O/a 9-2-83

IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,058

(Third District Court Case No. 81-1978)

CONTINENTAL VIDEO CORPORATION, a Florida corporation	:
Petitioner	:
vs	:
HONEYWELL, INC., a foreign corporation, d/b/a HONEYWELL PROTECTION SERVICES,	:
Respondent	:

AMICUS CURIAE BRIEF
FILED ON BEHALF OF
ALARM ASSOCIATION OF FLORIDA, INC.

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INTRODUCTION

This brief is filed pursuant to this Court's Order in granting the Motion of the Alarm Association of Florida, Inc., for leave to file Amicus Curiae Brief. The Alarm Association of Florida, Inc., is a Florida non-profit corporation composed of approximately 150 members who are engaged in the burglar and/or fire alarm business within the State of Florida. Several of its members are engaged in the providing of burglar and fire alarm services on a national basis and the association represents a cross section of the industry within the State of Florida.

ISSUE

Whether a provider of burglar and/or fire alarm services and their customer can enter into a valid written contract which provides for exculpation from liability, a limitation of liability and/or liquidated damages on the part of the provider of the alarm services in the event of the failure of the supplier to properly perform his obligations under the contract.

PREFACE

The briefs submitted by the parties in this cause are comprehensive and thorough and there is no need to burden the court with further citations of authority and disections of the substantial case law throughout the United States on the subject of the clauses at issue. Therefore, this Amicus Curiae Brief will direct attention to those arguments which most clearly expose the signifigance of this case and the far reaching implications of

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the decision to be rendered by this Court.

ARGUMENT

It is likely that burglar alarm systems in some form were utilized from the very beginnings of mankind. The desire to prevent the tampering with ones property is a basic human need and the methods used to accomplish that purpose have been both as simple and as complex as the mind can devise. Even with the great technological advances of recent times, there has yet to be devised a burglar alarm system that is completely and totally fool proof. Therein lies the crux of the problem.

The installation and service agreement entered into by Honeywell and Continental as set forth at page four, of the Record of Appeal, and at pages one and two of the appendix to Honeywell's answer brief on the merits, clearly and expressly states that no representations or warranties are made, that the system or service supplied may not be compromised. There can be no doubt that Continental knew the alarm system was not fool proof.

It is significant to note that nowhere in the Complaint of Continental, nor in their briefs do they allege that Honeywell received an "alarm signal". Not only does Continental not allege in its Complaint that Continental received an alarm signal from its premises, but on Page two of the Complaint the provisions of paragraph sixteen of the contract is materially misquoted.

The alarm system installed by Honeywell on Continental's premises, included, as setforth in the Installation and Service

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Agreement, (contract) a McCullah (sic) control. This alarm system utilizes telephone lines to transmit its signals. With rare exception, this is the only means available of transmiting signals from the premises of the customer to the monitoring station. The McCollogh loop system is a means of utilizing telephone company circuits to interconnect a number of subscribers on one line in a continuous loop from the monitoring station to each subscriber's premises back to the monotoring station. This system, which is in widespread use in the alarm industry, is similar to a string of Christmas tree lights in that when one bulb ceases to function it is necessary to inspect each and every bulb on the circuit by a process of trial and error to determine which bulb is no longer functioning. If after doing that and the system still does not work, the wire itself must be inspected. If the problem is thus located and repaired it is hopefully still Christmas. The literally miles of telephone cable interconnecting each subscriber with the central monitoring station must be similarly checked in the event of "trouble". These lines are within the exclusive control of the telephone company and the alarm company cannot be held responsible for the failure of telephone lines to function properly. A trouble signal,which for purposes of this brief can be assumed to have been received by Honeywell, could have resulted from problem in the telephone cable at any one or more of the customers on the line and miles from the premises of Continental.

PUBLIC POLICY

It is essential to the very existance of the burglar alarm

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industry that its maximum liability to its customers in the event of a loss from any cause, be limited. It has been argued that it is contrary to public policy to permit clauses in contracts which exculpate liability. Not only does public policy not stand in the way of an arms length transaction between two commercial enterprises as set forth in Honeywell's answer brief on the merits at page forty, but public policy requires that such clauses be valid. The need to deter criminal activities is obvious. It is estimated by the Alarm Association of Florida, Inc., that there are in excess of three hundred fifty thousand burglar and fire alarm systems installed within the state. The public's concern with and desire to reduce crime is clear.

Continental considers it "bunk" that the alarm industry needs to be able to limit its liability, that it has already factored in losses as a cost of doing business when it prices its systems. It is beyone comprehension that any business could charge as little as $67.36 per month for monitoring and/or service of an alarm system and factor in the consequences of even a ten million dollar loss. Can any business assume this unlimited risk ratio and remain in business? The result of such a theory is that the cost of insurance, if available, would be passed along to the consumer. It does not serve the public interest to make alarm systems available only to those who could afford the huge price that would have to be charged to cover the risk. It is possible to obtain retroactive insurance to cover the 350,000 alarm systems already installed under contracts that contain some form of limitation of liability, were those provisions to be declared

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invalid?

Even if one were to grant the argument put forth by Continental that the amount of property on the premises of Continental was determinable at the time of the contract, does Continental propose that prior to the installation of every burglar alarm system an audit be conducted of the value of property kept on the premises? Who would pay for this audit and would the liability of Honeywell then be limited to the value of property on the premises at that time? Such an opportunity was afforded to Continental in the contract by permitting them the option to increase the maximum amount of liquidated damages by paying an additional amount under a graduated scale of rates. There is no allegation in the Complaint that Honeywell refused to honor this option yet Continental attempts to persist to argue facts where there is not even the barest allegation in the Complaint to raise that issue.

INEQUALITY OF BARGAINING POSITION

Continental would have the Court believe that a contract entered into between two business entities for the installation and service of a burglar alarm system contained exculpatory and liquidated damage clauses which were forced upon Continental because of Honeywell's control of the market or their dominance of bargaining power or for some other unstated reason. There is no allegation of fraud or duress against Honeywell. In fact, Continental was under no obligation whatsoever to enter into the contract and could have, had they chosen to do so, installed an alarm system themselves. There is no law prohibiting Continental from installing their own alarm system and using a readily avail-

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able device to transmit over their own telephone lines a notification of an alarm to any one they chose. The fact that Continental chose to enter into an contract for the installation and monitoring of an alarm system was an act of their own free will and one which they should not now be permitted to successfully claim to have been forced upon them. It cannot be fairly stated that the services could not be obtained elsewhere.

There can be no adhesion contract or inequality of bargaining position sufficient to render the subject clauses unenforceable without allegations that the parties were greatly disparred in bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere. There have been no such allegations set forth in the Complaint. The mere use of the word "adhesion" in the Complaint without allegations of ultimate facts to support it, is insufficient. The determination of inequality of bargaining position does not turn on the dollar volume of sales of each of the parties, but rather whether the party seeking to void the contract was deprived of its ability to deal in a free and open market place. One can go into Radio Shack and buy a packaged alarm system complete with instructions. Without commenting on the efficiency or effectiveness of such a system it is certainly clear, to the most casual observer, that Continental was not bound and gagged and forced to obtain these services from Honeywell. Can one who enters into a contract the terms of which he later becomes displeased with, raise the issue of inequality of bargaining position, unconscienability and contrary to public

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policy, when he not only fails to allege in the Complaint any facts which support those arguments, but such facts could not be properly alleged. Continental should be commended for not having made such spurious allegations in its Complaint, but they should not now be permitted to imply and argue that proof of such facts should have been submitted to a jury. They must first be alleged in the Complaint.

Continental states "the relevant question is not whether other alarm services were readily available, but whether such services were readily available without exculpatory or limitation of liability clauses.", (petitioner's reply brief on merits page seven). The answer to this question is obvious, certainly there were. There are not allegations that Continental was required to obtain an alarm system at all. While the installation of an alarm system is of benefit to Continental it certainly was not required by any law to have one. It was a simple matter of choice. That choice having been made by Continental to have an alarm system, they were then free to obtain it in any means they saw fit, including installing it themselves. Continental seeks to raise questions of fact which it did not raise in its Complaint with good reason. They are not correct. One can argue for days as to what could have been alleged in the Complaint, but the simple fact is that there were no allegations made which raise these issues.

Continental has received a benefit from the contract and there has been a mutuality of obligation in that the alarm system was installed to provide the deterant effect desired. Continental attempts to argue on one hand that they do not claim the

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contract to be one of insurance and on the other hand argue that the disclaimer of liability removes the very essence of the contract. If the sole purpose this contract were to guaranty the safe keeping of the property of Continental which was on the premises, then an analogy to Sniffen[1] might be appropriate. Continental states it is not suing Honeywell as an insuror or as a guarantor (Continental's reply brief, page two) yet Continental would have Honeywell be responsible for an alleged loss of any and all property on its premises. It appears to be a distinction without a difference. Can the clauses limiting Honeywell's liability be invalid without resulting in Honeywell being an insuror or a guarantor of Continental's property ? This result would be, to borrow Continental's often used phrase, "unconscienable".

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1 Sniffen vs Century National Bank of Broward, 375 So.2d 892 (Fla. 4th DCA 1979)

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CONCLUSION

The parties entered into an arms length contract for the installation of an alarm system. Honeywell installed this alarm system in reliance upon the sanctity of the contract. The use of telephone lines for the transmission of signals, be they "alarm signals" or "trouble signals" is known to the customer. The system is installed in the customer's premises and it is the customer who controls the turning on, the turning off and the testing of that system. It is clearly not possible to determine at the time the contract is entered into the nature and extent of any future loss. An alarm system can be installed at the premises of a business selling gold plated chains one day and gold boullion the next. It is not uncommon that alarm systems are installed even prior to a business opening when there would be virtually no property of value contained on the premises at the time of the contract. The possibilities are vast and inumerable and totally and completely beyond the control of the alarm company. There are no guarantees of infallibility. Continental received an alarm system and enjoyed the deterant effect of that installation. To now claim that the exculpatory clause, the liquidated damage clause and the limitation of liability clauses are invalid pursuant to allegations similar to those set forth in the Complaint in this case, is contrary to the law of every jurisdiction in the United States that has ruled on this issue. The people of the State of Florida should to have the opportunity to obtain the crime deterrant effect of a burglar alarm system at a price which they can afford. And it is in the public interest

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to have as many burglar alarm systems installed as possible. It is essential to this goal that the providers of this service be able to limit their liability.

Accordingly, the decision of the trial court and of the 3rd District Court of Appeals should be affirmed.

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CERTIFCATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of July, 1983 to Bruce A. Christensen, Esquire, Floyd, Pearson, Stewart, Richman, Greer, Weil & Zack, P.A., One Biscayne Tower, Twenty-Fifth Floor, Miami, Florida 33131-1868, G. William Bissett, Esquire, Preddy, Kutner and Hardy, P.A., Concord Building, 66 West Flagler Street, 12th Floor, Miami, Florida 33130 and Lawrence A. Fuller, Esquire, Fuller and Feingold P.A., 1111 Lincoln Road Mall, Penthouse 802, Flagship Bank Building, Miami Beach, Florida 33139.

BY _____
HENRY I. SMYLER