

5th Circ. Won't Revive \$266B FCA Suit Over BP Atlantis Regs

By **Suevon Lee**

Law360, Los Angeles (March 14, 2017, 9:36 PM EDT) -- The Fifth Circuit on Tuesday affirmed a Texas federal judge's disposal of a \$266 billion False Claims Act suit involving BP PLC's Gulf of Mexico-based Atlantis oil production facility after saying there were no material facts in dispute over whether BP properly certified engineering designs.

A three-judge panel pointed out that the U.S. Department of the Interior in a 2011 report concluded that former BP contractor Kenneth Abbott's allegations that BP falsely certified compliance with regulatory requirements in order to secure a permit to produce oil in the Gulf lacked merit.

"Rarely does the pursuit of an individual's FCA claims lead to an investigation requested by Congress," the panel noted in its seven-page ruling. "The DOI report considered many of the same arguments advanced before us now by plaintiffs and nonetheless found that the Atlantis was in compliance with those regulations relating to certification."

The ruling upholds U.S. District Judge Lynn N. Hughes' grant of summary judgment to BP in August 2014 on grounds that Abbott and co-plaintiff Food & Water Watch Inc. didn't have standing to bring suit and failed to present evidence BP had made misrepresentations to the government.

Abbott and Food & Water Watch, an advocacy group, filed their suit against the oil giant in 2009, alleging that the way in which BP organized and stored engineering drawings created unsafe conditions at the Atlantis platform.

Their suit also alleged BP had made false claims to the government about its safety procedures in order to support its entitlement to produce oil on government-owned submerged land in the Gulf of Mexico.

The suit demanded \$266 billion in treble damages for alleged harm suffered by the U.S., and also brought Outer Continental Shelf Lands Act, or OCSLA, claims.

Judge Hughes' 2014 opinion and subsequent denial of the reconsideration request prompted an appeal by the plaintiffs, who said the judge showed "remarkable and unacceptable hostility" toward the whistleblowers and also "mocking hostility and sarcasm" in an opinion that was "undeniably derisive, offensively insulting and unmistakably hostile."

In his 2014 ruling, Judge Hughes lambasted Abbott and Food & Water Watch for bringing an "unprincipled case," as neither the former contractor nor the public interest group had sufficient ties to

the Atlantis oil and gas platform. He further stated that the "genesis of the suit is a disgruntled layman's speculation about complex laws and engineering, abetted by ideologues."

In their appeal, the whistleblowers argued that the district judge ignored clear evidence in granting BP summary judgment and later denying their reconsideration request. They claimed, among other things, that the FCA action was grounded in Abbott's firsthand observations as project services lead on the Atlantis project and that Judge Hughes ignored submitted evidence that engineers who inspected the engineering drawings found BP in violation of OCSLA regulations.

But the Fifth Circuit on Tuesday wasn't convinced to overturn the ruling.

The panel said the conclusions in the Interior Department's report were not fully rebutted by the plaintiffs' evidence so as to create a genuine dispute of material fact when it came to the FCA claims.

It also agreed with the lower court that Abbott and Food & Water Watch lacked standing to bring the OCSLA claims, saying they had failed to plead individualized inquiries, which instead "appear to be generalized and undifferentiated."

The panel said, "These alleged injuries could occur to anyone who uses the Gulf regularly, works near the Gulf, or lives or owns property near the Gulf, i.e., millions of people."

A representative for Food & Water Watch did not immediately respond to request for comment Tuesday.

U.S. Circuit Judges Patrick E. Higginbotham, Edith H. Jones and Catharina Haynes sat on the panel for the Fifth Circuit.

Abbott is represented by David L. Perry and Rene Marie Haas of Perry & Haas, Gerald M. Birnberg of Andersen LLP and Jennifer Bruch Hogan of Hogan & Hogan. Food & Water Watch is represented by Mary M. Whittle of Earthjustice. Both whistleblowers are represented by Edward A. Mallett of Mallett Saper Berg LLP.

BP is represented by Lynne Liberato, William Feldman and Mark R. Trachtenberg of Haynes & Boone LLP; Jonathan Andrew Hunter of Liskow & Lewis PLC; Otway B. Denny Jr., Anne M. Rodgers, Daniel M. McClure, Katherine Dudas Mackillop, Barclay Richard Nicholson and Peter Andrew Stokes of Norton Rose Fulbright US LLP and Damond R. Mace of Squire Sanders LLP.

The case is Kenneth W. Abbott et al. v. BP Exploration & Production Inc. et al., case number 16-20028, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Jeff Sistrunk and Shayna Posses. Editing by Catherine Sum.