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Exxon Defeat On Gas Additive Leaves Energy Cos. Vulnerable

By Sean McLernon

Energy companies will have a tougher time fending off pollution and public health claims from newly emboldened plaintiffs now that the Second Circuit has preserved a \$105 million verdict against Exxon Mobil Corp. over water contamination from the gasoline additive methyl tertiary-butyl ether, experts say.

By soundly rejecting Exxon's argument that the Clean Air Act preempts state law claims and by upholding the costly verdict, the appeals court sent MTBE manufacturers and suppliers a strong message that they face a difficult fight with municipalities and other plaintiffs that can point to water sources contaminated by the additive.

The Second Circuit also left open the possibility of punitive damages against Exxon and others in similar cases, adding to the risk of substantial penalties for the industry and providing greater incentive to settle MTBE claims before they reach the trial stage.

Exxon had been appealing the 2010 judgment in the case, which was selected for a bellwether trial in long-running multidistrict litigation over MTBE groundwater contamination. Spillage of MTBE-treated gas stored in underground tanks polluted New York City water with the additive, which has been identified as a possible human carcinogen.

The energy giant insisted that state law tort claims brought by the city conflict with a reformulated gasoline program, established by the Clean Air Act amendments of 1990, that required the use of gasoline oxygenates like MTBE. The federal law therefore preempted them, Exxon argued.

But the Clean Air Act did not force Exxon to use MTBE, the appeals court said. Even if Exxon had no safer way than MTBE to comply with the program's oxygenate requirement, the jury did not impose liability solely because of Exxon's use of that chemical, according to the ruling.

The Second Circuit's takedown of the preemption argument deals a serious blow to a tactic the industry has consistently used in MTBE cases, according to Fox Rothschild LLP counsel Adam H. Cutler.

"The preemption argument seems to have been a significant argument for the industry in the past, and that seems now, at the very least, to have some deficiencies that will lead them to have to sit down and go back to the drawing board to try to overcome," Cutler said.

Allowing defendants like Exxon to largely avoid the details of any given case by focusing on the language of federal statutes that apply across the board, the preemption argument is an attractive tool for the industry.

In the wake of the Second Circuit's decision, however, plaintiffs can feel more secure when they bring state causes of action, according to Michelman & Robinson LLP partner Daniel R. Lavoie.

"It will make it easier for firms entrenched in this mature toxic tort litigation to bring additional claims without fear of a preemption argument," Lavoie said.

Exxon and other companies facing MTBE suits may be able to fend off liability claims, but any road to victory will be longer and rockier.

"They still have an ample quiver full of defenses for these cases, but it does seem to me that they are going to have a much harder time looking for this knockout punch that the preemption argument could have offered them," Cutler said.

The Second Circuit shielded Exxon from additional penalties on top of the \$105 million by affirming the district court's holding that the city was not entitled to punitive damages. Punitive damage awards have been difficult for MTBE plaintiffs to secure, with the most recent example coming earlier this year, when the Maryland Supreme Court struck down the entirety of a \$1 billion award against Exxon.

Nonetheless, the Second Circuit went out of its way to stress that it had no view on penalties Exxon could face in other states and said other state laws might allow for punitive damages in similar cases.

"It seems like [the judges] went into painstaking detail on the record as to Exxon's knowledge in this case, while making it clear that they are not foreclosing the possibility of the company being penalized for its conduct in other cases," Lavoie said. "I thought that was an interesting way to keep the door open for other juries, perhaps in similar facts and circumstances, to possibly find punitive damages."

Even though MTBE is no longer used in most places and statutes of limitation would prevent a flood of new suits, Katten Muchin Rosenman LLP partner Thomas L. Van Wyngarden noted that the additive is still in the groundwater in many places and that cleanups could spur new claims.

"More of these actions will come forward," Van Wyngarden said. "If there are actions out there for cleanup, an award like this is going to promote attendant third-party claims, tort claims, fear of cancer claims, even claims for medical monitoring."

MTBE is easy to detect due to its strong odor. It is alleged that one drop of the substance in an Olympic-sized swimming pool, and you can still smell it, Van Wyngarden said. Plus, a link to cancer has the potential to draw plenty of litigation.

"Anytime someone says 'carcinogen,' there is a huge emotional reaction to that," Van Wyngarden said. "It causes people to just react without looking at the science."

It all should make companies like Exxon think twice about spurning settlement offers and taking cases to trial. Exxon was saddled with a \$236 million jury verdict over MTBE water contamination in New Hampshire in April, and was hit with a new suit from several Massachusetts towns last month.

"It would not surprise me to see more of these cases settle," Cutler said. "Assuming this decision stands, it's certainly going to enter into the decision-making process of MTBE defendants. It may well be that more defendants decide that they don't want to risk having another \$100 million verdict come down against them."

Several other defendants in the Second Circuit case reached an agreement with city officials early on for pennies on the dollar compared with what Exxon ended up paying.

"This could signal, perhaps, a change in strategy from the defendant's perspective, in that settling out early could be a heck of a lot less expensive," Lavoie said.