IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1728

Summary Calendar

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ELECTRONIC DATA SYSTEMS CORPORATION,

Plaintiff-Counter-Defendant-Appellant,

versus

LIFE INSURANCE COMPANY OF GEORGIA,

Defendant-Counter-Plaintiff-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
(3:90-CV-1476-J)

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(February 3, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

This appeal involves interpretation of a clause limiting liability for breach of contract. The parties stipulated the amount of damages to be awarded if the limitations clause did not apply. The district court found that an exception in the clause

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

obtained and awarded the Life Insurance Company of Georgia $6,000,000 with interest, as stipulated. We AFFIRM.

Electronic Data Systems Corporation contracted to provide a computer system to the Life Insurance Company of Georgia. EDS's product would allow the Insurance Company to expand its operations. When the date arrived for delivery, a dispute arose. The Insurance Company refused to compensate EDS, claiming that the computer system did not comply with the contractual terms. EDS denied any inadequacy in its product and contended that the Insurance Company refused to test the system thereby breaching the contract. When efforts to resolve the disagreement failed, EDS filed suit against the Insurance Company.

The district court found that EDS made a deliberate decision not to satisfy the terms of contract, preferring to attend to other projects that it expected to prove more lucrative. A limitation of liability clause in the contract capped damages at $500,000 except for suits based on "performance or non-performance" caused by "gross negligence or intentional conduct." The district court concluded that EDS's intentional decision not to perform fell within this exception. EDS argues on appeal that this exception does not encompass an intentional or grossly negligent breach of contract but rather refers exclusively to tort liability. The parties agree that Texas law applies.

Texas law requires us to consider the language of the contract and the circumstances of its formation. See Hanssen v. Qantas Airways Ltd., 904 F.2d 267, 269-70 (5th Cir. 1990). The

limitations clause is unambiguous on its face. It does not limit liability "due to" a party's "performance or non-performance of its obligations" under the contract if such liability arises from "gross negligence or intentional conduct" but does limit liability if it arises from "negligence." EDS intended not to perform. The exception therefore applies. See, e.g., Pagnan v. Mississippi River Grain Elevator, Inc., 700 F.2d 149, 151 (5th Cir. 1983) (interpreting exception to limitation of liability in cases of "willful or gross[ly] negligent acts" as including deliberate acts that result in breach of contract). This understanding comports with the contractual relationship between EDS and the Life Insurance Company.

The district court found that when the parties negotiated the contract, the Insurance Company worried that EDS might abandon the project. Whether EDS could attract a sufficient number of clients to make investment in the computer system worthwhile was unclear at the time. The parties fashioned the exception to the limitations clause to allay the Insurance Company's fears. The district court found that EDS nevertheless decided that completion of the contract was not in its best interest and so did not allocate the resources necessary to fulfill its obligations under the contract. As EDS deliberately breached, the limitations clause by its express terms provides no protection.