

Water Gun

Victor Sher opened the tap on massive MTBE settlements

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Victor Sher, Sher & Leff

In recent years, oil companies have agreed to pay nearly half a billion dollars to cities with water tainted by the gasoline additive MTBE.

The oil firms can blame Victor Sher for that. Sher, along with Dallas attorney Scott Summy, pioneered the idea of going after oil companies for groundwater contamination. After 20 years of suing the government as a lawyer for an environmental group, Sher founded his own firm to represent public agencies suing manufacturers in such suits.

Sher and Summy won the first massive settlement, a 2002 deal between gasoline makers and a South Lake Tahoe water district, for \$92 million. A year later, they topped themselves with a deal for the city of Santa Monica estimated at more than \$300 million. In that case, the attorneys claimed fees of at least \$66 million (see sidebar).

Call it the ground floor of a new kind of groundwater litigation. Now there are scores of MTBE suits nationwide, and Sher is co-counsel in several of the biggest. He's relishing the opportunity to practice a high-stakes brand of environmental law and insists that the best part of fat settlements is their impact on manufacturers.

"For someone like me, whose goal is to affect policy and change corporate behavior, this is a sweet spot," he said.

Until 1997, Sher was one of the country's most successful environmental activists. He masterminded the spotted owl litigation that curbed logging in vast tracts of the Pacific Northwest. By the mid-1990s, he was making about \$100,000 a year as director of the Sierra Club Legal Defense Fund, a large sum in the nonprofit world.

Sher's aggressive courtroom presence, lobbying and publicity efforts for the fund, now known as EarthJustice, gained him a reputation as an effective lawyer and political player, and he was credited with making the organization a formidable opponent of government environmental policy.

"He is a pretty intense individual," said Michael Sherwood, a lawyer who's worked in EarthJustice's Oakland office since 1974. "He was very expansion-minded, and he increased the size of the development staff substantially." Sherwood describes the spotted owl suits as

"a defining moment for EarthJustice."

But Sher found that being the group's executive director was unsatisfying and not just in terms of salary. Its traditional tactics of suing the government were generating diminishing returns.

As time went on, improved government defenses and judges' sagging receptiveness to Endangered Species Act challenges meant more work for less meaningful victories. "The golden age of environmental suits was the 1970s, when the laws were new," he said.

Sher wanted to pursue other types of environmental litigation, such as toxic torts, but was held back by the organization's tight budget.

So Sher left the nonprofit for the Sacramento firm of Miller, Sher & Sawyer, where he developed a new tort contingent on new legal theories and research expenses that, as a rule, exceed \$1 million per case. And after the \$92 million Tahoe settlement, he launched San Francisco's Sher & Leff.

DEEP POCKETS

Sher said the plaintiff work he does now is an extension of his nonprofit career.

"I ultimately thought the private sector was the way to go," he said. "If you look at what changes corporate behavior, it's regulation on the one hand and economic incentives on the other."

Historically, chemical makers had been unafraid of groundwater litigation because "large plaintiff judgments have been rare," Sher said.

The MTBE suits generated an economic incentive by using defective product arguments to go after the chemical's makers, rather than the gas stations directly responsible for leaks into groundwater.

This meant the difference between suing a mom-and-pop gas station for hundreds of millions of dollars' worth of contamination -- a prospect not worth litigating -- and going after the deep pockets of Shell Chemicals and Arco, which have been unable to convince courts that they are not responsible for the pollution.

The defective product argument was developed in the late 1990s by Sher and Summy, now a partner with the Dallas asbestos firm Baron & Budd. The two said they came upon the idea independently and met when their cases were consolidated.

Their defective product argument has changed the toxic tort landscape not only for attorneys but for the often litigation-shy public agencies Sher represents.

Water providers have been dealing with low-level pollution for years, and were historically

more concerned with insulating themselves from liability than holding others liable for pollution. This often meant convincing their customers that trace amounts of pollutants are safe to drink.

Public water providers were highly averse to the financial risk of suing polluters.

(The city of Lodi is a cautionary tale for paying lawyers' hourly fees in a tough groundwater case. On Jan. 12, the city sued its outside counsel after paying about \$25 million in legal fees in unsuccessful attempts to get insurance companies to pay for a cleanup of dry cleaner chemicals.)

But with recent MTBE settlements handled on contingency, the actions are nearly risk-free for water providers, which have shown an increasing eagerness to litigate.

John Lyons, a partner in Latham & Watkins' Los Angeles office who defends oil companies in MTBE suits, speaks highly of Sher. However, he said Sher's clients risk a credibility gap when they make the defective product argument.

"It's obviously a double-edged sword," he said. "On the one hand, they have for years been on the side of assuring their customers that water's safe ... and they shouldn't be sued. On the other hand, they are raising the claims now that they're suffering from low levels of contamination."

Sher puts it differently. "We're seeing the emergence of a new type of environmental enforcer: the public entities who are responsible for delivering resources to the public," he said.

Krista Clark, a legislative specialist with the Association of California Water Agencies, said the lower risks of litigating, tighter environmental regulations, and better methods of detecting groundwater pollution could benefit plaintiff lawyers.

"You're probably going to see more litigation as you find more and more of this stuff," she said.

PAYing up front

Sher said the rewards of these new suits -- for plaintiffs, their lawyers and the environment -- are clear, but that it takes years of tortuous and expensive labor to work up the cases. Dozens of experts are required -- at extraordinary cost.

"It's in the tens of millions for expenses, and that's separate from overhead," said Robert Gordon, senior trial counsel at Weitz & Luxenberg, the New York plaintiff firm that became famous for asbestos and multidistrict defective drug actions before taking on groundwater litigation.

The four firms that have successfully brought MTBE cases on behalf of public entities -- Sher

& Leff, Weitz & Luxenberg, Baron & Budd, and Sher's former firm, now known as Miller Axline & Sawyer -- have won enough money in prior actions to afford big investments.

In Sher's case, his firm is structured so his partner, Alexander Leff -- an attorney and former management consultant -- deals exclusively with the business end, while Sher and two associates handle the litigation.

In the past three years, MTBE suits have come under legislative attack. Earlier this month, House Majority Leader Tom DeLay, R-Texas, announced that Congress' next energy bill must include legal protection for oil companies.

Sher says that he takes the attack as a compliment.

Meanwhile, he and other plaintiff lawyers are busy diversifying their practices. They're applying defective product arguments to a host of other chemicals, including pesticides, dry cleaning fluids, semiconductor solvents and compounds used to pressure-treat lumber.

And Sher says he is confident that, whatever the fate of MTBE or the defective product argument in general, water agencies will always have a wide enough range of problems to keep litigating.

"There are other chemicals and other legal theories," he said.