IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3255

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

VERSUS

ALLNET COMMUNICATIONS SERVICES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-90-2913-L)

(February 16, 1993)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

In 1983, the predecessor in name to Allnet Communications Services, Inc. ("Allnet"), contracted with South Central Bell Telephone Company ("Bell") for Bell to construct a telephone facility. If Allnet did not use the facility to seventy percent of capacity, Allnet would owe Bell underutilization charges. In 1990, after negotiating a dispute involving overearnings by Bell, Bell

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

and Allnet signed a settlement agreement that released both parties from "any and all claims arising from charges assessed or services rendered as billed" prior to 1989. When Bell later sued Allnet to recover the underutilization charges, Allnet defended based upon the broad language of the 1990 release. The district court determined that the 1990 release did not cover the underutilization charges and therefore found in favor of Bell. We reverse.

I.

Allnet is a long distance telephone carrier that purchases access communications services from Bell. In December 1983, Allnet's predecessor in name requested that Bell construct a long-distance telephone facility, consisting primarily of underground cable, building cable, and other equipment necessary for Allnet to switch and transmit long-distance phone calls. Under the agreement between the two parties, Bell would be entitled to collect underutilization charges from Allnet if Allnet used less than seventy percent of the facility. Bell had to wait five years before determining whether Allnet had underutilized the facility.

In 1988, the end of the five-year period, Bell's analysis showed that Allnet had utilized only thirty percent of the facility and sent Allnet a bill for $180,023. After Allnet questioned this amount, Bell sent a revised bill for $161,123. Allnet continued to dispute the bill and has never paid the $161,123.

In 1989, Allnet and Bell had another dispute, stemming from Bell's reported interstate access overearnings. Allnet threatened

to file a complaint against Bell for recovery of these overearnings. In 1990, the two parties entered into a settlement agreement to resolve this claim. While Allnet's lawyers negotiating the agreement apparently knew of the underutilization obligation claim, Bell's lawyers seem to have been unaware of it.

On March 21, 1990, after negotiations, the two sides signed a settlement agreement containing the following language:

> 5. Except as provided in Article 3, Allnet and Bell South, for and in consideration of the payment of $398,000, mutually release, acquit and fully discharge each other, their officers, directors, agents, employees, representatives, successors and assigns from any and all claims arising from charges assessed for services rendered or billed prior to December 31, 1988. Allnet and BellSouth also mutually release, acquit and fully discharge each other from any and all claims arising from CC Docket No. 85-166, Phase II, Part I strategic pricing issues . . . .

Article 3 says that nothing in the settlement agreement shall be seen as a settlement of any claims related to case no. E-89-201 or no. E-89-202, cases unrelated to the underutilization obligation or the overearnings dispute.

The final settlement agreement was executed by Bell in Georgia and Allnet in Washington, D.C., on March 21, 1990. Bell is a corporation organized and existing under the laws of Georgia, with its principal place of business in Alabama. Allnet is a Michigan corporation having its principal place of business in Michigan and doing business in Louisiana as a long-distance carrier.

Allnet claims that several weeks after both parties had signed the agreement, Bell's attorney sought from Allnet's attorney a renegotiation of the written agreement. Apparently, the Bell

attorney had received some knowledge of the underutilization obligation and was nervous that this agreement might be read as releasing this obligation. Allnet refused to modify the agreement.

On August 13, 1990, Bell filed a complaint against Allnet to collect the underutilization obligation. In its answer to the complaint, Allnet claimed that it no longer owed Bell any of the underutilization charges because the 1990 settlement agreement released Allnet from all claims prior to 1989. A bench trial was held on September 3, 1991.

The district court rejected Allnet's defenses and ruled that Bell could collect from Allnet $161,123 in unpaid underutilization charges plus late payment charges of $48,156.19.[1] The court based its decision upon several findings of fact and conclusions of law, including finding of fact number 18, which reads as follows:

> The Court finds that, contrary to Allnet's contention, the quoted language contained in the March 1990 settlement agreement did not release Allnet from its obligation to pay the underutilization charges. The overearnings settlement agreement makes no mention of the $161,123 underutilization claim of South Central Bell as a released item. Exhibit D-1. Further the Court finds that the testimony of the South Central Bell representatives who negotiated the earnings settlement agreement to be credible. They testified that they had no knowledge of and did not intend to include the underutilization claim as a released claim.

Applying the law of Georgia and the District of Columbia to the interpretation of the settlement agreement (because the agreement was executed by Bell in Georgia and by Allnet in the District of Columbia), the court also entered several conclusions

[1] Bell then moved to amend the judgment to increase the late payment charges to $57,223.04. The court granted this motion and entered judgment in favor of Bell for $218,346.04.

of law, including number eight, which reads as follows:

> Because it was argued that the settlement included a dispute to which there was no express reference in the executed agreement, the Court found that there was a latent ambiguity in the settlement agreement and, accordingly, parol evidence was admissible at trial. [Citing Georgia and District of Columbia cases.]

The court then determined that there was no mutual intent that the settlement agreement would cover the underutilization claims. The court further found that the agreement on its face did not pertain to the underutilization claim as a released item. Because the underutilization and overearnings issues were unrelated, and because Allnet gave no consideration for a release of the underutilization claim, the court, concluding that Allnet's defense that the agreement released Allnet from this underutilization claim was without merit, found in favor of Bell.

II.

Allnet claims that the court erred in finding the language of the settlement agreement to be ambiguous and then considering extrinsic evidence of the parties' intent in reaching its conclusion that the agreement did not release Allnet from its obligation to pay Bell the underutilization charges. We agree.

In reviewing a district court's findings of fact, we are governed by the clearly erroneous standard of FED. R. CIV. P. 52(a). Pullman-Standard v. Swint, 456 U.S. 273, 287 (1987). Our review of questions of law is de novo. Id. In its finding of fact number 18, the district court declared that the settlement agreement "did not release Allnet from its obligation to pay the underutilization

charges." Despite the court's characterization of this statement as a finding of fact, we believe that it was a conclusion of law. In order to determine that the language in the agreement by which Allnet and Bell agreed "mutually [to] release . . . each other . . . from any and all claims" did not actually release Allnet from a claim, the district court had to interpret the agreement.

In Bose Corp. v. Consumers' Union of United States, 466 U.S. 485, 501 (1984), the Court stated, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." (Citation omitted.) Similarly, in Inwood Lab. v. Ives Lab., 456 U.S. 844, 855 n.15 (1982), the Court noted that "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." (Citation omitted.) In the instant case, because the district court mistakenly called an interpretation of a contract a finding of fact, we are not bound by the clearly erroneous standard in our review of that interpretation.

The interpretation of a contract is a question of law. Thornton v. Bean Contracting Co., 592 F.2d 1287, 1290 (5th Cir. 1980). We review a contract's interpretation de novo. City of Austin v. Decker Coal Co., 701 F.2d 420, 425 (5th Cir.), cert. denied, 464 U.S. 938 (1983) ("This circuit . . . has consistently

held that the interpretation of a contract `is a matter of law reviewable de novo on appeal.'"). The rationale behind this rule is that when contract interpretation involves simply examining the document, and not making credibility determinations, the appellate court stands in the same shoes as the district court.

We may also determine, on our own, whether any ambiguity existed in the agreement. In In re Stratford of Texas, Inc., 635 F.2d 365, 368 (5th Cir. Jan. 1981), we said,

> A question of contract interpretation, including the determination of whether a contract is ambiguous in order to permit extrinsic evidence of intent, is a question of law. Consequently, we are not bound by the clearly erroneous standard of review, Fed. R. Civ. P. 52(a), on the question of ambiguity. Ordinarily, we should glean the contract's meaning without resorting to extrinsic evidence in accordance with the principle that the language of an agreement, unless ambiguous, best represents the intention of the parties. [Citations omitted.]

See also City of Austin, 701 F.2d at 425-26 ("This broad standard of review includes the determination of whether the contract is ambiguous. This initial determination is . . . a question of law.").

In other words, we shall independently look at the settlement agreement to declare whether there is any ambiguity. If we find none, we scrutinize the agreement's language to ascertain its meaning. Contrary to Bell's assertion, we do not have to accept the district court's interpretation that the agreement did not intend to release Bell's underutilization claim.

In a diversity suit involving the interpretation of a contract, such as the suit before us, we apply the substantive law

of the state in which the district court sits. Godchaux v. Conveying Techniques, Inc., 846 F.2d 306, 314 (5th Cir. 1988). Since the district court in the case at bar sits in Louisiana, we apply Louisiana law, which considers a contract executed at the place where the offer is accepted. Id. Here, as the settlement agreement was signed both in Georgia and in the District of Columbia, we apply the laws of those two jurisdictions in interpreting the contract before us.

We first discuss the law of the District of Columbia. In Bolling Fed. Credit Union v. Cumis Ins. Soc., 475 A.2d 382, 385 (D.C. App. 1984), the court declared that a release is a form of contract and stated that "[i]f the release is facially unambiguous, we must rely solely upon its language as providing the best objective manifestation of the parties' intent." Id. (citation omitted). The court interpreted a release of "`all claims of any kind or character'" very broadly, in fact as "nothing less than a general release." Id. at 386.

In Holland v. Hannan, 456 A.2d 807, 815 (D.C. App. 1983), the court declared that absent

> ambiguity, a written contract . . . speaks for itself and binds the parties without the necessity of extrinsic evidence. Contracts are not rendered ambiguous by the mere fact that the parties do not agree upon their proper construction. The question of whether a contract is ambiguous is one of law to be determined by the court.

Id. (citations omitted). The court went on to decide that a contract is not ambiguous when a court "`can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning

depends . . . .'" Id. at 815 (citation omitted).

The reviewing court concluded that the trial court did not err in construing "determined to sell" as the decision to transfer rights and property to another for consideration. Despite acknowledging that it could hypothesize a set of circumstances in which this language might not constitute a determination to sell, the court found the language nevertheless unambiguous and interpreted the contract under its plain language. Id. at 816 n.11.

Georgia law takes a similar approach. In Helms, Inc. v. GST Dev. Co., 219 S.E.2d 458, 460-61 (Ga. App. 1975), the court said that "no construction is required or even permissible when the language employed by the parties in their contract is plain, unambiguous, and capable of only one reasonable interpretation. In such instances, the language used must be afforded its literal meaning and plain ordinary words given their usual significance." The court detected no "substantial ambiguity" in the terms of a waiver of a lien and so read the waiver literally. Id. at 461.

In Health Serv. Centers v. Boddy, 359 S.E.2d 659, 661 (Ga. 1987), the court reiterated this principle: "Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties." (Citations omitted.) The court then determined that the language of a merger clause showed that the parties intended their contract to be the final agreement. Id.

Thus, District of Columbia and Georgia law yield a similar

analysis. A reviewing court may independently examine a contract to determine whether it is ambiguous. If the reviewing court decides that the contract is facially unambiguous, it shall interpret the agreement based only upon its plain language.

We do not see any ambiguity in the language of the settlement agreement. The contested language reads, "Allnet and Bell . . . in consideration of the payment of $398,000, mutually release . . . [each other] from any and all claims arising from charges assessed for services rendered or billed prior to December 31, 1988." This is a broad mutual release provision of all claims stemming from services rendered. None of the wording indicates any obscurity in the meaning of the parties to release each other from "any and all claims."[2]

Since we discern no ambiguity on the face of the agreement, we turn to interpret its meaning by looking at the plain language of its words. We focus on the inclusion of the underutilization claim under the ambit of "all claims arising from charges assessed for

[2] The district court found, as a matter of law, a "latent ambiguity" in the agreement because it contained no express reference to the underutilization obligation, and accordingly, it admitted parol evidence. We first note a structural defect in the court's reasoning. Before admitting parol evidence, the court must find as a matter of fact a blatant, not a latent, ambiguity on the face of the contract. Additionally, the court's rationale behind the finding of a latent ambiguity is not convincing. Article 3 of the agreement states specifically that the agreement "does not . . . [affect] in any way, any claims, refunds, or damages due Allnet should it . . . prevail in its 88-1 Complaints filed in Case Nos. E-89-201 and E-89-202 . . . ." This provision shows that the parties contemplated eliminating certain claims from the scope of the agreement. They did not specifically exclude the underutilization claim. Had Bell desired that the agreement not release the underutilization claim, it could have negotiated a clause to be just that. Bell did not. Bell did, however, negotiate and accept an agreement that went on to release "any and all claims." We find no latent ambiguity in the fact that the underutilization claim was not mentioned by name.

services rendered or billed prior to December 31, 1988."

We conclude that charges for underutilization of facilities were charges for services that the settlement agreement released. The charges in dispute are related to special construction that Bell provided for Allnet when Bell built the long-distance facility in 1983. In Wallace Stevens, Inc. v. LaFourche Parish Hosp. Dist. No. 3, 323 So. 2d 794, 795 (La. 1975), the court equated the installation and leasing of telephone equipment with the provision of telephone services. Bell also provided special switching and access services in conjunction with the facility it constructed for Allnet. Moreover, the charges Bell assessed against Allnet for underutilization were charges billed pursuant to Bell's interstate access services tariff. All of these facts lead us to the conclusion that the charges for underutilization of a specially constructed facility are charges for services, ergo charges released by the settlement agreement.[3]

[3] Bell argues that neither special construction nor underutilization charges are services. It claims that while the Communications Act of 1934, 47 U.S.C. §§ 151-609, does not explicitly define "services," it does refer to services as "the receipt, forwarding, and delivery of communications." 47 U.S.C. § 153(a). A closer examination of § 153(a) first shows that this section does not pretend to be a broad definition of services in general, but rather defines only "wire communication," and second, the definition includes the words "among other things," indicating that the definition is by no means exhaustive.

We further note that the factors that lead us to the conclusion that charges for "services" include charges for underutilization of a specially constructed facility are not based upon evidence extrinsic to the contract, but rather derive from the context of the agreement. In order to determine that the underutilization charges are charges for services, we have confined our examination to what the word "services" encompasses; we have not relied upon parol evidence to vary the terms of the agreement.

III.

The plain language of article 5 of the settlement agreement states that the parties agreed to release each other from all claims arising from charges assessed for services rendered before 1989. Because we find that the charges Bell assessed Allnet for underutilization of the facility Bell constructed for Allnet are charges for services rendered before 1989, we conclude that the agreement released Allnet from any obligation to pay Bell for the underutilization charges. We therefore REVERSE the decision of the district court and RENDER judgment in favor of Allnet.