

“But You Said We Could Do It!”: Oil Companies’ Liability for the Unintended Consequence of MTBE Water Contamination

Carrie L. Williamson*

In 1990 Clean Air Act Amendments, Congress mandated the addition of an oxygenate to gasoline in an attempt to improve air quality. However, using methyl tertiary butyl ether (MTBE), the most frequently added oxygenate, has created another environmental problem: water contamination. Private individuals and public water utilities are suing oil companies to remedy MTBE water contamination, and some oil companies have successfully raised preemption arguments to escape liability for contamination. This comment argues that judges should not be persuaded by these preemption arguments; oil companies should be responsible for remedying MTBE contamination.

CONTENTS

Introduction	316
I. Introduction of MTBE to Fuels and Its Potential Consequences	317
A. Legislative Introduction of MTBE	317
B. Characteristics of MTBE and Water Pollution.....	320
C. Health Effects of MTBE.....	321
D. MTBE and Air Pollution	322
II. Restrictions on Use.....	323
III. Preemption of State Bans and State Law Claims	324
A. Preemption Doctrine	326

Copyright © 2002 by the Regents of the University of California

* J.D. 2003, University of California at Berkeley, Boalt Hall; B.A. 1998, Bowling Green State University. Many thanks to Hope Whitney and Dave Owen for insightful comments and suggestions that greatly improved this comment; to Professor Menell for teaching the Environmental Law Writing Seminar, and to family and friends who provide unwavering support and encouragement.

- B. MTBE Cases Considering the Preemption Issue 329
 - 1. Cases Holding that the CAA does not Preempt MTBE State Bans..... 329
 - 2. Cases Holding that CAA does not preempt MTBE state tort claims 332
 - 3. Cases Holding that the CAA Preempts MTBE Tort Claims..... 334
- IV. Analysis of Preemption Doctrine As Applied to MTBE Contamination..... 337
 - A. Express and Implied Preemption..... 337
 - B. Conflict Preemption 339
- V. Policy supports Rejecting Preemption claims..... 341
- Conclusion 345

INTRODUCTION

When Congress attempts to address one environmental issue, it sometimes unintentionally creates a second health or environmental problem. Methyl tertiary butyl ether (MTBE) was introduced in an attempt to reduce air pollution, but its use has created another serious environmental problem: contamination of drinking water wells and surface waters.¹ MTBE contamination is problematic because it can affect the taste and smell of water, and many people question its human health effects.

This paper describes legal aspects of the MTBE contamination problem. In Part I, I consider the environmental history that led to the widespread introduction of MTBE into the environment and discusses the health and remediation problems associated with MTBE water pollution. Attempting to remedy the MTBE water contamination, various states have attempted to

1. See *Drinking Water: Joint Study Finds MTBE Widespread in Sources for Drinking Water Nationwide*, CHEM. REG. DAILY, July 25, 2001 (“The gasoline additive [MTBE] was found to be the second most common of 42 volatile organic compounds in the source waters of nearly 1,000 municipal systems nationwide, according to a report released July 17. The findings are preliminary results of an ongoing cooperative study by the American Water Works Association Research Foundation, the U.S. Geological Survey, and participating drinking water suppliers.”); *Md. Task Force Documents 11 Wells Positive for MTBE*, MEALEY’S LITIG. REP.: EMERGING TOXIC TORTS, January 19, 2001 (stating that the Maryland MTBE Task Force reported that eleven public wells tested positive for MTBE above the taste threshold of 20 parts per billion (ppb) and that that New York State Department of Environmental Conservation (NYSDEC) determined that MTBE was detected in all 62 counties in the state.); Christopher W. Mahoney & John H. Kazanjian, *Water Contamination Suits Likely to Hit N.Y.; Vexing Issues Seen Arising in Claims over MTBE*, N.Y. L.J., Oct. 25, 1999, at S2 (stating “More than 90 percent of the MTBE spills reported by NYSDEC allegedly require remediation”).

restrict or ban MTBE use, and I examine these restrictions in Part II.

Much litigation has sprung from the MTBE water contamination problem. The only MTBE liability issue currently splitting the courts is whether the Clean Air Act preempts state actions regarding MTBE contamination. After providing some background on MTBE and preemption doctrine, this comment examines cases in which courts have considered whether the Clean Air Act preempts state MTBE bans or state law claims against oil companies for MTBE contamination. I analyze the preemption doctrine in the context of MTBE contamination. I conclude that the Clean Air Act does *not* preempt either state MTBE bans or state law claims against oil companies for MTBE contamination. Groundwater MTBE contamination simply is too far removed from the purpose and objective of the Clean Air Act to be preempted, and preemption would not further policy goals.

I

INTRODUCTION OF MTBE TO FUELS AND ITS POTENTIAL CONSEQUENCES

A. *Legislative Introduction of MTBE*

Congress enacted the Clean Air Act (CAA) to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”² Under the CAA, states enact State Implementation Plans to meet the National Ambient Air Quality Standards (NAAQS).³ In the late 1980s, Congress expressed frustration and concern that certain cities were unable to meet the NAAQSs for ozone and carbon monoxide.⁴ Nitrogen oxides and volatile organic compounds that come from gasoline exhaust react with sunlight and heat to produce ozone.⁵ Consequently, in an attempt to reduce the ozone in those particular areas, Congress enacted the Reformulated Gasoline Program through the Clean Air Amendments of 1990.⁶

2. 42 U.S.C. § 7401(b)(1) (1994).

3. 42 U.S.C. § 7410(a) (1994).

4. *See, e.g.*, 136 CONG. REC. S2739 (1990), reprinted in 4 ENV’T AND NAT. RESOURCES POL’Y DIVISION, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 [hereinafter LEGISLATIVE HISTORY] at 5864 (1993) (noting that in 1988 18 cities had exceeded carbon monoxide standards by one-third).

5. Pamela M. Franklin et al., *Clearing the Air: Using Scientific Information to Regulate Reformulated Fuels*, 34 ENVTL. SCI. & TECH. 3857, 3858 (2000).

6. 42 U.S.C. § 7545(k)(5) (1994).

The Reformulated Gasoline Program mandated the use of reformulated gasoline in carbon monoxide nonattainment areas.⁷ Reformulated gasoline typically contains an oxygenate, which increases the oxygen level of the gasoline, allowing the gasoline to burn more cleanly.⁸ Congress required that gasoline contain at minimum two percent oxygen by weight, but Congress did not mandate the addition of a specific oxygenate.⁹ In fact, Congress saw the oxygenate requirement as an opportunity to stimulate economic competition and growth while improving the environment.¹⁰

The legislative history of the 1990 Clean Air Act Amendments shows that to meet the oxygenate requirement, oil refiners could use at least six kinds of oxygenates.¹¹ However, in

7. 42 U.S.C. § 7475(k)(5) (1994). These nonattainment areas included Hartford, New York, Philadelphia, Baltimore, Chicago, Houston, Milwaukee, Sacramento, Los Angeles, and San Diego. Moreover, governors of certain states chose to require use of RFG in certain areas: Arizona, Connecticut, Delaware, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Texas, and Virginia. See 136 CONG. REC. 2290-96 (1990), *reprinted in* 6 LEGISLATIVE HISTORY, *supra* note 4, at 9432, 9588 (noting that testimony before the Subcommittee on Environmental Protection suggested that the "dominant component" of oxygenated fuels that affects carbon monoxide emission levels is the oxygen content). Because the committee believed that the oxygen content was directly related to the level of carbon monoxide emissions, it proposed requiring a certain level of oxygen content in gasoline.

8. See, e.g., 136 CONG. REC. 2530 (1990) (citing The Clean Air Facts, May 31, 1989), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 4, at 2446, 2516-17.

Carbon monoxide tends to be a cold-weather pollutant. When started with a cold engine, fuel combustion in the typical gasoline vehicle is incomplete. This produced elevated levels of carbon monoxide in the exhaust emissions. The addition of oxygen into the fuel mixture 'leans out' the air/fuel ratio and increases combustion efficiency.

Id.

While the Reformulated Gasoline Program has an oxygen requirement, reformulated gasoline may or may not contain oxygen. ARTURO KELLER ET AL., HEALTH AND ENVIRONMENTAL ASSESSMENT OF MTBE: REPORT TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF CALIFORNIA AS SPONSORED BY SB 521 [hereinafter HEALTH AND ENVIRONMENTAL ASSESSMENT OF MTBE] (1998). For the purposes of this paper, "reformulated gasoline" will refer to gasoline that contains an oxygenate.

9. See, e.g., 136 CONG. REC. 12860 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 4, at 1166 (noting that the "level of 2.7 percent [oxygen requirement] was chosen in part to provide more even opportunities for competition between the two major oxygenates, [MTBE] and ethyl alcohol, or ethanol.")

10. See 136 CONG. REC. 12934 (1990) (statement of Rep. Oxley), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 4, at 1177, 1415 ("I am particularly pleased by the clean fuel program that struck a balance between oil and gas refiners, farmers, and the environment. . . . The program will result in an increased demand of 600 million gallons of ethanol, creating a market for some 240 million bushels of corn.")

11. See 136 CONG. REC. 253031 (citing The Clean Air Facts, May 31, 1989), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 4, at 2517-218 (discussing various uses of ethanol, ETBE, methanol, and MTBE); 136 CONG. REC. 2768 (1990)(statement

the debates over the oxygen requirement, members of Congress focused largely on two chemicals: methyl tertiary butyl ether (MTBE) and ethanol.¹² MTBE is produced by reacting two petroleum products: isobutylene and methanol,¹³ while ethanol is made from grain.¹⁴ Reformulated gasoline is now used in seventeen states.¹⁵ Approximately 30 percent of all gas sold in the United States is reformulated, and MTBE is used in approximately 85 percent of this reformulated gas.¹⁶

Oil companies had several oxygenate options,¹⁷ but they chose MTBE most frequently for several reasons. First, MTBE will not move into solution with water, unlike other oxygenates such as ethanol.¹⁸ Consequently, oil refiners can add MTBE at

of Rep. Richardson), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 4, at 2702 ("There are seven approved oxygenated fuels to meet the requirements of my amendment. Two more are being considered by EPA and will likely be approved."); 136 CONG. REC. 2855 (1990) (statement of Rep. Richardson) (stating that fuels that could meet the "fuel neutral" 2.7 percent standard: ARCONOL, Dupont Waiver, Ethanol, Ethanol with MTBE, Methanol with MTBE, MTBE, Octamix, and Oxinol 50).

12. See, e.g., 136 CONG. REC. 16922 (1990) (statement of Sen. Durenberger), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 4, at 731, 852 (stating that the reformulated gasoline oxygen requirement can be met "by blending gasoline with a variety of additives like ethanol or MTBE"); see also Gary Lee, *Behind Fuel Additives: A Debate Over Corn or Natural Gas*, THE WASHINGTON POST, Aug. 8, 1994, at A3 (reporting on the two widely available competing oxygenates: MTBE and ethanol).

13. See, e.g., 136 CONG. REC. 6460 (1990) (statement of Sen. Daschle), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 4, at 2446, 2488. At the time of the debates, MTBE was the most widely used oxygenate. *Id.*

14. EPA, BLUE RIBBON PANEL ON OXYGENATES IN GASOLINE: EXECUTIVE SUMMARY AND RECOMMENDATIONS (1999).

15. EMISSION FACTS, *infra* note 17. However, recent gasoline sampling in Midwest states demonstrates that some gasoline contains both MTBE and ethanol. See 70 Percent of Gasoline in Ethanol Oxygenate States Contains MTBE > 10 PPM, MEALEY'S LITIG. REP.: MTBE, October 2001. "More than 70 percent of the gasoline sampled in three Midwest states where ethanol is the reformulated gasoline oxygenate of choice is contaminated with methyl tertiary butyl ether. . . . Of the Indiana samples analyzed, 80 percent had MTBE at greater than 10 parts per million. . . . The concentration in Illinois samples was lower, although 77 percent of the Illinois samples had MTBE at more than 10 parts per million." The most perplexing aspect of these statistics is that researchers cannot explain why MTBE is found in Midwest states. "Ethanol is the oxygenate of choice in the three-state region." *Id.*

16. THE BLUE RIBBON PANEL ON OXYGENATES IN GASOLINE: EXECUTIVE SUMMARY AND RECOMMENDATIONS 1 (July 27, 1999). Approximately 8 percent of RFG contains ethanol. *Id.* The RFG program was not, however, the reason MTBE was first added to gasoline. In the late 1970s, EPA approved the addition of MTBE to gasoline at concentrations up to 7 percent as an octane-enhancing replacement for lead. EPA, MTBE FAQ: When was gasoline that contains MTBE first stored in USTs?, at <http://www.epa.gov/swrust1/mtbe/mtbefaq1.htm> (last modified Aug. 8, 2000).

17. OFFICE OF MOBILE SOURCES IN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EMISSION FACTS: REFORMULATED GASOLINE (1999) [hereinafter EMISSION FACTS].

18. See Franklin et al, *supra* note 5, at 3585.

the moment they produce petroleum instead of waiting to add it at the time of sale.¹⁹ Adding MTBE at the point of production means that oil companies can use their existing pipelines to transport the MTBE and gasoline; thus, using MTBE means lower costs to the companies.²⁰ Second, because of the nature of the production process, oil companies can easily create large quantities of MTBE.²¹

B. Characteristics of MTBE and Water Pollution

MTBE contaminates water primarily through gasoline leaks from underground storage tanks (USTs). However, whenever gasoline touches the ground, this contact may permit MTBE to contaminate groundwater.²² Thus, when an ordinary consumer spills gas when filling up his gas powered lawn mower, he or she might have permitted MTBE to reach drinking water.

Certain undisputed characteristics of MTBE make it particularly problematic as a water pollutant. MTBE is much more water-soluble than gasoline and travels rapidly through the soil.²³ In addition, MTBE is not biodegradable, and its taste and odor can be detected at very low levels. While EPA has established a Drinking Water Advisory for MTBE at 20 to 40 parts per billion, the taste and odor of MTBE can be detected at five parts per billion.²⁴ MTBE has potentially contaminated at least 5 to 10 percent of drinking water supplies in areas that use

19. See 136 CONG. REC. 12904 (1990) (statement of Rep. Hall), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 4, at 1097, 1166 ("MTBE is added exclusively at gasoline refining facilities, where the finished fuel may be adjusted to accommodate the blending properties of this ether. . . . Ethanol is instead usually added to regular unleaded 87 octane 'oxygenless' gasoline at a gasoline terminal facility in the market area.").

20. David Littell, *MTBE or Not MTBE—Why is that the Question?*, 14 NAT. RESOURCES & ENV'T 247 (2000).

21. *Id.* at 248.

22. According to EPA, the following incidents of gasoline spills may lead to MTBE contamination: a discharge of unburned fuel from water craft, gasoline spills from automobile and tanker truck accidents, gasoline spills and drips when refueling gasoline powered vehicles, leaks from pipelines and aboveground storage tanks, leaks from home heating oil tanks, consumer disposal of "old" gasoline, and storm water runoff. EPA, MTBE FAQ: Other than regulated USTs, what are some other sources of MTBE releases? at <http://www.epa.gov/swrust1/mtbe/mtbfaq6> (last modified Aug. 8, 2000).

23. See KELLER ET AL., *supra* note 8.

24. *Id.* at 29.

RFG.²⁵ These characteristics contribute to the difficulty in remedying MTBE spills.²⁶

C. Health Effects of MTBE

In addition to most people's aversion to the taste and odor of MTBE-contaminated water, there are fears that MTBE is a carcinogen. Before MTBE was added to gasoline through the Reformulated Gasoline Program, several studies attempted to ascertain MTBE's health effects,²⁷ and EPA listed MTBE under the Toxic Substances Control Act.²⁸ However, a year later, EPA removed MTBE from TSCA listing.²⁹ While EPA later classified MTBE as a potential human carcinogen, several studies have reported that MTBE is not harmful to humans.³⁰ Recently,

25. See BLUE RIBBON PANEL, *supra* note 14, at 1.

26. USGS: Continue Monitoring MTBE Water Contamination Despite Few Recognized Risks, MEALEY'S LITIG. REP.: MTBE, January 2002. About 20 percent of wells tested between 1993 and 2000 in MTBE high-use areas had detectable levels of MTBE. *Id.*

27. See 1990 CAA LEG. HIST. 8457.

EPA has also proposed a voluntary testing program on the health effects of [MTBE] another octane enhancer now used in . . . 20 percent . . . of the gasoline fuel sold in the U.S. MTBE is to be listed as a hazardous air pollutant pursuant to the amendments made by in [sic] section 301 of the bill. . . . In its 1985 air toxics strategy, the agency recognized that fuel additives may be causing a significant threat to public health and as part of that strategy EPA indicated that it would be proposing a series of protocols for the testing of fuel additives. Only the MTBE tests have been proposed to date.

Id.

28. See 52 Fed. Reg. 19,020 (EPA, May 20, 1987).

29. See 53 Fed. Reg. 19,196 (EPA, May 20, 1988).

30. *Study Finds Increased Symptoms In People Who Are Exposed to MTBE*, MEALEY'S LITIG. REP.: EMERGING TOXIC TORTS, March 10, 2000. This study, *Controlled Human Exposure to Methyl Tertiary Butyl Ether in Gasoline: Symptoms, Psychological and Neurobehavioral Responses of Self-Reported Responses*, did not find a dose response relationship for MTBE exposure but did find increased total symptoms among certain people. While researchers have found MTBE related kidney damage in male rats, they concluded that this damage was specific to mice and probably wouldn't occur in other species. See Ben Thomas, *Case Study: MTBE and the Use of Animal Studies to Prove Causality: History of MTBE and Survey of Scientific Literature*, 9 KAN. J.L. & PUB. POLY 166, 170 (1999); Richard O. Faulk & John S. Gray, *MTBE Controversy Part II: The Problem of Toxicity and Tort Litigation*, 32 ENVTL. RPTR. at 1056-1059 (May 25, 2001) (arguing there is no valid evidentiary basis to conclude that MTBE is a human carcinogen).

For a summary of the cancer data on MTBE, see EPA, DRINKING WATER ADVISORY: CONSUMER ACCEPTABILITY ADVICE AND HEALTH EFFECTS ANALYSIS ON METHYL TERTIARY-BUTYL ETHER (1997). This report emphasizes the uncertainty associated with the animal studies data because the animals did not drink MTBE contaminated water; they either inhaled MTBE, or researchers directly injected MTBE into the animals' stomachs. See also Duane Miller & Richard O. Faulk, *Case Study: MTBE*

various governmental health organizations decided not to list MTBE as a human carcinogen.³¹

D. MTBE and Air Pollution

Scientists also disagree over whether MTBE has been helpful in reducing air pollution. For example, the California Air Resources Board lauds MTBE with reducing carbon monoxide emissions by several million pounds per day.³² However, in 1999, the National Research Council of the National Academy of Sciences reported that MTBE does little to reduce smog and ozone pollution.³³ Scientists who contributed to the Health and Environmental Assessment of MTBE Report to the State of California found that while reformulated gasoline reduced exhaust emissions, MTBE had no significant effect on exhaust emissions.³⁴ Consequently, if we accept the Health and Environmental Assessment Report's conclusions, it seems that reformulated gasoline produces significant air quality benefits, but MTBE itself had no significant additional air quality benefit.

and the Use of Animal Studies to Prove Causality: MTBE and the Use of Animal Studies to Prove Causality, 9 KAN. J.L. & PUB. POL'Y 172 (1999) (offering arguments for and against the value of animal studies in demonstrating MTBE's harmful effects on humans).

31. The Oxygenated Fuels Association's website on the health issues surrounding MTBE lists the following conclusions from organizations:

1) The European Union Risk Assessment on MTBE concluded in December 2000 that MTBE is not a human carcinogen.

2) The Department of Health & Human Services, National Toxicology Program voted in December 1998 not to list MTBE in its 9th Report on Carcinogens.

3) The World Health Organization's International Agency for Research on Cancer determined in November 1998 that MTBE is not classifiable as a human carcinogen.

4) The National Research Council, in September 1998, concluded that there was little likelihood that humans would contract kidney tumors from exposure to MTBE. California's Science Advisory Board for Proposition 65, determined in December 1998 that MTBE could not be considered carcinogenic or a developmental or reproductive toxicant.

Health Issues, at http://www.ofa.net/health_issues.htm (last visited Nov. 25, 2001).

32. See Frank Stephen & Joseph Forti, *What You Always Wanted to Know about MTBE: Public Threat or Safe Product?*, 12 ENV. LIT. COM. NWSL 11 (2001).

33. NATIONAL RESEARCH COUNCIL, OZONE POTENTIAL OF REFORMULATED GASOLINE (1999).

34. See HEALTH AND ENVIRONMENTAL ASSESSMENT OF MTBE, *supra* note 8, at 17. Scientists were careful to distinguish between reformulated gasoline and the presence of MTBE in gasoline. Reformulated gasoline may or may not contain an oxygenate.

II

RESTRICTIONS ON USE

In an attempt to address MTBE water pollution, EPA has published a notice of intent to restrict or ban MTBE.³⁵ However, EPA, along with Congress and environmentalists, is concerned that if MTBE use is reduced or banned, air quality will diminish.

New York, California, Illinois, and Washington³⁶ have similarly expressed intent to ban MTBE.³⁷ In 1999, Governor Gray Davis originally decided to ban MTBE in California by December 31, 2002. In 2001, Davis requested from EPA a waiver from the federal oxygen content requirement. EPA denied this waiver, reasoning that California had not demonstrated the impact the waiver would have on smog.³⁸ In response to EPA's refusal to grant the waiver, California sued EPA, asking the Ninth Circuit to overturn the federal oxygenate mandate.³⁹ Unless EPA lifts the oxygenate mandate, California will almost certainly have to use ethanol when—or if—the MTBE ban takes effect. Officials estimate the California would need at least 660 million gallons of ethanol each year.⁴⁰ Governor Davis has postponed the MTBE ban, delaying for now any decision on

35. *EPA Encourages Congress to Ban MTBE*, MEALEY'S POLLUTION LIABILITY REP., April 2000. EPA has suggested banning MTBE by amending the Clean Air Act or the Toxic Substances Control Act.

36. Nan Netherton, *Washington: Governor Signs Legislation Banning MTBE As Gasoline Additive After December 2003*, CHEM. REG. DAILY, May 11, 2001. The MTBE ban takes effect in stages. "Beginning July 22, 2001, mixing of MTBE into gasoline above sixteenths of 1 percent will be prohibited; as of Dec. 31, 2003, the use of MTBE in gasoline will be completely prohibited." *Id.*

37. Steve Poruban, *MTBE Debate Marches on*, OIL & GAS J., Aug. 13, 2001, at 15. Other states that have banned MTBE are Arizona, Colorado, Connecticut, Iowa, Michigan, Nebraska, and South Dakota. See Netherton, *supra* note 36; Stephen & Forti, *supra* note 32, at 11 (reporting that at least 20 states have passed or have considered legislation restricting or banning MTBE).

38. Press Release, Environmental Protection Agency, EPA Issues Decision on California Waiver Request, (June 12, 2001). EPA Administrator Christie Whitman stated, "We cannot grant a waiver for California since there is no clear evidence that a waiver will help California reduce harmful levels of air pollutants." *Id.*

39. Kara Sissell, *California Sues to Overturn EPA's MTBE Waiver Decision; Fuel Blends*, CHEM. WEEK, Aug. 22, 2001, at 9. The Renewable Fuels Association (RFA) and the National Corn Growers Association (NCGA) filed motions to intervene in this lawsuit. Presumably they will take EPA's position. RFA *Intervenes in California vs. EPA Lawsuit; Four Others Join*, OXY-FUEL NEWS, Sept. 17, 2001. Governor Davis responded by stating that because EPA rejected the waiver, California consumers will have to pay \$450 million more per year for gasoline.

40. *Federal Oxygenate Requirement Sets Stage for Legal Backlash; California Officials Sue EPA*, 39 Air/Water Pollution Rep. 257, Aug. 20, 2001; *Making it Happen: Ethanol Buyers, Sellers Discuss Logistics of an RFS*, OCTANE WEEK, Sept. 24, 2001 (stating that California would need 650 million gallons of ethanol per year).

whether to rely on ethanol⁴¹ Regardless, some scholars and scientists are hesitant to endorse use of such a large amount of ethanol without certainty that it will not cause another water contamination problem.

Congress has also been considering a federal MTBE ban. The 107th Congress considered ten bills to ban MTBE.⁴² All of these bills would ban MTBE in the next three⁴³ to four⁴⁴ years. Some of these bills benefit corn growers by requiring the use of ethanol instead of MTBE; some of the strongest supporters of a federal MTBE ban are from Midwestern corn-growing states. Other bills provide state waivers for vehicle emission standards. These emission standard waivers highlight an important tension between remedying MTBE contamination and ensuring that air quality does not decrease.

III

PREEMPTION OF STATE BANS AND STATE LAW CLAIMS

Litigation surrounding MTBE involves a wide range of issues.⁴⁵ While some MTBE cases have been settled,⁴⁶ various

41. Press Release, Office of the Governor, Governor Davis Allows More Time for Ethanol Solution, (March 15, 2002). Under the new timeline, oil companies now have another year to meet the ethanol requirement. Dan Morain & Deborah Schoch, *Davis Shifts on MTBE to Avert Crisis*, LOS ANGELES TIMES, Feb. 23, 2002, California Metro, Part 2, at 1 (Governor Davis "is trying to avert a second energy crisis - one that could hit late this year, about the time voters decide whether to give the Democratic governor a second term."). According to a spokesman for Governor Davis, "The governor based his decision to ban MTBE on science . . . [but is now] forced to take into account the economic consequences of the Bush administration's failure to grant . . . the waiver." *Id.* The governor's decision came after the state Energy Commission-ordered report recommended that the MTBE ban be postponed until 2005 and that the MTBE phase-out could cost California consumers between 1 and 3 billion dollars. *Id.*

42. *10 Bills Introduced to Ban MTBE As Fuel Additive; New Senate Leader a Sponsor*, MEALEY'S LITIG. REP.: MTBE, June 2001; Darren Sameulsohn, *Senate Panel Approves MTBE Legislation, Nominees*, ENV'T & ENERGY DAILY, Sept. 26, 2001.

43. See Clean and Renewable Fuels Act of 2001, S. 892, 107th Cong. (2001) (banning MTBE effective Jan. 1, 2002 (except for nonattainment areas). Within three years after adoption, the bill calls for a total ban of manufacture or sale of MTBE); MTBE Elimination Act, S. 265, 107th Cong. (2001).

44. See Federal Reformulated Fuels Act of 2001, S. 950, 107th Cong. (2001). This Act amends the Solid Waste Disposal Act to permit \$200 million from the Leaking Underground Storage Tank (LUST) Trust Fund to correct releases of MTBE.

45. See, e.g., *Damon v. Sun Company Inc.*, 87 F.3d 1467, 1476 (1st Cir. 1996) (describing the use of MTBE presence to date gas spills to determine liability); *Global Octanes Texas v. BP Exploration & Oil*, 154 F.3d 519 (5th Cir. 1998); (describing how BP agreed to buy minimum quantities of MTBE from Global but later argued that a change in EPA rules ended the need for purchasing MTBE in a particular area); *Two Rivers Terminal v. Chevron USA*, 96 F. Supp. 2d 432, 454-55 (M.D. Penn 2000) (describing the use of MTBE presence in spills to determine date of contamination

cases are going to trial to address MTBE contamination issues. First, there is a question of whether states are permitted to ban MTBE. Companies are suing states in an attempt to overturn MTBE bans,⁴⁷ while at least one state is suing to help make an MTBE ban effective.⁴⁸ Second, there are questions about whether public water districts⁴⁹ and private parties can successfully sue to clean up MTBE contamination. Lawyers representing private well owners and public water companies have attempted to bring claims under strict liability theories, product liability theories (e.g., failure to protect and failure to warn), deceptive business

and to determine who is responsible for cleanup); *Oliver Chevrolet v. Mobil Oil Corp.*, 274 A.D.2d 782, 783, (N.Y. S.Ct., Appellate Division, 2000) (describing how experts use MTBE presence in gasoline contaminated soil to determine which defendant is responsible for the gasoline spill).

One main concern of MTBE scholars is that MTBE contamination is the new legal crisis, i.e., that MTBE is simply an opportunity for lawyers to bring large class action suits. See, e.g., Faulk & Gray, *supra* note 30, at 1064-1065.

46. See *Five Oil Companies Agree to Clean up MTBE-Contaminated Sites*, OCTANE WEEK, Sept. 3, 2001, Communities for a Better Environment (CBE) brought suit against nine oil companies in 1998 to remedy MTBE contaminated sites in California. Shell, Chevron, Texaco, Equilon, and Unocal agreed to clean up approximately 700 sites, regardless of the cost, or face fines up to \$6,000 per day. *Chevron Settles South Lake Tahoe Lawsuit for \$10 Million*, OXY-FUEL NEWS, Sept. 24, 2001 (stating that Chevron paid \$10 million to settle *South Tahoe Public Utility District v. Atlantic Richfield*); Alan Fisk, *Exxon to pay \$12M in Well Case*, NAT'L L.J. Sept. 3-10, 2001, at A5.

See also Ritchenya A. Shepherd, *An MTBE Settlement Gets \$35,000*, NAT'L L.J., March 5, 2001, at A11. When the parties in *Millett v. Atlantic Richfield Co.* settled, four plaintiffs received cash awards. A car accident in front of Michael Millet's home had caused the release of 8-10 gallons of gasoline on his property. Millet discovered MTBE contamination in his water well after the accident and received \$22,000 in the settlement. One couple received \$10,000 after the state randomly tested their well and discovered MTBE contamination. Finally, two separate plaintiffs whose wells had never been tested each received \$1,500.

47. See *Oxygenated Fuels Association v. Pataki*, 158 F. Supp. 2d 248 (N.D.N.Y. 2001); *Oxygenated Fuels Association v. Gray Davis*, 163 F. Supp. 2d 1182 (E.D. Cal. 2001); Note & Comment, *California's MTBE Contaminated Water: An Illustration of the Need for Environmental Interpretative Note on Article 1110 of NAFTA*, 11 COLO. J. INT'L ENVTL. L. & POLY 499, 499-501(2000) (considering Methanex's case against California. Methanex argued that California's MTBE ban would end Methanex's business of selling methanol for use in MTBE, which violates NAFTA because it is a substantial interference and a taking of Methanex's investment in the United States.); *Methanex Alleges California Banned MTBE to Pay Back Contribution to Governor*, MEALEY'S LITIG. REP.: MTBE, April 2001.

48. See *supra* note 39 and accompanying text.

49. See, e.g., Michael Ravnitzky, *On The Docket: Oil and Water*, NAT'L L.J., March 5, 2001, at A8 (describing how in *Sturbridge v. Mobil Corp.*, No. 4:01CV40019 (D. Mass. 2001), the town filed a complaint asking for \$75 million from three oil companies because MTBE leaked from tanks into the city wells).

practices,⁵⁰ and common law torts of negligence, nuisance, and trespass.⁵¹

In response to the complaints filed, many of the oil companies have argued that they cannot be liable because the government required that they use MTBE; in other words, they argue that they cannot be blamed for the unintended consequences of the legislative requirement and thus the claims are preempted by the Clean Air Act. To date, the preemption of claims to remedy MTBE contamination is the only MTBE issue on which courts are split.⁵²

The rest of this comment will focus on the preemption issue, considering whether the Clean Air Act preempts state MTBE bans or common law tort claims. At least one state court and one federal court have concluded that the Clean Air Act preempts MTBE product liability claims against oil companies. Conversely, at least three federal courts and one state court have concluded that the Clean Air Act does *not* preempt product liability claims or MTBE state bans.

A. Preemption Doctrine

Article IV of the United States Constitution states that the laws of the United States "shall be the supreme Law of the Land."⁵³ Consequently, when a state law conflicts with a federal law, the law of the United States preempts state law.⁵⁴ Traditionally, absent clear congressional intent, courts have a presumption against preemption,⁵⁵ largely to protect the states'

50. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 2001 U.S. Dist. LEXIS 12192 (S.D.N.Y. 2001). The plaintiffs alleged seven causes of action: strict liability for design defect, failure to warn, deceptive business acts and practices in violation of New York General Business law, public nuisance, negligence, breach of notification of duty under Toxic Substances Control Act, and conspiracy to market an unsafe product.

51. See, e.g., Todd A. Frampton, *Comment: Private Well Owners Pay Price as MTBE Contamination Exposes the Lack of Groundwater Protection in Federal and New York Law*, 18 PACE ENVTL. L. REV. 135, 152-164 (2000) (describing the use of nuisance, trespass, and negligence to remedy MTBE contamination).

52. One explanation for this result (i.e., that the preemption issue is the only one splitting the courts) is that the MTBE litigation for remediation is still relatively new. Moreover, the preemption arguments are frequently made in the form of summary judgment motions and not after cases are heard on appeal.

53. U.S. CONST. art. VI, cl. 2.

54. See, e.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

55. *The Supreme Court, 1999 Term Leading Cases*, 114 HARV. L. REV. 339, 339 (2000) [hereinafter *1999 Leading Cases*].

police power to protect the health, safety, and property of their citizens.⁵⁶

There are several types of preemption.⁵⁷ First, when writing an act, Congress sometimes includes an express preemption clause that explicitly states Congress' intent to preempt state law.⁵⁸ When considering the validity of an express preemption clause, a court must determine the domain expressly preempted by examining the plain language of the statute and the congressional purpose of enacting the statute.⁵⁹ Without an express preemption clause, courts may infer Congressional intent to preempt.⁶⁰ When the depth and breadth of a federal law gives rise to a presumption that Congress left no room for state regulation, a court thus determines that state action is preempted through implied preemption.⁶¹

Finally, conflict preemption arises when there is actual conflict between a state action and federal law.⁶² The Supreme Court recently reiterated that conflict preemption occurs when a state law "under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶³ Conflict preemption applies when the conflict frustrates the objective or makes the objective impossible.

The Court has not previously driven a legal wedge—only a terminological one—between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law. Rather, it has said

56. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996).

57. For a discussion of types of preemption, see Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997).

58. See, e.g., *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 517 (1992).

59. See, e.g., *Medtronic*, 518 U.S. at 484.

60. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994).

61. See, e.g., *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).

62. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000). For a discussion of the case, see 1999 *Leading Cases*, *supra* note 55, at 339 (arguing that *Geier* is a shift away from the presumption against preemption); Note: *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135 (2001); see also Grey, *supra* note 57, at 566-567. Grey explains that implied preemption is divided into two categories: implied field preemption and conflict preemption. Conflict preemption is then divided into obstacle preemption and impossibility preemption. *Id.* at 623-26.

63. *Geier*, 529 U.S. at 873 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1942)).

that both forms of conflicting state law are 'nullified' by the Supremacy Clause.⁶⁴

Two recent Supreme Court cases have reexamined preemption doctrine. In *Geier v. American Honda Motor Co.*, the plaintiff brought suit after she was injured in an accident while driving her 1987 Honda Accord that was not equipped with an air bag.⁶⁵ She argued that Honda was negligent in failing to include a driver's side airbag. American Honda argued that the Department of Transportation's Federal Motor Vehicle Safety Standard (FMVSS) 208 preempted Geier's tort claim because it gave automobile manufacturers a choice in whether they would include an airbag.⁶⁶ The Supreme Court held that Geier's tort claim conflicts with the objectives of FMVSS 208.⁶⁷ FMVSS 208 was a safety standard that intended to give manufacturers choices regarding which passenger restraints they would install. This opportunity for choice would lower costs, encourage technological development, and win consumer approval for passenger restraints. The Court determined that the state tort claim, by arguing that car manufacturers had a duty to install an airbag,⁶⁸ would constitute an "obstacle" to FMVSS 208's objectives;⁶⁹ thus, the state tort claim was conflict preempted.

The second preemption case the Supreme Court most recently decided is *Lorillard Tobacco Co. v. Reilly*.⁷⁰ After the Massachusetts Attorney General promulgated regulations

64. *Id.* (citing *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153 (1982)). *But see* 1999 *Leading Cases*, *supra* note 55, at 344, discussing the distinction between impossibility preemption and obstacle preemption, stating that impossibility preemption occurs when "an actor cannot comply simultaneously with state and federal law." *Id.* Obstacle preemption "relies by definition on the full purposes and objectives of Congress." *Id.* at 344-45.

65. *Id.* at 865.

66. *Id.*

67. *Id.* at 874-885.

68. *Id.* at 881.

69. *Id.*

[A duty to install airbags] thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law.

Id.

70. 533 U.S. 525 (2001).

governing the content and location of advertising for cigarettes, cigars, and smokeless tobacco, tobacco manufacturers filed suit, arguing that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted the state advertising regulations.⁷¹ After considering the language of the statute and purpose of the FCLAA, the Supreme Court determined that the express preemption clause of the FCLAA⁷² preempted the Attorney General's state advertising regulations because the state regulations would "upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health."⁷³

B. MTBE Cases Considering the Preemption Issue

1. Cases Holding that the CAA does not Preempt MTBE State Bans

The Oxygenated Fuels Association (OFA)⁷⁴ has brought two suits arguing that the Clean Air Act preempts state MTBE bans. First, in *Oxygenated Fuels Association v. George Pataki*,⁷⁵ the OFA claimed in a motion for summary judgment that the New

71. *Id.* at 546-48.

72. The FCLAA's preemption provision states, " (a) No statement relating to smoking and health . . . shall be required on any cigarette package," and "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. §1334 (1994).

73. *Lorillard Tobacco*, 533 U.S. at 556-57. The Massachusetts attorney general argued that the cigarette advertising regulations were not "based on smoking or health" [as stated in the preemption provision] because the regulations target youth exposure to cigarette advertising. *Id.* at 554. The Supreme Court determined that the Attorney General's construction of the phrase was too narrow. "At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." *Id.* at 555. Moreover, the Attorney General had argued that the state's regulations are not preempted because they concern the location rather than the content of the cigarette advertising. The court also turned down this argument, stating that the "content/location distinction cannot be squared with the language of the preemption provision, which reaches *all* 'requirements' and 'prohibitions' imposed under State law." *Id.*

74. The Oxygenated Fuels Association is a trade association "established to advance the use of oxygenated fuel additives." Oxygenated Fuels Association, at <http://www.ofa.net/> (last visited Nov. 25, 2001). One of the purposes of the organization is to "sponsor numerous technical analyses and health science studies showing the automotive performance and health benefits of oxygenated fuels." *Id.*

75. 158 F. Supp. 2d 248 (N.D.N.Y. 2001).

York MTBE ban violated the Supremacy Clause.⁷⁶ Judge Mordue rejected this motion.

Judge Mordue first considered the express preemption provision in the Clean Air Act at 211(c)(4)(A), which generally restricts what actions states may take “for purposes of motor vehicle emission control.”⁷⁷ Judge Mordue decided that because New York’s MTBE law is aimed at preventing groundwater pollution and is not a “control or prohibition respecting any characteristic or component of a motor vehicle fuel or fuel additive for purposes of motor vehicle emission control,” CAA §211 does not expressly preempt New York’s exercise of police power to prevent groundwater contamination.⁷⁸ Any other interpretation would be reading Section 211 too broadly.⁷⁹

Second, Judge Mordue considered the oil companies’ argument that EPA regulations preempted state MTBE bans. He decided that EPA does not have the authority to preempt the entire field of state legislation affecting fuel and fuel additives, including those laws aimed at preventing groundwater contamination.⁸⁰ Examining the legislative history, Judge

76. New York law banned the use, sale, or importation of fuels containing MTBE as of Jan. 1, 2004. *Id.* at 249.

77. Section 211(c)(4)(A) states:

Except as otherwise provided. . . no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine-

if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or

if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

Id. at 251.

78. *Id.* at 253.

79. *Id.*

80. *Id.* at 254. OFA points to EPA’s rule implementing section 211(k) of the CAA. EPA’s rule states,

Congress provided in the 1977 Amendments to . . . CAA that federal fuels regulations preempt non-identical State controls, except under certain specified circumstances. EPA believes that the same approach to federal preemption is desirable for the reformulated gasoline and antidumping programs. EPA, therefore, is issuing today’s final rule under the authority of sections 211(k) and (c), and promulgates under section 211(c)(4) that dissimilar State controls be preempted unless either of the exemptions to federal preemption specified by section 211(c)(4) applies.

Id. at 255 (citing 59 Fed. Reg. 7,716, 7,809 (EPA, Feb. 16, 1994)).

Mordue concluded that Congress envisioned a program that would respond to “market forces, health and environmental impacts, regional priorities, technological feasibility, and other considerations.”⁸¹ Thus, EPA has authority to shape and respond to the Reformulated Gasoline Program but not control it.⁸² Moreover, because the CAA provides for variations among gasoline blends in different regions, Judge Mordue rejected the argument that EPA must have the authority to preempt in order to preserve uniformity throughout the nation.⁸³

Third, Judge Mordue considered whether congressional intent to occupy the field of fuel legislation could be implied from the CAA.⁸⁴ Judge Mordue concluded that in the CAA, there was no “clear and manifest purpose to preempt state action in the field of groundwater protection, where the action touches upon the field of motor vehicle fuel but is taken for a purpose other than motor vehicle emission control.”⁸⁵

Finally, Judge Mordue considered whether the state MTBE ban should be preempted because it actually conflicts with federal law.⁸⁶ OFA argued that the state MTBE ban constituted an obstacle to the purposes of the CAA. Because the parties disputed the cost and difficulty of substituting ethanol for MTBE, however, the court could not assess whether the New York MTBE ban stands as an obstacle to the goals of the REG program.⁸⁷ Consequently, Judge Mordue denied OFA’s entire motion for summary judgment.

The OFA made similar arguments in *Oxygenated Fuels Association v. Davis*,⁸⁸ its suit challenging the state of California’s 2002 MTBE ban.⁸⁹ OFA argued that the ban was invalid for three reasons: 1) Congress intended the Clean Air Act to encompass

81. *Id.* at 261.

82. *Id.* “[I]f a state rejects a fuel for purposes other than emission control, this rejection constitutes a factor which affects the market and which EPA must take into account when carrying out its responsibilities.” *Id.* at 262.

83. *Id.* at 264. Judge Mordue identifies sections of the CAA that permit variations among gasoline blends. First, only certain areas are part of the RFG program. *Id.* (citing CAA §211(k)(10)(D) (1994)). Second, California is permitted to enact its own fuel requirements. *Id.* (citing CAA §110, 249(c)(2) (1994)). Third, variations in RFG are permitted depending on region and season. *Id.* (citing CAA §211(k)(3)(B)(i) (1994)). Finally, RFG requirements may be waived for various reasons. *Id.* (citing CAA §211 (k)(2)(B), (D) (1994)).

84. *Id.* at 264.

85. *Id.* at 266.

86. *Id.* at 267.

87. *Id.* at 269-273.

88. 163 F. Supp. 2d 1182 (E.D. Cal. 2001).

89. Cal. Code Regs. tit. 13 § 2262.6(a)(1) (2000).

the regulation of oxygenated gasoline content; 2) the California ban conflicts with Congress' purpose in enacting the Clean Air Act; and 3) EPA's reformulated gasoline rule expressly preempts the MTBE ban.⁹⁰ California filed a motion to dismiss, arguing that Congress intended for California to establish its own course of regulation.⁹¹

Judge Levi granted the state's motion to dismiss, holding that Section 7545(c)(4)(B) of the Clean Air Act, which grants California authority to enact its own fuel regulations, permits California to enact the MTBE ban.⁹² Consequently, the court determined that there is no express, implied, or "actual conflict" between the California MTBE ban and the Clean Air Act because California has "unrestricted authority to impose controls or prohibitions respecting any fuel or additive."⁹³ In response to the OFA's concern that an MTBE state ban will affect the national price and availability of gasoline, Judge Levi determined that this concern is "too remote a consideration to support a preemption finding, given that Congress expressly granted California the authority to control or prohibit fuel additives."⁹⁴ He continued, "At best, the statute neither requires nor forbids the use of any particular oxygenate. Its 'goal' is to assure a particular oxygen content. It would require a far greater showing on OFA's part for the court to invalidate the State's enactment of a measure taken under its police powers to protect the environment and the public health."⁹⁵

2. Cases Holding that CAA does not preempt MTBE state tort claims

Deciding claims based on state tort law, some courts have held that because no regulation *required* MTBE, the company's liability under state tort law is not preempted.⁹⁶ First, in *South Tahoe Public Utility District v. Atlantic Richfield*, a public water utility district sought damages from oil companies, refiners, and local gas stations to remedy MTBE contamination in the Lake

90. 163 F. Supp. 2d., at 1186.

91. *Id.* at 1183.

92. *Id.* at 1187.

93. *Id.* at 1188.

94. *Id.* at 1189.

95. *Id.*

96. In *City of Dallas v. Explorer Pipeline Co.* (No. 00-09768, Texas Dist. Dallas Co. 2001), a Texas district court denied defense summary judgment motions on the preemption issue. *Texas District Court Denies Defense Summary Judgments Based on Federal Preemption*, MEALEY'S LITIG. REP.: MTBE, Dec. 2001.

Tahoe area.⁹⁷ The water utility argued that the oil companies knew or should have known of the effects of MTBE on groundwater.⁹⁸

Judge Stuart Pollack denied the oil companies' summary judgment motion, holding that nothing in the federal Clean Air Act expressly preempts state MTBE bans. He cited the Ninth Circuit's decision in *Exxon Mobil Corp. v. U.S. EPA*,⁹⁹ which held that a county had the right to adopt stricter oxygen standards than those stated in the Clean Air Act, despite the fact that these stricter standards would lead to the conclusion that MTBE could not be used.¹⁰⁰ Moreover, Judge Pollack was not persuaded that the Supreme Court's opinion in *Geier v. American Honda Motor Co.* on state airbag requirements applied to the to the present case. Judge Pollack decided that because the Clean Air Act did not explicitly require MTBE and because other oxygenates were available, state tort law claims against MTBE producers and suppliers do not conflict with the CAA.¹⁰¹ Furthermore, Judge Pollack determined that the impracticality for the oil company to replace MTBE with another oxygenate was not a sufficient reason to find preemption.¹⁰²

Several class actions based on state law claims were consolidated and decided in *In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*.¹⁰³ Like the oil company defendants in *South Tahoe*, defendant oil companies moved for

97. *State Right to Regulate Gasoline Not Preempted by Federal Clean Air Act*, MEALEY'S LITIG. REP.:MTBE, March 2001 (discussing South Tahoe Public Utility District v. Atlantic Richfield, CGC-98-999128 (2001) (petition for review denied in Ultramar Diamond Shamrock Corp. v. San Francisco Co. Sup. Ct., 2001 Cal. LEXIS 6144 (2001)); see *Jury Deliberates Liability in First Phase of Trial Heard in San Francisco*, MEALEY'S LITIG. REP.: MTBE, March 2002. The jury began deliberating 83 days after the trial began. The trial is occurring in two phases. Phase I addressed the defects and negligence claims, while Phase II "will ask the jury to determine if the releases of MTBE-containing gasoline interfered with the utility district's use of its wells and which defendants are legally responsible for the interference." *Id.* Before the trial began, 24 of 31 defendants settled for approximately \$32 million. *Id.*

98. *State Right to Regulate Gasoline Not Preempted by Federal Clean Air Act*, supra note 97.

99. 217 F.3d 1246 (9th Cir. 2000).

100. *San Francisco Utility Case Likely to Proceed to Trial*, MEALEY'S MTBE, March 2001.

101. *Id.*

102. *Id.*

103. 175 F. Supp. 2d 593 (S.D.N.Y. 2001). This consolidated multi-district litigation constitutes several class actions on the behalf of private well owners who seek relief for their MTBE contaminated wells: strict liability for design defect, failure to warn, deceptive business acts and practices in violation of §349 of NY Gen. Business law, public nuisance, negligence, breach of notification of duty under Toxic Substances Control Act (TSCA), and conspiracy to market unsafe product.

summary judgment, arguing that the CAA expressly and conflict preempted plaintiffs' state law claims.¹⁰⁴ Judge Shira Scheindlin examined the text of the CAA preemption provision (§211 of the CAA) and determined that the plaintiffs brought their claims "not for the purpose of the regulating motor vehicle emissions control, [sic] they concern groundwater contamination caused by spills and leakage of gasoline containing MTBE and are therefore outside the scope of the [express] preemption provision."¹⁰⁵ Relying heavily on *OFA v. Pataki*, Judge Scheindlin agreed that while the legislative history suggests that MTBE would be used, the CAA scheme sought to reduce emissions in the context of health and environmental impacts and market forces¹⁰⁶ and therefore did not expressly preempt state tort law claims.

The Supreme Court's decisions in *Lorillard* and in *Geier* did not control. Judge Scheindlin found that the express preemption provision addressed in *Lorillard* was quite broad, while the CAA express preemption provision is much more limited.¹⁰⁷ Moreover, in *Geier*, the plaintiff was trying to impose a duty to use a specific product (*i.e.*, install airbags), but MTBE plaintiffs, in contrast, were not seeking to impose a duty of using a specific oxygenate.¹⁰⁸

Defendants also argued that the plaintiff's tort claims were prohibited through conflict preemption. They sought to persuade the court that because there are no practical alternatives to MTBE use, obligating defendants to use another oxygenate—which allowing state tort claims to go forward would, in effect, do—would seriously undermine the objectives of the CAA. Judge Scheindlin did not decide this issue. Like Judge Mordue in *OFA v. Pataki*, she held that whether other alternatives are "practical" is a question of fact and not a matter for summary judgment consideration.¹⁰⁹

3. Cases Holding that the CAA Preempts MTBE Tort Claims

Oil companies have received some favorable court decisions. In *Theodore Holten v. Chevron U.S.A.*, approximately 300 plaintiffs brought suit against Chevron and Gulf Oil, arguing that MTBE

104. *Id.* at 599.

105. *Id.* at 612 (citing *Oxygenated Fuels v. Pataki*, 158 F.Supp. 2d 248, 253-55 (2001)).

106. *Id.* at 613.

107. *Id.* at 614.

108. *Id.* at 615.

109. *Id.* at 616.

from the defendants' gasoline had contaminated their drinking water.¹¹⁰ The defendants filed for summary judgment, arguing that the products liability claim should be dismissed for causation defects as well as preemption reasons.¹¹¹ The oil companies argued that the government approved the use of MTBE in gasoline; consequently, the oil companies effectively had no choice but to use MTBE and thus could not be held liable under state law.¹¹²

Judge Anne Thompson concluded that "[a]lthough the Court does not agree that defendants were specifically required to use MTBE as an oxygenate, it is clear that the defendants were required to use some type of oxygenate that Congress contemplated would be used frequently."¹¹³ Thompson noted that the legislative history of the Clean Air Act is "replete with references to MTBE and its usefulness."¹¹⁴ Therefore, "because Congress required that gasoline include an oxygenate and specifically designated that MTBE would be one of the most common and effective oxygenates, this Court concludes that gasoline containing MTBE cannot be deemed a defective product."¹¹⁵

The plaintiffs moved for reconsideration, arguing that there had been an "intervening change in the law" that entitled them to reconsideration.¹¹⁶ Plaintiffs cited the three district court decisions discussed above in section 1, holding that the Clean

110. 2001 U.S. Dist. LEXIS 17599 (D.N.J. 2001). The plaintiffs brought claims of negligence, strict liability, negligent infliction of emotional distress and fear of future injury, and quality of life damage. *Id.* at *4. See also *New Jersey Plaintiffs Charge Chevron Knew Gasoline With MTBE is Defective Product*, 14 MEALEY'S POLLUTION LIABILITY REP., Oct. 2000.

111. *Chevron, Gulf Allege No Connection to Releases From Cumberland Farms Tanks*, 1 MEALEY'S LIT. REP.: MTBE, May 2001.

112. *Holten*, 2001 U.S. Dist. LEXIS 15999, at *9-*10 ("Defendants argue that federal law effectively required gasoline manufacturers to add MTBE to gasoline and that for this reason, it cannot be deemed defective."); see also *Chevron, Gulf Allege No Connection to Releases From Cumberland Farms Tanks*, *supra* note 111.

113. *Holten*, 2001 U.S. Dist. LEXIS 15999, at *10; see also Charles Toutant, *Chevron Not Liable*, NAT'L L.J., Aug. 13, 2001, at A17; *Federal Preemption Questions Dominate July 13 MDL Hearing Considering Summary Judgment*, MEALEY'S LITIG. REP.: MTBE, Aug. 2001.

114. *Holten*, 2001 U.S. Dist. LEXIS 15999, at *10; see, e.g., 136 CONG. REC. S6383-01, S6384 (1990) (statement of Sen. Daschle) ("EPA predicts that the amendment will be met almost exclusively by MTBE, a methanol derivative."); 136 CONG. REC. 16895-01, S16922 (1990) (statement of Sen. Durenberger) ("reformulated gasoline is to have not less than 2 percent oxygen by weight. This requirement can be met by blending gasoline with a variety of additives like ethanol or MTBE.").

115. *Holten*, 2001 U.S. Dist. LEXIS 15999, at *10-*11.

116. *Holten v. Chevron U.S.A.*, 2001 U.S. Dist. LEXIS 17600, *12-*14 [hereinafter *Holten II*] (D.N.J. 2001).

Air Act has no express or implied preemptive effect.¹¹⁷ In response, the defendants cited *Kubas v. Unocal Corp.*¹¹⁸ Like Judge Thompson in *Holten*, the *Kubas* court determined that the Clean Air Act preempts negligence and strict product liability claims against refiners for MTBE contamination. Judge Thompson responded to plaintiff's motion for reconsideration on the preemption issue by stating that "[t]o the extent that the preemption rulings by the MTBE Court and the OFA Courts are in conflict with this Court's ruling in the case at bar, those Court decisions are not binding on this Court" and are not intervening changes in the law.¹¹⁹

Thus, to date, at least two courts have held that the Clean Air Act preempts MTBE negligence and strict product liability claims against oil companies. The main reason for these rulings is that the legislative history suggests that Congress contemplated that MTBE would be a commonly used oxygenate.

117. The plaintiffs cited in *re MTBE Products*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001), *OFA v. Davis*, 163 F. Supp. 2d 1182 (E.D. Cal. 2001), and *OFA v. Pataki*, 158 F. Supp. 2d 248 (N.D.N.Y. 2001). *Id.* at *13-*14. These cases are all discussed *supra* at notes 47-50 and accompanying text.

118. No. BC191876 (Super. Ct. Los Angeles Co., Cal. Aug. 23, 2001; *see also Los Angeles Parties Asked to Choose Mediation to Resolve the Damage Issues*, MEALEY'S LIT. REP.: MTBE, Aug. 2001. This article discusses the *Kubas* court's preemption hearing. At a pretrial conference, Judge Dau asked the defense attorneys about their preemption argument. "Do you have anything better than MTBE as having been shown contemplated in Congressional debates and within EPA in the planning stages as a possible alternative oxygenate?" The plaintiff's attorney responded: "If that's your question, there is nothing because Congress and EPA never intended to say, 'You can use MTBE. You can use ethanol.' Nowhere in the record does it say that MTBE is to be used as an oxygenate." In response, the defense attorneys stated, "We cited the court to the Federal Registry where EPA said in connection with the oxygenate requirements 'if you are going to use MTBE, here is the level you can use it at. If you are going to use ethanol, here is the maximum level.' So to that extent, it was listed as one of the approved options to use as an oxygenate." *Id.*

See also Earl J. Imhoff & William K. Enger, *Suits Target 'Clean Air' Gas Additive*, NAT'L L.J., Nov. 12, 2001, at B14. In the *Kubas* motion for summary judgment, Judge Dau determined that prohibiting oil companies from using MTBE would present "an obstacle to the accomplishment and execution" of the RFG program." *Id.* Moreover, Judge Dau emphasized the fact that the defendant oil company did not own or operate the UST that injured the plaintiffs. *Id.* Imhoff and Enger state that Judge Dau's emphasis "highlights the fundamental issue of ultimate responsibility for the MTBE problem. Plaintiffs fear that because independent gas station owners who operated many leaking tanks lack the assets to make just compensation, the consuming public will be forced ultimately to pay the steep price for MTBE contamination." *Id.*

119. *Holten II*, 2001 U.S. Dist. LEXIS 17600, at *14.

IV

ANALYSIS OF PREEMPTION DOCTRINE AS APPLIED TO MTBE CONTAMINATION

Oil companies argue that the Clean Air Act preempts state bans of MTBE and state tort law claims based upon MTBE contamination. This Part addresses those arguments and argues that no court should find that the bans or tort claims are preempted.

A. *Express and Implied Preemption*

The judges in *OFA v. Pataki*¹²⁰ and *In re MTBE Litigation*¹²¹ explicitly decided their cases using preemption analysis. In *OFA v. Pataki*, Judge Mordue compared New York's MTBE ban with the express preemption provision in Clean Air Act § 211(c)(4)(A), holding that state bans based on Concerns groundwater contamination are outside the scope of the Clean Air Act express preemption provision.¹²² Moreover, both Judge Mordue in *OFA v. Pataki* and Judge Schendlin in *In re MTBE Litigation* were persuaded by the fact that Congress wanted a program to respond to "market forces, health and environmental impacts, regional priorities, technological feasibility, and other considerations."¹²³ The Clean Air Act provides for flexibility, as evidenced in its provisions for variations among gasoline blends in different regions.¹²⁴ Consequently, they concluded that EPA, through the Clean Air Act, did not have express authority to preempt the entire field of state legislation affecting fuel and fuel additives.

The judges were also not persuaded that the MTBE claims were preempted because congressional intent could be implied. Because there was no "clear and manifest purpose to preempt state action in the field of groundwater protection," Judge Mordue concluded that no congressional intent to occupy the field of fuel legislation could be implied from the Clean Air Act.¹²⁵

In contrast, Judge Thompson's reasoning in *Holten* is unpersuasive. First, she does not seem to engage in preemption

120. See *supra* notes 75-87 and accompanying text.

121. See *supra* notes 103-109 and accompanying text.

122. *OFA v. Pataki*, 158 F. Supp. 2d 248, at 255. Similarly, Judge Scheindlin in *In re MTBE Products Liability Litigation* determined that because plaintiffs brought their claims because of groundwater contamination instead of for the purpose of regulating motor vehicle emissions, the claims were not expressly preempted. *In re MTBE Products Liability Litigation*, at 613.

123. *OFA v. Pataki* at 256; *In re MTBE Products Liability Litigation* at 613.

124. *OFA v. Pataki*, 158 F.Supp.2d at 257; see *supra* note 83.

125. *Id.* at 258.

analysis. Unlike Judge Scheindlin and Judge Mordue, she did not identify the type of preemption analysis (i.e., express, implied, or conflict preemption) she was using.¹²⁶ She simply concluded that because Congress required an oxygenate and contemplated that MTBE could be used, plaintiffs' strict liability claims were preempted. This reasoning is flawed because there is a distinction between what is permissible and what is required.¹²⁷ "It is *permissible* to use MTBE to achieve an oxygen content in gasoline up to 2.7 percent. . . . It is also *permissible* to use ethanol to achieve such oxygen content. What is *required* is the oxygen content."¹²⁸ The Clean Air Act does require that an oxygenate be used in reformulated gasoline. However, the CAA does *not* name a particular oxygenate that must be used.¹²⁹

126. The following is the entire portion of Judge Thompson's analysis regarding preemption:

One of the arguments Chevron and Gulf make with respect to the strict liability claim is that the claim is barred by the doctrine of federal preemption. Defendants argue that federal law effectively required gasoline manufacturers to add MTBE to gasoline and that for this reason, it cannot be deemed defective. Although the Court does not agree that defendants were specifically required to use MTBE as an oxygenate, it is clear that defendants were required to use some type of oxygenate and that MTBE was an oxygenate that Congress contemplated would be used frequently.

As noted in moving defendants' papers, the legislative history of the Clean Air Act Amendments is replete with references to MTBE and its usefulness. See, e.g., 136 CONG. REC. S6383-01, S6384 (1990) (statement of Sen. Daschle) ("EPA predicts that the amendment will be met almost exclusively by MTBE, a methanol derivative."); 136 CONG. REC. S16895-01, S16922 (1990) (statement of Sen. Durenberger) ("reformulated gasoline is to have not less than 2 percent oxygen by weight. This requirement can be met by blending gasoline with a variety of additives like ethanol or MTBE"). Thus, because Congress required that gasoline include an oxygenate and specifically designated that MTBE would be one of the most common and effective oxygenates, this Court concludes that gasoline containing MTBE cannot be deemed a defective product.

Holten v. Chevron U.S.A., 2001 U.S. Dist. LEXIS 17599, *9-*11.

127. Order Denying Ultramar's Motion for Nonsuit on the Issue of Preemption, South Tahoe Public Utility District v. Atlantic Richfield Co. et al. (No. 999128) (2002).

128. *Id.* at 2.

129. This fact was most persuasive to Judge Carlos Bea, who denied the oil companies' motion for nonsuit. He argues that the oil companies have confused what is permissible with what is required. *Order Denying Ultramar's Motion for Nonsuit on the Issue of Preemption, South Tahoe Public Utility District v. Atlantic Richfield et al.* at 2. Judge Bea writes,

For the purposes of the illustration of movants' [oil companies] error, consider the movant's proposed syllogism: 1) Congress has required an oxygenate in gasoline under section 211(m). . . . The evidence establishes that only one oxygenate can be used to mix with gasoline in any one batch of gasoline. 2) Congress has allowed that oxygenate to be MTBE or another oxygenate. 3) Therefore, the States cannot ban the use of MTBE and force

In fact, while the legislative history of the CAA states that while MTBE and ethanol will most likely be used to meet the oxygenate requirement, various other oxygenates can be used.¹³⁰ "MTBE" occurs 166 times in the legislative history. Of those 166 occurrences, "ethanol" or some other type of oxygenate is mentioned fifty-three time in a phrase like "MTBE or ethanol."¹³¹ While there was probably clear congressional intent that MTBE *could* be used to meet the oxygenate requirement, there is no such intent to mandate its use. Oil companies chose to use MTBE most frequently because it was cost efficient and offered them more flexibility.¹³² Because MTBE is not *required* under the CAA, express and implied preemption arguments are not convincing.

B. Conflict Preemption

Oil companies' arguments based on conflict preemption should fail for two reasons. First, they misapply Supreme Court precedent. Second, they lack the evidence needed to prove that bans or claims based on MTBE would, in practice, lead to no oxygenate use, frustrating Congressional objectives in the Clean Air Act.

In *Geier*,¹³³ the plaintiffs claimed automobile manufacturers were liable for their failure to install airbags, even though the history of the Federal Motor Vehicle Safety Standard (FMVSS) 208 shows that Congress explicitly considered and rejected a mandatory airbag requirement. Because plaintiffs' claims and the federal law both addressed the inclusion of air bags for safety objectives, the court ruled that the tort claims were preempted. The tort claims would have presented an obstacle to the accomplishment of the federal objectives, namely, improved safety through manufacturer and consumer choice regarding passenger restraints.

the use of another oxygenate. Compare: 1) Major League Baseball requires that there be a winner in the World Series. 2) Major League Baseball allows the Yankees, as well as the Diamondbacks, to play in the World Series. 3) Therefore, the Diamondbacks must allow the Yankees to win the World Series."

Id. at 2 n.4.

130. *Id.* at 2.

131. 136 CONG REC. (1990).

132. See Richard Faulk & John S. Gray, *The MTBE Controversy: Real Environmental Crises or Regulatory Hysteria?* 32 ENV'T REP. 995, 997 (2001).

133. See *supra* notes 62-69 and accompanying text.

In contrast, the MTBE plaintiffs' product liability claims are not based upon oil companies' use or failure to use MTBE to reduce air pollution, a problem the Clean Air Act contemplates. Instead, MTBE plaintiffs' claims are based upon the unintended consequences of MTBE groundwater contamination. If plaintiffs wanted to hold oil companies liable because MTBE was a defective product that did not improve air quality, their claim would have a better chance of being preempted according to the reasoning in *Geier*; the legislative history of the CAA does demonstrate that Congress considered MTBE an acceptable oxygenate that could be used to help improve air quality. However, the MTBE case plaintiffs have made no assertions about MTBE's effect on air quality. In theory, the MTBE water contamination claims *do not* frustrate the purpose of the oxygenate requirement in the Clean Air Act because other oxygenates can be used. Therefore, because the product liability claims address a defective product in the context of water pollution while the oxygenate requirement addresses air pollution, the water contamination claims are not conflict preempted. The fact that MTBE water contamination was an unintended and unknown consequence of a federal attempt to improve air quality does not lead to the conclusion that the oil companies should not be liable.

Thus, in theory, MTBE bans and MTBE water contamination claims do not frustrate the purpose of the oxygenate requirement. But if there are no practical substitutes, oil companies may be correct in their assertion that holding them liable for MTBE contamination (and forcing them to find a substitute for MTBE) or banning MTBE will constitute an obstacle to the Congressional objective of better air quality. Two courts refused to grant summary judgment on this issue because they considered it a question of fact whether, in practice, there are no alternatives to MTBE.¹³⁴ However, the oil companies have never shown that ethanol or any of the other oxygenates Congress considered are infeasible. Various groups suggest that ethanol can meet the oxygenate demand,¹³⁵ although more data are needed. Oil companies protested the introduction of oxygenates, and the fact that they are protesting now should not be surprising. Before courts find that MTBE bans and state law claims are conflict preempted, based upon the lack of a practical alternative, oil companies need to bear the burden of showing

134. See *supra* notes 102 and 109 and accompanying text.

135. See *supra* notes 39 and 40 and accompanying text.

that all the other oxygenates Congress considered are actually infeasible or impractical.

In conducting this inquiry into whether alternatives are practical, it is important to remember that, at least at one time, oil companies had many options. In the early 1990s, when the RFG program began, the companies had a choice among oxygenates. At that time, they could have added new pipelines to allow the ethanol to be added at the point of sale (instead of adding MTBE at the time of production and preventing the cost of adding new pipelines). In fact, Congress expressly contemplated that the oil companies would choose among oxygenates based upon science, their needs, and consumer demands.¹³⁶ State bans and state law claims, on this reasoning, are simply manifestations of the market forces that Congress contemplated would act upon oil companies' choice in an oxygenate. If alternatives to MTBE are "shown to be impractical or infeasible," they may be no more impractical or infeasible than MTBE was in the early 1990s when oil companies made the decision to develop that oxygenate.

V

POLICY SUPPORTS REJECTING PREEMPTION CLAIMS

Congress created a flexible reformulated fuels program that would respond to "market forces, health and environmental impacts, regional priorities, technological feasibility, and other considerations."¹³⁷ Keeping these objectives in mind, this section analyzes the general policy concerns that arise in the preemption context, namely the compensation function, the deterrence function, federalism concerns, and fairness concerns. Analysis of these policy objectives argues against preemption of state MTBE bans and state law claims.

First, allowing MTBE claims furthers states' well-established interest in compensating citizens for their injuries.¹³⁸ MTBE

136. See 136 CONG. REC. 253031 (citing *The Clean Air Facts*, May 31, 1989), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 4, at 2517-218; 136 Cong. Rec. H2768 (1990)(statement of Rep. Richardson), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 4, at 2702.

137. OFA v. Pataki at *18-*19.; *In re MTBE Litigation*, at *49.

138. See Marc Z. Edell & Cynthia Walters, *The Doctrine of Implied Preemption in Products Liability Cases—Federalism in the Balance*, 54 TENN L. REV. 603, 613 (1987). "The Court has refused to equate state tort claims with state regulation, and has consistently confirmed the autonomy of the states and their unique role in providing compensation to their citizens." *Id.* Edell and Walters discuss the role of preemption in the cigarette cases. *Id.* at 618-623. The Federal Cigarette Labeling and Advertising Act (Cigarette Act) requires cigarette manufacturers to place health warnings on

plaintiffs have incurred serious injury, such as groundwater contamination, that someone will have to pay for. The compensation interest states have argues against depriving innocent parties of a remedy.¹³⁹

cigarette packages and in advertisements. Consequently, the manufacturers argued that state tort law claims for failure to warn are preempted by this act. When this argument was challenged at the district court level, Edell and Walters recount that because Congress did not purposefully act to eliminate common law remedies for defective product claims in cigarette cases, the district court in *Cipollone* refused to eliminate those remedies through preemption. However, in *Cipollone v. Liggett*, 789 F.2d 181 (3d. Cir. 1986), Edell and Walters explain, the Third Circuit ruled that permitting state common law damage claims have the effect of creating an obstacle to the purposes and objectives of Congress as described in the Cigarette Act. Edell & Walters, *supra*, at 621. Edell and Walters argue that the cigarette preemption cases have served as a springboard for preemption arguments in other areas.

In response to the Third Circuit's preemption decision in *Cipollone*, Professor Laurence Tribe stated:

The court's view of preemption has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics, and toxic substances are all governed in some manner by Federal warning laws. If innocent people are injured because of inadequate warnings, or because advertisements downplay the product's dangers, are all of them banned by Federal law from pursuing tort claims in state court? If so, the circuit court's ruling [in *Cipollone*] is cause for a knowing snicker in corporate board rooms across the country.

Laurence Tribe, *Anti-Cigarette Suits, Federalism with Smoke and Mirrors*, THE NATION, June 7, 1986, at 790.

Like the cigarette cases, one area in which preemption has played an enormous role is the field of medical devices. See Ashley W. Warren, *Preemption of Claims Related to Class II Medical Devices: Are the Federal Objectives of Public Health and Safety Furthered or Hindered?* 49 SMU L. REV. 619, 621 (1996). Medical device manufacturers argue, often successfully, that because the FDA approves the use of a device, the manufacturers cannot be liable for tort claims associated with the use of the devices. Medical device manufacturers argue that allowing state claims based on defects in medical devices undermines the regulatory scheme because the "courts should defer to the specific scientific and policy judgments made by the FDA." *Id.* at 635. However, the cigarette cases and medical device cases are very different from MTBE cases in an important way: there was no federal agency that evaluated the safety of MTBE in the context of groundwater. While it might make sense to argue in the medical devices cases that we want one regulatory agency determining safety standards through research and requirements of manufacturers and that this agency's decisions deserve deference, this argument has no weight in the MTBE context because there was no agency decision regarding the safety of MTBE associated with water. Therefore, the argument advocating deference to federal regulatory judgments regarding product safety cannot apply to MTBE claims.

139. See Warren, *supra* note 138, at 644 (discussing the strong presumption against preempting state tort remedies when there is no alternative federal remedy); see also Note, *MTBE or Not to Be: Clean Air, Dirty Water, and Common Law Nuisance*, 30 MCGEORGE L. REV. 1325 (arguing that common law nuisance claims are "well suited to allow plaintiffs complaining of groundwater contamination caused by MTBE to recover damages")

Compensation is also part of a larger function: deterrence.¹⁴⁰ Professor Mary Lyndon argues that preemption of tort claims ignores "deterrence dynamics:" "compensation acts as the fine or tax that enforces the deterrence signal."¹⁴¹ In the absence of any federal regulation of groundwater contamination caused by MTBE, preempting tort claims and state bans would shift all the environmental costs associated with MTBE to consumers.¹⁴² Individual consumers would effectively bear the risk while oil companies would bear no costs associated with the risk of use of their product, MTBE.¹⁴³

Common policies underlying preemption doctrine are also generally inapplicable to the MTBE cases. Generally, the "purpose of preemption is to uphold the supremacy of higher level of government and reap the benefits of national uniformity."¹⁴⁴ Preemption of state claims is part of a "larger dialogue about the distribution of power among units of government;" this dialogue is about centralization compared to decentralization.¹⁴⁵ For example, preemption of state tort claims and bans overcomes externalities and prevents a race to the bottom.¹⁴⁶ In contrast, refusing to preempt state tort claims or state MTBE bans permits flexibility and regional

140. Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137 (1995).

141. *Id.* ("Compensation attempts to reflect actual social costs. . . . Regulation is not designed to provide or account for compensation. . . . [I]f compensation is part of the deterrence function, then we cannot preempt tort claims without replacing the enforcement mechanism.")

142. See Mary Loring Lyndon, *Tort Law, Preemption and Risk Management*, 2 WIDENER L. SYMP. J. 69, 83 (1997). Lyndon writes,

The decision to preempt tort law delegates all risk-related legal questions to the regulatory system. . . . [P]reemption of liability in effect answers the risk distribution question by ignoring it. . . . Where Congress has not provided for victim compensation, preempting state common law tort claims tears a great hole in the fabric of the law woven by some of the leading jurists of the twentieth century.

Id.

143. Holding oil companies liable for MTBE water contamination effectively spreads the plaintiffs' losses. See Warren, *supra* note 138, at 643 ("Loss-spreading permits an injured customer to divert the expenses incurred as a result of the injury onto the entire consuming public."). The risks of products, like MTBE, are shifted from the plaintiff to everyone who benefits from product use.

144. Paul S. Weiland, *Comment: Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 238 (2000).

145. *Id.* at 239.

146. *Id.*; see, e.g., Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997); Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997).

responsiveness.¹⁴⁷ Paul Weiland describes two types of preemption in federal environmental law: uniform minimum standards and non-discretionary standards, which provide both a floor and ceiling.¹⁴⁸ The oxygenate requirement is an example of the uniform minimum standard because it is a floor. States can exercise their police powers and go beyond the floor (i.e., make higher requirements). Similarly, because the CAA says merely "oxygenate," states can exercise their police powers to prevent certain oxygenates from being used when an oxygenate has a hazardous effect on field outside the scope of the Act. Because the MTBE ban's purpose is to address groundwater pollution (i.e., a purpose outside the scope of the CAA), the state's police power to ban MTBE to protect its citizens should not be invalidated. If there were a federal response to MTBE groundwater contamination, courts might be more likely to embrace the uniformity associated with preemption; however, there is presently no federal response.

Two aspects of the MTBE litigation also violate notions of fairness. First, there is evidence that in 1986 oil companies allegedly knew of water contamination problems associated with MTBE and misrepresented this information to EPA.¹⁴⁹ Plaintiffs have referred to this evidence in their complaint in *In re MTBE Litigation*,¹⁵⁰ but because the case has not yet been tried, the evidence has not yet been evaluated. Moreover, in the South Tahoe litigation, Judge Bea concluded, in an order rejecting a motion for nonsuit from defendants Lyondell Chemical Co. and

147. See, e.g., Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1235-41 (1995).

148. Weiland, *supra* note 144, at 256. "Uniform minimum standards are designed to raise the bar and foreclose the possibility of a race to the bottom by establishing a floor below which states and localities may not fall. Non-discretionary standards are designed to achieve the goals associated with uniform minimum standards by establishing both a floor and a ceiling." *Id.*

149. *In re: MTBE Products Liability Litigation*, 175 F. Supp. 2d 593, 601-03 (S.D.N.Y. 2001). The plaintiffs alleged that the defendants had knowledge of the threat to groundwater caused by MTBE and had evidence that the defendants had a 1986 report that suggested that MTBE be banned. The plaintiffs argued that the defendants had misled EPA, reporting that MTBE "was only slightly soluble in water, potential environmental exposure to MTBE was low, and that MTBE has excellent biodegradable characteristics."

150. *In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation No. 1:00-1898 MDL 1358* (S.D.N.Y. filed Jan. 8, 2001) (complaint). According to the complaint, in 1986, the Maine Department of Environmental Protection prepared a report recommending that MTBE either be banned or stored in double-walled tanks. Plaintiffs argued that the oil companies tried to discredit this report and convinced EPA that more testing on the health and environmental effects of MTBE was not needed. *Id.*

Shell Oil, that, based on plaintiff's proof, the companies had evidence of knowledge of defects associated with MTBE.¹⁵¹ The *South Tahoe* jury agreed, recently finding that two oil companies "acted with malice in selling gasoline containing MTBE that was defective in design because of a failure to warn."¹⁵² The jury's decision was the first verdict regarding the oil companies' liability for MTBE contamination, and this decision is a strong reason for judges to refuse to allow oil companies to escape liability through preemption claims.

Second, oil companies lobbied strenuously to use MTBE specifically. When they thought that earlier bills considered by Congress would require them to use ethanol, they pushed for a bill that would give them greater latitude to use MTBE. If the companies knew about MTBE contamination problems, misrepresented this information to EPA, and lobbied for MTBE, courts should not permit oil companies to escape liability for dishonest behavior that led to extensive contamination.

CONCLUSION

While scholars disagree over the benefits and harms of MTBE, it seems clear that MTBE-contaminated water is not acceptable drinking water. In response to the ubiquitous MTBE contamination, oil companies are pleading in defense, "But you told us we could use it!" Despite their pleas, courts analyzing preemption claims should not conclude that the Clean Air Act preempts state bans and state tort claims. 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. Further, finding preemption would send the wrong message to oil companies, ignoring the policy implications associated with preemption.

151. Order Denying Ultramar's Motion for Nonsuit on the Issue of Preemption, *South Tahoe Public Utility District v. Atlantic Richfield Co et al.* (No. 999128) (2002).

152. Special Verdict, *South Tahoe Public Utility District v. Atlantic Richfield Co.*, Case No. 999128 (Mar. 4, 2002). The jury considered the following question: "Was gasoline containing MTBE manufactured, sold, or supplied by any of the following defendants defective in design because the risk of harm inherent in its design outweighed the benefits of that design?" The jury answered that Shell Oil Company, Equilon Enterprises, Texaco, and Tosco Corporation sold gasoline that was defective in design, and the time period for this sale of defective gasoline began as early as Fall 1990 for Shell Oil Company. Moreover, the jury determined that the gasoline containing MTBE was manufactured, sold, or supplied by Shell Oil, Equilon, Texaco, and Tosco because of a failure to warn. See also Jane Kay, *Two Oil Giants Deceived Public on MTBE Hazards, Jury Finds*, SAN FRANCISCO CHRONICLE, April 17, 2002, at A1, A15. The jury deliberated for seven weeks. *Id.* at A15.

