County of San Mateo v. Chevron Corp.—Ninth Circuit affirms order remanding global-warming suit against energy companies to California state court

San Mateo County, Marin County and the City of Imperial Beach filed suits in state court against a large group of energy companies alleging "causes of action [under California law] for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass" arising from their "'extraction, refining, and/or formulation of fossil fuel products; their introduction of fossil fuel products into the stream of commerce; their wrongful promotion of their fossil fuel products and concealment of known hazards associated with use of those products; and their failure to pursue less hazardous alternatives available to them.'" Similar suits were filed thereafter by the County of Santa Cruz and the Cities of Santa Cruz and Richmond. The defendants removed the six suits to federal court asserting the existence of federal jurisdiction under various sections of Titles 28 and 43, United States Code. The district court found none provided such jurisdiction and remanded the suits to state court. *County of San Mateo v. Chevron Corp.,* 294 F. Supp. 3d 934 (N.D. Cal. 2018).

The Ninth Circuit dismissed the subsequent appeal on the ground that it lacked jurisdiction under the "non-reviewability clause" of 28 U.S.C. § 1447(d) "because the district court's order remanded the complaints on subject matter jurisdiction grounds, and the non-reviewability clause applies when a district court bases its remand order on subject matter jurisdiction or nonjurisdictional defects." *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020). However, the Supreme Court granted the energy companies' petition for writ of certiorari, vacated the Court of Appeals' judgment, and remanded for further consideration in light of *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). There, the Court "interpreted § 1447(d) as permitting appellate review of all the defendants' grounds for removal under that section." *Chevron Corp. v. San Mateo County, Cal.*, 141 S. Ct. 2666 (2021). On remand, the Ninth Circuit panel addressed, often in substantial detail, each of the energy companies' grounds for federal jurisdiction and affirmed the district court. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, & 18-16376, 2022 WL 1151275 (9th Cir. Apr. 19, 2022).

- 28 U.S.C. § 1331. "The Energy Companies argue that the Counties' global-warming claims arise under federal common law and are removable under two exceptions to the well-pleaded complaint rule: (1) the exception articulated in *Grable* [*& Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005)]; and (2) the doctrine of complete preemption." As the panel explained, "*Grable* affirmed a long line of Supreme Court cases that recognized an exception to the well-pleaded complaint rule when 'federal law is a necessary element of the [plaintiff's] claim for relief.'" Following *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), which involved a somewhat similar claim, it stated "even if we assume that the Counties' complaints 'could give rise to a cognizable claim' under federal common law, ... the global-warming-related tort claims do not 'require resolution of a substantial question of federal law' because they do not require any interpretation of a federal statutory or constitutional issue, and are 'displaced by the Clean Air Act.'" The panel added that "even if the complaints raise federal policy issues that are national and international in scope, implicate foreign affairs and negotiations with other nations, and require uniform standards, they do not 'raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331.'" *Oakland* also disposed of the complete-preemption assertion because it held "that '[t]he Clean Air

Act is not one of the three statutes that the Supreme Court has determined has extraordinary preemptive force' and conclude[e] that it does not 'meet either of the two requirements for complete preemption'"—i.e., "complete preemption applies when Congress '(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action.'"

The panel next rejected the energy companies' contention that federal question jurisdiction existed "because the tort claims arose on a federal enclave." Here, however, the plaintiffs "have not alleged that their claims are based on torts taking place on a federal enclave. Rather, their complaint raises state-law claims arising from injuries to real property and infrastructure within their local jurisdictions." The companies themselves, moreover,

> allege[d] only that some of the defendants engaged in some conduct on federal enclaves that may have contributed to global warming, which allegedly caused the rising sea levels that resulted in the injuries that are the basis for the Counties' claims. The Energy Companies do not allege how much of that conduct occurred on federal enclaves. The connection between conduct on federal enclaves and the Counties' alleged injuries is too attenuated and remote to establish that the Counties' cause of action is governed by the federal law applicable to any federal enclave.

- 43 U.S.C. § 1349(b)(1). The Outer Continental Shelf Lands Act "gives federal courts jurisdiction over actions 'arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals.'" Citing this jurisdictional grant, the defendants contended that "[t]he Counties allege that their injuries were caused in part by the Energy Companies' cumulative fossil-fuel extraction; and a portion of this extraction took place on the outer Continental Shelf (OCS) because some of the Energy Companies have conducted (and continue to conduct) petroleum exploration, development, and production on the outer Continental Shelf." The panel disagreed, construing OCSLA to have adopted through 43 U.S.C. § 1333, which provides in part that federal law applies to Continental Shelf operations "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State[,]" the "federal enclave model's legal framework." Accordingly, "we read the phrase 'aris[e] out of, or in connection with' in § 1349(b)(1) as granting federal courts jurisdiction over tort claims only when those claims arise from actions or injuries occurring on the outer Continental Shelf." Applying the rule that "'a dispute must have a sufficient nexus to an operation on the OCS to fall within the jurisdictional reach of the OCSLA[,]'" the panel deemed the connection between the Continental Shelf operations and the plaintiffs' alleged injuries "too attenuated to give rise to jurisdiction."

- 28 U.S.C. § 1442(a)(1). Removal is available to "'[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office[.]'" A private party may invoke this provision if " (a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and [the] plaintiff's claims; and (c) it can assert a colorable federal defense.'" Settled precedent nonetheless has established that "a person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services." In this case, the fuel-sales contracts relied upon

by the energy companies fell within that exclusion because "[s]upplying gasoline to the Navy for resale to its employees is not an activity so closely related to the government's implementation of federal law that the person faces 'a significant risk of state-court "prejudice."'" A unit agreement between one energy company and the Navy to coordinate extraction activities in a common oil field, as an "arm's length business arrangement[,]" was similarly insufficient.

- 28 U.S.C. § 1452(a). This section provides, with exceptions, for removal of actions if the district court would have jurisdiction under 28 U.S.C. § 1334 under which "'the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11[.]'" The energy companies contended "that the Counties' complaints have a sufficiently close nexus to the Peabody Energy and Texaco, Inc. bankruptcy cases." The panel held otherwise, relying on the "general rule" that "proceedings that merely require the court to read a confirmed plan to determine whether it bars certain claims that arose before the confirmation date are not proceedings '*affecting* the interpretation [or] implementation' of a [bankruptcy] plan."

- 28 U.S.C. § 1331(1). One energy company raised the claim that "because the Counties' claims are based on fossil fuel extraction that occurs on vessels engaged in maritime activities, they fall within the Constitution's grant of original jurisdiction over 'all Cases of admiralty and maritime Jurisdiction.'" This assertion foundered on "[t]he 'saving to suitors' clause of § 1333(1) [which] 'leave[s] state courts "competent" to adjudicate maritime causes of action in proceedings "in personam," that is, where the defendant is a person, not a ship or some other instrument of navigation.'" Consequently, "when a plaintiff brings a maritime cause of action against a person in state court, a federal court lacks admiralty jurisdiction over that claim. ... In order to remove such a claim to federal court, the defendant must assert some other basis of jurisdiction, such as diversity jurisdiction."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/19/18-15499.pdf