IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 11, 2020
Lyle W. Cayce
Clerk

No. 19-10056

In the Matter of: TRENDSETTER HR L.L.C.

Debtor

TRENDSETTER HR L.L.C.; TREND PERSONNEL SERVICES, INCORPORATED; TSL STAFF LEASING INCORPORATED,

Appellants

v.

ZURICH AMERICAN INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY,

Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

DON R. WILLETT, Circuit Judge:

This bankruptcy appeal is mathematically complex but legally straightforward. Trendsetter HR, L.L.C., Trend Personnel Services, Inc., and TSL Staff Leasing Inc. (together "Trend") purchased workers' compensation insurance from Zurich. After four years, Trend ditched Zurich for a new insurance provider. Zurich sued, and Trend filed for bankruptcy. The bankruptcy court allowed—and the district court affirmed—Zurich's claims for

various unpaid invoices, estimated future losses, and unpaid fee schedule write-down fees. We affirm the district court's judgment.

I

From 2011–2015, Trend, through its sophisticated brokers, obtained workers' compensation insurance from Zurich American Insurance Company. Over these four years, the basic agreement remained stable: Zurich insured Trend's employees and paid out all workers' compensation claims up-front; then Trend reimbursed Zurich up to Trend's per-claim deductible.

But the mechanics varied over time. Though the contracts themselves were uniform, the contracted-for programs were not—two of the contracts provided for traditional "paid loss" plans[1] and the other two created complex "incurred loss" plans. Under the incurred loss plans, Trend was required to *pre-fund* a loss reserve account from which Zurich would deduct qualifying expenses as incurred.[2] The incurred loss programs operated as follows: Zurich initially invoiced Trend for a base level of loss reserve funding determined by the contracts;[3] then it would invoice Trend periodically for adjustments to the funding level. Zurich calculated these adjustments under a contractual formula that considered both (1) what Zurich had already paid out for Trend's

[1] Zurich would pay claims and then invoice Trend for Trend's share.

[2] An analogy helps: The loss reserve fund was like an escrow account that Zurich held to pay itself out of as qualifying expenses were incurred. Zurich did not indisputably "own" the loss reserve fund money until it properly paid itself out of the fund. For example, if the qualifying, ultimate expense was less than predicted and invoiced for, Zurich must refund Trend the difference.

[3] The "funds to be held in the reserves"—the loss reserve fund—was calculated based on "Incurred Losses." "Incurred Losses" included both (1) "Paid Losses"—already paid-out claims that were not "future losses"—and (2) "Loss Reserve"—the amount Zurich anticipated Trend's claims would ultimately cost over their lifetime.

current claims, and (2) what Trend's current and future claims would likely cost moving forward.[4]

Beyond insurance, Trend also engaged Zurich to review submitted medical bills by applying a series of checks to each invoice processed on Trend's behalf. One such "check" was the automated fee schedule write-down—Zurich would apply its complex algorithm to determine if the billed amount was within the applicable workers' compensation fee schedule.[5] If it was not, Zurich disputed the above-schedule billing. And if Zurich ended up paying below the billed rate, Zurich would invoice Trend for a 25% fee of these "savings"—the delta between what the parties would have paid the service provider without the fee schedule write-down and what the parties ultimately paid.[6]

In late 2015, Trend quit paying Zurich's invoices and found a new workers' compensation insurance provider. Zurich initiated arbitration to recover unpaid invoices and future losses that Zurich expected to incur due to Trend's policies.[7] Trend filed for bankruptcy. In the bankruptcy proceeding,

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[4] For example, Zurich would first invoice Trend for the base amount (let's say $100,000) of pre-funding allowed under the contract. Then, the next year (and each year after that), Zurich calculated the paid loss—how much Trend's claims had actually cost Zurich thus far—and the needed loss reserve—how much Zurich thought Trend's claims would ultimately cost in the future. So, if Trend's claims actually cost $200,000 in year one, Zurich would calculate the annual to-be-invoiced adjustment by adding the extra $100,000 ($200,000 - $100,000) in paid-out losses to whatever Zurich now believed Trend's claims would cost in the future (considering the new data), let's say $300,000. So the base adjustment for the year two invoice would be $400,000 ($100,000 + $300,000). Zurich would then take this sum and multiply it by contractual multipliers. And the final sum was the reserve adjustment Trend must fund for year two. Zurich repeated this process annually.

[5] Most states have a fee schedule that limits how much medical providers can charge workers' compensation patients for services.

[6] The contracts authorized Zurich to charge Trend Allocated Loss Adjustment Expenses, "expenses directly allocable to a specific claim," which included "medical cost containment" expenses. And medical cost containment expenses explicitly included "25% of Total Savings" from "Bill Review."

[7] Notably, workers' compensation is dynamic, and Zurich remains liable for qualifying claims that accrued while Trend's policies were active, even though the policies themselves

Zurich sought $8,911,513.73, including $2,999,496 in estimated future losses.[8] In response, Trend asserted various defenses and presented an expert who limited Zurich's future losses to $1,691,000.[9]

After an extensive trial, the court allowed Zurich a $7,603,017 claim for unpaid invoices, pre-judgment interest, and—accepting Trend's estimate of Zurich's future losses under Trend's policies—estimated future losses.[10]

1	$5,700,719	Liquidated Unpaid Invoices
2	+ $521,711	Pre-Petition Interest on Liquidated Unpaid Invoices
3	+ $1,691,000	Trend's Unliquidated Future Obligations to Zurich
4	- $310,413	Liquidated Offset for Secured Amount Held in Loss Fund
=	$7,603,017	Court's Ruling as to Zurich's Allowed Claim

Trend appealed the court's order to the Northern District of Texas.[11] The district court affirmed the bankruptcy court across the board, and Trend appeals to us.

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have since expired. Therefore, Zurich "faces [uncertain] exposure under [Trend's] policies that may last decades."

[8] Zurich's expert calculated the estimated future losses by (1) determining the ultimate amount Zurich will have to pay out under Trend's plans that Trend would have reimbursed it for, and (2) subtracting the amount Trend had already paid or been invoiced for.

[9] Trend's expert explicitly excluded all past-due invoiced amounts (including loss reserve fund adjustments) from his calculation.

[10] The four-day bankruptcy trial included testimony from nine witnesses.

[11] Trend appealed on three issues: (1) the bankruptcy court's allowance of both "unpaid invoices" and "projected future losses"; (2) its allowance of Zurich's claim for 25% of medical bill review "savings"; and (3) its denial of Trend's unconscionability defense.

II

First, the law we apply. Federal bankruptcy law governs the proceeding.[12] But New York law governs the contracts and, therefore, the "substance of [the bankruptcy] claims."[13]

Second, how we apply it. When reviewing a district court's affirmation of a bankruptcy order, we directly review "the actions of the bankruptcy court."[14] We review the court's legal conclusions de novo.[15] And we review its factual findings for clear error.[16] Same goes for reviewing its conclusions of mixed questions of law and fact, as long as those questions are "primarily . . . factual."[17] When reviewing for clear error, we must affirm the trial court if its "account of the evidence is plausible in light of the record," even if we "would have weighed the evidence differently."[18]

III

When a debtor declares bankruptcy, its creditors may file claims against it.[19] Bankruptcy claims are broadly defined as "right[s] to payment"[20] as

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[12] *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449–50 (2007).

[13] *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 20 (2000). New York law indisputably governs the contracts pursuant to the contractual choice-of-law clauses. *See Dalton v. Paccar Fin.*, 95 F.3d 49, *3 (5th Cir. 1996) (per curiam).

[14] *In re Age Ref., Inc.*, 801 F.3d 530, 538 (5th Cir. 2015).

[15] *Id.*

[16] *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965–68 (2018).

[17] *Id.* (holding that the application of a legal standard to the "basic facts found" is "about as factual sounding as any mixed question gets"); *see Pullman–Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) ("[M]ixed question[s] [ask] . . . whether the rule of law as applied to the established facts is or is not violated.").

[18] *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

[19] 11 U.S.C. § 101(5)(a); *Travelers*, 549 U.S. at 449.

[20] 11 U.S.C. § 101(5)(a).

"recognized under state law."[21] And if the debtor disputes a creditor's claim, the court itself "shall determine the amount of such claim [to allow]."[22]

A

Trend first challenges two disputed-claims-turned-allowances: the bankruptcy court's allowance of Zurich's (1) claim for nearly three million dollars in unpaid invoices for loss reserve fund adjustments and (2) claim for nearly two million dollars in estimated future losses from Trend's policies.[23] Trend argues that the court (1) legally erred by unintentionally allowing *both* the unpaid-invoices claim and the future-losses claim; (2) legally erred by allowing the unpaid-invoices claim because it is not a cognizable bankruptcy claim; and (3) clearly erred in its total allowance because the evidence shows Zurich isn't entitled to $4,674,629 in "future losses." We disagree.

First, there is no legal error due to unintentionality. The bankruptcy court purposefully, and separately, made a § 502(b) allowance—the unpaid-invoices claim—and a § 502(c) allowance—the future-losses claim.[24]

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[21] *Travelers*, 549 U.S. at 450–51, 453 (stating that "bankruptcy courts [are required] to consult state law in determining the validity of most claims").

[22] 11 U.S.C. § 502(a),(b); 4 COLLIER ON BANKRUPTCY ¶ 502.03 (16th ed. 2019). Bankruptcy courts allow two types of claims: liquidated and unliquidated. For liquidated claims—settled claims "properly existing under state law"—the court calculates the allowance directly from the underlying obligation. *Id.*; 11 U.S.C. § 502(b); *see In re Rhead*, 179 B.R. 169, 173–75 (Bankr. D. Ariz. 1995). For unliquidated claims—undetermined claims of an unsettled amount—the court may be required to estimate an allowance using "whatever method is best suited to the particular circumstances." COLLIER *supra* note 22 at ¶ 502.04; 11 U.S.C. § 502(c); *see In re Mickey's Enters., Inc.*, 165 B.R. 188, 193 (Bankr. W.D. Tex. 1994). Here, the bankruptcy court was indisputably required to "accelerat[e]" all future losses and allow them as an estimated § 502(c) claim. *See, e.g.*, *In re Fairchild Aircraft Corp.*, No. 90-50257C, 1990 WL 119650, at *10 n.21 (Bankr. W.D. Tex. June 18, 1990).

[23] Importantly, Trend does not challenge the *amount* of each allowance individually. And there are no forfeiture issues here; Trend effectively raised its challenges at trial and on appeal.

[24] The court first allowed Zurich's claim for $5,700,719 in unpaid invoices and then separately allowed Zurich a claim for $1,691,000 in future losses, based on Trend's estimation.

There is no serious argument that, after a four-day trial with witnesses and documents clarifying the difference between the unpaid-invoices claim and the future-losses claim, the court made an unintentional "double" allowance. The record shows that the court knew what the allowed invoices were requesting payment for and how those invoices related to Zurich's estimated future losses.[25] The court even considered whether its allowances left Trend "subject to double recovery," and found they did not. There was no legal error due to unintentionality.[26]

Second, Zurich's unpaid-invoices claim is a cognizable bankruptcy claim because the underlying invoices are enforceable rights to payment under New York law.[27] Under New York law, a party accrues a right to payment when it sends an invoice to collect on a contractual obligation.[28] Here, Zurich had a contractual right to require Trend to fund adjustments to the loss reserve account. And Zurich sent Trend annual invoices for these adjustments, accruing a right to payment under New York law.[29] Therefore, § 101's broad definition of a claim plainly subsumes Zurich's unpaid-invoices claim.[30]

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[25] For example, the bankruptcy court heard testimony delineating the differences between the future losses Zurich would incur and the unpaid invoices Zurich was owed.

[26] In fact, Trend's future losses estimate—which was accepted (and allowed) by the court—explicitly "excluded" the unpaid loss reserve adjustment invoices because they were "outside the scope of [the] engagement," implicitly leaving it up to the court whether to allow a claim for those invoices in addition to the future losses allowance—which it did.

[27] *Travelers*, 549 U.S. at 450–51 (stating that 11 U.S.C. § 101(5)(a) defers to governing state law to determine the "validity of most claims").

[28] *Bombardier Transp. (Holdings) USA, Inc. v. Telephonics Corp. ("Bombardier")*, 788 N.Y.S.2d 80, 81 (N.Y. App. Div. 2005) (stating that a "right to payment [does] not accrue, under the contract, until . . . invoiced"); *see Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co. ("Hahn")*, 967 N.E.2d 1187, 1191 (N.Y. 2012) (assuming there is a right to payment when the party has the contractual right to, and does, demand unconditional payment); *see also Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990).

[29] *Bombardier*, 788 N.Y.S.2d at 81; *see Hahn*, 967 N.E.2d at 1191.

[30] *See In re McNeilly*, No. 18-31057, 2019 WL 3540660, at *3 (Bankr. D. Conn. Aug. 2, 2019) (recounting the Supreme Court's broad definition of a cognizable bankruptcy claim)

Trend disagrees. Relying on federal bankruptcy law, Trend argues that the loss reserve fund adjustment invoices didn't vest Zurich with a § 101 right to payment because Zurich didn't have complete ownership of the loss reserve fund itself.[31] This argument is unavailing. Under *Raleigh* and *Travelers*, federal bankruptcy law looks to governing state law to determine if there is a cognizable bankruptcy claim.[32] And under New York law, Zurich was vested with a § 101 right to payment when it invoiced Trend for the contractually-required loss reserve fund adjustments.[33] Therefore, Zurich's unpaid-invoices claim is a cognizable bankruptcy claim, and the court did not legally err by allowing it.

Third, the bankruptcy court did not clearly err in its assessment of the evidence by concurrently allowing Zurich's claims such that the total allowance was $4,674,629 for "future losses."[34] Trend's argument to the contrary is

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(citing *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1409 (2017) and *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)).

[31] Trend's argument goes as follows: There is a cognizable right to payment under § 101 only if the invoicing party will wholly own the invoiced amount immediately upon payment. Applied here, since Zurich would not *immediately* "own" the loss reserve fund adjustments for which it invoiced Trend—it only owns the funds as it properly withdraws them over the coming years—there is no right to payment for the adjustment invoices.

[32] *Travelers*, 549 U.S. at 451–52; *Raleigh*, 530 U.S. at 20. And Trend asserts no "federal interest" supporting the application of federal law in lieu of state law here. *Travelers*, 549 U.S. at 452 ("[W]e generally presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed [by federal interests]."). Regardless, even if federal law did apply, these unpaid invoices would still be cognizable rights to payment, just like invoices for adjustments to analogous escrow accounts. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354 (5th Cir. 2008) ("[U]npaid escrow payments . . . constitute a 'claim' under the Bankruptcy Code.").

[33] *Bombardier*, 788 N.Y.S.2d at 80; *see Hahn*, 967 N.E.2d at 1191.

[34] *U.S. Bank*, 138 S. Ct. at 966 ("[F]actual findings are review[ed] . . . with a serious thumb on the scale for the bankruptcy court.").

simple—the total amount allowed for future losses is too large considering that only a "handful" of claims under Trend's policies remain.[35]

Yet Trend can't point to a single erroneous factual assessment showing that this allowance was a mistake.[36] The court's order was based on complex evidence, testimony, and credibility determinations.[37] And, even though there are only a "handful" of claims left, the record clearly establishes that workers' compensation claims are tough to estimate; Trend's own head of operations stated that "anything could happen."[38] Therefore, the $4,674,629 allowance is plausible in light of the record—Zurich's future losses are inherently uncertain and the court developed expertise and relied on witnesses to allow a reasonable estimate. There is no clear error here.

B

Trend also challenges the bankruptcy court's allowance of Zurich's claim for unpaid fee schedule write-down fees. Trend makes two arguments: (1) the court legally erred in allowing this claim because Zurich doesn't have a contractual right to these fees; and (2) the court clearly erred by rejecting Trend's unconscionability defense against this 25% fee.

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[35] This argument is premised on an erroneous assertion—the total allowance wasn't exclusively for "future losses." The record shows that the unpaid loss reserve fund adjustment invoices reflected, in part, past expenses already incurred. *See supra* note 3. So the total allowance was for both future and past expenses. However, we put aside this issue and still find no clear error in the court's allowance.

[36] *U.S. Gypsum Co.*, 333 U.S. at 395 ("A finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

[37] *See Anderson*, 470 U.S. at 574–75 (noting the deference trial courts are accorded for matters on which they develop expertise); *Bertucci Contracting Corp. v. M/V ANTWERPEN*, 465 F.3d 254, 259 (5th Cir. 2006) (stating that extra deference is due to factual assessments based on witness credibility).

[38] Claims accrued during an active policy can be brought at any time; filed claims can become more expensive than originally predicted; and closed claims can reopen.

We first review, de novo, whether Zurich has a contractual right to the fee schedule write-down fees; if so, the court's allowance of this claim was proper.[39] Zurich has a right to these fees if it was contractually entitled to them. To make this determination, we interpret the parties' contract, applying New York law. We start by determining if the contract is ambiguous.[40] A contract is ambiguous if it is "reasonably susceptible" to more than "one meaning."[41] But if we find the contract unambiguous, we give its terms their "plain and ordinary meaning."[42]

Here, the provision at issue—"25% of Total Savings" from "Bill Review"—unambiguously entitles Zurich to the fee schedule write-down fees. "Total Savings" is clear language that means any reduction in money spent; this definition is not open to multiple interpretations.[43] And "Bill Review" incorporates the entire multi-step process of reviewing bills, including fee schedule write-downs. Therefore, "25% of Total Savings" from "Bill Review" has only one reasonable interpretation—its plain and ordinary meaning.[44]

And we give effect to this plain meaning: Zurich is entitled to 25% of any savings—reductions in monies spent—generated by the fee schedule write-down portion of the bill review process. And fee schedule write-downs did

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[39] *Bayou Steel Corp. v. Nat'l Union Fire Ins. Co.*, 642 F.3d 506, 509 (5th Cir. 2011) ("[The Fifth Circuit] review[s] issues of contract interpretation de novo."); *see* 11 U.S.C. § 101(5)(a) (providing that the "right to payment" is a cognizable bankruptcy claim).

[40] *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002).

[41] *Id.* at 170–71.

[42] *Teichman by Teichman v. Cmty. Hosp. of W. Suffolk*, 663 N.E.2d 628, 631 (N.Y. 1996).

[43] *Evans v. Famous Music Corp.*, 807 N.E.2d 869, 872 (N.Y. 2004); *see* OXFORD ENGLISH DICTIONARY (3d ed. 2012) ("savings" means "a reduction made in the use of money"); *id.* ("total" means "comprising the whole . . . amount").

[44] *See, e.g.*, *Nissho Iwai Europe PLC v. Korea First Bank*, 782 N.E.2d 55, 60 (N.Y. 2002).

generate savings. This service empowered Zurich (and Trend through its deductible) to pay service providers less than what the providers originally billed—reducing the parties' expenditures. If Zurich didn't use its complex software to flag over-fee-schedule billings, the parties would have paid sticker price. Therefore, it doesn't matter if this service took Zurich only "nanoseconds" and resulted in the parties paying no more than "legally required." This service reduced money spent and falls within the "plain and ordinary meaning" of "Total Savings" from "Bill Review." Because Zurich has a cognizable claim to the unpaid fee schedule write-down fees, the court did not legally error by allowing it.

Second, we address whether the court clearly erred in finding that the "25% of Total Savings" fee, as applied to fee schedule write-downs, wasn't unconscionable.[45] Applying New York substantive law, we find no clear error.[46]

A contract is unconscionable if it is "grossly unreasonable . . . in the light of the mores and business practices of the time . . . ."[47] There are two elements of unconscionability that operate on a "sliding scale": substance and procedure.[48] Substantive unconscionability considers whether contractual

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[45] We apply clear-error review to this determination because it is a "mixed question" that is "factually sounding"; it requires substantially more factual inquiry than "legal work." *U.S. Bank*, 138 S. Ct. at 966–69 (applying clear-error review to a mixed question that required "[t]he court [to take] a raft of case-specific historical facts, consider[] them as a whole, balance[] them one against another . . . [and] make a determination that[,] when two particular persons entered into a particular transaction, they were (or were not) acting like strangers").

[46] Although New York law holds that unconscionability "is to be decided by the court," *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 647 (N.Y. 1989), we apply the federally mandated standard of review—clear error—in this bankruptcy case, *Travelers*, 549 U.S. at 451; *U.S. Bank*, 138 S. Ct. at 966.

[47] *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 828 (N.Y. 1988).

[48] *Emigrant Mortg. Co. v. Fitzpatrick*, 945 N.Y.S.2d 697, 699 (N.Y. App. Div. 2012) (observing that, while both elements are generally required to find unconscionability, "the

provisions are unreasonably favorable to one party.[49] Procedural unconscionability reviews the "contract formation process" and considers whether there was a "lack of meaningful choice."[50]

The bankruptcy court's conclusion of no unconscionability is "plausible in light of the record."[51] The evidence shows that the 25%-of-savings fee is reasonable in light of modern business practices: (1) Trend was a large company represented by sophisticated insurance brokers in each negotiation with Zurich;[52] (2) the pricing of the fee schedule write-down was "consistent with other pricing mechanisms in the industry"; (3) the service required an expensive, complex algorithm; and (4) the market appreciated the contingency fee model. And Trend points to no definite and firm mistakes underlying the court's finding of no procedural or substantive unconscionability. Considering the entire record, we are not left with the "conviction that a mistake has been committed"—there was no clear error.[53]

IV

The bankruptcy court intentionally allowed Zurich's unpaid-invoices and future-losses claims. This concurrent allowance was not legal error and was

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more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa") (internal quotation marks omitted).

[49] *Sablosky*, 535 N.E.2d at 647; *Emigrant Mortg. Co.*, 945 N.Y.S.2d at 699 ("Examples of unreasonably favorable contractual provisions . . . include inflated prices, unfair termination clauses . . . and improper disclaimers of warranty.").

[50] *Gillman*, 534 N.E.2d at 828; *Emigrant Mortg. Co.*, 945 N.Y.S.2d at 699 ("Examples include . . . 'inequality of bargaining power, deceptive . . . language in the contract, and an imbalance in the understanding and acumen of the parties.'").

[51] *Anderson*, 470 U.S. at 574.

[52] Although Trend points to testimony that Zurich's deal was "take it or leave it" for Trend, this testimony doesn't dispositively establish no meaningful choice on Trend's part because if Trend "left it," Trend could, and did, survive.

[53] *U.S. Gypsum Co.*, 333 U.S. at 395.

not based on a clearly erroneous evidentiary assessment. And the bankruptcy court properly allowed Zurich's claim for the unpaid fee schedule write-down fees. As the bankruptcy court committed no reversible error, we AFFIRM the district court's judgment.