

DESIGN DATA CORP. v. MARYLAND CASUALTY CO.
503 N.W.2d 552 (Neb. 1993)

HASTINGS, Chief Justice.

This action was brought by the insured, Design Data Corporation, upon the denial of a claim made on a commercial insurance policy issued by defendant and third-party plaintiff Maryland Casualty Company. Design Data sought the recovery of damages to a computer plotter shipped by third-party defendant Consolidated Freightways, Inc., from the insured to a customer, HHB Drafting, Inc.

* * *

Design Data operates a computer services company in Lincoln, Nebraska. Design Data purchased from Maryland Casualty a policy of commercial insurance for its operations which was in effect at the time of the loss at issue here. In relevant part, the policy provides:

Property Insured

....

We'll cover equipment you own, rent, or for which you are legally responsible. We'll consider all of these to be yours in this agreement.

....

Where Insurance Applies

We'll cover losses that occur at the locations shown in the Declarations, or while in transit in the United States of America excluding Hawaii and Alaska.

Causes of Loss Insured

....

We'll cover losses that occur at the locations shown in the Declarations, up to the limit of coverage that applies. Losses that occur while property is in transit are covered up to the transit limit. If no transit limit is shown, these losses won't be covered.

The schedule of covered premises in the "Declarations" shows the address of the location as 1033 O Street, Lincoln, NE 68508. The limits of insurance in the "Declarations" disclose: "G. Property in Transit \$_____."

In November 1988, Design Data sold a "Hewlett Packard 7586B Roll-Feed 8-Pen Drafting Plotter," as part of a structural steel design computer system, to HHB. Design Data

arranged for shipment to the purchaser in Pevely, Missouri, via Consolidated. In a deposition, Design Data's vice president of sales, Ed Bruening, stated that the plotter was in good condition when tendered to Consolidated and that the carton it was packaged in showed no evidence of damage or perforation. However, HHB employee Harold Glamann, who received the shipment, testified by deposition that when the plotter arrived, he noticed that there had been some damage to the cardboard container. Glamann stated: "The wheels of the plotter were actually protruding through a hole in the container. When the driver drug [sic] it off or dropped it to the ground, that may or may not have created more damage. It dropped rougher than I would like to see computer equipment handled." When Glamann was asked if there was any other noticeable damage to the carton, he replied that it appeared that "something had either fallen on it or something heavy put on it that it was caved in." Upon opening the carton and examining the plotter, Glamann noticed that it had been "cracked and chipped in a couple of different places" and that the paper tray was bent or not positioned properly.

Howard Becker, president of HHB, stated in a deposition that at the time he learned of the damage to the plotter upon his return to his plant, a Design Data representative was present. Becker testified that the individual from Design Data hooked up the plotter and "tried to get it to work," but that it just made a loud noise and was not operable. The plotter had been tendered to Consolidated pursuant to a tariff provision which set the "released value" for the computer equipment at \$5 per pound. As a result of the damage, Design Data filed a claim with Consolidated, which issued a draft to Design Data on March 29, 1989, for \$1,700, the tariff limit as specified. The reverse side of the draft, which was accepted and endorsed by Design Data, contained the following language:

Endorsement and negotiation of this draft constitutes a release of *all claims*, known or unknown, including judgments thereon, the undersigned has or may have against the payor, and *any other person* on account of any injury, loss or damage, arising out of, or in connection with, the occurrence referred to on the explanatory voucher slip attached hereto. (Emphasis supplied.)

In a letter to Design Data dated February 21, 1989, Maryland Casualty acknowledged the receipt of a loss notice regarding the damaged plotter and stated:

It is our position that Design Data Inc. no longer owned the equipment purchased and accepted by HHB Drafting Inc. Therefore, your Electronic Data Processing form would not cover any equipment since you did not own[,] rent or have legal responsibility for same. We must respectfully deny coverage on this claim.

In its amended answer, Maryland Casualty alleged that Design Data had delivered the computer to the purchaser, which had accepted the goods; that the property was damaged while in transit; and that the property was covered by a transit limit calculated at the released value rate of \$5 per pound. It was additionally alleged that there had been a settlement of all claims which arose from the damage in that a check for \$1,700 was issued to Design Data from Consolidated. Maryland Casualty generally denied all other allegations of Design Data's petition. Design Data moved to strike portions of the amended answer dealing with the transit limit, asserting that Maryland Casualty was estopped from raising new and different allegations in defense of denial

of coverage. In a journal entry dated October 24, 1990, the district court sustained Design Data's motion to strike and granted Design Data's motion for summary judgment, as previously indicated. The court later entered judgment for the amount of damage which it found due. The parties had stipulated that the remaining value of the damaged plotter after crediting the payment of \$1,700 made by Consolidated was \$10,112.88. It was in this amount that the court entered judgment for Design Data, plus attorney fees of \$6,961.80.

Maryland Casualty first contends that the district court erred in finding that Design Data had an insurable interest in the plotter at the time the damage was discovered. The initial question to be resolved is whether the Nebraska Uniform Commercial Code is applicable to the transaction at issue. Design Data argues that the transaction was not governed by the provisions of the Uniform Commercial Code because it was primarily for the performance of services and not for the sale of goods.

The president of HHB, Becker, testified that from his discussions with Design Data, he was under the impression that he was purchasing a complete system for the price of \$73,495, which included the hardware and software that worked together, a license to use the software, a 3-day training seminar in Lincoln, and installation of the software and hardware at his office. Becker stated that he would not have purchased the hardware from Design Data apart from the system, because although he could have purchased the same hardware locally, a condition of the sale was the purchase of the hardware and software as a bundled unit, and the software was the most important part of the system. Both hardware and software would be considered "goods."

In *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 307-08, 363 N.W.2d 155, 160 (1985), this court discussed the applicability of the Uniform Commercial Code when a contract calls for both the sale of goods and the rendition of services, noting:

The question of whether this is a contract for the sale of goods depends upon an examination of the entire contract. The cases are uniform in holding that the U.C.C. applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the U.C.C. do not apply.

The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.

While Becker stated that he would not have purchased the hardware apart from the system as a whole, it is evident from his testimony that the hardware and software, sold as a bundled unit, were the essential elements of the sale, and not the installation or other peripheral items, such as the 3 days of training, which were included in the purchase price. Becker also testified that "[w]e had made arrangements for Design Data's representative to be here [at HHB's plant] on a Sunday to install this so that we could productively start using it on a

Monday.” It would seem apparent that installation required no more than a relatively short time to hook up the \$73,495 system and test it. Thus, the sale of goods was the predominant factor in the transaction, with labor incidentally involved, and the provisions of the Uniform Commercial Code therefore apply.

Maryland Casualty contends that under NEB. U.C.C. § 2-509 (Reissue 1992), the risk of loss had passed to the buyer upon the buyer’s acceptance of the plotter and that Design Data had no insurable interest at the time the damage was discovered....

Maryland Casualty concedes that the risk of loss can be shifted back to the seller if the buyer effectively revokes acceptance, but contends that the key criterion is whether the buyer’s acceptance was reasonably induced by the difficulty of discovery of nonconformity before acceptance. [NEB. U.C.C. § 2-608.]

NEB. U.C.C. § 2-510 deals with the effect of a breach on the risk of loss

....

Maryland Casualty argues that HHB’s rejection was untimely and, thus, an ineffective transfer of the risk of loss, since the buyer’s onsite manager had reason to suspect that the plotter had been damaged when the shipment arrived. Although HHB employee Glamann noticed that the container was damaged when the shipment arrived, he testified that at the time he signed the delivery receipt, the plotter was still in the box and he did not know that there was any physical damage to the plotter. After he discovered the damage he reported it to his supervisor, Becker, when Becker returned to the office.

Becker testified that he had been in Lincoln for a training session with Design Data and learned of the damage to the plotter upon his return to the office on Sunday. As we have previously stated, Becker said that he had made arrangements for a Design Data representative to be at HHB’s plant on Sunday to install the equipment so that it could be used on Monday. Becker and the Design Data representative learned of the damage to the plotter at approximately the same time. Becker stated that the Design Data representative was to return to Lincoln on Monday morning and report the damage to his supervisor and would send another plotter to HHB as soon as possible. Becker further testified that he was to pay the balance due on the equipment after it was installed in his office, but that he withheld payment that day because the system was not working.

While HHB had reason to suspect that the plotter was damaged, the nature of the damage was not known until the carton was opened and inspection was made. It was reasonable under the circumstances for Becker to allow the Design Data representative who was present to install the plotter to ascertain the extent of the damage. The revocation of acceptance was timely, and thus, the risk of loss remained with the seller, Design Data. Under the terms of its policy, Maryland Casualty was to provide coverage for equipment which Design Data owned, rented, or for which it was legally responsible. Design Data had an insurable interest in the plotter at the time the damage was discovered, and therefore Maryland Casualty’s first assignment of error is without merit.

* * *

We determine that the trial court, in implicitly finding that this particular loss was within the coverage of the insurance policy, committed plain error and that Design Data is not entitled to summary judgment. However, Maryland Casualty filed no corresponding motion for summary judgment, so it is necessary that we remand the cause to the district court for further proceedings. Because we reverse the judgment, it is unnecessary for us to consider Maryland Casualty's final assignment of error.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.