

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50721

SOUNDS & THINGS, d/b/a Communication
Professionals,

Plaintiff-Appellee,
Cross-Appellant,

versus

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.,
d/b/a San Antonio SMSA Limited Partnership,
ET AL.,

Defendants-Appellants,
Cross-Appellees..

Appeal from the United States District Court for
the Western District of Texas
(SA-91-CA-1116)

November 27, 1995
Before REAVLEY, JOLLY and WIENER, Circuit Judges.

REAVLEY, Circuit Judge:*

Sounds & Things, Inc., d/b/a/ Communications Professionals ("CP"), brought this suit against San Antonio SMSA Limited Partnership, and its general partner, Southwestern Bell Mobile Systems, Inc. (collectively "SBMS"), asserting numerous state and federal causes of action. The case was submitted to the jury

*Local rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

based on state common law contract and fraud causes of action. Although the jury found no breach of contract, CP recovered a judgment based on its fraud cause of action. SBMS appeals, arguing that the law and facts do not support the fraud judgment. CP cross-appeals, seeking prejudgment interest. We affirm in part, reverse in part, and remand to the district court for calculation of prejudgment interest.

BACKGROUND

SBMS is a federally licensed common carrier authorized to provide cellular radio service in the San Antonio area. Under the federal scheme two common carriers are granted licenses for a given metropolitan market, and each of those carriers is granted rights to use a cellular radio band in that market. SBMS sells cellular phone services directly to customers, but has also entered into agreements with other companies to market those services via agency or other arrangements.

In 1984 CP became a reseller of SBMS cellular service, and in 1986 it entered into an authorized agency agreement with SBMS. In 1988 SBMS entered into a renewed nonexclusive agency agreement with CP, and it is the 1988 agreement with which this case is concerned. Under its terms CP was authorized to sign up customers for the SBMS brand of cellular radio service ("CRS"). SBMS agreed that it would:

Distribute CRS on an equitable basis through all of its agents and distributors. SBMS cannot, however, guarantee the quantity of telephone numbers that will be available through its agents and distributors.

The agreement also provided that:

During the term of this Agreement or thereafter, SBMS reserves the right without obligation or liability to [CP], to market [CRS] in the same geographical areas served by [CP], whether through SBMS' own representatives or through others including, but not limited to other authorized agents, resellers and distributors.

CP was able to earn fees under the contract in a number of ways. It could purchase equipment and sell at a profit to its subscribers. It could charge fees for installing cellular equipment in automobiles. In addition it received two types of commissions from SBMS. It was paid a one-time "activation" commission for each new customer. The activation commission was subject to a "vesting period" of 180 days. If the customer discontinued service within the vesting period, CP would forfeit its activation commission through a "chargeback" by SBMS of the activation commission. CP also earned a "residual" commission. This commission was a fixed percentage of the customer's monthly airtime and access charges. CP's residual commission was set at seven percent provided that CP maintained a subscriber base of one thousand or more customers. Once an agent like CP signed up a customer, billing was handled by SBMS.

The basic theme of CP's case against SBMS was that CP was treated unfairly because SBMS negotiated more favorable contracts with other agents and distributors. CP claimed that this preferential treatment was both fraudulent and a breach of the contract's requirement that SBMS "[d]istribute CRS on an

equitable basis through all of its agents and distributors."¹ The theme of SBMS's defense was that CP, its original agent for the distribution of CRS in the San Antonio area, had become a "dinosaur" in a rapidly changing market, and simply fell prey to more nimble competitors. SBMS claimed, for example, that competitors were able to take market share away from CP through more aggressive advertising, by offering discounts on equipment or even free phones, and by reaching more customers through multiple, better-located outlets.

SBMS was committed to increasing market penetration in the San Antonio area, and entered into numerous unique agreements with car dealers, retailers and other agents. One such agreement is illustrative. SBMS entered into an agreement with Red McCombs, a successful San Antonio car dealer. As an incentive to attract car buyers, Red McCombs would offer prospective buyers a "free car phone." SBMS would pay Red McCombs a one-time activation commission for each new phone, but would later debit Red McCombs for the cost of equipment and installation which SBMS provided. The activation commission and the equipment charge were identical. Red McCombs was paid no residual commission. In effect Red McCombs made no money from cellular services or from SBMS; the deal made sense only because Red McCombs hoped to sell more cars, not cellular services. CP complained that Red McCombs was not subject to chargebacks and was able to give away

¹ CP also asserted federal price discrimination and other causes of action which are irrelevant to this appeal.

equipment for free. SBMS responded, however, that CP did not want a car dealer agreement and could not have made any money under such an agreement.

CP claimed many instances of unfair, preferential treatment toward competitors by SBMS, but this appeal centers on two disputes. One concerned residual commissions. The contract expressly provided that SBMS could unilaterally change commission rates so long as it gave thirty days notice. SBMS was originally paying residual commissions based on fees charged to customers. It later decided to base commissions on fees *collected* from customers, so that CP would receive no commission for cellular services which were billed but for whatever reason were unpaid by the customer. CP does not claim that SBMS did not have the right to alter the residual commission rate or that SBMS was unfair in refusing to pay residual commissions for customers who did not pay their bills. Instead, CP claimed that it simply was shortchanged on residual commission under the agreed new formula. Some evidence was presented that SBMS admitted that CP was underpaid due to some form of accounting or software error, and that SBMS agreed to correct the problem and failed to do so.

A second dispute (discussed in more detail below) concerned chargebacks. CP claimed that before and after it negotiated its 1988 agreement with SBMS, SBMS offered chargeback arrangements with other agents and distributors which were more favorable than CP's chargeback arrangement based on a 180-day vesting period. CP claimed that other competitors were given a 90-day vesting

period or that chargebacks were waived altogether. CP claimed that this preferential treatment offered to others by SBMS was a breach of contract and amounted to a fraud on CP.

DISCUSSION

The parties raise many arguments on appeal. We limit our discussion to those issues we find dispositive.

A. *Fraud Recovery*

As presented to the jury, CP made claims relating to chargebacks assessed against it and unpaid residuals. As to the unpaid residuals, the jury was asked to determine damages for "[l]oss of the benefits of the bargain." As to the chargebacks, the jury was simply asked to determine "[l]oss of chargeback payments." Damage questions were asked both as to breach of contract and fraud.² The jury found no breach of contract, and therefore did not award contract damages. The jury did find fraud, and awarded \$47,500 for unpaid residuals and \$52,500 for loss of chargeback payments, for a total of \$100,000.

SBMS argues that the evidence was insufficient to support the jury's finding of fraud. SBMS filed motions for judgment based on insufficiency of the evidence under FED. R. CIV. P. 50. In reviewing the denial of a motion for judgment, a jury verdict "must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men

² The jury was also asked to determine the loss of the value of CP's business as a going concern, but awarded no damages for this alleged loss. CP does not challenge the jury's findings in this regard.

could not arrive at any verdict to the contrary." *Western Co. of North America v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892 (1983).

To recover for fraud under Texas common law, a party must establish that "(1) a material representation was made; (2) the representation was false; (3) the speaker made the representation knowing it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) the speaker made the representation with the intention that it should be relied upon by the party; (5) the party acted in reliance upon the misrepresentation; and (6) the party thereby suffered injury." *Norman v. Apache Corp.*, 19 F.3d 1017, 1022 (5th Cir. 1994).

1. *Residuals*

As to the residuals issue, we agree with SBMS that the evidence was insufficient to support a fraud recovery. At most, CP offered evidence that a "computer glitch" had caused it to be shortchanged on residuals after the parties agreed that the residual commission should be based on amounts collected from customers rather than amounts billed. After the change CP noticed that its residual commissions fell significantly. The parties met to discuss this issue. The parties agreed that as a temporary solution CP would be paid based on an average of amounts billed and amounts collected. There was some evidence that SBMS agreed to correct the accounting/computer problem and failed to do so. This evidence might be sufficient to support a breach of contract claim (which the jury rejected), but is

insufficient to support a fraud claim. We conclude that no reasonable jury could conclude based on this evidence alone that SBMS intentionally or recklessly misrepresented material facts to CP, or that CP relied on these misrepresentations to its detriment. To the extent that CP is arguing that SBMS promised to fix the accounting problem and failed to do so, a promise of future performance, standing alone, will not support a fraud cause of action. *Schindler v. Austwell Farmers Cooperative*, 841 W.W.2d 853, 854 (Tex 1992).

2. *Chargebacks*

We conclude that CP did offer sufficient evidence of fraud regarding the chargeback issue to support the jury verdict. The evidence of representations regarding chargebacks and CP's vesting period was hotly contested at trial. CP offered evidence that it was induced to enter the 1988 agreement and continued under that agreement based on repeated, false assurances that it would be treated equally with other agents and distributors regarding chargebacks and other terms of its agreement. Sumner Bowen, the president of CP, testified that the 1988 agreement was rewritten out of "concern for parity and equality between all channels of distribution in the market," and that SBMS assured him "that there would be a level playing field." He testified that "all our decisions were based on this contract; that there would be a level playing field." He also testified that SBMS assured him that two large retailers who had 90-day vesting periods at the time would be going to the same 180-day vesting

period found in CP's agreement. SBMS responded with evidence that although the San Antonio regional office preferred 180-day vesting, the Dallas headquarters controlled the large retailer agreements.

CP offered evidence that it was told by SBMS that another competitor, Mother's Window Tint, had a 180-day vesting period when in fact it had a 90-day vesting period. SBMS offered evidence that the misrepresentation if any regarding this contract was innocent, and was a result of confusion regarding the terms of that contract, which contained reference to both a 180-day and a 90-day vesting period. SBMS's position was that it attempted to issue chargebacks to Mother's Window Tint based on 180-day vesting, but dropped the issue after Mother's Window Tint complained.

CP also offered evidence that, despite assurances that all agents and distributors would be subject to a 180-day vesting period, two car dealers were able to obtain shorter vesting periods, and that one of these, Red McCombs, ultimately was charged no chargebacks at all. Mr. Bowen testified that SBMS assured him that the car dealers would be subject to chargebacks. He also testified that at a November 1990 meeting SBMS again assured him that "everybody else" had a 180-day vesting period, and that in 1991 SBMS told him that Red McCombs had paid all of its chargebacks. Again, SBMS offered explanations for the car dealer arrangements that were inconsistent with CP's fraud theory. For example, SBMS offered evidence that it waived

chargebacks to Red McCombs as a business decision after that dealer refused to pay them, and that SBMS had attempted to collect such chargebacks.

Eventually, SBMS put all retailers, agents and dealers on a 90-day vesting period in 1991, after disputes with CP and others. An internal SBMS memo indicates that the move to 90-day vesting was prompted in part to "resolve the Mother's Window Tint issue," and "remove any potential claims, founded or unfounded, that Sumner Bowen may have." Bowen testified that he would not have signed the 1988 agreement as written if he had known that other distributors or dealers had a shorter vesting period.

The jury was properly instructed on the elements of fraud. We cannot say, based on the evidence presented, that no reasonable jury could find that the elements of fraud were met here with respect to the chargeback claim. We conclude that a reasonable jury could find, based on the evidence presented, that among other things (1) SBMS repeatedly misrepresented to CP that other competitors did not have shorter vesting periods or that those shorter periods would be lengthened to match CP's vesting period; (2) CP either would not have agreed to the 180-day vesting period or would have insisted that it be changed but for the misrepresentations; and (3) CP, as SBMS's largest and most successful agent at the time of the 1988 agreement and for a period thereafter, had the leverage with SBMS to insist on such a change in the vesting period. SBMS again argues, correctly, that even if it promised to make vesting uniform at the time of the

negotiation of the 1988 contract with CP, a promise of future performance, standing alone, will not support a fraud cause of action. However, the Texas Supreme Court has also explained that intent to defraud "invariably must be proven by circumstantial evidence," and that "[s]light circumstantial evidence' of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) (citations omitted). Here CP offered evidence not only of the initial promise to move all agents and distributors to 180-day vesting, but of repeated failures to carry out that promise and repeated misrepresentations to CP regarding the vesting periods of competitors. Fraudulent intent "may be inferred from the party's subsequent acts after the representation is made." *Id.* at 434.

SBMS argues in the alternative that the fraud damages are not recoverable as a matter of law because CP's action lies only in contract under Texas law. In *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991), the plaintiff sued the defendant phone company for failing to print its advertisement in the Yellow Pages. Plaintiff sued for negligence but not for breach of contract. The court held that the action sounded in contract and reversed the award of damages for negligence. The court considered several factors as indicating that the action sounds in contract alone: (1) whether the defendant's conduct "would give rise to liability only because it breaches the

parties' agreement"; (2) whether "the only loss or damage is to the subject matter of the contract"; and (3) whether the defendant's duty to the plaintiff arose because of the contract and not because a general obligation imposed by law. *Id.* at 494. Ultimately, the court held that the action sounded in contract because plaintiff's damages "were only for the economic loss caused by [defendant's] failure to perform" and because plaintiff "clearly sought to recover the benefit of his bargain with [defendant]." *Id.* at 495.

We conclude that damages for fraud relating to the chargebacks are not foreclosed as a matter of law under the contract/tort distinction recognized in *Delaney* and other cases. CP was not suing for chargeback amounts due under its contract; there is no dispute that the agency agreement had a 180-day vesting period, and that SBMS could charge back any activation commissions paid for customers who did not continue their cellular service for this period. Instead, CP's theory of damages here was that it agreed to this vesting period and made no demand for a change in the vesting period based on SBMS's misrepresentations regarding the vesting periods it was granting to others. The claimed damages are not amounts due under the contract, but amounts CP would not have been charged but for SBMS's alleged misrepresentations.

In an argument somewhat related to the one discussed above, SBMS argues that the damages awarded are not recoverable because under Texas fraud law "benefit of the bargain" damages are not

compensable. While there is some authority in support of this notion,³ we do not see the chargebacks CP recovered as benefit of the bargain damages. On the contrary, CP's contract with SBMS plainly called for the chargebacks. As to chargebacks, CP was not seeking the benefit of its bargain with SBMS. Instead its theory was that SBMS's misrepresentations caused CP originally to agree to chargebacks and to continue to suffer them while other competitors were not paying them.

SBMS also points to language in the contract which precludes recovery of lost profits or consequential damages. Whatever limitations this provision may place on contract damages, CP's recovery was for common law fraud. We fail to see how a contractual limitation on damages is applicable to the fraud recovery.

B. *Punitive Damages*

The parties agreed to submit the issue of punitive damages to the court, after the jury found that SBMS acted "willfully, wantonly, maliciously, or with callous indifference to Plaintiff's rights" The court awarded punitive damages of \$200,000. In awarding punitive damages the court should

³ See *Camp v. Ruffin*, 30 F.3d 37, 38 (5th Cir. 1994) (benefit-of-the-bargain damages ordinarily are not compensable under Texas fraud law), *cert. denied*, 115 S. Ct. 1315 (1995); *but see Airborne Freight v. C.R. Lee Enters.*, 847 S.W.2d 289, 295 (Tex. App.--El Paso 1992, writ denied) (Texas law allows recovery of benefit of the bargain damages in fraud cases); *Streller v. Hecht*, 859 S.W.2d 114, 116 (Tex. App.--Houston [14th Dist.] 1993, writ denied) ("Our common law allows recovery of either the benefit of the bargain measure of damages or out of pocket losses in fraud cases.") (citing *Leyendecker & Assocs. Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984)).

consider "the nature of the wrong, character of the defendant's conduct, the degree of the defendant's culpability, the situation and sensibility of the parties, and the extent to which the conduct offends the public sense of justice and propriety." *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The district court expressly considered these factors, and in applying them found, among other things, that SBMS's conduct was dishonest, willful and in callous indifference to the rights of CP, that SBMS's net worth was immense in relation to the actual damages assessed by the jury, and that CP had incurred substantial costs and attorney's fees in prosecuting this suit. We cannot say that the district court erred in awarding these punitive damages. While the Texas Supreme Court has cautioned that punitive damages are only warranted in "the most exceptional cases," *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994), we conclude that the evidence here of a pattern of deceptive conduct is sufficient to warrant punitive damages.

C. *CP's Cross-appeal*

In its cross-appeal CP argues that the court erred in failing to award prejudgment interest on its fraud judgment. The court denied CP's post-verdict motion for prejudgment interest without explanation. As to the state law fraud claim, state law governs the award of prejudgment interest, and federal law governs the adequacy of a pleading for prejudgment interest. *FSLIC v. Texas Real Estate Counselors, Inc.*, 955 F.2d 261, 270 (5th Cir. 1992). Under federal law, a request in the complaint

for "any other relief, both special and general, to which [plaintiff] may be justly entitled," is a sufficient pleading for prejudgment interest. *Id.* Here CP specifically prayed for prejudgment interest as well as "such other relief as this court deems appropriate." Under Texas law, non-statutory or "equitable" prejudgment interest is recoverable in fraud cases. *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 82 (Tex. App.--Corpus Christi 1993, writ denied); *Voskamp v. Arnoldy*, 749 S.W.2d 113, 124 (Tex. App.--Houston [1st Dist.] 1987, writ denied). Equitable prejudgment interest is awarded "as a matter of course when the trier of fact finds that damages accrued before the time of judgment," *Concorde Limousines v. Maloney Coachbuilders, Inc.*, 835 F.2d 541, 549 (5th Cir.1987), and such an award "is not generally a matter for the trial court's discretion," *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1330 (5th Cir. 1994). Upon remand the district court is to award prejudgment interest unless, for some reason that does not appear from our reading of the record, exceptional equities favor of SBMS.

CONCLUSION

The judgment is reversed insofar as it awarded \$47,500 for unpaid residuals, and is modified to award actual damages of \$52,500, the latter figure representing chargeback payments. The judgment is affirmed insofar as it awarded punitive damages. The cause is remanded for calculation of the appropriate amount prejudgment interest, if any, on the modified judgment.

Judgment Affirmed in part, Reversed in part; case Remanded.