WINNING CONTRACT PROVISIONS

BY: WENDY M. CANADAY

Recently, a state senator in New York introduced a bill that, if enacted into law, would curtail limitations of liability and damages in alarm contracts. As I write this, it is too soon to tell whether that bill will pass into law, but the alarm industry's reaction opposing the law underscores just how important these contract provisions are for the survival of alarm manufacturers, sellers, installers and those who monitor. In a word, they are vital to the industry's survival.

For that reason, I am certain that those of you who deal with end-users of alarm products have contracts with your customers that contain provisions limiting your company's liability and limiting the damages recoverable from your company. But what do those contract provisions really mean? And what can you do to increase your chances your contract will be enforced in court, should it come to that? Read on to find out.

What these contract provisions mean:

Limitation of liability

Here is an example of a contract provision limiting liability:

> *Customer agrees that Company is not liable for any loss, damage, injury or other consequences arising from the services we perform or the systems we provide or the performance of the Company's duties under this agreement.*

This is important: This provision does not mean the company cannot be held liable for anything it does. Rather, courts interpret this provision to mean that the company will not be liable if it is *negligent*, which is legally defined as the failure to act with reasonable care, or as an ordinary prudent person would act under the circumstances.

Courts have held that the company will still be liable for willful acts, and in some jurisdictions gross negligence. This conduct is typically defined as a reckless disregard for the safety or property of another, or not paying any attention to the consequences or using no care at all. Courts have determined it is against public policy to exculpate yourself from these types of actions.

As a result, this contract provision might deter a lot of otherwise frivolous lawsuits, but it is not an absolute shield. And whether conduct is negligent versus willful or grossly negligent is often litigated.

In court decisions the distinction between what is negligence and what is willful or gross negligence can be as clear as mud. Here are some examples from alarm cases where conduct was found to be merely negligent, meaning the company was not liable under its contract provision:

- Alarm company employee ignored burglary signals, believing it was an equipment malfunction.
- Alarm company received panic signal and gave police the wrong business name, causing police to be unable to find the business where an employee had been shot.
- Alarm company failed to detect a burglary because employee had turned down volume on equipment used to listen into business.
- Alarm company called the wrong fire department and failed to give directions to home.

In the end, however, whether conduct is deemed negligent versus willful or grossly negligent depends on the specific facts involved, including whether the employee acted reasonably and diligently, and whether the employee followed company policy and procedure, and any applicable laws.

Limitation of Damages

Hand-in-hand with the limitation of liability provision, alarm contracts usually contain a limitation of damages provision. Here is an example of a contract provision limiting damages:

> *If any liability is imposed on Company, it will be limited to six times the monitoring charge provided in this agreement or five hundred dollars ($500.00), whichever is more.*

This language is pretty self-explanatory—if the company is held liable for negligence, it agrees to pay the greater of $500 or six times the monitoring charge. You should know, however, that, like the limitation of liability clause, most jurisdictions will not enforce the limitation of damages if the company's conduct is found to be willful or grossly negligent.

What can you do to ensure your contract is enforced

First, the obvious: Avoid willful and grossly negligent behavior. You, of course, cannot control everything every person in your company does at every moment. So, in practice, at a minimum that means hiring diligent people and training them well; developing standards for your employees and adequately supervising them to ensure the standards are followed; and staying abreast of, and following, the law and code requirements. If you can come to court with the ability to show you did your best, even though something went wrong, you will be much better off.

Second, and equally obvious: Keep a copy of the customer's signed contract in a safe place. Better yet, keep a paper and an electronic copy. And if your contract has a place for a company representative to sign, make sure to have him or her sign it. The contract can usually be enforced without the company's signature where the company has been providing service as if there was a contract, but it can be a big distraction from an otherwise good case.

Third, be mindful of to whom your contract applies. This consideration is really worthy of a whole article unto itself because the courts are divided on this issue, but it bears mentioning. As an example, say you have an unmarried couple living together and only one of them signs the contract for their home's alarm system. Both of them are then killed in a house fire and a claim is made that the deaths were caused because the alarm did not timely sound. Does the alarm contract and its limitation apply to both people, or just the one who signed the contract? That is an open question in many jurisdictions. So your best practice is to have all adult occupants sign the contract, if you can.

Finally, make sure your contract is up-to-date. Laws change (see my introduction) and court decisions regularly affect how these contracts are interpreted. Make sure your company's contract is current or it could be unenforceable or missing a helpful provision.

One provision I have noticed that is missing from some older contracts is a subrogation waiver. Here is an example:

> *Customer releases and discharges Company from and against all claims arising from hazards covered by Customer's insurance, it being expressly agreed and understood that no insurance company or insurer will have any right of subrogation against Company.*

Many lawsuits against alarm companies are subrogation lawsuits brought by insurance companies. Insurance companies have the right to step into the shoes of the party that it compensates and sue any party that the compensated party could have sued. For example, if an insurer pays for a homeowner's claim on a house fire, it can then sue the alarm company because the alarm allegedly did not timely notify the homeowner of the fire. If your company's contract has a subrogation waiver, you have agreed with the customer in advance that the insurer cannot bring such a claim. Of course there are exceptions to this provision's enforcement: some insurance policies prohibit the insured from making such agreements, and some courts have held that even this provision is not valid if the alarm company's conduct is willful or grossly negligent. But it is wise to make sure your contract includes this provision because it is regularly enforced.

In sum, contract provisions limiting your company's liability and the damages recoverable are a vital first line of defense against lawsuits arising from alarm products and services, but the contract is not an absolute guarantee your company won't be held liable. A little diligence and regular review of your contract's terms, however, can put you in the best position to win based on your contract.

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