

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

COMPLETE DATA PRODUCTS, INC.

Docket No. BD 7 -12

Creditor Claim
Eastern New York Federal Credit Union

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to §709.8 of NCUA Regulations (12 C.F.R. §709.8), as an appeal of the denial by the Agent for the Liquidating Agent for Eastern New York Federal Credit Union (FCU) of a creditor claim filed by Complete Data Products, Inc. (Claimant).

Background and Initial Determination

The Board placed the FCU into liquidation on January 27, 2012, due to its insolvency, and appointed the Asset Management and Assistance Center (AMAC) as Agent for the Liquidating Agent. Claimant had entered a Software License and Maintenance Agreement (Contract) with the FCU, providing a license to the FCU to use Claimant's proprietary software. The Contract specified that maintenance fees equal to \$550 per month would be paid, annually in advance, with additional fees due for extraordinary support and modification requests. The term of the Contract ran from January 1, 2010, through January 31, 2017. AMAC determined the Contract to be burdensome and advised Claimant by letter of May 10, 2012, of its determination to repudiate the Contract.

Claim

In its initial claim, Claimant merely asserted that fees unpaid through the end of the term of the Contract (from January 2013 through January 31, 2017) in the amount of \$26,950 were due and payable. In its appeal, Claimant reiterated its claim for the same amount but asserted that, as of the date of repudiation, it had already substantially performed and delivered products and services equal to the full value of the Contract. Therefore, according to Claimant, the full amount of the unpaid maintenance fees due under the Contract had already been earned and so should be paid to Claimant.

Analysis

According to Claimant, the nature of the software business within the context of the financial industry is such that software firms must expend many hours in research and development in order to deliver a product that is adaptable and responsive to changing trends in the market. Claimant asserted that this front-end work represented services “already performed and delivered” and that the Contract simply reflects the FCU’s commitment to pay for them. Claimant did not explain why, assuming its view of the Contract is accurate, the Contract called for maintenance fees to be paid on an annual basis rather than all to be paid up front, or why fees were to be billed for other services only when rendered.

If Claimant could establish that it had already fully performed under the Contract before AMAC’s repudiation determination, Claimant’s argument would be much more compelling. The FCU Act provides that, notwithstanding the repudiation power available to the liquidating agent, compensation for contractual services already rendered are recoverable. 12 U.S.C. §1787(c)(7).

In this case, however, the facts undermine Claimant’s argument. The Contract called for periodic payments to be made over the term of the license, co-extensive with the right to the supported use of the product. The very fact that the Contract specified periodic maintenance payments invalidates Claimant’s argument that all its fees had been earned. Had they been, the Contract would have provided for a one-time, up-front fee. In fact, the Contract’s predominant feature is the aspect of maintenance and support for the FCU’s use of the product over its term.

Furthermore, even if the FCU were Claimant’s only client, Claimant’s expenditure of resources to establish the foundation for its business is not the equivalent of conferring the full benefit of its services over the entire (unexpired) term of a licensing and maintenance agreement. Despite its claims, Claimant has not rendered services to the FCU beyond the effective date of the Contract’s repudiation. Therefore, it is not entitled to recover on the theory that it had fully performed.

Repudiation and Damages

The Federal Credit Union Act (FCU Act) vests the liquidating agent with authority, within a reasonable time following its appointment, to repudiate any contract it determines to be burdensome if, in the judgment of the liquidating agent, repudiation will promote the orderly administration of the credit union’s affairs. 12 U.S.C. §1787(c). In this case, following the date of liquidation, the FCU had no further need or use for Claimant’s software or maintenance. Repudiation is uniquely appropriate in such cases. In any event, Claimant has not challenged the liquidating agent’s decision to repudiate.

In accordance with the FCU Act, the liquidating agent is not liable for damages for contract repudiation, except for certain actual direct compensatory damages. 12 U.S.C. §1787(c)(3). The FCU Act limits the liability of the liquidating agent for other damages,

specifically providing that “lost profits or opportunity” are excluded from recoverable damages, as are punitive damages and damages for pain and suffering. 12 U.S.C. §1787(c)(3)(B). While the FCU Act does not further define “actual direct compensatory damages,” there are several court cases interpreting this language (which is also contained in the Federal Deposit Insurance Act) in matters involving FDIC or the Resolution Trust Corporation while acting in a capacity similar to that of the liquidating agent.

In general, courts have held that this limiting language is designed to “distinguish between those damages which can be thought to make one whole and those that are designed to go somewhat further and put a plaintiff securely in a financial position he or she would have occupied but for the breach.” *Office & Professional Employees Int’l Union, Local 2 v. FDIC*, 27 F.3d 598, 604 (D.C. Cir. 1994). As a result, courts have allowed recovery of “actual direct compensatory damages,” which include out-of-pocket expenses paid by a plaintiff in specific reliance on a particular contract, as well any amounts due and owing for past performance. Yet courts have denied relief for what has traditionally been known as the “benefit of the bargain” or lost profits. See *Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 246 (D.C. Cir. 1995).

The Board places particular reliance on a 9th Circuit case presenting very similar facts to this one, in which the U.S. Court of Appeals considered a service provider’s claim against the FDIC following the FDIC’s repudiation of the service contract. The claimant in that case alleged the right to contractual fees for services not yet rendered. The court rejected this argument, noting that the plaintiff had failed “to establish how its claim for payments for services *not yet rendered* at the time of repudiation (and never rendered) cannot be characterized as remote, speculative or indirect.” *ALLTEL Info. Services, Inc. v. FDIC*, 194 F.3d 1036, 1039-40 (9th Cir. 1999) (emphasis in original). Noting that the relevant statute excluded recovery of lost profits, the court found no reason to think that Congress had any intention for that term to mean anything other than the plain meaning of the phrase. *Id.* The court also rejected the plaintiff’s contention that Congress intended to preserve a plaintiff’s claim for “reasonable expectation” damages. *Id.* Noting that “lost profits” is the usual measure of compensatory damages in breach of contract cases, the court found that the specific exclusion of that term from the definition of “actual direct compensatory damages” strongly suggested “that the statute was specifically intended to preclude the ordinarily available damages.” *Id.* The court noted that its interpretation was supported by another provision in the Federal Deposit Insurance Act (12 U.S.C. §1821(e)(4)) that expressly limits damages for a repudiated lease to which a failed bank was lessee to past rent, precluding payment for future rent. *Id.* The FCU Act contains virtually identical language. 12 U.S.C. §1787(c)(4).

The FCU Act and applicable case law preclude recovery of the damages sought by Claimant for AMAC’s repudiation determination.

Order

For the reasons set forth above, it is ORDERED as follows:

The appeal by Complete Data Products, Inc.'s seeking recovery in the amount of \$26,850 following the repudiation by AMAC of its Software Licensing and Maintenance Agreement with Eastern New York Federal Credit Union is denied.

The Board's decision constitutes a final agency determination. Pursuant to 12 C.F.R. 709.8(c)(1)(iv)(B), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the credit union's principal place of business was located. Such action must be filed within 60 days of the date of this final determination.

So **Ordered** this 20th day of September, 2012, by the National Credit Union Administration Board.

Mary F. Rupp
Secretary of the Board