

ARTICLE

NOT QUITE OFF THE HOOK: WHY THERE SHOULD BE A LEGISLATIVE SOLUTION FOR MTBE CONTAMINATION WITHOUT A SAFE HARBOR FOR MTBE PRODUCERS

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INTRODUCTION

Cambria, a central California coastal town, lost two of its five drinking wells because of it.¹ Dallas, the fifth largest city in the country, temporarily lost a third of its water supply to it.² Santa Monica, California cannot use seventy-five percent of its drinking water supply because of it.³ The culprit in all of these cases is methyl tertiary butyl ether (“MTBE”), an oxygenate additive for gasoline designed to increase combustion efficiency and thus reduce harmful vehicle emissions.⁴ In 1995, Congress mandated the addition of oxygenates to gasoline in all regions not meeting certain Clean Air Act air quality standards.⁵ However, as MTBE was added to gasoline supplies at an increasing rate, an insidious side effect emerged. MTBE, a substance highly soluble in water, was also inadvertently being added to water supplies through leaks and spills. A recent study suggests that it has contaminated as much as nine percent of

1. *ChevronTexaco to Pay \$9.1 Million to Resolve California Lawsuit on MTBE*, 34 ENVTL. REP., Sept. 19, 2003, at 2076 [hereinafter *ChevronTexaco*].

2. Brenda Rodriguez, *Gas Spill Forces Water Shut-off*, DALLAS MORNING NEWS, Mar. 16, 2000, at 23A.

3. *USGS Survey Finds MTBE Widespread But Mostly at Low Levels in Source Water*, 34 ENVTL. REP., Aug. 22, 2003, at 1878.

4. U.S. ENVTL. PROT. AGENCY, METHYL TERTIARY BUTYL ETHER (MTBE): MTBE IN FUELS (2006), available at <http://www.epa.gov/mtbe/gas.htm>.

5. 42 U.S.C. § 7545(m) (2005).

community water systems.⁶

Despite a lack of consensus on the precise health effects of MTBE contamination, water contaminated with the substance is unusable due to its strong taste and odor.⁷ As a result, municipalities that encounter MTBE contamination must bear the burden of cleaning their water or finding alternate water supplies. This problem involves many parties who either contribute to or are affected by it, including the federal government, state governments, municipalities, gasoline producers, gas station owners, gasoline transporters, and consumers. Efforts to assess liability for the costs of remediation have been achieved through ad hoc litigation based on novel and controversial product liability claims.⁸ This litigation approach has led to inefficiency and confusion with respect to proper liability for MTBE contamination. For this reason, Congress has considered legislation to provide federal money for cleanup costs while limiting MTBE-related litigation.⁹ The proposed scheme places the financial burden of remediation on the consumer, while the gasoline producers are essentially given a no-fault status.¹⁰ Although this solution may be more efficient and effective than litigation, it ignores the fact that the gasoline industry may have produced a faulty product and failed to warn the government and consumers of its potentially harmful effects. By providing a safe harbor for the gasoline manufacturers, the government would set a dangerous precedent to allow impunity for industries that use substandard solutions and products to comply with government regulations. Therefore, while a legislative remedy is desirable, a safe harbor for the gasoline manufacturers is not and thus should be excluded from any pending legislation.

6. U.S. GEOLOGICAL SURVEY, MTBE AND OTHER VOLATILE ORGANIC COMPOUNDS—NEW FINDINGS AND IMPLICATIONS ON THE QUALITY OF SOURCE WATERS USED FOR DRINKING-WATER SUPPLIES (2001), <http://pubs.usgs.gov/fs/fs10501/pdf/fs10501.pdf> [hereinafter USGS STUDY].

7. U.S. ENVTL. PROT. AGENCY, ACHIEVING CLEAN AIR AND CLEAN WATER: THE REPORT OF THE BLUE RIBBON PANEL ON OXYGENATES IN GASOLINE 13 (1999) [hereinafter BLUE RIBBON REPORT], available at <http://www.epa.gov/oms/consumer/fuels/oxypanel/r99021.pdf>.

8. John Hinck, *Testing the Waters in MTBE Litigation*, 37 TRIAL 44 (2001).

9. H.R. 6, 108th Cong. §§ 832, 17102 (2003); see also H.R. 6, 109th Cong. §§ 1502, 1525 (2005) (drafts of both bills, known as the Energy Policy Acts of 2003 and 2005 respectively, would have provided funding for MTBE contamination remediation, as well as shielded the gasoline industry from product liability litigation).

10. *Id.*

I. FACTUAL BACKGROUND—WHAT IS MTBE AND WHY IS IT USED?

A. *The Beneficial Effects of MTBE on Air Quality*

A standard automobile combustion engine works on the premise of burning a substance (gasoline) in a confined space (the cylinder) to create a high pressure gas situation that, upon combustion, will move the piston and motor.¹¹ When the gasoline does not burn at a high enough temperature it can disrupt the equilibrium of the system and cause what is known as “engine knock.”¹² MTBE, an oxygenate chemical that is very flammable, was initially added to gasoline in the 1970s in order to make it burn hotter and eliminate the “engine knock” problem.¹³

A decade later, another benefit of MTBE as a gasoline additive became apparent.¹⁴ As awareness of the growing urban air quality problem increased, so did the focus on decreasing automobile emissions.¹⁵ One way to decrease these emissions is to improve the performance of automobile engines.¹⁶ When the combustion process occurring in the automobile engine does not get a sufficient supply of oxygen, incomplete combustion will occur.¹⁷ Combustion is incomplete if products of the reaction contain any unburned fuel or its chemical components.¹⁸ Therefore, incomplete combustion in the auto engine results in the emission of numerous chemicals from the tailpipe of every automobile. Many of these chemical emissions react with ambient oxygen in the presence of sunlight to form ground level ozone (“O₃”).¹⁹ The addition of oxygenates like MTBE can raise the oxygen content of gasoline, which increases the completeness of combustion and reduces the amount of ozone-causing emissions.²⁰

Congress, in an effort to reduce vehicle emissions, instituted a requirement that gasoline contain oxygenate additives if sold in

11. YUNUS CENGEL, THERMODYNAMICS: AN ENGINEERING APPROACH 15 (2d ed. 1989).

12. *Id.*

13. U.S. ENVTL. PROT. AGENCY, *supra* note 4.

14. Michael Obel, *Colorado Eyes Gasoline Oxygenates*, OIL & GAS J., Jan. 19, 1987, at 19.

15. Rochelle Stanfield, *Car Trouble*, 19 NAT'L J. 1152, 1152 (1987).

16. STANLEY MANAHAN, ENVIRONMENTAL CHEMISTRY 381–91 (6th ed. 1994).

17. CENGEL, *supra* note 11, at 737.

18. *Id.*

19. MANAHAN, *supra* note 16.

20. U.S. ENVTL. PROT. AGENCY, *supra* note 4.

areas not meeting Clean Air Act standards.²¹ Many chemicals can be considered oxygenates based on their chemical properties. However, MTBE and ethanol are the chemicals primarily used for oxygenate additive purposes because of their availability, blendability, and ability to provide air quality benefits while meeting automobile performance standards.²² In 1997, of the oxygenates used in gasoline, MTBE constituted approximately seventy-six percent, ethanol constituted approximately nineteen percent, and other ethers constituted the other five percent.²³

B. The Detrimental Effects of MTBE on Water Quality

While certain chemical properties of MTBE are beneficial for air quality, some of its other properties have been found to be detrimental to water quality. Ethers, and particularly MTBE, are highly soluble in water.²⁴ Therefore, when there is a gasoline spill, MTBE dissolves into any water with which the gasoline comes into contact.²⁵ This characteristic has proved particularly troublesome in the groundwater context because there are an enormous number of underground storage tanks (“UST”) for gasoline that have leaked or are currently leaking.²⁶ Groundwater travels in currents through the ground, much like the currents in a river, in what are known as aquifers.²⁷ Therefore, MTBE contamination of groundwater can spread quickly through an underground aquifer and contaminate numerous sources of drinking water. In addition, MTBE is a very persistent substance that does not quickly degrade naturally, thus exacerbating the spread of contamination in groundwater.²⁸ In addition to leaking from USTs, MTBE can be introduced to water supplies through pipeline spills, gas pump spills, and gas tank spills from motorized watercraft.²⁹

These spills and leaks have contributed to a growing MTBE

21. 42 U.S.C. § 7545(m) (1990).

22. BLUE RIBBON REPORT, *supra* note 7, at 26 (MTBE and ethanol both meet the American Society for Testing and Materials (ASTM) specifications for use as a gasoline additive).

23. *Id.*

24. BLUE RIBBON REPORT, *supra* note 7, at 17.

25. *Id.*

26. GOV'T. ACCOUNTABILITY OFFICE, ENVIRONMENTAL PROTECTION: MTBE CONTAMINATION FROM STORAGE TANKS 10 (2002), *available at* <http://www.gao.gov/new.items/d02753t.pdf>. As of the publication of this report there were 416,702 known releases from underground storage tanks.

27. NEIL S. GRIGG, WATER RESOURCES MANAGEMENT: PRINCIPLES, REGULATIONS, AND CASES 40–41 (1996).

28. BLUE RIBBON REPORT, *supra* note 7, at 17.

29. *Id.* at 16.

contamination problem in the nation's drinking water supplies. A recent study conducted by the United States Geological Survey ("USGS") found at least low levels of MTBE in fourteen percent of the surface water and five percent of groundwater sources examined.³⁰ In areas where oxygenated fuels are heavily used, the study discovered MTBE five times more frequently in source water.³¹ Interestingly enough, proximity to gasoline storage tanks (the most common pathway of gasoline contamination) did not seem to be associated with MTBE detection.³²

The effects of MTBE can be devastating to a supply of drinking water. The most obvious and harmful effect of such contamination is the unpalatable taste and odor it gives to drinking water.³³ Amounts of MTBE as small as twenty parts per billion can render water undrinkable due to unpleasant taste and odor.³⁴ The precise health effects of MTBE ingestion are less obvious. The Environmental Protection Agency ("EPA") has studied the health effects of MTBE inhalation on animals and determined that prolonged exposure can result in increased kidney and liver weights, renal lesions and increased prostration in females, and swollen periocular tissue.³⁵ However, the particular human health and carcinogenic effects of MTBE are not conclusively known and are in dispute.³⁶ Despite the uncertainty of human health effects, the EPA has issued a drinking water advisory for MTBE recommending a maximum contamination level of twenty to forty parts per billion (0.02 mg/L to 0.04 mg/L) based on its taste and odor thresholds.³⁷

Removing MTBE from drinking water supplies is an expensive and lengthy process. Current methods of remedying MTBE contamination at municipal treatment plants would cost

30. USGS STUDY, *supra* note 6. Low levels of MTBE contamination were less than 5.0 micrograms per liter. *Id.*

31. *Id.*

32. *Id.*

33. BLUE RIBBON REPORT, *supra* note 7, at 13, 77 ("The turpentine-like taste and odor of MTBE...can make such drinking water unacceptable to consumers.").

34. *Id.* at 18.

35. U.S. ENVTL. PROT. AGENCY, INTEGRATED RISK INFORMATION SYSTEM (IRIS), METHYL TERT-BUTYL ETHER (MTBE) (1993), available at www.epa.gov/iris/subst/0545.htm.

36. U.S. ENVTL. PROT. AGENCY, OXYGENATES IN WATER: CRITICAL INFORMATION AND RESEARCH NEEDS 24-26 (1998), available at http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=4611.

37. U.S. ENVTL. PROT. AGENCY, DRINKING WATER ADVISORY: CONSUMER ACCEPTABILITY ADVICE AND HEALTH EFFECTS ANALYSIS ON METHYL TERTIARY-BUTYL ETHER (MTBE) 2 (1997). The advisory merely is a recommendation and EPA has not issued mandatory regulations concerning MTBE levels in drinking water.

anywhere from \$42 to \$391 per family of four, annually.³⁸ Costs of cleaning groundwater contamination are even higher because they require accessing or extracting the groundwater.³⁹

II. LEGAL BACKGROUND

As the air pollution benefits of oxygenates became apparent to lawmakers, Congress decided their addition to gasoline should be mandated. In 1990, the Clean Air Act amendments included a requirement that gasoline sold in regions not attaining the national ambient air quality standards (“NAAQS”) for carbon monoxide contain a 2.7 percent oxygenate content by weight during the winter months.⁴⁰ In 1995, the Reformulated Gasoline Program began requiring reformulated gasoline year-round in cities not meeting the ozone NAAQS.⁴¹ Reformulated gasoline must contain at least two-percent oxygenate additive by weight.⁴² Congress did not mandate the use of MTBE in particular, but due to its availability and cost it became the most widely used oxygenate additive in reformulated gasoline.⁴³ As of 2003, reformulated gasoline constituted up to thirty percent of all gasoline, and of this thirty percent, eighty-seven percent contained MTBE.⁴⁴

A. Regulation

As MTBE use increased throughout the 1990s, so did its introduction into the nation’s drinking water supplies. Underground gasoline storage tanks, widely considered the leading source of MTBE groundwater contamination, are regulated under Subtitle IX of the Resource Conservation and Recovery Act (“RCRA”).⁴⁵ The UST provisions in RCRA regulate the technical specification of such tanks as well as leak detection

38. BLUE RIBBON REPORT, *supra* note 7, at 51, fig. 1. Costs are based on either the air stripping, ozone/hydrogen peroxide, and granulated activated carbon methods. Costs are also based on the gallons per minute treated. *Id.*

39. *Id.* at 55. Groundwater is either extracted or accessed using the pump and treat, soil vapor extraction, air sparging, dual phase extraction, bioremediation, and in-situ oxidation methods. Once water is extracted it is typically cleaned using the three remediation techniques. *Id.*

40. 42 U.S.C. § 7545(m) (2005).

41. See 42 U.S.C. § 7545(k)(1)(A) (2005).

42. U.S. ENVTL. PROT. AGENCY, GASOLINE FUELS: REFORMULATED GASOLINE 3 (1999), available at <http://www.epa.gov/otaq/f99040.pdf>.

43. BLUE RIBBON REPORT, *supra* note 7, at 1 (noting over 85 percent of reformulated fuels contained MTBE as the oxygenate.); see also 42 U.S.C. § 7545(k)(1)(A) (2005).

44. U.S. ENVTL. PROT. AGENCY, *supra* note 4.

45. See 42 U.S.C.A. § 6991(10) (2005); see also 40 C.F.R. §§ 280–82.

systems.⁴⁶ In addition to the technical requirements of RCRA, the Act also requires UST owners to demonstrate that they have a source of funds to cover the costs of UST leaks and third-party liability arising from such leaks.⁴⁷ This liability coverage requirement mandates at least one million dollars, per occurrence or leak, to cover any leak related costs and damages.⁴⁸

In addition to the liability requirements, there are provisions for the administration of a Leaking Underground Storage Tank Trust Fund (“LUST Fund” or “LUST”)⁴⁹. The LUST Fund is funded by a 0.1 cent-per-gallon sales tax on gasoline, and under limited and specific circumstances, is used to pay for remediation of contamination which is attributable to a specific leaking UST.⁵⁰ These circumstances include the following:

1. An owner or operator who is required to undertake the corrective action, and who is capable of carrying out corrective action properly, does not exist or cannot be identified;
2. Prompt action by the EPA (or state) is necessary to protect human health and the environment;
3. The financial resources of the owner or operator, including any UST financial assurance, are inadequate to pay the entire cost of the corrective action, and expenditures from the Fund are necessary to assure effective corrective action; or
4. An owner or operator has failed or refused to comply with an order to perform corrective action.⁵¹

Congress did not authorize the LUST Fund to act as financial assurance but instead intended it to “stand behind” owners or operators who have demonstrated financial responsibility in the required amounts.”⁵² Because of the difficulty in getting private insurance, many states have created their own insurance programs which required all UST’s to pay into the program.⁵³ Therefore, federal grants to states from the

46. 42 U.S.C. § 6991b (2006).

47. 42 U.S.C. § 6991b(d) (2006).

48. 42 U.S.C. § 6991b(d)(5)(A) (2005).

49. *See generally* 26 U.S.C. § 9508 (2005).

50. 26 U.S.C. § 4081(a)(2)(B) (2005).

51. 42 U.S.C. § 6991b(h)(2) (2005); *see also* U.S. ENVTL. PROT. AGENCY, FINANCIAL RESPONSIBILITY FOR UNDERGROUND STORAGE TANKS: A REFERENCE MANUAL 4 (2000) [hereinafter FINANCIAL RESPONSIBILITY], available at <http://www.epa.gov/oust/pubs/frustman.pdf>.

52. FINANCIAL RESPONSIBILITY, *supra* note 51, at 4.

53. GOV’T ACCOUNTABILITY OFFICE, *supra* note 27, at 14. Under regulations

LUST Fund have been limited, and have mostly been used for administrative costs.⁵⁴ Of the money paid to the states, thirty-five percent covered administrative costs, twenty-nine percent covered enforcement costs, and thirty-six percent covered site cleanup costs.⁵⁵ The majority of these funds are dedicated to administration and enforcement because they cannot be used for cleanup costs if the owner or operator is able to pay.⁵⁶ As of 2001, the states' own insurance funds were still operating, but due to the higher than projected cost of UST clean-ups, including MTBE clean-ups, several state funds were coming up short.⁵⁷

States have brought claims against owners and operators of USTs. The city of Cambria, California, settled for \$9.1 million with ChevronTexaco for MTBE contamination that stemmed from a gas station the company owned.⁵⁸ However, the size of Cambria's settlement with a gas station may be rare. An EPA study shows that 146,000 of 182,000 gas stations are not owned by gasoline manufacturers in an apparent effort by the manufacturers to shield themselves from UST liability.⁵⁹ Therefore, the deep pockets of the petroleum industry are being replaced by the shallow pockets of franchisees, making a sizable future settlement with a gas station an unlikely occurrence.

B. Litigation

While the LUST program and state insurance funds have been successful in some states' efforts to remediate MTBE contamination, many situations remain where there is not adequate funding or where the contamination cannot be attributed to a specific UST. In these circumstances, local governments have developed unique tactics for recouping remediation costs. The most significant of these funding techniques has been litigation against the *manufacturers* of MTBE and gasoline.⁶⁰ Claiming that MTBE manufacturers were

promulgated by the EPA, states may administer and fund their own UST insurance programs as long as their requirements and restrictions for owners are no less stringent than the federal requirements. 40 C.F.R. § 281.11 (2005).

54. *Id.* at 14–15.

55. *Id.* at 16.

56. *Id.* at 15.

57. *Id.* at 14.

58. *ChevronTexaco*, *supra* note 1, at 2076.

59. *See* BLUE RIBBON REPORT, *supra* note 7, at 42.

60. *Hinck*, *supra* note 8 (describing *Communities for a Better Env't v. Unocal*, No. 997013, 2002 WL 33829809 (Cal. Super. Ct. Apr. 16, 2002); *South Tahoe Pub. Util. Dist. v. ARCO*, No. 999128 (Cal. Super. Ct. Nov. 9, 2001); *City of Dinuba v. Unocal*, No. 305450 (Cal. Super. Ct. Nov. 9, 2001); *City of Santa Monica v. Shell Oil Co.*, No. 313004 (Cal. Super. Ct. June 2000); *California v. Atlantic Richfield Co.*, No. 80-40-30 (Cal. Super. Ct.

aware of the dangers of their product to water sources, municipalities and class-action plaintiffs have brought suits complaining of defective product design, failure to warn of a dangerous product, and various other claims.⁶¹ The first major case between a municipality and manufacturers was brought in early 2001, when a California water utility company sought to recoup millions of dollars to fund the cleanup of public waters contaminated by MTBE.⁶² That case resulted in numerous settlements and eventual judgments against the manufacturers for selling defective MTBE, failing to warn of its dangers, and in the case of two manufacturers, malice for withholding information.⁶³ Since then, many other plaintiffs have brought claims on similar grounds.⁶⁴ However, a number of such state cases have been dismissed due to a judicial determination of federal preemption.⁶⁵ Therefore, litigation in state court has been an unpredictable method of funding MTBE contamination cleanups.

C. Legislation

In an effort to deal with the various issues arising from MTBE contamination, Congress has considered amendments to the federal LUST Fund provisions. One such amendment included in the highly contentious and ultimately unsuccessful Energy Policy Act of 2003, proposed amending the LUST Fund statute to make LUST Fund money available specifically for MTBE contamination remediation.⁶⁶ The proposed statute would

Oct. 5, 2000); *Young v. ExxonMobil Corp.*, No. 8:00-CV-1912T-24C (M.D. Fla. Sept. 14, 2000); *Sutton Farms v. Amerada Hess Corp.*, No. 00-3544 (S.D. Fla. Sept. 21, 2000); *Holten v. Chevron U.S.A., Inc.*, No. OCN-L-2763-00 (N.J. Super. Ct. Sept. 22, 2000).

61. *Id.* at 47–48.

62. Sara Hoffman Jurand, *Settlement Concludes First MTBE Products Trial*, 39 TRIAL 84, (2003) (describing *South Tahoe Pub. Util. Dist. v. Atlantic Richfield Co.*, No. 999128 (Cal. Super. Ct. Aug. 5, 2002)). The case was brought by the South Tahoe water utility against MTBE producers and fuel manufacturers, refineries, and distributors. More than a dozen defendants settled before the case went to trial. In April 2002, a jury found the remaining five defendants liable for marketing a defective product and failing to warn of its dangers. The court also ruled that two defendants, Shell Oil and ARCO Chemical, acted with malice by withholding information. *Id.*

63. *Id.*

64. See Hinck, *supra* note 8, at 47–48.

65. Carrie Williamson, “*But You Said We Could Do It!*”: *Oil Companies’ Liability for the Unintended Consequence of MTBE Water Contamination*, 29 ECOLOGY L.Q. 315, 329–32 (2002) (describing the cases of *Oxygenated Fuels Ass’n, Inc. v. George Pataki*, 158 F. Supp. 2d 248 (N.D.N.Y. 2001) and *Oxygenated Fuels Ass’n, Inc. v. Davis*, 163 F. Supp. 2d 1182 (E.D. Cal. 2001) in which the court declared state law tort claims against gasoline producers were preempted by the Federal Clean Air Act).

66. H.R. 6, 108th Cong. § 17201 (2003).

have authorized the EPA, or a state, to “use funds made available under §9013(1) to carry out corrective actions with respect to a release of methyl tertiary butyl ether or other ether fuel additive that presents a threat to human health, welfare, or the environment.”⁶⁷ The state LUST program would have to be certified by the EPA for the funds to be disbursed to the state.⁶⁸ This would have been a departure from the current regulatory framework because it would have made LUST funds available for MTBE contamination cleanup costs, even when the contamination cannot be directly attributed to a leaking storage tank.⁶⁹ In addition to the availability of LUST Fund money, the proposed legislation contained a controversial liability waiver provision that would have shielded the producers of MTBE from product liability claims.⁷⁰

III. THE CURRENT REGULATORY AND JUDICIAL FRAMEWORK IS FAILING

A. *Deficiencies of the Current Regulatory Framework*

The regulatory framework for dealing with MTBE contamination does not encompass all sources of the contamination. Currently, the only regulatory regime to principally address gasoline leaks and their effects is the underground storage tanks provisions of RCRA.⁷¹ While these provisions are effective for preventing and responding to leaks from USTs, they do not address other pathways for MTBE contamination. According to the most recent USGS report, proximity to a UST is not a major indicator of MTBE contamination.⁷² This finding by the USGS reflects the fact that there are numerous pathways for MTBE contamination, including small spills, improper disposal, leaks from recreational watercraft, and storm-water runoff.⁷³ The UST program does not regulate any of these pathways and provides no mechanism for preventing future releases.

In addition, the current program offers no funding or

67. *Id.*

68. H.R. 6, 108th Cong. § 832(a)(1) (2003) (as it would amend 42 U.S.C. § 6991b(h)(7)(a) if it had been enacted).

69. H.R. 6, 108th Cong. § 832(a)(2) (2003).

70. H.R. 6, 108th Cong. § 17102(a) (2003) (safe-harbor provision foreclosing suits based on a contention of MTBE's defective design).

71. *See generally* 42 U.S.C. §§ 6991b (2002).

72. *See* USGS STUDY, *supra* note 6.

73. BLUE RIBBON REPORT, *supra* note 7, at 16.

remediation solutions for contamination from these alternate pathways. The only way to receive federal and state funds for MTBE remediation is to first make a threshold demonstration that the source of the MTBE was a specific leaking UST.⁷⁴ The rapid and pervasive spread of MTBE in the water system makes it difficult to attribute the source to a specific UST. Even if the contamination is attributed to a leaking UST, money will only be appropriated if the owner or operator cannot, or will not, contribute to the cleanup costs.⁷⁵ Therefore, relatively small amounts are paid out by state and federal funds for MTBE remediation.⁷⁶

B. Deficiencies of the Current Judicial Solutions

Because of the lack of remediation funding options, municipalities have begun tracing the line of contamination back to the source—the producers of the gasoline and MTBE.⁷⁷ The numbers of tort claims against these producers have steadily increased.⁷⁸ The *South Tahoe* lawsuit serves as a good case study on the issue of whether tort liability is the best method of obtaining cleanup funds for MTBE contamination.⁷⁹ This suit was filed by a California water utility company against more than a dozen defendants who were producers of MTBE and gasoline.⁸⁰ The suit was a response to an initial detection of MTBE in the district's drinking-water wells in 1997 and the subsequent closure of thirteen of its thirty-four wells.⁸¹ The action was filed in November 1998, the trial commenced in early 2001, and the final disposition with all defendants occurred in August 2002.⁸² Nearly four years of litigation were required to receive all of the MTBE remediation funds in the South Tahoe district. The payments made by the defendants totaled just over \$69 million.⁸³

74. See GOV'T ACCOUNTABILITY OFFICE, *supra* note 26, at 2–3, 14–17.

75. *Id.*

76. *Id.* at 16.

77. Hinck, *supra* note 8, at 46–51.

78. *Id.*

79. Hinck, *supra* note 8, at 48; see also Amanda Fehd, *MTBE Ruling a Loss to Oil Industry: South Tahoe was 1st to get Punitive Settlement*, TAHOE DAILY TRIB., Aug. 2, 2005, at 1, available at <http://www.tahoe-dailytribune.com/article/20050802/News/108020024/-1/NEWS>.

80. *Id.*

81. South Tahoe Public Utility District Website, MTBE FAQs, <http://www.stpud.us/mtbe-faqs.html> (last visited Sept. 15, 2006); see also Fehd, *supra* note 79.

82. *Id.*

83. *Id.*

Another potential pitfall for those seeking remediation funds through litigation is the doctrine of federal preemption. The doctrine of federal preemption simply states that when a federal law speaks directly to a specific issue, that federal law is the supreme law of the land under Article VI, the Supremacy Clause.⁸⁴ Therefore, that federal law preempts any state law on the same issue. The preemption doctrine has become an issue in state suits because some courts have found that cases challenging MTBE use cannot be brought because of federal law preemption under the Clean Air Act.⁸⁵ This Article does not explore the merits of preemption claims, but at least one commentator has argued that federal preemption should not apply in the context of MTBE.⁸⁶ Nevertheless, cases have been dismissed based on this theory and it remains a challenge to those seeking compensation for cleanup costs.

IV. LEGISLATIVE SOLUTIONS TO MTBE CONTAMINATION

The current remedial framework for MTBE contamination is insufficient. A solution is needed that will provide a quicker and more efficient way to compensate utilities and well owners for their contaminated water and resulting cleanup. Commentators have suggested that Congress legislate a funding and remediation solution for the growing MTBE problem.⁸⁷ As discussed in Section II of this Article, Congress continues, in their attempt to amend Subtitle I of RCRA, to create funding options for MTBE remediation.⁸⁸ A legislative solution is certainly preferable to the inefficient, unpredictable, and protracted methods currently used to obtain cleanup funds.

A legislative solution enacted through the existing regulatory framework would be the most efficient method of distributing funds to those entities needing to remove MTBE from their source water. The LUST Fund is one such framework, as it is already structured to deal with the problems of leaking or spilled petroleum.⁸⁹ The program has an administrative structure that would be able to implement quickly the provisions

84. U.S. CONST. art. VI.

85. Williamson, *supra* note 66, at 317.

86. *Id.* (arguing that the Reformulated Gasoline Program, along with its objectives to improve and protect air quality, is too far removed from groundwater contamination to preempt MTBE water contamination claims in state court).

87. Daniel Velez, *No Fault Remediation of MTBE*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 477, 477 (2001) (advocating a no-fault legislative remedy to the MTBE problem).

88. See H.R. 6, 108th Cong. § 832 (2003); H.R. 6, 109th Cong. § 1525 (2005).

89. 26 U.S.C. § 9508 (2005).

of MTBE remediation legislation. For example, instead of filing suit against a dozen companies, a water utility could file a petition with either state or federal authorities requesting money to remediate MTBE contamination.⁹⁰ This process would likely be quicker than the four years needed to settle the *South Tahoe* suits. Additionally, with administrative regulations in place that lay out the requirements for receiving such funds, there would be less unpredictability about whether funds would be acquired. Knowing when and how much funding is expected would help utilities plan for the water-cleaning process much earlier than if they receive funding through litigation.

However, before victims of MTBE contamination could adequately use the LUST Trust Fund, the Fund's shortcomings with respect to MTBE would have to be addressed. The first of these shortcomings is the requirement that contamination be attributed to a specific leaking UST.⁹¹ While that is appropriate for other localized petroleum contamination, it will prove to be a substantial impediment to MTBE remediation. MTBE can travel a significant distance in the groundwater flows.⁹² Requiring a direct link to a specific tank would entail an expensive hydrogeologic study.⁹³ Additionally, as the USGS study indicated, a substantial number of contamination sites are not located near USTs.⁹⁴ The appropriate solution to this causation requirement is to eliminate it for MTBE. Not only will this facilitate the cleanup of contamination sites that are not collocated with USTs, it will make the entire remediation process more efficient.

The LUST Fund is also an adequate vehicle for funding MTBE cleanup from an appropriations point of view. Money from the LUST Fund comes from a federal sales tax on gasoline.⁹⁵ Therefore, the people paying for the cleanup are the people using the gasoline. The people who use and demand the most gasoline will pay the most for its cleanup. This is an appropriate allocation of the funding burden because it is the consumer, who uses gasoline for combustion purposes, which creates the air

90. U.S. ENVTL. PROT. AGENCY, *Leaking Underground Storage Tank (LUST) Trust Fund*, Mar. 9, 2006, <http://www.epa.gov/swerust1/lffacts.htm> (last visited Oct. 2, 2006).

91. 42 U.S.C. § 6991b (2006).

92. ARTURO A. KELLER, ET AL., AN INTEGRAL COST-BENEFIT ANALYSIS OF GASOLINE FORMULATIONS MEETING CALIFORNIA PHASE II REFORMULATED GASOLINE REQUIREMENTS 23–24 (1998), available at http://tsrtp.ucdavis.edu/mtberpt/vol5_7.pdf.

93. *Id.* at 25 ("[Site investigation] costs ranged from \$30,000 to \$250,000 for typical gasoline station sites Since MTBE is more mobile and less degradable than any other gasoline component, MTBE plumes will typically be 50% – 100% more expensive to characterize than comparable plumes from conventional gasoline with no MTBE.").

94. See USGS STUDY, *supra* note 6.

95. 42 U.S.C. § 6991b(h) (2006); see also 26 U.S.C. § 4081(a)(2)(B) (2005).

quality problem. Because MTBE use was implemented to address this air quality problem, the consumers should share in a portion of the remediation funding.⁹⁶

However, the Fund may not be adequate to cover all of the future costs of MTBE contamination. The \$1.7 billion currently in the Fund⁹⁷ is far less than the projected \$29 billion that would be needed to cleanup all MTBE contamination.⁹⁸ Congress must address this apparent shortfall by updating the current method of obtaining money for the fund. One solution would be to increase the LUST Fund levy on gasoline sales from the current 0.1 cent-per-gallon level. Another solution would be to pass these added remediation costs on to the producers of MTBE and gasoline. Because these companies have profited from the use of MTBE and gasoline, it seems appropriate for them to also contribute to the solution. One possible funding scenario would be to establish a LUST Fund tax-matching provision, whereby the gasoline producers would match all of the tax revenue generated through gasoline sales. However, such a scenario would be complicated by the various participants in the markets including the producers of MTBE, the gasoline producers, and the retail gas station owners. Each of these players contributed to the current problem, and thus it would be only equitable to allocate the costs to all of them. Because retailers fall under the current UST regulations and liability requirements that contribute to an extent to prevention and remediation, they could be exempt from such a funding regime.⁹⁹

V. CONGRESS SHOULD NOT PROVIDE MTBE PRODUCERS A LIABILITY WAIVER

A. Overview of the Proposed Liability Waiver

Proposed legislation in Congress concerning the remediation of MTBE contamination also includes a safe-harbor provision for the producers of MTBE and gasoline.¹⁰⁰ The safe-harbor provision would provide a liability waiver for the producers of

96. Velez, *supra* note 87, at 507–08.

97. GOV'T ACCOUNTABILITY OFFICE, *supra* note 26, at 1–2.

98. Seema Mehta, *MTBE Cleanup Cost \$29 Billion, Study Says*, LOS ANGELES TIMES, Oct. 14, 2001, at 3 (reporting that a study conducted by Komex H2O Science, a Huntington Beach, California environmental consulting firm, concluded that the total remediation costs for MTBE contamination would like be nearly \$29 billion. The study was conducted using state, federal and university research data.).

99. 42 U.S.C. § 6991b (2006).

100. H.R. 6, 108th Cong. § 17102(a) (2003); H.R. 6, 109th Cong. § 1502 (2005).

MTBE and gasoline from product liability suits.¹⁰¹ Some commentators contend that the gasoline and MTBE industry cannot be faulted for using MTBE.¹⁰² The rationale for absolving the industry from fault for MTBE contamination is that they were under a regulatory directive to use oxygenates and the EPA accepted the use of MTBE without objection.¹⁰³ However, there is evidence that while the industry was praising its virtues before Congress and the EPA, it was aware of the dangers of MTBE as well.¹⁰⁴ A liability waiver could be a dangerous precedent that would serve to encourage deceptive behavior by regulated industries.¹⁰⁵ In addition, such a waiver would allow the industry to get away without paying for the mess created by their pursuit and attainment of profits, and it would cut off an important source of potential funding.¹⁰⁶

B. Evidence Industry Withheld Information of Negative Effects

MTBE had been increasingly used since the 1970s as an anti-knocking additive in gasoline. Therefore, the manufacture and use of MTBE as an additive was a well established practice by 1989. It was in this year that Congress was contemplating an amendment to the Clean Air Act that would require a minimum percentage of oxygenate additives in gasoline to help combat air pollution.¹⁰⁷ Congressional hearings were held in the fall of 1989 to discuss the appropriateness of the oxygenate requirement and the properties of the various additives.¹⁰⁸ Industry groups and manufacturers of MTBE offered testimony before Congress that generally praised the air quality benefits of MTBE use, yet they gave no testimony concerning possible negative effects of its use.¹⁰⁹ For example, executives from ARCO Products Company,

101. *Id.*

102. Velez, *supra* note 87.

103. *Id.* at 507.

104. *Clean Air Act Amendments of 1989: Hearings on S. 1630 Before the Subcomm. on Environmental Protection of the S. Comm. on Environment and Public Works*, 101st Cong. 83–85 (1989) [hereinafter *Hearings on S. 1630*] (statement of Wayne Kuhn, Vice President, Arco Chem. Co.).

105. *See infra* Section VI, B (Industry representatives did not disclose the harmful effects of MTBE to Congress despite having knowledge. Protecting the industry from liability would serve as positive reinforcement for such behavior.).

106. Shari Blecher, Stuart Lieberman, & Scott Summy, *Fuels Safe Harbor' Provision Grants Immunity to MTBE Manufacturers*, 174 N.J.L.J. 237 (2003).

107. *See* Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

108. *See infra* notes 104–108 (noting the oxygenates requirements and considering the Clean Air Act Amendments of 1990).

109. *Hearings on S. 1630, supra* note 104.

the leading producer of MTBE, offered testimony encouraging legislators to reduce the oxygenate percentage requirement from 3.1 percent, as written in the bill, to two percent in order to accommodate the use of MTBE.¹¹⁰ In that testimony, there was discussion of the superior qualities of MTBE as opposed to other oxygenates, including its high octane content, low volatility, and superior blending properties.¹¹¹ However, there was no discussion of its possible negative side effects in the context of water and groundwater contamination.¹¹² The American Petroleum Institute (“API”) also offered testimony on the benefits of using ethers, such as MTBE, as opposed to alcohols like ethanol.¹¹³ Ironically, the API touted the dangers of using the alcohol methanol because it “is totally soluble in water” and moves easily through soil to groundwater, making drinking water contamination another concern.¹¹⁴ However, once again, there was no discussion concerning the possible water contamination dangers associated with MTBE.¹¹⁵ A statement by the Consumers for Competitive Fuels even said, “ether blends (MTBE, ETBE) do not separate in the presence of water.”¹¹⁶

These representations would not be notable if they were not indicative of the actual knowledge the industry possessed about the dangers of MTBE at that time. However, there are strong indications that the industry knew of the emerging dangers MTBE posed to groundwater. In 1986, studies conducted at two sites in Maine reported extremely high concentrations of MTBE.¹¹⁷ The researchers concluded that MTBE’s properties made it an extraordinary groundwater contaminant and they recommended its elimination as a gasoline additive.¹¹⁸ A draft of this report, known as the “Garrett Report,” was circulated for review and comment throughout the oil industry, including

110. *Id.* at 83–85 (statement of Wayne D. Kuhn, Vice President, Business Management, ARCO Chem. Co.).

111. *Id.*

112. *Id.*

113. *Id.* at 76–77 (statement of Thomas C. DeLoach, Vice President and General Manager, U.S. Mktg. and Ref. Div., Mobil Oil Co.).

114. *Hearings on S. 1630, supra* note 104, at 76–77.

115. *Id.*

116. *Clean Air Act Amendments (Part 1): Hearing on H.R. 99 and H.R. 2323 Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce*, 101st Cong. 627 (1989) (statement of the Consumers for Competitive Fuels).

117. Hinck, *supra* note 8, at 45 (citing Peter Garrett et al., *MTBE as a Ground Water Contaminant, Presentation at the Nat’l Water Well Ass’n/American Petroleum Institute Conf. on Petroleum Hydrocarbons & Organic Chemicals in Ground Water: Prevention, Detection, & Restoration* (Nov. 12–14, 1986) in PROCEEDINGS, at 227).

118. *Id.*

producers Shell, ARCO, and Exxon.¹¹⁹ While publicly disputing the findings and recommendations of the Garrett Report, a February 1987 letter from ARCO Chemical stated that it had no data refuting the findings of the report.¹²⁰ In May of 1987, Mobil Oil Company became aware of numerous East Coast wells that tested positive for MTBE contamination.¹²¹ In that same month, the Mobil Technical Center, which served as an industry laboratory, circulated a memorandum acknowledging the dangers of MTBE, stating “MTBE in gasoline will dissolve in groundwater at a faster rate than any gasoline hydrocarbon.”¹²² Additionally, a February 1987 Chevron memorandum concluded that MTBE contamination can “extend farther and spread faster than a gasoline leak that does not include MTBE.”¹²³ It is clear from these early memorandums and studies that the MTBE and gasoline industry was aware of the emerging dangers of water contamination. However, it appears the industry did not offer any of their knowledge, findings, or suspicions to lawmakers who were in the process of passing the oxygenate requirement. In fact, they specifically fought for the use of MTBE by lobbying for the two-percent standard.¹²⁴

Even more egregious than the industry’s passive omission of the additive’s adverse effects was their apparent conspiracy to suppress this information. In the case of *In re MTBE Products Liability Litigation*, the plaintiffs, who were contaminated water source owners, offered evidence indicating such a conspiracy.¹²⁵ They presented evidence that in 1986, the federal Interagency Testing Committee (“ITC”) recommended that the EPA conduct testing of MTBE in order to assess its environmental risks.¹²⁶ On or about December 12, 1986, ARCO responded to the ITC’s recommendation by discrediting the information relied upon by the ITC, and intentionally downplayed the risks by stating that

119. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, 175 F. Supp. 2d. 593, 601 (S.D.N.Y. 2001).

120. *Id.*

121. Hinck, *supra* note 8, at 45–46 (citing Memorandum from R.L. Arscott, Chevron Inc. to D.B. Smith (Feb. 17, 1987) (on file with author)).

122. Hinck, *supra* note 8, at 46 (citing Memorandum from S.S. Hetrick, Technical Services Laboratory, Mobil Technical Center to C.L. Hagan, Technical Services Laboratory, Mobil Technical Center (May 6, 1987) (on file with author)).

123. Hinck, *supra* note 8, at 46 (citing Memorandum from R.L. Arscott, Chevron to D.B. Smith (Feb. 13, 1987) (on file with author)).

124. *Hearings on S. 1630*, *supra* note 105.

125. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, 175 F. Supp. 2d. 593, 601–602 (S.D.N.Y. 2001).

126. *Id.* at 602.

MTBE was only slightly soluble in water.¹²⁷ That case also included allegations that, in 1987, the gasoline industry provided information to the EPA which represented that MTBE was only slightly soluble in water, that potential exposure to MTBE was low, and that MTBE had excellent biodegradation characteristics.¹²⁸ In addition, the industry submitted written comments to the EPA which stated that there was no evidence that MTBE posed any significant risk of harm to public health or the environment.¹²⁹ By 1987, the industry certainly possessed sufficient knowledge that these allegations were, in the very least, questionable.

This prior knowledge of the dangers of MTBE has formed the basis of many of the product liability suits filed against the manufacturers. Two defendants in the *South Tahoe* case, Shell Oil and ARCO Products Company, were found to have acted with malice by withholding information concerning the dangers of MTBE.¹³⁰ The principal policy question in this context is whether the public would desire the industry to repeat their actions in the future. Clearly, it would not be in the best interest of the public and government to be given imprecise or incomplete information concerning the safety of products. The specter of looming lawsuits serves as a significant deterrent to future cover-ups and equivocation by industry with respect to the safety of their products. On the other hand, a liability waiver would be an acknowledgement that this misleading behavior is condoned by the government. It would serve to place the desires of the industry above the needs of the public.

C. Government Agencies Rely on Industry for Technical Information

Professor McGarity has pointed to a disturbing trend in the federal regulatory framework that does not provide adequate incentives for regulated entities to reduce risks to the public.¹³¹ He claims that there are two major causes for this problem.¹³² First, federal agencies, such as the EPA, are heavily dependent upon regulated entities for the scientific and technical

127. *Id.*

128. *Id.*

129. *Id.*

130. Jurand, *supra* note 62, at 86.

131. Thomas O. McGarity, *Beyond Buckman: Wrongful Manipulation of the Regulatory Process in the Law of Torts*, 41 WASHBURN L.J. 549, 549 (2002).

132. *Id.*

information that they need to draft regulations.¹³³ Secondly, the regulatory agencies often do not have adequate resources to police against such wrongful manipulation of the administrative process.¹³⁴ Indeed, comments made by the EPA Office of Research and Development (“ORD”) concerning the health and safety considerations of MTBE illustrate their lack of knowledge. In testimony before Congress, the ORD stated that “a paucity of experimental data makes an assessment of the effects of use of sparingly soluble oxygenates (such as MTBE) on soil and groundwater contamination very difficult.”¹³⁵ The resources of regulatory agencies are typically stretched thin, and they rely on the good faith cooperation of the regulated industry to provide them with an accurate portrayal.¹³⁶ Therefore, industry should not be given a waiver when it appears so likely that they knowingly withheld information.

*D. Limitations on Liability Would
Eliminate Funding for Remediation*

In addition to serving as a deterrent to future misconduct, judicial liability for MTBE contamination may serve as a necessary source of supplemental funds. The LUST Fund had \$1.7 billion available for petroleum spills and leaks at the end of fiscal year 2001.¹³⁷ Recent estimates of the total costs of cleaning the nation’s MTBE contamination show that it could total \$29 billion.¹³⁸ These costs are clearly more than the \$1.7 billion currently in the LUST Fund. Money will also come from state LUST funds as well as from responsible UST owners and operators. However, if those funds are lacking, as they more than likely will be, then there must be a source of additional funds. Forcing local municipalities to pay is unjust and will result in extraordinarily high water utility bills for citizens. The most appropriate source of funds is the source that benefited most from its use—the manufacturers of MTBE and gasoline.

133. *Id.*

134. *Id.*

135. *Clean Air Act Reauthorization: Hearings Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 314 (1989) (U.S. ENVTL. PROT. AGENCY, OFFICE OF RESEARCH AND DEVELOPMENT, ALTERNATIVE FUELS RESEARCH STRATEGY: INTERIM DRAFT NO. 2, presented at hearings).

136. McGarity, *supra* note 131, at 549.

137. GOV’T ACCOUNTABILITY OFFICE, *supra* note 26, at 2.

138. Mehta, *supra* note 98.

VI. A REBUTTAL TO THE ARGUMENTS FOR A LIABILITY WAIVER

A. Industry Was Merely Complying With Federal Mandate

Proponents of a liability waiver cite the fact that oxygenates were mandated by federal law and that the gasoline companies were merely abiding by that mandate.¹³⁹ This argument, however, is not persuasive. In this situation, the government developed a technology-forcing requirement that the industry chose to meet with a specific product.¹⁴⁰ Although there were known dangers associated with that product, the industry actively chose not to divulge those dangers.¹⁴¹ An analogy, albeit somewhat extreme, would be if the federal government mandated the use of seat belts and there were only two viable models of seat belts. One seat belt is expensive and would cause the price of automobiles to rise considerably, while the other is less expensive but also is known to choke people in accidents. The car company does not divulge this exclusively known information, but instead fights for the right to be able to use the cheaper of the seatbelts. When those cheap seat belts begin killing passengers in accidents, it would not be appropriate for the car company to say “we should not be liable because the Feds made us use it.”

B. Liability Waiver Would Reduce Excessive Lawsuits

Another argument for a liability waiver is that it would prevent frivolous lawsuits brought by greedy tort lawyers.¹⁴² It may be true that some class action tort lawyers may shop for affected well-owners. However, utility companies and large well owners will be aware of the regulatory process that will be in place with a legislative solution to the problem. The relative ease and predictability of using this process should prove to be a disincentive to filing a law suit, especially when drinking water is involved, because parties will most likely prefer faster and

139. Velez, *supra* note 87.

140. See *supra* Section II, A.

141. See *infra* Section VI, B.

142. Bill Greehey, *Fuel Makers Deserve Some Liability Protection*, HOUSTON CHRON., Oct. 19, 2003, at 4C (“...some enterprising trial lawyers are trying to say fuel makers should be subject to lawsuits just for following the law. ... We will be forced to spend millions in defending these baseless lawsuits while lining the pockets of greedy trial lawyers. ... House and Senate leaders are courageously attacking the problem by screening off the most unreasonable suits [with the safe-harbor provision protecting producers] while allowing suits against those who actually mishandle fuels to proceed.”) (Editorial written by the chairman of the board and chief executive officer of Valero Energy Corp.).

more reliable resolutions over litigation.

C. The Problem of Double Compensation

Supporters of a liability waiver could also contend that lawsuits would be unnecessary and would possibly constitute double compensation for cities or well owners already receiving LUST Fund money for MTBE remediation. The common law “collateral source rule” provides that when an injured party has received some sort of compensation from a source totally independent of the tortfeasor, the compensation should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.¹⁴³ Therefore, courts would not allow evidence that a water-source owner received government funds for the cleanup of MTBE contamination.

However, because the collateral source rule is common law, it may be changed by statute.¹⁴⁴ In fact, some legislatures have enacted statutes that modify or abolish the collateral source rule in certain situations.¹⁴⁵ Therefore, Congress could enact a statute which abolishes the collateral source rule if an injured party has received LUST Funds, thereby allowing courts to consider evidence of monies received. As part of any MTBE remediation legislation, such a statute would be an appropriate substitute for an outright liability waiver. It would allow injured parties to receive both an efficient remediation solution through the LUST Fund, as well as any needed supplemental funding from the tortfeasor through civil action. Because most or all of the compensatory damages might be satisfied by the LUST Fund solution, abolishing the collateral source rule would lead to a significant reduction of tort damages and less of an incentive to bring suit against MTBE producers. This framework would lessen the possibility of excessive litigation while leaving all legal theories open for holding MTBE producers liable for remediation costs.

It is true that a statute limiting the collateral source rule would not preclude punitive damages. However, a jury must find that the conduct of the defendant is outrageous due to the defendant’s evil motive or reckless indifference to the rights of others.¹⁴⁶ The purposes of awarding such damages are to punish the person doing the wrongful act and to discourage him and

143. 22 AM. JUR. 2D *Damages* § 392 (2003).

144. RESTATEMENT (SECOND) OF TORTS § 920A cmt. d (1979).

145. 22 AM. JUR. 2D *Damages* § 293.

146. RESTATEMENT (SECOND) OF TORTS § 908(2).

others from similar future conduct.¹⁴⁷ Therefore, precluding such damages through a liability waiver would seemingly negate its deterrent effect on malicious and reckless behavior.

D. The Current Liability Waiver Proposals Only Bar Design Defect Claims

The liability waiver proposals Congress has considered would only bar claims that assert MTBE was a defective product.¹⁴⁸ Therefore, injured parties could continue to make claims based on negligence, nuisance, and trespass. For this reason, many industry proponents have stated that this safe-harbor provision would not be unduly harsh on those affected by MTBE contamination.¹⁴⁹ While it is true that legal claims are still available to potential plaintiffs, a safe harbor for defective design would only shield the producers of MTBE from liability.

In determining whether a product is defective in design, courts have generally used the risk-utility balancing test.¹⁵⁰ This test states that:

A product is defective when, at the time of sale or distribution, it . . . is defective in design. . . . A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.¹⁵¹

In the present context, the defective product would be gasoline and the defect in design would be the addition of MTBE. Plaintiffs making this claim have alleged that defendants were aware of the unreasonable dangers stemming from gasoline containing MTBE, actively conspired to conceal those dangers, and safe alternatives to MTBE were known and available to the defendants for use in gasoline.¹⁵² This legal theory places the liability for MTBE contamination squarely on the shoulders of the manufacturers of gasoline and MTBE, and is in contrast to the other liability theories which place the liability on the owner and handler of the gasoline. In most cases, these owners and

147. *Id.* cmt a.

148. H.R. 6, 108th Cong. § 17102(a) (2003); H.R. 6, 109th Cong. § 1502 (2005).

149. *14 State Attorneys General Urge Senate to Deny Liability Waiver to MTBE Producers*, ENVTL. REP., June 27, 2003, at 1451.

150. *In re MTBE Prod. Liab. Litig.*, 175 F. Supp. 2d at 623.

151. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998)).

152. *In re MTBE Prod. Liab. Litig.*, 175 F. Supp. 2d at 624.

handlers are the franchised or independent gas station owners.¹⁵³

While it is fair to place the burden on a negligent gas station owner for a leaking UST, the effect of the waiver would be to allow the MTBE and gasoline producers off the hook. Because these manufacturers were the principal beneficiaries of the sale of gasoline, they should shoulder a portion of the cleanup costs—especially in light of their knowledge and alleged cover up of MTBE's dangers. The economic deterrence theory of tort assumes that "the purpose of tort law is to promote overall social welfare by deterring accidents in the future" through monetary penalties.¹⁵⁴ The foundation for economic deterrence theories of tort is the assumption that an entity conducts a cost/benefit analysis before deciding how to engage in a certain activity.¹⁵⁵ In this balancing, the self-interested entity considers only the costs that he will have to bear and not costs imposed on others, which are known as externalities.¹⁵⁶

In the current situation, the gasoline producers had to weigh the costs and benefits of using MTBE as opposed to other alternatives. Based on their failure to disclose the effects of MTBE on water sources, it is apparent that they did not adequately take the externality of water pollution into account. By imposing injunctions or damage awards on entities, such as the gasoline producers, tort law can force them to take into account (internalize) externalities when they decide whether or how to act.¹⁵⁷ Eliminating tort liability against the gasoline producers will allow them to avoid internalizing the externalities of water pollution and thus would not serve to deter them from future polluting and deceitful acts.

CONCLUSION

In 2005, after many states banned MTBE,¹⁵⁸ Congress finally eliminated the requirement that reformulated gasoline

153. See BLUE RIBBON REPORT, *supra* note 7, at 42.

154. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 544 (2003).

155. *Id.* at 545.

156. *Id.*

157. *Id.*

158. ENERGY INFO. ADMIN., STATUS AND IMPACT OF STATE MTBE BANS: TABLE 1. OVERVIEW OF STATE MTBE BANS (2003), available at http://www.eia.doe.gov/oiaf/archive/aeo04/issues_3.html (providing an overview of MTBE bans in various states, including their provisions and effective dates and noting that, as of March 2003, seventeen states had passed legislation limiting or banning the use of MTBE in one form or another).

contain oxygenates.¹⁵⁹ Although the use of MTBE is certain to decrease, the contamination problem and debate continue.¹⁶⁰

The 108th Congress proposed a solution to the problem as part of the Energy Policy Act of 2003.¹⁶¹ Their proposal, including amendments to the LUST Fund and a liability waiver for MTBE and gasoline producers, proved so controversial that passage of the Energy Policy Act hinged on the proposal¹⁶² and ultimately led to the failure of the Act.¹⁶³ A similar impasse threatened the Energy Policy Act of 2005 until lawmakers removed the pivotal MTBE liability waiver provisions.¹⁶⁴ Proponents of the liability waiver continue to assert that they were merely following the law by adding MTBE to gasoline, and that the liability waiver will help avoid frivolous lawsuits brought by greedy attorneys.¹⁶⁵ Opponents of the liability waiver point to evidence that the industry misrepresented the safety of MTBE and that such a bar would force citizens to pay for the contamination through higher water utility bills.¹⁶⁶ Ultimately, Congress must make the final determination on this issue and create a workable solution to the growing problem of MTBE contamination because the status quo is unacceptable.

The only certainty with the MTBE problem is that there is much uncertainty. Even after extensive studies by the nation's leading experts, there is still dispute as to the exact extent of the problem and its danger. Even less certain is how a small local public utility will bear the costs of cleaning drinking water that its citizens will not drink because it tastes and smells like MTBE.

159. Clean Air Act § 211(k), 42 U.S.C. § 7545(k) (2006) (as amended by H.R. 6, 109th Cong. § 1504 (2005)). The Clean Air Act no longer mandates oxygen content in reformulated fuels. This change in requirement became effective May 5, 2006. *Id.*

160. ENERGY INFO. ADMIN., ELIMINATING MTBE IN GASOLINE IN 2006 1 (2006), http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/2006/mtbe2006/mtbe2006.pdf ("In 2005, a number of petroleum companies announced their intent to remove methyltertiary-butyl ether (MTBE) from their gasoline in 2006. Companies' decisions to eliminate MTBE have been driven by state bans due to water contamination concerns, continuing liability exposure from adding MTBE to gasoline, and perceived potential for increased liability exposure due to the elimination of the oxygen content requirement for reformulated gasoline (RFG) included in the Energy Policy Act of 2005.")

161. See H.R. 6, 108th Cong. (2003) (not enacted).

162. Michael Davis, *Energy Bill's Fate May Hinge On MTBE Battle*, HOUSTON CHRON., Nov. 21, 2003, at 1C.

163. John J. Fialka & Shailagh Murray, *Rush Is On to Rescue Energy Bill*, WALL ST. J., Nov. 24, 2003, at A3.

164. David Ivanovich, *Lawmakers reject MTBE protection*, HOUSTON CHRON., July 25, 2005, at A9. See also H.R. 6, 109th Cong. § 1502 (2005) (as passed by the House would have provided a safe harbor for MTBE and gasoline producers). Cf. H.R. 6, 109th Cong. (2005) (enacted) (final legislation did not contain liability waiver).

165. Davis, *supra* note 162, at 8C.

166. *Id.*

A legislative solution that provides for a reliable and effective funding mechanism for MTBE remediation is needed. The LUST Trust Fund was previously established for the prevention and remediation of gasoline leaks from underground storage tanks. This fund has an existing administrative and budgetary structure established for gasoline contamination. Using the existing LUST Trust Fund would be the most effective and efficient method of administering these funds and cleanups. A legislative solution through the LUST Fund, however, would require changes to its existing structure. Such changes would include a no-cause provision specifically for the remediation of MTBE contamination, as well as more appropriations and funding that adequately address the unique nature of MTBE.

However, a legislative solution alone is not likely to be a complete solution. With projected cleanup costs reaching into the tens of billions of dollars, any money appropriated by Congress is likely to be expended quickly. Therefore, states and municipalities will have to look elsewhere for the funding necessary to adequately remediate the MTBE mess. The most appropriate parties to bear these costs are the corporations that, for years, profited from the sale of gasoline and MTBE—profits gained somewhat through apparent deceit and misrepresentation. By forcing the MTBE and gasoline producers to pay for these cleanups, they will be internalizing their product's costs to society. Additionally, requiring them to pay for remediation will serve as a deterrent against future misrepresentation to lawmakers and regulatory agencies. Compelling honest behavior by regulated industries is vital to the effective flow of information needed by lawmakers and agencies to make regulatory decisions. To grant the industry a waiver of liability, and let them off the hook, will essentially serve as an open invitation for the industry to engage in deceitful and irresponsible actions in the future.