

High Court Denies Exxon's Challenge To \$236M MTBE Verdict

By **Keith Goldberg**

Law360, New York (May 16, 2016, 10:05 AM ET) -- The U.S. Supreme Court refused Monday to review a \$236 million trial judgment against ExxonMobil Corp. in a groundwater contamination case involving gasoline additive MTBE in New Hampshire, leaving in place a verdict the energy giant claims is a violation of its due process rights.

The high court denied Exxon's Jan. 20 **petition** for high court review, which had been **opposed** by New Hampshire and **backed** by business and defense bar groups.

New Hampshire won the judgment in 2013 against Exxon over its use of the additive methyl tertiary butyl ether, or MTBE, and the New Hampshire Supreme Court upheld the judgment in October. In its petition for a writ of certiorari, Exxon said New Hampshire courts wrongly apportioned liability according to the company's 29 percent share of the gasoline market in the state instead of facts about individual contaminated sites, and the state improperly relied on projections of statewide contamination rather than hard data.

Exxon also told the U.S. Supreme Court that its use of MTBE was the only feasible way to comply with New Hampshire's program to oxygenate gasoline to reduce air pollution as mandated by the Clean Air Act. A state tort law penalty can't be imposed for complying with a federal mandate, the company argued in its petition.

Business and defense bar groups filed amicus briefs supporting Exxon and arguing that the judgment unjustly puts a liability bulls-eye on companies.

"We will continue to conduct our operations in a manner that protects human health and the environment, and will also continue to vigorously defend ourselves against claims regarding the past blending of MTBE," Exxon spokesman Todd Spitler said in an e-mail Monday. "These MTBE lawsuits lack any firm basis because energy companies are being held liable for blending oxygenates into gasoline as required by law, not for actually spilling gasoline."

In a brief urging the Supreme Court to deny the petition, New Hampshire argued that Exxon had waived its arguments that its federal due process rights were violated through the use of statistics to extrapolate the company's share of liability for MTBE contamination. New Hampshire also ripped Exxon's claim that its use of MTBE was the only feasible way to comply with the state's Clean Air Act-mandated program to oxygenate gasoline, saying federal courts have consistently held that the law doesn't preempt state actions imposing liability for manufacturers' decisions to use MTBE.

New Hampshire sued 16 oil companies over the additive in 2003, claiming they knew it would contaminate water supplies and be difficult to clean up but ignored those risks. The state settled with 15 of the defendants for a total of \$136 million in consideration. Only Exxon went to trial.

After a three-month trial, a state jury found Exxon liable for pollution linked to the additive and awarded the state \$236 million for testing and cleanup costs. On appeal, the company argued the case should have been tossed at the outset, because remediation for gas spills was dealt with exclusively by state-mandated funds.

Around \$195 million of the judgment meant for future cleanups was locked in a trust, but the New Hampshire Supreme Court reversed that ruling on Oct. 2, ordering the funds released to the state.

The state Supreme Court found that the laws creating cleanup funds did not preclude the state from seeking damages. The court also rejected Exxon's argument that the trial court had deviated from precedent set by other courts considering MTBE cases by allowing statistical evidence of the contamination.

"This decision upholds what we previously described as the most significant environmental victory in the history of the State," New Hampshire Attorney General Joseph Foster said in a statement Monday.

Exxon is represented by Walter Dellinger, Jonathan D. Hacker and Charles C. Lifland of O'Melveny & Myers LLP, and Paul D. Clement, George W. Hicks Jr. and Michael D. Lieberman of Bancroft PLLC.

New Hampshire is represented Attorney General Joseph A. Foster and Senior Assistant Attorney General K. Allen Brooks of the Department of Justice's Environmental Protection Bureau, by David C. Frederick, Amelia I.P. Frenkel and Ariela Migdal of Kellogg Huber Hansen Todd Evans & Figel PLLC, Matthew F. Pawa and Benjamin A. Krass of Pawa Law Group PC, and Esther L. Klisura and Alexander Leff of SL Environmental Law Group PC.

The case is ExxonMobil Corp. et al. v. State of New Hampshire, case number 15-933, in the Supreme Court of the United States.

--Editing by Emily Kokoll.

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