

# 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. In the 109<sup>th</sup> Congress, the Energy Policy Act of 2005 (H.R. 6) has been passed by the House of Representatives; it contains a safe-harbor provision protecting any potential defendant, such as MTBE manufacturers and distributors, from claims asserting that MTBE is a “defective product,” a common standard for liability under products liability jurisprudence. Additionally, the H.R. 6 provision includes language applying the safe-harbor retroactively, potentially barring numerous 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.

Legal liability for methyl tertiary butyl ether (MTBE) contamination has played a prominent role in the debate over 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 would have dealt with MTBE in a variety of ways, although none of the proposals were enacted.<sup>1</sup> In the 109<sup>th</sup> Congress, the Energy Policy Act of 2005, H.R. 6, has passed the House of Representatives with a safe-harbor provision shielding certain parties from specified forms of liability associated with MTBE

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<sup>1</sup> Some legislative proposals, such as S. 2095, would have provided for the eventual discontinuation of MTBE use but would not have provided parties associated with MTBE with any special protections from liability. Other legislation, such as H.R. 6 from the 108<sup>th</sup> Congress, would have provided a safe-harbor provision protecting certain parties from specified forms of liability associated with MTBE contamination.

contamination.<sup>2</sup> Specifically, the H.R. 6 provision would exempt all potential defendants from liability arising from “defective product” claims for fuel additives, including MTBE, and fuels blended with such additives, so long as certain conditions are met. This MTBE safe-harbor would not insulate a responsible party from other liabilities, such as responsibility for environmental cleanup. The safe-harbor provision is also written to apply retroactively to September 5, 2003, thus barring claims made in 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 may 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 the current version of H.R. 6.

## 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>3</sup> Use of reformulated gasoline is required in areas that fail to meet federal ozone standards.<sup>4</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>5</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>6</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>7</sup> The EPA has studied the health effects of MTBE, and, so far, the agency has

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<sup>2</sup> The safe-harbor provision has also been included in the Reliable Fuels Act, S. 606 and appears to be substantially similar to the provision included in H.R. 6 from the 108<sup>th</sup> Congress. The safe-harbor does not appear in other comparable legislation that has been introduced in the 109<sup>th</sup> Congress, H.R. 1608 and S. 650.

<sup>3</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>4</sup> 42 U.S.C. § 7545.

<sup>5</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>6</sup> *Id.* at 1. For further information, see CRS Report RS21201, *Leaking Underground Storage Tanks: Program Status and Issues*, by Mary Tiemann.

<sup>7</sup> See Earl Ainsworth, *Protecting Water: Energy Bill Fuels Rush to File Pollution Claims*, 12 N.J. (continued...)

concluded that the associated risks are minimal at levels typically detected in drinking water. However, the agency continues to study the issue.<sup>8</sup>

## Liability

Title 15 of H.R. 6 (109<sup>th</sup> Congress) would address fuel additives. Section 1502 of that title contains the safe-harbor provision for manufacturers and other parties associated with MTBE and other fuel oxygenates. The section reads:

(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 (hereafter in this section 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>9</sup>

This language would potentially provide 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>10</sup> The liability shield would take effect so long as the cited statutory and regulatory requirements were complied with.<sup>11</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>12</sup> EPA regulations issued under the Clean Air Act define fuel and

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<sup>7</sup> (...continued)

LAW: WKLY. NEWSPAPER 2196 (Nov. 10, 2003).

<sup>8</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).

<sup>9</sup> H.R. 6, 109<sup>th</sup> Cong. § 1502(a) (2005).

<sup>10</sup> While the safe-harbor provision would apply 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>11</sup> H.R. 6, 109<sup>th</sup> Cong. § 1502(a) (2005).

<sup>12</sup> Blending of MTBE with fuel is typically done by refiners. Other additives may be blended at  
(continued...)

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>13</sup> Section 211 of the Clean Air Act appear to implicitly adopt this definition of “manufacturer,” and specifically indicates that the term encompasses importers.<sup>14</sup> Thus, it appears relatively clear that the applicability of the safe-harbor provision would depend upon compliance with section 211 of the Clean Air Act and any relevant EPA regulations by a potentially large group of manufacturers.

Assuming the safe-harbor’s applicability, the type of liability protection that would be provided would necessarily depend on the term “defective product,” which appears to refer to state products liability claims.<sup>15</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, courts apply strict liability instead of negligence as the standard for recovery.<sup>16</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>17</sup> A product with a manufacturing defect is one that is not in the condition in which it was designed to be.<sup>18</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>19</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>20</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>21</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

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<sup>12</sup> (...continued)  
different stages of production.

<sup>13</sup> 40 C.F.R. § 79.2 (2003).

<sup>14</sup> 42 U.S.C. § 7545(b), (o).

<sup>15</sup> *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. § 1 (1998).

<sup>16</sup> *See, e.g.*, Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3<sup>rd</sup> Cir. 1980).

<sup>17</sup> *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. § 2 (1998).

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

<sup>19</sup> *See, e.g., id.* § 2(b).

<sup>20</sup> *See, e.g., id.* § 2(c).

<sup>21</sup> *See, e.g., id.* § 1; Wright v. Newman, 735 F.2d 1073, 1077 (8<sup>th</sup> Cir. 1984).

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 likely apply to all three concepts of products liability and effectively prevent liability from attaching under such theories. Additionally, while the safe-harbor's applicability is conditioned upon certain actions taken by additive or blended-fuel manufacturers, the provision would likely apply 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 likely remove the liability shield for all potential defendants.<sup>22</sup>

Finally, while potential defendants could be shielded from defective products-related liability, it appears that they would remain susceptible to other types of legal claims. Indeed, the language of the provision specifically maintains 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 are not to be affected by the safe-harbor provisions.<sup>23</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 has indicated in H.R. 6 that the safe-harbor provisions would apply retroactively, meaning that the law, if enacted, would govern events in the past back to the specified date. The provision states:

(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>24</sup>

In this particular case, the safe-harbor's retroactive application would effectively bar products liability claims in several pending lawsuits. It is well-settled that Congress has the power to legislate retroactively, effectively closing off a remedy in the courts, under certain circumstances.<sup>25</sup> Primary among these circumstances is the requirement that there be no final decision in the case.<sup>26</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

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<sup>22</sup> H.R. 6, 109<sup>th</sup> Cong. § 1502(a) (2005).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 1502(b).

<sup>25</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. Bonjourn*, 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>26</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.

legislation has “a legitimate legislative purpose furthered by a rational means,” a standard that is quite deferential to the Congress.<sup>27</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>28</sup> The crux is straightforward: do the accrued MTBE causes of action that would be 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>29</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>30</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>31</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> *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

<sup>28</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).

<sup>29</sup> 28 U.S.C. § 1491(a).

<sup>30</sup> *See, e.g., Abraham-Youri v. United States*, 139 F.3d 1462, 1465 (Fed. Cir. 1997).

<sup>31</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.