

Plaintiffs Bar Likely Emboldened by the \$105 Million Jury Award Entered Against Exxon Mobil Corporation in MTBE Water Contamination Litigation

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On October 19, 2009, after an 11 week trial, a New York federal jury awarded \$104.7 million in compensatory damages to New York City based upon its conclusion that Exxon Mobil Corporation ("Exxon") contaminated six of the city's groundwater wells used for drinking water with methyl tertiary-butyl ether ("MTBE").

In the wake of the United States Environmental Protection Agency's ("USEPA") recent pronouncement of enhanced scrutiny of water contamination, this jury award may represent a shift in the tide of water contamination litigation.

MTBE is a chemical compound added to gasoline to help it burn cleaner and more efficiently. Pursuant to a 1990 amendment to the Clean Air Act, companies were required to add an oxygenate like MTBE or ethanol to gasoline to reduce air pollution. MTBE, therefore, became a commonly used gasoline additive. When it appeared that MTBE was contaminating the nation's water supply, however, plaintiffs began filing lawsuits.

City of New York v. Amerada Hess Corp et al, Docket No. 04-cv-3417 ("Amerada"), before Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York, marks the first MTBE water contamination lawsuit to proceed to trial and serves as the bellwether case for the more than 200 cases pending in the multi-district MTBE litigation. Prior to the *Amerada* trial, 33 oil companies settled with New York City, including BP Plc, Chevron Corp., ConocoPhillips, Hess Corp. and Royal Dutch Shell Plc. In fact, Exxon was the only defendant that remained in the lawsuit.

Based on the jury's factual findings in Phases I and II (i.e. New York City had a good faith intent to build a treatment facility and high levels of MTBE will be present in the city's wells in 2033), the trial proceeded to Phase III regarding liability. During Phase III, the jury found that Exxon was liable for failing to warn government agencies, gas station owners and the public of the potential dangers of MTBE and that MTBE contamination to the City's water supply constituted a trespass, public nuisance and negligence. As a result, the jury entered an award of \$104.7 million in favor of the City. Because Judge Scheindlin granted Exxon's motion to preclude the jury from considering an award of punitive damages, Phase IV of the trial never took place. Notably, although Judge Scheindlin found that New York City had not met its burden of proof regarding punitive damages, Judge Scheindlin stated that this holding is limited to the facts presented during the *Amerada* trial, leaving this an open issue with respect to other pending actions. The jury's factual findings and award in *Amerada* are important not only to MTBE litigation, but also water contamination litigation in general. The plaintiffs bar has focused a great deal on water contamination claims in the last several years. In addition to MTBE claims, recent water contamination class action lawsuits have been filed regarding coal by-products, pesticides and herbicides. These lawsuits have been bolstered by the Obama administration's commitment to re-examine water contamination risks posed by chemicals. In fact, the USEPA recently announced that it will conduct a comprehensive evaluation of the

pesticide atrazine to determine whether new restrictions are necessary to protect public health and the environment. Water contamination claims have gained the attention of the plaintiffs bar and the media and the recent announcements by the federal government are likely to shine a spotlight on these claims in the upcoming months. Coughlin Midlge & Garland will continue to monitor these emerging claims. Should you have any questions about the *Amerada* decision or water contamination litigation generally, please do not hesitate to contact us.