



# DAILY ENVIRONMENT



## REPORT

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### Drinking Water

#### **Court Dismisses Property Owners' Lawsuit Against Motiva for MTBE Contamination**

**A** property appraiser who lacks contamination-related experience is not qualified to offer expert testimony about the loss of value attributable to stigma, a federal district court in New Jersey ruled in an MTBE case Jan. 20 (*Player v. Motiva Enterprises*, D.N.J., 02-3216, 1/20/06).

Excluding a long-time, licensed appraiser from testifying about the amount of stigma damages a group of New Jersey property owners were entitled to, the U.S. District Court for the District of New Jersey said the appraiser's lack of experience with contamination issues made him unqualified under *Daubert v. Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579 (1993), to testify as an expert.

The district court also held that the expert's methodology at arriving at his value estimates was "entirely unreliable."

Although most of the property owners had no evidence of any contamination from methyl tertiary butyl ether (MTBE) on their properties, the court said that the expert had compared their properties to another site in New Jersey with "profoundly contaminated residential properties."

Relying on such a comparison to arrive at stigma damages, the court said, was "highly misleading."

The district court dismissed the property owners' lawsuit against Motiva Enterprises, finding that without the expert's testimony, the owners had failed to present enough evidence to go to trial on their allegation that gasoline-related pollutants from a nearby service station had polluted their drinking water and depressed their property values.

**MTBE Found in Wells.** In April 2000, soon after high concentrations of the gasoline additive MTBE were discovered in a local drinking well in Camden County,

N.J., the New Jersey Department of Environmental Protection discovered that a service station owned and operated by Motiva had discharged MTBE and other volatile organic compounds.

The state ordered Motiva to investigate the discharge, to implement an interim treatment system, and to submit a remedial action work plan.

Later that spring, the Department of Environmental Protection shut down the service station. In addition to remediating the MTBE-contaminated well, Motiva also was required to sample and test potable wells regularly on 40 nearby residential properties.

Of the 40 wells that were tested in 2000, small amounts of MTBE were detected in 13. Monitoring continued in area wells over the next several years.

In 2002, Jeff Player and 26 others who owned residential properties near the Motiva service station filed suit against Motiva alleging both state statutory and common law causes of action.

Although only eight of the plaintiff property owners' wells ever tested positive for any gasoline-related compounds, all 27 property owners alleged that the stigma associated with contamination had reduced their property values.

The plaintiffs claimed stigma damages, and offered the testimony of Daniel McDonald, a licensed appraiser with 22 years of experience appraising property values in New Jersey.

According to McDonald, the value of those properties with no evidence of contamination was reduced by 35 percent and the value of those 8 properties that at one time had tested positive for contaminants was reduced by 66 percent.

Moving to exclude McDonald's expert testimony, Motiva argued that McDonald was unqualified to testify about stigma damages because he had no experience appraising contaminated properties. Motiva also argued that McDonald used a flawed methodology to arrive at his estimates of how much stigma damage attached to the owners' properties.

**No Contamination Experience.** Agreeing with Motiva, the district court held that despite McDonald's long tenure as a real estate appraiser he was unqualified to testify about the contamination's impact.

"Although McDonald is an experienced appraiser, no evidence indicates that he has any experience appraising contaminated properties or is qualified to value the effects of stigma on property values," the court said. "Just as a psychologist experienced in assisting individuals to find work may be unqualified to testify about the general availability of jobs in the economy, an individual able to appraise an uncontaminated property may have no grounds for appreciating the devaluation of the same property under unique conditions of contamination or stigma."

In support, the court cited a pair of opinions by the U.S. Court of Appeals for the Third Circuit for the rule that "where a proposed expert's area of experience is adjacent to, but not actually encompassing, the subject matter of his testimony, he may be deemed unqualified" (*Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000) and *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110 (3d Cir. 1987)).

In *Aloe Coal*, a pre-*Daubert* opinion, the Third Circuit held a tractor salesperson unqualified to give expert testimony about the cause of a tractor fire.

In *Elcock*, a post-*Daubert* opinion, the Third Circuit said that it while it harbored "misgivings" on the issue, the appeals court could not find that a trial court had abused its discretion in concluding that a psychologist experienced in helping disabled individuals find jobs was qualified to testify about vocational rehabilitation for an injured plaintiff.

While finding no abuse of discretion, the Third Circuit added in *Elcock* that it would have excluded the psychologist from testifying as an expert because "he does not appear particularly qualified to testify on the macro-level regarding the number of jobs in the national or local economy that the disabled individual is able to perform."

Instead, the appeals court said, the psychologist "seems most qualified to testify on a micro-level regarding the ability of a disabled individual to return to a specific job."

Judge Robert B. Kluger wrote the opinion.

Keith A. McKenna with McKenna, Mulcahy & McKenna in Montclair, N.J., represented Player and the other property owners. Jeffrey W. Moryan with Connell Foley in Roseland, N.J., represented Motiva Enterprises.

BY STEVEN PATRICK