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Ninth Circuit Affirms District Court in Kivalina Climate-Change Case

On Friday, September 21, 2012, the Ninth Circuit Court of Appeals issued an important opinion in the developing area of climate-change litigation, affirming the dismissal of a lawsuit that threatened the energy sector with potentially limitless liability.

In *Native Village of Kivalina, et al. v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. Sept. 21, 2012), the city of Kivalina—located on a small island off the coast of Alaska—sued several oil and power companies to recover US$400 million, alleging in public nuisance claims that the companies "tortiously" contributed to the global warming that has severely eroded the island's shoreline, requiring its residents to be relocated. The district court dismissed Kivalina's claims on two grounds: 1) plaintiffs lack standing because their injuries are not "fairly traceable" to any of the defendants' alleged wrongdoing; and 2) because the issues raised by the complaint require a legislative, not a judicial, solution, the claims are barred by the political question doctrine.

The Ninth Circuit, without reaching the issue of standing, affirmed the dismissal on the ground that federal public-nuisance actions based on global warming have been displaced by the Clean Air Act.

In its opinion, the Ninth Circuit followed the Supreme Court's decision in *AEP v. Connecticut*, announced on June 20, 2011. In *AEP*, the Supreme Court put part of the public nuisance climate-change genie back in the bottle, when it vacated a Second Circuit decision and rejected federal public nuisance claims seeking injunctive relief. It held that the Clean Air Act displaces private nuisance law where plaintiffs base nuisance claims on allegations that emission of greenhouse gases have contributed to global warming, at least when plaintiffs are seeking an injunction. *AEP v. Connecticut*, 131 S. Ct. 2527 (2011). Click here to view the opinion.

AEP largely controlled the outcome in *Kivalina*, where the Ninth Circuit affirmed dismissal of Kivalina's lawsuit based on *AEP's* displacement analysis. The Ninth Circuit held that the doctrine of displacement applies not just to federal climate-change claims seeking injunctive relief but to those claims seeking damages as well.

White & Case Partners Doug Halsey and David Draigh filed amicus briefs in both cases on behalf of the Washington Legal Foundation. In *Kivalina*, the amicus brief showed that the plaintiffs did not and could not allege facts from which a court could conclude that their injuries are fairly traceable to the defendants' conduct—particularly because the defendants were only 19 of literally countless worldwide contributors to global warming, and because greenhouse gases, no matter where emitted, merge in the atmosphere into an undifferentiated mass that may contain emissions from prior decades or even centuries. Click here to view White & Case's amicus brief.

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Judge Philip M. Pro, who concurred with the majority, agreed, stating that Kivalina could not fairly trace its alleged injury to the mass of emissions "undifferentiated in the global atmosphere," and therefore did not have standing "to pick and choose against all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages." Indeed, Kivalina sought to impose boundless liability, threatening the viability of entire industrial sectors, even though those sectors are minor contributors to greenhouse gas levels, their emissions are lawful and they undoubtedly provide services of great social utility.

In *AEP*, where eight states had sued utilities claiming their permitted emissions contribute to global warming and should be judicially enjoined as a public nuisance, White & Case's amicus brief supported the TVA and four private utilities that operate in 21 states: American Electric Power Company, Duke Energy Corporation, Southern Company, and Xcel Energy Inc. The District Court had dismissed the suit as presenting non-justiciable political questions. 406 F. Supp. 2d 265 (S.D.N.Y. 2005). But the Second Circuit reversed, 582 F.3d 309 (2d Cir. 2009), finding that the claim was an "ordinary tort" and that the States' allegation that the utilities contributed to global warming was sufficient to satisfy the causation element of standing. Click here to view White & Case's amicus brief. As noted above, however, the Supreme Court reversed the Second Circuit, and there is a straight line from *AEP* to the Ninth Circuit's affirmance of the dismissal of Kivalina's claims.

Although the *Kivalina* and *AEP* decisions effectively foreclose federal common law claims based on the effects of climate change, plaintiffs may still attempt to pursue state common law claims, however tenuous, in state court. White & Case represents numerous industries that have been the primary targets in these climate-change lawsuits, including clients in the power, oil and gas, and mining sectors. The firm has extensive experience in complex environmental litigation in state and federal courts.