Journal of Natural Resources & Environmental Law

Volume 17
Issue 2 *Journal of Natural Resources & Environmental Law, Volume 17, Issue 2*

Article 6

January 2003

Methyl Tertiary Butyl Ether (MTBE): A Certification Problem

Trevor Graves
University of Kentucky

METHYL TERTIARY BUTYL ETHER (MTBE): A CERTIFICATION PROBLEM

TREVOR GRAVES*

I. INTRODUCTION

Congress enacted amendments to the Clean Air Act of 1990[1] to regulate air pollution in all fifty states.[2] Specifically, these amendments were designed to "reduce ozone-forming volatile organic compounds (VOCs) and emissions of toxic air pollutants."[3] The legislation required the use of reformulated gasoline (RFG) in motor vehicles in areas with high levels of ozone and smog.[4] Initially, nine metropolitan areas identified as those having the worst air pollution problems in the United States were required to use RFG in the summertime months.[5]

The main aspect of RFG that separates it from regular gasoline is its increased chemical oxygen content.[6] The increased oxygen content enables the fuel to burn more completely and reduces the emissions of VOCs.[7] The amendments to the Clean Air Act mandated that reformulated gasoline consist of at least two percent oxygen by weight.[8] Since gasoline does not naturally meet the required oxygen content, gasoline manufacturers are required to add oxygenates to the gasoline.[9]

Methyl tertiary butyl ether, more commonly known as MTBE, quickly became the petroleum manufacturers' "oxygenate of choice,"[10] and is still the most popular oxygenate in the United States.[11] Manufacturers chose MTBE not only because it was effective at reducing air pollution, but also because it was easily and

---

*J.D. expected 2004, University of Kentucky College of Law; B.S. Chemical Engineering, 2001, University of Kentucky.

[1] Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7671 (1995).

[2] Millet v. Atl. Richfield Co., No. CV-98-555, 2000 Me. Super. Lexis 39, at *1 (Me. Super. Mar. 2, 2000).

[3] In re Methyl Tertiary Butyl Ether Prod. Liab. Litig., 175 F.Supp. 2d 593, 600 (S.D.N.Y. 2001) [hereinafter *MTBE I*].

[4] W. States Petroleum Ass'n. v. Dept. of Health Servs., 122 Cal. Rptr. 2d 117, 120 (Cal. Ct. App. 2002).

[5] *MTBE I*, 175 F. Supp. 2d at 600.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Millet*, No. CV-98-555, 2000 Me. Super. Lexis 39, at *4.

efficiently manufactured and transported.[12] Currently, MTBE is added to approximately eighty-seven percent of the gasoline that is "marketed, sold and used" in the United States.[13]

MTBE is a hydrocarbon produced from methanol and isobutylene.[14] It is characterized as small in molecular size, colorless, and highly soluble in water.[15] As a result of its high solubility and its poor absorption by surrounding soils, MTBE can travel through soil faster and farther than other gasoline components and can easily migrate into groundwater.[16] Additionally, MTBE biodegrades very slowly, if at all, causing it to endure in soil and groundwater for decades.[17]

MTBE groundwater contamination is a major problem in the United States because of its high solubility.[18] Annually, over nine million gallons of reformulated gasoline containing MTBE enters the environment during transportation, storage, sale or use in the United States.[19] The primary source of MTBE groundwater contamination comes from underground gasoline storage systems.[20] Furthermore, consumer overfills and spills at gas stations, automobile accidents, improper disposal, and even rainfall are sources of MTBE groundwater contamination.[21]

The issue of MTBE groundwater contamination has led to an even larger problem: drinking water contamination.[22] MTBE contaminates drinking water by leaving it with a turpentine-like taste and odor.[23] The foul taste and odor of MTBE-contaminated water renders it unsafe for human consumption.[24] Two of the main concerns with MTBE are that it is a known animal carcinogen and it has been linked to several human health problems,[25] such as an increased chance of developing asthma, negative reproductive and developmental effects, and such minor symptoms as

---

[12]Ryan W. Herrick, *MTBE or Not to Be?: Clean Air, Dirty Water, and Common Law Nuisance*, 30 MCGEORGE L.REV. 1325, 1332 (1999).

[13]*In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.* 209 F.R.D. 323, 330 (S.D.N.Y. 2002) [hereinafter *MTBE II*].

[14]*MTBE I*, 175 F. Supp. 2d. at 599.

[15]*W. States Petroleum Ass'n*, 122 Cal. Rptr. 2d at 120.

[16]*Id.*

[17]*MTBE II*, 209 F.R.D. at 330.

[18]*MTBE I*, 175 F. Supp. 2d at 599.

[19]*Id.*

[20]*MTBE II*, 209 F.R.D. at 330.

[21]*Id.*

[22]Herrick, *supra* note 12, at 1327.

[23]*Id.*

[24]*MTBE I*, 175 F. Supp. 2d at 599.

[25]*Id.*

headaches, nausea, and dizziness.[26] In addition, the United States Environmental Protection Agency (EPA) has identified MTBE as a possible human carcinogen.[27]

Contamination of drinking water caused by the use of MTBE in RFG has generated numerous lawsuits. The purpose of this comment is to analyze this problem by examining an MTBE-related class action lawsuit. This comment will discuss the background of the litigation, analyze the court's decision, and draw conclusions about the future of MTBE class action certification issues.

II. MTBE PRODUCTS LIABILITY LITIGATION

In re Methyl Tertiary Butyl Ether Products Liability Litigation,[28] was a consolidated, multi-district case, consisting of several putative class actions brought on behalf of private well owners asking for relief from threatened or actual contamination of their wells.[29] The plaintiffs primarily sought injunctive relief against a number of petroleum companies who, it is alleged, "knowingly caused the widespread contamination of groundwater as a result of their use of a gasoline additive known as methyl tertiary butyl ether."[30]

In *MTBE* I, five separate multi-district actions were before the United States District Court for the Southern District of New York, including: (1) an individual claim by two private New York well owners seeking damages and injunctive relief;[31] (2) a class of well owners in New York who may be at risk for contamination, but had not been tested ("the 'non-test' plaintiffs");[32] (3) a class of well owners in sixteen states whose wells had been tested, but no contamination of MTBE had been found ("the 'non-detect' plaintiffs");[33] (4) a private well owner in Florida seeking to represent a class of Florida well owners;[34] and (5) a class of private well owners in New York whose wells had actually been contaminated with MTBE.[35]

---

[26]Herrick, *supra* note 12, at 1329.
[27]*MTBE I*, 175 F. Supp. 2d at 599.
[28]*Id.*
[29]*Id.* at 598.
[30]*Id.* at 598-99.
[31]*Id.* at 603-04.
[32]*Id.* at 604.
[33]*MTBE I*, 175 F. Supp. 2d at 605.
[34]*Id.*
[35]*Id.*

The court dismissed the claims of the "non-detect" and "non-test" plaintiffs in *MTBE* I for a lack of standing because they did not allege actual MTBE exposure, nor did they identify any MTBE release sites close to their property.[36] Nevertheless, the court allowed the other three actions of the two private well owners in New York, the private well owner in Florida, and the class of private well owners in New York, allowing them to proceed under a number of theories, including market-share liability, concert of action, strict liability, negligence, failure to warn, public nuisance, and conspiracy.[37]

Following the court's decision in *MTBE* I, the remaining plaintiffs sought to invoke a class action against several oil companies[38] alleging that one or more of the defendants had caused actual contamination of their private well water.[39] The main causes of action alleged in the complaint included negligence, strict liability, failure to warn, nuisance, trespass, and failure to report toxic substance releases.[40] The plaintiffs limited the putative class to only four states and were amenable to class certification under Rule 23(b)(2) or (3) of the Federal Rules of Civil Procedure.[41]

A majority of state studies reported twenty percent of samples collected indicated MTBE contamination in their groundwater.[42] However, a nationwide study showed that only one out of 2,243 public drinking wells contained MTBE at a level higher than the EPA's advisory level of twenty parts per billion.[43] It is important to note that the present litigation focused on private wells,[44] so this study can be misleading. Private wells are at a higher risk of MTBE contamination because they are subject to little governmental regulation, no federal or state testing requirements, and tend to be shallower than public wells.[45]

---

[36] *Id.* at 608-11.

[37] *Id.* at 635.

[38] The oil companies sued were: Amerada Hess Corp., Atlanta Richfield Co., BP Corp., Amoco Oil Co., Chevron U.S.A., Inc., CITGO Petroleum Corp., Conoco Inc., El Paso CGP Co., Equilon Enterprises, LLC, Exxon Mobil Corp., Motiva Enterprises, LLC, Phillips Petroleum Co., Shell Oil Co., Shell Oil Products Co., Sunoco, Inc., Texaco Refining and Marketing, Inc., Tosco Corp., United Refining Co., and Valero Marketing and Supply Co. *MTBE II*, 209 F.R.D. 323, 329 (S.D.N.Y. 2002).

[39] *Id.* at 330.

[40] *Id.* at 328.

[41] *Id.*

[42] *Id.* at 331.

[43] *Id.*

[44] *MTBE II*, 209 F.R.D. at 331.

[45] *Id.* at 331.

The plaintiffs sought to limit certification of the class to claims for injunctive relief and damages proceeding on an individual basis.[46] Plaintiffs asserted that a number of issues were relevant to the entire class: MTBE's chemical characteristics, its interference with the use and enjoyment of plaintiffs' property, and the foreseeability of MTBE's environmental consequences.[47] Furthermore, the plaintiffs alleged certain aspects of the defendants' conduct were applicable to the entire class.[48] These issues were the defendants' knowledge of MTBE's negative characteristics, participation in misleading plaintiffs, failure to warn of potential harmfulness of MTBE, causation, joint liability, and knowledge of the existence of possible alternative oxygenates.[49]

In addition to the issues relevant to each class member, the plaintiffs felt that notification by publication would give other potential class members an opportunity to become part of the class.[50] The Plaintiffs limited the class to members who could meet the following criteria: (1) they own or have an interest in the real property; (2) such property has at least one water well on it; (3) such well is contaminated with a detectable level of MTBE; (4) such well is capable of providing a source of drinking water; and (5) such property is located in New York, California, Illinois, or Florida.[51] Furthermore, private well owners would have to test their own water for MTBE contamination in order to become a class member.[52]

Rule 23(a) of the Federal Rules of Civil Procedure[53] establishes the standard for class certification.[54] It sets forth four prerequisites that must be met by the class before certification: (1) the class must be so numerous that it is impracticable to join all members of the class (numerosity requirement); (2) common questions of law or fact must exist with respect to each member of the class (commonality requirement); (3) the claims of the representative party must be typical of the claims of the entire class (typicality requirement); and (4) the representative party must fairly and adequately represent the interests of the entire class (adequacy of

---

[46] *Id.* at 334.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *MTBE II*, 209 F.R.D. at 334-35.
[51] *Id.* at 335.
[52] *Id.*
[53] FED. R. CIV. P. 23.
[54] *MTBE II*, 209 F.R.D. at 336.

representation requirement).[55] Plaintiffs have the burden of proof in establishing that each requirement for class certification is met.[56] A court must be satisfied after "rigorous analysis" that all of the criteria set forth in Rule 23 are met before class certification will be granted.[57]

In *MTBE* II, the court concluded that the plaintiffs met the burden of establishing the first two prerequisites set forth in Rule 23(a).[58] The court did not address the commonality requirement because it concluded that the "defendants appear to concede that plaintiffs have identified at least one common question of law and fact, and have thus satisfied the commonality requirement."[59] In addition, the court noted the Plaintiffs made "a reasonable estimate of class size numbering in the tens of thousands," thereby fulfilling the numerosity requirement.[60]

Furthermore, the court discussed the implied requirement of ascertainability.[61] "Rule 23(a) does not expressly require that a class be definite in order to be certified, [but] a requirement that there be an identifiable class has been implied by the courts."[62] The test for determining ascertainability is whether a class may be identified by referring to objective criteria.[63] In *MTBE* II, the court concluded the ascertainablity requirement was met because the plaintiffs' class was based solely on objective criteria: "either a well has MTBE or it does not; either an individual has an ownership interest or she does not; either her property is located in a class state or it is not."[64]

However, the court concluded the plaintiffs had not established the typicality and adequacy requirements.[65] The typicality requirement is established pursuant to Rule 23(a)(3), "where each member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability."[66] The court relied on the fact that the plaintiffs sought to use market-share liability against the defendants to show

---

[55]FED. R. CIV. P. 23(a).
[56]Pecere v. Empire Blue Cross & Blue Shield, 194 F.R.D. 66, 69 (E.D.N.Y. 2000).
[57]Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).
[58]*MTBE II*, 209 F.R.D. at 336.
[59]*Id.* at 336 n.19.
[60]*Id.*
[61]*Id.* at 336.
[62]Alliance to End Repression v. Rochord, 565 F.2d 975, 977 (7th Cir. 1977).
[63]Zapka v. Coca-Cola Co., 2000 U.S. Dist. LEXIS 16552 (N.D. Ill. 2000).
[64]*MTBE II*, 209 F.R.D. 323, 337 (S.D.N.Y. 2002).
[65]*Id.* at 337-40.
[66]Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147,155 (2nd Cir. 2001).

that the typicality requirement was not met.[67] The court concluded,

> Most of the class representatives can identify a responsible gasoline manufacturer with ease because they live near a point source of gasoline pollution, and therefore face an uphill battle in utilizing a market share theory. The ambient well owners, on the other hand, cannot identify the manufacturer or manufacturers of the MTBE that allegedly contaminates their wells. Thus, in this critical respect, the named plaintiffs claims are not typical of the claims of the class.[68]

Furthermore, the court determined the plaintiffs failed to meet the adequacy of representation requirement of Rule 23(a)(4).[69] Under the adequacy requirement, "plaintiffs must show that the proposed action will fairly and adequately protect the interests of the class."[70] Additionally, the plaintiffs must show that the class representative's interests do not conflict with any of the other class members and that all members share the need to actively and strongly prosecute the action.[71]

The court found that the plaintiffs failed to meet the test of "adequacy of representation" for two reasons. First, since the class was attempting certification under Rule 23(b)(2), there was no opt-out provision for members of the class. Thus, the court did not believe the absent class members with personal injury or property claims could be adequately represented by the class representatives who only sought injunctive relief.[72] Second, the court had a major concern about "whether the named plaintiffs' stake in the action was substantial enough, relative to class members who suffered personal injury, to prosecute the action vigorously on behalf of the absent class members."[73]

A plaintiff must not only establish the four express prerequisites in Rule 23(a)(1)-(4) for certification, but must also show that the action is maintainable according to one of three proposed

---

[67] *MTBE II*, 209 F.R.D. at 337.
[68] *Id.* at 338
[69] *Id.* at 340.
[70] Banyai v. Mazur, 205 F.R.D. 160, 164 (S.D.N.Y. 2002).
[71] *Robinson*, 267 F.3d at 170.
[72] *MTBE II*, 209 F.R.D. at 339.
[73] *Id.* at 339.

classes contained in Rule 23(b).[74] Rule 23(b) authorizes three types of classes: (1) prejudice class actions in which separate actions by or against individual members of the class create a risk of inconsistent or varying adjudications with respect to individual members of the class; (2) injunctive class actions in which the defendants have acted or refused to act in a manner generally applicable to the entire class, thereby making injunctive relief appropriate; or (3) damage class actions in which questions of law or fact dominate over any other questions and a class action is the best method of adjudication of the matter (damage class action).[75]

The plaintiffs contended the proposed class met the first requirement of Rule 23(b)(2) "because the defendants conspired to use MTBE in their gasoline and promote its continued use, despite their knowledge of MTBE's dangerous properties."[76] The court did not necessarily dispute the plaintiff's claim, however, it did not find that the second prong of Rule 23(b)(2) was met.[77] Rather, the court concluded the plaintiffs failed to show injunctive relief was appropriate with respect to the class as a whole.[78] The court explained that "the hallmark of the (b)(2) action is homogeneity,"[79] instead finding individualized issues, such as whether owners of underground storage tanks (USTs) were warned about leakage in each class member's neighborhood and whether each class member was warned of the existence of MTBE. In addition, whether each class member suffered an actual injury from MTBE was another individual concern that was dispositive.[80]

In the alternative, plaintiffs argued the class met the requirements of Rule 23(b)(3).[81] The court also denied class certification under Rule 23(b)(3) because there were too many individual issues within the proposed class and class treatment was not superior to other methods of adjudicating MTBE drinking water contamination claims.[82] Because the plaintiffs did not meet the typicality and adequacy requirements of Rule 23(a) or the maintainability requirement of Rule 23(b), the court denied the motion

---

[74] *Id.* at 340-41.
[75] FED. R. CIV. P. 23(b).
[76] *MTBE II*, 209 F.R.D. at 342.
[77] *Id.* at 342.
[78] *Id.*
[79] *Id.* at 343 (quoting Arnold v. UA Theatre Circuit, Inc., 158 F.R.D. 439, 450 (N.D. Cal. 1994)).
[80] *MTBE II*, 209 F.R.D. at 343 n.31.
[81] *Id.* at 349.
[82] *Id.* at 350.

for class certification.[83]

III. ANALYSIS & CONCLUSION

The court's decision in *MTBE* II not only burdened the plaintiffs and potential class members, it also created uncertainty as to the future of MTBE litigation. First, there is plenty of evidence in the background of the case that MTBE drinking water contamination is a problem in the U.S.[84] For example, a March 2000 EPA report notes that most states reported MTBE existed in twenty percent of groundwater samples.[85] Additionally, there is ample evidence that MTBE is a harmful chemical that plays a role in many potential health problems.[86] A number of studies have found that MTBE is carcinogenic and harmful to the human reproductive system.[87]

Furthermore, the court's decision created uncertainty in future class certification issues because the plaintiffs met their burden of proving the requirements of Rule 23. The court's decision not to certify the class essentially rested on three grounds: (1) the typicality requirement; (2) the adequacy requirement; and (3) the maintainability requirement.[88] The court found no support in the plaintiffs' arguments concerning the typicality requirement, that "due to the large number of possible sources and the extreme solubility and mobility of MTBE in the environment, ambient non-point source contamination by MTBE is common."[89] The motivating factor behind the court's decision regarding typicality was that some members of the class could easily ascertain which defendant had contaminated their well, while other plaintiffs would not be able to identify a specific defendant.[90] While the typicality requirement would have been met if the court had accepted the Plaintiffs' theory, it instead dismissed the Plaintiffs' theory entirely by stating, "it is unclear, however, whether any named plaintiff or declarant fits this description."[91]

It is important to note that the test for typicality "is not

---

[83] *Id.* at 353.
[84] *Id.* at 328-31.
[85] *Id.* at 331.
[86] *See id* at 328-31.
[87] Herrick, *supra* note 12, at 1325.
[88] *MTBE II*, 209 F.R.D. at 336-50.
[89] *Id.* at 338 n. 21.
[90] *Id.* at 338.
[91] *Id.* at 338.

demanding."[92] The typicality requirement does not require that each plaintiff suffer an injury in the exact same way, only that "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members."[93] Since this standard was not difficult to meet, it seems that the plaintiffs should have easily met their burden. Nevertheless, the court tried to justify its position by stating, "The contamination of each named plaintiff's well comes about through a factually unique set of circumstances, e.g., a leaking UST owned by Big Saver, a burst pipeline, etc."[94] However, the court's rationale is not persuasive. Clearly, each named plaintiff in the litigation suffered harm from MTBE contamination and the precise cause of contamination should not be relevant to the typicality inquiry.

In addition to erring with respect to the typicality requirement, the court failed to take into account important considerations with respect to the adequacy requirement. The plaintiffs noted that "courts generally allow plaintiffs in class actions to sue for injunctive relief on behalf of the class and then bring damages claims in subsequent individual actions."[95] In *Norris v. Slothouber*,[96] the United States Court of Appeals for the District of Columbia held "a suit for damages is not precluded by reason of the plaintiff's membership in a class for which no monetary relief is sought."[97] Thus, it seems clear that if plaintiffs only seek injunctive relief, then the adequacy of representation requirement would be met since all members of the class would be seeking the same goal and all plaintiffs with a claim for damages would be adequately represented.

Finally, the court found that the Plaintiffs failed to show the action was maintainable under one of the Rule 23(b) prongs: prejudice class action, injunctive class action or damage class action.[98] Although the Plaintiffs did not adequately prove they met the requirements of Rule 23(b)(3), the class could have been certified pursuant to Rule 23(b)(2). In *Barnes v. American Tobacco Co.*,[99] the Third Circuit noted that a court must "ensure that individual issues do not pervade the entire action [because] the suit

---

[92]Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993).
[93]Marisol A. v. Giuliani, 929 F. Supp. 2d 662, 691 (S.D.N.Y. 1996).
[94]*MTBE II*, 209 F.R.D. at 337.
[95]*Id.* at 339.
[96]Norris v. Slothouber, 718 F.2d 1116, 1117 (D.C. Cir. 1983).
[97]*Id.* at 1117.
[98]*MTBE II*, 209 F.R.D. at 340-51.
[99]Barnes v. Am. Tobacco Co., 161 F.3d 127 (3rd Cir. 1998).

could become unmanageable and little value would be gained in proceeding as a class action if significant individual issues were to arise consistently."[100] As such, the court erred in concluding that individual issues pervaded the entire action.

The issues relevant to each member of the proposed class in the MTBE litigation are the same: the level of contamination, the source of contamination, and the effects of contamination on each class member.[101] It is difficult to understand what individual issues will pervade this class action. The court tried to justify its reasoning by noting that "the level at which people perceive the presence of MTBE in water varies significantly" and "not all individuals respond equally to taste and odor because of differences in individual sensitivity."[102] However, the court in its attempted justification admitted that a contamination problem existed. The very reasoning the court used to show an apparent maintainability problem was that individuals recognize and are affected by MTBE contamination differently. Thus, the court seems to have admitted contamination existed in the plaintiffs' wells, yet refused to hear the Plaintiffs' cause of action.

In conclusion, the court looks only superficially at the plaintiffs' complaint and the issues in this case by concluding that "a classwide trial of these claims would be inefficient and unmanageable."[103] In essence, by refusing class certification, the court gave petroleum manufacturers using MTBE an excuse not to take contamination problems seriously. The court concluded that class certification would be inefficient; yet individual adjudication of these matters would not only be inefficient, but unfair to the plaintiffs as well.

The court's failure to issue class certification essentially awarded the defendant oil companies a free pass to continue to avoid taking protective measures against MTBE contamination because individual plaintiffs are unlikely to have the economic resources to battle a large petroleum company one-on-one in the courtroom. Furthermore, the problems associated with MTBE drinking water contamination are clearly documented and do not appear to be going away.[104] The problems range from causing drinking water to have a foul taste and odor[105] to causing such

---

[100] *Id.* at 143.
[101] *MTBE II*, 209 F.R.D. 323, 344 (S.D.N.Y. 2002).
[102] *Id.* at 343.
[103] *Id.* at 346.
[104] *See id.*
[105] *Id.* at 332.

possible serious heath effects as cancer.[106]

Finally, this court recognized not only the dangers associated with MTBE-contamination, but also that there was actual contamination in this case.[107] Moreover, the contamination was not only limited to a few isolated instances, but possibly affected several tens of thousands individuals within the class states (New York, California, Illinois, and Florida).[108] Thus, a class action seemed like an appropriate course of action. Additionally, the court concluded that the class met the first two requirements of Rule 23 of the Federal Rules of Civil Procedure: numerosity and commonality.[109] While the Plaintiffs also offered evidence that the typicality and adequacy of representation requirements of Rule 23 of the Federal Rules of Civil Procedure were met, the court refused to issue class certification.[110]

Individual adjudication of these issues will not only be an inefficient use of judicial resources, it will also burden individual plaintiffs. Accordingly, the court should have issued class certification so these plaintiffs would be able to compete with the petroleum companies on a more level playing field and should have held the petroleum companies accountable for the MTBE drinking water contamination problem.

---

[106]Herrick, *supra* note 12, at 1325.
[107]*MTBE II*, 209 F.R.D. at 346.
[108]*Id.* at 337.
[109]*Id.*
[110]*Id.*