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## **MTBE Litigation Moves Forward In New York**

By Nora Lockwood Tooher  
[ntooh@lawyersweekly.com](mailto:ntooh@lawyersweekly.com)

MTBE - a key gasoline additive - was supposed to help reduce air pollution.

Ironically, the chemical compound has become one of the nation's biggest sources of groundwater pollution.

The problem is threefold - very small amounts of the compound can contaminate drinking water, the substance moves very easily through the soil when it leaks from underground storage tanks and it breaks down very slowly. The combination makes the substance - which is used as an alternative to lead to boost the octane of gasoline - an environmental menace.

The result is mounting litigation by water districts and municipalities that could cost major oil companies billions of dollars in damages.

The potential for massive verdicts stems from the work of attorneys Victor Sher and Scott Summy, who pioneered a legal theory that makes it possible to go after the major oil companies. Rather than use traditional environmental contamination theory to go after individual gas stations that leaked the substance, Sher and Summy sued MTBE manufacturers using a product liability theory.

"Gas stations - where most of the stuff leaks into the soil - have no say what's in their gasoline," Sher said.

Sher, a former president of the Sierra Club Legal Defense Fund, is now a partner at five-lawyer Sher & Leff in San Francisco. Summy is an attorney at Baron & Budd in Dallas.

Sher and Summy teamed up to win the first major MTBE settlement - an August 2002 agreement by oil companies to pay the South Lake Tahoe, Calif., water district \$69 million to clean up 18 wells.

The pair teamed up again to win the largest MTBE settlement to date - a 2003 water contamination lawsuit by the city of Santa Monica, Calif., that could eventually cost oil producers hundreds of millions of dollars. Exxon Mobil Corp., ChevronTexaco Corp., Shell Oil and 19 other oil companies agreed to settle for \$121 million in cash, plus pay the full costs of a treatment facility. Sher said experts estimate the treatment facility could cost up to \$500 million over 50 years.

The environmental niche has been lucrative for the attorneys involved, with legal fees in the Santa Monica case totaling \$66 million.

### Multi-State Litigation

The vast number of MTBE suits have been consolidated into a multi-state litigation now pending before U.S. District Court Judge Shira Scheindlin of the Southern District of New York. The litigation includes 70 lawsuits - representing 175 water districts.

Three cases from New York and one from California have been fast tracked as test cases. They are:

- Orange County Water District v. Unocal Corp. (California)
- Suffolk County Water Authority v. Amerada Hess Corp. (New York)
- United Water New York v. Amerada Hess Corp. (New York)
- The City of New York v. Amerada Hess Corp. (New York)

The New York City test case involves the contamination of a Queens well system; the other two involve well systems on parts of Long Island.

The Orange County Water District manages the groundwater in much of Orange County, Calif. Within the district's boundaries are about 200 public groundwater wells - and more than 400 known leaking underground storage tanks with MTBE in groundwater, according to Sher.

The suit seeks the full costs of investigating and treating MTBE contamination.

Although trials are not expected to start for two years, the costs to oil companies could be astronomical.

"These are all public water agency cases, and any public water well with MTBE treatment costs typically run between \$1 million and \$12 million," Sher said. "Everybody knows these are very, very large cases."

### California Screaming

Much of the MTBE litigation originated in California, where MTBE was widely used and where groundwater pollution was first detected.

According to the federal Environmental Protection Agency, MTBE (methyl tertiary-butyl ether) has been used in U.S. gasoline at low levels since 1979 to replace lead as an octane enhancer that helps prevent engine "knocking." Since

1992, MTBE has been used at higher concentrations in some gasoline to fulfill the oxygenate requirements set by Congress in the 1990 Clean Air Act Amendments. (A few cities, such as Denver, used MTBE at higher concentrations during the wintertime in the late 1980s.)

The problem, according to the EPA, is that a growing number of studies have detected MTBE in groundwater throughout the country; in some instances the contamination has leached into drinking water. Low levels of MTBE can make water undrinkable due to its offensive taste and odor.

An EPA panel has recommended reducing the use of MTBE substantially nationwide. So far, 17 states have banned MTBE. And water districts and municipalities are taking oil companies to court to force them to clean up contaminated water supplies.

"The problem with MTBE is that in contrast to other gasoline constituents, when it leaks into the groundwater it travels farther, faster, and it doesn't biodegrade, so it's very persistent, and at extraordinarily low levels it renders water unfit for drinking," Sher explained.

"And it's extremely expensive to remove," he noted.

House Majority Leader Tom DeLay, R-Texas, has tried to shield oil companies from MTBE product liability. But the effort failed when the U.S. Energy Bill stalled in the Senate in 2003. DeLay has pledged to reintroduce the MTBE immunity measure this year, but Sher said he's confident the bill will be defeated.

Questions or comments can be directed to the writer at:  
[ntoother@lawyersweekly.com](mailto:ntoother@lawyersweekly.com)

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Nora L. Tooher  
Lawyers Weekly USA  
41 West St.  
Boston, Ma. 02111  
617-218-8153 (phone)  
617-451-1466 (fax)