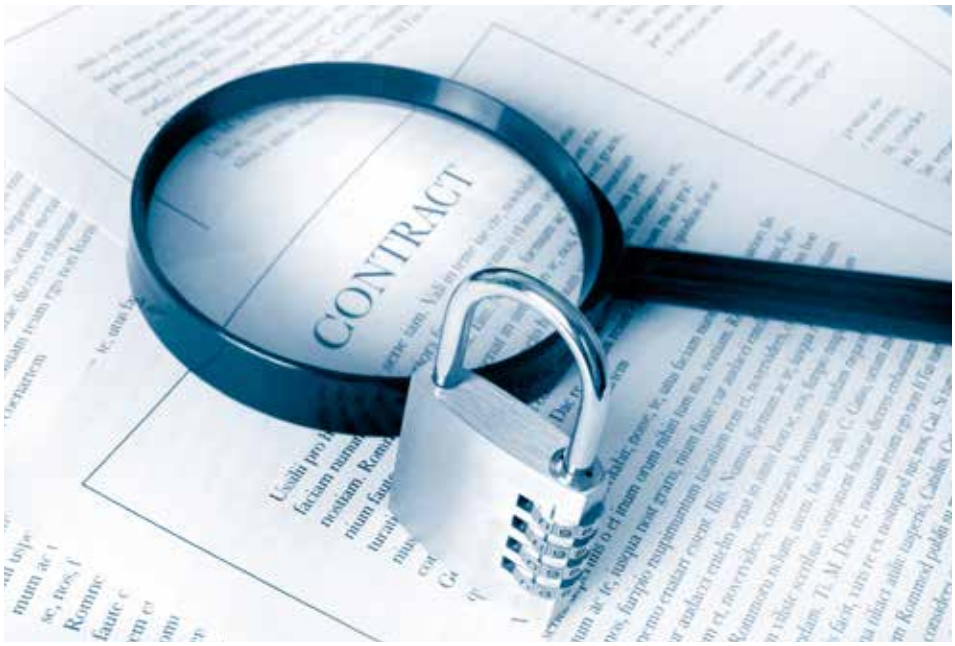
Vigilance Can Prevent Seven Common Mistakes That Place Contracts in Jeopardy

By Wendy Carlisle

I have the pleasure – and unfortunately sometimes the pain – of reviewing alarm sales and monitoring contracts for litigation, revisions and potential acquisitions. Here are seven mistakes I see most often in contracts.



Non-assignability

Do you want to sell your business someday? The buyer will likely want to take over without having to get every one of your customers to sign a new contract. This can be done if you can "assign" your existing contract. An "assignment" is when one party to a contract gives the contract's obligations and benefits to another person.

To make sure that you – but not your customer – can assign your contract, it should be worded similar to this:

Assignment. Customer cannot assign this Agreement without Alarm Company's prior written consent. Alarm Company may assign this Agreement or any of its obligations under this Agreement without notice to Customer.

I have seen contracts that, because of sloppy legal drafting, do not allow an assignment. One agreement that I looked at recently had a clause that allowed for assignments, but also had a blanket provision stating the agreement was not transferrable. That was enough to make the potential buyer walk away.

Typos

Typos are the bane of any writer's existence. They can happen to anyone (just ask my editor at ESA), but they can mean the death knell for a contract. As an example, I recently looked at a contract that was riddled with typos, including one in the limitation of liability section.

> … Customer agrees to indemnify, defend and hold Alarm Company harmless form any and all claims and lawsuits …

It's easy to spot the typo. It might look innocuous, and a court would probably still enforce this provision because the intent is obvious. But, in the worst case, typos could ruin the intent of the contract and make it unenforceable. Do you really want to take that chance?

Moreover, having typos in your contract gives the impression that your company is sloppy. If a document that is vital to your business is sloppy, you will also have an uphill battle to convince a potential buyer, a court, or a jury that your sales practices, installations, and service are not also sloppy.

Not updated for technology

Have you been to any security industry trade shows recently? The amount of new technology is staggering. Indeed, over the past decade the industry has transformed because of all the new electronic aspects of security. If you have been in business awhile and you have not updated your contract, it may be stuck in the dark ages of technology when all you had to worry about was a POTS line and some hard-wired components.

These days, depending on your business and what components you sell, you may need to include provisions in your contract that are related to Internet and cellular data transmission, data storage and corruption, privacy (especially if you offer video), password security and theft (especially for smart phone or Internet access).

Failure to comply with home solicitation cancellation laws

There are federal and state laws that govern home solicitation sales. These laws dictate that you must give your customer at least three days in which to walk away from any sale that was made in their home (and in some states by telephone). These laws include wording that must be in your contract giving notice of this right to cancel. The wording must be in a certain place in the contract, and in a certain type size – typically by the customer's signature in at least a 10-point font. In addition, these laws require that the home solicitation customer be given a handout, separate from the contract, with this information.

If you do not follow these laws, your customer may be able to get out of the contract altogether at a later date. This would make your limitations of liability and damages meaningless.

Hiding important provisions

Unfortunately, in many jurisdictions the days of courts upholding contractual provisions limiting an alarm company's liability and damages without a second thought are waning. You may recall that last year I wrote about a case in which the Georgia Supreme Court upheld a ruling that a company's limitation of liability clause was unenforceable because it was not explicit, prominent, clear and unambiguous. The court explained what was wrong with the contract:

> "[T]he limitation of liability clause is found on the back of the one-page, two-sided contract ... which is titled 'DAMAGES.' And rather than being set off in its own paragraph – or even its own subparagraph – the $250 limitation appears toward the end of the second long subsection (e), after a nearly equally long sentence discussing the liability of police or fire departments, and it is far removed from the paragraph 5 title indicating the subject matter of the paragraph. In addition, while the sentence indicating that (the company) is not liable for incidental or consequential damages is in capitalized typeface, neither the $250 limitation nor the fact that it applies to acts of negligence is capitalized or set off in any unique or prominent way. To the contrary, this important language is written in the same small, single-spaced typeface as the majority of the contract."

In other words, the important provisions protecting the alarm company were hidden in small font, on the second page, under a heading that did not give a hint about the provisions. Don't make these mistakes.

Another case comes from California, where a plaintiff claimed he did not receive the second page to his monitoring agreement and therefore was not aware of the cancellation and renewal provisions. The case was initially dismissed, but then was reinstated on appeal because the court found:

> "Based on the record before us, (the plaintiff) … had no reasonable opportunity to learn the essential terms of the document he signed as a result of (the company's) purported failure to provide him with the second page of the agreement. Although the agreement warns a potential customer that he may be charged a cancellation fee, that statement alone would not have informed a reasonable person that he would be charged an early termination fee, much less one for $750 or the remaining amount due under the agreement. (The plaintiff) was not negligent in failing to take additional steps to ascertain what may be charged as an early termination fee. While the law is clear that a consumer is generally not excused from reading a contract, (the company) has provided no legal authority for the proposition that a consumer is obligated to question and investigate any provisions which merely allude to a potential fee."

The allegations in the second case are different from the first. It is not that the terms were hidden in small font, for example, but that they were hidden entirely by failure to give the customer both pages of the contract.

Other than the obvious lesson to make sure you give your customer all pages of the contract, there are some perhaps less obvious contract-drafting lessons to be learned: Include page numbers on your contract ("page 1 of 2," for example); have the customer initial pages on which the customer does not sign; and indicate the total number of pages on the first page of the agreement, and that by signing the customer agrees that he or she has read and received all pages.

No subrogation waiver

A subrogation waiver is a provision that states that the alarm company will not be liable for any claims arising from hazards covered by the customer's insurance. As I have written before, many lawsuits against alarm companies are subrogation lawsuits brought by insurance companies. For example, if an insurer pays for a homeowner's claim on a house fire, it may then sue the alarm company claiming the alarm did not notify the homeowner of the fire in a timely manner. 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. There are exceptions to this provision's enforcement but it is wise to make sure your contract includes this provision because it is enforceable, under the right circumstances, in many jurisdictions.

Not updated on a regular basis

Your contract should be a living document, ever-changing as new information comes to light on best practices, whether from new laws, court decisions, or shared wisdom in the industry. While it is tempting, do not get a contract and then forget it. Just like technology, the law affecting your contracts changes. Your contracts should be reviewed regularly by an attorney who is familiar with the industry, and who stays abreast on legal happenings.

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