

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERRILL & WHITEHEAD, CORP. : CIVIL ACTION
v. :
SIGNATURECARD, INC. : NO. 96-8533

MEMORANDUM AND ORDER

FULLAM, Sr.J. SEPTEMBER , 1997

Defendant in this diversity breach of contract action has moved for summary judgment on the issue of its liability for consequential damages. The version of the facts most favorable to plaintiff is as follows:

Plaintiff Merrill & Whitehead Corp. (“M&W”) is in the business of providing consumer marketing and promotional services to manufacturers. In the summer of 1994, M&W began negotiations with the R.J. Reynolds Tobacco Co. (“RJR”) concerning a bowling promotion for the latter’s Winston and Salem brands. Coupons for free games were to be placed on the back of cigarette packs; it was to be M&W’s responsibility to sign up bowling-alley owners who would participate and honor these coupons. In anticipation of this promotion, M&W contacted Signaturecard, a telemarketing concern, to sign up the 3,000 participants RJR was seeking. M&W and Signaturecard entered into a contract in early November. M&W and RJR signed their contract in mid-December. The M&W-RJR contract provided that M&W would receive

\$500,000 if the target of 3,000 bowling alleys was reached. Signaturecard failed to reach the target, allegedly due to its hiring of unqualified personnel and various unprofessional practices. M&W is seeking \$400,000 in lost profits, \$75,000 in costs incurred, and \$10,000 that M&W paid to defendant for its services.

Defendant says that under Pennsylvania law,¹ consequential damages, in order to be recoverable, must have been foreseeable and within the reasonable contemplation of the parties. Defendant therefore asserts that it could not have known what plaintiff was supposed to receive from RJR, especially since plaintiff's contract with RJR was not signed until after its contract with defendant. Plaintiff argues correctly that this is a somewhat too restrictive an interpretation of the law. Future lost profits are recoverable in a contract action, so long as the proof is not merely speculative. See Delahanty v. First Pennsylvania Bank, 464 A.2d 1243 (Pa. Super. 1983). Here, M&W has produced at least some evidence that defendant was included in conference calls with RJR, that it was told how many participants needed to be signed up by what dates, and generally that defendant was involved in the planning process and aware of what was at stake. Of course, plaintiff will have to convince a jury that its version of the facts is the accurate one, and that its injuries were proximately caused by defendant's alleged malfeasance.

An Order follows.

¹ The contract was signed in both Pennsylvania and Illinois; plaintiff is a Pennsylvania corporation, while defendant is a citizen of Illinois. The parties argue Pennsylvania law almost exclusively, so there appears to be no real dispute concerning the choice of law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERRILL & WHITEHEAD, CORP. : CIVIL ACTION
v. :
SIGNATURECARD, INC. : NO. 96-8533

ORDER

AND NOW, this day of September, IT IS ORDERED that defendant's
motion for partial summary judgment is DENIED.

Sr.J.

Fullam,