels blended with such additives. This MTBE safe-harbor would not insulate a responsible party from other liabilities, such as responsibility for environmental cleanup. The safe-harbor provision is also written to apply retroactively to September 5, 2003 and would bar numerous lawsuits already filed in courts throughout the country.

The rationale behind the H.R. 6 provision is that MTBE use in gasoline was precipitated by federal mandates and that leaking storage tanks and other sources of exposure, not the product itself, are responsible for current contamination. As liability related to MTBE contamination remains controversial and is likely to again become the subject of debate, this report analyzes the legal implications of the safe-harbor provision found in the previous version of omnibus energy legislation.

Background

For technical and cost reasons, MTBE's present use was, in part, precipitated by the requirements of the 1990 Clean Air Act Amendments and their requirements that reformulated gasoline contain at least 2% oxygen.¹ Use of reformulated gasoline is required in areas that fail to meet federal ozone standards.² MTBE, like all ethers, is highly soluble and has become more controversial in recent years as reports of water contamination and resulting lawsuits continue to surface.³ Sources of contamination are varied but are primarily identified with leaks or other spills from Underground Storage Tanks, a pervasive method of gasoline storage.⁴ At the present time, there is no consensus on the health effects associated with MTBE contamination, with certain parties claiming that MTBE is a suspected carcinogen and others claiming that the chemical is relatively benign.⁵ The EPA has studied the health effects of MTBE, and, so far, the agency has concluded that the associated risks are minimal at levels typically detected in drinking water. However, the agency continues to study the issue.⁶

¹ See, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REPORT, ACHIEVING CLEAN AIR AND CLEAN WATER: THE REPORT OF THE BLUE RIBBON PANEL ON OXYGENATES IN GASOLINE, Pub. No. EPA402-R-99-021, (September 1999); see also 42 U.S.C. § 7545. For further information, see CRS Report 98-290 ENR, *MTBE in Gasoline: Clean Air and Drinking Water Issues*, by James E. McCarthy and Mary Tiemann.

² 42 U.S.C. § 7545.

³ See generally UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, TESTIMONY OF JOHN STEPHENSON, DIRECTOR NATURAL RESOURCES AND ENVIRONMENT, BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES: MTBE CONTAMINATION FROM UNDERGROUND STORAGE TANKS, Pub. No. GAO 02-753T (May 21, 2002).

⁴ *Id.* at 1. For further information, see CRS Report RS21201, *Leaking Underground Storage Tanks: Program Status and Issues*, by Mary Tiemann.

⁵ See Earl Ainsworth, Protecting Water: Energy Bill Fuels Rush to File Pollution Claims, 12 N.J. Law: Wkly. Newspaper 2196 (Nov. 10, 2003).

⁶ See, Announcement of the Drinking Water Contaminant Candidate List, 63 Fed. Reg. 10273 (March 2, 1998); see also U.S. Environmental Protection Agency, MTBE (methyl tertiary butyl ether) and Underground Storage Tanks available at [<http://www.epa.gov/swrust1/mtbe/>]; see also UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OFFICE OF RESEARCH AND DEVELOPMENT, ASSESSMENT OF POTENTIAL HEALTH RISKS OF GASOLINE OXYGENATED WITH METHYL TERTIARY BUTYL ETHER (MTBE), Pub. No. EPA/600/R-93/206 (November 1993).

Liability

Title 15 of H.R. 6, the Energy Policy Act of 2003, deals with fuel additives. Section 1502 of that title contains the safe-harbor provision for manufacturers of MTBE and other fuel oxygenates. The section currently reads:

(a) In General.—Notwithstanding any other provision of Federal or State law, no renewable fuel, as defined by section 211(o)(1) of the Clean Air Act, or methyl tertiary butyl ether (hereinafter this section [sic] referred to as “MTBE”), used or intended to be used as a motor vehicle fuel, nor any motor vehicle fuel containing such renewable fuel or MTBE, shall be deemed a defective product by virtue of the fact that it is, or contains, such a renewable fuel or MTBE, if it does not violate a control or prohibition imposed by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the “Administrator”) under section 211 of such Act and the manufacturer is in compliance with all requests for information under subsection (b) of such section 211 of such Act. If the safe harbor provided by this section does not apply, the existence of a claim of defective product shall be determined under otherwise applicable law. Nothing in this subsection shall be construed to affect the liability of any person for environmental remediation costs, drinking water contamination, negligence for spills or other reasonably foreseeable events, public or private nuisance, trespass, breach of warranty, breach of contract, or any other liability other than liability based upon a claim of defective product.⁷

This language would potentially provide a liability shield for all those who might be sued for supplying a defective renewable fuel or MTBE itself, as well as fuels blended with MTBE or other additives.⁸ The liability shield will take effect so long as the cited statutory and regulatory requirements are complied with.⁹ To this end, we note that the term “manufacturer,” as used in the bill, might apply to manufacturers of MTBE and other fuel additives, as well as those entities that produce additive-blended and specifically MTBE-blended fuels.¹⁰ EPA regulations issued under the Clean Air Act define fuel and fuel additive manufacturers to include those who cause or direct “the alteration of the chemical composition of a bulk fuel, or the mixture of chemical compounds in a bulk fuel, by adding to it an additive,” and those who produce, manufacture, import, or sell fuel additives.¹¹ Section 211 of the Clean Air Act appears to implicitly adopt these definitions of “manufacturer,” and specifically indicates that term encompasses importers.¹² Thus, it appears relatively clear that the applicability of the safe-harbor provision may depend upon compliance with section 211 of the Clean Air Act and any relevant EPA regulations by a potentially large group of manufacturers.

⁷ H.R. 6, 108th Cong. § 1502(a) (Conference report).

⁸ While the safe-harbor provision would apply to other additives and additive blended fuels, such as ethanol or bio-diesel, this report is primarily focused upon MTBE and MTBE-blended fuels and does not address issues specific to other additives.

⁹ *Id.*

¹⁰ Blending of MTBE with fuel is typically done by refiners. Other additives may be blended at different stages of production.

¹¹ 40 C.F.R. § 79.2 (2003).

¹² 42 U.S.C. § 7545(b), (o).

Assuming the safe-harbor's applicability, the type of liability protection provided necessarily depends on the term "defective product," which appears to refer to state products liability claims.¹³ Products liability is a traditional common law tort. A tort is a civil action to recover damages for injuries caused by means other than breach of contract. The usual standard of liability in tort actions is negligence, which is the failure to exercise due care. In products liability cases, however, the courts apply strict liability instead of negligence as the standard for recovery.¹⁴ Thus, absent the safe-harbor provision, an MTBE manufacturer or distributor, for instance, could be held liable for a defective product that causes injury even if the party had exercised due care in all phases of production.

There are three different types of product defects that can give rise to liability: manufacturing defects, design defects, and failures to adequately warn of product hazards.¹⁵ A product with a manufacturing defect is one that is not in the condition in which it was designed to be.¹⁶ A product with a design defect is one that is in the condition in which it was designed to be, but was not designed in the safest feasible manner.¹⁷ If a manufacturer has used the safest feasible design, but that design has an inherent danger that is not obvious to users of the product, then the manufacturer must warn users of the danger or be liable for failure to warn.¹⁸ While manufacturers are often the target of such litigation, and while the exact contours are a matter of state law, liability often extends beyond manufacturers to distributors, sellers, and even to commercial lessors and bailors.¹⁹ Thus, absent a safe-harbor provision, most entities involved in the production, distribution, and sale of fuel additives or blended fuel, even those who would not be deemed manufacturers under the relatively broad definition found in the Clean Air Act and EPA regulations, could potentially be held liable for a defective product under any of the above-mentioned theories.

The broad language of the MTBE safe-harbor provision would appear to apply to all three concepts of products liability and effectively prevent liability from attaching under such theories. Further, even if a plaintiff could prove that an MTBE manufacturer had breached a warranty or been negligent in the manufacture of MTBE, the plaintiff under the bill apparently could not bring a defective product suit. Additionally, while the safe-harbor's applicability is conditioned upon certain actions taken by additive or blended-fuel manufacturers, in its current form, the provision would appear to apply to all potential defendants in a products liability claim. Similarly, failure on the part of a manufacturer

¹³ See, e.g., Restatement (Third) of Torts: Prod. Liab. § 1 (1998).

¹⁴ See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3rd Cir. 1980).

¹⁵ See, e.g., Restatement (Third) of Torts: Prod. Liab. § 2 (1998).

¹⁶ See, e.g., Restatement (Third) of Torts: Prod. Liab. § 2(a) (1998).

¹⁷ See, e.g., Restatement (Third) of Torts: Prod. Liab. § 2(b) (1998).

¹⁸ See, e.g., Restatement (Third) of Torts: Prod. Liab. § 2(c) (1998).

¹⁹ See, e.g., Restatement (Third) of Torts: Prod. Liab. § 1 (1998); Wright v. Newman, 735 F.2d 1073, 1077 (8th Cir. 1984).

to comply with the cited environmental provisions would appear to remove the liability shield for all potential defendants.²⁰

While potential defendants could shield themselves from defective products-related liability, it would appear that they would remain susceptible to other types of legal claims. Indeed, the language of the provision specifically maintains that other bases of liability, such as environmental remediation costs, drinking water contamination, trespass, public or private nuisance, breach of warranty, breach of contract, and negligence for reasonably foreseeable events are not affected by the safe-harbor provisions.²¹ Reaching MTBE manufacturers and those who blend fuels may prove more difficult under these other bases of liability. As stated previously, most contamination occurs due to leaking underground storage tanks located at individual gas stations. Liability for this contamination could attach to the party responsible for such tanks, but that party is not necessarily the fuel manufacturer or refiner.

Retroactive Application

As is not an uncommon practice, Congress has indicated that the safe-harbor provisions will apply retroactively, meaning that the law, if enacted, would govern events in the past back to the specified date. The provision states:

(b) Effective Date.—This section shall be effective as of September 5, 2003, and shall apply with respect to all claims filed on or after that date.²²

In this particular case, the safe-harbor's retroactive application would effectively bar several pending lawsuits claiming MTBE is a defective product. It is well-settled that Congress has the power to legislate retroactively, effectively closing off a remedy in the courts, under certain circumstances.²³ Primary among these circumstances is the requirement that there be no final decision in the case.²⁴ Such action must also satisfy due process. In this context, it has been established that due process will not be violated when the legislation has "a legitimate legislative purpose furthered by a rational means," a standard that is quite deferential to the Congress.²⁵

But while Congress has the *power* to cut off pending MTBE lawsuits, it is an altogether separate question whether exercise of that power effects a Fifth Amendment

²⁰ H.R. 6, 108th Cong. § 1502(a).

²¹ H.R. 6, 108th Cong. § 1502(a).

²² H.R. 6 108th Cong. § 1502(b).

²³ *See*, United States v. Schooner Peggy, 5 U.S. 103, 110 (1801); Landgraf v. U.S.I. Film Products, 511 U.S. 244, 280 (1994); Kaiser Alum. & Chem. Corp. V. Bonjourn, 494 U.S. 827, 837-38 (1990); Kopec v. City of Elmhurst, 193 F.3d 894, 903 (7th Cir. 1999); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1573 (11th Cir. 1992).

²⁴ Plaut v. Spendthrift Trust, 514 U.S. 211, 218-19 (1995). A decision is not considered final until all appeals have been taken or the time for appeals has lapsed.

²⁵ General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

taking of private property (the underlying causes of action), requiring compensation.²⁶ The crux is straightforward: do the accrued MTBE causes of action that would be extinguished constitute “property”? Of particular significance is how this inquiry would be resolved in two courts, the U.S. Court of Federal Claims and its appellate court, the U.S. Court of Appeals for the Federal Circuit, since the former has exclusive jurisdiction over takings claims against the United States seeking more than \$10,000.²⁷ But while the Federal Circuit has held accrued causes of action to be property, it has done so apparently only as regards extinguishment of *international* claims.²⁸ Were these courts faced with extinguishment of *state-law* claims, as in the case of the MTBE litigation, they might be tempted to follow the rule that “property” under the Takings Clause is normally defined by reference to state law. Our preliminary review suggests that state courts are divided as to the property status of accrued causes of action.²⁹

In sum, whether enactment of the energy bill would effect a taking of the MTBE plaintiffs’ accrued product-liability causes of action must be deemed an open question.

²⁶ The Fifth Amendment Takings Clause states: [N]or shall private property be taken for public use, without just compensation.” The Clause is designed to “secure compensation in the event of otherwise proper interference amounting to a taking.” *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987).

²⁷ 28 U.S.C. § 1491(a).

²⁸ See, e.g., *Abraham-Youri v. United States*, 139 F.3d 1462, 1465 (Fed. Cir. 1997).

²⁹ We refer here to accrued causes of action prior to being reduced to final, unreviewable judgment. Once reduced to final, unreviewable judgment, preliminary research indicates near-unanimous support for property status.