o/a 9-2-83

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 63,058

Third District Case Number: 81 - 1978

CONTINENTAL VIDEO CORPORATION, a Florida corporation,

Petitioner,

-vs-

HONEYWELL, INC., a foreign corporation, d/b/a HONEYWELL PROTECTION SERVICES,

Respondent.

ANSWER BRIEF ON MERITS

OF

RESPONDENT, HONEYWELL, INC.

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INTRODUCTION

In this discretionary proceeding, the Petitioner, CONTINENTAL VIDEO CORPORATION (hereinafter referred to as "VIDEO CORP.") seeks review of a decision rendered by the District Court of Appeal, Third District, affirming with opinion an adverse order of the trial court dismissing its amended complaint. The Respondent, HONEYWELL, INC., d/b/a HONEYWELL PROTECTION SERVICES, will be referred to herein as "HONEYWELL."

The following abbreviations will be utilized in this brief:

"R."	Record on Appeal
"A."	Appendix accompanying this brief
"I.B."	VIDEO CORP.'s initial brief

Wherever emphasis has been added it will be so noted.

STATEMENT OF THE CASE AND OF THE FACTS

This case had its genesis in July of 1980, when HONEYWELL and VIDEO CORP. entered into a contract captioned "Installation and Service Agreement." (R. 4; A. 1 - 2). Pursuant to that contract, HONEYWELL agreed to install an alarm system on VIDEO CORP.'s premises "to reduce certain risks of loss." The contract reflects that the system[1] was to be installed between August 10th and 12th of 1980 at a cost of $815. In addition, for a modest charge of $67.36 per month (or about $2.25 per day), HONEYWELL agreed to maintain the alarm system in proper working order, as well as to monitor the alarm system from its central station. It should also be noted in passing that included within that $2.25 per day was an amount charged by the telephone company for use of its lines. VIDEO CORP.'s system, along with those of other subscribers, was connected to HONEYWELL's central monitoring station by way of a telephone line forming what is called a McCollogh Loop[2]. Finally, under the contract, HONEYWELL agreed

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1. As the contract reflects, the alarm system selected by VIDEO CORP. was composed of intrusion detecting devices (foil wire circuits and switches) installed on two doors and eight windows which were all centrally connected to a McCollogh control and an alarm bell (R. 4; A. 1).

2. This so-called "McCollogh Loop" is one of two basic ways in which subscribers' alarm systems are connected to the central monitoring station. The McCollogh Loop method, which is lower priced, is a single telephone line extending out in a loop from the monitoring station over many miles. Numerous individual subscribers' systems are connected to the continuous loop by means of a drop line at each subscriber's premises. The "alarm signal" at each premises connected to the Loop is uniquely coded to enable the central monitoring station to isolate the exact premises (of the many premises connected to the Loop) from which the "alarm signal" is being emitted. The counterpart of this McCollogh Loop, (or party line system,) is more expensive, and is a single, private line system which connects a single subscriber's premises directly to the central monitoring station. For a more thorough explanation of these two connection systems, reference can be made to the opinion in RINALDI & SONS, INC. vs. WELLS FARGO ALARM SERVICE, INC., 47 A.D.2d 462, 367 N.Y.S.2d 518, 520 - 21 (1975).

that "upon receipt of an alarm signal[3] from [VIDEO CORP.'s] premises, [it would] make every reasonable effort to transmit the alarm promptly to the headquarters of the police . . . , unless there is just cause to assume that an emergency condition does not exist . . ."

The "Installation and Service Agreement" contained two complementary liability limiting clauses. These clauses, which are the primary focus of the instant appeal, were not set forth completely by Petitioner in his initial brief. These liability limiting clauses were set forth in paragraph "7" on the front page of the "Installation and Service Agreement," just above where each party to the contract placed his signature. These clauses were not hidden amongst the fine print, nor were they relegated to an inconspicuous part of the agreement. The entire provision, which was read, understood, and

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3. The significance of the use of the terminology "alarm signal" should be recognized by the Court. Particularly as to those alarm systems connected to the central monitoring station by a McCollogh Loop (as here), the distinction between an "alarm signal" and a telephone line "trouble (or open circuit) signal" is important because the contractually required response to each is distinctly different. As the contract in the case at bar reveals, receipt of an "alarm signal" required HONEYWELL to make every reasonable effort to transmit the alarm to police headquarters (see paragraph 16 of the subject contract). On the other hand, receipt of a "trouble signal" required HONEYWELL to notify the telephone company and request that it determine the location of the trouble. It was not until after the telephone company had traced the trouble to a specific subscriber of the many on the Loop that HONEYWELL was required "to make a reasonable effort to notify" VIDEO CORP. or its designated representative (see paragraph 17 of the subject contract).

VIDEO CORP. has not specifically stated in its amended complaint that the signal allegedly received by HONEYWELL at the monitoring station was an "alarm signal." Indeed, careful examination of VIDEO CORP.'s complaint reveals that the word "alarm" is never used; VIDEO CORP. merely alleges that a "signal" from its premises was received at the monitoring station, and this "signal" was never transmitted to the police. For further explanation of the distinction between an "alarm signal" and a "trouble (or open circuit) signal," reference can be made to NICHOLAS vs. MIAMI BURGLAR ALARM CO., 339 So.2d 175, 176 (Fla. 1976) and RINALDI & SONS, INC. vs. WELLS FARGO ALARM SERVICE, INC., 47 A.D.2d 462, 367 N.Y.S.2d 518, 519 - 21 (1975).

expressly agreed to by VIDEO CORP.'s corporate signatory, stated as follows:

> It is understood and agreed by the parties hereto that Contractor is not an insurer and that insurance, if any, covering personal injury and property loss or damage on Subscriber's premises shall be obtained by the Subscriber; that the Contractor is being paid for the installation and maintenance of a system designed to reduce certain risks of loss and that the amounts being charged by the Contractor are not sufficient to guarantee that no loss will occur; that the Contractor is not assuming responsibility for any losses which may occur even if due to Contractor's negligent performance or failure to perform any obligation under this Agreement. THE CONTRACTOR DOES NOT MAKE ANY REPRESENTATION OR WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, THAT THE SYSTEM OR SERVICE SUPPLIED MAY NOT BE COMPROMISED, OR THAT THE SYSTEM OR SERVICES WILL IN ALL CASES PROVIDE THE PROTECTION FOR WHICH IT IS INTENDED.
>
> Since it is impractical and extremely difficult to fix actual damages which may arise due to the faulty operation of the system or failure of services provided, if, notwithstanding the above provisions, there should arise any liability on the part of the Contractor, such liability shall be limited to an amount equal to one half the annual service charge provided herein or $250, whichever is greater. *This sum shall be complete and exclusive and shall be paid and received as liquidated damages and not as a penalty. In the event that the Subscriber wishes to increase the maximum amount of such liquidated damages, Subscriber may, as a matter of right, obtain from Contractor higher limits by paying an additional amount under a graduated scale of rates relating to the higher limits of liquidated damages.*

> *Subscriber agrees to and shall indemnify and save harmless the Contractor, its employees and agents, for and against all third party claims, lawsuits, and losses alleged to be caused by the improper operation of the system, whether due to defects in the system or acts or omissions of the Contractor in receiving and responding to alarm signals.*
>
> [NOTE: The italicized portions of the liability limiting clause were omitted entirely from VIDEO CORP.'s recitation of the facts. This omission can only be deemed intentional, since the Third District specifically emphasized this portion of the clause in its opinion below (R. 91 - 92; A. 3 - 4)].

Approximately six months after the system had been installed, thieves allegedly broke through the rear wall at VIDEO CORP.'s store. Notwithstanding the fact that the contract reflects that no alarm devices were installed in the walls, VIDEO CORP. alleged that the forced entry caused a repeating "signal" to be transmitted to the central monitoring station of HONEYWELL. The HONEYWELL employees at the monitoring station allegedly failed to make every reasonable effort thereafter to notify the police or VIDEO CORP. of their receipt of the "signal." It was further alleged that had the police or VIDEO CORP.'s representative been promptly notified, the burglary would have been foiled. As a result of this burglary, VIDEO CORP. allegedly suffered a loss of business property and profits.

Three months after the burglary, VIDEO CORP. filed its initial complaint[4] in Dade County Circuit Court seeking a judgment against HONEYWELL for the total value of property stolen from its store for alleged loss of profits, and for punitive damages (R. 1 - 4). Following substitution of counsel for VIDEO CORP. an "amended complaint" was filed joining certain HONEY-

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4. A copy of the executed "Installation and Service Agreement" was attached to the initial complaint and provided the basis for the motions to dismiss ultimately filed by HONEYWELL (R. 4; A. 1 - 2).

WELL employees as additional defendants (R. 7 - 12). The causes of action asserted against HONEYWELL itself were contained in three counts of the amended complaint. Count I sounded in breach of contract, and alleged that HONEYWELL breached its contract with VIDEO CORP. "by failing to notify police and [VIDEO CORP.'s representative] pursuant to the terms of said contract."

Count II sounded in negligence, and simply alleged that "[t]he aforementioned acts and/or omissions of [HONEYWELL] . . . constitute negligence and were the sole proximate or contributing cause of the aforementioned losses sustained by [it], including loss of merchandise and profits."

Count III sounded in tort and sought recovery of punitive damages based upon the vituperative epithet that "[t]he acts of [HONEYWELL's agents] . . . constitutes a reckless disregard for the safety of [VIDEO CORP.'s] property and gross willful and wanton negligence."

Obviously in response to HONEYWELL's understandable reliance upon the express terms of the liability limiting provisions in the agreement reached between the parties, VIDEO CORP. inserted two paragraphs in its amended complaint upon which it would thereafter rely in seeking to have the questioned provisions voided. These two paragraphs allege that:

* * *

> 10. On March 6, 1981 [the date of the burglary] and all times material hereto [CONTINENTAL VIDEO] was conducting a pre-recorded video tape business with inventory at a value greatly in excess of $250.00. Paragraph "7" of [the "Installation and Service Agreement"] purporting to be a provision for liquidated damages, is in fact a penalty and is unenforceable because it does not provide just compensation in the event of injury

> and because the actual damages sustained by [CONTINENTAL VIDEO] are readily ascertainable.
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> * * *
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> 12. The purported waiver of liability in paragraph "7" of [the "Installation and Service Agreement"] is invalid, void and unenforceable because it is an adhesion contract due to the inequality of bargaining power between the parties, it would make the terms of the contract illusory and it is against public policy.

(R. 9, emphasis supplied).

In reliance upon what the written contract reflected the express agreement reached between the parties to be with respect to who was to shoulder the risk of property loss or other damage resulting from a burglary, HONEYWELL filed a motion to dismiss the initial and amended complaints based on the grounds that: (1) the complaint failed to state a cause of action[5]; (2) the waiver of liability provision in the parties' agreement clearly and unequivocally relieved HONEYWELL from any and all liability for consequential property and profit losses; and (3) in the event of a determination of any liability on its part, such liability was expressly limited by the complementary limitation of liability clause in the parties' agreement, which limited such liability to an amount well below the minimum jurisdictional limits of the circuit court[6] (R. 13, 20).

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5. This particular ground contained in the motion to dismiss obviously raised the question of whether the factual allegations contained in VIDEO CORP.'s amended complaint were sufficient to state a cause of action.

6. The complementary limitation of liability clause provided that HONEYWELL's liability, if any, for property losses and other damage would be "limited to an amount equal to one-half the annual service charge provided herein or $250, whichever is greater." As the "Installation and Service Agreement" reveals, the annual service charge totalled $808.32 (12 times the monthly charge of $67.36). One-half this amount is $404.16, which is "greater" than $250. Thus, any recovery under the complementary limitation of liability clause had an upper limit of $404.16, not $250 as VIDEO CORP. has consistently misrepresented.

The trial court granted HONEYWELL's motion to dismiss, holding that both of the liability limiting provisions contained in the "Installation and Service Agreement" were valid and enforceable, and that VIDEO CORP. was therefore precluded from suing HONEYWELL to recover the full value of its stolen property and lost profits (R. 89, 90). The trial court's order was affirmed with opinion following VIDEO CORP.'s appeal to the District Court of Appeal, Third District (R. 91 - 5).

Dissatisfied with these two courts' enforcement of the agreement between the parties, and alleging a conflict of decisions,[7] VIDEO CORP. sought discretionary review here.

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7. Although it is not entirely clear from the record which specific decisions gave rise to this Court's determination that decisional conflict existed, VIDEO CORP. primarily relied upon "four principle" cases in its jurisdictional brief: NICHOLAS vs. MIAMI BURGLAR ALARM CO., INC., 339 So.2d 175 (Fla. 1976); GOYINGS vs. JACK AND RUTH ECKERD FOUNDATION, 403 So.2d 1144 (Fla. 2d DCA 1981); SNIFFEN vs. CENTURY NATIONAL BANK OF BROWARD, 375 So.2d 892 (Fla. 4th DCA 1979); and IVEY PLANTS, INC. vs. FMC CORPORATION, 282 So.2d 205 (Fla. 4th DCA 1973), cert. denied 289 So.2d 731 (Fla. 1974).

POINT ON APPEAL

WHETHER, AND TO WHAT EXTENT, MAY AN ALARM COMPANY AND ITS SUBSCRIBER VALIDLY AGREE IN ADVANCE TO LIMIT THE POTENTIAL LIABILITY OF THE ALARM COMPANY FOR LOSS OF PROPERTY AND OTHER CONSEQUENTIAL DAMAGES WHICH MIGHT RESULT FROM THE ALARM COMPANY'S FAILURES IN PROVIDING THE ALARM SYSTEM OR SERVICES UNDER THE CONTRACT?

ARGUMENT

AN ALARM COMPANY AND ITS SUBSCRIBER MAY VALIDLY AGREE IN ADVANCE TO WAIVE, OR AT LEAST LIMIT, THE POTENTIAL LIABILITY OF THE ALARM COMPANY FOR LOSS OF PROPERTY AND OTHER CONSEQUENTIAL DAMAGES WHICH MIGHT RESULT FROM THE ALARM COMPANY'S FAILURES IN PROVIDING THE SYSTEM OR SERVICES UNDER THE CONTRACT, SO LONG AS NO FRAUD OR DECEPTION IS PRACTICED AND SO LONG AS THE AGREEMENT CLEARLY AND UNEQUIVOCALLY EXPRESSES SUCH INTENT.

Preface

In analyzing the point presented for review in the instant cause, it is important to first recognize that, regardless of what descriptive label VIDEO CORP. utilizes in stating its claim against HONEYWELL, this Court, in actuality, is only dealing with a cause of action for breach of contract. VIDEO CORP. is seeking to recover a judgment for damages based upon the value of the property stolen from its store in March of 1981, as well as for its ensuing loss of business profits. The sole foundation of VIDEO CORP.'s claim is an alleged breach by HONEYWELL of a specific provision in the "Installation and Service Agreement" which required HONEYWELL to notify the police and VIDEO CORP.'s representative upon receipt of an "alarm signal" at its central monitoring station.

In an effort to convert what is clearly a breach of contract action into a tort action, VIDEO CORP. imaginatively argues that the "acts and/or omissions" of HONEYWELL's agents constitute "negligence" and "gross willful and wanton negligence." This imaginative approach founders once one real-

izes that the only allegation contained in VIDEO CORP.'s amended complaint regarding the basis for the specific duty owed to it by HONEYWELL quotes word for word from the contract (R. 7 - 8, paragraph 6). Thus, since VIDEO CORP.'s lawsuit is bottomed solely upon an alleged breach of a specific contractual duty, its cause of action for breach of contract cannot be converted into a cause of action in tort simply by characterizing the breach as "negligence", nor by alleging that the breach was "willfully" or "wantonly" done.[8] LEWIS vs. GUTHARTZ, 428 So.2d 222 (Fla. 1983); DAYS vs. FLORIDA EAST COAST RAILWAY COMPANY, 165 So.2d 434 (Fla. 3d DCA 1964); GIBSON vs. GREYHOUND BUS LINES, INC., 409 F.Supp. 321 (M.D. Fla.), aff'd without op., 539 F.2d 708 (5th Cir. 1976). See generally, 1 Fla.Jur.2d ACTIONS §8 (1977).

Thus, since the gravamen of VIDEO CORP.'s amended complaint is for breach of contract, its action can only be maintained in accordance with the rights and interests of the parties as they appear in the contract. The province of this Court is not to make or to change a contract for the parties, but to ascertain and give effect to the intent of the parties. ATLANTA & St. A. B. RAILWAY CO. vs. THOMAS, 60 Fla. 412, 53 So. 510, 513 (1910). In the case at bar, the intent of the contracting parties with respect to allocation of the risk of property and business losses resulting from burglaries is clearly expressed in the "Installation and Service Agreement." The two commercial entities involved in this appeal, agreed in clear and unequivocal language: (1) that HONEYWELL was not to be deemed the

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8. To be distinguished is that type of situation where an implied legal duty arises independently of or concurrently with the contract giving rise to an action in tort. E.g., BANFIELD vs. ADDINGTON, 104 Fla. 661, 140 So. 893 (1932).

insurer of any of the business property kept at VIDEO CORP.'s premises; (2) that VIDEO CORP. was to secure insurance to protect itself against loss of its business property by theft; (3) that the alarm system installed was designed to "reduce certain risks of loss," not to guarantee that no losses would occur; and (4) that HONEYWELL was not assuming any responsibility for potential losses of VIDEO CORP.'s business property, even if the loss was the result of HONEYWELL's "negligent performance or failure to perform any obligation under the agreement."

If this later provision were to be held invalid for any reason, then the complementary clause contained in the Agreement would become operative. This complementary clause provided that HONEYWELL's maximum liability, in any event, would be limited to an amount equal to one-half the annual service charge under the contract or $250, whichever was greater.[9] This complementary provision provided for bargaining between the parties such that VIDEO CORP. could, "as a matter of right," increase the upper limitation on liability by paying an additional amount under a graduated scale of rates computed with reference to the higher limitation amount selected by VIDEO CORP. As the contract attached to VIDEO CORP.'s complaint reveals, VIDEO CORP. was satisfied (at least in July of 1980 when the contract was executed) with the bottom line limitation on liability, and made a deliberate choice not to avail itself of the right granted under the contract to secure higher limits on HONEYWELL's liability for breach.

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9. As noted earlier, liability under this complementary clause would be limited to $404.16. This amount is not automatically forfeited to VIDEO CORP., since under a limitation of liability clause the claimant must plead and prove that the other party to the contract not only breached the contract, but also that the breach was a legal cause of the damages being claimed. The upper limit on the amount of such proven damages is limited by the contract, here, the upper limit was $404.16.

Nevertheless, VIDEO CORP. now implores this Court to ignore the intent of the parties as clearly expressed in their contract. VIDEO CORP. contends it is entitled to have a jury determine whether either of the complementary liability limiting clauses agreed to by the parties are valid and enforceable. Aside from the fact that equitable defenses to the enforcement of contract clauses that waive or otherwise limit liability resulting from breach are matters for determination by the equitable arm of the courts, (and not juries), to determine, the purported equitable defenses relied upon by VIDEO CORP. have never been applied in the context of a case such as this.

Before proceeding to a discussion of the applicable legal principles, HONEYWELL deems it necessary to outline briefly the contentions raised by VIDEO CORP. in its initial brief. VIDEO CORP. argues first that the liability limiting clauses in the agreement are not binding on it because of a purported "inequality of bargaining power" between itself and HONEYWELL[10]. Secondly, VIDEO CORP. contends that enforcement of the liability limiting clauses renders the contract "illusory"[11]. Thirdly, VIDEO CORP. contends that the liability limiting clauses are invalid as against its claim seeking exemplary damages based on a characterization of the breach of contract as gross willful wanton negligence[12]. Finally, VIDEO CORP. contends that the complementary

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10. To support this contention, VIDEO CORP. relies on the case of IVEY PLANTS, INC. vs. FMC CORP., 282 So.2d 205 (Fla. 4th DCA 1973), cert. denied, 290 So.2d 731 (Fla. 1974). VIDEO CORP. also relied on this decision in support of its claim of decisional conflict for jurisdictional purposes.

11. To support this contention, VIDEO CORP. relies on the case of SNIFFEN vs. CENTURY NATIONAL BANK OF BROWARD, 375 So.2d 892 (Fla. 4th DCA 1979). VIDEO CORP. also relied on this case in support of its claim of decisional conflict for jurisdictional purposes.

12. As VIDEO CORP.'s jurisdictional brief reflects, no claim of decisional conflict was suggested as to this particular contention.

clause which limits HONEYWELL's liability, in any event, to $414 is an invalid "penalty."[13]

Since there are no allegations of ultimate fact contained in the amended complaint in support of VIDEO CORP.'s claim that the clauses in the contract are unenforceable, this Court will be called upon to determine whether those clauses are unenforceable on their face.[14] Contrary to VIDEO CORP.'s assertion, the trial judge did not ignore factual allegations when he ruled on the motion to dismiss. Allegations that a contractual provision is a "penalty," that it is an "adhesion contract," or that it is "against public policy" amount to nothing more than mere legal conclusions by the pleader without any ultimate facts for support. If a trial court is compelled to accept such conclusory legal allegations as a substitute for allegations of ultimate fact, then we will have taken, at best, a precarious step into the "twilight zone" when contract claims are being litigated.

Precision of analysis can only be obtained in this case by first determining what is really at issue. What is really at issue in this case is the extent to which this Court is inclined to sacrifice both the paramount public policy of freedom of contract and the availability of alarm protection at reasonable rates to the citizens of this state in order to relieve one party

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13. To support this contention, VIDEO CORP. relies on NICHOLAS vs. MIAMI BURGLAR ALARM CO., 266 So.2d 64 (Fla. 3d DCA 1972); HUTCHINSON vs. TOMPKINS, 259 So.2d 129 (Fla. 1972); HYMAN vs. COHEN, 73 So.2d 393 (Fla 1954).

14. This is so because the appellate courts of this state have repeatedly cautioned that, while the pleader is not required to plead his evidence, he must adequately allege ultimate facts, as opposed to mere legal conclusions, to support his claim. Mere legal conclusions are insufficient to preclude dismissal, unless the conclusion is either apparent or reasonably inferable from the specific facts alleged. See, KISLAK vs. KREEDMAN, 95 So.2d 510, 514 (Fla. 1957); MARSHALL vs. CLIETT, 97 Fla 11, 119 So. 518 (1929); DOYLE vs. FLEX, 210 So.2d 493 (Fla. 4th DCA 1968); CURTIS vs. BRISCOE, 129 So.2d 450 (Fla. 2d DCA 1961).

in an individual case of the burden of what at first glance may appear to be an unfair bargain. However, when the Court steps back for a moment and realizes that the modest amount which HONEYWELL charged VIDEO CORP. for the monitoring services was totally unrelated to the value of the merchandise kept on the premises, the bargain which was struck, under which the risk of loss of that merchandise was allocated by agreement to the party who owned the property and knew its approximate value from one day to the next, was commercially reasonable and entirely justified. It is only through the vehicle of this prior, agreed to risk allocation that the charges for monitoring can remain modest, and therefore affordable by the greatest number of the populace. HONEYWELL would have charged VIDEO CORP. the same $67 per month for monitoring, regardless of whether VIDEO CORP. kept a business inventory valued at $2,000 or a business inventory valued $1 million dollars on its premises. In its initial brief, VIDEO CORP. attempts to give this Court the impression that the validity of liability limiting clauses contained in contracts between alarm companies and their subscribers are being determined by a different standard. HONEYWELL submits that such is clearly not the case. Even a cursory analysis of the substantial number of decisions from Florida and other jurisdictions in this area of the law reveals that the liability limiting clauses contained in contracts between alarm companies and their subscribers have been scrutinized according to the same judicial standards. The unanimity with which the decisions have upheld these clauses simply reflects that the courts recognize the commerical reasonableness of these clauses, the necessity for their inclusion in this particular category of contract, and the untoward results which would inevitably follow a decision holding them invalid, both as to the alarm companies and as to those desirous of such services.

For the sake of clarity, HONEYWELL will follow the same order in its brief as VIDEO CORP. did in its initial brief, i.e. - (A) whether paragraph 7 of the Agreement is valid insofar as it shifts the entire risk of loss of property arising from theft to VIDEO CORP.; and (B) whether paragraph 7 is valid insofar as it limits HONEYWELL's liability, in any event, to $404.16.

A. TOTAL EXEMPTION FROM LIABILITY

> *Contractual provisions which relieve a party from liability for the consequences of its own negligence in performing a contract are valid and enforceable, where such intention is made clear and unequivocal, and where the contract is between two commercial entities engaged in an arm's length transaction which is not injurious to and does not contravene some established interest of society.*

It cannot be over-emphasized at the outset that this case does not involve any claim of fraud, unfair surprise, oppression, or misrepresentation with reference to the execution of the "Installation and Service Agreement." The record reveals an eyes open, arm's length transaction between private parties (here two commercial entites) under which the risk of property loss by theft was by clear agreement allocated to VIDEO CORP., who was to secure insurance providing this financial protection. Having accepted the contract as written, having signified its understanding of the terms, and having securing the advantage of the lowest possible charge for the monitoring services (by specifically agreeing to accept the contract's allocation of the risk of loss of business merchandise by theft), VIDEO CORP. should not

now be heard to complain. As aptly stated decades ago, "[i]t is not permissible to both approbate and reprobate in asserting the same right in the courts." MALSBY vs. GAMBLE, 61 Fla. 310, 54 So. 766, 771 (1911).

The courts of this state have long been committed to the principle that all parties litigant who are sui juris stand upon an equal footing before the courts, entitled to equal rights and protection, and none to special privileges. In reviewing contract cases brought before them, the courts of this state have diligently avoided adopting rules of law which evince a paternalistic attitude.[15] This committment is particularly strong when the courts have dealt with disputes involving purely private contracts and agreements.

With respect to purely private agreements, it has long been the rule in Florida that:

> . . . [P]arties are free to make whatever contracts they please, so long as no fraud or deception is practiced and there is no infraction of law, and the fact that one of the parties may have made a rather hard bargain will not void the contract.

MALSBY vs. GAMBLE, 61 Fla. 310, 54 So. 766, 771 (1911). See also, SOUTHERN HOME INSURANCE CO. vs. PUTNAL, 57 Fla. 199, 49 So. 922, 930 (1909), and cases cited therein. In his multivolume treatise on the subject of contracts, Williston has stated:

> Freedom of contract has been regarded as part of the common law heritage. Absent mis-

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15. For example, in ALLIED VAN LINES INC. vs. BRATTON, 351 So.2d 344, 347 (Fla. 1977), this court stated, "[i]t has long been held in Florida that one is bound by his contract." BRATTON involved a shipper's unsuccessful attempt to avoid a liability limitation clause contained in the bill of lading by arguing that she had not read the contract provision, did not understand it, and did not assent to it.

> take, fraud or duress, parties who have made a contract are bound thereby although it may be unwise and even foolish. Equity has refused to enforce some agreements when, in its sound discretion, these have been deemed unconscionable:
>
> "People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the allevation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of the contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability." [quoting from CARLSON vs. HAMILTON, 8 Utah2d 272, 332 P.2d 989].

14 Williston on Contracts § 1632, pp. 50 - 2 (3rd Ed.)

It is undoubtly on the basis of the paramount policy of allowing freedom of contract[16] that the courts of this state have consistently recog-

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16. Indeed, at the turn of the century, the United States Supreme Court made it clear that freedom of contract is the general common law rule, with only a limited number of exceptions based on overriding considerations of public policy:

> The principles declared in those cases [holding attempts by common carriers to exempt themselves from liability for their own negligence which injured public passengers to be void as against public policy] are salutory and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most

[continued on next page]

nized that one party to a contract involving purely private rights may legally exculpate itself from liability for the consequences of its own negligence in performing that contract, provided that such intent is clearly and unequivocally expressed in the contract and provided that no fraud or deceit is practiced. See, RUSSELL vs. MARTIN, 88 So.2d 315 (Fla. 1956); CONTINENTAL VIDEO CORP. vs. HONEYWELL, INC., 422 So.2d 35 (Fla. 3d DCA 1982); ACE FORMAL WEAR, INC. vs. BAKER, 416 So.2d 8 (Fla. 3d DCA 1982); HUGHES vs. SECURITY ENGINEERING, INC., 406 So.2d 1225 (Fla. 4th DCA 1981) (while admittedly of no precedential value, this case affirmed the dismissal of a complaint in a burglary alarm case "on the authority of" L. LURIA & SON, INC. vs. ALARMTEC INTERNATIONAL

Footnote 16 cont'd

> important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M.R., in *Printing & N. Registering Co. vs. Sampson*, L.R. 19 Eq. 465:
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> "It must not be forgotten that you are not to extend arbitarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, -- that you are not lightly to interfere with this freedom of contract."

BALTIMORE & O.S.R. R. CO. vs. VOIGT, 176 U.S. 498, 20 S.Ct. 385, 387, 44 L.Ed. 560 (1900) (emphasis supplied).

CORP., 384 So.2d 947 (Fla. 4th DCA 1980)); GOYINGS vs. JACK & RUTH ECKERD FOUNDATION, 403 So.2d 1144 (Fla. 2d DCA 1981); L. LURIA & SON INC. vs. ALARMTEC INTERNATIONAL CORP., 384 So.2d 947 (Fla. 4th DCA 1980); JOHN'S PASS SEAFOOD CO. vs. WEBER, 369 So.2d 616 (Fla. 2d DCA 1979); ORKIN EXTERMINATING CO., INC. vs. MONTAGANO, 359 So.2d 512 (Fla. 4th DCA 1978); RUBIN vs. RANDWEST CORP., 292 So.2d 60 (Fla. 4th DCA 1974); KINKAID vs. AVIS RENT-A-CAR SYSTEMS, INC., 281 So.2d 223 (Fla. 4th DCA 1973); MIDDLETON vs. LOMASKIN, 266 So.2d 678 (Fla. 3d DCA 1972); ADVANCE SERVICE, INC. vs. GENERAL TELEPHONE CO. OF FLORIDA, 187 So.2d 660 (Fla. 2d DCA 1966); JONES vs. WALT DISNEY WORLD CO., 409 F.Supp. 526 (W.D.N.Y.1976) (applying Florida law). Cf. CHARLES POE MASONRY, INC. vs. SPRINGLOCK SCAFFOLDING RENTAL EQUIPMENT CO., 374 So.2d 487 (Fla. 1977), and cases cited therein.

HONEYWELL and VIDEO CORP. obviously disagree as to the treatment which Florida courts have afforded liability limiting clauses contained in purely private contracts. From VIDEO CORP.'s perspective, judicial declarations of invalidity are the general rule, with declarations of validity being only the exception. HONEYWELL, on the other hand, submits that the courts of this state have declared such liability limiting clauses valid in the vast majority of cases, with only a few very narrow exceptions.

HONEYWELL recognizes that liability limiting clauses contained in contracts are not looked upon with favor by the courts. Because of the disfavor in which such clauses are held, they must initially pass the "test of clarity and unequivocation." ORKIN EXTERMINATION CO., INC. vs. MONTAGANO, 359 So.2d 512 (Fla. 4th DCA 1978); MIDDLETON vs. LOMASKIN, 266 So.2d 678 (Fla. 3d DCA 1972). Cf., MARINO vs. WEINER, 415 So.2d 149 (Fla. 4th DCA 1982).

The first appellate decision in Florida dealing with a contract for the installation, maintenance, and monitoring of an alarm system was handed down by the Fourth District in L. LURIA & SON, INC. vs. ALARMTEC INTERNATIONAL CORP., 384 So.2d 947 (Fla. 4th DCA 1980). In that case, the defendant (Honeywell Protection Services) installed an electronic burglary alarm system on the plaintiff's business premises. A burglary occurred and a loss of merchandise valued in excess of $135,000 was suffered.[17] Suit was brought based on theories of breach of contract, breach of express and implied warranties, ordinary negligence, and gross, willful and wanton negligence. There, as here, the defendant moved to dismiss the complaint, relying on the exculpatory clause[18] contained in the agreement between the parties. There, as here, the trial court dismissed the complaint with prejudice, finding that the exculpatory clause totally excluded liability on Honeywell's part or, alternatively, limited Honeywell's maximum liability to an amount equal to six months of service charges.

This ruling was affirmed on appeal, with the court holding that:

> We find the aforecited clause to be clear and unequivocal in totally absolving the appellee [Honeywell] from liability under the facts alleged in this complaint.

384 So.2d at 948 (emphasis supplied).

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17. Parenthetically, it was alleged in LURIA, as in the case at bar, that Honeywell received a signal at its monitoring station, yet completely failed to investigate the situation, send a guard to the premises, notify the police, or notify the owner of the store, as it had contractually agreed. Additionally, it was alleged in LURIA that the contractual provision limiting Honeywell's liability in the event of a loss was a penalty clause and therefore null and void (R. 42 - 56).

18. The pertinent portion of the exculpatory clause provided that ". . . it is not the intention of the parties that company assume responsibility for any loss occasioned by malfeasance or misfeasance in the performance of the services under this contract . . .". 384 So.2d at 947 - 48.

Thus, such exculpatory clauses contained in purely private agreements are valid and enforceable under Florida law, so long as such intention is made clear and unequivocal. See also, ACE FORMAL WEAR, INC. vs. BAKER, 416 So.2d 8 (Fla. 3d DCA 1982). In LURIA, the clause utilized the language ". . . responsibility for any loss occasioned by malfeasance or misfeasance in the performance of the services under this contract . . ." In the case at bar, the clause utilized the language ". . . responsibility for any losses which may occur even if due to [Honeywell's] negligent performance or failure to perform any obligation under this agreement." (emphasis supplied).

[1] Interpretation

It cannot seriously be contended that the above-quoted clause is not clear and definite in expressing the parties' mutual intent to release Honeywell from responsibility for "any losses" which VIDEO CORP. may suffer "even if due to [Honeywell's] . . . failure to perform . . . " under the agreement. Nevertheless, VIDEO CORP. argues at footnote 12 beginning on page 13 of its initial brief that the clause "should be held unenforceable because it does not contain that absolute degree of clarity required to uphold such disfavored clauses." In the subject footnote VIDEO CORP. appears to argue that the limitiation of liability clause only applies to those circumstances where the loss by theft was "not the fault of Honeywell, such as the late arrival of the police once called, or a quick escape by the burglars." However, as noted by Federal District Judge Scott in his opinion in GIBSON vs. GREYHOUND BUS LINES, INC., 409 F.Supp. 321, 324 (M.D.Fla. 1976), it does not seem to be a sensible reading of a limitation

of liability to say that one contracting party can limit its liability only in the event it is not liable in the first instance.

Moreover, simply by comparing the clause involved here with the clause involved in the LURIA case, it becomes readily apparent that this argument is without merit. While the first sentence in paragraph 7 is lengthy, the 3 independent clauses contained therein are clear in expressing the parties' intent that: (1) HONEYWELL was not assuming any responsibility with respect to loss of the property stored on VIDEO CORP.'s premises; (2) the responsibility for securing insurance to protect VIDEO CORP. for loss of any of the property stored on its premises was to be shouldered by VIDEO CORP.; and (3) HONEYWELL was assuming no responsibility for any losses of property that might occur, even if due to its own failure to perform contractual duties.

It is clear under the wording of the clause that HONEYWELL and VIDEO CORP. entered into the contract with full knowledge and with an express understanding that by simply providing the system and services HONEYWELL was in no way assuming liability with respect to the loss of property stored on the premises. VIDEO CORP. was to purchase insurance to cover the value of the goods, since the monthly charge for maintenance, telephone lines, and monitoring service was simply not related to the value of the property stored on the business premises -- the monthly service charge would have been the same amount regardless of whether $500 or $500,000 worth of property was stored on the VIDEO CORP.'s premises. Under the allegations of the amended complaint that HONEYWELL's "failure to perform" its alleged contractual duty [to notify the police authorities and VIDEO CORP.'s appointed representative upon receipt of an "alarm signal"],

resulted in a property loss, HONEYWELL is clearly and unequivocally relieved of liability. ACE FORMAL WEAR, INC. vs. BAKER, 416 So.2d 8 (Fla. 3d DCA 1982); L. LURIA & SON, INC. vs. ALARMTEC INTERNATIONAL CORP., 384 So.2d 947 (Fla. 4th DCA 1980); RUBIN vs. RANDWEST CORP., 292 So.2d 60 (Fla. 4th DCA 1974); KINKAID vs. AVIS RENT-A-CAR SYSTEMS, INC., 281 So.2d 223 (Fla. 4th DCA 1973); MIDDLETON vs. LOMASKIN, 266 So.2d 678 (Fla. 3d DCA 1972). Compare, GOYINGS vs. JACK & RUTH FOUNDATION, 403 So.2d 1144 (Fla. 2d DCA 1981) (clause which stated in one unpunctuated sentence that ". . . reasonable precautions will be taken by Camp to assure the safety and good health of said boy/girl but that Camp is not to be held liable in the event of injury, illness, or death of said boy/girl . . ." interpreted as releasing Camp from liability only so long as "reasonable precautions" taken by Camp to assure campers' "safety and good health")[19]; ORKIN EXTERMINATING CO. INC., vs. MONTAGANO, 359 So.2d 512 (Fla. 4th DCA 1978) (various provisions on the front and the reverse side of agreement were equivocal and inconsistent); and JONES vs. WALT DISNEY WORLD CO., 409 F.Supp. 526 (W.D.N.Y. 1976) (in-

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19. At page 9 of its brief, VIDEO CORP. quotes a portion of the GOYINGS opinion. The quoted portion is clearly taken out of context. The GOYINGS case simply involved interpretation of the exculpatory clause. The GOYINGS case did not "reason" that to allow a party to exculpate itself from liability for failure to perform a contractual undertaking would render the contract illusory and lacking mutuality of obligation, as VIDEO CORP. seems to imply. Indeed, the GOYINGS opinion recognizes that a party may absolve itself from such liability and even cites the decision in the LURIA case. The sole issue in GOYINGS was whether the clause was "sufficently clear" in expressing the parties' intent to absolve the defendant from liability for its own negligence. In deciding this issue, Chief Judge Scheb, speaking for the court, stated:

> . . . We find, however, that the language in the clause was ineffective because it did not explicitly state that the camp would be absolved from liability for injuries resulting from its negligence.

403 So.2d at 1146 (emphasis supplied). The clause in the case at bar does not suffer from this infirmity.

terpreting Florida law to require that a waiver of liability in a contract, to be valid and enforceable, must expressly state that a party is being relieved of responsibility for injury arising wholly or partially from its own negligence).

While the majority of appellate decisions across the United States in cases involving breach of alarm system contracts have dealt with either limitation of liability or liquidated damages provisions[20], three decisions were uncovered which concluded that similar disclaimer provisions were valid and enforceable so as to totally relieve the alarm company from liability for property losses sustained by the subscriber. See, NEW ENGLAND WATCH CORP. vs. HONEYWELL, INC. 416 N.E.2d 1010 (Mass.App. 1981) (contract disclaimed responsibility "for any losses. . . . even if due to contractor's negligent performance or failure to perform any obligation under [the] agreement"); FIRST FEDERAL INSURANCE CO. vs. PURALATOR SECURITY, INC., 69 Ill.App.3d 413, 388 N.E.2d 17 (lst DCA 1979) (contract disclaimed responsibility for any loss "which results directly or indirectly to persons or property from performance or nonperformance of obligations imposed by [the] contract or from negligence [of defendant] . . .."); SHAER SHOE CORP. vs. GRANITE STATE ALARM, INC., 262 A.2d 285 (N.H. 1970) (in dicta).

[2] Inequality of Bargaining Power and Unconscionability

Having shown that the clause in the instant contract is clear and unambiguous in expressing the parties' intent to release HONEYWELL from

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20. This category of cases will be discussed below at pages _____

liability for losses occasioned by theft of VIDEO CORP.'s business property, attention must now be directed to the question of whether enforcement of this contractual provision is prohibited for some other reason. VIDEO CORP. argues that its conclusory allegation that the instant contract is one of "adhesion" due to an inequality of bargaining power "creates issues of fact for the jury's consideration which will ultimately determine the enforceability of that clause." [I.B. at 8]. First, it should again be noted that the amended complaint alleges no ultimate facts on this point, but merely charges that the instant contract is one of "adhesion." Secondly, the "inequality of bargaining power" argument was expressly or impliedly rejected in the following decisions: GOYINGS vs. JACK & RUTH ECKERD FOUNDATION, 403 So.2d at 1147; RUBIN vs. RANDWEST CORP., 292 So.2d 60 (Fla. 4th DCA 1974); KINKAID vs. AVIS RENT-A-CAR SYSTEMS, INC., 281 So.2d 223 (Fla. 4th DCA 1973); MIDDLETON vs. LOMASKIN, 266 So.2d 678 (Fla. 3d DCA 1972).

By definition, an adhesion contract is drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot be readily obtained elsewhere. SCHLOBOHM vs. SPA PETITE, INC., 326 N.W.2d 920, 924 (Minn. 1982). Moreover, even though a contract is on a printed form and offered on a "take it or leave it" basis, those facts alone do not cause it to be an adhesion contract. In order to establish that a contract is one of adhesion, it must be alleged and proven "that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation, and that the services could not be obtained elsewhere." SCHLOBOHM vs. SPA PETITITE INC., 326 N.W.2d 924 - 25. A mere showing of unequal bargaining power alone will

not establish a claim of unconscionability. BENNETT vs. BEHRING CORP., 466 F.Supp. 689 (S.D.Fla. 1979).

Thus, it is important to realize that an inequality of bargaining power is but one factor consumed within the broader concept of "unconscionability." An unconscionable contract or an unconscionable bargain has been defined as one which:

> . . . no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.

HUME vs. UNITED STATES, 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 (1889). The principle underlying the refusal of a court of equity to enforce unconscionable contracts is a principle which finds it roots in the "prevention of oppression and unfair surprise, not the disturbance of allocation of risk because of superior bargaining power." BENNETT vs. BEHRING CORP., 466 F.Supp. at 695.

The lone Florida authority cited by VIDEO CORP. in support of its point is the case of IVEY PLANTS, INC. v. FMC CORP., 282 So.2d 205 (Fla. 4th DCA 1973), cert. denied, 289 So.2d 731 (Fla. 1974).[21] Admittedly,

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21. VIDEO CORP. also cited the IVEY PLANTS case for the proposition that if a party is allowed exemption from liability for failure to perform a contractual duty, then the contract is illusory. First, how can VIDEO CORP. in one breath rely on the contract for its right to recovery, yet in the next breath claim that the contract is unenforceable because of lack of mutuality of obligation and mutuality of remedy? Secondly, the intent of the exculpatory clause is not to negate the contractual duty, as between the two parties to the contract, but merely makes it clear that VIDEO CORP. has the responsibility for obtaining insurance coverage which will protect each party from the consequential damages which may result from a breach of that duty. Thirdly, the courts have expressly rejected the contention that such clauses tend to encourage negligence. 175 A.L.R. 23, 28 (1948). Fourth, VIDEO CORP.'s position on this point runs afoul of the numerous Florida decisions holding that a party may validly enter into an indemnity agreement providing for that party's ultimate exemption from liability resulting from its breach of contractual duties. E.g., JOSEPH L. ROZIER MACHINERY CO. vs. NILO BARGE LINE, INC., 318 So.2d 557 (Fla. 2d DCA 1975), cert. denied, 328

[continued on next page]

the IVEY PLANTS opinion contains the language quoted in VIDEO CORP.'s brief. Yet, upon a close analysis of the opinion and the broad general authorities cited therein, it becomes apparent that the decision therein does not conflict with the decision reached in the case at bar. The fact that the services being contracted for are not a public necessity, the fact that the same or similar types of services are widely available, and the fact that these clauses are commercially reasonable and necessary because of the incalculable and unfathomable liability exposure associated with a breach of the contract, clearly distinguish the instant case.

The IVEY PLANTS decision appears to hold that an exculpatory clause may be unenforceable where the bargaining position of the parties is unequal. The authority cited for this broad proposition reveals that it clearly has no arguable applicability to the instant case. As the cases compiled in ANNO., Limiting Liability for Own Negligence, 175 A.L.R. 8 (1948), reveal, the inequality of bargaining power argument only has applicability to those categories of cases involving some special relationship between the parties (e.g. - public utilities and carriers to their customers, professional bailees to their bailors, landlords to their tenants, employers to their employees, and public hospitals to their patients). Because of this relationship and the essential nature of the services being contracted for, the courts reason that to enforce the exculpatory clause would clearly be injurious to the public welfare. Indeed, in most cases one finds that the legislature extensively regulates the particular business or commercial entity involved.

Footnote 21 cont'd

So.2d 843 (1976); OLD DOMINION IRON & STEEL CORP. vs. MARYLAND CASUALTY COMPANY, 374 So.2d 57 (Fla. 1st DCA 1979).

Finally, even assuming arguendo that complete exoneration of HONEYWELL for breach of its contractual duty renders the contract illusory, then the (liability limitation) clause would apply. Under this clause, VIDEO CORP. was given the right to choose a higher limit of liability (i.e. - an increased remedy) for breach of the contractual duties. Since VIDEO CORP. chose not to avail itself of this right, it should not now be heard to complain.

Clearly, the amended complaint and the attached contract reveal that the instant case does not fall into the category of cases applying the inequality of bargaining power rationale to allow one helpless party to avoid the effect of an exculpatory clause. No special relation affecting the general public welfare is involved here, nor could it reasonably be argued that VIDEO CORP. was unable to secure alarm or other types of protective services in the market place. Purely and simply, the inapplicability of the inequality of bargaining power argument is apparent; there are no "issues of fact to be submitted to a jury" regarding the enforceability of the instant agreement between the parties.

Moreover, research uncovered several appellate decisions from other jurisdictions rejecting challenges to alarm contracts (which either waive or limit liability resulting from breach) based upon an asserted "inequality of bargaining power." At least three decisions have specifically rejected challenges based on an asserted "inequality of bargaining power." See, FIRST FINANCIAL INSURANCE CO. vs. PUROLATOR SECURITY, INC., 69 Ill.App.3d 413, 388 N.E.2d 17 (1st DCA 1979); LAZYBUG'S SHOP, INC. vs. AMERICAN DISTRICT TELEGRAPH CO., 374 So.2d 183 (La.App. 1979); ABLE HOLDING CO.,INC. vs. AMERICAN DISTRICT TELEGRAPH CO., 138 N.J.Sup. 137, 350 A.2d 292 (1975), aff'd, 147 N.J.Sup. 263, 371 A.2d 111 (1977). In reaching this conclusion, the courts recognized as important the following factors: (1) that both parties to the contract were commercial entities; (2) that the alarm company did not have a virtual monopoly on the market such that the subscriber was prevented from shopping around for the best bargain; (3) that the agreement on its face appeared to be an arm's length transaction based on reasonable commercial considerations;

(4) that the contract itself offered the subscriber the option of raising the limitation of liability through additional service charges based on a graduated scale; and (5) that there was no special legal relationship nor overriding public interest which demanded that the contract provisions, voluntarily entered into by competent parties, should be rendered ineffectual. The existence of these various factors is revealed in the record in the case at bar. While the conclusory allegation of an inequality of bargaining power contained in VIDEO CORP.'s amended complaint may have applicability in the context of other cases, it clearly does not apply to the case at bar and is totally insufficient to raise any question of fact.

At footnote 5 on page 7 of VIDEO CORP.'s initial brief, six cases are cited in support of the statement that "[i]n foreign jurisdictions, as well as in Florida, the inequality of bargaining power of the parties has traditionally provided a basis by which courts refuse to enforce exculpatory clauses in contracts as to the liability of the party enjoying the superior position." First, none of the cases cited support such a broad proposition. Secondly, analysis of each case reveals that the considerations upon which the decisions were based have not been pled in the case at bar, nor could they be pled And, most importantly, when the courts of those same states have dealt with exculpatory or limitation of liability clauses contained in alarm contracts, the clauses are unanimously upheld.

VIDEO CORP. first cites to WEAVER vs. AMERICAN OIL CO., 276 N.E.2d 144 (Ind. 1971). The majority of the court in that case, over a strong dissenting opinion, held that an exculpatory clause in a service station lease was unconscionable and unenforceable, where the provision was

in fine print[22] and probably would not have been understood or appreciated by the service station lessee, who hadn't completed high school and worked only in labor-oriented jobs. The majority opinion evinces a paternalistic attitude, which if carried to its logical conclusion would make the basic concept of freedom of contract a thing of the past. Moreover, when an Indiana appellate court first had occasion to deal with the question of the validity of limitation of liability clauses contained in alarm contracts, the clause was upheld. GENERAL BARGAIN CENTER vs. AMERICAN ALARM CO., INC., 430 N.E.2d 407 (Ind.App. 1982).

DANNA vs. CON EDISON COMPANY, INC., 71 Misc.2d 1029, 337 N.Y.S.2d 722 (Civ.Ct.N.Y. 1972), simply provides an example of one category of those limited number of cases where exculpatory clauses are denied effect due to inequality of bargaining power between the parties. DANNA involved a suit against an electric utility for damages to a refrigerator caused by low voltage in a brown-out. A finding of inequality of bargaining power was based upon the monopoly granted to the utility by the state in order to serve a necessary public function, in addition to the extensive regulation of the business involved. These types of cases are clearly inapplicable to the instant one, where no state granted monopoly is involved, where the services being provided, although important, are not a public necessity, and where no extensive governmental regulation is involved.

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22. Parenthetically, it might be noted here that two of the cases cited at page 17 of VIDEO CORP.'s brief [RUBIN vs. AMC HOME INSPECTION & WARRANTY SERVICE, 418 A.2d 306 (N.J.Super. 1980), and A & Z APPLIANCES, INC. vs. ELECTRIC BURGLAR ALARM CO., INC., 455 N.Y.S.2d 674 (App. 1982)] do not support the proposition for which they are cited. These two cases involved the questions (which have already been discussed) as to whether the exculpatory clause was actually a part of the parties' agreement and also whether it was clear in language and conspicuously placed in the contract.

Indeed, the courts of New York have upheld limitation of liability clauses contained in burglary alarm contracts. See, H.G. METALS, INC. vs. WELLS FARGO ALARM SERVICES, 45 A.D. 2d 490, 359 N.Y.S.2d 797 (S.Ct.App. Div. 1974); RINALDI & SONS, INC. vs. WELLS FARGO ALARM SERVICES, INC., 47 A.D.2d 462, 367 N.Y.S.2d 518 (S.Ct.App.Div. 1975), reversed on other grounds, 39 N.Y.2d 191, 383 N.Y.S.2d 256, 347 N.E.2d 618 (App. 1976); FLORENCE vs. MERCHANT'S CENTRAL ALARM, INC., 73 A.D.2d 869, 423 N.Y.Sup.2d 663 (S.Ct.App.Div.1980).

The third case cited by VIDEO CORP., PHILLIPS HOME FURNISHINGS, INC. vs. CONTINENTAL BANK, 231 Pa.Super. 174, 331 A.2d 840 (1974), lends no support to their argument. There the court refused to follow the majority rule that a bank may contractually place the risk of loss from use of a night depository on the customer. In holding that a bank may not contractually exculpate itself from the consequences of its own negligence in the performance of any of its banking functions, the court drew an analogy to those types of cases where the courts refused, on public policy grounds, to enforce exculpatory agreements based upon a finding that one party occupied a superior, monopolistic bargaining position, or that one party was engaged in providing some necessary service to the general public.[23] Once again, the record in the case at bar reveals that we are dealing with a materially different situation. Indeed, the same appellate court recognized the different considerations presented in alarm con-

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23. The court cited such cases as those involving the employer/employee relationship, public utilities, common carriers, hospitals, and airports. To like effect is SNIFFEN vs. CENTURY NATIONAL BANK OF BROWARD, 375 So.2d 892 (Fla. 4th DCA 1979), holding that a bank cannot exculpate itself from liability to a customer for loss of the contents of a safe deposit box alleged to have resulted from the bank's negligence in permitting unauthorized access to the box.

tract cases in WEDNER vs. FIDELITY SECURITY SYSTEMS, INC., 307 A.2d 429 (Pa.Super. 1973), wherein it was stated that:

> In this case, however, we have a private arrangement between two firms without the attendant state regulation that exists with banks and public utilities. The appellant had a choice as to how to protect his property, and whether or not he should obtain insurance. Although protection against burglary is becoming increasingly important, we believe that it has not yet reached the level of necessity comparable to that of banking and other public services.

307 A.2d at 432 (emphasis supplied). See also, LOBIANCO vs. PROPERTY PROTECTION, INC., 437 A.2d 417 (Pa.Super. 1981).

In CARDONA vs. EDEN REALTY COMPANY, 118 N.J.Super. 381, 288 A.2d 34 (1972), the court held that a landlord could not contractually exculpate himself from liability for injuries to a residential tenant alleged to have resulted from the landlord's breach of the statutory duty to maintain the common areas in a state of good repair. The decision was grounded upon the fact that the lease provision was an attempt to circumvent the duties place on landlords by state statute, and therefore violated public policy.[24]

However, some three years later, another New Jersey court rendered a decision in a case involving an alarm contract and upheld the limitation of liability clause contained therein over challenges based upon asserted public policy, unequal bargaining power, and unconscionability. ABEL HOLDING COMPANY, INC. vs. AMERICAN DISTRICT TELEGRAPH CO., supra.

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24. Prior to the adoption in Florida of the Residential Landlord Tenant Act [Fla.Stat.§83.40 et seq.], the Third District upheld just such an exculpatory clause against a challenge based on public policy grounds in MIDDLETON vs. LOMASKIN, supra. At the present time, the legislature's enactment of Fla.Stat.§83.47 would appear to void such clauses, if included in residential leases executed after July 1, 1973. There are no legislative enactments voiding limitation of liability clauses in alarm contracts.

See also, FOONT - FREEDENFELD CORPORATION vs. ELECTRO-PROTECTIVE CORPORATION, 126 N.J.Super. 254, 314 A.2d 69 (App.Div. 1973).

Finally, in HY-GRADE OIL COMPANY vs. NEW JERSEY BANK, 138 N.J.Super. 112, 350 A.2d 279 (1975), the New Jersey court simply adopted the minority rule expressed in the PHILLIPS HOME FURNISHINGS case that a bank could not contractually exculpate itself from liability for damages resulting from its negligence in the operation of its night depository. Yet, as pointed out earlier, the New Jersey courts do not extend the public policy - unequal bargaining power rationale to alarm contract cases.

As explained earlier, "the relative bargaining power of the parties to a contract is but one factor to be considered in determining whether the enforcement of exculpatory provisions would be unfair or unconscionable." FIRST FINANCIAL INSURANCE CO. vs. PURALATOR SECURITY, INC., 388 N.E.2d at 22. Thus, those cases dealing with unconscionability challenges to alarm contracts will shed further light on the merits vel non of VIDEO CORP.'s claims. In this regard it should be noted at the outset that in every case where a subscriber has challenged the provisions of an alarm contract as being unconscionable, the courts have consistently rejected the subscriber's claim as being without merit. See, BARGAIN TOWN OF D.C., INC. vs. FEDERAL ENGINEERING CO., INC., OF WASHINGTON, D.C., 309 A.2d 56, 57 (D.C.Ct.App. 1973); WEDNER vs. FIDELITY SECURITY SYSTEMS, INC., 307 A.2d 429, 432 (Pa.Super. 1973); ABEL HOLDING CO., INC. vs. AMERICAN DISTRICT TELEGRAPH CO., 350 A.2d 292, 303 - 5 (N.J.Super. 1975); MORGAN COMPANY vs. MINNESOTA MINING & MANUFACTURING CO., 246 N.W.2d 443, 448 (Minn. 1976); CENTRAL ALARM OF TUSCON vs. GANEM, 116 Ariz. 74, 567 P.2d 1203, 1207 - 8 (Ariz.App. 1977); FIRST FINANCIAL

INSURANCE CO. vs. PUROLATOR SECURITY, INC., 388 N.E.2d 17, 21 - 2 (Ill.App. 1979); VALLANCE & CO. vs. DeANDA, 595 S.W.2d 587, 590 (Tex. App. 1980); FIREMAN'S FUND AMERICAN INSURANCE CO. vs. BURNS ELECTRONIC SECURITY SERVICES, INC., 417 N.E.2d 131, 132 - 33 (Ill. App. 1981).

The Illinois decision in FIREMAN'S FUND AMERICAN INSURANCE CO. vs. BURNS ELECTRONIC SECURITY SERVICES, INC., supra, is particularly applicable. That case arose out of an $800,000 theft from a jewelry store, which was insured by the plaintiff/insurance carrier and which had in place an alarm system provided by defendant/alarm company. The contract between the alarm company and the subscriber is similar to the one involved in the instant case, providing for a waiver of the alarm company's liability for property losses, even if due to its own negligence, and for a maximum limit on liability, in any event, to $250. Notwithstanding the enormity of the loss caused by the alarm company's negligence, the trial court reduced the damages recoverable in the action to $250, in keeping with the limitation on liability provision contained in the parties' contract.

On appeal, the plaintiff in FIREMAN'S FUND first argued that the exculpation clause of the contract was unconscionable and therefore unenforceable. In rejecting this contention outright, the appellate court reasoned that:

> The terms of this contract belie unconscionability. . .. The type and quantity of merchandise in the store, perhaps the prime motivation for a break-in, was for [the subscriber] to determine, not [the alarm company]. It was not unreasonable for [the alarm company] to feel that the [subscriber] was better able than itself to

> buy any desired amount of insurance at appropriate rates. [The alarm company] could properly insist on the exculpation clause to make certain that the risk of a burglary lay on the [subscriber], not on [the alarm company] . . .
>
> Allocating the risk to [the subscriber] was thus not a bargain "which no man in his senses, not under (delusion), would make . . . and which no fair and honest man would accept." . . . It does not suggest unfair surprise or oppression . . . on the contrary, the exculpation clause was a commercially (sensible) arrangement and the plaintiff is bound by it.

417 N.E.2d at 132 - 33 (emphasis supplied) (citations omitted).

The courts have additionally noted that in a situation of this nature there is no reasonable way, at the time the contract is executed, to estimate the actual damages which may be sustained as a result of a breach by the alarm company. Furthermore, due to the innumerable factual situations, it would be quite difficult at the time the contract was executed to predict what portion of a loss would be directly attributable to a failure to perform the services agreed upon. VIDEO CORP. fails to recognize that commerical inventories can fluctuate to a great degree. For example, what if a particular subscriber is involved in the jewelry business and, during the period of the alarm contract, he adds the Hope diamond to his inventory? Moreover, not every failure of the alarm system or services will always result in a loss of the subscriber's entire inventory. Purely and simply, there are many possibilities ranging from no loss to a complete loss.

No unfair surprise or oppression is alleged as being involved here. The subject clause is contained in the first page of the contract, just above the signature of VIDEO CORP.'s representative. Its meaning is clear and it is in no way "hidden amongst" the fine print of the contract. If this contract

was for the sale of goods, it would be prima facie conscionable. WEDNER vs. FIDELITY SECURITY SYSTEMS, INC., 307 A.2d at 432. Finally, the most persuasive reason for upholding such clauses in alarm contracts in the face of unconscionability challenges is contained in the following quote from the opinion in CENTRAL ALARM OF TUSCON vs. GANEM, 567 P.2d 1203 (Ari. App. 1977):

> In our opinion, it would be both unreasonable and unfair to expect [the alarm company] to assume the responsibilities arising under a burglary insurance policy upon payment of a nominal fee, i.e., $43/mo. (citation omitted). Had [the subscriber] desired that [the alarm company] assume greater liability, additional amounts could have been made payable under a graduated scale of rates, as provided in the agreement.

567 P.2d at 1207 (emphasis supplied). Accord, VALLANCE & CO. vs. DeANDA, 595 S.W.2d 587, 590 (Tex.App. 1980).

In the case at bar, the alarm contract makes it clear that the nominal service fee was related solely to the services provided, and likewise, was totally unrelated to the value of the goods stored on VIDEO CORP.'s premises. The contract made it clear that VIDEO CORP. was to purchase insurance to protect itself from loss of goods due to theft. Finally, the contract offered VIDEO CORP. the option of increasing the maximum limitation of liability by paying additional amounts on a graduated scale of rates.

As a commerical enterprise, VIDEO CORP. should not now be heard to complain, since it failed to take either of the steps set forth in the contract to protect itself from consequential property and business losses. Additionally, the claim by VIDEO CORP. that it is "unfair" to enforce the contract as written, since it lost an "inventory at a value greatly in excess of $250" is drained of its appeal when compared with some of the losses sus-

tained in other alarm contract cases.[25]

Two additional economic and commerical realities under which this contract was executed should be commented upon in passing. First, since central alarm station monitoring is designed to reduce certain risks of loss, the subscriber often receives a substantial reduction in its insurance premiums. See, UNITED STATES vs. GRINNELL CORP., 384 U.S.563, 567, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)[26]. In addition, by its contract, VIDEO CORP. had locked in the modest monitoring and service charge for at least two years, excluding increase in telephone line charges.

Furthermore, the liability waiver and limitation clauses in alarm contracts were obviously developed in response to the substantial liability exposure that central station operations involve. As previously noted, the clauses recognize that the subscriber has the primary responsibility for protecting his person and property against losses due to fire or theft. Usually, as a prudent businessman, he will acquire insurance protection in this regard. If there were no alarm system installed, and a loss was incurred, the subscriber would look to his insurance company for compensation. Also, the

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25. See, e.g., L. LURIA & SON, INC. vs. ALARMTEC INTERNATIONAL CORP., supra, (no recovery in case involving in excess of $135,000 loss); FIRST FINANCIAL INSURANCE CO. vs. PUROLATOR SECURITY, INC., supra, (no recovery in case involving $6,713 loss); FIREMAN'S FUND AMERICAN INSURANCE COMPANIES vs. BURNS ELECTRONIC SECURITY SERVICES, INC., supra, (liability limited to $250 in case involving $800,000 loss); MORGAN COMPANY vs. MINNESOTA MINING & MANUFACTURING COMPANY, supra, (liability limited to $250 in case involving $957,740 loss); and FOONT-FREEDENFELD CORP. vs. ELECTRO-PROTECTIVE CORP., supra. Clearly the magnitude of the loss is immaterial to a determination of the validity of the contract clauses.

26. In GRINNELL the Supreme Court was called upon to review an injunctive order of a federal district judge in a civil anti-trust suit brought by the United States against three corporations engaged in the central alarm protection business seeking relief for alleged violations of the Sherman Anti-trust Act. Prior to the 1966 decision in GRINNELL, 87% of the accredited central alarm station service business was owned or controlled by these three corporations. 384 U.S. at 571. Since the court-ordered (divestitures) competition in this particular field of business has flourished.

deterrent affect of the presence of an alarm system cannot be overlooked.

However, if this Court feels that the clauses are invalid and unenforceable and therefore holds the alarm companies liable for the full amount of the subscribers' losses, then it would be necessary for the alarm companies to have insurance protection equal to that of all subscribers. The alarm companies would have to pay exorbitant premiums, if they were able to get coverage at all, since the agggregate value of property on protected premises, while obviously incapable of anything but gross estimation, could easily be in the billions of dollars. The increased premiums would necessarily be passed on to the subscribers, thus pricing many of them out of the alarm protection market. It would undoubtedly result in a situation where those with small inventories would be subsidizing those with large inventories. The solution argued for by VIDEO CORP. actually results in a less, not more, equitable allocation of the risk of loss. Particularly in view of the fluctuation in business inventories, as between the subscriber and the alarm company, the alarm company is more "defenseless" than the subscriber.

Since the reasonably prudent subscribers will also be carrying their own insurance coverage, the net result would be two business entities paying a much higher aggregate of premiums with no increase in coverage, a situation clearly benefiting no one except the insurance companies. Thus, after all the dust has settled, one easily sees that the practical economic effect of liability waiving or limiting provisions in alarm contracts is to leave the responsibility for a loss where it belongs for minimum business insurance costs -- on the subscriber, or his insurance company.

[3] Public Policy

Nearly a half century ago, Justice Terrell, in speaking for the supreme court of this state in STORY vs. FIRST NATIONAL BANK & TRUST CO., 156 So. 101 (Fla. 1934), had the following to say with reference to "public policy" challenges directed to private agreements:

> In an old case . . . public policy was described as a very unruly horse, and, once you get astride it, you never know where it will carry you . . . personal acts and contracts are said to be against public policy when the courts refuse to recognize them for the reason that they have a mischievous tendency, are injurious to the public welfare, and are contrary to well-settled legal or moral principles.

156 So. at 103 (emphasis supplied).

Where, as here, it cannot be shown that the contract has a mischievous tendency, is injurious to the public welfare, or is contrary to any well-settled legal or moral principles, but on the contrary represents an arm's length transaction between two commercial enterprises allocating the responsibility as between themselves for securing insurance to protect the one party's business inventory from loss by theft, it should be enforced.[27] Cf., GULF INSURANCE CO. vs. DOLAN, FERTIG & CURTIS, ___ So.2d ___ (Fla. 1983) [Case No. 63,786, op. issued May 26, 1983, 1983 FLW 180] ("claims made" insurance policy not against public policy).

While a public policy challenge had not been expressly ruled upon in Florida in the context of an alarm contract case until the case at bar, the rulings in other jurisdictions on this particular point are numerous. These

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27. Compare, JOHN'S PASS SEAFOOD COMPANY vs. WEBBER, supra, (holding that, based upon public policy grounds, exculpatory clause in agreement between commercial lessor and lessee could not immunize lessor from liability to lessee for lessor's failure to comply with a positive duty to protect a class of individuals established by a penal statute or ordinance).

rulings are unanimous in upholding, over public policy challenges, clauses contained in alarm contracts which either waive or limit the alarm company's liability for loss of the subscriber's property, even though due to the alarm company's negligence or failure to perform contractual duties. See, AMERICAN DISTRICT TELEGRAPH COMPANY OF ALABAMA vs. ROBERTS & SON, INC., 122 So. 837, 840 - 41 (Ala. 1929); SHAER SHOE CORPORATION vs. GRANITE STATE ALARM, INC., 262 A.2d 287 (New Hampshire), WEDNER vs. FIDELITY SECURITY SYSTEMS, INC., 307 A.2d at 431 - 32 (Pennsylvania) ALAN ABIS, INC. vs. BURNS ELECTRONIC SECURITY SERVICES, INC., 283 So.2d 822 (La.App. 1973) ABEL HOLDING CO., INC. vs. AMERICAN DISTRICT TELEGRAPH CO., 350 Ao.2d 297 - 302 (New Jersey); MORGAN COMPANY vs. MINNESOTA MINING & MANUFACTURING CO., 246 N.W.2d 448 (Minnesota); CENTRAL ALARM OF TUSCON vs. GANEM, supra (Arizona); FIRST FINANCIAL INSURANCE CO. vs. PUROLATOR SECURITY, INC., 388 N.E.2d at 20 - 21 (Illinois); REED'S JEWELERS, INC. vs. ADT COMPANY, 260 S.E.2d 107 (N.C.App. 1979); VALLANCE & CO. vs. De ANDA, 595 S.W.2d at 590 (Texas).

Thus, it should be clear from the above that the clauses contained in the instant contract are valid and enforceable as between VIDEO CORP. and HONEYWELL. The trial judge correctly rejected VIDEO CORP.'s arguments to the contrary.

[4] Willful and Wanton Misconduct

At page 13 of its brief, VIDEO CORP. claims that the exculpatory clause cannot validly apply to allegations of gross negligence. First, the

federal cases cited therein refer to "willful and wanton" negligence.[28] Secondly, the decision in LURIA upheld the exculpatory clause in the face of similar conclusory allegations to the effect that the acts or omissions of the alarm company constitute "gross, wanton, and willful misconduct." Thirdly, even assuming arguendo that the exculpatory clause could not be held applicable to allegations of a gross breach, then the limitation of liability clause would apply. Moreover, this Court affirmed the denial of punitive damages in the NICHOLAS burglary alarm case, holding that:

> . . . the allegations[29] do not establish an intentional wrong that amounts to an independent tort, nor do they establish the entire want of care or attention to duty that would allow a jury to impute malice to the burglar alarm company.

NICHOLAS vs. MIAMI BURGLAR ALARM CO., 339 So.2d at 177 - 178.

Finally, the trial court's decision in favor of VIDEO CORP. is correct on this point even without reference to the contract. In Count III of the Amended Complaint, VIDEO CORP. attempts to hold HONEYWELL liable under the doctrine of respondeat superior for the alleged acts of gross, willful and wanton misconduct committed by employees, John Doe and Richard Roe. Yet, the allegation that John Doe and Richard Roe "knowingly and intentionally" ignored and disregarded the signals received at the monitoring

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28. The decision in DOUGLAS W. RANDALL, INC. vs. AFA PROTECTIVE SYSTEMS, INC., 516 F.Supp. 133 (E.D.Pa. 1981), was grounded upon interpretation of the alarm contract, not upon public policy.

29. The punitive damage allegations in the NICHOLAS case were as follows:

> 6. Even though Defendant Miami Burglar Alarm was notified that the said alarm system was not working properly as aforesaid, Defendant, Miami Burglar Alarm failed to make any examination or investigation whatsoever into why the system was not working properly, said failure evincing a complete and entire want of care or want of even slight care or slight attention by Defendant to the duty it had assumed toward the Plaintiff, thus constituting gross, wanton, and willful misconduct.

NICHOLAS vs. MIAMI BURGLAR ALARM CO., 266 So.2d 64 (Fla. 3d DCA 1972) (emphasis supplied).

station are clearly repugnant to the doctrine of respondeat superior, which springs from acts done by employees in furtherance of the interests and to the benefit of his master. ALEXANDER vs. ALTERMAN TRANSPORT LINES, INC., 350 So.2d 1128, 1130 (Fla. 1st DCA 1977). Some five months prior to the filing of the amended complaint herein, this Court held in MERCURY MOTORS EXPRESS, INC. vs. SMITH, 393 So.2d 545 (Fla. 1981), that a plaintiff must allege some independent fault on the part of the employer in order to hold the employer responsible for the intentional or grossly negligent wrongs of the employee. A review of the amended complaint herein reveals a total absence of any allegation of wrongdoing by HONEYWELL separate and apart from the wrongdoing of the employees, John Doe and Richard Roe. Accordingly, there is no predicate for holding HONEYWELL liable for the allegedly gross, willful and wanton conduct of the employees and thus no need to reach the limitation issue as to that portion of VIDEO CORP.'s claim stated in Count III.[30]

B. LIMITATION OF LIABILITY

> *Even assuming arguendo that the contract cannot totally relieve HONEYWELL from responsibility for VIDEO CORP.'s property and business losses without rendering the contract illusory, the complementary provision limiting HONEYWELL's liability to $404.16 is valid and enforceable whether viewed as a limitation of liability clause or as a liquidated damages clause.*

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30. Parenthetically, it might be noted that VIDEO CORP. failed to allege a tort which is distinguishable from or independent of the breach of contract. Thus, no right to recover punitive damages has been stated. See, LEWIS vs. GUTHARTZ, 428 So.2d 222 (Fla. 1983), and cases cited therein.

Provisions, nearly identical to the complementary limitation of liability clause contained in the instant agreement, which limit liability and the amount of recoverable damages under alarm service agreements have been uniformly upheld. Since it would take an entire page to set forth the numerous citations, HONEYWELL would simply refer the Court to ANNO., Validity, Construction, & Effect of Limited Liability or Stipulated Damages Clause in Fire or Burglar Alarm Service Contract, 42 A.L.R.2d 591 (1955). While the results are uniform, the rationale for the holdings has differed depending on whether the agreement provided for liquidated damages or a limitation of liability While similar in purpose, but not necessarily effect, these provisions can be categorized as follows: (1) those that fix liability at a specific amount or at a specified percentage of the annual service charge[31]; and (2) those that set an upper limit to the amount recoverable by the subscriber.[32]

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31. See, e.g., AMERICAN DISTRICT TELEGRAPH COMPANY OF ALABAMA vs. ROBERTS & SON, INC., 122 So. 837 (Ala. 1929) (limited to and "fixed at" the sum of $50); BETTER FOOD MARKETS, INC. vs. AMERICAN DISTRICT TELEGRAPH CO., 253 P.2d 10 (Cal. 1953) (limited to and "fixed at" $50); NICCOLI vs. DENVER BURGLAR ALARM, INC., 490 P.2d 304 (Colo.App. 1971) (limtied to a fixed sum of $50 or 10% of annual service charge, whichever is greater); BARGAINTOWN, INC. vs. FEDERAL ENGINEERING CO., 309 A.2d 56 (D.C.Ct.App. 1973) (limited to and "fixed at" the sum of $25); FOONT-FREEDENFELD CORP. vs. ELECTRO-PROTECTIVE CORP., 314 A.2d 69 (N.J.App. 1973) (limted to and "fixed at" a sum equal to 10% of annual service charge, but not less than $50); A.G. SCHEPPS vs. AMERICAN DISTRICT TELEGRAPH COMPANY OF TEXAS, 286 S.W.2d 684 (Tex.App. 1955) (limited to and "fixed at" a sum equal to 10% of the annual service charge, but not less than $50).

32. See, e.g., ACE FORMAL WEAR, INC. vs. BAKER PROTECTIVE SERVICE, INC., 416 So.2d 8 (Fla. 3d DCA 1982) (right to recover within a limit not to exceed $50); L. LURIA & SON, INC. vs. ALARMTEC INTERN'L CORP., 384 So.2d 947 (Fla. 4th DCA 1980) (liability limited to an amount equal to six months service charge); CENTRAL ALARM OF TUSCON vs. GANEM, 567 P.2d 1203 (Ariz.App. 1977) (liability limited to an amount not to exceed 6 months service charge; FIRST FINANCIAL INSURANCE COMPANY vs. PURO-

[1] Liquidated Damages Approach

In determining whether a liquidated damage clause in a burglary alarm service contract is enforceable, the courts have unanimously rejected the contention that such provisions are void as penalties. It is usually reasoned that the possible consequences of a breach by the alarm company are numerous, some breaches resulting in no damage, and other breaches resulting in substantial damages. Thus, at the time of the execution of the alarm contract, the nature and extent of a future loss would be difficult to predict. Finally, it has been recognized that at the time of the execution of the alarm contract, it would be nearly impossible to foresee what portion, if any, of a future loss would be solely attributable to the alarm company's failure of performance and what portion would be attributable to other causes. See the cases cited in footnote 31.

Parenthetically, it should be noted that the allegations in VIDEO CORP.'s amended complaint claim that this complementary provision is a penalty because it does not provide just compensation in the event of injury and "because the actual damages sustained by plaintiff are readily ascertainable." On their face, these allegations are insufficient to void the clause, since under this Court's ruling in HUTCHISON vs. TOMPKINS, 259 So.2d 129

Footnote 32 cont'd

LATOR SECURITY, INC., 388 N.E.2d 17 (Ill.App. 1979); LAZYBUG SHOPS, INC. vs. AMERICAN DISTRICT TELEGRAPH CO., 374 So.2d 183 (La.App. 1979) (limited to 10% of annual service charge of $250, whichever is greater); REED'S JEWELERS, INC. vs. ADT COMPANY, 260 S.E.2d 197 (N.C.App. 1979) (limited to $250 or 10% of annual service charge, whichever is greater); MORGAN vs. MINNESOTA MINING & MFG. CO., 246 N.W.2d 443 (Minn. 1976) (limited to six times monthly service charge or $250, whichever is less); SHAER SHOE CORP. vs. GRANITE STATE ALARM, INC., 262 A.2d 285 (N.H. 1970) (limited to refund of service charges paid); WEDNER vs. FIDELITY SECURITY SYSTEMS, INC., 307 A.2d 429 (Pa.App. 1973) (limited to sum equal in amount to annual service charge); VALLANCE & CO. vs. DeANDA, 595 S.W.2d 587 (Tex.App. 1980) (limited to a sum equal in amount to the service charge for a period not to exceed six months).

(Fla. 1972), the complaining party must plead and prove that the damages which would necessarily flow from breach were "readily ascertainable at the time of the drawing of the contract" (not at the time of the breach as alleged here).

In an analagous situation involving a liquidated damages clause in a contract for the installation and service of fire protection equipment at a private school, the Third District rejected the contention that the liquidated damages clause was a penalty. FACTORY INSURANCE ASSOC. vs. AMERICAN DISTRICT TELEGRAPH CO., 277 So.2d 569 (Fla. 3d DCA) cert. denied 284 So.2d 392 (Fla. 1973).

VIDEO CORP. places repeated reliance upon the case of WACKENHUT PROTECTIVE SERVICE, INC. vs. ETERNA OF MIAMI, INC., 375 So.2d 352 (Fla. 3d DCA 1979). It should first be noted that the WACKENHUT decision was per curiam without any explanation or opinion as to the basis for the court's ruling. It is well established that such a decision has no precedential impact upon this unrelated case. See, STATE OF FLORIDA COMMISSION ON ETHICS vs. SULLIVAN, ___ So.2d ___ (Fla. 1st DCA 1983) [Case No. AL-13, op. issued 4/19/83, 1983 FLW 1080, 1081 - 82], and cases cited therein. Indeed, all reference to said case should be stricken from VIDEO CORP.'s brief. See STATE vs. A. D. H., ___ So.2d ___ (Fla. 5th DCA 1983) [Case No. 82 - 197, op. issued 4/20/83, 1983 FLW 1090].

Nevertheless, insofar as this Court is inclined to accept the case as precedent, two critical distinguishing factors should be pointed out. First, the clause there was clearly one providing for liquidated damages, as opposed to one providing for limitation of damages, as here. In WACKENHUT, a fixed amount of $50 was forfeited by the alarm company upon breach. Secondly, and most importantly, the clause in WACKENHUT did not grant subscriber

the option of purchasing additional protection against property loss under a graduated scale of rates. Thus, the WACKENHUT contract did not provide an area for bargaining between the parties.

[2] Limitation of Liability Approach

When the clause in the instant case is compared with the clauses involved in other alarm cases, it becomes readily apparent that we are dealing with a limitation of liability. Florida courts have uniformly recognized and upheld limitation of liability clauses contained in contracts. See, ADVANCE SERVICE, INC. vs. GENERAL TELEPHONE COMPANY OF FLORIDA, 187 So.2d 660 (Fla. 2d DCA 1966) (liability for errors and omissions in yellow pages limited to return of amount charged for listing); ORKIN EXTERMINATING CO. OF SOUTH FLORIDA, INC. vs. CLARK, 253 So.2d 884 (Fla. 3d DCA 1971) (liability of terminate exterminating company limited to $5,000).

The Florida decisions dealing with limitation of liability clauses contained in alarm contracts have upheld such clauses. L. LURIA & SON, INC. vs. ALARMTEC INTERNATIONAL, 384 So.2d 947 (Fla. 4th DCA 1980) (alternative holding); ACE FORMAL WEAR, INC. vs. BAKER PROTECTIVE SERVICES, INC., 416 So.2d 8 (Fla. 3d DCA 1982). These holdings are in accord with every other appellate court decision which has specifically dealt with the question. See the cases previously cited in Footnote 32. A limitation of liability clauses is neither a penalty, since it does not normally operate in terrorem to induce proper performance, nor is it in the nature of liquidated damages, since it does not purport to be a pre-estimate of probable damages resulting from a breach. In the case at bar, the $414 amount es-

tablished in the contract is not automatically forfeited by HONEYWELL upon a breach of the contract. VIDEO CORP. additionally would have to prove that the breach caused its loss. If the loss was $230, then VIDEO CORP. would be entitled to $230, not $414. In sum, when dealing with a limitation of liability clause it is immaterial whether the limitation established in the contract is a reasonable estimate of the probable damages resulting from a breach (as is required for a liquidated damages clause). MORGAN COMPANY vs. MINNESOTA MINING AND MANUFACTURING CO., 246 N.W.2d 443 (Minn. 1976); VALLANCE & CO. vs. DeANDA, 595 S.W.2d 587 (Tex.App. 1980). See also, 5 Williston on Contracts, §781 A (3d Ed. 1961); Restatement of Contracts § 339, Comment"g"(1932).

Moreover, since this complementary limitation of liability clause also provided for bargaining between the parties to increase the upper limit of maximum liability, the inequality of bargaining power argument by VIDEO CORP. is rendered simply a "paper issue." Also, since under this complementary limitation of liability clause, VIDEO CORP. was entitled to a remedy for breach, it cannot be said that the contract was illusory. As detailed in section A of this brief, limitation of liability clauses in alarm service contracts have been upheld despite arguments of unequal bargaining power, unconscionability, and public policy.

In conclusion it has been clearly shown that the clauses in the contract between VIDEO CORP. and HONEYWELL are valid and enforceable. Under the complementary clauses, HONEYWELL is either completely absolved of any liability to VIDEO CORP. or is liable for a sum not to exceed $404.16. VIDEO CORP. simply cannot complain about the contractual provisions at this point in time, having decided not to avail itself of the right at the time of execution of the contract to purchase additional protection from HONEYWELL

or independently through its own insurance carrier. It was so aptly stated by the Texas Court of Appeal in VALLANCE & CO. vs. DeANDA, supra:

> . . . [T]here is a sound policy reason compelling the enforcement of these provisions. [Subscriber] paid a service charge of $24.50 per month to [alarm company]. It would be unreasonable "to expect [alarm company] to assume the responsibilities arising under a burglary insurance policy upon payment of . . ." this nominal fee. (citations omitted). Had [subscriber] desired greater protection against loss from burglary he could have purchased burglary insurance or paid additional amounts under a graduated scale of rates, as provided in the agreement.

595 S.W.2d at 590 (emphasis supplied).

CONCLUSION

Based upon the reasoning and citation of authorities presented above, it is respectfully submitted that the decision brought up for review was correct and in accord with the unanimous weight of authority across this country. The courts of this state, as well as those in other jurisdictions, enforce contractual provisions contained in alarm service contracts which either limit or totally exempt the alarm company from liability for consequential property loss resulting from failures in performance. The instant contractual provisions are clear and unequivocal and violate no public policy. The bargain struck in the agreement was between two commercial entities which were fully competent to understand at the outset their respective rights and liabilities thereunder. Each party knew the nature of the potential consequences which follow a failure in performance under the contract, and who would shoulder the burden of those consequences. The commerical reasonableness and necessity of these liability limiting clauses have been recognized time and time again.

The fact that VIDEO CORP. is now displeased with the agreement it reached is simply no reason to nullify the contractual provisions at the expense of freedom of contract and business necessity.

In any event, HONEYWELL's maximum liability under any view of the contract is limited to $404.16. Under this view, it cannot seriously be contended that the contract was illusory. Moreover, since this sum could have been increased if VIDEO CORP. had availed itself of the bargaining power granted to it under the contract, the inequality of bargaining power argument is simply inapplicable.

Accordingly, the decision brought up for review was correctly rendered and should be approved in all respects (especially since VIDEO CORP. has never made an issue of whether it should be entitled to prove up to the amount established under the complementary limitation of liability clause). Certiorari was improvidently granted and should be discharged.