

# CRS Report for Congress

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## The Safe-Harbor Provision for Methyl Tertiary Butyl Ether (MTBE)

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### Summary

Methyl tertiary butyl ether (MTBE) is a fuel additive in wide use throughout the United States. Due to leakage from underground storage tanks and other sources of exposure, MTBE has been found in the drinking water supplies of several states. Whether to shield certain parties from MTBE-related liability proved controversial in the 108<sup>th</sup> Congress, and ultimately no legislation addressing the issue was enacted. 108<sup>th</sup> Congress legislation included S. 2095, S. 791, H.R. 3940, and H.R. 2253, each of which would have provided for the eventual discontinuation of the additive but did not provide parties associated with MTBE with any special protections from liability. Other 108<sup>th</sup> Congress legislation, including the conference-reported version of the Energy Policy Act of 2003 (H.R. 6) contained a safe-harbor provision protecting any potential defendant, such as MTBE manufacturers and distributors, from products liability claims. Additionally, the H.R. 6 provision included language applying the safe-harbor retroactively, potentially barring several pending lawsuits. Exemption from liability related to MTBE contamination remains controversial and may again become the subject of debate in the 109<sup>th</sup> Congress. Accordingly, this report analyzes the legal implications of the safe-harbor provision found in H.R. 6. This report will be updated as necessary.

The legal status of methyl tertiary butyl ether (MTBE) has played a prominent role in the debate over future U.S. energy policy. MTBE is a petroleum fuel additive that has commonly been in use since the 1970s and is now primarily used as a fuel oxygenate. Legislation in the 108<sup>th</sup> Congress dealt with MTBE in a variety of ways. S. 2095, one of the later versions of omnibus energy legislation, would have provided for the eventual discontinuation of the additive but did not provide parties associated with MTBE with any special protections from liability. The conference-reported version of H.R. 6, the predecessor to S. 2095, contained a safe-harbor provision exempting all potential defendants from liability associated with “defective product” claims for fuel additives, including MTBE, and fuels blended with such additives. This MTBE safe-harbor would not have insulated a responsible party from other liabilities, such as responsibility for environmental cleanup. The safe-harbor provision was also written to apply retroactively

to September 5, 2003 and would have barred numerous lawsuits already filed in courts throughout the country.

The rationale behind the H.R. 6 form of liability protection is that MTBE use in gasoline was precipitated by federal mandates and that leaking storage tanks and other sources of exposure, not the product itself, are responsible for current contamination. As liability related to MTBE contamination remains controversial and is likely to again become the subject of debate in the 109<sup>th</sup> Congress, this report analyzes the legal implications of the safe-harbor provision found in previous omnibus energy legislation.

## Background

For technical and cost reasons, MTBE's present use was, in part, precipitated by the requirements of the 1990 Clean Air Act Amendments, especially the requirement that reformulated gasoline contain at least 2% oxygen.<sup>1</sup> Use of reformulated gasoline is required in areas that fail to meet federal ozone standards.<sup>2</sup> MTBE, like all ethers, is highly soluble and has become more controversial in recent years as reports of water contamination and resulting lawsuits continue to surface.<sup>3</sup> Sources of contamination are varied but are primarily identified with leaks or other spills from Underground Storage Tanks, a pervasive method of gasoline storage.<sup>4</sup> At the present time, there is no consensus on the health effects associated with MTBE contamination, with certain parties claiming that MTBE is a suspected carcinogen and others claiming that the chemical is relatively benign.<sup>5</sup> The EPA has studied the health effects of MTBE, and, so far, the agency has concluded that the associated risks are minimal at levels typically detected in drinking water. However, the agency continues to study the issue.<sup>6</sup>

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<sup>1</sup> See, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REPORT, ACHIEVING CLEAN AIR AND CLEAN WATER: THE REPORT OF THE BLUE RIBBON PANEL ON OXYGENATES IN GASOLINE, Pub. No. EPA402-R-99-021, (September 1999); see also 42 U.S.C. § 7545. For further information, see CRS Report 98-290 ENR, *MTBE in Gasoline: Clean Air and Drinking Water Issues*, by James E. McCarthy and Mary Tiemann.

<sup>2</sup> 42 U.S.C. § 7545.

<sup>3</sup> See generally UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, TESTIMONY OF JOHN STEPHENSON, DIRECTOR NATURAL RESOURCES AND ENVIRONMENT, BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES: MTBE CONTAMINATION FROM UNDERGROUND STORAGE TANKS, Pub. No. GAO 02-753T (May 21, 2002).

<sup>4</sup> *Id.* at 1. For further information, see CRS Report RS21201, *Leaking Underground Storage Tanks: Program Status and Issues*, by Mary Tiemann.

<sup>5</sup> See Earl Ainsworth, Protecting Water: Energy Bill Fuels Rush to File Pollution Claims, 12 N.J. LAW: WKLY. NEWSPAPER 2196 (Nov. 10, 2003).

<sup>6</sup> See, Announcement of the Drinking Water Contaminant Candidate List, 63 Fed. Reg. 10273 (March 2, 1998); see also U.S. Environmental Protection Agency, MTBE (methyl tertiary butyl ether) and Underground Storage Tanks available at [<http://www.epa.gov/swrust1/mtbe/>]; see also UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OFFICE OF RESEARCH AND DEVELOPMENT, ASSESSMENT OF POTENTIAL HEALTH RISKS OF GASOLINE OXYGENATED WITH METHYL TERTIARY BUTYL ETHER (MTBE), Pub. No. EPA/600/R-93/206 (November 1993).

## Liability

Title 15 of H.R. 6 (108<sup>th</sup> Congress), the Energy Policy Act of 2003, would have dealt with fuel additives. Section 1502 of that title contained the safe-harbor provision for manufacturers of MTBE and other fuel oxygenates. The section read:

(a) In General.—Notwithstanding any other provision of Federal or State law, no renewable fuel, as defined by section 211(o)(1) of the Clean Air Act, or methyl tertiary butyl ether (hereinafter this section [sic] referred to as “MTBE”), used or intended to be used as a motor vehicle fuel, nor any motor vehicle fuel containing such renewable fuel or MTBE, shall be deemed a defective product by virtue of the fact that it is, or contains, such a renewable fuel or MTBE, if it does not violate a control or prohibition imposed by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the “Administrator”) under section 211 of such Act and the manufacturer is in compliance with all requests for information under subsection (b) of such section 211 of such Act. If the safe harbor provided by this section does not apply, the existence of a claim of defective product shall be determined under otherwise applicable law. Nothing in this subsection shall be construed to affect the liability of any person for environmental remediation costs, drinking water contamination, negligence for spills or other reasonably foreseeable events, public or private nuisance, trespass, breach of warranty, breach of contract, or any other liability other than liability based upon a claim of defective product.<sup>7</sup>

This language would have potentially provided a liability shield for all those who might be sued for supplying a defective renewable fuel or MTBE itself, as well as fuels blended with MTBE or other additives.<sup>8</sup> The liability shield would have taken effect so long as the cited statutory and regulatory requirements were complied with.<sup>9</sup> To this end, we note that the term “manufacturer,” as used in the bill, might apply to manufacturers of MTBE and other fuel additives, as well as those entities that produce additive-blended, and specifically MTBE-blended, fuels.<sup>10</sup> EPA regulations issued under the Clean Air Act define fuel and fuel additive manufacturers to include those who cause or direct “the alteration of the chemical composition of a bulk fuel, or the mixture of chemical compounds in a bulk fuel, by adding to it an additive,” and those who produce, manufacture, import, or sell fuel additives.<sup>11</sup> Section 211 of the Clean Air Act appears to implicitly adopt these definitions of “manufacturer,” and specifically indicates that the term encompasses importers.<sup>12</sup> Thus, it appears relatively clear that the applicability of the safe-harbor provision would have depended upon compliance with section 211 of the Clean Air Act and any relevant EPA regulations by a potentially large group of manufacturers.

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<sup>7</sup> H.R. 6, 108<sup>th</sup> Cong. § 1502(a) (Conference report).

<sup>8</sup> While the safe-harbor provision would have applied to other additives and additive blended fuels, such as ethanol or bio-diesel, this report is primarily focused upon MTBE and MTBE-blended fuels and does not address issues specific to other additives.

<sup>9</sup> *Id.*

<sup>10</sup> Blending of MTBE with fuel is typically done by refiners. Other additives may be blended at different stages of production.

<sup>11</sup> 40 C.F.R. § 79.2 (2003).

<sup>12</sup> 42 U.S.C. § 7545(b), (o).

Assuming the safe-harbor's applicability, the type of liability protection that would have been provided would necessarily depend on the term "defective product," which appears to refer to state products liability claims.<sup>13</sup> Products liability is a traditional common law tort. A tort is a civil action to recover damages for injuries caused by means other than breach of contract. The usual standard of liability in tort actions is negligence, which is the failure to exercise due care. In products liability cases, however, the courts apply strict liability instead of negligence as the standard for recovery.<sup>14</sup> Thus, absent the safe-harbor provision, an MTBE manufacturer or distributor, for instance, could be held liable for a defective product that causes injury even if the party had exercised due care in all phases of production.

There are three different types of product defects that can give rise to liability: manufacturing defects, design defects, and failures to adequately warn of product hazards.<sup>15</sup> A product with a manufacturing defect is one that is not in the condition in which it was designed to be.<sup>16</sup> A product with a design defect is one that is in the condition in which it was designed to be, but was not designed in the safest feasible manner.<sup>17</sup> If a manufacturer has used the safest feasible design, but that design has an inherent danger that is not obvious to users of the product, then the manufacturer must warn users of the danger or be liable for failure to warn.<sup>18</sup> While manufacturers are often the target of such litigation, and while the exact contours are a matter of state law, liability often extends beyond manufacturers to distributors, sellers, and even to commercial lessors and bailors.<sup>19</sup> Thus, absent a safe-harbor provision, most entities involved in the production, distribution, and sale of fuel additives or blended fuel, even those who would not be deemed manufacturers under the relatively broad definition found in the Clean Air Act and EPA regulations, could potentially be held liable for a defective product under any of the above-mentioned theories.

The broad language of the MTBE safe-harbor provision would have likely applied to all three concepts of products liability and effectively prevented liability from attaching under such theories. Additionally, while the safe-harbor's applicability was conditioned upon certain actions taken by additive or blended-fuel manufacturers, the provision would have likely applied to all potential defendants in a products liability claim. Similarly, failure on the part of a manufacturer to comply with the cited environmental provisions would have likely removed the liability shield for all potential defendants.<sup>20</sup>

Finally, while potential defendants could have shielded themselves from defective products-related liability, it would appear that they would have remained susceptible to

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<sup>13</sup> See, e.g., Restatement (Third) of Torts: Prod. Liab. § 1 (1998).

<sup>14</sup> See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3<sup>rd</sup> Cir. 1980).

<sup>15</sup> See, e.g., Restatement (Third) of Torts: Prod. Liab. § 2 (1998).

<sup>16</sup> See, e.g., *id.* § 2(a).

<sup>17</sup> See, e.g., *id.* § 2(b).

<sup>18</sup> See, e.g., *id.* § 2(c).

<sup>19</sup> See, e.g., *id.* § 1; Wright v. Newman, 735 F.2d 1073, 1077 (8<sup>th</sup> Cir. 1984).

<sup>20</sup> H.R. 6, 108<sup>th</sup> Cong. § 1502(a).

other types of legal claims. Indeed, the language of the provision specifically maintained that other bases of liability, such as environmental remediation costs, drinking water contamination, trespass, public or private nuisance, breach of warranty, breach of contract, and negligence for reasonably foreseeable events were not to have been affected by the safe-harbor provisions.<sup>21</sup> It is worth noting that reaching MTBE manufacturers and those who blend fuels may prove more difficult under these other bases of liability. As stated previously, most contamination occurs due to leaking underground storage tanks located at individual gas stations. Liability for this contamination could attach to the party responsible for such tanks, but that party is not necessarily the fuel manufacturer or refiner.

## Retroactive Application

As is not an uncommon practice, Congress indicated in H.R. 6 that the safe-harbor provisions would have applied retroactively, meaning that the law, if enacted, would have governed events in the past back to the specified date. The provision stated:

(b) Effective Date.—This section shall be effective as of September 5, 2003, and shall apply with respect to all claims filed on or after that date.<sup>22</sup>

In this particular case, the safe-harbor's retroactive application would have effectively barred several pending lawsuits claiming that MTBE is a defective product. It is well-settled that Congress has the power to legislate retroactively, effectively closing off a remedy in the courts, under certain circumstances.<sup>23</sup> Primary among these circumstances is the requirement that there be no final decision in the case.<sup>24</sup> Such legislative action must also satisfy due process. In this context, it has been established that due process will not be violated when the legislation has "a legitimate legislative purpose furthered by a rational means," a standard that is quite deferential to the Congress.<sup>25</sup>

But while Congress has the *power* to cut off pending MTBE lawsuits, it is an altogether separate question whether exercise of that power effects a Fifth Amendment taking of private property (the underlying causes of action), requiring compensation.<sup>26</sup> The crux is straightforward: do the accrued MTBE causes of action that would be

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 1502(b).

<sup>23</sup> See *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801); *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 280 (1994); *Kaiser Alum. & Chem. Corp. v. Bonjourno*, 494 U.S. 827, 837-38 (1990); *Kopec v. City of Elmhurst*, 193 F.3d 894, 903 (7<sup>th</sup> Cir. 1999); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1573 (11<sup>th</sup> Cir. 1992).

<sup>24</sup> *Plaut v. Spendthrift Trust*, 514 U.S. 211, 218-19 (1995). A decision is not considered final until all appeals have been taken or the time for appeals has lapsed.

<sup>25</sup> *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

<sup>26</sup> The Fifth Amendment Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." The Clause is designed to "secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987).

extinguished constitute “property”? Of particular significance is how this inquiry would be resolved in two courts, the U.S. Court of Federal Claims and its appellate court, the U.S. Court of Appeals for the Federal Circuit, since the former has exclusive jurisdiction over takings claims against the United States seeking more than \$10,000.<sup>27</sup> But while the Federal Circuit has held accrued causes of action to be property, it has done so apparently only as regards extinguishment of *international* claims.<sup>28</sup> Were these courts faced with extinguishment of *state-law* claims, as in the case of the MTBE litigation, they might be tempted to follow the rule that “property” under the Takings Clause is normally defined by reference to state law. Our preliminary review suggests that state courts are divided as to the property status of accrued causes of action.<sup>29</sup>

In sum, whether enactment of a safe-harbor provision similar to that contained in H.R. 6 would effect a taking of the MTBE plaintiffs’ accrued product-liability causes of action must be deemed an open question.

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<sup>27</sup> 28 U.S.C. § 1491(a).

<sup>28</sup> *See, e.g.,* Abraham-Youri v. United States, 139 F.3d 1462, 1465 (Fed. Cir. 1997).

<sup>29</sup> We refer here to accrued causes of action prior to being reduced to final, unreviewable judgment. Once reduced to final, unreviewable judgment, preliminary research indicates near-unanimous support for property status.