GlassRatner Advisory & Capital Group LLC

is a multi-office financial advisory firm providing solutions to complex business problems and board level agenda items. The firm applies a unique mix of skill sets and experience to address matters of the utmost importance to the enterprise such as planning and executing a major acquisition or divestiture, pursuing a fraud investigation or providing expert witness services in complex commercial litigation matters, managing through a business crisis or bankruptcy and other non-typical business challenges. The firm brings together a unique combination of financial and operating insight gained from decades of collective experience working in crisis situations, along with practical experience.

Ian Ratner
Principal
Atlanta, GA, United States
T: +1 (404) 835 8840
E: iratner@glassratner.com
ONE-ON-ONE INTERVIEW

DAMAGES ANALYSIS - PROCESS, METHODOLOGY AND CHALLENGES

Ian Ratner
Principal
GlassRatner Advisory & Capital Group LLC
T: +1 (404) 835 8840
E: iratner@glassratner.com

Ian Ratner has more than 25 years experience in public accounting, forensic accounting, business valuations, due diligence services, corporate finance, bankruptcy consulting and fiduciary services. He has a diverse practice but is better known as a national expert witness in complex commercial litigation cases, fraud investigations and solvency related valuation disputes. Mr Ratner has testified at trials, arbitrations and depositions on more than 135 occasions and has worked on matters throughout the US and Caribbean for law firms, governmental agencies and Fortune 500 companies. Recently he acted as an expert witness on behalf of the DoJ in the penalty phase of the BP Deepwater Horizon Oil Spill Litigation.
One-on-One Interview

CD: Could you outline a few of the key challenges parties face when assessing the scope of damages pertaining to a corporate dispute case?

Ratner: There are many complex business relationships that large corporations have with customers, business partners, joint venture partners, vendors and service providers to name a few. Many of these relationships are documented in complex and voluminous contracts and operating procedures. In some cases, business relationships operate in a manner that is not always consistent with their documentation. One of the biggest challenges in a complex damages case is truly understanding or forecasting from a financial point of view the impact or result from a change in the situation or a breach. The challenge of assessing what would have happened but for some critical event can be very difficult in dynamic business relationships. The basic question sounds simple enough: “What would have happened but for X or Y or Z?” The challenge is that knowing where to look and how to measure the damages is different in most cases and can become very complex when there are multiple business dynamics that have to be considered and measured.

CD: What factors can influence the calculation of damages in dispute resolution cases? How does the establishment of ‘real’ value guide case strategy?

Ratner: Access to information and a thorough understanding of the environment and events around the damage situation are critical. The first step is to come up with a basic ‘hypothesis’ or theory in a damage case and then start digging to determine if the data or information is available or maintained in a fashion that it can be manipulated. In some cases the hypothesis or mandate can be pretty straightforward but getting the data or reliable estimates of the data can become a major forensic accounting challenge. Getting to the real answer involves creativity in designing the damages analysis or calculations, flexibility depending on the types of data that are available and good knowledge of the types of data or information that the company might have to support your work. Since there are so many different finance and business systems that support companies, the ability to ask lots of questions and the time to discover who in the organisation has the data is important. Damage analysis is a creative process and typically cases with short timeframes, where the experts don’t have the time they need to fully explore the situation, result in the least supportable work.
CD: Given the complexities involved in most corporate disputes, at what point in the process should experts be engaged?

Ratner: Without question, the earlier the expert is hired the better, especially in large complex cases involving large data sets. In some cases the mandate can be relatively simple. For example, in price fixing case where the plaintiff is trying to determine the volume of purchases of the affected material, the mandate might be as simple as determining the volume of copper purchased by a business. Consider how complex that could be if the plaintiff has different divisions that all used copper. What happens if the company has more than one copper vendor? Consider if the company also purchases other products that contain copper and copper is not the prime element of the item purchased. What about a large multinational with different purchasing functions around the world and different accounting systems? And on and on. The more time the expert has to fully understand the situation and design an effective methodology, the better and more accurate his work will be. Further, having more time to design the appropriate approach can help keep costs down and reduce the risk of false starts or the need to redo the calculations. Finally, it also gives the expert a chance to assist in the document discovery process.

CD: In your experience, what considerations should parties make when selecting a damages expert to advise on a particular matter?

Ratner: It goes without saying that the person has to have the academic and financial expertise. But assuming that in large complex cases there are many good experts, I believe that creativity, communication skills and testimony experience are the three most significant attributes for an excellent damages expert. Creativity helps with the assessment of the damages but also in the data and information collection process. A creative expert will be thinking of alternative ways to get information
that might be important to his calculation but not easily available from the company’s point of view. Written and verbal communication skills are a must; the expert has to be able to communicate what he did, why, where he got the information and how the result is reasonable based on other circumstances. Providing testimony in a complex case is not a given. There are some very talented damages experts, economists and forensic accountants that have fallen apart on the stand – in some cases not even being able to present their own opinion, never mind withstand tough cross-examination.

**CD: What are the main steps that need to be taken to ensure that the data gathered is reliable and indeed relevant? How do sensitive issues, regulatory requirements and time constraints impact on this process?**

**Ratner:** To ensure that the data that you are relying on is reliable, it is important to find a way to test it. Testing the data from one source to another source can be very helpful. Perhaps the data can be found in multiple systems at the company – the shipping system and the manufacturing system, for example. There could be a reason why the data is not exactly the same but if it is supposed to be similar then this type of test can be helpful, especially if it can be reconciled. Complex businesses involve many confidential pieces of information, prices, costs, formulas, and the like. The need to use highly sensitive data in your calculation is a challenge and is often met with concern from the company. One tool I have seen used effectively is certain data and documents becoming ‘for attorney eyes only’. In other words, the parties to the litigation never see the underlying data. Time constraints are the single biggest roadblock to a quality result – not only needing the time to do the calculations, but the time to test the work and consider other issues that may not be evident at the outset. When receiving a call from a client, one of the first questions is: what is your schedule?

**CD: How should parties go about ensuring that they have determined damages that are logical, justifiable and defendable?**

**Ratner:** Sitting back and looking at your calculation from a high level is very important. Does the result of your analysis make sense? Is it possible that this event really caused this much damage? Have you considered all the potential arguments or assumptions that would cause the numbers to go in the other direction? Being critical of your own work is very important in damages cases. It is also important to have to defend your analysis to one of your partners in the office. Critical peer or colleague review is very important. Unpacking the mechanics of your calculation is also helpful, figuring out which
assumptions or variables are the most sensitive and causing the biggest swing in the numbers. This allows you to ensure that the assumptions around those critical items are even more thoroughly tested.

**CD:** What final advice can you offer to parties on the importance of evaluating damages connected with a corporate dispute?

**Ratner:** Upon reflection, the two most important elements in evaluating damages are building enough time into the schedule to do a thorough job and building a team with creative professionals.