

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

Filed January 11, 2007

SUPERIOR COURT

CRAIG WALTZ, ET AL. :
Plaintiffs :

V. : C. A. NO. PC 02-2436

EXXON MOBIL CORPORATION, f/k/a :
EXXON CORPORATION, and f/k/a :
MOBIL CORPORATION :
Defendants :

THEODORE GARILLE, Executive :
Director for the PASCOAG UTILITY :
DISTRICT :
Plaintiff :

V. : C. A. NO. PC 02-2437

EXXON MOBIL CORPORATION, f/k/a :
EXXON CORPORATION, and f/k/a :
MOBIL CORPORATION :
Defendants :

JANICE ST. OURS, Individually :
and on behalf of all other similarly :
situated plaintiffs :
Plaintiffs :

V. : C. A. NO. PC 03-0079

EXXON MOBIL CORPORATION, f/k/a :
EXXON CORPORATION, and f/k/a :
MOBIL CORPORATION :
Defendants :

**DECISION RE: DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' COMPLAINTS**

SAVAGE, J. Before this Court for decision are motions to dismiss filed by the defendants, pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil

Procedure, by which they seek to dismiss plaintiffs' complaints in these three related actions. Defendants argue that plaintiffs' claims of tortious liability are preempted by federal law. Defendants also argue that plaintiffs fail to state claims of civil conspiracy or illegal concert of action. For the reasons set forth below, this Court finds that plaintiffs' claims of tortious liability asserted against the defendants are not preempted by federal law and that plaintiffs state legally cognizable claims of civil conspiracy and illegal concert of action. Defendants' Rule 12(b)(6) motions to dismiss plaintiffs' complaints in these three related actions are therefore denied.

FACTS AND TRAVEL

Plaintiffs' claims stem from alleged contamination of their water supply by the gasoline additive methyl tertiary butyl ether ("MTBE"). MTBE is a chemical compound that is designed to increase the oxygen content of gasoline. MTBE is also highly soluble and travels faster and farther in water than other gasoline components. MTBE easily can infiltrate underground water reservoirs and contaminate wells that draw from underground aquifers where it can remain for decades at a time. MTBE imparts a foul taste and odor to water, rendering it unfit for human consumption. MTBE is a known animal carcinogen and been classified by the United States Environmental Protection Agency ("EPA") as a possible human carcinogen.

In 1990, Congress established the Reformulated Gasoline Program ("RFG Program") as part of the Clean Air Act.¹ The RFG Program requires the greatest reduction in emissions of ozone forming volatile organic compounds and emissions of toxic air pollutants achievable through the reformulation of conventional gasoline. 42

¹ The RFG program is codified in section 211(k), 42 U.S.C. § 7545(k), of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*

U.S.C. § 7545. The RFG Program also requires the nine largest metropolitan areas with the most severe summertime ozone levels to use reformulated gasoline. Id. Other ozone non-attainment areas may opt into the program. See 42 U.S.C. § 7545(k)(6). Reformulated gasoline is required to contain increased chemical oxygen content, enabling the fuel to burn cleaner and thus reduce the emission of pollutants. The RFG Program requires that reformulated gasoline consist of at least 2.0% oxygen by weight. See id. § 7545(k)(2). It also requires that gasoline contain 2.7% oxygen by weight during the wintertime in areas that are not in attainment for the NAAQS for carbon monoxide. See id. § 7545(m).

To meet the required oxygen levels required by the RFG Program, gasoline manufacturers add oxygenates. MTBE is such an oxygenate. The EPA has certified MTBE for use in the RFG Program. See id. § 7545(k)(4). Pursuant to the RFG Program, the EPA has issued regulations that list MTBE and several other oxygenates, including ethanol, as possible ingredients in gasoline. See 40 C.F.R. § 80.46 (2001). In promulgating the regulations for the RFG Program, the EPA “expects that MTBE and ethanol will be the most commonly used oxygenates during Phase I of the reformulated gasoline program.” Abundiz v. Explorer Pipeline Co., 2002 U.S. Dist. LEXIS 13120 (D. Tex. 2002) (citing Final Rule, Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Ref. 7716, 7732 (daily ed. Feb. 16, 1994)).

On January 1, 1995, the State of Rhode Island opted into the RFG Program and began using MTBE in gasoline throughout the state. Ten years later, however, the Rhode Island General Assembly passed legislation banning the use of MTBE in gasoline in the

state beginning on June 1, 2007. See R.I. Gen. Laws § 31-37-7.1(a) (“Beginning June 1, 2007, no person shall sell, deliver for sale, import, or cause to be imported into the state for sale any gasoline containing methyl tertiary-butyl ether (MTBE) or other ether oxygenates in quantities greater than one-half of one percent (0.5%) by volume.”) Rhode Island is joining at least 24 other states that have banned the use or sale of MTBE.

Plaintiffs Waltz, et al., Garille (as Executive Director for the Pascoag Utility District), and St. Ours (individually and on behalf of all other similarly situated plaintiffs), each filed actions against defendant Exxon Mobil Corporation and its predecessors in interest, Exxon Corporation and Mobil Corporation. According to plaintiffs’ complaints,² gasoline containing MTBE has been discharged from an Exxon Mobil service station located in Pascoag, Rhode Island and has contaminated the drinking water supply. Plaintiffs seek to hold defendants liable in each case for harm caused due to the presence of MTBE in the gasoline that has seeped into the ground. Plaintiffs allege that defendants misled both the EPA and the public in failing to acknowledge the dangerous nature of MTBE. Plaintiffs’ complaints seek to hold defendants liable in tort and also assert claims against them of civil conspiracy and illegal concert of action.

Defendants each have filed motions to dismiss pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. Defendants argue that plaintiffs’ claims must be dismissed because they are preempted by federal law. Defendants also argue that the allegations in plaintiffs’ complaints are inadequate to support claims for civil conspiracy and illegal concert of action.

² While each of these plaintiffs has filed a separate complaint, all three complaints contain the same allegations. As a result, for the purposes of this Decision, the Court will address plaintiffs’ complaints collectively.

STANDARD OF REVIEW

In determining whether to grant a Rule 12(b)(6) motion to dismiss, this Court “assumes the allegations contained in the complaint[s] to be true and views the facts in the light most favorable to the plaintiffs.” Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). This Court should not grant the motion “unless it appears to a certainty that [the plaintiffs] will not be entitled to relief under any set of facts which might be proved in support of [their] claim[s].” Id. at 1037 (quoting Bragg v. Warwick Shoppers World, Inc., 227 A.2d 582, 584 (R.I. 1967)).

ANALYSIS

Preemption

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Traditionally, the states have had “great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” Oxygenated Fuels Ass'n v. Davis, 163 F. Supp. 2d 1182, 1188 (D. Cal. 2001) (citing Metro. Life Ins. Co. v. Massachusetts Travelers Ins. Co., 471 U.S. 724, 756, 105 S. Ct. 2380, 2397, 85 L. Ed. 2d 728 (1985)). Federal law, however, supersedes state law in the following instances: (1) express preemption of state law by the United States Congress; (2) a comprehensive regulatory scheme in the area effectively removing the entire field from the state’s dominion; in other words, implied or field preemption; or (3) conflict

preemption, that is, situations where compliance with both state and federal requirements is impossible or where state law is an obstacle to the achievement of federal objectives. In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 611 (D.N.Y. 2001).

Defendants state that they are not pursuing an express preemption theory. Thus the provision of the federal Clean Air Act relevant to state action is not relevant to this motion.³ Defendants likewise do not argue that field preemption applies. However, defendants do argue that the plaintiffs' claims are barred by the doctrine of conflict preemption in that allowing plaintiffs to pursue their state law tort claims would frustrate the purposes and objectives of the federal Clean Air Act. Defendants maintain that federal law permits and effectively requires that MTBE be used in gasoline. They contend, therefore, that allowing state law tort claims of this nature would be an obstacle to the objectives of Congress in enacting the RFG Program.

In response, plaintiffs contend that the RFG provision of the Clean Air Act does not limit their state law claims. Plaintiffs assert that their claims address water contamination from leakage of gasoline containing MTBE. According to plaintiffs, their claims are not brought to regulate emissions control, but concern groundwater contaminated by MTBE gasoline and are thus outside the scope of the Clean Air Act. Plaintiffs argue that their claims are not conflict preempted because Congress only enacted a performance-based standard for oxygen content in gasoline and left the choice of which oxygenate to use to the marketplace.

³ "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" 42 U.S.C. § 7545(c)(4)(A).

To find plaintiffs' claims preempted, this Court must determine either that: (1) it would be impossible for a private party to comply with both the state law sought to be imposed and the federal requirements; or (2) the state law sought to be imposed would provide an obstacle to the achievement and execution of the full purposes and objectives of Congress. See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 614 (D.N.Y., 2001). Defendants argue that this case is controlled by the United States Supreme Court's decision in Geier v. American Honda Motor Co., 529 U.S. 861, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000). Defendants assert that plaintiffs' state tort law claims which seek to impose liability because defendants selected one federally authorized compliance option rather than another are an "obstacle to the accomplishment and execution" of the federal regulation. According to defendants, the reasoning in Geier dictates that the Clean Air Act leave the choice of oxygenates to gasoline producers.

In Geier, the United States Supreme Court held that a state law product liability lawsuit was preempted by the Department of Transportation's Federal Motor Vehicle Safety Standards ("FMVSS"). Plaintiffs in Geier, if they had been successful, would have created a state common law standard that would have required all passenger cars to contain airbags. Id. at 865. The Supreme Court found that such a standard was preempted by the FMVSS. According to the Court, the FMVSS "deliberately provided the manufacturer with a range of choices among different passive restraint devices." Id. at 875; Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 672 (9th Cir. 2003). The Court in Geier declared that "[t]hose choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread

consumer acceptance -- all of which would promote FMVSS 208's safety objectives.” Geier, 529 U.S. at 875. Thus, “a rule of state tort law imposing a duty to install airbags would have presented an obstacle to the variety and mix of devices that the federal regulation sought.” Id. at 881. Defendants argue that the Clean Air Act would be similarly frustrated if the plaintiffs were allowed here to proceed with their state tort law claims.

A number of courts have rejected preemption challenges to MTBE regulations based on the holding in Geier. See Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 672 (9th Cir. 2003); Abundiz v. Explorer Pipeline Co., 2002 U.S. Dist. LEXIS 13120 at *10-17 (N.D. Tex. July 17, 2002); In re MTBE Litig., 175 F. Supp. 2d at 614-16; Pataki, 158 F. Supp. 2d at 260 n.6; but see Holten v. Chevron U.S.A., 2001 U.S. Dist. LEXIS 17599 at *10 (D.N.J. July 3, 2001).⁴ These courts have rejected applying Geier to MTBE cases for a number of reasons. First, in Geier, the Department of Transportation’s interpretation of the relevant statute indicated that the suit was preempted, and the Supreme Court gave deference to the agency’s determination. Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 672 (9th Cir. 2003). In contrast, the EPA has made no such determination in MTBE cases. Id. Moreover, “the Supreme Court in Geier found abundant evidence in the administrative history of the FMVSS to indicate that it was intended to give auto manufacturers a choice of safety restraints.” Id. (citing Geier at 875-83). There is no evidence, however, to suggest that Congress intended the Clean Air Act

⁴ Defendants also cite Kubas v. Unocal Corp. in support of their argument of preemption, a case in which a California Superior Court found that a rule of state tort law imposing a duty of using an oxygenate other than MTBE would have prevented the defendant from complying with the Clean Air Act and therefore the plaintiffs’ claims were preempted. Kubas v. Unocal Corp., 2001 WL 1940938 (Cal. Super. Ct. Aug. 23, 2001). Although the case was decided a year later than the Geier decision, the court in Kubas does not cite at all to the decision in Geier to reach its conclusion.

to provide gasoline producers with a similar choice of oxygenates. Id. “The legislative history of the Clean Air Act does not support a conclusion that Congress meant to give gasoline producers an unconstrained choice of oxygenates.” Id. Congress enacted the RFG Program for the “purpose of protecting and enhancing the quality of air resources.” In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 615 (citing Pataki, 158 F. Supp. 2d at 251). The RFG Program set a minimum standard for oxygen content for gasoline to be used in certain designated non-attainment areas. Id. Although the EPA has approved blends of gasoline for the RFG Program, including that with MTBE, “unlike the federal regulation at issue in Geier, the RFG Program does not deliberately seek to employ various ‘means-related’ objectives, such as maintaining a mix of oxygenates or creating a gradual phase-in plan for the use of oxygenates in order to further its goal of reducing air pollution.” Id. The RFG Program “does not mandate the use of MTBE, nor was it ‘intended to maintain the status quo or to protect certain fuel additives.’” In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d at 615 (quoting Pataki, 158 F. Supp. at 256); see also Exxon Mobil v. U.S.E.P.A., 217 F.3d 1246, 1253 (9th Cir. 2000) (“The legislative history [of the 1990 Clean Air Act amendments] suggests that fuel neutrality on the part of the [EPA] Administrator was a goal of the provisions . . .”). Here, in contrast to the rule sought to be imposed in Geier, plaintiffs are not urging that a specific oxygenate be used. Accordingly, this Court agrees with the decisions of the previously cited courts and rejects defendants’ assertion that the rule in Geier applies to plaintiffs’ claims.

A recent United States Supreme Court case also warrants mention. In Bates v. Dow Agrosciences L.L.C., 125 S. Ct. 1788, 1793 (U.S. 2005), the Supreme Court was

asked to determine whether the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) preempted a state law claim for damages in a case involving pesticide labeling requirements. In finding that plaintiff’s claims were not preempted, the Court noted that there is a longstanding presumption “that Congress does not cavalierly preempt state-law causes of action.” Bates, 544 U.S. at 449, 125 S. Ct. at 1801 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 116 S. Ct. 2240 (1996)). The powers of the states are not superceded by federal law unless that was the “clear and manifest” purpose of Congress. Id. at 1802. The Court also explained that “[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.” Id. at 1801. As was true in Bates, there is no indication here that Congress, in enacting the oxygenate provisions of the Clean Air Act, clearly intended to preempt state law causes of action such as those brought by the plaintiffs.⁵

Moreover, Justice Scheindlin’s recent decision concerning a similar motion to dismiss in In Re Methyl Tertiary Butyl Ether Products Liability Litigation in the United States District Court for the Southern District of New York buttresses this Court’s finding that plaintiffs’ claims here are not barred by the doctrine of conflict preemption. In Re Methyl Tertiary Butyl Ether Products Liab. Litig., No. 1:00-1893, 2006 WL 1738233 (S.D.N.Y. June 23, 2006). Facing very similar allegations as those asserted by plaintiffs in this case, defendants in In Re Methyl Tertiary Butyl Ether claimed that plaintiffs’ tort

⁵ Indeed, Congress appears to have contemplated permitting some state law causes of action, as evidenced by the Clean Air Act’s citizen suit savings provision, codified at 42 U.S.C. § 7604(e). That provision states, in relevant part, that: “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).” 42 U.S.C. § 7604(e); see In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 175 F. Supp. 2d 593, 613 (D.N.Y. 2001).

allegations were preempted by the Clean Air Act. In response to defendants' claims that amendments to the Clean Air Act listing MTBE as a viable oxygenate preempted state tort law from effectively eliminating MTBE as an option, the court stated:

The 1990 amendments to the Clean Air Act gave the states the flexibility to set emissions standards. They were not intended to give unfettered discretion to defendants to use any oxygenate, regardless of its safety. Every other court to grapple with state regulations banning MTBE or tort claims based on defendants' use of MTBE has found that the RFG Program does not result in federal preemption.

Id. at *8 (citations omitted).⁶ The court further reasoned that "even if the tort duty is characterized as a duty not to use MTBE and defendants comply with that duty...that would not present an obstacle to a federal purpose." Id. at *4. Based on the clear weight and logic of this authority, defendants' motions to dismiss in this case, grounded on claims of federal preemption, are denied.

Civil Conspiracy / Illegal Concert of Action

In addition to arguing that plaintiffs' claims are preempted, defendants also seek dismissal of plaintiffs' claims of civil conspiracy and illegal concert of action. Defendants assert that it is inappropriate to bring such claims involving joint liability against a single defendant. Defendants also argue that plaintiffs have failed to allege an underlying intentional tort, a necessary element of conspiracy and illegal concert of action claims. Defendants argue that plaintiffs' claims of strict product liability and negligence cannot support a secondary claim for conspiracy. Defendants further argue that plaintiffs cannot establish that the tort of deceit is sufficient to support their

⁶ The court provided eight different examples of cases in which state regulations banning MTBE or tort claims based on defendants' use of MTBE have been found to not result in federal preemption. The examples include decisions from New York state and federal courts, the Ninth Circuit Court of Appeals, a Texas federal court, and California state courts. See In Re Methyl Tertiary Butyl Ether, 2006 WL 1738233 at *8 n. 104 (collecting cases).

conspiracy and illegal concert of action claims because they cannot establish a necessary element of that tort, namely that defendants intended to induce plaintiffs' reliance on a false representation. Finally, defendants argue that Rhode Island's Anti-SLAPP statute bars plaintiffs' claims of conspiracy and illegal concert of action.

Plaintiffs respond by asserting that they have indeed pleaded underlying intentional torts against multiple defendants. Plaintiffs contend that they have alleged that defendants engaged in a willful failure to warn, intentional misrepresentation and suppression of information related to MTBE as well as intentional marketing of a defective product. Plaintiffs also argue that reliance on defendants' alleged misrepresentations on the part of others not a party to this lawsuit can support their claims of deceit. Plaintiffs also contend that, unlike their conspiracy claims, their illegal concert of action claims do not require proof of an underlying intentional tort. Finally, plaintiffs' assert that the Anti-SLAPP statute does not require dismissal of their claims.

The Rhode Island Supreme Court recently explained the necessary components of a civil conspiracy claim. In order to prove a civil conspiracy, plaintiffs must show evidence of an unlawful enterprise. Read & Lundy, Inc. v. Wash. Trust Co., 840 A.2d 1099, 1102 (R.I. 2004). Civil conspiracy is not an independent basis of liability. Id. Rather, it is a means for establishing joint liability for other tortious conduct; therefore, it "requires a valid underlying intentional tort theory." Id. (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000)).

Plaintiffs allege that defendants purposefully and deceitfully withheld information from "distribution channels, downstream handlers, gasoline station owners, EPA, Congress, retail gas station operators and owners, and state governmental agencies,

including the State of Rhode Island.” Essentially, plaintiffs’ allege that defendants wrongfully and knowingly agreed to mislead the public and others regarding the hazards inherent in gasoline formulated with MTBE. See State v. Lead Induc. Ass’n, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct., 2001). These allegations, if proven true, could form a sufficient basis for plaintiffs’ civil conspiracy or illegal concert of action claims.⁷ As it does not “appear[] to a certainty that [the plaintiffs] will not be entitled to relief under any set of facts which might be proved in support of [their] claims,” Giuliano v. Pastina, Jr., 793 A.2d at 1037, therefore, the plaintiffs’ claims of civil conspiracy and illegal concert of action survive the defendants’ motion to dismiss.

Anti-SLAPP Statute

Rhode Island’s Anti-SLAPP statute was “enacted to prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning by granting those activities conditional immunity from punitive civil claims.” Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004) (citing Hometown Properties, Inc. v. Fleming, 680 A.2d 56, 61 (R.I. 1996)). Defendants assert that the Anti-SLAPP statute demands dismissal of plaintiffs’ claims of civil conspiracy and illegal concert of action because those claims rely on statements made to governmental entities involving issues of public concern. Plaintiffs’ dispute this contention and argue that the Anti-SLAPP statute does not apply. They contend that their claims are not based on petitioning activity, but are based on an alleged scheme by the defendants to create and introduce a known defective product into the stream of commerce without warning the public of its dangers. According to plaintiffs, their causes of action do not arise solely

⁷ As a result, it is unnecessary for this Court, at this stage of the proceedings to decide whether the latter type of claim requires proof of an underlying intentional tort or whether either of the claims can be proven as a matter of law.

from defendants' protected free speech or petitioning activity. As a result, plaintiffs argue that this action is not the sort of lawsuit that the Anti-SLAPP law was intended to prevent.

This appeal for Anti-SLAPP immunity, however, is premature. The proper vehicle for asserting an Anti-SLAPP defense is not a motion to dismiss but a motion for summary judgment that will allow the hearing justice to consider information extrinsic to the pleadings. Alves, 857 A.2d 748; Hometown Props., Inc., 680 A.2d at 63 ("It is clear that the General Assembly intended a hearing justice to consider more than the pleadings in ruling on a motion made pursuant to [R.I. Gen. Laws] § 9-33-2, and thus . . . the 'appropriate motions' or 'other appropriate means' described in the 1995 amendment [to the Anti-SLAPP statute] would be a motion for summary judgment."). Accordingly, the defendants' request for dismissal of plaintiffs' civil conspiracy and illegal concert of action claims on the basis of Anti-SLAPP immunity is denied.

CONCLUSION

The defendants' motions to dismiss plaintiffs' complaints, pursuant to Rule 12(b)(6), on the grounds of federal preemption and failure to state claims of civil conspiracy and illegal concert of action are denied. Counsel shall confer and submit to this Court forthwith for entry three separate agreed upon forms of order, for filing in each case, which are consistent with this Decision.