District Court in BP Securities Class Action Dismisses Non-U.S. Securities Claims on the Basis of Morrison and Effective Preemption

February 20, 2012 by Louis M. Solomon

In re BP p.l.c. Securities Litigation, MDL No. 10-md-2185 (S.D. Tex. Feb. 2012), is a 129-page decision comprehensively addressing the allegations underlying and the securities claims arising from the BP oil spill of April 20, 2010. The portion of the decision relating to international practice and dispute resolution addresses the Court's jurisdiction and retention of jurisdiction over non-U.S. securities claims — that is, claim on behalf of all persons and entities who purchased or acquired BP ordinary shares in domestic transactions executed on foreign exchanges (the "Ordinary Share Purchasers").

Although the Court granted in part and denied in part the defendants' motions to dismiss the U.S.-based securities claims, it granted in full defendants' motion directed at the Ordinary Share Purchases. The noteworthy portions of the decision for purposes of international practice include the following:

The Court considered "preliminarily whether the Ordinary Share Purchasers can bring Exchange Act claims at all in light of the Supreme Court's recent decision in" *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010). In the *decision* in *Morrison*, held that Section 10(b) of the Securities Exchange Act of 1934 did not provide a private cause of action in "foreign-cubed" cases—cases where foreign plaintiffs sue foreign defendants for misconduct in connection with securities traded on foreign exchanges (hence "foreign cubed"). The Court rejected over 40 years of lower-court jurisprudence – which focused on where "conduct" and "effects" occurred or would be felt to determine the reach of Rule 10b-5. Instead the Supreme Court held that Section 10(b) reaches frauds only where "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange". We have posted on *Morrison* many times.

As applied to the Ordinary Share Purchases of BP, the District Court applied Morrison, shall we say, hook, line, and sinker. It held that *Morrison* precluded the claims and went on to reject two arguments the plaintiffs made to distinquish *Morrison:* First, the Court rejected any arguments that "hinges on the residencyof the investors and the locus of the purchase decision". The Court rejected the allegations showing that "pivotal aspects of the purchases" were made in the United States". Citing only district court decisions — mostly from the Second Circuit, which the Court acknowledged had "extensive securities experience" — the Court held that "the addition of a U.S. investor . . . would be insufficient tocreate liability under section 10(b)". Waiving the same hand as nearly all other district courts have since *Morrison,* the Court said that "courts have refused to adopt" technical readings in the effort to avoid the *Morrison* result. In a clear favorite for most colorful quote on this

issue, the Court quoted the District Court in Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010) :

“the conduct and effect analysis as applied to § 10(b) extraterritoriality disputes is now dead letter. Plaintiffs’ cosmetic touch-ups will not give the corpse new life.”

It was also important to the District Court here that no other basis for jurisdiction existed over the English law claims asserted as part of the Ordinary Share Purchases. The Court found no jurisdiction under any other federal statute and refused to permit supplemental jurisdiction under 28 U.S.C. sec. 1367(c).

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