When A Waiver of Subrogation Clause Is Not A Bar to Subrogation OR The Case of the Asleep-At-The-Switch Security Alarm Operator

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In 2006, Insured entered into a contract for alarm-monitoring services with Defendant Stanley. Approximately two years later, in November, 2008, the Stanley operator received a low-temperature signal from the insured's residence. The operator called the residence to communicate receipt of the alarm signal, but because the home was unoccupied and service to the landline for the residence had been disconnected, the operator was unable to reach the insured, or anyone else. Under the circumstances, Stanley company policy required that the operator contact the individuals designated on the homeowner's call list and obtain the password from the designee ultimately contacted. For inexplicable reasons, no follow-up call was made by the Stanley operator, nor was any other attempt made to communicate receipt of the low-temperature alarm to the insured, or anyone on the insured's call list. As a consequence, the low-temperature condition in the insured's home was not discovered until January, 2009, by which time, the water pipes had frozen and broken and water had inundated the insured's residence, causing approximately $250,000.00 in damages. The homeowner's insurance carrier paid to have the damaged repaired and commenced a subrogation action against Stanley.

This article will appear in an upcoming issue of the NASP *Subrogator*

Stanley's defense was based upon exculpatory clauses in its contact with the insured, and accordingly, Stanley moved for summary judgment arguing, that the exculpatory clauses precluded the insurance carrier's subrogation claim. United States District Court Judge Montgomery granted the motion, finding that the language of the exculpatory clauses, some of which read in pertinent part,

> "customer agrees that [Stanley] is not responsible for personal injury or other losses which are alleged to be caused by improper operation or non-operation of the system and/or [monitoring] service…"

was valid and enforceable under Minnesota law and, as such, was a complete bar to the insurance carrier's subrogation action.

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the trial court, holding that as a matter of public policy, an exculpatory clause in an alarm contract cannot prevent an injured party from suing a tortfeasor for intentional or willful and wanton acts. *Gage v. HSM Elec. Prot. Services, Inc.*, 655 F3d 821 (8th Cir. 2011). The Court went on to conclude that the insurance carrier was entitled to a jury trial on the issue of willful and wanton negligence which, in Minnesota, is defined as a failure to exercise reasonable care in the face of a known peril. In this case, 1) the carrier had alleged willful and wanton negligence in its complaint; 2) there was overwhelming evidence that Defendant was aware of a known peril when it received the low-temperature signal; and 3) because the operator had arguably failed to exercise reasonable care by not communicating the receipt of said alarm signal to the insured or her designees, the Court of Appeals reversed the trial court's order granting summary judgment and remanded the case back to the trial court. In remanding the case back to the trial court, the Court of Appeals stated:

> "[w]e decline HSM's (Stanley) invitation to affirm the entry of summary judgment on the alternative issue of whether Gage's insurer's claim is barred by

> the contract's anti-subrogation clause. The district court did not rule on that issue in the first instance, but may consider the defense upon remand. *See Cody v. Weber*, 256 F3d 764, 769 n.2 (8th Cir. 2001)."

Viewing this caveat as an invitation to renew its motion for summary judgment, Stanley, on remand, moved for summary judgment arguing that the carrier's claims were barred by the anti-subrogation clause in Stanley's contract with the carrier. The exculpatory clause upon which Stanley relied provided as follows:

> "**No subrogation**. Customer does hereby for himself / herself and other parties claiming under him/her release and discharge [Stanley] from and against all claims arising from hazards covered by Customer's insurance, it being expressly agreed and understood that no insurance company or insurer will have any right of subrogation against [Stanley]."

The carrier, on the other hand, argued that for the same reasons an exculpatory clause is invalid under Minnesota law as it applies to intentional or willful and wanton conduct, an anti-subrogation clause is invalid as it applies to similar claims. The Trial Court agreed.

First, the Court reasoned that:

> "Under the equitable doctrine of subrogation, the insurer steps into the shoes of the insured. As a result, the rights of the insurer are identical to the rights of its insured… Thus, an insured may as a practical matter defeat the subrogation rights of her insurer by settling or releasing her claims against the tortfeasor…. Here, however, {Plaintiff} did not relinquish her right to sue Stanley for intentional, willful or wanton conduct. As the Eighth Circuit held, the exculpatory clause in the {subject} contract is unenforceable under Minnesota law to the extent that it applies to {Plaintiff's} claim for willful and wanton negligence…"

Consequently, the Court concluded:

> "Logically, then, because {Plaintiff} retains the right to sue Stanley for willful and wanton negligence, her insurer likewise retains the right to bring a subrogation action against Stanley for the same conduct."

Moreover, the Court explained:

> "From the standpoint of deterrence, there is no reason to distinguish between exculpatory clauses and anti-subrogation clauses. In this case, for example, enforcing the exculpatory clause would leave {Plaintiff} – and not Stanley – to suffer the consequences of Stanley's willful and wanton negligence. Enforcing the anti-subrogation clause would leave {Plaintiff's} insurer – and not Stanley – to suffer the consequences of Stanley's willful and wanton negligence. If *either* clause is enforced, then, Stanley would be insulated from being held accountable for its willful and wanton negligence."

Finally, the Court rejected Stanley's argument that such clauses deter litigation and allow parties to plan their affairs by obtaining insurance to cover losses. Analyzing this argument, the Court observed that the argument applies with equal or greater force to other exculpatory clauses. Yet, Minnesota courts do not enforce exculpatory clauses except as applied to ordinary negligence.

Accordingly, this case is noteworthy because it answers a question of first impression under Minnesota law to wit: is an anti-subrogation clause in a contract subject to the same rules and limitations as any other exculpatory clause in that contract? The short answer in Minnesota is, "yes." As a result, because in Minnesota a claim for willful or wanton negligence is not barred by a contractual exculpatory clause, a subrogation claim for willful and wanton negligence is not barred by a contractual waiver of subrogation clause. The bottom line is that in Minnesota, public policy considerations bar the enforcement of *any* exculpatory clause against a claim of willful and wanton negligence.