

WAYMAN, IRVIN & MCAULEY, LLC

LIABILITY DIGEST:

ALARM INSTALLATION AND MONITORING

A Brief Summary of Liability Cases: 2006

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Introduction

This Liability Digest is prepared as an informational resource solely for the informational use of executives and professionals in the Electronic Life Safety and Security Systems Industry. The cases listed here were decided during 2006 and address legal issues affecting the burglar and fire alarm related companies throughout the United States. This year's cases include everything from routine negligence matters to allegedly unconstitutional permit revocations to even more courts attempting to decipher limitation of liability clauses.

The focus of these cases, however, points to the significant importance on utilizing appropriate contract language to limit liability and to fix damages to a liquidated sum. In some contexts, the courts have passed task of contract interpretation on to the jury or accepted some other defense to the contract.

For ease of reference, this summary organizes the cases by legal issue and then lists each according to jurisdiction. Although procedural rules vary among jurisdictions, I have included a Basic Description of the Court System as an aid for non-lawyers.

Although every effort has been made to accurately reflect the court rulings, there is no substitute for a complete examination of all legal precedent by qualified legal counsel. Certain cases in this summary may still be in the appeal process, and case holdings case be reversed by another case or by legislative action. Of course, this summary does not intend to convey legal advise or your receipt or review does not create an attorney client relationship,

Your comments or suggestions would be greatly appreciated.

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Basic Description of the Court System

In order to determine the impact of the cases cited in this summary, the reader should have a basic understanding of the court system and the civil litigation process.

The reported decisions include both state and federal courts. In the federal court system, cases are filed first in the U.S. District Court and appeals from the District Court are filed in a circuit court of the United States Court of Appeals. Each state has at least one district court and the thirteen circuit courts have jurisdiction over multiple district courts. Generally, decisions from the circuit courts take precedence over district court decisions.

The state court systems vary by procedure and nomenclature. In New York, the "Supreme Court" is the trial court, while in Pennsylvania the "Supreme Court" is the highest appellate court. Where possible, we have referred to the trial court, the intermediate appellate court, and the high court of each state.

In both the state and federal systems, a civil case typically begins by filing a "Complaint" by a plaintiff and against one or more defendants. The defendant may join other additional defendants to the case if those parties are deemed to have liability for the subject of the lawsuit. The defendant admits or denies the allegations in a document called an "Answer." The defendant may file a motion to dismiss before or after filing the Answer.

Additionally, the parties can conduct an investigation of the claims and defenses during the "Discovery" phase, which include serving and answering written interrogatories, exchanging documents, taking testimony in form of depositions, conducting site and device inspections, and gathering other evidence.

A motion to dismiss filed after discovery ends is called a "Motion for Summary Judgment." If the trial court denies the Motion for Summary Judgment, the case will proceed to trial, where the trial judge could dismiss the case after the presentation of plaintiff's evidence or allow the case to go to the jury.

The reported cases in this summary typically result from the trial court's decision or refusal to grant a motion to dismiss.

CONTRACT FORMATION:**Unsigned Contract Not Enforced Against Customers**

Plaintiffs sued alarm monitoring companies for damages sustained by pipes that froze and burst, after Defendants failed to notify them of a low temperature alarm signal at the premises. Plaintiffs purchased the property from Plaintiff-wife's mother. Following mother's death, Plaintiffs used the property as a summer home. Mother had paid predecessor in interest of Defendant Alarm-Tech Security Systems, Inc. to install an alarm system at the premises in 1985. In 1994, after Plaintiffs had purchased the property, Alarm-Tech installed a low temperature alarm sensor. Plaintiffs allege they paid the monitoring fee after mother's death. Plaintiffs claim that defendants are liable for negligence and gross negligence, and breach of contract. Plaintiffs moved for summary judgment on the breach of contract action, alleging that by failing to take action after the low temperature signal was received, Alarm-Tech breached its contract. Defendants argued that Plaintiff's mother was acting as an agent for plaintiffs, and there was an exculpatory clause in the contract that barred recovery. Defendants also allege that the failure to respond was due to confusion from low battery signals received prior, due to Plaintiffs' failure to change the battery. Plaintiffs argued that mother was not acting as their agent, and that the agreement with the exculpatory clause was never executed by mother, and they never assented to the terms of the agreement, and finally, that Defendants failed to change the low battery.

The court found that Defendants raised an issue of fact to defeat summary judgment in alleging that the failure to report the alarm was due to the confusion over the low battery signal. The court also found, however, that the written contract was not signed by Plaintiffs or mother, and therefore, there was no manifestation of mutual assent to the terms, and therefore no limitation of liability. Plaintiffs' motion for summary judgment regarding the limitation of liability was granted, and the written agreement was deemed unenforceable against Plaintiffs.

Schaberg v. Alarm-Tech Security Systems, Inc.,
2006 N.Y. Misc. LEXIS 3063 (N.Y. App. 2d 2006)
SUPREME COURT OF NEW YORK, APPELLATE TERM, SECOND DEPARTMENT

SCOPE OF AGREEMENT:

Installer's Contract Protects Phone Line Monitor

Fragrance Mart purchased a burglar alarm system for its merchandise warehouse from Continental Technology, Inc. The contract contained a limitation of liability clause (1) disclaiming liability for negligence and gross negligence, (2) setting liquidated damages at \$250.00, and (3) applied to "any company which renders monitoring or other services in connection with this alarm agreement." Continental's contract specifically mentioned telephone line security and the WatchAlert system.

Continental provided monitoring to Fragrance through Horizon Electronics, Inc. The burglar alarm also included a WatchAlert transmitter designed to transmit a signal over the Fragrance phone line every twenty-six seconds to BellSouth. Thus, if a burglar cut the warehouse's phone line, BellSouth would notify Horizon that it failed to receive a signal from WatchAlert. Fragrance's warehouse suffered a burglary and received compensation from its insurer, The Hartford.

Hartford filed suit against BellSouth alleging negligence in operating the WatchAlert system allowed the burglars to enter the warehouse undetected.

Applying Florida law, the District Court judge entered judgment as a matter of law pursuant to F.R.C.P. 50 after Hartford presented its case to the jury and before defendants put on their case. The court found that the limitation of liability clause contained in the contract between Fragrance and Continental applied to BellSouth and capped BellSouth's liability at \$250.00. BellSouth then stipulated to entry of a final judgment in the amount of \$250.00.

On appeal from the trial court's ruling, the federal appeals court affirmed the trial court's finding that BellSouth was a company that rendered services in connection with the alarm system and was entitled to rely upon the Fragrance/Continental contract. Both courts rejected Hartford's arguments. At a minimum, BellSouth provided "other services" in connection with the Continental installation. The court rejected Hartford's argument that BellSouth separately contracted and billed for its services apart from Continental. Further, Hartford did not convince either court that only the installation of the WatchAlert, and not the monitoring of the transmissions, was governed by the Continental installation contract.

Hartford Ins. Co. v BellSouth Telecoms, Inc.,

2006 U.S. App. LEXIS 29120 (11 Cir. Fla. Nov. 24, 2006)

United States Court of Appeals for the Eleventh Circuit

CONTRACT RIGHTS:

Court Allows Monitoring Company to Sue Under Dealer's Installation Contract

Plaintiff Sonitrol sued its customer for breach of contract, promissory estoppel, and unjust enrichment. Plaintiff alleged that it had contracted with the Defendant to provide electronic security services at various locations across the United States. Plaintiff alleged that it had installed the equipment and provided services, and the Defendant failed to pay almost \$500,000 due.

Defendant contended that Plaintiff was required to join its franchised dealers who provided the installation services. The Court disagreed. Defendant also argued that Plaintiff lacked standing to sue, as the separate transactions were with the dealers. The Court denied this argument as well, finding that Sonitrol itself was providing the monitoring, and the contract, though with the dealers, intended Sonitrol to be a beneficiary. Therefore, as a third party beneficiary of the installation contract, Sonitrol had standing to sue for breach of the contract.

Sonitrol Corp. v. Signature Flight Support Corp.,
2006 Del. Super. LEXIS 161 (Del. Super. Ct. Mar. 24, 2006)
SUPERIOR COURT OF DELAWARE, NEW CASTLE

CONTRACT INTERPRETATION:**Ability of Customer to Increase Liquidated Damages Clause Proves Contract is Not Contract of Adhesion**

Plaintiff insurer and insured homeowner filed action for damages against defendant alarm company claiming losses due to fire. Plaintiff's home sustained heavy damage due to an accidental fire, and plaintiff insurer paid for repairs under an insurance policy. Defendant alarm company had installed a fire alarm system and agreed to monitor the alarm under a contract with homeowner. The contract contained a provision limiting defendant's liability to \$250.00 as liquidated damages in the event the system failed to properly function. An investigation revealed that the alarm panel likely malfunctioned. The fire cause and origin investigation revealed that that fire started due to faulty wiring of the home and was not related to the alarm system. ADT's contract allowed the homeowner to increase the LD amount through additional payment with the contract ("IF THE CUSTOMER DESIRES ADT TO ASSUME A GREATER LIABILITY, ADT SHALL AMEND THIS AGREEMENT BY ATTACHING A RIDER SETTING FORTH THE AMOUNT OF ADDITIONAL LIABILITY AND THE ADDITIONAL AMOUNT PAYABLE BY THE CUSTOMER FOR THE ASSUMPTION BY ADT OF SUCH GREATER LIABILITY PROVIDED, HOWEVER THAT SUCH RIDER AND ADDITIONAL OBLIGATION SHALL IN NO WAY BE INTERPRETED TO HOLD ADT AS AN INSURER.").

The court held the homeowner's ability to increase the liquidated damages negated any argument that the service agreement was a contract of adhesion. The appellate court affirmed the trial court's ruling in favor of the alarm installer.

United Services Auto Ass'n v. ADT Security Services,
2006 Ky. App. LEXIS 284 (Ky. Ct. App. Sept. 8, 2006)
COURT OF APPEALS OF KENTUCKY

The limitation of liability provision stated, "Limit of liability - it is understood that ADT is not an insurer, that insurance, if any shall be obtained by the customer and that the amounts payable to ADT hereunder are based upon the value of the services and the scope of liability as herein set forth and are unrelated to the value of the customer's premises. ADT makes no guaranty or warranty, including any implied warranty or merchantability or fitness that the system or services supplied, will avert or prevent occurrences or the consequences therefrom, which the system or service is designed to detect. It is impractical and extremely difficult to fix the actual damages, if any, which may proximately result from failure on the part of ADT to perform any of its obligations hereunder. The customer does not desire this contract to provide for full liability of ADT and agrees that ADT shall be exempt from liability for loss, damage, or injury due directly or indirectly to occurrences or consequences therefrom, which the service or system is designed to detect or avert; that if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 10% of the annual service charge or \$ 250, whichever is greater, as the agreed upon damages and not as a penalty, as the exclusive remedy, and that the provisions of this paragraph shall apply if loss, damage or injury irrespective of cause or origin, results directly or indirectly to person or property from performance or nonperformance of obligations imposed by this contract or from negligence, active or otherwise, of ADT, its agents or employees"

CONTRACT INTERPRETATION:

Central Station's Erroneous Dispatch to Wrong Address Governed by Agreement to Fix Damages at \$500.00

Plaintiff's estate brought claims against alarm monitoring company when emergency personnel were dispatched to the wrong location in response to plaintiff's activation of alarm for assistance. Defendant moved for summary judgment and asserted as controlling the limitation of liability and liquidated damages provision in the monitoring subscriber contract.

The court considered the pleaded claims to sound in breach of contract for failure to perform an agreed upon service, and not a tort claim for breach of a duty to plaintiff. The district court undeniably held that the defendant breached the contract by failing to dispatch emergency personnel to the correct address. The court further limited defendant's liability to the contractually agreed liquidated sum of \$500.00.

Spengler v. ADT Security Services, Inc.,

2006 U.S. Dist. LEXIS 76446 (E.D. Mich. Oct. 20, 2006)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

CONTRACT INTERPRETATION:**Central Station's Decision to Ignore Signal as "False Alarm" Does Not Constitute "Gross Negligence"**

Plaintiff business contracted with the defendant company for alarm monitoring services. The contract contained a conspicuous "limitation of damages" provision and a "liquidated damages" provision. The court summarized the main events: "At 4:53 a.m. on June 22, 2004, the security system at plaintiff's store detected an unauthorized entry. The console operator at defendant's headquarters immediately notified the local police department and plaintiff's designated representative. The officers who responded to the scene informed the console operator that there was no sign of forced entry. Therefore, the operator determined that the signal was only a false alarm. The following night, the same console operator received an alarm signal that plaintiff's system had again detected an unauthorized entry. The operator, acting alone, decided that this was another false alarm and, as a result, failed to contact law enforcement or plaintiff's representative. In the morning, one of plaintiff's employees discovered that Foodlane Market had, in fact, been burglarized during the night. As a result, plaintiff suffered \$ 60,000 in damages. Defendant admitted that its operator violated company policy by failing to notify the proper authorities of the alarm and offered plaintiff \$ 360, the maximum liquidated damages for its loss. Plaintiff refused this offer and filed suit. Plaintiff contended that the liquidated damages clause was inapplicable under the circumstances, as the conduct of defendant's console operator amounted to gross negligence. Although plaintiff had served notice of its intent to depose the chief executive officer of defendant's corporation, the trial court granted defendant's motion for summary disposition prior to the close of discovery. The trial court determined based on the pleadings that the plaintiff could not create a question of fact on the issue of gross negligence. Accordingly, the court determined that plaintiff's recovery was limited by the contract and dismissed its claims against defendant."

The Court of Appeals affirmed the trial court's entry of summary disposition of the plaintiff's breach of contract and gross negligence claims. The Court of Appeals concluded that the facts did not rise to the level of "gross negligence" and that the plaintiff store owner was bound by the agreement to limit damages to \$360.00.

S & M Golden, Inc. v. Alarm Management II, LLC,
2006 Mich. App. LEXIS 176
Court of Appeals of Michigan

CONTRACT INTERPRETATION:

One Year Limitations Provision in Contract with Customer Enforced Against Insurance Company

A fire destroyed the house of Pamela Donar on August 30, 2003. Ms. Donar had an agreement with ADT Security Services for alarm monitoring. Plaintiff High Point Insurance Company paid Ms. Donar for the damage, and filed a complaint against ADT, alleging that the fire was caused by equipment ADT had installed in the house.

ADT filed for summary judgment, arguing that the action is barred by a one-year limitation of action provision in its contract with Ms. Donar, as well as arguing that Ms. Donar waived her right to subrogation in her contract with ADT. The Court found that the limitation of action provision applied to this case, as it applied to "any lawsuit." The court also found that no tolling could apply to High Point, as a sophisticated insurer. The court upheld the limitation provision in the contract, and dismissed the lawsuit as time-barred.

High Point Ins. Co. v. ADT Security Services, Inc.,

2006 U.S. Dist. LEXIS 44388 (D.N.J. June 29, 2006)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CONTRACT INTERPRETATION:

Federal Trial Court Upholds Contract, But Finds Sufficient Facts Alleged to Support Gross Negligence Claim

Country Club suffered substantial damages when a sprinkler pipe burst after freezing. Insurance company sought subrogation for money paid. A predecessor company of Defendant SimplexGrinnell, had been contracted to inspect and test the fire suppression system in October of 2002. The damage occurred in January 2003. Defendant maintained its liability was limited by the contract with the Country Club to the contract price of \$245. Plaintiff insurance company contended it had to pay over \$200,000 to the Country Club to repair the damage, which was allegedly caused by Defendant's negligence, gross negligence, breach of contract, and breach of warranty. Specifically, Plaintiff alleged that Defendant failed to properly inspect the system under the standards of the National Fire Protection Association, and that the limitation of liability clause should not be enforced. Plaintiff alleged that the clause was a liquidated damages clause that was unenforceable as a penalty, and that the Defendant was grossly negligent in its inspection of the fire system.

The Court first held that the clause in the contract was a valid limitation of liability clause, and not a punitive liquidated damages clause. The Court also found that it was a jury question whether the Defendant was grossly negligent, but granted summary judgment on all of Plaintiff's other claims.

Transcontinental Insurance Co. v. SimplexGrinnell, L.P.,

2006 U.S. Dist. LEXIS 48654 (N.D. Ohio July 18, 2006)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

CONTRACT INTERPRETATION:

Connecticut Trial Court Rules LD/LL Does Not Apply to Product Liability

Plaintiff insurance company sued to recover money paid to North American Marketing Corporation ("NAMCO") by the plaintiff as the result of an explosion and fire on NAMCO's premises. ADT filed a Motion for Summary Judgment to all counts listed against it, on the grounds that a January 3, 1990 contract between NAMCO and ADT's predecessor, Wells Fargo, contained a limitation of liability clause that limits ADT's liability to \$10,000 or the annual contract price, whichever was less. Plaintiff opposed on the grounds that the contract was not the applicable contract, ADT breached a condition precedent to the contract, and several other reasons. The Connecticut Superior Court found the limitation of liability clause was valid, and limited ADT's liability to \$9049.20 pursuant to the contract. The court, however, found that the limitation of liability did not apply to Plaintiff's count for product liability, as Plaintiff alleged that ADT engaged in intentional, willful, wanton, and reckless conduct. Under Connecticut law, public policy prevents a party from limiting damages for gross negligence or willful or wanton conduct. ADT did not submit any evidence regarding the substance of these claims, so the court concluded that the Defendant could not meet its burden of proving the nonexistence of an issue of material fact. The court entered judgment in favor of Plaintiff in the amount of \$9,049.20 on all counts except product liability, which was held for trial.

National Fire Insurance Co. v. PPG Industries,

2006 Conn. Super. LEXIS 1360 (Conn. Super. Ct. May 8, 2006)

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD

DUTY TO THIRD PARTIES:

Lessee Owned No Duty to Adjacent Lessee to Prevent Arson

In this subrogation action, plaintiff insurance company filed suit against defendant restaurant owner seeking reimbursement of sums paid to an adjacent business owner under a property insurance policy. An unknown person broke into the restaurant and started a fire. The restaurant owner leased property where an arson caused damage to the defendant's property and to an adjacent business insured by the plaintiff. Although restaurant owner had installed a burglar alarm system, she adjusted the sensors on the rear door due to several false alarms. Insurer claimed the restaurant owner was negligent in failing to adequately secure its leased premises.

The court ruled that the restaurant owner did not owe a duty to the adjacent business owner to prevent criminal acts such as arson from causing harm to the other's property. The court reasoned that the facts of the case did not create a foreseeable risk of arson, even though the restaurant had been broken into on prior occasions. The court also noted that arson could be committed without entering the building.

Travelers Property Casualty v. Pratt,

940 So. 2d 704 (La. Ct. App. Sept. 27, 2006)

COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT

INSURANCE COVERAGE:

Liability Insurer Bound By Company's Post-Verdict Settlement

In 1992, Tri-Etch, Inc., entered into a contract with MLS Inc., to monitor an alarm system Tri-Etch installed at the MLS liquor store located on Tillotson Avenue in Muncie, Indiana. Tri-Etch's duty under the contract was to monitor the night alarm system while it was activated after business hours, and monitor the panic alarm which could be activated by the store clerk. Tri-Etch provided a separate service to MLS not in the contract, which was to contact the store if the alarm had not been set within a certain amount of time after the store's usual closing time. If no employee answered when Tri-Etch called, they would notify the general manager, and then call the police. Tri-Etch customarily notified the store or the general manager by 12:30 a.m. – one half hour after the store closed. On August 12, 1997, the store was robbed after 11:50 p.m., but before the alarm was activated. The clerk was kidnapped, beaten, and tied to a tree in a nearby park. The alarm was never set. Tri-Etch did not call the store or the general manager until 3:15 a.m. The clerk was found alive at 6:00 a.m. the next morning, but later died of his injuries. The clerk's estate first sued Tri-Etch, but the court dismissed the suit finding that the claim was governed by a one-year limitation provision in the contract. The Supreme Court of Indiana reversed and remanded.

Following remand, Tri-Etch made a demand to its insurer to defend. The insurer denied coverage, and sought from the court a declaratory judgment that it did not have to provide coverage. Meanwhile, the underlying action went to trial, with a jury finding Tri-Etch 40% liable for the death of the clerk, and a non-party 60% liable, with damages totaling \$2.5 million. The court entered a judgment against Tri-Etch for \$1 million, and later amended the judgment to make Tri-Etch liable for all damages. Subsequently, Tri-Etch and the estate settled for \$1 million. Tri-Etch's insurer sought to intervene in the appeal to remove its name from the judgment. The Court of Appeals of Indiana concluded the trial court erred in allowing the insurer to intervene, and found that the settlement will bind the insurer as to all issues except coverage.

Cincinnati Insurance Co. v. Young,
852 N.E.2d 8 (Ind. Ct. App. 2006)

CONTRACT INTERPRETATION:

Connecticut Trial Court Rules Fact Issue Precludes Judgment on Indemnification Claim

Plaintiff insurer for two commercial tenants sued Sonitrol Security of Hartford (Sonitrol), which installed and monitored a sprinkler alarm on premises owned by Partridge Square after a fire occurred on the premises. The sprinkler system activated and sent an alarm signal to Sonitrol. Sonitrol received the signal, but failed to call the town fire department, which could have shut off the sprinklers, which remained on for four hours, causing extensive property damage. Sonitrol then sued Partridge Square pursuant to the contract between the parties, which included a hold harmless agreement running in favor of Sonitrol. Partridge Square raised two affirmative defenses that the hold harmless provision was void as against public policy under Connecticut Statute, and because Sonitrol sought to relieve itself from the consequences of its own negligence. Partridge Square moved for summary judgment, claiming the claims raised in its defenses should bar Sonitrol from seeking indemnification as a matter of law. Sonitrol first argued that the motion was not timely filed, but this argument was denied. Sonitrol also argued that Connecticut General Statute § 52-572 did not apply, as that section only applies to construction contracts, and not this contract.

The court concluded that there was a genuine issue of material fact whether the statute applied, and therefore this argument for summary judgment was denied. The court also concluded that it could not resolve whether the provision was void as against public policy at the summary judgment stage, as there were issues of material fact such as the parties' respective bargaining power, clarity of contractual language, and other matters. Accordingly, summary judgment was denied.

Traveler's Indemnity Co. v. Sonitrol Security of Hartford.

2006 Conn. Super. LEXIS 889 (Conn. Super. Ct. Mar. 24, 2006)

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD

LANDLORD LIABILITY:

Landlord Could Be Held Liable to Tenants for Lack of Smoke Detectors

Plaintiffs had rented a second floor unit from defendant landlord and filed suit against defendant landlord after a first floor fire caused damage to their second floor unit. The second floor unit had operable smoke detectors, but the evidence was conflicting on the issue of whether the first floor unit had working smoke detectors. After being alerted to the fire, the three plaintiffs suffered injuries when attempting to escape from a second floor deck. An Ohio statute required landlords to comply with local safety ordinances, and a Cleveland ordinance required landlord to install one simple detectors adjacent to the sleeping area in each unit.

The trial court granted the landlord's motion for summary judgment and plaintiffs appealed. Essentially, the plaintiffs argued that the presence of a first floor smoke detector would have alerted them to the fire sooner and they could have utilized a safer exit from the unit.

The appeals court Violation of an ordinance can constitute negligence per se (the existence of a duty and the breach of the duty) and concluded that plaintiffs did not need to produce expert testimony because the plaintiff's theory fell within the lay understanding of the jurors.

Edmond v. Bazzizichi,

2006 Ohio 2588 (Ohio Ct. App., Cuyahoga County 2006).

Court of Appeals of Ohio, 8th Appellate Division

LANDLORD LIABILITY:

Landlord Could Be Negligent for Code Violation; Tenant Could Be Comparatively Negligent

Defendant Michael Murphy purchased a home at a sheriff's sale. Between 1986 and 1988, Mr. Murphy had updated the building by removing plaster, installing drywall, and updating the electrical service from knob and tube wiring to Romex wiring. Mr. Murphy leased the property to tenants when the renovations were complete. Mr. Murphy later sold the property under an installment contract to Larry and Carol Swords, who formed Swords Property Management. Mr. Murphy transferred the property to Swords Property in 2002. In 2003, the apartment plaintiff was living in burned, killing two of her three children, a babysitter, and a neighbor's child. Plaintiff sued the Swords and Swords Property Management, who joined Mr. Murphy and his wife. The trial court granted summary judgment for each defendant. Plaintiff alleged that under the City of Lima Building Code, the property was required to have smoke detectors installed and properly maintained. The Court held that Mr. Murphy and his wife, who was also sued, owed no duty to the Plaintiff as they did not own the property when she leased the property, and because they were not in privity of contract with the Plaintiff. The Court also found that Mr. Murphy was not liable as a builder/vendor, as there is no basis to hold a builder/vendor liable unless he built the structure based on a commercial tenant's particular needs.

As to the Swords defendants, the Court held that there was a duty to comply with the building code and install smoke detectors at the time of the fire. The Court also found there were genuine issues of material fact as to whether the required smoke detectors, whether the detectors were properly maintained, and who was responsible for testing the smoke detectors. Additionally, the Court held there was a genuine issue of material fact on causation. The Court affirmed the summary judgment as to Carol Swords individually, but reversed summary judgment for Swords Property and Larry Swords individually. The Court also found that there was a genuine issue of material fact as to whether the Plaintiff was comparatively negligent.

Baraby v. Swords,

851 N.E.2d 559 (Ohio Ct. App., Allen County 2006)

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, ALLEN COUNTY

INSURANCE COVERAGE:

Alleged Misrepresentation About Alarm Status in Insurance Application

Insurer filed an action for a declaratory judgment seeking a declaration as to its coverage liability under a policy to a hotel following a fire at the hotel. The insurer alleged that the Hotel misrepresented in its application for insurance that it had a central station fire alarm system. The hotel joined Klein Reassurance Agency, which was a specialty wholesale insurance broker. Klein only sold insurance for Plaintiff-insurer. Klein contends that it had no relationship with the hotel, but only operated through an additional broker, who became involved through a retail broker. The wholesale broker contended the retail broker insisted that the hotel had a central station fire alarm, when the retail broker testified that she did not know what a central station fire alarm was. It was undisputed, however, that the wholesale broker informed Klein that the hotel had a central station fire alarm, without anyone asking for a definition. Once a binder was issued for the policy, Klein contracted with Site Inspections, LLC to perform the hotel inspection as part of the underwriting process. Site reported that the fire alarm system was "central station", but the inspector had no training in fire alarm systems, and no idea what a central station fire alarm was. Klein filed for summary judgment on all claims against it by the hotel, which were negligent misrepresentation and negligence in procuring and processing policy and breach of contract. The Court held that Klein owed no duty to the hotel, but rather was an agent for the plaintiff-insurer. The Court also held that there was no contract between the hotel and Klein, and therefore granted summary judgment on all of the counts alleged against Klein.

Insurance Corporation of Hanover v. Vantage Property Management, L.L.C.,

2006 U.S. Dist. LEXIS 53494 (W.D. Mo. Aug. 2, 2006)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

PROPERTY INSURANCE COVERAGE:
Home Under Renovation With Inactive Alarm

Plaintiffs sustained extensive damage to their house and pool house during a fire in 2002. In 2004, Defendant insurer investigated and then denied coverage, based on its conclusions that (1) the fire had been set by the Plaintiffs or at their direction; and (2) the Plaintiffs misrepresented and concealed material facts leading up to the loss. Plaintiffs denied the accusations and sued for breach of contract, breach of the implied covenant of good faith and fair dealing, Massachusetts statutory violations, and infliction of emotional distress. Plaintiffs also sought injunctive relief precluding the defendants from taking any action to recover money paid on Plaintiffs' mortgage. Defendant countersued for fraud, intentional misrepresentation, negligent misrepresentation, breach of contract, and unjust enrichment. Defendant filed for summary judgment on all of Plaintiffs' claims, and Plaintiff-wife filed a motion for partial summary judgment on all claims as they related to her.

Plaintiff-wife had purchased the property for \$1.3 million, intending to restore it from a state of disrepair. Plaintiff obtained a mortgage for \$750,000. Plaintiff sought homeowners insurance for the property. A local insurance broker prepared an insurance application based on information obtained from Plaintiff-husband. The broker wrote on the application that the property has a central station fire and burglar alarm.

The issue presented was whether an active central station-monitored fire and burglar alarm was a condition precedent to recovery under the property insurance policy and whether the Plaintiffs misrepresented the presence of a system. The evidence showed that the property did contain an alarm, but the Defendants contended that the Plaintiffs deceived them into believing that the system was active when it was not. In order to prove the alarm's active status, Plaintiffs alleged that in 2001, some curtains caught on fire, they extinguished the fire, and the alarm sounded before stopping within one or two minutes. Plaintiffs contend they believed, therefore, that the alarm was active. However, effective April 25, 2002, the previous owners of the property cancelled the monitoring services. A representative of the monitoring company attempted to contact the Plaintiffs, and at one point spoke with Plaintiff-husband. He informed the representative that the alarm system was Plaintiff-wife's responsibility.

Plaintiff-wife never contacted the representative, and Plaintiffs never paid for or re-activated the alarm service. Plaintiffs also contended that due to the extensive renovations at the property, the alarm system could not have been monitored at that time. A representative testified that the company does not monitor homes under construction until they are fully enclosed. He noted that the insurance binder reflected as "Special Conditions/Other Coverages" that the insurer required active central station fire and burglar alarms. However, the Court noted the language made no express reference to this being a condition precedent.

The Court also noted that the 2001 policy documents submitted by the Defendant made no mention of the alarm system requirement, and mentioned that the insurer believed there

was no fire alarm present when the policy was issued. Therefore, the Court concluded that the Defendant could not obtain summary judgment on the condition precedent.

Yerardi v. Pacific Indemnity Company,

436 F.Supp. 2d 223 (D. Mass. 2006)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

STATUTE OF LIMITATIONS:

Statute of Limitation Bars Claims Against Device Manufacturer

Plaintiffs alleged a defect in their vehicle started a fire in their garage and that a defect in their fire alarm system allowed the fire to destroy their home. Plaintiffs sued the auto manufacturer and dealer, as well as the fire alarm component manufacturers.

Plaintiff contracted with ASCO to install and monitor a burglar and fire alarm system consisting of various Honeywell components and heat sensors manufactured by Chemetronics. Plaintiff also purchased and installed battery operated smoke detectors. Prior to the subject fire, several false alarms occurred but ASCO provided assurances that the alarm system was working properly.

Plaintiffs awoke in the middle of the night to the sound of a battery smoke detector. During their evacuation, ASCO telephoned Plaintiffs and asked if they were having a problem.

During discovery, plaintiffs received documents identifying the manufacturers of the system devices, including Chemetronics as the manufacturer of the heat sensors installed in the home. Although Plaintiffs sued Honeywell, they did not sue Chemetronics because they assumed it to be another Honeywell subsidiary.

The trial court granted summary judgment to Chemetronics, and the Supreme Court affirmed, finding that plaintiffs had sufficient information concerning the identity of the heat sensor manufacturer to have brought their claims against it within two years of the fire.

Bennett v. ASCO Services, Inc.,

621 S.E.2d 710 (W.V. 2005)

Supreme Court of Appeals of West Virginia

STATUTE OF LIMITATIONS:

Statute of Limitation Bars Claims Against Fire Alarm Installer

Plaintiffs sued Fire Management Systems (FMS) and Air Systems Manufacturing of Lenoir (ASML) for injuries sustained when Plaintiff-husband was injured when a blower pipe that was part of a fire alarm system allegedly purchased from FMS and an air flow system purchased from ASML. The blower pipe broke loose after allegedly having been improperly braced/installed/clamped and/or a malfunction in the fire alarm system which caused the pipe to fall, striking Plaintiff in the head and shoulder, causing various injuries on May 6, 2003. Plaintiffs filed a complaint against FMS and ASML on May 5, 2004 in state court in Tennessee. In its answer, FMS alleged the injuries were caused by someone else. FMS admitted selling systems, but denied manufacturing alarm systems. However, in discovery, FMS alleged that the components in the system were pre-engineered and manufactured by Clarks International. On October 4, 2004, Plaintiffs filed a motion seeking to add Clarke's Sheet Metal, Inc., and Clarke's Allied, Inc. (collectively CSMI). Plaintiffs did not serve their amended complaint until October 21, 2004, and the Tennessee Court did not enter an order permitting the amendment until December 1, 2004, after the action was removed to federal court on November 29, 2004. CSMI moved for partial summary judgment, arguing that claims of negligence, misrepresentation, and negligence *per se* were barred by the one-year statute of limitations for personal injury under Tennessee State Law, with no reason to extend the statute. The Court concluded that the complaint was not timely filed under Tennessee law, and summary judgment in favor of CSMI on the negligence, misrepresentation, and negligence *per se* counts of the Amended complaint were granted.

Kizziah v. Fire Management Systems,

2006 U.S. DIST. LEXIS 5846 (E.D. Tenn. Jan. 27, 2006)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

PERSONAL INJURY:**Annunciator-Related Hearing Loss Claim Rejected**

Plaintiff sued building owner, designer and installer of an evacuation alarm system, and the manufacturer of components of the system for negligence, claiming he suffered permanent hearing loss and other injuries during a test of the evacuation system at his workplace. The building owner had contracted with ADT to design an evacuation alarm system for the building. ADT contracted with an installer to install the system, with certain components manufactured by Wheelock, Inc. ADT provided the materials to the installer, who installed them according to ADT's blueprints and drawings without deviation. The installer placed an audible alarm in the building's lunchroom, which was a small room. The installer made no adjustment to the sound level, which was set to medium. The installer informed the owner when installation was complete and ready for testing. . An e-mail plus visible signs posted the day prior to the test informed employees the system would be tested. Plaintiff had arrived at work on the morning of April 4, and was in the lunchroom when the test occurred. The alarm sounded once, stopped, and then sounded again. The alarm blasts lasted between six and seven seconds, and were one second apart. Plaintiff's head was approximately 15-18 inches away from the alarm. Two other employees were in the lunchroom and claimed the noise was extremely loud and painful. Defense retained an expert to test the alarm level, and compare the results to OSHA standards. According to the Defendant's expert, the maximum noise level recorded was within OSHA standards. Further, an independent medical examination concluded that Plaintiff's hearing loss was a result of cumulative noise exposure over a prolonged period of Plaintiff's work as a rock musician, producer, and recording engineer. The medical evaluation concluded that Plaintiff's hearing loss was not due to the alarm. Plaintiff attempted to present evidence that the alarm the expert tested was not the same alarm that caused his injuries, and that the Defendants had replaced the original alarm to disguise a malfunction. The trial court ruled that Plaintiff could not suggest improper tampering absent admissible evidence that the alarm had been tampered with. The trial court granted a nonsuit for ADT on the grounds that the Plaintiff failed to establish any duty that ADT owed him, or a breach of that duty. The Court also concluded that the installer was an ostensible employee of ADT, as there was no written contract between the parties and ADT supplied all of the materials, plans and components of the system to the installer. The Court also denied Plaintiff's claim against the manufacture of the alarm, as Plaintiff did not elicit expert testimony of the standard of care for alarm manufacturers. The California Court of Appeals upheld the trial court in finding the Defendants were not liable.

Hoier v. Global Digital Media Xchange, Inc.,

2006 Cal. App. Unpub. LEXIS 10824

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

INVASION OF PRIVACY:

Homeowner Could Not Prove Alarm Company Installed Listening Devices

PROPERTY DAMAGE:

Homeowner Could Not Prove Roof Damage Caused Mold

Plaintiff contracted with defendant alarm company to install a residential security system consisting of a control panel, two door sensors, two motion detectors, a key pad, a window sensor and a smoke detector. Plaintiff alleged that defendant also installed electronic listening devices in order to spy on him (on behalf of the government in order to gain access into his clairvoyance). Plaintiff also alleged that defendant failed to properly seal roof holes relating to the system installation, and that such failure caused mold and other damage.

The federal district court granted the defendant's motion for summary judgment and dismissed the claims against the alarm company. Plaintiff had no evidence that defendant actually installed electronic listening devices in support of his invasion of privacy claim. On the property damage claim, plaintiff had no expert evidence linking the roof holes to the mold.

Smith v. ADT Security Services, Inc.,

2006 U.S. Dist. LEXIS 70109 (S.D. Miss. Sept. 26, 2006)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

DUTY TO THIRD PERSONS:

Federal Trial Court Holds Duty Owed to Bank Employees, Who are Not Bound By Bank's Agreement

Protection One Alarm Monitoring, Inc., installed a security alarm at a branch of Commerce Bank where Plaintiffs worked. In 2002, the bank was robbed by an intruder who entered the rear door after the Plaintiffs opened the branch in the morning. The rear door alarm was disarmed when the Plaintiffs disarmed the front door while opening the bank. The parties dispute whether the alarm system should have been configured in that manner, and the extent to which Protection One was required to inform the bank about the configuration.

On the day of the robbery, the manager arrived and locked herself in the building, disarmed the alarm, then unlocked the front door and allowed the remaining employees to enter, and then re-locked the front door. Soon after this procedure, a masked intruder burst out of a closet near the rear door, ran into the bank lobby, and pointed his gun at the Plaintiffs' heads. After handcuffing the Plaintiffs, and stealing money from the vault, the robber left the building via the rear door. The Plaintiffs hit multiple panic buttons to notify Protection One, who immediately alerted the police.

Protection One moved for summary judgment, arguing that it owed no duty to the plaintiffs, nor have the plaintiffs breached a duty. Protection One also moved for partial summary judgment based on the liquidation of damages clause in its Installation and Monitoring Contract.

There was no dispute that the bank relied upon Protection One's expertise in installing, designing, and configuring the system. The Court found that the decision to have the rear door disarm when the front door was disarmed was made by an employee of Protection One, though it was unclear which employee. It was also unclear as to why the system was programmed in this manner, as well as whether the person who programmed the system this way explained the configuration to anyone at the bank. The bank never tested the alarm, and the employees assumed that the rear door was armed at all times.

The Court held that under Massachusetts Law, a provider of security services under a contract owes a duty of reasonable care to the employees of its customers. Further, the Court noted that under the contract Protection One expressly disclaimed any warranty of merchantability or fitness for a particular purpose. Therefore, Protection One argued that it did not have a duty to install and configure an alarm system that was fit for its purpose, or anything, and therefore, there was no tort duty. The Court rejected this argument, holding that under Massachusetts law, injured parties may not be bound by a disclaimer that they never saw and to which they never agreed. The Court also found that the scope of the Defendant's duty to exercise due care is not defined by the contract, but by the scope of the undertaking, in this case, an undertaking to install an alarm system for a bank at a particular location. Therefore Protection One owed a duty to the employees who could be injured by its failure to provide an appropriate security system. The Court then denied summary judgment.

ment on Protection One's argument that no duty was breached, as it found that a jury could conclude that Protection One held itself out as an expert in designing and installing alarm systems, the bank relied on them to choose and configure an alarm system, the configuration was unreasonable, and not obvious to the bank, and foreseeable that it would endanger the bank's employees. The Court found that it could be deemed a hidden defect. The Court also denied summary judgment on Protection One's argument that its negligence was not the cause of the Plaintiffs' injuries, finding that liability will be imposed where they realized or should have realized that a situation that would afford a third person an opportunity to commit a crime, and that the third person would commit the crime.

Finally, the Court held that the Plaintiffs were not parties to the contract, and therefore could not be bound by the limitation of damages clause contained in the contract.

Davis v. Protection One Alarm Monitoring, Inc.,

456 F.Supp.2d 243 (D. Mass. 2006)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DUTY TO THIRD PERSONS:

NY Appellate Court Hold No Duty Owed to Third Party

Plaintiffs rented safe deposit boxes at Columbia Savings & Loan Association (Columbia). After Columbia was robbed, Plaintiffs brought suit against Columbia, Wells Fargo Alarm Services and Baker Protective Services, Inc. Wells Fargo and Baker Protective Services appealed an order of the Supreme Court of New York which denied their motion for summary judgment dismissing cross claims asserted against them by Columbia. Plaintiffs appeal from the same order that granted the Wells Fargo and Baker's request to have the direct claims against them in the complaint dismissed. The basis for the motion was the exculpatory clause in the contract between them and Columbia.

The court concluded that the exculpatory clause was not a basis for dismissal of the cross claims against Baker and Wells Fargo, as there were allegations that they were grossly negligent, which would nullify the cross claims. The Court concluded that the Plaintiffs' claims against Wells Fargo and Baker should be dismissed however, as they were third-party beneficiaries of the contract between Wells Fargo / Baker and Columbia. Accordingly, there was no duty owed to Plaintiff. The Appellate Division of the Superior Court of New York affirmed the trial court's decision.

Adler v. Columbia Savings & Loan Association,

26 A.D.3d 349, 811 N.Y.S.2d 737, 2006 N.Y. App. Div. LEXIS 1935 (N.Y. App. 2d 2006).
SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

AGENCY:**Federal District Court Denies MSJ— Fact Issue Concerning Installer's Status as Agent**

Plaintiff brought an action against security services companies for unfair trade practices, wrongful collection practices, and breach of contract. Plaintiff alleges that she entered into an agreement with ADT Security Services, Inc. (ADT) and its authorized dealer, Secure One, Inc. (Secure One) for alarm services. Plaintiff alleges that ADT and Secure One began wrongfully drafting \$98.97 per month from her checking account, when the amount was supposed to be drafted quarterly. Plaintiff also alleges that Defendant wrongfully engaged a collection agency in Dallas, Texas to collect additional money, which the agency was not properly licensed in Tennessee. ADT moved for summary judgment on the grounds that it did not have a contract with Plaintiff, and that it did not have any action regarding the withdrawal of money, or engage the debt collection agency. Plaintiff countered that Secure One was ADT's agent with express or apparent authority to collect money, and that ADT entered into a contract with the Plaintiff through its authorized dealer/agent Secure One. Plaintiff presented evidence that the payment authorization sheet attached to her contract only authorized ADT to electronically debit Plaintiff's account, and that the agreement was signed and authorized by Plaintiff and Secure One, and further, ADT's representative signed an affidavit approving the contract. On ADT's motion for summary judgment, the court found that there was a genuine issue of material fact as to whether Secure One was an agent of ADT authorized to bind ADT. The court denied ADT's motion for summary judgment as to whether it contracted with Plaintiff, and also denied ADT's motion for summary judgment seeking denial of Plaintiff's request for punitive damages.

Gunkel v. Secure One, Inc.,

2006 U.S. Dist. LEXIS 88401 (E.D. Tenn. Dec. 6, 2006)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

PROPERTY DAMAGE:**Dispute Among Factory Mutual And Installer**

Plaintiff Lockheed Martin sued to recover property damages incurred due to the accidental activation of the fire control system in Lockheed's Large Compact Range anechoic chamber (LCR), which is used to test electromagnetic emissions, immunity, and radio frequencies. The LCR anechoic chamber is designed to simulate conditions of outer space, by eliminating all light and sound. Anechoic foam is a special material that absorbs sound, and is placed on all four walls of the chamber. The facility is highly sensitive, thus requiring fire sprinklers to be telescoping sprinkler assemblies (TSAs). The TSAs were designed and sold to Lockheed by the Defendant and ETS-Lindgren LP, successor to Rantec Power Systems, Inc. Grinnell Fire Protection Company installed the fire control system. Rantec designed and constructed anechoic chambers, and designed a TSA for the chamber. Rantec sued Factory Mutual Research Corporation (FMRC) for indemnity. FMRC sued Rantec for indemnification for the costs and fees incurred in defending the other action. Rantec counterclaimed for fraud, violations of the California Business and Professions Code, and punitive damage. Both parties filed for summary judgment. FMRC is a nonprofit organization set up to provide, among other things, approvals of fire protection devices and sprinklers. Rantec contacted with FMRC for approval for the TSAs. Following problems in the testing of the TSAs at high 'g' forces, FMRC suggested Rantec cooperate with automatic sprinkler manufacturers in the design. Rantec refused, arguing it was not in a position to undertake any cooperation as it was not in the fire-suppression system business. Eventually, FMRC approved Rantec's design. FMRC filed for summary judgment on Rantec's count of fraud. Rantec argued that FMRC did not disclose the testing results of the sprinklers, thus amounting to fraudulent concealment. The Court permitted Rantec to amend its complaint to allege fraudulent concealment properly instead of fraudulent misrepresentation. The Court granted FMRC's motion for summary judgment for the counts under the California Business and Professions Code. Rantec filed for summary judgment on FMRC's counts for indemnification. FMRC contends that it was entitled to indemnification under the contract between Rantec and FMRC, and this was not a compulsory counterclaim in the 1999 lawsuit between the parties relating to the fire. Finally, the Court denied summary judgment to Rantec on the issue of whether it was responsible for FMRC's costs and attorney's fees.

Lockheed Martin Corporation v. RFI Supply, Inc.

2006 U.S. Dist. LEXIS 34827 (N.D. Cal. May 30, 2006)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

EVIDENCE OF PRODUCT DEFECT:

Pennsylvania Superior Court Affirms Insufficient Evidence Ruling

Plaintiffs filed suit arising out of an explosion at a particle-board manufacturing plant. The trial court granted summary judgment to GreCon Electronics, who was the manufacturer of heat sensors that were installed at the facility. Plaintiffs claimed that three heat sensors malfunctioned by failing to alarm and douse with water a large glowing ember that was being moved on a conveyor belt at the plant. The ember caused the explosion and fire. The sensors disappeared after the fire and were unavailable for the litigation.

Plaintiffs sued under a malfunction theory of strict products liability. Plaintiffs conceded the sensors had operated properly for ten years. The trial court concluded that because the sensors operated properly for ten years after they were installed by Defendant, no reasonable jury could conclude that the sensors were defective when they left Defendant's possession and control. The Pennsylvania Superior Court affirmed, finding that the Plaintiffs did not present a case-in-chief free of reasonable secondary causes such as wear and tear from prolonged use. Such evidence is required to proceed on a malfunction theory of product liability.

Barnish v. KWI Building Company,

2007 PA Super 1, 2007 Pa. Super. LEXIS 2 (2007)

SUPERIOR COURT OF PENNSYLVANIA

CREDIT REPORTING CLAIM:
Dismissed Without Prejudice

Plaintiffs sued Protection One Alarm Monitoring for defamation, alleging that they were not in default on a two-year contract entered into in 1999 concerning installation and maintenance of a home alarm system, but that the contract had been replaced by a later contract. Plaintiffs alleged Protection One Alarm Monitoring had falsely reported to a credit reporting agency that the Plaintiffs were in default. Protection One filed a Motion to Dismiss for failure to state a claim, alleging that the Complaint was insufficient in alleging a cause of action in defamation. The Court denied the Motion, concluding that Protection One's reporting to the credit reporting agency Equifax met the requirements of a defamation claim, including malice, as it was a statement that the Plaintiffs did not pay their legal debts. Plaintiffs also sued for breach of contract by commission of the common law tort of libel, incorporating the allegations from their defamation claim into a claim for breach of contract. Protection One asserted that the complaint did not give them adequate notice of the contractual basis of the claim. The Court agreed, but granted Plaintiffs leave to amend their complaint. The Court however, struck Plaintiffs' claim for punitive damages relating to the breach of contract claim.

Woods v. Asset Resources,

2006 U.S. Dist. LEXIS 94325 (E.D. Cal. Dec. 21, 2006).

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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