

7/25/13 Alison Frankel's On The Case 21:46:30

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Plaintiffs' negotiator blasts BP for 'backpedaling'

Alison Frankel

I have known Joseph Rice of Motley Rice for nearly 20 years, during which time he has negotiated billions of dollars worth of settlements for plaintiffs in asbestos and tobacco litigation (and earned hundreds of millions for his firm in the process). If you asked some of the best-regarded defense lawyers in the Am Law 100 to name the smartest dealmaker they ever sat across the table from, they'd say Joe Rice.

Rice told me privately last week that BP has been misrepresenting the facts of its multibillion-dollar settlement with claimants in the Deepwater Horizon oil spill, which Rice spent more than a year negotiating. As you know, the company's new lawyers from Gibson, Dunn & Crutcher have recently appeared before the 5th Circuit Court of Appeals and before U.S. District Judge Carl Barbier of New Orleans, arguing that claims administrator Patrick Juneau has misconstrued the language of the settlement and is approving big payouts to undeserving claimants for accounting losses unrelated to the oil spill.

Rice told me that BP scrutinized every word of the settlement language on determining business economic losses. To prove it, he sent me a nine-page email analysis of the settlement's business loss provisions he received from BP counsel Richard Godfrey of Kirkland & Ellis while negotiations were under way. Godfrey's email suggests that BP's biggest point of contention with the plaintiffs was whether businesses' damages would be calculated by comparing the same benchmark pre-spill and post-spill time period or whether claimants could use longer time periods for comparison. Godfrey says that the plaintiffs' approach - which was not adopted - could create "fictitious losses."

This week, Rice went public. In a blog post at Motley Rice's website, Rice said that he had "never seen a corporate defendant backpedal on an agreed-to settlement to the extent BP is attempting to do in the Deepwater Horizon.... In short, BP is objecting to its own settlement."

According to Rice, BP never suggested in negotiations that claimants should be required to match revenue losses to oil spill damages. Nor would the plaintiffs have agreed to such a subjective standard, he said. Instead, according to Rice, both sides agreed to a "transparent, objective" standard of comparing business records from a pre-spill benchmark against the comparable post-spill months.

"The most important thing to the company was to have a settlement that did not use a time period after Dec. 31, 2010, for the determination of damages," Rice said in his blog. "BP wanted to be able to argue then, and now, that there was no damage done by the oil after 2010. It wanted protection from the consequences of the enormous environmental damage it caused, such as fines and penalties, as well as to keep claimants from being able to present arguments over the next decade of continuing harm. It wanted the federal government to feel that the company was appropriately addressing the problem so that the federal government would be lenient on the criminal penalties. All of this happened. BP has been able to enter a favorable resolution of its criminal liabilities and the settlement agreement does not focus on losses in the business economic loss category after 2010 in most cases."

BP is now attempting to "take away" the agreed-upon "transparent objective standards" for calculating revenue losses, Rice asserted. "I believe that BP is knowingly and recklessly making false statements concerning the integrity of the court-appointed claims administrator and claims administration procedure," he wrote. "It is time for BP to face the fact that it entered an agreement and it got what it wanted."

Rice is the diametric opposite of a disinterested party here, since he not only sat across the table from BP in making the deal but also represents clients bringing claims under the settlement agreement. If you're inclined to mistrust plaintiffs lawyers, you're probably not going to believe one of the most prominent members of that wing of the bar. But I will tell you that the world of lawyers who negotiate settlements on the scale of BP's deal or the tobacco agreements is very small and Rice wouldn't have enough credibility to have done his job for as long as he has if he weren't considered trustworthy by adversaries.

I emailed BP lawyers Godfrey of Kirkland and Theodore Olson of Gibson for comment on Rice's post. Neither got back to me immediately.

---- **Index References** ----

Company: GIBSON ENERGY INC; KIRKLAND AND ELLIS LLP; BP PLC

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Industry: (Agricultural Crops (1AG44); Cereals, Breads & Grains (1CE39); Agriculture (1AG63); Oil & Gas (1OI76); Agriculture, Food & Beverage (1AG53); Energy Industry Environmental Issues (1EN22); Pollution (1PO10); Energy & Fuel (1EN13); Offshore Oil & Gas (1OF48); Rice Farming (1RI36); Environmental Problems (1EN46))

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