UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10356

AMARILLO CELLTELCO,

Plaintiff-Counter-Defendant-Appellee,
Cross-Appellant,

VERSUS

DOBSON CELLULAR SYSTEMS, INC., ET AL.,

Defendants,

DOBSON CELLULAR SYSTEMS, INC.,

Defendant-Counter-Plaintiff-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(2:92-CV-87-J)

(May 31, 1995)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Dobson Cellular Systems, Inc., challenges an adverse judgment, following a jury trial, on Amarillo CellTelCo's claim under the Federal Communications Act, 47 U.S.C. § 151, *et seq.* (FCA). The district court awarded CellTelCo substantial attorney's fees as a

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

result of its successful FCA claim, and denied Dobson's counter-claim charging a bad faith state law claim. We **AFFIRM**.

I.

Amarillo CellTelCo is a cellular communications provider, licensed by the Federal Communications Commission to provide cellular service on the A-Band frequency in the Amarillo Metropolitan Statistical Area (MSA). Southwestern Bell Mobile Systems is the B-Band carrier in the MSA.

Dobson manages and operates a unified cellular system covering parts of Texas and Oklahoma. Individually-licensed cellular providers subscribe to the Dobson system for cellular service, and Dobson is also the managing general partner for several of its subscribers, including Texas 2 Ltd. (in which Dobson had a 61% interest). Texas 2 is licensed by the FCC to provide cellular service on the B-Band frequency in the Texas Rural Service Area No. 2, a 12-county area east of Amarillo. Southwestern, which operates in CellTelCo's area (MSA), is also a limited partner in Texas 2.

This action arises from two agreements between CellTelCo and Texas 2 (through Dobson). The first was a "roaming" agreement -- an agreement which permits customers of one cellular provider to use services of another provider when the customer is in that other provider's area. CellTelCo sought a two-way agreement, whereby its customers could "roam" on the Dobson system (operated for Texas 2 and other providers), and Texas 2 customers could roam on CellTelCo's system. Dobson, on behalf of Texas 2, would agree only to a one-way agreement (allowing CellTelCo customers to roam on the

Dobson system, but not vice-versa). On the other hand, Dobson had a two-way agreement with Southwestern (CellTelCo's competitor in the MSA, and a Texas 2 limited partner, with Dobson the general partner); in addition, it charged Southwestern lower rates than CellTelCo.

The second agreement was a "resale" agreement, by which CellTelCo purchased cellular service through the Dobson system for resale to customers outside the MSA. CellTelCo negotiated with Texas 2 (through Dobson) for a wholesale rate for services; but, relying on a subsequent FCC ruling[2], which only required cellular providers to offer retail rates under resale agreements, Texas 2 withdrew the proposed agreement, and CellTelCo agreed to a retail rate.

This action against Dobson and Texas 2 claimed, *inter alia*, violations of the FCA (price discrimination), and the Texas Deceptive Trade Practices and Consumer Protection Act, Texas Business and Commerce Code §§ 17.41 *et seq.* (DTPA).[3] Dobson and Texas 2 counterclaimed for attempted monopolization, and for CellTelCo's DTPA claim, abandoned before trial, allegedly being in bad faith.

After an 11-day trial, a jury returned a verdict for Texas 2 on all claims against it; for CellTelCo on the antitrust counter-

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[2] ***Cellular Resale Decision***, 6 FCC Rcd. 1719, 1725 (1991), *aff'd*, ***Cellunet Communication, Inc. v. Federal Communication Comm'n***, 965 F.2d 1106 (D.C. Cir. 1992).

[3] CellTelCo also pressed antitrust claims under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.

claim, and on the FCA discriminatory pricing claim against Dobson; and for Dobson on the antitrust claims. The jury awarded CellTelCo approximately $330,000. After a separate hearing, the court rejected Dobson's bad faith claim.

The district court entered judgment on the jury verdict, and awarded CellTelCo approximately $408,000 in attorney's fees. Dobson's motion for judgment as a matter of law, or in the alternative for a new trial, was denied.

II.

Dobson raises numerous issues: (1) improper denial of judgment as a matter of law on the FCA claim, asserting that it is not an FCA "common carrier"; (2) insufficient evidence of damages; (3) insufficient evidence of resale pricing discrimination; (4) entitlement to relief under Fed. R. Civ. P. 60(b)(3); (5) improper evidentiary rulings; (6) excessive attorney's fees; and (7) improper denial of its bad faith claim against CellTelCo.[4]

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[4] Dobson and Texas 2 moved pretrial to abate the proceedings and have the FCA issues submitted to the FCC for resolution. Dobson contends that the district court abused its discretion in denying this motion, and asks, if we remand for a new trial on the FCA issues, that the case instead be held in abeyance and the FCA issues submitted to the FCC for determination under the primary jurisdiction doctrine. Because a new trial is not warranted, this issue is moot.

CellTelCo cross-appeals, asserting that it is entitled to judgment against Texas 2 (if not Dobson), and that a new trial, if ordered, should encompass all the issues of the first trial (not merely the FCA claim). Again, because we affirm the judgment, these issues are also moot. To the extent CellTelCo may be contending that Texas 2 should be held liable *in addition* to Dobson, this issue was not preserved for appeal. CellTelCo did not move for judgment as a matter of law against Texas 2; we cannot enter such a judgment on appeal. *E.g.*, ***Zervas v. Faulkner***, 861 F.2d 823, 832 n.9 (5th Cir. 1988).

A.

As noted, CellTelCo prevailed solely against Dobson, and only then on the FCA price discrimination claim. The FCA confers a cause of action against a "common carrier", defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy ...." 47 U.S.C. § 153(h).[5] Dobson maintains that it was entitled to judgment as a matter of law on the basis that it is not a common carrier.

CellTelCo responds that Dobson failed to preserve the common carrier issue for review. A post-verdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) is simply a renewal of the Rule 50(a) motion made at the close of all the evidence. Fed. R. Civ. P. 50(b); *e.g.*, ***House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.***, 468 F.2d 64, 68 (5th Cir. 1972). Dobson's Rule 50(a) motion did not specifically raise the common carrier issue -- far from it.[6] Rather, Dobson urged, *inter alia*, only that there

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[5] The FCA provides in pertinent part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter....

47 U.S.C. § 206.

[6] Dobson's motion for judgment as a matter of law at the close of CellTelCo's evidence was denied. Dobson reurged this motion at the close of all the evidence. Accordingly, Dobson could renew its

was insufficient evidence to submit the FCA claim to the jury. Dobson's motion, as supplemented, for judgment as a matter of law had 79 separate grounds for judgment, none of which so much as mention the term "common carrier". Only in its post-verdict Rule 50(b) motion did Dobson finally present that issue.

Dobson cannot raise the common carrier issue, because it was not raised in the Rule 50(a) motion. Rule 50(a)(2) requires the movant to "*specify* ... the law and the facts on which the moving party is entitled to the judgment". (Emphasis added.) The obvious, and salutary, purpose of this requirement is "so that the responding party may seek to correct any overlooked deficiencies in the proof". Rule 50 (commentary to 1991 amendments). ***McCann v. Texas City Refining, Inc.***, 984 F.2d 667, 672 & n.6 (5th Cir. 1993); ***Piesco v. Koch***, 12 F.3d 332, 340-41 (2d Cir. 1993). This purpose was not served here. Dobson's Rule 50(a) motion was insufficient to put either the court or CellTelCo on notice of the common carrier issue. *See* ***Piesco***, 12 F.3d at 340-41.[7]

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motion post-verdict, pursuant to Rule 50(b). The question, however, is whether the pre-verdict motion raised the common carrier issue.

[7] Although we do not reach whether Dobson was a common carrier, the following evidence bears noting. Dobson urges that it is not a common carrier because it is not an FCC license-holder; therefore, it does not, and cannot, engage in communication by wire or radio. And, although Texas 2 is a license-holder, Dobson contends that, as the managing general partner of Texas 2, it was only the agent of a common carrier -- not a common carrier itself. Dobson cites an FCC ruling which held that a "third party collection and billing service" is not a common carrier by virtue of performing its services for a common carrier. ***Detariffing of Billing and Collection Servs.***, 102 FCC 2d 1150 (1985). But, it appears that, for all practical purposes, Texas 2 and Dobson were one and the same. The following exchange at trial is illustrative:

B.

In order to recover for price discrimination under the FCA, a party must prove damages. 47 U.S.C. § 206. Dobson contends that CellTelCo failed to present evidence of damages sufficient to present a jury question, and that, therefore, it was entitled to judgment as a matter of law.[8] Maintaining that the only evidence

> Mr. Dobson (president of Dobson): Dobson is the managing general partner of Texas 2 Limited.
>
> CellTelCo Counsel: And in that capacity, as manager ... Dobson was responsible for all administrative duties for Texas 2 Limited, is that correct?
>
> Mr. Dobson: Yes.
>
> CellTelCo Counsel: What other functions ... did Dobson ... handle as managing general partner?
>
> Mr. Dobson: All of them. ... Sales, marketing, billing, collections; you name it, it's all -- all the activities of Texas 2 Limited are done by its general partner Dobson.

Furthermore, although Dobson makes much of the fact that it is not an FCC license holder, its name appears on Texas 2's license. Moreover, through its various partnerships throughout Texas and Oklahoma, Dobson has constructed a "unified" cellular communications system, and markets that system to its customers. In short, it is certainly arguable that Dobson has undertaken "to provide communications service to the public for hire". ***American Tel. & Tel. Co. v. Federal Communications Comm'n***, 572 F.2d 17, 24 (2d Cir.) (defining "common carrier"), *cert. denied*, 439 U.S. 875 (1978). In addition, there was testimony at trial that Dobson was a "reseller" of Texas 2's communication services. Resellers are liable as common carriers under the FCA. ***Id.*** at 24-25.

[8] CellTelCo asserts that Dobson failed to object to the jury instructions on damages, and thereby failed to preserve this issue for review. *See* Fed. R. Civ. P. 51. For the hereinafter stated reasons, we need not decide whether such failure would preclude raising the judgment as a matter of law issue. At the charge conference, Dobson requested, and was granted, leave to have its earlier motion for judgment as a matter of law incorporated into its objections to the court's charge, to the extent the court would

of damages presented by CellTelCo was the difference between the rates Dobson charged CellTelCo and those it charged other parties, Dobson relies on ***Interstate Commerce Comm'n v. United States, ex rel. Campbell***, 289 U.S. 385, 389-90 (1933), in which the Court, in interpreting the provisions of the Interstate Commerce Act, upon which the FCA was based, stated that "[t]he question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less".

But, as the FCC held in ***MCI Telecommunications Corp. v. American Tel. & Tel. Co.***, 94 FCC 2d 360, 382-83 (1981), "***Campbell*** does not ... preclude the possibility that the rate discrepancy may sometimes be the measure of damages.... [C]ourts both before and after ***Campbell*** have found the difference between rates to be an accurate measure of damages." (*Citing* ***Meeker v. Lehigh Valley R. Co.***, 236 U.S. 412 (1915); ***States Marine Lines, Inc. v. Federal Maritime Comm'n.***, 313 F.2d 906 (D.C. Cir.), *cert. denied*, 374 U.S. 831 (1963).) Restated, ***Campbell*** does not hold that price differential cannot be a measure of damages, only that the differential, standing alone, is insufficient evidence of them. *See* ***Campbell***, 289 U.S. at 389-90 (holding that rate differential "is an evidentiary circumstance to be viewed along with others. It is not the measure without more.").

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instruct the jury on issues Dobson believed were not properly raised by the evidence. Dobson had moved for judgment as a matter of law for failure to prove damages.

The rate differential was not the only evidence of damages. CellTelCo also presented testimony from several sources on its inability to compete as a result of Dobson's discriminatory pricing. In sum, damages was properly before the jury, and it was entitled to consider the rate differential in making the award.[9]

C.

Dobson contends next that it was entitled to judgment as a matter of law on CellTelCo's price discrimination claim relating to the resale agreement. As noted, relying on an FCC ruling, Dobson refused to provide CellTelCo with a more favorable rate than Dobson charged its retail customers. Dobson urges that no evidence was presented supporting CellTelCo's claim that the resale agreement was discriminatory.

Once again, CellTelCo responds that Dobson has failed to preserve this issue. We agree. There was no finding by the jury on the specific issue of resale price discrimination. Dobson's complaint on appeal, therefore, is essentially an objection to the jury charge. But, Dobson did not ask for, nor did the court give, an instruction requiring the jury to make a separate finding on resale price discrimination. Instead, the question presented to the jury was as follows:

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[9] As quoted in part in note 10, *infra*, the jury was instructed that, to find a violation of the FCA, it must conclude both that different prices were charged for similar ("like") services, and that these differentials were unreasonable. As to calculation of damages, however, the court made no reference to price differentials, and instructed only on the burden of proof, proximate cause, mitigation of damages, and the requirement that damages be proved with reasonable certainty.

> Do you find that one or both of the Defendants violated the [FCA] by charging ... [CellTelCo] unjustifiably different rates from those rates Defendant charged other carriers for like services, and that [CellTelCo] suffered injury to its business or property as a proximate result of such conduct?

Furthermore, the accompanying instruction on this question did not contemplate a segregated analysis by the jury.[10] The jury could find price discrimination based on either roaming rates or resale

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[10] The instruction states, in relevant part:

> The [FCA] prohibits common carriers from charging unjustifiably different rates for like communication services. Or stated another way, the [FCA] provides that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges for like communication services.
>
> [CellTelCo] claims that Defendants violated the [FCA] by charging [CellTelCo] unreasonably discriminatory fees for roaming and other services, and by withholding from [CellTelCo] and [CellTelCo's] customers terms and services Defendants offered to others.
>
> To determine whether Defendants unlawfully discriminated against [CellTelCo] in violation of the [FCA], you must decide:
>
> (1) Whether the roaming and other services sold by Defendants to carriers and marketers other than Plaintiff are "like" those roaming and other services sold by Defendants to [CellTelCo];
>
> (2) If so, is there a price difference between the roaming and other services sold by Defendants to marketers of cellular services other than [CellTelCo] and the roaming and other services sold by Defendants to [CellTelCo]?
>
> (3) If so, is the price difference reasonable?

rates, or both. Because Dobson did not object[11] to the form of either the question or the instructions accompanying that question, it cannot now object on appeal. *See* ***McDaniel v. Anheuser-Busch, Inc.***, 987 F.2d 298 (5th Cir. 1993); Fed. Rule. Civ. P. 51.[12]

D.

Dobson contends also that the district court erred in denying it relief from judgment, as provided for by Fed. R. Civ. P. 60(b)(3).[13] It asserted in district court that CellTelCo had

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[11] Dobson points to a general objection offered at the charge conference. *See supra* note 8. We find it inadequate. As is well-established,

> [a] party has the burden to request the submission of its issues to the jury and to request instructions on each such issue. If a party neither requests submission of an issue nor objects to the omission of that issue from the special interrogatories given to the jury, such party is deemed to have waived its right to have the jury determine that issue. Likewise, failure to object to the wording of a special issue prevents a party from objecting to such wording on appeal.

McDaniel v. Anheuser-Busch, Inc., 987 F.2d 298, 306 (5th Cir. 1993) (internal footnotes omitted).

[12] Pursuant to the form of the question to the jury, to which Dobson did not object, and assuming *arguendo* that there was insufficient evidence of discriminatory resale pricing, we are unable to determine whether the jury based its verdict on that evidence -- and if so, what portion was so based. And, although the parties have attempted here to attribute the damages awarded CellTelCo as flowing in part from resale rates, we cannot engage in such speculation. For example, CellTelCo asserts that its evidence at trial was sufficient for a reasonable juror to find that if Dobson had provided it with "a non-discriminatory roaming rate, it would have been able to devise roaming plans to avoid having to resell in order to serve its customers."

[13] Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party ... from a final judgment

fraudulently concealed that one of its expert witnesses, Kenneth Hardman, was acting as an attorney for CellTelCo in the case.

We review the denial of Rule 60(b)(3) relief only for abuse of discretion. ***Diaz v. Methodist Hosp.***, 46 F.3d 492, 496 (5th Cir. 1995). As our court recently noted:

> A rule 60(b)(3) assertion must be proved by clear and convincing evidence, and the conduct complained of must be such as to prevent the losing party from fully and fairly presenting its case. The purpose of the rule is to afford parties relief from judgments which are unfairly obtained, not those which may be factually incorrect.

Id. (internal quotations and citations omitted).

Dobson insists that, contrary to the representations by CellTelCo and Hardman, Hardman was not only an expert witness, but an active attorney and advocate for CellTelCo in this matter. It bases this conclusion on various entries in CellTelCo's attorney's billing records -- made available, in unredacted form, only after trial.[14] But, although the entries establish that Hardman often

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> ... for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party ....

[14] Dobson relies on the following billing entries:

> 9/16/91 ... telephone conference with ... Hardman re regulatory matters
>
> * * *
>
> 1/21/92 ... Review memoranda of ... Hardman; telephone conference with ... Hardman; outline pleadings
>
> * * *
>
> 2/10/92 ... Review & revise draft of Complaint;

played an active role in advising CellTelCo's attorneys on various matters, CellTelCo admitted as much at trial when, through Hardman's testimony, it noted that he had indeed been employed as

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* * *

2/11/92 ... Review draft; confer w/Richard Brown, fax to ... Hardman

* * *

2/13/92 ... Revise complaint draft; t/c w/ ... Hardman re: regs & statute

* * *

4/8/92 ... telephone conference w/ ... Hardman re: Communications Act issues; draft additional factual statements based thereon; revise response; revise pleadings

4/8/92 ... telephone conference with Bill SoRelle & ... Hardman; ... review fax from ... Hardman

* * *

5/7/92 ... Work on response to motion to abate; fax draft to ... Hardman

* * *

5/11/92 ... Work on review of response brief; telephone conference with ... Hardman; revise brief

* * *

10/8/92 ... telephone conference with ... Hardman re: Communications Act & whether within; research re: same

* * *

5/28/93 ... Review fax & pleading from Hardman; work on [redacted] DTPA portion of brief

a consultant on communications regulations. Dobson was given ample opportunity, on cross-examination, to inquire about Hardman's role. The claimed evidence of CellTelCo somehow engaging in fraud or misrepresentation falls far, far short of meeting the requisite "clear and convincing" standard. There was no abuse of discretion.

E.

Dobson contends that the district court impermissibly allowed Hardman to express legal conclusions concerning (1) the definition of the legal terms "roaming" and "resale"; (2) his opinion that a particular agreement was a resale, rather than a roaming, agreement; and (3) his opinion that Dobson was a reseller. The district court overruled Dobson's objections to this testimony, and denied its motion for partial new trial.

"The admission or exclusion of expert testimony is a matter left to the discretion of the trial judge, and his or her decision will not be disturbed on appeal unless it is manifestly erroneous". ***Phillips Oil Co. v. OKC Corp.***, 812 F.2d 265, 280 (5th Cir.), *cert. denied*, 484 U.S. 851 (1987). Obviously, this case called for the application of technical language. For example, although terms such as "resale" and "roamer" are defined by the FCC, we are not prepared to question the district court's judgment that Hardman's opinion on the applicability of these technical terms to the facts of the case might aid the jury in its role as ultimate factfinder. *See* ***id***. at 281-82; ***United States v. Fogg***, 652 F.2d 551 (5th Cir.

1981), *cert denied*, 456 U.S. 905 (1982).[15] In exercising that judgment, the district court was careful not to relinquish *its* role as the ultimate instructor on the law; responding to Dobson's frequent objections, the court reminded the jury that "all instructions on the law would come from the Court." There was no manifest error.

F.

By reason of its recovery under the FCA, CellTelCo was entitled, under 47 U.S.C. § 206, to reasonable attorney's fees. It sought $453,692.55, and the district court determined that 90% of that figure, $408,323.29, was reasonable. Dobson urges that the award was excessive.

We review an award of attorney's fees only for abuse of discretion. *E.g.*, ***Purcell v. Seguin State Bank and Trust Co.***, 999 F.2d 950, 961 (5th Cir. 1993). As stated in ***Hensley v. Eckerhart***, 461 U.S. 424, 433 (1983), for fixing a reasonable award, the district court determines the number of attorney-hours reasonably expended, and multiplies that number by a reasonable hourly rate. The parties stipulated that the hours and rate were reasonable; solely at issue is whether CellTelCo was entitled to recover 90% of its total fee, in that it prevailed on only one of its claims.

Hensley addressed this issue specifically:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit ... work on an unsuccessful claim

[15] The court provided the FCC definitions of "roaming" and "resale" in its jury charge.

> cannot be deemed to have been expended in pursuit of the ultimate result achieved.
>
> * * *
>
> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.

Id. at 434-35. The district court determined that this case fell into the latter category, concluding that "[a]t least 90% of the work would have had to have been done", regardless of which claims were brought. This is the conclusion in issue.

Dobson contends that CellTelCo's unsuccessful antitrust claims, and abandoned DTPA claim, were unrelated to the successful FCA claim; CellTelCo counters that each claim was designed to redress a single wrong -- the price differential. We conclude that the district court could properly agree with CellTelCo.[16]

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[16] The court's statement of CellTelCo's causes of action in its charge to the jury is illustrative:

> Monopolization
>
> [CellTelCo] claims that Defendants ... monopolized a relevant market by:
>
> (1) Denying [CellTelCo] reasonable access to an essential facility, i.e. cellular telephone services at reasonable and nondiscriminatory prices.... and,
>
> (2) Seeking to preclude CellTelCo as a competitor for customers in Texas RSA 2.
>
> Attempt to Monopolize
>
> [CellTelCo] claims that Defendants ... attempted to monopolize a relevant market by:

When claims are related, ***Hensley*** directs the district court to arrive at a reasonable fee by "focus[ing] on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation". ***Id***. at 435. The district court concluded that "[n]inety percent of the $453,692.55 fee sought by Plaintiff would be reasonable in relation to the results obtained". Dobson challenges this conclusion on the basis that CellTelCo's recovery, $331,243.71, was small in relation to

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> (1) Withholding an essential facility (cellular telephone services at reasonable and non-discriminatory prices).
>
> Conspiracy in Restraint of Trade and to Monopolize
>
> [CellTelCo] claims that Defendants ... conspired in restraint of trade by:
>
> (1) Entering into contracts, combinations, and conspiracies, thereby restraining trade and commerce by denying [CellTelCo] comparable cellular telephone services in Texas RSA 2 and the Amarillo MSA.
>
> Violation of Federal Communications Act
>
> [CellTelCo] claims that Defendants ... violated the provisions of the Federal Communications Act ... by:
>
> (1) Breaching their duty to furnish services on a non-discriminatory basis; and,
>
> (2) Charging unreasonably high and discriminatory fees for roaming services to [CellTelCo] and its customers.

Furthermore, the abandoned DTPA claim was based on Dobson's "charging for roaming services a price that results in a gross disparity between the value received and the consideration paid". From the foregoing, we conclude that, per ***Hensley***, these claims can reasonably be viewed as involving "a common core of facts" and "based on related legal theories". ***Hensley v. Eckerhart***, 461 U.S. 424, 435 (1983).

the almost $1.3 million sought. CellTelCo responds that its recovery at trial was more than ten times the amount of its initial settlement demand to Dobson. Faced with this conflict, we again find direction from ***Hensley***:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Id. at 437. We conclude that, in all respects, the district court complied with ***Hensley***. Had we been the trier of fact, we might have awarded a lesser fee; but, that is not the issue. The award was not an abuse of discretion.

G.

CellTelCo abandoned the DTPA claim approximately a year into the litigation. Dobson asserts that the claim was initiated and maintained in bad faith, and that, therefore, it is entitled to attorney's fees, pursuant to DTPA § 17.50(c). To recover, Dobson was required to show that the claim was (1) groundless, and (2) brought in bad faith or for the purpose of harassment. ***Donwerth v. Preston II Chrysler-Dodge, Inc.***, 775 S.W.2d 634, 637 (Tex. 1989). After a hearing, the district court found that Dobson failed to prove either element. We review this finding only for clear error. ***Nobby Lobby, Inc. v. City of Dallas***, 970 F.2d 82, 87 (5th Cir. 1992).

Dobson contends that the DTPA claim was groundless because CellTelCo was not a "consumer" entitled to bring such a claim. Under the DTPA, a consumer "does not include a business consumer

... that is owned or controlled by a corporation or entity with assets of $25 million or more". DTPA § 17.45(4). At least two of CellTelCo's minority-ownership holders had assets greater than $25 million.

CellTelCo responds that "owned or controlled" covers only entities that hold complete or majority ownership. Insisting that this position is groundless, Dobson points to the plain language of the statute, and the absence of authority supporting CellTelCo. Dobson further suggests that CellTelCo's bad faith and its purpose to harass may be inferred from its initiation of a known groundless claim. ***Knebel v. Port Enters, Inc.***, 760 S.W.2d 829, 832 (Tex. App. 1988).

CellTelCo's position was essentially that, in DTPA § 17.45(4), the "or" means "and". Whether CellTelCo could have prevailed on this argument is another matter -- one we need not address. We conclude that the district court did not clearly err in finding that CellTelCo's DTPA claim was neither groundless nor in bad faith.

III.

For the foregoing reasons, the judgment is

AFFIRMED.