

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-30586

United States Court of Appeals
Fifth Circuit

FILED

March 18, 2019

Lyle W. Cayce
Clerk

Consolidated with 18-30587

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

Requesting Parties – Appellants,

v.

CLAIMANT ID 100204031,

Objecting Party – Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana
USDC Nos. 2:18-CV-3359 and 2:18-CV-3360

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

BP disputes the award of approximately \$7 million to the Florida-based law firm Carlton Fields Jorden Burt, P.A., for two claims the firm submitted in connection with the *Deepwater Horizon* Settlement Agreement. The district

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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court denied BP's request for discretionary review of the two Appeal Panel decisions. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

The general background of appeals arising out of the *Deepwater Horizon* oil spill in 2010 and the resulting class-action settlement are discussed in detail elsewhere. *See, e.g., In re Deepwater Horizon*, 785 F.3d 1003, 1008–09 (5th Cir. 2015). We discuss only those facts necessary to resolve this appeal.

Carlton Fields is a law firm headquartered in Tampa, Florida, with other offices in Florida and elsewhere. It filed claims with the Court Supervised Settlement Program (“CSSP”) for two of its offices: Tampa and St. Petersburg. In support of its claims, it provided the CSSP with tax returns; income and Profit and Loss (P&L) statements for all its offices; and spreadsheets reflecting “project-by-project” revenue for the Tampa and St. Petersburg offices for the period 2007 to 2011.

The CSSP awarded Carlton Fields approximately \$4.7 million for its Tampa office, \$1 million for its St. Petersburg office, and then applied a risk transfer premium that resulted in final awards totaling \$7 million.

BP appealed the award for each office to separate Appeal Panels. BP and Carlton Fields submitted competing final proposals. BP proposed awards of zero dollars, while Carlton Fields proposed the same amounts determined by the CSSP. Under the so-called “baseball” process, an Appeal Panel is limited to selecting the final proposal that it concludes is closer to the correct amount. Both Appeal Panels selected Carlton Fields' proposals, effectively affirming the CSSP awards.

BP then filed a motion seeking discretionary review from the district court, which was denied. This appeal followed.

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DISCUSSION

We review the district court’s denial of discretionary review for abuse of discretion. *Id.* at 1011. The district court can abuse its discretion when “the decision not reviewed by the district court [1] actually contradicted or misapplied the Settlement Agreement, or [2] had the clear potential to contradict or misapply the Settlement Agreement.” *Holmes Motors, Inc. v. BP Expl. & Prod., Inc.*, 829 F.3d 313, 315 (5th Cir. 2016) (quoting *In re Deepwater Horizon*, 641 F. App’x 405, 409–10 (5th Cir. 2016)).

BP presents here the arguments it earlier made to the CSSP and to the Appeal Panels. The gist of BP’s argument is that the CSSP was unable to verify the claimed losses arose in the designated Gulf Coast areas because it “inexplicably failed to inquire as to how Carlton Fields allocates revenue and expenses . . . in matters where attorneys from several offices worked on the same matter.”

BP frames this as a “misapplication” of Section 38.57 and Exhibit 5 of the Settlement Agreement. Section 38.57 defines “Economic Damage” to “mean loss of profits, income and/or earnings arising in the Gulf Coast Areas or Specified Gulf Waters allegedly arising out of, due to, resulting from, or relating in any way to, directly or indirectly, the Deepwater Horizon Incident.” Exhibit 5 provides, in relevant part:

1. Where a Multi-Facility business maintained separate contemporaneous profit and loss statements for each Facility during the Benchmark Period and 2010, and files a claim for one, some, or all facilities within the Gulf Coast Areas, all direct expenses associated with each claiming Facility in the Facility’s contemporaneously-prepared P&L statements, and only such expenses, will be included in the calculation.

2. Where a Multi-Facility Business prepares individual Facility P&L statements based on its books and records to support a claim, all shared costs shall be allocated among all Facilities

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based on their share of the total revenue of the Multi-Facility Business.

In its request for discretionary review in the district court, BP stated that the Appeal Panels’ “reliance on a lack of investigation and analysis is a recurring issue, highlighting the need for review.” BP did not, though, identify any specific provision of the Settlement Agreement that was being misapplied or any split among Appeal Panel decisions. It is therefore questionable whether BP sufficiently raised this “misapplication” argument in the district court. “Under our general rule, arguments not raised before the district court are waived and will not be considered on appeal unless the party can demonstrate ‘extraordinary circumstances.’” *State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450, 456 (5th Cir. 2009) (citations omitted). Even if the argument is not waived, BP has not identified a *misapplication* of the identified settlement provisions. We explain.

With respect to the St. Petersburg claim, the Appeal Panel’s decision was based on BP’s failure to preserve its arguments under the Rules Governing the Appeals Process and did not involve *any* application of the Settlement Agreement at all, much less a misapplication of it.

As to the Tampa claim, BP does not dispute that the CSSP relied upon “contemporaneously-prepared P&L statements” provided by Carlton Fields, as required by Exhibit 5. The Appeal Panel for the Tampa claim accordingly found that the CSSP “determined the claim was sufficiently matched and applied the general [Business Economic Loss] methodology to process the claim,” and that the CSSP had “segregated claimant’s revenues and expenses of the Tampa office from all others.” The Appeal Panel based this in part on a paragraph in the CSSP’s calculation notes:

There are differences between the P&Ls and tax returns because the tax returns report the revenues and expenses of all

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facilities. The Claimant provided annual profit and loss statements by facility for the years 2007-2011. . . . Accounting Review compared the Gross Receipts, Net Income and Salaries and Wages expense reported on the tax returns to the P&Ls.

BP asserts that the Settlement Agreement was misapplied because the CSSP “failed to inquire as to how Carlton Fields allocates revenue and expenses . . . in matters where attorneys from several offices worked on the same matter.” Even if more information could have been obtained concerning the allocations among offices, we see nothing arising from the level of scrutiny given to that issue to require the district court’s discretionary review.

Further, BP seeks a remand to the CSSP with instructions to investigate the veracity of Carlton Fields’ attestations that its losses were caused by the oil spill. BP argues that these “attestations are implausible because it is much more likely that market forces, rather than the spill, caused any losses incurred by the two firm offices making claims.” This argument raises an issue the court has needed to address several times before, that of alternative causation. *E.g., In re Deepwater Horizon*, 785 F.3d 986, 1001–02 (5th Cir. 2015). We have held that a claimant’s attestation of causation is generally sufficient, but that the claims process should be alert to the possibility of fraudulent claims and address those “in the usual course of processing individual claims.” *In re Deepwater Horizon*, 744 F.3d 370, 377–78 (5th Cir. 2014). No failure has been shown in that regard in the processing of this claim. We make that finding in large part because of the nature of the evidence on which BP relies.

BP refers us to a June 2009 statement by the firm’s chairman in the *New York Law Journal* that he expected the firm’s revenue would decline that year. Even though that indicates an expectation of some decline in the financial success of the firm, the Appeal Panels could accept that the St. Petersburg and

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Tampa offices' revenues that are the subject of these claims declined more substantially than otherwise would have been the case.

BP also argues that the attestation is suspicious because the spill "generally sparked demand for litigation services," and that Carlton Fields has represented other claimants in the settlement process. The argument does not create any suspicion in us about the propriety of upholding the award. How much revenues declined, and when the financial condition of those offices started improving, were evidentiary matters that were resolved by the Appeal Panels.

The district court did not abuse its discretion in denying review.

AFFIRMED.