

The Eleventh Circuit Reaffirms Validity of Waiver of Consequential Damages Provisions in Contracts

By

E. Tyron Brown
Hawkins Parnell Thackston & Young LLP
Atlanta, Georgia 30308
tbrown@hptylaw.com

The Eleventh Circuit Court of Appeals, in *Silverpop Systems, Inc. v. Leading Market Technologies, Inc.*, 2016 U.S. App. LEXIS 196 (11th Cir. January 5, 2016) enforced a contractual waiver of consequential damages provision, thereby reaffirming the validity of such provisions in Georgia.

In that case, the Plaintiff Silverpop Systems, Inc. (“Silverpop”) provided digital marketing services to businesses such as the Defendant Leading Market Technologies, Inc. (“LMT”). The parties entered into a service agreement whereby LMT was authorized to access Silverpop’s web-based e-mail marketing program and upload digital advertising content and recipient e-mail addresses. The advertising content was then sent to the e-mail addresses. The list of e-mail addresses from LMT was stored on Silverpop’s marketing program. Silverpop’s program eventually had a list of nearly 1/2 million email addresses from LMT.

Then, a data breach occurred to Silverpop’s program and the hackers gained access to the information stored on the program by 110 of Silverpop’s customers -- including LMT. Silverpop said it could not confirm that the hackers exported the data files out of the system.

Subsequently, Silverpop filed a declaratory judgment action against LMT seeking a judgment declaring, *inter alia*, that LMT was not damaged by the data breach or that LMT incurred only consequential damages which were barred by a waiver of consequential damages provision in the contract. LMT counterclaimed against Silverpop asserting several claims.

The waiver of consequential damages provision in the contract stated:

In no event will Silverpop . . . be liable to the other party . . . for any . . . consequential damages . . . in any way relating to this agreement . . .

In addressing the Plaintiff Silverpop's motion to declare that Defendant LMT's damages were consequential damages and barred by the contract, the Eleventh Circuit first gave a primer on consequential damages. The Eleventh Circuit said: "The Court finds it helpful to consider general (i.e., direct) damages as those damages that compensate for "the value of the very performance promised" and consequential damages as those damages that "seek to compensate a plaintiff for additional losses (other than the value of the promised performance) that are incurred as a result of the defendant's breach." *Id.* at *17-18 (citations omitted). The Eleventh Circuit decided that the Defendant's damages were "best characterized as consequential." *Id.* at *18.

Next, the Eleventh Circuit addressed Defendant's argument that the waiver of consequential damages provision did not apply because another section in the contract, a limitation of damages provision which limited LMT's damages to Silverpop's fees received during the twelve months preceding a breach, also provided that such limitation of damages provision did not apply to a breach of sections 4 and 6 of the contract. Section 4 of the contract was a confidentiality provision requiring Silverpop to not disclose to any third person LMT's proprietary information -- namely the e-mail addresses that LMT provided to Silverpop. The Eleventh Circuit rejected LMT's argument because the limitation of damages provision, which included the language that said limitation did not apply to a breach of sections 4 and 6 of the contract, was separate and distinct from the waiver of consequential damages provision.

Then, the Eleventh Circuit addressed Defendant's argument that the waiver of consequential damages provision did not survive the termination of the contract and, thus, it could not serve as a bar to LMT's recovery. In support of this argument, Defendant LMT

pointed to Section 5.4 of the contract which stated: “Termination of this Agreement by either party . . . will terminate each party’s obligations under this Agreement except for Sections 4, 6, 7, 8, and 9, all of which survive termination of this Agreement” (“survival provision”). Defendant argued that since the waiver of consequential damages provision was not included as a provision that would survive the termination of the agreement, it was extinguished once the contract was terminated.

Plaintiff Silverpop countered that: (1) the limitation of damages provision pertained to the allocation of risk for a breach of contract rather than an obligation that would terminate along with the contract; and (2) the survival provision had no bearing on the limitation of damages provision because the conduct giving rise to Defendant LMT's claim occurred while the contract was in force and the parties’ recovery rights became fixed at that time.

The Eleventh Circuit, siding with Silverpop on this issue, said: “While contractual obligations may expire upon the termination of a contract, provisions that are structural (e.g., relating to remedies and the resolution of disputes) may survive that termination.” *Id.* at *23 (citations omitted).

The Eleventh Circuit also agreed with Silverpop that the survival provision had no bearing on LMT's claim for consequential damages because the contract was in force at the time of Silverpop’s alleged breach, and LMT's rights to damages were fixed at that time in accordance with the contract.

The Eleventh Circuit succinctly held: “To summarize, the damages LMT seeks are consequential, and the damages limitation provision in the parties’ agreement applies to bar the recovery of these damages. As such, Silverpop is entitled to summary judgment on LMT's claim for breach of contract and, consequently, LMT is not entitled to summary judgment in its favor

on this claim.” *Id.* at * 26.

The decision in *Silverpop Systems, Inc.* follows and enhances the Georgia Court of Appeals’ decision in *Imaging Systems International, Inc. v. Magnetic Resonance Plus, Inc.*, 227 Ga. App. 641 (1997), which held that a waiver of consequential damages provision was enforceable and barred the plaintiff’s alleged consequential damages, even when the other party wrongfully terminated or breached the contract.

The decision in *Silverpop Systems, Inc.* also follows the paramount public policy of Georgia that courts will not lightly interfere with the freedom of parties to contract. *See e.g. 2010-1 SFG Venture LLC v. Lee Bank & Trust Company*, 332 Ga. App. 894, 897-898 (2015). In Georgia, unless prohibited by statute or public policy, parties to a contract are free to contract on any terms and about any subject matter in which they have an interest. *See e.g. Precision Planning, Inc. v. Richmark Communities, Inc.*, 298 Ga. App. 78 (2009). A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law. *See e.g. Piedmont Arbors Condo. Assn., Inc. v. BPI Constr. Co.*, 197 Ga. App. 141 (1990).