Bloomberg BNA

Toxics Law Reporter™

PUBLIC NUISANCE

CLIMATE CHANGE

The Death of a Tort: The Ninth Circuit's Decision In *Native Village of Kivalina v. ExxonMobil Corp.*

By R. Trent Taylor

The federal common law of public nuisance died at 9:37 a.m. PDT on September 21, 2012, after a long illness. He was 74. He is survived by his children, the Clean Air Act and the Clean Water Act, and his mother, environmental common law. The cause of death was the Ninth Circuit's decision in *Native Village of Kivalina v. ExxonMobil Corp.*,[1] in which a three-judge panel affirmed the trial court's dismissal of the plaintiffs' action for damages against multiple oil, energy, and utility companies based on allegations that greenhouse gas emissions emitted by the defendants have resulted in global warming, which, in turn, has severely eroded the land where the plaintiffs sit and threatens them with imminent destruction. He had been on life support since the U.S. Supreme Court's decision in *AEP v. Connecticut* mortally wounded him in 2011. In related news, his mother, environmental common law, is also seriously ill as a result of the *Kivalina* decision and has been admitted to the hospital in critical condition. Her prognosis at this time is unclear.

Rarely are lawyers able to witness the death of a tort. When a tort does die, it generally occurs over a long period of time and is usually due to simple disuse. But lawyers who follow appellate decisions closely perhaps came as close as they ever will to witnessing such a death on September 21, 2012, when the *Kivalina* decision was issued by the Ninth Circuit. This decision, if left standing, effectively ends the life of federal common law. More importantly, it has grave implications for the future of environmental common law more generally, and could lead to a sea-change in how environmental common-law claims are litigated in the future.

[1] No. 09-17490, 2012 BL 242717 (9th Cir. Sept. 21, 2012).

R. Trent Taylor, a partner at McGuireWoods LLP in Richmond, Va., focuses on defending complex toxic tort and products liability cases with an emphasis on public and private nuisance litigation, environmental contamination suits, and food safety issues. His experience includes defending clients in class actions, MDL proceedings, nationwide mass-tort litigation, and appellate cases involving complex scientific and medical issues. The author can be reached at rtaylor@mcguirewoods.com.

Decision in *Kivalina*

Despite the fact that the trial court in 2009 dismissed the case on political question and standing grounds, the chief focus of the Ninth Circuit's decision was the arcane and rarely-invoked doctrine of displacement. This was not a complete surprise since the U.S. Supreme Court had decided the *AEP v. Connecticut*[2] case last year on the displacement doctrine, and the legal theory at issue in *Kivalina* was the federal common law of pub-

[2] 131 S. Ct. 2527, 2535, 180 L. Ed. 2d 435 (2011).

 ISSN 0887-7394

lic nuisance, just as it was in *AEP*. It is axiomatic that ''there is no federal general common law,''[3] but in certain areas of national concern, such as environmental protection, federal courts have the power to fill in ''statutory interstices,'' and if necessary, even ''fashion federal law.''[4] This specialized federal common law has been invoked—albeit rarely—by federal courts in the past.[5] However, when there is a federal statute that speaks directly to the issue posited by the federal common law action, then courts find that the federal common law has been displaced—a concept similar to preemption.[6]

Judge Sidney Thomas, writing for the panel in *Kivalina*, relied heavily on the U.S. Supreme Court's decision in *AEP*: ''We need not engage in [a] complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance'' that ''has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.''[7] Judge Thomas does note, however, one key distinction between the facts in *Kivalina* and those in *AEP*—''Kivalina does not seek abatement of emissions; rather, Kivalina seeks damages for harm caused by past emissions.''[8] He found though that ''the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement,''[9] relying most heavily on the 1981 decision by the U.S. Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.[10] He concluded that ''under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies.''[11]

Judge Thomas then confronted an argument raised by the Plaintiffs—that there could not possibly be displacement when there is no federal statutory remedy for monetary damages as a result of climate change. Judge Thomas noted, however, that ''if the federal common law cause of action has been displaced by legislation, that means that 'the field has been made the subject of comprehensive legislation' by Congress,'' and that ''[w]hen Congress has acted to occupy the entire field, that action displaces any previously available federal common law action'' including remedies.[12] He thus concludes that ''*AEP* extinguished Kivalina's federal common law public nuisance damages action, along with the federal common law public nuisance abatement actions.''[13] In conclusion, he states that ''the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law''[14]—an apparent nod to the district court's reliance on the political question doctrine.

Concurrence

Another member of the panel, District Court Judge Philip Pro, sitting by designation, wrote a lengthy concurrence that wrestled with the displacement issue in much more detail. He explained that he wrote separately for two reasons: (1) because there is ''tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim''; and (2) because he wanted to express his view that Kivalina lacked standing.[15] His concurrence stands in marked contrast to Judge Thomas's decision who resolved the displacement issue very matter-of-factly and without any real acknowledgement that there was any tension in Supreme Court authority.

Judge Pro explains that the Supreme Court's decision in the 2008 case of *Exxon Shipping Co. v. Baker*[16] appears to be a ''departure''[17] from the 1981 case relied upon by Judge Thomas—*Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.[18] He goes through *Exxon* in meticulous detail as well as a case relied on by the Court in *Exxon—Silkwood v. Kerr-McGee Corp*.[19] Ultimately though, he reaches the same conclusion, albeit one after much more hand-wringing, as Judge Thomas did in his decision. He does so by deeming the *Exxon* result an outlier, arguing that it ''stray[ed]'' from and is ''at odds'' with *Middlesex*.[20]

He, like Judge Thomas, finds that the lack of a federal remedy is not dispositive:

> Consequently, the lack of a federal damages remedy is not indicative of a gap which federal common law must fill. Congress could have included a federal damages cause of action in the CAA, and it may add one at any time, but thus far it has opted not to do so. By supplying a federal remedy Congress chose not to provide, this Court would not be 'filling a gap,' it would be 'providing a different regulatory scheme' than the one chosen by Congress.[21]

His concurrence concludes with a detailed analysis of why he believes Kivalina lacks standing as well.[22]

Outlook

The plaintiffs in *Kivalina* now have appealed the decision *en banc* to the full Ninth Circuit and may ask the U.S. Supreme Court to grant *certiorari* soon as well. It is unlikely that either will decide to review the case. Indeed, *en banc* review is granted in far less than one percent of cases.[23] However, two considerations make further review by either the full Ninth Circuit or the U.S. Supreme Court at least in the realm of possibility. First, the Ninth Circuit grants *en banc* review more than many other circuit courts of appeal.[24] In addition, the

---

[3] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).
[4] *AEP*, 131 S. Ct. at 2535.
[5] *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 4 (1981).
[6] *AEP*, 131 S. Ct. at 2537.
[7] *Kivalina*, 2012 BL 242717 at *6.
[8] *Id*.
[9] *Id*.
[10] 453 U.S. 1, 4 (1981).
[11] *Kivalina*, 2012 BL 242717 at *7.
[12] *Id*.
[13] *Id*.
[14] *Id*. at *8.
[15] *Id*.
[16] 554 U.S. 471 (2008).
[17] *Kivalina*, 2012 BL 242717 at *12.
[18] 453 U.S. 1, 4 (1981).
[19] 464 U.S. 238 (1984).
[20] *Kivalina*, 2012 BL 242717 at *15.
[21] *Id*. at *16.
[22] *Id*. at *16-20.
[23] Second Circuit Courts Committee, ''En Banc Practices in the Second Circuit: Time for a Change?'' at p. 4 (Federal Bar Council, July 2011).
[24] Administrative Office of the United States Courts. *2011 Annual Report of the Director: Judicial Business of the United States Courts*. Washington, D.C.: 2012 at p. 36 (Table S-1).

  TXLR ISSN 0887-7394

Ninth Circuit has granted *en banc* review recently in cases related both to environmental statutes as well as preemption, suggesting that its members have an interest in some of the issues that appear in *Kivalina*.[25] Moreover, we also know that the U.S. Supreme Court has an interest in this issue as it granted *certiorari* in *AEP*. It could possibly jump at the chance to decide issues that were not before it in *AEP*, especially when at least, according to Judge Pro, there is a tension between two U.S. Supreme Court decisions on the issue of displacement of monetary damage claims.[26] Thus, while further review is still unlikely, the chances are better than usual for it to occur in *Kivalina*.

Significance

There are three significant implications as a result of this decision. The first was expected, the second was a little surprising but nothing earth-shattering, and the third has the potential to significantly alter environmental common-law litigation in the future.

1. Another Nail in the Coffin for Climate Change Litigation

First, the *Kivalina* decision is yet another nail in the coffin for climate change litigation. This is not unexpected as the U.S. Supreme Court's decision in *AEP v. Connecticut* gravely wounded the legal theory that emitters of greenhouse gas emissions could be held liable for climate change effects through the common law. Though the *AEP* decision only barred claims for injunctive relief under the federal common law of public nuisance, even the most optimistic plaintiffs saw little hope that the remaining climate change suits, despite some differences with *AEP*, would survive. The only real question was not whether they would survive, but the cause of death—political question, standing, proximate causation, or displacement. The *AEP* decision had left the door only slightly ajar for more climate change suits, and the *Kivalina* decision, assuming it stands, shuts it almost completely.

In many ways, the *Kivalina* decision is more significant than the *AEP* decision. Many forget that *AEP* was one of the earliest-filed climate change suits and that it only sought injunctive relief.[27] *Kivalina*, on the other hand, was the last significant climate change suit that was filed, and as such, it was seen as more evolved and having a higher likelihood of success—a Version 3.0 of the climate change suit.[28] Furthermore, it sought money damages for individual plaintiffs, and if successful (or even if it merely survived a motion to dismiss), could have been a popular template for other members of the plaintiffs' bar to pursue, given the potential for a large monetary payout. Many were watching the *Kivalina* case closely as ***the*** test case for climate change litigation. Now that the Ninth Circuit has affirmed its dismissal, the legal theory underlying climate change litigation appears to be in shambles. The only possible basis for other climate change suits would be state common law,[29] and as discussed below, the *Kivalina* decision suggests that even that possibility might be foreclosed.

2. The Federal Common Law of Public Nuisance: Rest in Peace

The federal common law of public nuisance died after a long illness at 9:37 a.m. PDT on September 21, 2012. We already knew from the *AEP* decision that federal common law actions seeking injunctive relief for environmental pollution were dead. That still left the door slightly ajar though for monetary damage claims. The *Kivalina* decision firmly shuts that door, leaving no further apparent need for the federal common law of public nuisance. It extends the displacement doctrine arguably further than it has ever before been extended and leaves virtually no exceptions or loopholes. Assuming the *Kivalina* decision stands (and other circuits eventually adopt it), it is unlikely that we will see any more federal common law claims based on public nuisance ever again—it is now, for all intents and purposes, an extinct tort.

3. The Death of Environmental Common Law More Generally?

The final significant implication of the *Kivalina* decision is that it could significantly strengthen the preemption defense for defendants in all environmental common law actions, under both federal and state law. In fact, one could even argue that it could potentially lead to the death of environmental common law. This requires a bit of imagination, but a close look at both Judge Thomas's and Judge Pro's decisions suggest that such an argument is not complete hyperbole.

Displacement and preemption are closely related concepts. Though the *Kivalina* court did not consider preemption and though the displacement defense is easier to apply than the preemption defense, the language in the decision is so thoroughly one-sided on the displacement issue that it cannot help but strengthen the preemption defense as well. In fact, Judge Thomas's opinion comes very close to collapsing the distinction between displacement and preemption when he states: ''[w]hen Congress has acted to occupy the entire field, that action displaces any previously available common law action.''[30] Similarly, Judge Pro's concurrence discusses a preemption case—*Silkwood*—in the context of the displacement analysis and seems to acknowledge that the analysis is similar.[31] The most difficult aspect of any preemption defense in environmental common law actions has always been convincing a court to apply it to monetary damage claims, especially when the federal statutes at issue, usually the Clean Air Act and Clean Water Act, do not provide such a remedy for plaintiffs.[32] But the *Kivalina* decision overcomes both of those difficulties and makes a compelling case for why displacement, and by implication preemption,

[25] *See, e.g., Karuk Tribe of California v. U.S. Forest Service, et al.*, No. 05-16801; *Stengel v. Medtronic Inc.*, No. 10-17755.

[26] *Kivalina*, 2012 BL 242717 at *8.

[27] *AEP*, 131 S. Ct. at 2532.

[28] Coyle, Marcia, ''High court could melt climate-change cases,'' The National Law Journal | Law.com (2010).

[29] The plaintiffs in *Kivalina* asserted state common law claims in their Complaint, but the trial court ''declined to exercise supplemental jurisdiction over the state law claims.'' *Kivalina*, 2012 BL 242717 at *4.

[30] *Kivalina*, 2012 BL 242717 at *7.

[31] *Id.* at *12-14.

[32] *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

should be applied to bar common law environmental actions.

Conclusion

Put simply, this case has the potential to rewrite environmental law in a very significant way. An undercurrent in environmental litigation for years has been this fundamental question: To what extent should any environmental common law tort claims, state or federal, be permitted in today's world where there are federal and state statutes as well as regulations regarding every conceivable subject matter?

With the *Kivalina* decision, the balance of power on this issue shifts firmly in favor of those asserting the preemption defense. Trial courts are likely to be very receptive to an argument that common law claims in other environmental contamination suits are preempted by federal and state statutes—a very good development for those who are likely to be defendants in such suits.

  TXLR ISSN 0887-7394