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ALIVE AND KICKING: THE UNDERTAKER DOCTRINE IN ALARM AND SECURITY COMPANY LITIGATION

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When property damage results from the failure of an alarm or security system, the subrogation investigation is often stopped dead in its tracks due to severe contractual limitations of liability. If the damaged party was *not* a party to that contract, most courts will not apply those limitations. The question remains whether an alarm or security company owes a duty to persons with whom it did not contract? The security company will argue it owed no duty, which is the first element to be proven in a negligence claim. That argument can be met with a visit from the undertaker… doctrine.

THE DOCTRINE EXPLAINED

The undertaker doctrine holds that one who undertakes to render services for the protection of a third person or his things, whether the duty arose by contract or otherwise, owes a duty to persons whom the undertaker reasonably foresees could be damaged by its negligence. *See* Restatement of Torts (2d) § 324A (1965). A recent decision from one of the country's most populous states makes it clear that the undertaker doctrine is alive and well.

FLORIDA DECISION

In *Travelers Insurance Company v. Securitylink from Ameritech, Inc.*, 995 So. 2d 1175 (Fla. 3d DCA Dec. 10, 2008), the plaintiff was the subrogee of a warehouse owner that sustained a theft loss. The security company delayed in responding to the alarms, and then when on site failed to notice the theft in progress. The warehouse owner was in privity of contract with the alarm company. The alarm company was in privity of contract with the security company. No privity of contract existed between the warehouse owner and the security company. The security company filed a motion to dismiss the case arguing it owed no duty to the warehouse owner. The trial court agreed and dismissed the case. On appeal, the decision was reversed, citing to the undertaker doctrine. In so ruling, the court stated the following:

> The security company contends that it owed a duty only to the alarm company with whom it contracted. However, Florida law is well settled that a non-contracting party may bring an action for breach of a contractual duty when the party is the intended beneficiary of the contract. …. Further, negligent performance of inspections may give rise to a cause of action [citations omitted].

The *Travelers* court concluded that a cause of action may be maintained against an alarm or security company in certain circumstances:

> (a) if the security company failed to reasonably perform its obligation to respond and inspect the warehouse premises; (b) the warehouse owner suffered harm because it relied on the security company reasonably performing these services; and (c) the harm suffered is directly attributable to the security company's failure to reasonably perform these services.

The court then cited to *Clay Electric Cooperative, Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003), wherein the Florida Supreme Court used the standard set forth in section 324A of the Restatement (Second) of Torts (1965), which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize

> as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm suffered because of reliance of the other or the third person upon the undertaking.
>
> This standard is commonly referred to as the "undertaker doctrine."

Id. See also Burns International Security Services Inc. of Florida v. Philadelphia Indemnity Insurance Company, 899 So. 2d 361 (Fla. 4th DCA 2005) (affirming jury verdict for subrogee of warehouse tenant against security company for allowing theft property stored in a warehouse); *Wells Fargo Guard Services, Inc. v. Nash,* 654 So. 2d 155 (Fla. 1st DCA 1995), *quashed on other grounds,* 678 So. 2d 1269 (Fla. 1996) (First District held Well Fargo liable to a party with whom it was not in privity, a finding undisturbed by the Florida Supreme Court).

OTHER STATES

North Carolina and Illinois also apply the undertaker doctrine in alarm/security cases. In both states, the issue is not whether there was privity of contract, but whether the harm to the damaged party was foreseeable. North Carolina has a six-factor test in the alarm/security context, with foreseeability as the touch stone:

> (1) [T]he extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

Holshouser v. Shaner Hotel Group Properties One Ltd., 518 S.E.2d 17 (N.C.App. 1999) (citing *Ingle v. Allen,* 71 N.C.App. 20, 27, 321 S.E.2d 588, 594 (1984) (quoting *Leasing Corp. v. Miller,* 45 N.C.App. 400, 406-07, 263 S.E.2d 313, 318 (1980)).

Similarly, Illinois focuses on foreseeability, not privity. *Scott & Fetzer, Inc. v. Montgomery Ward & Co.,* 112 Ill.2d 378, 493 N.E.2d 1022 (1986) (allowing building tenants to sue alarm contractor in privity with neighboring tenant for fire damages, noting the adjacent tenants' losses were "highly foreseeable").

CONCLUSION

If your subrogation case involves an alarm or security company that had no contractual duty to your insured, don't assume you are dead in the water. Thanks to the undertaker doctrine, your case may be very much alive.