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BP Deepwater Securities Claim Not Time-Barred, Judge Says

By **Ed Beeson**

Law360, New York (October 01, 2014, 3:15 PM ET) -- A Texas federal judge overseeing multidistrict securities litigation against BP PLC over the Deepwater Horizon disaster on Tuesday sided with plaintiffs in a question about statutes of repose that the U.S. Supreme Court had been slated to take up next week in a case known as IndyMac, but he also dismissed claims against two BP executives.

In an order, District Court Judge Keith P. Ellison denied the oil giant's motion to dismiss a complaint brought by plaintiffs — including the New York City Employees' Retirement System — on the basis that they had exceeded the five-year statute of repose covering claims based on statements made before April 2008.

BP argued that the plaintiffs could not avail themselves of the tolling provisions established in *American Pipe & Construction Co. v. Utah*, a landmark 1974 Supreme Court ruling that held that if a class action is filed on time, the statute of limitations is suspended for all class members until the class is denied certification.

Recognizing a split of appellate opinions on the question, Judge Ellison said he was "persuaded" by the Tenth Circuit's reading of *American Pipe*, which said the tolling provision applied equally to the Securities Act of 1933's statute of repose. The Second Circuit took a different view in 2013, when it quashed a shareholder class action against IndyMac Corp. and other banks over their mortgage-backed securities business.

"Viewing the filing of a class action as a 'prefiling' of all unnamed class members' claims means that the concern identified by the Second Circuit in *IndyMac* — that applying *American Pipe* tolling somehow abridges a defendant's substantive right to be free from suit after a specific period of time—is illusory," Judge Ellison wrote in his order.

"So long as the defendant has fair notice of the type and number of claims that could be asserted against it, which should be required for *American Pipe* tolling in the first instance, then there is no unfair surprise when a class member assumes responsibility for its own individual claim during the course of the class action, or after class status has been denied," he said.

The plaintiffs' suit, brought in April 2013, alleged that BP and individual executives had made material misrepresentations about the company's commitment to safety in the run-up to the 2010 Deepwater explosion, as well as its ability to clean up such a spill and the extent of its likely responsibility once the disaster occurred. Such misstatements cost plaintiffs tens of millions of dollars when BP's stock price plunged in the wake of the disaster.

Tuesday's ruling is significant in light of the Supreme Court's decision this week to **strike its previously granted** writ of certiorari to the Public Employees' Retirement System of

Mississippi, which sought to overturn the Second Circuit decision in the IndyMac case. The justices were scheduled to hear oral arguments Oct. 6, but on Monday the order was ruled “improvidently granted” amid settlement talks between the parties.

An attorney for the plaintiffs, Matthew Tuccillo of Pomerantz LLP, called Judge Ellison’s order on the statute of repose “very significant” in light of the IndyMac case being removed from the high court docket. A BP spokesman declined to comment.

Also on Tuesday, Judge Ellison said he was dismissing all shareholder claims against David Rainey, BP’s vice president of exploration for the Gulf of Mexico, on the grounds that the plaintiffs had failed to state viable claims against him under Section 20(a) of the Securities Exchange Act of 1934.

The judge also dropped 20(a) claims against Andrew Inglis, who was chief executive of BP Exploration & Production Inc. between 2007 and 2010, on the same grounds, though other claims against him survived.

The plaintiffs, including the New York City Employees' Retirement System, are represented by Pomerantz LLP and Abraham Watkins Nichols Sorrels Agosto & Friend.

BP is represented by Sullivan & Cromwell LLP and Andrews Kurth LLP.

The MDL is In re: BP PLC Securities Litigation, case number 4:10-md-02185, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Stephanie Russell-Kraft. Editing by Kelly Duncan.
