IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
January 4, 2019

Lyle W. Cayce
Clerk

No. 18-30273

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,

Requesting Parties–Appellees,

v.

CLAIMANT ID 100262795,

Objecting Party–Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-28

Before STEWART, Chief Judge, and KING and OWEN, Circuit Judges.

PER CURIAM:*

This is an appeal from the denial of a claim by Claimant ID 100262795 (Claimant) under the Settlement Program established following the *Deepwater Horizon* oil spill. The Claims Administrator concluded that the Claimant failed the tests for whether its losses were caused by the oil spill. The test at issue involves a comparison of Claimant's revenue during a period of "three

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

consecutive months between May-December 2010" with Claimant's revenue during the same period in different years. Claimant organized its financial data into four- or five-week periods that Claimant calls "accounting months," but the Claims Administrator converted Claimant's data into calendar months before performing the test. An Appeal Panel within the Settlement Program overturned the denial of the claim. The district court reinstated the denial. Claimant appeals, arguing that the district court misapplied the Settlement Agreement and previous *Deepwater Horizon* precedent. We affirm the district court's judgment.

I

In April 2010, an explosion on the *Deepwater Horizon*, a mobile offshore drilling unit leased by BP Exploration & Production, Inc., BP America Production Company, and BP, P.L.C. (collectively, BP), caused the discharge of millions of gallons of oil into the Gulf of Mexico.[1] Two years later, BP entered into the "*Deepwater Horizon* Economic and Property Damages Settlement Agreement" with a class of individuals and entities allegedly injured by the *Deepwater Horizon* oil spill. The Settlement Agreement created the Settlement Program under which claims for settlement benefits are reviewed by the Claims Administrator, whose decisions can be appealed to an Appeal Panel.

Businesses seeking settlement benefits as compensation for economic losses "must establish that their loss was due to or resulting from the Deepwater Horizon Incident" by meeting the applicable "causation requirement[]." The Settlement Agreement imposes different causation requirements on businesses located in different geographic "zones." Claimant is located in Zone D. Businesses located in Zone D can establish causation

[1] *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 418 (5th Cir. 2013).

under any one of six causation tests set forth in Exhibit 4B of the Settlement Agreement.

The test at issue in this case is the "V-Shaped Revenue Pattern" (V-test). To meet the requirements of the V-test, a business must show (1) a "downturn: a decline of an aggregate of 15% or more in total revenues over a period of three consecutive months between May-December 2010 compared to the same months in the Benchmark Period selected by the claimant," and (2) a "later upturn: an increase of an aggregate of 10% or more in total revenues over the same period of three consecutive months in 2011 compared to 2010." Claimants can choose to use 2009, 2008 and 2009, or 2007 through 2009 as the "Benchmark Period."

Claimant, a wholesale food distributor, submitted a business economic loss claim to the Settlement Program. In support of its claim, Claimant provided calculations that it contends comply with the V-test. Claimant's accountant used the "4-4-5" financials that Claimant created in its ordinary course of business to perform the calculations. Claimant's 4-4-5 financials divide a year into four quarters, each consisting of two four-week periods and one five-week period. These accounting periods do not correspond exactly with the months of the Gregorian calendar.

The Claims Administrator denied the claim after finding that Claimant did not satisfy any of the causation tests laid out in Exhibit 4B, including the V-test. The Claims Administrator used the information in Claimant's financials to calculate Claimant's revenue by calendar month before performing the V-test. The Claims Administrator calculated Claimant's revenue by calendar month using the method in Policy 218, a Settlement Program policy under which "the Program's accountants have the ability to convert . . . 13-period revenue and expense statements into a twelve month year by allocating each period's revenue and expense items into their

respective months." Under that method, a Program accountant determines the average revenue per day in each accounting period, multiplies that number by the number of days in that period in each calendar month, and then adds together the revenue from different periods attributable to the same calendar month. As the Policy itself explains,

> if Period 1 starts on 1/1 and ends on 1/28 and Period 2 starts on 1/29 and ends on 2/25, 100% (28 days/28 days) of the Period 1 revenue and expenses will be included in January as well as 10.71% (3 days/28 days) of Period 2 revenue and expenses. The remaining 89.29% (25 days/28 days) of the Period 2 revenue and expenses will be included in February.

Claimant appealed the denial of its claim to an Appeal Panel. Claimant stated that "[i]n a phone conversation with the Claims Reviewer regarding how revenue was adjusted, the Claims Reviewer cited to Policy 218." Claimant argued that applying Policy 218 to recalculate Claimant's revenue was improper because "Policy 218 only addresses claimants with 13-period [financial] statements" and Claimant "utilizes 12-period statements."

The Appeal Panel overturned the denial of the claim, concluding that the Claims Administrator converted Claimant's financials to calendar months "[i]n reliance on Policy 218," and that the Claims Administrator's "reliance on Policy 218 was misplaced" because Claimant's financials utilized "a 12 month basis." According to the Appeal Panel, "the issue presented is whether the [Settlement Program] accountant had a valid basis for converting the [financials], independent of Policy 218." The Appeal Panel found no valid basis for the conversion and remanded the claim for reevaluation using the periods in Claimant's 4-4-5 financials.

BP sought review in the district court, which, under the terms of the Settlement Agreement, retains "the discretionary right to review any Appeal determination to consider whether the determination was in compliance with

the Agreement."[2] The district court granted discretionary review, reversed the Appeal Panel's decision, and reinstated the Claims Administrator's denial of the claim. The district court held that the Claims Administrator properly converted Claimant's financials to calendar months because "[i]n order to fairly evaluate a claim under the terms of the Settlement Agreement, the [financials] must be considered on a calendar month basis." Claimant appeals.

II

The parties do not dispute that Claimant meets the V-test using its 4-4-5 financials but does not if its financials are converted to calendar months. This case turns on whether the Claims Administrator violated the Settlement Agreement by converting Claimant's financials to calendar months before performing the V-test.

"The interpretation of a settlement agreement is a question of contract law that this Court reviews de novo."[3] The Settlement Agreement provides that it "shall be interpreted in accordance with General Maritime Law."[4] Under maritime law, a contract "should be read as a whole and its words given their plain meaning unless the provision is ambiguous."[5] A provision is not ambiguous if "its language as a whole is clear, explicit, and leads to no absurd consequences, and as such it can be given only one reasonable interpretation."[6] If a provision is ambiguous, only then should its meaning should be resolved

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[2] *See Claimant ID 100217021 v. BP Expl. & Prod., Inc.*, 693 F. App'x 272, 274 (5th Cir. 2017) (per curiam) (unpublished) (citing *In re Deepwater Horizon*, 641 F. App'x. 405, 408 (5th Cir. 2016) (per curiam) (unpublished)) ("The district court has discretion to review whether an appeals panel's decision was in compliance with the Settlement Agreement.").

[3] *In re Deepwater Horizon*, 864 F.3d 360, 363 (5th Cir. 2017) (quoting *In re Deepwater Horizon*, 785 F.3d 1003, 1011 (5th Cir. 2015)).

[4] *In re Deepwater Horizon*, 858 F.3d 298, 302-03 (5th Cir. 2017) ("The Settlement Agreement is a maritime contract.").

[5] *Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 955 (5th Cir. 1984) (citing *Lirette v. Popich Bros. Water Transp., Inc.*, 699 F.2d 725, 728 (5th Cir. 1983)).

[6] *Chembulk Trading LLC v. Chemex Ltd.*, 393 F.3d 550, 555 n.6 (5th Cir. 2004).

"consistent with the intent of the parties."[7] A court may "look beyond the written language of the document to determine the intent of the parties."[8] In this case, looking at both the language of the Settlement Agreement and our precedent reveals that the contract is unambiguous and "month" refers to the calendar months of the Gregorian calendar.

A

Reading the Settlement Agreement as a whole indicates that "month," when referred to in the V-test, unambiguously means calendar month. The V-test requires a decline in revenue "over a period of three consecutive months *between May-December 2010*" as compared to those same months in 2007, 2008, and/or 2009. The test itself refers to "month" in conjunction with the names of calendar months. To show that they have met the test, claimants must submit "[m]onthly and annual profit and loss statements . . . or alternate source documents establishing monthly revenues and expenses." The "monthly statements" requirement should be construed to correspond with the V-test's explicit use of calendar months. Furthermore, the word "month" is used in conjunction with the names of calendar months elsewhere in Exhibit 4B of the Settlement Agreement. For example, Exhibit 4B references "months between May-December" in other causation tests and uses "June, July and August" in its "Examples of Revenue Pattern Requirements for Causation Tests."

Additionally, Claimant's reading of the word "month" would allow a result that is directly contrary to the clear language of the V-test. The V-test requires a claimant's revenue data from "three consecutive months between May-December 2010," but Claimant's reading of "accounting months" would

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[7] *In re Deepwater Horizon*, 858 F.3d at 303 (quoting *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31 (2004)).

[8] *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332-33 (5th Cir. 1981) (citing *Hicks v. Ocean Drilling and Expl. Co.*, 512 F.2d 817, 825 (5th Cir. 1975)).

allow claimants to use data that is outside that date range. For example, looking at Claimant's financial data from Fiscal Year 2011, one period ran from November 28, 2010 through January 1, 2011. Under Claimant's proposed interpretation, this period would qualify as a "month between May-December 2010" even though it includes one day from 2011. Such an interpretation cannot be squared with the plain language of the Settlement Agreement. Looking to the Settlement Agreement as a whole, the phrase "three consecutive months between May-December 2010" unambiguously refers to three consecutive months of the Gregorian calendar.

B

Interpreting "month" to mean calendar month is also consistent with the definition of the word in Supreme Court precedent and this court's precedent. In *Sheets v. Selden's Lessee*, the Supreme Court interpreted a provision in a real estate contract under which the lessees' rights ceased if any rent installment remained unpaid "for one *month* from the time it . . . bec[a]me due."[9] The Supreme Court held that "[t]he term ['month'] is not technical, and when the parties have not themselves given to it a definition, it must be construed in its ordinary and general sense, and there can be no doubt that in this sense calendar months are always understood."[10] This court came to the same conclusion in *Fogel v. C.I.R.*, holding that "the term [month] is not a technical one, and when undefined . . . is commonly understood to mean a calendar month."[11] We cited *Guaranty Trust*,[12] a case in which the Supreme Court stated that "[i]t is the settled law . . . of this court . . . that the word

[9] 69 U.S. 177, 189 (1864).

[10] *Id.* at 190.

[11] 203 F.2d 347, 349 (5th Cir. 1953) (citing *Guar. Trust & Safe-Deposit Co. v. Green Cove Springs & Melrose R. Co.*, 139 U.S. 137, 145 (1891)).

[12] *Id.*

'month,' when used in contracts or statutes, must be construed, where the parties have not themselves given to it a definition . . . to mean calendar, and not lunar, months."[13] We agree that the term "month" is not technical and should be read to mean calendar month unless the parties have provided a different definition, which the parties to the Settlement Agreement have not.

III

Claimant also argues that the Claims Administrator's conversion to calendar months violated both a previous decision of this court (the *Policy 495 Opinion*) and the district court's order implementing that decision (Implementing Order). We disagree.

The district court previously issued an order holding that the Settlement Agreement requires a claimant's revenue to be "matched" with its expenses for the purposes of the causation tests.[14] A financial statement that "matches" revenue and expenses includes expenses in the same accounting period as their corresponding revenue regardless of when the expenses were incurred.[15] The Claims Administrator issued Policy 495 in an attempt to comply with the district court's order.[16] Policy 495 provides five methodologies for matching revenue and expenses: four industry-specific methodologies (ISMs) that only apply to a certain industry and an annual variable margin methodology (AVMM) that applies to all other businesses.[17] "The AVMM requires the Claims Administrator to match all unmatched profit and loss statements."[18]

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[13] *Guar. Trust*, 139 U.S. at 145.

[14] *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2013 WL 10767663, at *21 (E.D. La. Dec. 24, 2013), *aff'd sub nom. In re Deepwater Horizon*, 744 F.3d 370 (5th Cir. 2014).

[15] *In re Deepwater Horizon*, 858 F.3d 298, 301 (5th Cir. 2017).

[16] *Id.* at 302.

[17] *Id.* at 300, 302.

[18] *Id.* at 302.

"The ISMs also require matching, but go a significant step farther, requiring the Claims Administrator to move, smooth, or otherwise reallocate *revenue*," by, for example, spreading revenue paid in a lump sum across different accounting periods.[19] The district court approved all five methodologies.[20]

This court affirmed the district court's approval of the AVMM, but overturned the district court's approval of the ISMs "because the ISMs require the Claims Administrator to move, smooth, or otherwise reallocate revenue in violation of the Settlement Agreement."[21] We explained that allowing the Claims Administrator "to remove revenue from [the three months chosen by a claimant as] the Compensation Period[] and spread it throughout the non-compensation months" infringes upon a claimant's "right to choose his or her Compensation Period."[22] On remand, the district court ordered that "where the Claims Administrator uses the AVMM to achieve sufficient matching, the Claims Administrator shall not reallocate revenues, except for the purpose of correcting errors."

Claimant contends that our *Policy 495 Opinion* and the district court's Implementing Order prohibit the conversion of Claimant's financials into calendar months. Specifically, Claimant contends that the conversion of its financials into calendar months violated the Implementing Order by "reallocat[ing] revenues" not "for the purpose of correcting errors."

Claimant's argument fails. The *Policy 495 Opinion* prohibits reallocating lump sum revenue over multiple periods in the manner required by the ISMs. The Claims Administrator did not engage in that sort of reallocation when it converted Claimant's financials to calendar months.

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[19] *Id.* at 303 (emphasis added).
[20] *Id.* at 300.
[21] *Id.* at 303-04.
[22] *Id.*

Additionally, the Implementing Order prohibits reallocating lump sum revenue from the accounting period in which the revenue was received into other accounting periods. The Implementing Order does not prohibit converting revenue data from accounting months into calendar months, as that process entails adjusting the time periods used to categorize the revenue data, not reallocating revenue across multiple accounting periods. The Claims Administrator did not violate this court's *Policy 495 Opinion* or the Implementing Order when it converted Claimant's financials.

* * *

For the foregoing reasons, we AFFIRM the judgment of the district court.