

PUBLIC JUSTICE 2009 TRIAL LAWYER OF THE YEAR AWARD FINALIST

Case: *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation MDL 1358*

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MAKING BIG OIL CLEAN UP ITS DANGEROUS MESS

For 30 years, the big oil companies, including BP Amoco, Atlantic Richfield, Chevron, Shell, and others, allowed a chemical that causes cancer in animals, and possibly in humans, to seep into America's water supply. The refiners used methyl tertiary butyl ether (MTBE) to burn gasoline more thoroughly and reduce air pollution, even though they knew it was dangerous and could have used a less harmful chemical.

About a dozen oil giants were finally held accountable for contaminating our nation's water supply, thanks to the tenacity and creativity of co-lead counsel **Scott Summy**, of Baron & Budd, P.C. in Dallas, and **Rob Gordon**, of Weitz & Luxenberg, P.C. in New York; and co-counsel **Celeste Evangelisti** and **Carla Burke** of Baron & Budd; and **Robin Greenwald** and **Perry Weitz** of Weitz & Luxenberg. After nearly six years of litigation, the attorneys achieved a settlement in *In re Methyl Tertiary Butyl Ether Products Liability Litigation MDL 1358* on behalf of 153 public water providers in 17 states, requiring the oil companies to pay more than \$435 million to remove existing MTBE contamination and a substantial percentage of the clean-up costs for any contamination that appears within the next 30 years. It was the largest groundwater contamination settlement in history and means millions of Americans will now have drinking water that is free of the potentially cancer-causing chemical.

In 2002, Summy and Gordon's team filed the first suit against the oil refiners in New York state court in Suffolk County. Eventually, more than 150 cases on behalf of water providers were removed and consolidated into multidistrict litigation (MDL) in the United States District Court for the Southern District of New York. The core claims in the cases involved state common-law theories of product liability, negligence, nuisance and trespass.

As a group, the refiners represented the largest, richest, and most powerful corporations in the world. The contrast in resources and staff power was evident at each MDL status conference when less than 20 plaintiffs' lawyers faced off against nearly 100 defense lawyers. From the beginning, the oil companies raised every possible legal obstacle. First, they challenged the court's personal jurisdiction, raising novel issues of federal jurisdiction, removal, and remand jurisprudence. Then came a series of substantive legal motions. By the time of settlement, the court had issued over 1,000 pages of written opinions disposing of almost 40 motions, any one of which could have ended the litigation entirely.

Summy and Gordon's team faced a seemingly insurmountable challenge: it was impossible to identify the refiner of the specific gasoline that contaminated individual wells. The creative lawyers persuaded the court to fashion the "commingled product theory" and expand traditional tort concepts to reach each manufacturer of this generic liquid product that caused harm but could not be tied to a particular manufacturer through normal means of proof.

Summy and Gordon's team faced another serious obstacle when the refiners argued that the federal Clean Air Act required them to blend oxygenates like MTBE into gasoline and that this requirement preempted the plaintiffs' state tort claims. The trial lawyers argued, and the court agreed, that the Act did not require the refiners to use MTBE, rather than a safer alternative.

At one point, the oil companies attempted to dismiss the suits as nonjusticiable political questions, arguing that the plaintiffs' claims amounted to a ban on MTBE without a policy determination from the President and Congress. At another point, the refiners asked the court to stay or dismiss some cases on primary jurisdiction grounds to allow the contamination to be addressed at the regulatory level. In both instances, Summy and Gordon's team successfully argued that the court's involvement did not impinge on the role of any other branch of government.

While the industry's lawyers tried to defeat the cases in court, the oil companies sought legislative immunity from all the potential cases. In 2003 and 2005, the refiners pressed Congress for a provision that would have shielded MTBE manufacturers from litigation. Summy and Gordon led a lobbying force that defeated the legislation twice in the Senate – by a single vote in 2003 and by just a few votes in 2005. This was an extraordinary accomplishment, given that the refiners had powerful allies, including President Bush, Vice President Cheney, and House Majority Leader Tom Delay.

Summy and Gordon's team also won two appeals that ultimately cleared the way for settlement. In May 2008, the refiners agreed to pay more than \$435 million in cash to remove existing contamination from 1,037 wells serving 1,792,140 people nationwide. In addition, they agreed to pay a substantial percentage of the costs of remediating contamination in any well that has not yet been contaminated but becomes contaminated at any time in the next 30 years. This protects more than 3,000 public drinking wells from future MTBE contamination which, in turn, protects another 5,376,419 people served by those wells.

Summy, Gordon and their colleagues scored a huge victory for the environment and protected the drinking water of seven million Americans. Never before had a refiner been held liable for contamination that emanated from a site it did not own or operate. Applying products liability theories to their actions expanded the refineries' liabilities beyond their own properties in an unprecedented manner. Ultimately, Summy and Gordon's team were able to shift the costs of clean-up from the taxpayers to the parties responsible for the harm.

After *In re Methyl Tertiary Butyl Ether Products Liability Litigation MDL 1358* brought the dangers of MTBE to light, more than 20 states banned its use. As a result of the growing legislative pressure and the potential liability in this case, the industry stopped using MTBE in the United States. It took six years and an exceptional commitment from a team of trial lawyers, but the oil industry was finally held accountable for valuing profits over people. ■