



Ninth Circuit Upholds Dismissal of Global Warming Action on Displacement Grounds

Benjamin A. Blume • 312.382.1112 • bblume@cozen.com

Daisy Khambatta • 312.382.3113 • dkhambatta@cozen.com

The U.S. Court of Appeals for the 9th Circuit affirmed the dismissal of a complaint filed by the Native Village of Kivalina and the city of Kivalina (collectively Kivalina) against 22 of the world's largest energy producers alleging damages caused by global warming. *Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. filed Sept. 21, 2012). Kivalina alleged that the barrier island on which the village is located is becoming uninhabitable. The district court dismissed the complaint on the basis of standing and the political questions doctrine. The 9th Circuit affirmed on an alternative ground, holding that the Clean Air Act would "displace" Kivalina's claims, citing the recent U.S. Supreme Court opinion in *Connecticut v. Am. Elec. Power Co., Inc.*, 131 S.Ct. 2527 (2011). The 9th Circuit reasoned that Congress had already spoken on the issues raised by Kivalina because they fell within the scope of the Act, and there was no remedy under federal common law. The court acknowledged that its holding would not "aid Kivalina, which itself is being displaced by the rising sea." Nevertheless, the court directed Kivalina to "the legislative and executive branches of our government, not the federal common law."

The city of Kivalina sits on the tip of a six-mile barrier island on the northwest coast of Alaska, approximately 70 miles north of the Arctic Circle. The city has long been home to members of the Village of Kivalina, a self-governing, federally recognized tribe of Inupiat Native Alaskans. Kivalina's survival has been threatened by erosion resulting from wave action and sea storms for several decades.

In its complaint, Kivalina asserted that massive greenhouse gas emissions emitted by 22 oil and energy companies, including ExxonMobil Corporation, BP America Inc., Chevron Corp. and others (collectively Energy Producers), resulted in global warming, which constituted a "substantial and unreasonable interference with public rights, including the rights to use and enjoy public and private property in Kivalina." The complaint also charged the Energy Producers with acting in concert to conspire to mislead the public about the science of global warming. Kivalina sought \$400 million in damages.

In response, the Energy Producers moved to dismiss for lack of subject matter jurisdiction, arguing that Kivalina's allegations raised inherently non-justiciable political questions. To adjudicate its claims, they argued, the court would have to determine the point at which greenhouse gas emissions become excessive, without guidance from the political branches. They also asserted that Kivalina lacked Article III standing to raise its claims because it alleged no facts showing its injuries were "fairly traceable" to the actions of the Energy Producers.

The district court agreed with the Energy Producers and held Kivalina lacked standing to bring its claims, some of which raised political questions that precluded judicial consideration. The court found that the issues presented by the claims were matters more appropriately left for determination by the executive or legislative branch. Finally, given the remoteness of its injury claim, the court

held Kivalina could not establish it was within sufficient geographic proximity to the Energy Producers' alleged "excessive" discharge of greenhouse gases to infer causation.

On appeal, the 9th Circuit quickly disposed of Kivalina's claims. It held there was no need to engage in a complex analysis because the Supreme Court recently held that federal common law addressing domestic greenhouse gas emissions had been displaced by Congressional action under the Clean Air Act. In *Connecticut*, 131 S.Ct 2527, the plaintiffs sought to abate emissions produced by many of the same Energy Producers named in Kivalina's action. The Supreme Court held "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement" of such emissions. Based on the Supreme Court's holding, Kivalina had no redress under the common law and the 9th Circuit directed them to seek relief from the legislative and executive branches of government.

In a lengthy concurring opinion, Justice Pro argued that Supreme Court authority on displacement of a claim for injunctive relief did not necessarily call for displacement of a damages claim, and would have held only that Kivalina lacked standing because they could not meet the burden of alleging facts showing they could plausibly trace their injuries to the Energy Producers.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

Benjamin A. Blume at 312.382.1112 or bblume@cozen.com

Daisy Khambatta at 312.382.3113 or dkhambatta@cozen.com