

As Courts Erode Your Legal Protection, Make Sure Your Contract Withstands the Challenge

You probably sleep better at night knowing your business has a contract that protects it if something happens to your customers or their property because of an alarm system or monitoring failure.

The language in the contract that protects your business is known in legal terms as an exculpatory clause, which says that you're not liable for any delay or interruption of service due to circumstances beyond your control; and that you're not responsible for personal injury or other losses caused by improper operation, defects in the alarm system, or a number of other factors.

Likewise, your business has a contract provision that prevents your customer's insurance company from suing your business for subrogation – to recover losses incurred by its insured.

These clauses are important to your business because most of the myriad ways your customer might experience a loss are out of your control. No matter how sophisticated the alarm system, there will always be clever burglars able to circumvent it; there will always be fire caused by lightning, carelessness, and rogue appliances; there will always be unattended furnace failures that cause pipes to break in the winter.

The clauses are also important to protect your business because alarm monitoring premiums and installation costs are based on the products and services provided,

not on the value of the premises where the alarm is installed, or the property inside. As one court has noted, the burden to protect the property through insurance coverage should be on the alarm customer, who is in a far better position to know the property's value and to bargain with an insurance company to determine an appropriate premium and coverage.

Most states do not have laws regarding enforceability of these clauses. Rather, the law comes about through court cases. Someone files a lawsuit and the courts determine whether, and in what circumstances, a contract's exculpatory clause or subrogation waiver will be applicable. This is called "case law."

Through case law, courts uniformly hold that exculpatory clauses are enforceable against negligence but not intentional actions or willful and wanton or grossly negligent actions.

But courts also recognize that such clauses are disfavored. And whether the clause will be upheld depends on the facts of the case and, to a large extent, what state you are in.

There is also a difference in how different states treat subrogation waivers. Some treat them just like exculpatory clauses. Others, however, treat them differently, holding that they are applicable no matter whether the conduct is alleged to be negligent, intentional or somewhere in



between. They do so under the theory that a subrogation waiver is not an exculpatory clause, but rather is a provision shifting the risk of loss to the insurer.

Unfortunately, a review of case law over the past 30 years shows that in much of the country there has been an erosion in the enforceability of exculpatory clauses and subrogation waivers. In states where such clauses were once routinely upheld, or cases were dismissed before trial, now courts are holding that the clauses are unenforceable or that their enforceability is a question for a jury. This forces companies to take cases to trial, which is expensive and sometimes risky, or to settle, which takes out the risk and expense of trial, but is expensive and unfair when you're not at fault.

Courts have accomplished this erosion through new definitions of what it means for behavior to be considered willful and wanton or grossly negligent. In one recent case, a court redefined what willful and wanton negligence means, essentially equating it to nothing more than negligence if a person knows someone is in peril and does not act. This arguably means that, in that state, exculpatory clauses are unenforceable where an alarm company receives a signal but doesn't respond appropriately, even if its failure to respond was purely an accident.

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Other courts have eroded exculpatory clauses by holding that they only apply to harm that was foreseeable given the activity involved. In one incredulous case, a court held that a recreational swimming pool's waiver of liability was unenforceable in a lawsuit brought by a drowning victim's family because drowning was not a foreseeable harm of swimming. Given all the ways an alarm customer could experience a loss, it is easy to see that whether it is foreseeable is ripe for debate.

Still other courts have strained the bounds of causation to find alarm companies liable for losses. In order to be held liable for damages, your actions must have caused the damage. Several older alarm liability cases found that, because the alarm company did not create the loss, it could not be held liable for it. Now, however, alarm companies are routinely held responsible for losses they didn't create.

Why have the winds of change shifted in many jurisdictions? It's likely a combination of many factors. First, I think there has been a general shift in attitudes. People want to feel safe and secure in this crazy world, where terrorist attacks are a real threat, as is sitting in a movie theater for a midnight premiere. They cannot take the reality that bad things can happen to really good people. So when something bad happens, they want to blame someone, not themselves, and not just bad luck. The alarm company, with deep pockets or at least an insurance policy, is a prime target.

Second, there has been a lot of negative press about alarm companies for some egregious behavior, causing public outrage. Over the years we have seen exposé reporting on fly-by-night alarm companies preying on senior citizens with shoddy alarm systems and lawsuits by several Attorneys General for these bad business practices. And there has been a lot of news coverage on several high-profile cases, including murders with orphaned children. All, we are led to believe

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by the stories, could have been prevented if the alarm system had operated properly. Because it is not newsworthy, we never hear about all the really great alarm companies, and the many times disaster is thwarted by the alarm system.

Finally, perhaps buoyed by the negative press, there is a lot of activism from attorneys who represent the people that have been injured to prevent enforcement of exculpatory clauses. Each legislative session,

they are hounding their legislators to enact laws making these clauses unenforceable.

Given the state of public opinion, and the consequent erosion, here are some actions you can take to protect your business:

- Make sure your contract is air-tight. It will take time and money, but it should be reviewed yearly by an attorney. Given that case law changes all the time, if you haven't reviewed your contract recently, you probably are not up to date with your state's law. Likewise, if you are buying cookie-cutter contracts, you are probably not protected as well as you should be. The law is not uniform throughout the country as to what wording can and cannot be used, font and size of the clauses, and placement in the contract. You need a contract drafted to reflect the law in your state.
- Avoid bad facts. This is easier said than done, and mistakes will inevitably be made. But be sure to instill in your employees the need for excellence and honesty. Implement best business practices to ensure that if something goes wrong and you are sued, you can come to court knowing you did your best and you have it all documented in writing.

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- Actively defend your legal rights. It is critically important that you get involved in the effort to defend the use of exculpatory clauses and to clarify the scope of their enforceability. The squeaky wheel gets the oil, so make sure your legislators know how important exculpatory clauses and subrogation waivers are to the vitality of your business. Keep abreast of proposed legislation in your state

and write your legislators when necessary.

- Also, support ESA, your Chartered Chapter and other industry groups in their lobbying efforts to protect your business, whether it's through monetary donations or volunteer support.

Given the erosion of exculpatory clause and subrogation waiver enforceability, now is not the time to be complacent. Get out there and update your contract and join the fight for enforcement of these vital provisions today. You will sleep better for years to come if you do.



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