Contracting for Medical Computer Software

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Why is Software contracting such a big issue?

50 percent of all software development dollars are spent on systems which are abandoned, seriously delayed, or require major surgery

Contracts are critical to the Build/buy decision

Build or Buy

The Build/buy decision represents a choice among different consequences

Build or Buy

Build-risk is “management” failure

Buy-risk is “procurement” failure.

Software development risk

All software development involves substantial risk

Software contracting

The goal of software contracting is to make sure that the allocation of risk tracks the financial arrangements

Why is software contracting so risky?

Software contracting

Software contracting is risky because the software field has not developed the necessary technical tools to predict the costs and risks of developing software.

Software Development Risk

Generally Software development risk can be related to problems with software quality

Software Quality

The software industry has always been characterized by a tolerance for low quality product

Software Quality

At the lowest level is software which will not run.

Software Quality

More commonly, the system runs,after a fashion, but crashes for unknown reasons and gives results which cannot be easily verified.

Software Quality

Higher level quality problems

- Slow responses
- Arcane and counterintuitive commands
- Poor maintenance structures
- inflexibility

Why is software such a problem?

It is difficult and very time consuming even for another software expert to analyze and critique software,without the cooperation of the software developer.

Why is software such a problem?

This inability to critique another's work is related to the reality that the planning and subdivision of software development is very difficult.

Why is software such a problem?

The difference between software development and traditional engineering is rooted in the problem of managing, subdividing and evaluating the work.

Why is software such a problem?

While software is a very advanced technology, the practice of software development is organizationally at a very primitive state.

Software architects

The fundamental problem with software development is that it does not have either architects or blueprints.

Architects

Architects are professionals whose job it is to take the inchoate and often incomprehensible desires of end users and translate them into a form which is comprehensible to both end users and constructors

Blueprints

Formal plans that allow individuals who are not personally familiar with one another to complete a project

Blueprints

In architecture and engineering, blueprinting is a fundamental stage, because blueprinting is what allows any craftsmen (with the necessary skills) to construct the object

Blueprints

When Edison conceived of the phonograph,he put the design into a sketch which could be built by a craftsman, and even indicated how much it would cost

Inspectability

- Blueprints can be inspected and with blueprints the job can be inspected
- Blueprints allow a reasonable certainty that the final project can and will be built to the plan

Software development

No architects

No Blueprints

Software development

We neither have good ways of breaking down the job into simpler and more complex functions, nor simple means of defining and testing a finished product.

Software Development

Blueprints are created afterwards if we think of it, if someone will pay for it, if the software developer is still interested in it, and if he or she can still figure out what was done

Software Development

For most software, any blueprints that do exist were made after the software was created.

Software development

It was also widely accepted that it is impossible to test all paths, and therefore impossible to remove all software bugs from code.

Software testing

The traditional work pattern that developed was superficial testing before the software release

Software testing

Software developers, pressed for time by their managers, figured that the bugs would be discovered by the customers and reported

Software testing

They can then be fixed in the next "software update". The customer could then be charged for "program maintenance

Software culture

Software developers thus flourished in an environment in which specification of the design was not rigorous, and quality control over the output was not enforced at the manufacturer level

Software Quality

Software which does not properly match the task required can also be thought of as a quality issue

User problems

The fundamental problem for users is that persons who are not familiar with the structure, potentials problems and nuances of software cannot specify their needs in a form that developers can use.

User Problems

These problems will increase as software becomes more machine independent, and more interactive

User Problems

Software systems also change the end user environment in unpredictable ways.

Contract problems

The inability of the users to specify in advance exactly what the need the system to do is why software is such a large contracting problem

Contract specifications

The usual answer that most lawyers give is to simply write more and more specifications into the contract.

Contract Specifications

But the combination of the user problem and the software quality problem does not make that a viable solution.

Contract risks

The risk allocation problem in software depends on system complexity.

System complexity

Computer controlled medical devices tend to be fairly simple and well defined software, which responds well to engineering techniques.

Open network hospital information systems tend to be complex, poorly specified, inflexible and poorly documented.

Software Quality

The causes of software quality problems are complex, but in general they have to do with the nature of software development.

Software Quality

Real time, programmable interactive digital equipment was unknown anywhere 40 years ago. The use of computers grew out of two different, but fundamentally well known tasks.

Management systems

The first was essentially financial and inventory accounting, in which the computer system replicates a real world environment and can be cross checked against that environment.

Management Systems

In other words, the computer indicated how much money should be left in the drawer, and a person could go and count it to see if the system was working properly.

Scientific systems

The second function was to make extremely sophisticated scientific calculations. In this case, the approximate correctness of the result could be checked by using mathematical and scientific tools.

Software quality

These powerful and intricate, but ultimately very straight forward tasks set a low standard for software quality control, customer satisfaction and system reliability.

Software quality

The software industry has gotten so used to this low standard of quality that they have tried to write it into contract law.

Medical Software

With computer systems in medicine it became possible to do things that were never done before, and could not be done without a computer system

Medical Software

However, the possibility for disastrous failure increases, because the increase in the technological capability does not necessarily increase the ability to manage the hazard, or regulate the risk.

Software contracting

Software contracting is a process of defining and assigning the risks of software development.

Oracle to pay $98-million for contract fraud

By ASSOCIATED PRESS
Published October 11, 2006
WASHINGTON - Softwaremaker Oracle Corp. agreed Tuesday to pay $98.5-million to settle complaints that it overcharged the government for nearly a decade on a slew of contracts, Justice Department officials said.

The settlement with Oracle's PeopleSoft kicked off what the department called a crackdown on waste, fraud and abuse in federal contracts.

"Criminals who cheat the government must be identified, stopped and punished," Deputy Attorney General Paul McNulty told reporters in Washington. He estimated that 5 percent of federal agencies' annual revenues is wasted on faulty or otherwise illegal contracts.

The case against Oracle of Redwood Shores, Calif., is the largest settlement from a company that had multiple contracts with the General Services Administration, McNulty said. Between 1997 and 2005, he said, the government "paid vastly inflated prices" for computer software and maintenance for human resources and financial systems for 60 federal agencies.

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The federal investigation followed a complaint against PeopleSoft by a former employee, James A. Hicks, who tipped off officials that the government was not receiving discounts for buying multiple products and services - as other clients were given.

Hicks will receive $17.7-million - 18 percent of the settlement - for his complaint as allowed under federal whistle-blower provisions.

Oracle said the complaints originated with PeopleSoft, which Oracle purchased in January 2005 for $11.1-billion after an 18-month hostile takeover battle. The deal created the world's second-largest business software manufacturer after Germany's SAP AG.

"Oracle was not aware of the suit at the time of the acquisition," said Oracle spokesman Bob Wynne.

In all, the government paid about $300-million to PeopleSoft's office in Bethesda, Md., which was responsible for selling software products to federal agencies. U.S. Attorney for Maryland Rod J. Rosenstein called the case the largest fraudulent federal contract settlement in state history.

The Justice Department's new task force is modeled in part after efforts to track relief money and contracts rushed to the Gulf Coast last year after Hurricane Katrina, which has so far yielded 400 investigations into complaints or criminal cases

Contract

A contract is an “agreement” that the law will enforce

Contract

A contract is an agreement that the law will enforce

An agreement that the law will not enforce is not a contract

Software contracting

Contracting for the development of computer software may be the single most complex and risky form of contracting available in the law today.

Software Contracting

Software contracting is not for amateurs or the faint of heart.

Meyer's Internal and External Software Product Quality Factors

Correctness

The ability of software to perform the tasks defined by r specification.

Robustness

The ability of software systems to react appropriately to abnormal conditions.

Efficiency

The ability of a software system to place as few demands as possible on hardware resources such as processor time, internal and external memories and communication bandwidth.

Ease of use

The ease with which people of various backgrounds and qualifications can learn to use software products for their intended role.

Functionality

The extent of possibilities provided by a system. The applicability of software to solve a range of problems.

Timeliness

The ability of a software system to be made available when or before its users want it.

Portability

The ease of transferring software products to various hardware and software environments.

Reusability

The ability of software elements to serve for the construction of many different applications.

Understandability

The ease with which a programmer can understand the source code of a software system.

Compatibility

The ease of combining software elements with others.

Cost

The financial cost of developing or acquiring and using the software. Both original and life cycle

Extendibility

The ease of adapting software to changes of specification.

Testability

The ease of testing a software system for correctness and robustness.

Written contract

The writing is only evidence of and part of the contract

Implied Warranties

Express Warranties

American law does not require express warranties to be contained within the "four corners" of the contract; they may be oral.

Express warranties may be created by any affirmation of fact, a promise, or a description of goods which becomes part of the bargain; this may include affirmations made in brochures or in demonstrations

Section 2-316 of the Uniform Commercial Code ("UCC") states that "words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other

- the courts held that very specific language contained in an express warranty prevailed over a general disclaimer of warranty liability.
- The computer equipment manufacturer made an express warranty in its brochure that the computer terminals would operate at high speed and were reliable

Software Contracting Part 3

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Uniform Commercial Code

The Uniform Commercial Code (UCC) is the backbone of all commercial law in the United States

Uniform Commercial Code

The UCC was developed in the 1950s by the national commissioners on uniform state laws and enacted by all states in roughly identical form.

Uniform Commercial Code

- Article 2 of the UCC deals with the sale of goods

Uniform Commercial Code

The UCC represents a balance between the interests of industrial producers and consumers of goods

Uniform Commercial Code

Software producers in general hate the UCC because of this balance.

Uniform Commercial Code

Software producers tried to create a new Article 2 that applied only to software

Uniform Commercial Code

This effort failed but it produced a bizarre unbalanced proposed statute called UCITA

UCITA

Uniform Computer Information Transaction Act

At this moment only the law in Maryland and Virginia

BEWARE UCITA

Beware of any suggestion of applying this statute or the laws of these states to any computer transaction

Beware UCITA

UCITA is designed to give legal approval to the most outrageous terms in current software contracts

Why is software such a legal problem?

Software manufacturers try to take advantage of the “intangible” nature of software to claim that it is not “goods”

Goods Versus Services

The legal system has many distinctions between goods and services

In particular the UCC applies only to transactions in goods.

Goods

Most Courts have rejected the claim that Software is not “goods” but the industry has gotten so used to the claim that they tried to structure contracts to avoid the balancing of the UCC

§ 2-302. Unconscionable contract or Clause

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(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract,

§ 2-302. Unconscionable contract or Clause

or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

§ 2-302. Unconscionable contract or Clause

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 2-313. Express Warranties….

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

§ 2-313. Express Warranties….

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Express Warranties….

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Express Warranties

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty,

Express warranties

but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Merchantability

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

Merchantability

(b) in the case of fungible goods, are of fair average quality within the description; and

Merchantability

(c) are fit for the ordinary purposes for which such goods are used; and

Merchantability

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

Merchantability

(f) conform to the promise or affirmations of fact made on the container or label if any.

Course of dealing

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods,

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other;

§ 2-316. Exclusion or Modification of Warranties.

but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

§ 2-316. Exclusion or Modification of Warranties.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

§ 2-316. Exclusion or Modification of Warranties.

Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

§ 2-316. Exclusion or Modification of Warranties.

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

§ 2-316. Exclusion or Modification of Warranties.

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

§ 2-316. Exclusion or Modification of Warranties.

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

Breach of Warranty

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

2-606. What Constitutes Acceptance of Goods.

Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he willtake or retain them in spite of their non-conformity; or

Acceptance of goods occurs when the buyer

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

Acceptance of goods occurs when the buyer

Acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

2-608. Revocation of Acceptance in Whole or in Part.

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

2-608. Revocation of Acceptance in Whole or in Part.

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

2-608. Revocation of Acceptance in Whole or in Part.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

Revocation of Acceptance

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

2-721. Remedies for Fraud.

Remedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach

2-721. Remedies for Fraud

Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

proposed and rejected SECTION 2B-404. IMPLIED WARRANTY: INFORMATION AND SERVICES.

Rejected language

(a) If a licensor provides services, access, data, data processing, or the like, there is a warranty that the licensor warrants that there is no inaccuracy, flaw or other error in the informational content caused by a failure of the licensor to exercise reasonable care and workmanlike effort in its performance in collecting, compiling, transcribing, or transmitting the information.

Rejected Language

(b) The warranty under subsection (a) is not breached merely because the licensor's performance does not yield a result consistent with the objectives of the licensee or because the informational content is not accurate or is incomplete.

(3) Unless excluded or modified by section 2-316, other implied warranties may arise from course of dealing or usage of trade

Piper Jaffray & Co., Plaintiff v. SunGard Systems International, Inc., f/k/a SunGard Treasury Systems Inc., d/b/a SunGard Trading Systems, Defendant

Civ. No. 04-2922 (RHK/JSM)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2005 U.S. Dist. LEXIS 7497; 57 U.C.C. Rep. Serv. 2d (Callaghan) 479

April 28, 2005, Decided

This case arises out of a contract dispute. Plaintiff Piper Jaffray & Company ("Piper Jaffray") and Defendant SunGard Systems International, Inc. ("SunGard") executed an agreement whereby SunGard would license computer software and provide related services to Piper Jaffray. Because the software never performed as expected, Piper Jaffray has sued SunGard seeking, among other things, direct, consequential, and incidental damage

In 2000, Piper Jaffray intended to upgrade its computer software. During its search for new software, it spoke to SunGard about a computer application called Global Trader. Piper Jaffray described its software needs to SunGard and SunGard researched Piper Jaffray's business operations. At the conclusion of its research, SunGard represented that Global Trader would meet Piper Jaffray's needs.

6.1. Performance. SunGard warrants to Customer that the Software, as and when delivered to Customer by SunGard and when properly used for the purpose and in the manner specifically authorized by this Agreement, will perform as described in the Documentation in all material respects. SunGard's only obligation under this warranty is to comply with the provisions of Section 3.1 n3 with respect to any material failure to perform as described in the Documentation.

Prior to the date upon which Customer uses the Software in a production environment, with respect to each instance in which the Software does not perform as described in the Documentation in all material respects, SunGard will have ninety (90) days from the date that such failure to perform is reported to SunGard to remedy such failure. The Warranty set forth in this Section 6.1 shall terminate 90 days after the date upon which Customer uses the Software in a production environment.

6.10. Limitations . . . . WITH RESPECT TO EACH SOFTWARE SCHEDULE NEITHER PARTY'S TOTAL LIABILITY UNDER THIS AGREEMENT SHALL UNDER ANY CIRCUMSTANCES EXCEED THE INITIAL LICENSE FEES ACTUALLY PAID BY CUSTOMER TO SUNGARD UNDER THIS AGREEMENT WITH RESPECT TO SUCH SOFTWARE SCHEDULE.

Upon execution of the Agreement, the parties agreed that by September 2001 Global Trader would be installed with agreed-upon specifications and functionality. As September 2001 approached, however, the software did not perform as required, and the parties extended the installation deadline to October 2001. By late 2001, the software still did not meet Piper Jaffray's needs.

In March 2002, Piper Jaffray terminated the Agreement and commenced litigation in Minnesota state court. In September 2002, after subsequent mediated negotiations, the parties executed an Addendum to the Agreement by which Piper Jaffray agreed to dismiss the state court action without prejudice and SunGard agreed to provide a defined "Production Ready Version" of Global Trader by January 2003. Other than the express modifications contained in, the Addendum, the Agreement, including the Warranty and the Damages Cap, remained in full force and effect.

By January 2003, SunGard had not delivered a Production Ready Version of Global Trader. (In Spring 2003, SunGard's project manager disclosed to Piper Jaffray that Global Trader would not function as required. SunGard proposed to meet its obligations with an Internet version of Global Trader called eGT. In September 2003, Piper Jaffray tested eGT, but it failed to operate as specified. (In October 2003, Piper Jaffray had Global Trader and eGT installed, but neither met its agreed-upon functionality. (SunGard has since been unable to cure the **defects** in its **software.**

6.11. Consequential Damage Exclusion . . . . UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER OR ANY OTHER PERSON FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND OR NATURE, INCLUDING, SUCH DAMAGES ARISING FROM ANY BREACH OF THIS AGREEMENT OR ANY TERMINATION OF THIS AGREEMENT, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY), OR OTHERWISE, WHETHER OR NOT FORESEEABLE, EVEN IF THE PARTY HAS BEEN ADVISED OR WAS AWARE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

In a Memorandum Opinion and Order, this Court determined that the consequential and incidental damages waiver was valid and enforceable.

6.10. Limitations . . . . WITH RESPECT TO EACH SOFTWARE SCHEDULE NEITHER PARTY'S TOTAL LIABILITY UNDER THIS AGREEMENT SHALL UNDER ANY CIRCUMSTANCES EXCEED THE INITIAL LICENSE FEES ACTUALLY PAID BY CUSTOMER TO SUNGARD UNDER THIS AGREEMENT WITH RESPECT TO SUCH SOFTWARE SCHEDULE.

Piper Jaffray responds that the Damages Cap is unenforceable under § 2719 of Pennsylvania's UCC because the Warranty has failed of its essential purpose, which then entitles it to all the remedies available under the UCC -- including direct damages without limitation.

(a) **General rule.** -- Subject to the provisions of subsections (b) and (c) and of section 2718 (relating to liquidation or limitation of damages; deposits):(1) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the remedies of the buyer to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.

(2) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(b) **Exclusive remedy failing in purpose.** -- Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

(c) **Limitation of consequential damages.** -- Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Ucc comment

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection [b], where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

Against this backdrop, Piper Jaffray argues that the Warranty is a limited or exclusive remedy that has failed of its essential purpose because SunGard has been unable to put Global Trader in the warranted condition. For the purposes of this Motion, the Court will assume that this is true.

Perhaps recognizing the clarity of the Agreement, Piper Jaffray submits the affidavit of its former Chief Technology Officer, who states that Piper Jaffray only agreed to the Damages Cap in return for the Warranty.

The Chief Technology Officer's statement, however, is inadmissible parol evidence. The parol evidence rule set forth in § 2202 of Pennsylvania's UCC provides that written contractual terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(1) by course of dealing or usage of trade (section 1205) or by course of performance (section 2208); and

(2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Finally, persuasive case [*23] law supports this Court's conclusion that the failure of an exclusive or limited remedy does not void a damages limitation. For example, in Computerized Radiological Services, the parties contracted for the sale of a CAT Scan machine. Id. at 1509. The contract contained both a warranty that limited the defendant's liability to repair and replacement of the machine and a damages cap that limited the defendant's liability to the amount paid by the plaintiff. Id. Assuming that the warranty had failed of its essential purpose, the court held that "even though an exclusive remedy is stricken because it fails of its essential purpose, that does not mean that all limitations must be stricken." Id. at 1510. Thus, the court upheld the damages cap. Id. n10

SUTTER INSURANCE CO., Plaintiff, vs. APPLIED SYSTEMS, INC., Defendant.

Case No. 02 C 5849

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2004 U.S. Dist. LEXIS 3802

March 11, 2004, Decided

Sutter sells property and casualty insurance in the West Coast region, both directly and through agents. In 1999, the company that provided and maintained the computer software Sutter used to produce and service its insurance policies advised Sutter that it would no longer provide updates of the software as of a particular future date. Sutter searched for a new software provider and solicited proposals from a number of entities, including Applied. Applied's software system was called the "Diamond System." Applied's personnel made two sales presentations to Sutter at its California offices.

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At Applied's sales presentations, Sutter's and Applied's representatives discussed Sutter's agency billing and related needs. Applied's personnel assured Sutter that the Diamond System was capable of handling agency billing.

It is unclear whether these discussions involved much in the way of details, and it does not appear to the Court that there was any significant discussion of the specifics of Applied's needs. However, Applied's agency billing and reconciliation functions followed a pattern standard in the insurance business.

Its representatives reasonably believed that Applied's software, represented to be an off-the-shelf system (that is, one that could be implemented with minimal effort), would satisfy these seemingly basic needs.

Sutter's representatives advised Applied's personnel at the sales presentations that Sutter wanted to be able to convert all of its software to a new system by no later than December 31, 2000. After that date, Sutter would be required to pay additional fees to continue to maintain its former software.

Applied was hopeful that it could complete transition by that time, but it made no firm commitment to Sutter, as the speed with which the transition process would occur was, in significant part, in the customer's hands.

Sutter and Applied entered into a written contract entitled "System Implementation and License Agreement" dated March 21, 2000. The initial draft of the Agreement represented a standard form contract used by Applied, with some modifications to particularize it to Sutter. Sutter sought to revise certain substantive terms of the Agreement, but Applied declined. Sutter was, however, able to negotiate a somewhat better price than had been proposed in the initial draft provided by Applied.

The Agreement provided that Sutter would purchase from Applied the software and services specified in Schedule A to the Agreement, together with the system configuration options specified in Schedule B and the programming options specified in Schedule C (there were none of the latter). Schedule A listed, in summary form, the features and functions of the Diamond System. This included a reference to "Agency and Direct Bill Statement Options."

Sutter reasonably understood this, particularly in conjunction with Schedule A's references to "Installment Based Billing," "Daily, Monthly, and Yearly Calculation of Written and Earned Premium," and the like, to encompass the agency billing, accounting, reconciliation, and reporting functions referenced earlier. In fact, however, the Diamond System did not support agency reconciliation in the manner expected by Sutter, though Sutter would not find this out until much later.

The Agreement contemplated that Sutter would provide specifications regarding its needs, and Applied would then develop the software to meet those specifications. The finished product would be delivered to Sutter for a period of testing and evaluation, and once this was finished Sutter would "go live" and begin using the system in its day to day operations

Applied warranted in the Agreement that "all services provided hereunder will be performed in a good and workmanlike manner and that the Software provided by Applied hereunder will substantially conform to and perform in accordance with the specifications stated in Schedules A, B, C, D, and F, and in all associated documentation." Agreement, P6(a). Applied disclaimed any other implied or express representations and warranties. *Id.* Sutter represented that "no material statements or representations have been made by Applied and upon which [Sutter] has relied in entering into this Agreement that are not contained [*8] herein." *Id.*, P6(b).

The Agreement also recited that Sutter "understands that in the design and development of complex computer **software** systems limited system **defects** or errors may be expected," and that Sutter's "sole and exclusive remedy in the event of programming defects is expressly limited to correction of the defects by adjustment, repair or replacement at Applied Systems' sole election and expense."

This was not a particularly sensible contract for Sutter to sign, a fact that Sutter presumably realizes in retrospect. The Agreement contemplated that Sutter would pay $ 150,000 -- a significant sum -- before seeing any software at all, and another $ 150,000 upon receipt of the test product before having any clue whether it would perform as hoped and expected. The effect of this was to make the process of developing system specifications vitally important.

If Sutter, through oversight or lack of software expertise, left something out of the specifications and realized it was missing only after it received and tested the software, it would be too late at that point to cancel the contract and get its money back. But Sutter had, it appears, no background in developing or assisting in the development of software. Perhaps it should have hired an independent consultant, or perhaps it should have declined to execute the contract after Applied refused to modify its principal terms. Sutter did neither. But it had ample opportunity to say no, and as a sophisticated commercial entity it cannot now sidestep the contract's terms.

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the system was activated in August 2000 after a second trip to Sutter's offices by Applied personnel. Sutter experienced numerous problems with the operation of the Diamond System during this trip. Some but not all of these problems were resolved. Applied advised Sutter that problems would be easier to work out if Sutter went live, as once that happened the maintenance and support function would be handled by a different and more experienced team at Applied. Sutter determined to go live and work out the problems as and when they appeared

But Sutter believed that it was being required to spend an inordinately large amount of time testing and working the bugs out of what it had been told was an "off the shelf" system. In addition, it eventually became clear that the Diamond System did not support the type of agency billing reconciliation functions that Sutter had expected.

As noted earlier, these specifications, reasonably construed, communicated to Sutter that the software would conform to its agency billing reconciliation needs. The software failed to do so, and it was not capable of doing so without further work for which Applied proposed to bill Sutter. Without this functionality, the software was effectively worthless.

Because the Tier 1 software failed to conform to contractual specifications, Applied breached its contractually-provided warranty and thus is not entitled to recover for the cost of developing this software. *See* 810 ILCS 5/2-602(2)(c) ("The buyer has no further obligations with regard to goods rightfully rejected.").

TAYLOR INVESTMENT CORPORATION, Plaintiff, v. DENNIS L. WEIL, CONSTRUCTION MANAGEMENT AND CONSULTING, INC., and GEAC COMPUTERS, INC., Defendants.

Civil No. 98-2632 (JRT/FLN)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

March 31, 2001, Decide

n September 1995, Taylor sent a request for proposal ("RFP") to several vendors of software and computing services in the construction industry outlining its requirements for a new business computer system. The RFP required a Microsoft Windows-based system comprised of a variety of software applications that would provide networked integration of Taylor's sales, land acquisitions and financial operations and would transfer data from its field sales offices to its headquarters in Minneapolis. Defendant CMAC was one of the vendors who received and responded to Taylor's RFP.

After reviewing a variety of bids from computer systems developers, Taylor contracted with CMAC for its services on December 8, 1995. CMAC charged Taylor a total of $ 230,000 for the entire package of products and services it provided to Taylor. A core component of the software package that CMAC presented to Taylor during the bidding process was a newly developed Microsoft Windows-compatible software product from Geac called "StarBuilder." The itemized cost of StarBuilder to Taylor was $ 20,000. This amount included a cost of $ 10,000 that CMAC paid to Geac for the product, as well as an additional $ 10,000 mark-up that CMAC kept for itself.

The StarBuilder product constitutes the Windows-based version of a Microsoft DOS-based product licensed by Geac called "CS2000." In November 1995, when Weil presented CMAC's package to Taylor, Geac had been marketing CS2000 for an extended period of time with positive customer responses indicating that it was a reliable and stable product. StarBuilder, however, was still in an incomplete stage of development.

During his marketing presentations, Weil informed Taylor's employees that the development of StarBuilder was unfinished. Taylor therefore was aware that the CS2000 product demonstrated by Weil was not the same product as StarBuilder. Taylor was also aware, when it signed the contract with CMAC in December 1995, that the development of StarBuilder was incomplete. Nevertheless, Weil represented to Taylor that StarBuilder was "virtually" complete and that it would be available to customers by January 1996. Weil also stated that StarBuilder was expected to be as reliable and stable as CS2000. Weil avers that he made these statements solely on Geac's representations to him. Neither Weil nor Taylor has produced specific evidence, however, of what Geac's representations to Weil precisely were. At no time during the negotiation process did Geac communicate directly with Taylor about the stability or development status of StarBuilder.

Shortly after CMAC installed StarBuilder at Taylor, Taylor began discovering serious **defects** in the **software** that made it entirely unusable. The record reflects that numerous other Geac customers, including other customers of CMAC, were having similar problems with StarBuilder. On March 5, 1996, Geac issued a memorandum to its sales force describing various flaws in the software that customers had discovered. The memorandum further stated that Geac would not ship StarBuilder to any new clients until the known products were rectified, reasoning, "While there are customers and prospects who say they want StarBuilder immediately (never mind the bugs) our experience is that they eventually do care very much . . . . Better that they find fault with shipping delays than our software

In September 1996, Taylor contacted Geac directly for the first time for help with the product. Geac directed Taylor to continue dealing with CMAC as its provider for software support. Throughout 1996 and 1997 Geac released several new versions of StarBuilder containing corrections to errors that customers had discovered, but was unable to entirely correct the problems that caused StarBuilder to fail.

Taylor terminated its relationship with CMAC in 1998, after paying CMAC a total of $ 240,000 for software, custom development services, project management, training and support, and expending a large number of its own labor resources attempting to implement and use the faulty system.

"liability of [Geac] for damages to the Customer for any cause whatsoever, and regardless of the form of action, whether in contract or tort . . . shall not exceed the actual payments made by customer." The agreement continues on to state that "in no event will [Geac] be liable for any damages caused by the Customer's failure to perform Customer's responsibilities or for any lost profits, loss of business, business interruption, or other consequential damages . . . ."