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Declined to Follow by *America Online, Inc. v. St. Paul Mercury Ins. Co.*,
E.D.Va., June 20, 2002

2000 WL 726789

Only the Westlaw citation is currently available.

United States District Court, D. Arizona.

AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY,
a New York corporation, Plaintiff,

v.

INGRAM MICRO, INC., a
Delaware corporation, Defendant.
INGRAM MICRO, INC., a Delaware
corporation, Counterclaimant,

v.

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, a New
York corporation, Counterdefendant.

No. 99–185 TUC ACM.

|
April 18, 2000.

ORDER

[MARQUEZ](#), Senior District J.

*1 This case presents an insurance coverage dispute between Plaintiff/Counterdefendant American Guarantee & Liability Insurance Company (“American”) and Defendant/Counterclaimant Ingram Micro, Inc. (“Ingram”). American issued Ingram a property damage policy which insured against certain business interruption and service interruption losses. As a result of a power outage, Ingram’s computer systems were rendered inoperable. Ingram made a claim under its policy to American and American denied the claim. Thereafter, American filed a Complaint for declaratory relief against Ingram and Ingram filed a Counterclaim for breach of contract.

Pending before the Court are cross-motions for partial summary judgment on the issue of whether a 1998 power outage caused “direct physical loss or damage from any cause, howsoever or wheresoever occurring” to Ingram’s computer system.¹

Judgment as a matter of law is available “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Fed.R.Civ.P. Rule 56(c)*.

For reasons which follow, the Court grants Ingram’s Motion and denies American’s Motion.

I. *Relevant Undisputed Facts*

Ingram is a wholesale distributor of microcomputer products. The company uses a world-wide computer network (the Impulse System) to track its customers, products, and daily transactions. Ingram receives orders from its customers both electronically and through telesales representatives. All of Ingram’s orders are processed through Impulse and Ingram’s entire business operation depends upon the proper functioning of Impulse.

In October of 1998, Ingram procured an insurance policy from American which insured Ingram’s “[r]eal, and personal property, business income and operations in the world wherever situated except for U.S. Embargo Countries.” (Primary All-Risk Policy at 2 ¶ E.) The policy insured against “All Risks of direct physical loss or damage from any cause, howsoever or wheresoever occurring, including general average, salvage charges or other charges, expenses and freight.” (Policy at 11 ¶ D.) Ingram’s computers, including Impulse, are insured under the Policy.

Ingram’s data processing and data base maintenance operations are performed primarily at Ingram’s Tucson Data Center. At approximately 8:00 a.m. on the morning of December 22, 1998, the Data Center experienced a power outage which was apparently caused by a ground fault in the fire alarm panel. While electrical power service to the building itself was not disrupted, all of the electronic equipment at the Data Center, including the computers and telephones, stopped working.

Power was restored to the Data Center within a half hour. Ingram employees reset all of the circuit breakers that had been tripped by the power outage. Some of Ingram’s equipment, such as the printers, were fully operational as soon as power was restored. The three mainframe computers, however, lost all of the programming information that had been stored in their random access memory and Ingram employees had to reload the lost programming information.

One and one half hours after the power outage, the Data Center was up and running at the mainframe level.

*2 The return of the mainframes to operation did not restore to action the computers and other equipment that connect the Data Center to the rest of the Impulse System. Connections between Tucson and six Impulse locations in the U.S. and Europe were interrupted and Ingram could not conduct business. After working for hours to determine the source of the problem, Ingram employees finally brought the network back up to operation by means of bypassing a malfunctioning matrix switch. Impulse was restored to full operation by 4:00 p.m., approximately eight hours after the shutdown.

In the days following the power outage, Ingram employees determined that when the power outage occurred, all of the programming information disappeared from the random access memory. The custom configurations that existed prior to the outage were different than the default settings after the outage. So when power was restored to the matrix switch, the custom configurations remained lost. The matrix switch had to be reprogrammed with the necessary custom configurations before communications with the six Impulse locations could be restored.





II. Discussion

American and its expert witnesses admit that Ingram's mainframe computers and the matrix switch did not function as before the power outage and that certain data entry and reconfiguration processes were necessary to make Impulse operate as it had before the power outage. American argues however, that the computer system and the matrix switch were not "physically damaged" because their capability to perform their intended functions remained intact. The power outage did not adversely affect the equipment's inherent ability to accept and process data and configuration settings when they were subsequently reentered into the computer system.


Ingram argues that the fact that the mainframe computers and the matrix switch retained the ability to accept the restored information and eventually operate as before, does not mean that they did not undergo "physical damage." Ingram offers a broader definition of this term and contends that "physical damage" includes loss of use and functionality.

At a time when computer technology dominates our professional as well as personal lives, the Court must side with Ingram's broader definition of "physical damage." The Court

finds that "physical damage" is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality.

The Court is not alone in this interpretation. The federal computer fraud statute, which makes it an offense to cause damage to a protected computer, defines damage as "any impairment to the integrity or availability of data, a program, a system, or information."  18 U.S.C. § 1030 (West 1999). In Connecticut, a person is guilty of computer crime when he "disrupts or degrades or causes the disruption or degradation of computer services." *Conn. Gen.Stat. § 53a-251* (2000). In Minnesota, computer damage includes the alteration of any computer, computer system, computer network or computer software.  *Minn.Stat. § 609.88* (1999). In Missouri, damage to a computer is defined as "any alteration, deletion, or destruction of any part of a computer system or network."  *Mo. Ann. Stat. § 569.093* (West 1999). In New York, a person is guilty of computer tampering in the fourth degree when he "intentionally alters in any manner or destroys computer data or a computer program of another person."  *N.Y. Penal § 156.20* (McKinney 1999).

*3 The Court is mindful that these definitions appear not in insurance coverage cases, but in the penal codes of various states. Their relevance however, is significant. Lawmakers around the country have determined that when a computer's data is unavailable, there is damage; when a computer's services are interrupted, there is damage; and when a computer's software or network is altered, there is damage. Restricting the Policy's language to that proposed by American would be archaic.


 *Seagate Technology, Inc. v. St. Paul Fire and Marine Insurance Co.*, 11 F.Supp.2d 1150, 1151 (N.D.Ca.1998) does not dictate a different result. Seagate manufactured disk drive storage devices for personal computers and small business machines. Amstrad purchased Seagate disk drives for its personal computers and sold personal computers in which the Seagate drives had been incorporated. Amstrad sued Seagate alleging that the drives were defective. The court found that physical incorporation of a defective product into another does not constitute property damage *unless* there is "physical harm" to the whole. Because Amstrad's complaints contained no allegation that the defective drive did or could harm other components of the host computers, there was no allegation of


“property damage” within the meaning of the umbrella policy.


 *Id* at 1155.


In this case, Ingram *does* allege property damage—that as a result of the power outage, Ingram's computer system and world-wide computer network physically lost the programming information and custom configurations necessary for them to function. Ingram's mainframes were “physically damaged” for one and one half hours. It wasn't until Ingram employees manually reloaded the lost programming information that the mainframes were “repaired.” Impulse was “physically damaged” for eight hours. Ingram employees “repaired” Impulse by physically bypassing a malfunctioning matrix switch. Until this restorative work was conducted, Ingram's mainframes and Impulse were inoperable.

The Court does not believe that the declarations of Troy Bates and Frank Lombardo, two insurance industry consultants hired by American, create an issue of fact. It is true that expert opinion is admissible and may defeat summary judgment when the affiant is competent to give an expert opinion and the

factual basis for the opinion is stated in the affidavit.  *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir.1995), *cert. denied* 516 U.S. 987 (1995). However, when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Id. In order to defeat summary judgment, the inferences drawn from the expert's affidavit must fulfill the standard in  *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–52 (1986) of being sufficient to sustain a favorable jury verdict.

See also  *In re Agent Orange Product Liability Litigation MDL No. 381*, 818 F.2d 187, 193 (2d Cir.1987), *cert. denied*, 487 U.S. 1234 (1988) (to defeat summary judgment, expert affidavits cannot involve “mere speculation or idiosyncratic

opinion”);  *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir.1993) (the federal rules of evidence regarding expert testimony were not intended “to make summary judgment impossible whenever a party has produced an expert to support its position”), *cert. denied*, 511 U.S. 1126 (1994).

*4 For reasons previously stated, the Court finds that the conclusions of Troy Bates and Frank Lombardo that Ingram's computer system did not suffer “physical damage” as a result of the power outage are not reasonable and are not sufficient to create a genuine issue of material fact. The undisputed facts do not support judgment in favor of American but do support judgment in favor of Ingram.

Accordingly,

IT IS ORDERED that Ingram's Motion for Partial Summary Judgment (Document 28) is GRANTED.

IT IS FURTHER ORDERED that American's Cross–Motion for Summary Judgment Requesting Declaration of “No Coverage” (Document 31) is DENIED.

IT IS FURTHER ORDERED that counsel shall file a Proposed Joint Pretrial Order on or before Friday, May 12, 2000.

IT IS FURTHER ORDERED that a Pretrial Conference will take place on Tuesday, May 23, 2000 at 10:30 a.m. If counsel for any party is out of town, counsel shall contact the Court 10 days prior to the date of the Pretrial Conference to arrange for the Conference to be telephonic.

All Citations

Not Reported in F.Supp.2d, 2000 WL 726789

Footnotes

- 1 On February 22, 2000, the Court approved the parties' stipulation that this was the only issue to be determined by the Court.