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Native Village of Kivalina v. ExxonMobil Corp.

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***Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 2012 WL 4215921 (9th Cir. 2012).**

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ABSTRACT

The Court of Appeals for the Ninth Circuit's decision in *Kivalina* follows the United States Supreme Court's recent trend in denying the use of federal common law claims for redress of damages allegedly caused by greenhouse gas emissions. Under the doctrine of displacement, the court concluded that the concerns raised by the Native Village of Kivalina are addressed under the Clean Air Act, precluding a federal common law nuisance claim. However, the court noted that additional analysis by future federal courts may be appropriate in addressing whether damages are also displaced. The court did not preclude the possibility for redress under a state common law nuisance claim. The court held that federal common law was not available to resolve the issues raised by Kivalina, and that only the legislative and the executive branches could provide a remedy.

I. INTRODUCTION

Kivalina is an appeal of a district court decision sustaining defendants' motion to dismiss for lack of subject matter jurisdiction.[1] The defendants ("Energy Producers") represent almost every major oil and gas producer in the United States.[2] The plaintiffs ("Kivalina") argued that global warming, caused by the defendants' production of greenhouse gas ("GHG") emissions, had "severely eroded land upon which the city [Kivalina] was situated."[3] Kivalina claimed the Energy Producers' GHG emissions interfered with the plaintiffs' rights to use and enjoy both

[1] *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012).
[2] *Id*.
[3] *Id*.

public and private property.[4] Kivalina also asserted a civil conspiracy claim against the Energy Producers, claiming they acted in concert "[T]o mislead the public about the science of global warming."[5] Kivalina sought damages under the federal common law of nuisance for past GHG emissions. The Ninth Circuit held that Kivalina could not assert a federal nuisance claim because the Clean Air Act ("CAA"), a federal legislative action addressing GHG emissions, displaces federal common law.[6]

II. FACTUAL AND PROCEDURAL BACKGROUND

Kivalina is an Alaskan village of 400 residents located on the tip of a barrier reef in northwestern Alaska about seventy miles north of the Arctic Circle.[7] Ninety-seven percent of the villagers are members of the federally recognized tribe of Inupiat Alaskan Natives.[8] The village is imperiled by increasing erosion due to changes in weather patterns and sea level rise.[9] In the winter months coastal sea ice forms, protecting the village.[10] However, in recent years, the ice forms later, breaks up earlier and covers a smaller area.[11] In their complaint, the villagers alleged that global warming is causing the changes to the sea ice, which in turn, is damaging their property.[12] They further assumed that defendants are responsible for global warming and climate change, due to their participation in producing GHG emissions.[13] Kivalina argued the production of GHG emissions is a federal and state public nuisance.[14] As a result, Kivalina asserts that the Energy Producers should bear responsibility for interferences with the villagers'

[4] *Id*. at 854.
[5] *Id*.
[6] *Id*.
[7] *Native Village of Kivalina*, 696 F.3d at 853.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Native Village of Kivalina*, 696 F.3d at 853.
[14] *Id*. at 854.

property rights.[15] Furthermore, they argue that the Energy Producers know about the effects of GHG emissions, and are working to actively "mislead the public about the science of global warming."[16] Finally, Kivalina seeks damages associated with past GHG emissions and an injunction to prevent further current release of GHG emissions.

The Energy Producers responded to the claim by filing a motion to dismiss for lack of subject matter jurisdiction.[17] They argued that Kivalina raised nonjusticiable political questions and furthermore lacked standing.[18]

The district court agreed roundly with the Energy Producers and found that the claim of federal nuisance could not be resolved because "there was insufficient guidance as to the principles or standards that should be employed to resolve the claims at issue."[19] Furthermore, reaching a conclusion under the federal common law theory of public nuisance would have forced the court to set a standard for GHG emissions, as well as decide who should bear the cost for impacts caused by GHG emissions.[20] The court found such determinations are legislative and executive questions and could not be decided by the judiciary.[21] The court also found Kivalina lacked standing, as they could not demonstrate a "substantial likelihood" connecting the Energy Producers' conduct to the erosion damaging the village.[22] On appeal, the Ninth Circuit reviewed the decision based on whether Kivalina's argument that GHG emissions released by the Energy Producers contribute to global warming and cause a public nuisance is "viable under federal common law" or if it has been displaced by legislative action.[23]

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[15] *Id*.
[16] *Id*.; *citing* Fed. R. Civ. P. 12 (2009).
[17] *Id*.; *see also* Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Native Village of Kivalina*, 696 F3d at 854.
[22] *Id*.
[23] *Id*. at 855.

III. ANALYSIS

A. Majority Opinion

The court held that the test for whether congressional legislation pre-empts federal common law claims is to look first at whether any statutes directly address the issue in question and then at whether the legislation is a sufficient remedy to the exclusion of federal common law.[24] The court found that the Clean Air Act ("CAA") already addresses Kivalina's claims, and therefore, federal common law is displaced.[25] It clarified that Kivalina's claims are unique in that it seeks a remedy for past emissions, not an injunction to cease existing ones.[26]

In reaching its conclusion that Kivalina's claims are displaced by the CAA, the court considered previous holdings dealing with transboundary pollution where the doctrine of displacement was found to be separate from the remedy asserted,[27] and where displacement of one cause of action would displace all associated remedies.[28] The court found that the CAA displaced the plaintiff's claims by already addressing the issue of interstate pollution.[29] It next concluded that regardless of whether the CAA offered a remedy, the Supreme Court has held it would still displace available common law remedies because Congress acted to occupy the field by passing the legislation, thereby filling any gap otherwise requiring a common law remedy.[30] Finally, even though the challenged conduct occurred before the Supreme Court held the CAA displaces common law claims based on GHG emissions, it was not an issue to retroactively applying the decision.[31]

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[24] *Id*.
[25] *Id*. at 856.
[26] *Id*.
[27] *Id*. at 857, *citing Exxon Shipping Co. v. Baker,* 554 U.S. 471, 484, 128 S.Ct. 2605, 2616, 171 L.Ed.2d 570 (2008).
[28] *Native Village of Kivalina*, 696 F.3d at 856.
[29] *Id*. at 857.
[30] *Id*.
[31] *Id*.

The court stated that there could be cases where "the lack of a federal remedy may be a factor to be considered in determining whether Congress has displaced federal common law,"[32] opening a potential for further analysis of whether claims without a remedy may need additional attention under the theory of displacement.[33] The court held that in this case, however, it did not matter that GHG standards set by the Environmental Protection Agency ("EPA") occurred after the damage to Kivalina because Congress had "spoken directly" to the issue through legislation, which can be retroactively applied.[34]

In conclusion, the court echoed the Supreme Court's previous determination that the CAA precluded a federal common law nuisance claim. As a result, Kivalina's claim for damages due to GHG emissions was effectively displaced by the CAA.[35] Furthermore, the court found that Kivalina's civil conspiracy claim "falls with the substantive claim," and it concluded its analysis there.[36] The court pointed out that the proper source for a remedy lies with legislative and executive branches if the CAA falls short as a remedy for damages caused by GHG emissions.[37]

B. Concurring Opinion

In a detailed concurring opinion, a district judge chronicled the case law developing the question of "whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim."[38] The concurring opinion clearly advocates for the traditional application of the displacement doctrine, where if the federal common law is displaced then so is any claim for damages.[39] The opinion notes that *Exxon* departs from the other cited case law, holding instead that the "Court has rejected 'attempts to sever remedies from their causes of

[32] *Id*., *citing Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 92 S.Ct. 1385, 1392, 31 L.Ed.2d 712 (1972).
[33] *Id*., *citing City of Milwaukee v. Illinois, 451 U.S. 304,* 314, 325, 101 S.Ct. 1784, 1791, 68 L.Ed.2d 114 (1981).
[34] *Id*. *citing Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).
[35] *Native Village of Kivalina*, 696 F.3d at 858.
[36] *Id*.
[37] *Native Village of Kivalina*, 696 F.3d at 858.
[38] *Id*. at 859.
[39] *Id*. at 861.

action.'"[40] The concurrence clarifies that while federal law cannot sever damages from a claim otherwise precluded by displacement, state law can when an injunctive remedy is sought.[41] The concurrence argues, "[d]isplacement of the federal common law does not leave those injured by air pollution without a remedy. Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law."[42]

The concurrence agreed with the lower court's holding that Kivalina did not have standing.[43] The concurrence added that Kivalina was not able to "plausibly trace their injuries to the Appellees."[44] It concludes that a private party should not be able to "pick and choose amongst all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages."[45]

IV. CONCLUSION

Kivalina opens wide the door for state court actions on the issue of nuisance due to global warming. However, standing will remain a daunting barrier for the village of Kivalina in asserting a state nuisance claim. The court provides small hope in its discussion of non-remediable claims. The court hints that, if there is no federal remedy, perhaps the CAA is not sufficient for addressing GHG emissions. Further case law at the federal level is necessary, however, to provide the missing analysis to reach that conclusion. It appears the concurring opinion would like to see that opportunity extinguished.

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[40] *Id*. at 862, *citing Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008).
[41] *Native Village of Kivalina* 696 F.3d at 862, *citing Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 255–56, 104 S.Ct. 615, (pinpoint) 78 L.Ed.2d 443 (1984).
[42] *Navitve Village of Kivalina*, 696 F.3d at 866.
[43] *Id*. at 867.
[44] *Id*.
[45] *Id*. at 869.