Marquette Law Review

Volume 101
Issue 2 *Winter 2017*

Article 7

Codify This: Exculpatory Contracts in Wisconsin Recreational Businesses

Blake A. Nold

CODIFY THIS: EXCULPATORY CONTRACTS IN WISCONSIN RECREATIONAL BUSINESSES

It is common practice for recreational businesses, such as ski resorts or fitness centers, to require their customers to sign a release of liability form. The purpose of this release form is to relieve the business from any potential liability in the event a customer suffers an injury. However, since 1982, the Wisconsin Supreme Court has yet to uphold an exculpatory contract. Rather than attempting to lay out principles and guidelines for how to draft an exculpatory agreement—in hopes that it will be ruled enforceable—this Comment proposes that Wisconsin recreational businesses, like ski resorts or gyms, should not require customers to sign a release of liability form.

I. INTRODUCTION

When consumers decide to hit the slopes or sign up for that new gym membership when the New Year hits, more often than not, they are required to sign a release of liability form. A release form, i.e., exculpatory contract, is a "contract in which one party agrees to release . . . another from potential tort liability for future conduct covered in the agreement."[1] Businesses will rely on these release forms in order to limit their exposure to lawsuits.[2] The Wisconsin Supreme Court defines exculpatory contracts as "contracts which relieve a party from liability for harm caused by his or her own negligence."[3] Examining the cases heard before the Wisconsin Supreme Court regarding exculpatory contracts, the following three main principles have been cited when determining the validity of exculpatory contracts: (1) "[exculpatory] contracts are not favored by the law";[4] (2) an exculpatory clause must "be construed strictly against the party seeking to rely on [it]";[5] and (3) courts will "examine the facts and circumstances of each exculpatory contract with special care to determine whether enforcement of the exculpatory contract in the individual case contravenes public policy."[6] These three principles represent the Wisconsin Supreme Court's attempt to balance both principles of contract and tort law.[7]

---

1. Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still a Place for Their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 580 (2003).

2. Keith Bruett, *Can Wisconsin Businesses Safely Rely upon Exculpatory Contracts to Limit Their Liability?*, 81 MARQ. L. REV. 1081, 1081 (1998).

3. Merten v. Nathan, 108 Wis. 2d 205, 210, 321 N.W.2d 173, 176 (1982).

4. *Id.* at 210–11; Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 81, 557 N.W.2d 60, 62 (1996); Richards v. Richards, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118, 121 (1994); *accord* Roberts v. T.H.E. Ins. Co., 2016 WI 20, ¶ 48, 367 Wis. 2d 386, 879 N.W.2d 492; Atkins v. Swimwest Family Fitness Ctr., 2005 WI 4, ¶ 12, 277 Wis. 2d 303, 691 N.W.2d 334; Dobratz v. Thomson, 161 Wis. 2d 502, 514, 468 N.W.2d 654, 658 (1991); Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 117 Wis. 2d 587, 600, 345 N.W.2d 417, 423 (1984) (quoting Pride v. S. Bell Tel. & Tel. Co., 138 S.E.2d 155, 157 (S.C. 1964)); Arnold v. Shawano Cty. Agric. Soc′y, 111 Wis. 2d 203, 209, 330 N.W.2d 773, 777 (1983), *overruled on other grounds by* Green Spring Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987). The rationale behind why exculpatory contracts are not favored by the law is "because exculpatory contracts tend to allow conduct . . . below the acceptable standard of ordinary and reasonable care." *Dobratz*, 161 Wis. 2d at 514.

5. *Merten*, 108 Wis. 2d at 211; *accord Roberts*, 2016 WI 20, ¶ 48; *Atkins*, 2005 WI 4, ¶ 12; *Richards*, 181 Wis. 2d at 1015; *Disc. Fabric House of Racine*, 117 Wis. 2d at 600; *Arnold*, 111 Wis. 2d at 209.

6. *Merten*, 108 Wis. 2d at 211.

7. *Id.* at 212; *Atkins*, 2005 WI 4, ¶ 14; *Richards*, 181 Wis. 2d at 1016; *Dobratz*, 161 Wis. 2d at 514–15.

Despite the fact that courts attempt to strike a balance between principles of contract law and tort law,[8] the Wisconsin Supreme Court, since 1982, has considered the validity of an exculpatory contract in a total of eight cases, and has—in all eight cases—held each exculpatory contract unenforceable.[9] And while the holdings have been consistent, the Wisconsin Supreme Court's analysis regarding the enforceability of exculpatory contracts has evolved.[10] This makes it extremely difficult for businesses to prevail and convince the Wisconsin Supreme Court (or any circuit court under it for that matter) to find the exculpatory contract enforceable.

Given the uphill battle in attempting to convince the Wisconsin Supreme Court to uphold an exculpatory contract, this Comment argues that Wisconsin recreational businesses should not require their customers to sign a release of liability form because: (a) Wisconsin case law does not favor exculpatory contracts; and (b) various Wisconsin statutes offer immunity/protection to those who fulfill their duties under the applicable statute.

This Comment proceeds as follows. Part II examines the Wisconsin Supreme Court's analysis of exculpatory contracts under both contract law and public policy grounds. I also establish a timeline mapping out exactly how the Wisconsin Supreme Court's analysis has evolved. In Part III, I discuss *Roberts v. T.H.E. Insurance Company*, a case recently decided by the Wisconsin Supreme Court.[11] Additionally, I analyze the exculpatory language found in a gym membership agreement located in Milwaukee, Wisconsin, and apply the analysis the Wisconsin Supreme Court undertook in *Roberts*. Specifically, I demonstrate just how difficult it is for businesses to prevail when relying on an exculpatory contract, given the current analysis undertaken by the Wisconsin Supreme Court. I then assess whether or not a court would find the exculpatory language enforceable. Part IV examines a specific Wisconsin statute that affords ski resorts protection, and thus, eliminates a need for customers to sign a release of liability form. I also briefly return to *Roberts v. T.H.E. Insurance Company*, which supports the notion that an exculpatory contract is not needed

8. *See Atkins*, 2005 WI 4, ¶ 14; *Richards*, 181 Wis. 2d at 1016; *Dobratz*, 161 Wis. 2d at 514–15; *Merten*, 108 Wis. 2d at 212.

9. *See* Alexander T. Pendleton, *Enforceable Exculpatory Agreements: Do They Still Exist?*, WIS. LAW., Aug. 2005, at 17; *see also Roberts*, 2016 WI 20, ¶ 4; *Atkins*, 2005 WI 4, ¶ 2; *Yauger*, 206 Wis. 2d at 89; *Richards*, 181 Wis. 2d at 1020; *Dobratz*, 161 Wis. 2d at 526; *Disc. Fabric House of Racine*, 117 Wis. 2d at 604; *Arnold*, 111 Wis. 2d at 214; *Merten*, 108 Wis. 2d at 215.

10. *See Yauger*, 206 Wis. 2d at 86 (recognizing that earlier cases had resolved the issue based on contract but determined that public policy is actually the "germane analysis"); *Atkins*, 2005 WI 4, ¶ 13 (confirming that public policy is the "germane analysis").

11. 2016 WI 20.

when a business is afforded statutory protection.[12] Finally, Part V sets forth a proposal that would eliminate the need for recreational businesses in Wisconsin to require their customers to sign a release of liability form.

II. TIMELINE OF THE WISCONSIN SUPREME COURT'S ANALYSIS OF EXCULPATORY CONTRACTS

In this Part, I examine the Wisconsin Supreme Court's analysis of exculpatory contracts under both contract law and public policy grounds, while establishing a timeline that lays out exactly how the court's analysis has evolved. Historically, exculpatory contracts have been analyzed under both principles of contract law and public policy grounds.[13] However, recent cases decided by the Wisconsin Supreme Court have not emphasized the contractual analysis and have claimed that public policy is the germane analysis.[14] Nonetheless, the court will still conduct its analysis under principles of contract law if needed.[15]

A. Historical Approach: Exculpatory Contracts Analyzed Under Principles of Contract Law and Public Policy (1965–1994)

From 1965 to 1994, the Wisconsin Supreme Court analyzed exculpatory contracts under both a contractual basis and public policy.[16] However, the analysis undertaken using principles of contract law versus the analysis undertaken using public policy is distinguishable.[17] In order to differentiate between the two, it is helpful to examine exculpatory contracts resolved under either (i) principles of contract law or (ii) public policy.

1. Exculpatory Contracts Resolved under Principles of Contract Law

When an exculpatory contract is enforceable under public policy grounds, the Wisconsin Supreme Court will "look to the contract itself to consider its

12. *See id.* ¶ 47.

13. *See Yauger*, 206 Wis. 2d at 86.

14. *Id.*; *Roberts*, 2016 WI 20, ¶ 49.

15. *See Roberts*, 2016 WI 20, ¶ 50; Arnold v. Shawano Cty. Agric. Soc′y, 111 Wis. 2d 203, 211, 330 N.W.2d 773, 777 (1983), *overruled on other grounds by* Green Spring Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987).

16. *See* Richards v. Richards, 181 Wis. 2d 1007, 1011, 513 N.W.2d 118, 119 (1994); Dobratz v. Thomson, 161 Wis. 2d 502, 506–07, 468 N.W.2d 654, 655 (1991); Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 117 Wis. 2d 587, 600, 345 N.W.2d 417, 423 (1984); *Arnold*, 111 Wis. 2d at 210–11; Merten v. Nathan, 108 Wis. 2d 205, 206, 321 N.W.2d 173, 174 (1982).

17. *See Merten*, 108 Wis. 2d at 214–15.

validity" under contract principles.[18] The court will examine the facts and circumstances of each case to determine whether the contract expresses the intent of the parties.[19] If in fact the contract fails to express the intent of the parties, the court will not enforce the exculpatory agreement.[20] Perhaps even more significant, the Wisconsin Supreme Court disfavors any exculpatory agreement that is broad and general in terms and will only bar "claims that are within the contemplation of the parties when the contract was executed."[21] In order to shed some light on these principles, the following paragraphs illustrate the two leading exculpatory contract cases analyzed under principles of contract law decided by the Wisconsin Supreme Court.

In *Arnold v. Shawano County Agricultural Society*, racecar driver Leroy Arnold and his wife, Karen Arnold, sued Shawano County Agricultural Society, Shawano County, and the Shawano County Fair Board (track owners and race promoters), seeking to recover damages for the severe brain damage and personal injuries that Mr. Arnold sustained as a result of the accident.[22] The defendants moved for summary judgment, pointing to an exculpatory contract signed by Mr. Arnold.[23] In its analysis, the Wisconsin Supreme Court first looked to public policy.[24] After determining the exculpatory contract was not invalid under public policy grounds, the court then looked to the contract itself to determine its validity.[25]

Looking at the facts and circumstances of the agreement in order to determine whether the exculpatory contract expressed the intent of the parties,[26] the court stated, "[t]he determination of intent of the parties to a release, and

18. *Dobratz*, 161 Wis. 2d at 520 (quoting *Arnold*, 111 Wis. 2d at 211). *Dobratz* paved the way in terms of exculpatory agreements being analyzed under principles of contract. *See, e.g.*, *Richards*, 181 Wis. 2d at 1014.

19. *Arnold*, 111 Wis. 2d at 211; Dobratz, 161 Wis. 2d at 520.

20. *Arnold*, 111 Wis. 2d at 211. The Wisconsin Supreme Court in *Dobratz* framed the issue in the following manner: "[T]his court must determine whether the claim being made by the plaintiff was clearly within the contemplation of the parties when the contract was executed. Only if it is apparent that the parties . . . knowingly agreed to excuse the defendants from liability will the contract be enforceable." *Dobratz*, 161 Wis. 2d at 520 (citation omitted).

21. *Arnold*, 111 Wis. 2d at 211 (citations omitted); *accord Dobratz*, 161 Wis. 2d at 520. In *Dobratz*, the Wisconsin Supreme Court reiterated the fact that "the court will closely scrutinize an exculpatory contract and construe it strictly against the defendants." *Id.*

22. *Arnold*, 111 Wis. 2d at 204–05.

23. *Id.* at 206–07.

24. *See id.* at 210–11.

25. *Id.* at 211 (examining two cases that resolved an exculpatory contract issue under public policy before moving on to contract law).

26. *Id.*

the scope of a release, is a question of fact for the jury."[27] Looking at Karen Arnold's affidavit, the court noted that Mrs. Arnold in fact alleged not that her husband's injuries were caused by the accident, but rather by the spraying of toxic chemicals during the rescue mission.[28] Examining the contract itself, the Wisconsin Supreme Court found that "an issue of material fact exists as to whether the risk of negligent rescue operations was within the contemplation of the parties at the time the exculpatory contract was executed," and therefore appropriate for the trier of fact to decide.[29] Specifically, the exculpatory contract stated that it covered "any loss, liability or damages whether caused by the negligence of releasees or otherwise."[30] As a result, the court concluded that, even though an attempt was made to construct an all-inclusive contract, the exculpatory contract was ambiguous.[31] Thus, the Wisconsin Supreme Court affirmed the court of appeals, holding that the exculpatory contract did not bar the claims.[32]

Eight years later, the Wisconsin Supreme Court examined and resolved another exculpatory contract under principles of contract law.[33] In *Dobratz v. Thomson*, Mark Dobratz, a member of a water ski show, was struck and killed by a boat during one of the shows.[34] Brenda Dobratz, Mark Dobratz's widow, filed negligence claims against club officers, various members who participated in the show, and the driver of the boat that struck him.[35] The defendants moved for summary judgment, claiming the exculpatory contract signed by Mark Dobratz barred the claims.[36] Brenda Dobratz argued that the terms of the contract were unclear and ambiguous such that the exculpatory contract should be rendered unenforceable as a matter of law.[37]

Following the blueprint in *Arnold*, the Wisconsin Supreme Court first looked to public policy.[38] The court here found that the contract was not void

27. *Id.* at 212.

28. *Id.*

29. *Id.*

30. *Id.* (footnote omitted).

31. *Id.* at 214.

32. *See id.* at 215.

33. *See* Dobratz v. Thomson, 161 Wis. 2d 502, 468 N.W.2d 654 (1991).

34. *Id.* at 507–08.

35. *Id.* at 508. Neither the club nor the insurance carrier was named in the suit because it did not carry any applicable insurance; however, the individual defendants' insurers were joined as parties. *Id.*

36. *Id.*

37. *Id.* at 520.

38. *Id.* at 515.

on public policy grounds, and therefore looked to the contract itself.[39] Similar to *Arnold*, the court held that provisions of the contract at issue here were broad and general.[40] The Wisconsin Supreme Court reasoned that, "[l]ike the contract in *Arnold,* this contract did not 'set out any particular conditions concerning the nature of [the activity] and the [location] where it [was] to take place.'"[41] More specifically, the exculpatory contract did not specify the kind of stunts Mr. Dobratz would perform, what level of difficulty or danger might be associated with the stunts, and no information regarding these concerns was provided to Mr. Dobratz prior to signing.[42]

However, distinguishable from *Arnold*, the Wisconsin Supreme Court held that, as a matter of law, an exculpatory contract never existed.[43] As a result, unlike *Arnold*, the trier of fact did not need to determine whether an exculpatory contract existed in the first place.[44] Additionally, in an attempt to offer guidance when drafting exculpatory contracts, the Wisconsin Supreme Court stated:

> [A]lthough we do not intend to create a "magic words" rule, we consider that it would be very helpful for such contracts to set forth in clear and express terms that the party signing it is releasing others for their negligent acts or, where the contract includes an assumption of risk clause, is assuming the risk of harm caused by the negligent acts of others.[45]

While some may have taken this advice when drafting exculpatory contracts, it will become evident that heeding this advice is by no means a sure thing.

2. Exculpatory Contracts Resolved under Public Policy

The Supreme Court of Wisconsin recognizes that public policy is not an easily-defined concept.[46] The concept "embodies the community common

39. *Id.* at 519–20. The court here stated, "In *Arnold,* we indicated that where an exculpatory contract is not void and unenforceable on public policy grounds[] [w]e . . . must look to the contract itself." *Id.* at 520 (quoting Arnold v. Shawano Cty. Agric. Soc′y, 111 Wis. 2d 203, 211, 330 N.W.2d 773, 777 (1983), *overruled on other grounds by* Green Spring Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987)).

40. *Id.* at 522.

41. *Id.* (alterations in original) (quoting *Arnold*, 111 Wis. 2d at 211).

42. *Dobratz*, 161 Wis. 2d at 522.

43. *Id.* at 523.

44. *See id.* Therefore, unlike *Arnold*, it was not necessary "for the trial court to determine whether in fact there existed an exculpatory contract even though [the court] could not find an enforceable exculpatory contract as a matter of law." *Id.*

45. *Id.* at 525.

46. Merten v. Nathan, 108 Wis. 2d 205, 213, 321 N.W.2d 173, 178 (1982).

sense and common conscience."[47] In order to determine whether an exculpatory contract violates public policy, the court must look at the facts and circumstances of each case.[48] In determining the validity of an exculpatory contract under public policy, the Wisconsin Supreme Court attempts to balance "the tension between principles of contract law and tort law inherent in any exculpatory contract."[49]

Principles of contract law justify exculpatory contracts.[50] The law of contract is based on the key fundamental principle of freedom of contract and that individuals should have the opportunity to "govern their own affairs without governmental interference."[51] Moreover, "[f]reedom of contract requires that [individuals who] engage in the bargaining process [do so] 'freely and voluntarily.'"[52] Each party is then protected by the courts, which ensure that the promises will be performed.[53] One scholar has pointed to the importance of freedom of contract by citing the United States Supreme Court, which stated:

> 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.[54]

On the other hand, principles of tort law discourage the enforceability of exculpatory contracts.[55] "The law of torts is directed toward compensation of individuals for injuries sustained as the result of the unreasonable conduct of another."[56] Additionally, tort law "serves the 'prophylactic' purpose of

47. *Id.*

48. *Dobratz*, 161 Wis. 2d at 514.

49. *Id.* at 515; *accord* Bruett, *supra* note 2, at 1083 ("Courts assessing the validity of exculpatory clauses attempt to balance 'the tension between the principles of contract and tort law that are inherent in such [] agreement[s].'" (alterations in original) (quoting Richards v. Richards, 181 Wis. 2d 1007, 1016, 513 N.W.2d 118, 121 (1994))).

50. *See* Bruett, *supra* note 2, at 1083.

51. *Merten*, 108 Wis. 2d at 211.

52. Bruett, *supra* note 2, at 1083 (quoting *Richards*, 181 Wis. 2d at 1016).

53. *Merten*, 108 Wis. 2d at 211.

54. Bruett, *supra* note 2, at 1083 (quoting Baltimore & Ohio S.W. R.R. Co. v. Voigt, 176 U.S. 498, 505 (1900)).

55. *Id.* at 1084.

56. *Merten*, 108 Wis. 2d at 211.

preventing future harm."[57] Furthermore, payment of damages functions as an incentive to act in accordance with a reasonable standard of care.[58]

Balancing the principles of contract and tort law, courts will find that an exculpatory contract violates public policy when "the public policy 'of imposing liability on persons whose conduct creates an unreasonable risk of harm' outweighs the public policy of 'freedom of contract.'"[59] However, as noted by the Wisconsin Supreme Court in one of its earliest cases regarding exculpatory contracts, the balancing is nothing short of a challenge. The court stated:

> Adherence to principles of contract law would generally lead a court to enforce an exculpatory agreement without passing on the substance of the agreement. Adherence to principles of tort law would tend to make a court reluctant to allow parties to shift by contract the burden of negligent conduct from the actor to the victim who has no actual control or responsibility for the conduct causing the injury. The rules governing exculpatory contracts reflect the uneasy balance between these principles of contract and tort law.[60]

Nevertheless, Wisconsin's adoption of section 195 of the Restatement (Second) of Contracts somewhat eliminated this difficulty in balancing.[61] According to section 195 of the Restatement—concerning contractual terms exempting liability for harm caused intentionally, recklessly, or negligently—exculpatory contracts can be found unenforceable on grounds of public policy; section 195 states:

> (1) A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.
>
> (2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if
>
> (a) the term exempts an employer from liability to an employee for injury in the course of his employment;
>
> (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or

57. *Id.*

58. *Id.* at 211–12; Bruett, *supra* note 2, at 1084.

59. Richards v. Richards, 181 Wis. 2d 1007, 1016, 513 N.W.2d 118, 122 (1994) (quoting *Merten*, 108 Wis. 2d. at 215).

60. *Merten*, 108 Wis. 2d at 212 (footnote omitted).

61. *See id.*

> (c) the other party is similarly a member of a class protected against the class to which the first party belongs.
>
> (3) A term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability.[62]

Additionally, *Comment a* of section 195 of the Restatement provides the court with an out.[63] The Wisconsin Supreme Court has noted that these categories "are not intended as an exhaustive list of situations in which exculpatory contracts are unenforceable on the grounds of public policy."[64] As a result, the Wisconsin Supreme Court has the ability to craft its own rules and factors for each case.[65] To clarify the public policy analysis just explained, and to demonstrate the court's broad discretion, it may be helpful to illustrate a case decided by the Wisconsin Supreme Court.

In *Richards v. Richards*, Leo Richards, an "over-the-road truck driver" for Monkem Company, and his wife, Jerilyn Richards, discussed the possibility of her riding along as a passenger with him.[66] However, before Mrs. Richards could ride as a passenger, Monkem Company required her to sign a "Passenger Authorization" form.[67] The form not only served as the Company's authorization form for passengers to ride in a company truck, but it also served as the passenger's release of all claims against Monkem.[68] While accompanying her husband on one of his scheduled trips, the truck overturned, injuring Mrs. Richards.[69] The Wisconsin Supreme Court held that the exculpatory language in Monkem's Passenger Authorization form violated public policy, and thus, was unenforceable.[70] In reaching this conclusion, the Supreme Court of Wisconsin looked at a combination of three factors.[71]

---

62. RESTATEMENT (SECOND) OF CONTRACTS § 195 (AM. LAW INST. 1981).

63. *See id.* § 195 cmt. a.

64. *Merten*, 108 Wis. 2d at 213; *see* Dobratz v. Thomson, 161 Wis. 2d 502, 516, 468 N.W.2d 654, 659 (1991).

65. Bruett, *supra* note 2, at 1086; *see, e.g.*, Richards v. Richards, 181 Wis. 2d 1007, 1016, 513 N.W.2d 118, 122 (1994) (applying three different factors).

66. *Richards*, 181 Wis. 2d at 1011–12.

67. *Id.* at 1012.

68. *Id.*

69. *Id.* at 1014.

70. *Id.* at 1020.

71. *Id.* at 1016.

First, the court looked at the fact that the Passenger Authorization form served a dual function and was not clearly identified.[72] The court noted that, in order to avoid confusion, the release form should have been clearly labeled and distinguishable from the ride along form.[73] Second, the release Mrs. Richards signed was broad and all-inclusive.[74] Courts have held that "[a]n exculpatory agreement will be held to contravene public policy if it is so broad 'that it would absolve [the defendant] from any injury to the [plaintiff] for any reason.'"[75] In this case, the release excused "intentional, reckless, and negligent conduct" by the Company, another entity, and all "affiliated, associated, or subsidiary companies, partnerships, individuals, or corporations, and all other persons, firms or corporations."[76] Additionally, the release was not limited to a specified vehicle or for a specific period of time.[77] Third, the contract was a standardized agreement, which offered Mrs. Richards zero opportunity to negotiate or bargain.[78] The court reasoned that, "[h]ad [Mrs. Richards] been afforded the opportunity to negotiate a release, she might have declined to release the Company from liability."[79]

Finally, the court balanced principles of contract law and tort law.[80] The Wisconsin Supreme Court concluded that the combination of the three factors demonstrated "that adherence to the principle of freedom of contract is not heavily favored," and thus, the principle of tort law prevailed.[81] As a result, the court held that the contract violated public policy, and was therefore unenforceable.[82]

---

72. *Id.* at 1017. The form served as an authorization form for a passenger to ride along and as a general release of liability form. *Id.*

73. *Id.*

74. *See id.* "The very breadth of the release raises questions about its meaning and demonstrates its one-sidedness; it is unreasonably favorable to the Company, the drafter of the contract." *Id.* at 1018.

75. *Id.* at 1015 (alterations in original) (quoting Coll. Mobile Home Park & Sales, Inc. v. Hoffmann, 72 Wis. 2d 514, 521–22, 241 N.W.2d 174, 178 (1976)).

76. *Id.* at 1017–18.

77. *Id.* at 1018.

78. *See id.* at 1019 (reasoning that while the release was "printed in a standardized form," this alone did not invalidate the release; rather, Mrs. Richard's lack of opportunity to bargain on top of the breadth of the release lead to its invalidation).

79. *Id.* at 1020.

80. *See id.*

81. *See id.*

82. *Id.*

B. Germane Analysis: A Shift to Public Policy (1996–2017)

Two years after *Richards* was decided, the Wisconsin Supreme Court took up yet another exculpatory contracts case: *Yauger v. Skiing Enterprises, Inc.*[83] In this case, Michael Yauger purchased a family ski pass.[84] On the application form, Yauger filled in the names of his daughters and wife.[85] Immediately below this information, the application contained the following exculpatory clause at issue: "There are certain inherent risks in skiing and that we agree to hold Hidden Valley Ski Area/Skiing Enterprises Inc. harmless on account of any injury incurred by me or my [f]amily member on the Hidden Valley Ski Area premises."[86] Later that ski season, Tara, one of Yauger's daughters, was skiing at Hidden Valley when she ran into a concrete base of a chair lift.[87] The Yaugers filed a negligence suit, claiming Hidden Valley failed to pad the concrete base.[88] After both the trial court and court of appeals held that the exculpatory clause barred the Yaugers' negligence claim, the case made its way to the Wisconsin Supreme Court.[89]

In this landmark case, the Wisconsin Supreme Court adopted its new analysis regarding exculpatory contracts.[90] The court recognized exculpatory contracts were being resolved under both contract law and public policy[91]: "Although we recognize that *Dobratz* and *Arnold* resolved the issue on a contractual basis, *Richards* reached the same result, yet departed from the contractual analysis and rested on public policy. We conclude that public policy is the *germane* analysis."[92]

Distinguishable from *Richards*, here the court looked at two factors to support its holding that the exculpatory contract violated public policy: "First, the waiver must clearly, unambiguously, and unmistakably inform the signer of what is being waived. Second, the form, looked at in its entirety, must alert the

83. 206 Wis. 2d 76, 557 N.W.2d 60 (1996).

84. *Id.* at 79.

85. *Id.*

86. *Id.* This was the first paragraph out of five. The waiver paragraphs "did not stand out from the rest of the form," nor did they "require a separate signature." *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 79–80.

90. *See id.* at 84–89.

91. *See id.* at 81–84.

92. *Id.* at 86 (emphasis added). "In other words, the notion of 'freedom of contract' has been 'de-emphasized' in favor of other considerations." Richard Schuster, *Do Liability Waivers Really Work?*, MATTHIESEN, WICKERT & LEHRER, S.C.: BLOG (Sept. 30, 2013), https://www.mwl-law.com/do-liability-waivers-really-work/ [https://perma.cc/BZ87-PMYR].

signer to the nature and significance of what is being signed."[93] The court held that the waiver failed both factors, and as a result, the waiver was ruled void as against public policy.[94]

The Wisconsin Supreme Court's decision to adopt public policy as the germane analysis[95] is the court's attempt to rectify a messy situation in the world of exculpatory contracts. Years later, in 2005, the court confirmed that public policy is the germane analysis in *Atkins v. Swimwest Family Fitness Center*.[96]

In *Atkins*, a local physician, Wilson, visited Swimwest for physical therapy.[97] Before entering the facility, Wilson was required to fill out a guest registration card which contained a "Waiver Release Statement."[98] Without asking any questions, Wilson signed the card and entered the pool area.[99] Soon thereafter, an employee saw Wilson lying motionless at the bottom of the pool.[100] A Swimwest employee pulled Wilson from the pool and began administering CPR.[101] Wilson died at the hospital the next day.[102] The autopsy indicated the cause of death was drowning.[103] Wilson's only child, Benjamin Atkins, filed suit for wrongful death.[104] In order to clarify Wisconsin's law regarding the enforceability of exculpatory contracts, the court of appeals certified the appeal to the Wisconsin Supreme Court.[105]

First, the Supreme Court of Wisconsin undertook a "contractual inquiry" to determine whether the language of the contract covered the activity.[106] Because the language in the contract did cover the activity, the court proceeded to a

93. *Yauger*, 206 Wis. 2d at 84.

94. *See id.* at 89. First, the waiver failed to clearly inform the signer that he was waiving all claims because the form was absent any language that would indicate "Yauger's intent to release Hidden Valley from its own negligence." *Id.* at 84. Second, the form failed to communicate the significance of the form being signed because (a) the form served two purposes; (b) the waiver section did not stick out; and (c) the waiver section did not require its own signature. *Id.* at 79, 87.

95. *Id.* at 86.

96. 2005 WI 4, ¶ 13, 277 Wis. 2d 303, 691 N.W.2d 334.

97. *Id.* ¶ 3.

98. *Id.* ¶¶ 3–4.

99. *Id.* ¶ 5.

100. *Id.* ¶ 7.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* ¶ 8.

105. *Id.* ¶ 10. Initially, the circuit court held that the form Wilson signed was enforceable, and thus, protected Swimwest from any liability for Wilson's death. *Id.* ¶ 9.

106. *See id.* ¶ 13.

public policy analysis, and confirmed that such analysis "remains the 'germane analysis' for exculpatory clauses."[107] However, rather than resolving the conflicting approaches in *Yauger* and *Richards*,[108] the court applied factors from both cases, and held that the exculpatory contract violated public policy.[109] The court concluded that: (1) the waiver of liability form was overly broad and all-inclusive (*Richards* and *Yauger*);[110] (2) the form served two purposes—guest registration and waiver of liability (*Richards*);[111] and (3) Wilson did not have an opportunity to bargain (*Richards*).[112] As a result, the Wisconsin Supreme Court once again held that the exculpatory language was contrary to public policy, and thus, unenforceable.[113]

III. THE CONSISTENT HOLDING: "VOID AS AGAINST PUBLIC POLICY"

Fast forward to March 2016. In *Roberts v. T.H.E. Insurance Company*, the Wisconsin Supreme Court decided its most recent case regarding the enforceability of exculpatory contracts.[114] In this Part, I examine *Roberts* in order to illustrate the most recent analysis undertaken by the Wisconsin Supreme Court when resolving the enforceability of exculpatory contracts. I then analyze the exculpatory language found in a gym membership contract located in Milwaukee, Wisconsin. Applying the analysis the Wisconsin Supreme Court undertook in *Roberts*, I determine whether or not the court

107. *See id.*

108. One scholar has stated that "[t]he majority sidestepped resolving the conflicting approaches in those two cases" because, under either approach, the contract would violate public policy. Pendleton, *supra* note 9, at 18.

109. *Atkins*, 2005 WI 4, ¶ 18 ("Applying the factors from *Yauger* and *Richards*, we hold that Swimwest's exculpatory clause is in violation of public policy.").

110. *Id.* ¶ 18–19 ("The language chosen by Swimwest [was] not clear and could potentially bar any claim arising under any scenario."); *see also* Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 84, 557 N.W.2d 60, 63 (1996); Richards v. Richards, 181 Wis. 2d 1007, 1017, 513 N.W.2d 118, 122 (1994).

111. *Atkins*, 2005 WI 4, ¶ 23 ("Just as in *Richards* and *Yauger*, the exculpatory language appeared to be part of, or a requirement for, a larger registration form."); *see also Richards*, 181 Wis. 2d at 1017.

112. *Atkins*, 2005 WI 4, ¶ 18. While a Swimwest employee did inform Mrs. Wilson that the form included a waiver, in addition to Mrs. Wilson being given an opportunity to read the form and ask questions, "[t]his information alone . . . is not sufficient to demonstrate a bargaining opportunity. The form itself must provide an opportunity to bargain." *Id.* ¶ 25; *see also Richards*, 181 Wis. 2d at 1019.

113. *Atkins*, 2005 WI 4, ¶ 30.

114. *See* Roberts v. T.H.E. Ins. Co., 2016 WI 20, 367 Wis. 2d 386, 879 N.W.2d 492.

would find the exculpatory language in the gym membership contract enforceable.

A. Roberts v. T.H.E. Insurance Company

In *Roberts*, Patti Roberts was injured at a charity event when she was struck by a hot air balloon while waiting in line for a balloon ride.[115] The hot air balloon was tied to a pick-up truck and two trees.[116] The balloon-ride operator would raise the balloon to the length of the ropes and then lower it back down.[117] After Patti and her family got in line for a balloon ride, Sundog Ballooning (owner and operator of the hot air balloon) gave her a waiver of liability form.[118] While Roberts did in fact sign the release form, she did not return it to Sundog.[119] Due to heavy winds, a rope tied to the hot air balloon snapped, causing the balloon to veer towards the customers waiting in line.[120] As a result, Patti Roberts sustained injuries when she was struck by the hot air balloon's basket and knocked to the ground.[121]

Roberts filed suit against Sundog claiming that the balloon operator's negligence caused her injuries.[122] Sundog argued, "Roberts read the release, understood its importance, and understood she was waiving her right to bring a negligence claim."[123] Additionally, Sundog maintained that Patti Roberts failed to ask questions and had the opportunity to bargain.[124] In the end, the court held that the liability waiver form was void as against public policy, and thus, unenforceable.[125]

---

115. *Id.* ¶¶ 5–10.

116. *Id.* ¶ 7.

117. *Id.*

118. *Id.* ¶ 8.

119. *Id.* (noting that the signed form was actually found on the ground after Roberts was injured).

120. *Id.* ¶ 10.

121. *Id.*

122. *Id.* ¶ 13. As the court noted,

> [t]he evidence submitted to the circuit court demonstrated that defendant Kerry Hanson, the balloon operator, had limited experience with tethered ballooning before giving rides at Green Valley's event. Hanson testified in his deposition that he should have obtained information regarding weather fronts in the area. Had he known about the weather front on the day Roberts was injured, Hanson testified that he would have suspended the ride.

Id. ¶ 11.

123. *Id.* ¶ 57.

124. *Id.*

125. *See id.* ¶ 63.

In reaching its conclusion, the Wisconsin Supreme Court examined its previous rulings in *Richards, Yauger,* and *Atkins*.[126] Again, the court stated, "[i]f the contract covers the activity, we proceed to a public policy analysis, 'which remains the "germane analysis" for exculpatory clauses.'"[127] Moving to public policy, the court noted that the *Atkins* decision adopted a combination of the factors set forth in both *Yauger* and *Richards*.[128] Again, the factors set forth in *Atkins* included whether: "(1) the waiver was overly broad and all-inclusive; (2) the form served two functions and did not provide the signer adequate notification of the waiver's nature and significance; and (3) there was little or no opportunity to bargain or negotiate in regard to the exculpatory language in question."[129] This time around, the court reached its conclusion based on the first and third factors.[130]

First, the exculpatory contract was overly broad and all-inclusive.[131] In finding that the exculpatory contract was overly broad and all-inclusive, the court examined the following specific provisions:

> I expressly, willing, and voluntarily assume full responsibility for all risks of any and every kind involved with or arising from my participation in hot air balloon activities with Company whether during flight preparation, take-off, flight, landing, travel to or from the take-off or landing areas, or otherwise.
>
> Without limiting the generality of the foregoing, I hereby irrevocably release Company, its employees, agents, representatives, contractors, subcontractors, successors, heirs, assigns, affiliates, and legal representatives (the "Released Parties") from, and hold them harmless for, all claims, rights, demands or causes of action whether known or unknown, suspected or unsuspected, arising out of the ballooning activities.[132]

126. *Id.* ¶¶ 50–55. "Our prior decisions have also set forth the factors to apply in analyzing whether a contract is void as a matter of law." *Id.* ¶ 50.

127. *Id.* ¶ 49 (quoting Atkins v. Swimwest Family Fitness Ctr., 2005 WI 4, ¶ 13, 277 Wis. 2d 303, 691 N.W.2d 334 (citing Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 86, 557 N.W.2d 60, 64 (1996))).

128. *Id.* ¶ 55.

129. *Id.*

130. *See id.* ¶¶ 59–63.

131. *Id.* ¶ 59.

132. *Id.* ¶ 9.

Additionally, the court addressed the issue of whether Roberts would have contemplated that the waiver covered waiting in line for a balloon ride.[133]

Second, Mrs. Roberts had no opportunity to bargain or negotiate,[134] given the fact that she was *told*, in order to ride the hot air balloon, she must sign the form.[135] Moreover, the court noted that Sundog did not discuss with Roberts: the content of the waiver; any risk associated with the activity of riding hot air balloons; or any risks of watching others ride hot air balloons.[136] Additionally, Sundog did not ask if Roberts had any complaints or concerns regarding the waiver, and therefore, she was given no opportunity to bargain or negotiate the terms laid out.[137]

As seen in *Roberts*, rather than clarifying Wisconsin's law regarding the enforceability of exculpatory contracts—as had been requested by the court of appeals in *Atkins*[138]—the Wisconsin Supreme Court has continued to void exculpatory contracts.[139] Furthermore, the court has tailored its analysis to fit within each case, and has applied different factors to each.[140] This type of analysis exemplifies just how difficult it is for businesses to prevail when relying on an exculpatory contract.

B. The Wisconsin Supreme Court's Hypothetical Analysis of the Exculpatory Language Found in a Milwaukee Gym Membership Agreement

When the New Year hits, millions of people across America begin to make New Year's resolutions. For many Americans, that resolution often entails shedding some unwanted pounds. As a result, consumers will flock to their local gym eager to achieve their New Year's goal.[141] Nevertheless, before one

133. *Id.* ¶ 60 ("[I]t is not clear whether waiting in line for the ride is something Roberts would have contemplated as being covered by the waiver, especially because she was not required to return the waiver before she got into the line.").

134. *Id.* ¶ 61.

135. *Id.* ¶ 62 ("Roberts was *told* she would have to sign 'this document.'" (emphasis added)).

136. *Id.*

137. *Id.*

138. Atkins v. Swimwest Family Fitness Ctr., 2005 WI 4, ¶ 10, 277 Wis. 2d 303, 691 N.W.2d 334.

139. *See, e.g.*, *Roberts*, 2016 WI 20, ¶ 63.

140. *Compare id.* at ¶¶ 59–63, *with Atkins*, 2005 WI 4, ¶¶ 18–19, *and* Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 78, 557 N.W.2d 60, 61 (1996), *and* Richards v. Richards, 181 Wis. 2d 1007, 1016, 513 N.W.2d 118, 122 (1994).

141. Oliver St. John, *Can Gyms Retain New Year's Resolution Members?*, USA TODAY (Jan. 16, 2013), http://www.usatoday.com/story/money/personalfinance/2013/01/16/gyms-new-years-

may dive into his or her new workout routine, many gyms require consumers to fill out gym membership contracts.[142] However, given the status of Wisconsin's current law regarding exculpatory contracts, recreational business owners, specifically gym owners (for purposes of this Section), cannot safely rely upon exculpatory language or release waivers in order to avoid liability.[143] Using the analysis undertaken in *Roberts*, in this Section I examine a Milwaukee gym membership contract,[144] and evaluate whether or not a Wisconsin court would find the exculpatory language in the contract enforceable. In order to create a hypothetical lawsuit, I take facts from a recent case heard by California's Court of Appeal.[145]

In this "hypothetical" case, a gym member fell backwards off of a moving treadmill and hit her head on the steel foot of an exercise machine,[146] and, as a result of the fall, sustained severe head injuries.[147] The machine upon which the member hit her head was placed nearly four feet behind the treadmill.[148] Consequently, the gym member filed a lawsuit claiming the gym was negligent in its set up of the treadmill.[149] The gym maintains it is free from liability because the member had signed a waiver of liability form.[150] In response, the member argues that the waiver should be found unenforceable because it violates public policy.[151]

---

resolution-rush/1779651/ [https://perma.cc/9FS8-RLRP] (citing a survey that found "over 12% of new gym members join in January alone").

142. *See, e.g.*, Gold's Gym Membership Agreement (Jan. 12, 2017) [hereinafter Milwaukee Gym Membership Agreement] (on file with author); *FTX Crossfit Membership Agreement*, FTX CROSSFIT, http://ftxcrossfit.com/wp-content/uploads/2012/11/FTXMembershipAgreement1.pdf [https://perma.cc/J3R3-58U5] (last visited Jan. 3, 2018); *Life Gym, L.L.C. Membership Agreement*, LIFE GYM, https://www.lifegymok.com/files/Revised%20Life%20Gym%20Membership.pdf [https://perma.cc/Z23A-RF2Q] (last visited Jan. 3, 2018).

143. *See generally* Bruett, *supra* note 2 (addressing the issue of whether a reasonable business can safely rely upon exculpatory contracts to limit liability).

144. Milwaukee Gym Membership Agreement, *supra* note 142.

145. Jimenez v. 24 Hour Fitness USA, Inc., 188 Cal. Rptr. 3d 228 (Ct. App. 2015).

146. *Id.* at 231.

147. *Id.*

148. *Id.*

149. *Id.* at 231–32 (noting that the treadmill's owner's manual states that "*[t]he minimum space requirement needed for user safety and proper maintenance is three feet wide by six feet deep . . . directly behind the running belt*").

150. *Id.* at 231.

151. In *Jiminez* itself, the plaintiff actually argued that the release was "invalid because [the gym] was grossly negligent and because [the gym] obtained the release through fraud." *Id.* at 233.

Applying the framework in *Roberts*, the court would first determine whether the language of the contract covered the activity.[152] Because the language in the contract does cover the activity,[153] the court would then proceed to the germane analysis for exculpatory contracts—public policy.[154] Case law has detailed factors to apply when analyzing whether a contract is void as against public policy.[155] Similar to *Roberts*, the court here would likely find the waiver of liability void as against public policy "because it fails to satisfy the factors set forth in [its] prior case law."[156] Specifically, the court would examine two factors.

First, the gym's liability waiver is likely too broad and all-inclusive.[157] As mentioned previously, "[a]n exculpatory agreement will be held to contravene public policy if it is so broad 'that it would absolve [the defendant] from any injury to the [plaintiff] for any reason.'"[158] Analogous to *Roberts*, the waiver of liability here would "absolve [the Milwaukee gym] . . . for any reason."[159] The waiver states:

> Member voluntarily agrees to assume *all* risks of personal injury to Member, Member's spouse, children, unborn children, other family members, guests or invitees and waives *any and all* claims or actions Member may have against [the Gym], any of its subsidiaries or other affiliates and any of their respective officers, directors, employees, agents, successors and assigns for any such personal injury (and no such person shall be liable to Member, Member's spouse, children, unborn children, other family members, guests or invitees for any such personal injury), including, *without limitation* [injuries that

152. *See* Roberts v. T.H.E. Ins. Co., 2016 WI 20, ¶ 49, 367 Wis. 2d 386, 879 N.W.2d 492.

153. *See* Milwaukee Gym Membership Agreement, *supra* note 142 ("Member voluntarily agrees to assume all risks of personal injury to Member . . . and waives any and all claims or actions that Member may have against [this] Gym . . . for any such personal injury . . . including, without limitation . . . injuries arising from use of any exercise equipment.").

154. *See Roberts*, 2016 WI 20, ¶ 49.

155. *See id.* ¶ 50. Factors the court will consider include: (1) whether the waiver is overly broad and all-inclusive; (2) whether the form serves two functions and does not provide the signer adequate notification of the waiver's nature and significance; and (3) whether there is little or no opportunity to bargain or negotiate in regard to the exculpatory language in question. *See, e.g.*, Richards v. Richards, 181 Wis. 2d 1007, 1017–19, 513 N.W.2d 118, 122–23 (1994).

156. *Roberts*, 2016 WI 20, ¶ 58.

157. *See* Milwaukee Gym Membership Agreement, *supra* note 142.

158. *Richards*, 181 Wis. 2d at 1015 (alterations in original) (quoting Coll. Mobile Home Park & Sales, Inc. v. Hoffmann, 72 Wis. 2d 514, 521–22, 241 N.W.2d 174, 178 (1976)).

159. *Roberts*, 2016 WI 20, ¶ 60.

result from various types of gym activities].[160]

Second, the form serves two functions and is not clearly identified. The form functions as the Membership Agreement as well as the Waiver of Liability form.[161] This dual function was not clearly identified in the title,[162] as the title of the form states "Membership Agreement." The only sort of notice offered is a statement near the bottom of the form which reads, "Notice: See other side for important information."[163] A court would not likely give this fact much significance. Throughout the first page of the Membership Agreement, the member is required to initial or sign next to sections regarding items such as monthly dues and consent to receive telemarketing calls and texts.[164] Nonetheless, the member is not required to initial or sign next to the Waiver of Liability section.[165] Thus, the Membership Agreement fails to clearly distinguish between the dual functions.

The Wisconsin Supreme Court's analysis in *Roberts*, as well as its application to a given set of facts, as illustrated above, demonstrates just how difficult it is for businesses to prevail when relying on an exculpatory contract. Additionally, the court's eventual adoption of public policy as the germane analysis underscores the court's broad discretion when resolving the enforceability of exculpatory contracts.[166] This near impossibility to find an enforceable exculpatory contract has left scholars and practicing attorneys begging the question whether a business can safely rely upon exculpatory contracts.[167]

---

160. Milwaukee Gym Membership Agreement, *supra* note 142 (emphasis added).

161. *See id.*

162. See *Richards*, 181 Wis. 2d at 1017, for an analysis of this requirement. In *Richards*, the form was titled "Passenger Authorization," yet functioned as both (1) an authorization form to allow passengers to ride in a company vehicle and (2) a release of liability form. *Id.*

163. Milwaukee Gym Membership Agreement, *supra* note 142.

164. *Id.*

165. *Id.*

166. *See, e.g.*, Roberts v. T.H.E. Ins. Co., 2016 WI 20, ¶ 49, 367 Wis. 2d 386, 879 N.W.2d 492; Atkins v. Swimwest Family Fitness Ctr., 2005 WI 4, ¶ 13, 277 Wis. 2d 303, 691 N.W.2d 334; Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 86, 557 N.W.2d 60, 64 (1996).

167. *See* Timothy Fenner, *Waivers of Liability: Are They Worth the Paper They Are Written On?*, AXLEY BRYNELSON (May 30, 2013), https://www.axley.com/publication_article/waivers-of-liability-are-they-worth-the-paper-they-are-written-on/ [https://perma.cc/AVL4-UYFS]; Schuster, *Do Liability Waivers Really Work?*, *supra* note 92; Richard Schuster, *The Wisconsin Supreme Court Weighs in Again on Liability Waivers*, MATTHIESEN, WICKERT & LEHRER, S.C.: BLOG (Oct. 25, 2016), https://www.mwl-law.com/wisconsin-supreme-court-weighs-liability-waivers/ [https://perma.cc/R4BT-BXQZ]; *see also* Bruett, *supra* note 2, at 1098 ("[U]nder the current approach taken by Wisconsin courts, businesses cannot safely rely upon these agreements.").

IV. STATUTORY PROTECTION

While the Wisconsin Supreme Court has yet to uphold an exculpatory contract since 1982,[168] the ski industry can breathe a sigh of relief. On February 29, 2016, the Wisconsin Legislature enacted Wisconsin Act 168.[169] The purpose of the act was to repeal, amend, renumber, and create statutes[170] related to the "duties of ski area operators and persons who bike in a ski area, and liability of ski area operators."[171] In this Part, I examine this Act more closely, demonstrating that ski resorts no longer have a need for exculpatory contracts. Additionally, I run a quick survey of various ski resorts, which will verify whether these ski resorts are taking advantage of the statutory protection. Finally, I briefly return to the case *Roberts v. T.H.E. Insurance Company*, which will demonstrate the court's willingness to grant statutory protection when applicable, and thus, eliminate the need for customers to sign exculpatory contracts.

A. Wisconsin Statutes Section 167.33—Alpine Sports

Wisconsin Statutes sections 167.33(3) and 167.33(4) impose certain duties upon ski area operators and ski area owners.[172] Under section 167.33(3)(a), the first duty imposed upon a ski area operator is to print a warning notice on each ticket issued to participants.[173] Sections 167.33(3)(b) through 167.33(3)(j) lay out various requirements concerning signage.[174] These requirements specify: (1) the exact language of what each sign should contain; (2) the dimensions of the signs; and (3) the location(s) of where the signs need to be placed.[175]

---

168. *See* Pendleton, *supra* note 9, at 17; *see also* Roberts v. T.H.E. Ins. Co., 2016 WI 20, 367 Wis. 2d 386, 879 N.W.2d 492.

169. 2015 Wis. Act 168.

170. *Id.*

171. *Id.*

172. WIS. STAT. §§ 167.33(3)–(4) (2015–2016).

173. *Id.* § 167.33(3)(a) ("WARNING: Under Wisconsin law, each participant in an alpine sport assumes the risk of injury or death to person or injury to property resulting from the conditions and risks that are considered to be inherent in an alpine sport, has a number of duties that must be met while engaging in an alpine sport, and is subject to limitations on the ability to recover damages from a ski area operator for injuries or death to a person or to property. A complete copy of this law is available for review at the main site where tickets to this ski area are sold.").

174. *See id.* §§ 167.33(3)–(j).

175. *Id.* § 167.33(3)(b). This section states, in part:

> Each ski area operator shall post and maintain the following signs:
>
> 1. A sign that is at least 10 square feet in size at or near each of the sites where tickets to the ski area are sold, at or near each of the entrances or lift loading areas for areas that are open to alpine sports, and at or near each area open to sledding,

Moreover, Wisconsin Statutes section 167.33(4) sets out other various duties for ski owners.[176] Specifically, section 167.33(4)(c) requires a qualified lift inspector[177] to perform annual lift inspections.[178]

The substance of Wisconsin Act 168, however, is the amendment to Wisconsin Statutes section 895.526(4)(a). This section states:

> A ski operator who fulfills all of his or her duties under [subsections] 167.33 (3) and (4) owes no further duty of care to a participant in an alpine sport and is not liable for an injury or death that occurs as a result of any condition or risk accepted by the participant under [subsection] (2).[179]

This statute finally provides a means to escape exculpatory contracts, yet a foolproof mechanism to ensure protection from liability. Now, think back to *Dobratz v. Thomson*.[180] In that case, the Wisconsin Supreme Court stated:

> [A]lthough we do not intend to create a "*magic words*" rule, we consider that it would be very helpful for such contracts to set forth in clear and express terms that the party signing it is releasing others for their negligent acts or, where the contract includes an assumption of risk clause, is assuming the risk of

---

biking, or tubing which is not served by a lift. The sign shall contain the following warning:

WARNING—ASSUMPTION OF RISKS: Under Wisconsin law, each participant in an alpine sport is considered to have accepted and to have knowledge of the risk of injury or death to person or injury to property that may result. Under Wisconsin law, each participant in an alpine sport has the duty to take the precautions that are necessary to avoid injury or death to person or injury to property. Wisconsin law sets forth certain other limitations on the liability of ski area operators for injuries or death to person or injury to property. A complete copy of this law is available for review at the main site where tickets to this ski area are sold.

Id.

176. *See id.* § 167.33(4).

177. Under section 167.33(4)(d), a qualified lift inspector means:

1. An individual authorized by the department of safety and professional services to make inspections of lifts pursuant to ch. 101.

2. An individual who has knowledge of the requirements of the rules specified in par. (c) and of the design and operation of lifts and who has one of the following:

a. A degree of engineering from a recognized university.

b. Experience as an inspector of lifts for an insurance company that has provided liability insurance coverage to any ski area.

Id. § 167.33(4)(d).

178. *Id.* § 167.33(4)(c).

179. *Id.* § 895.526(4)(a).

180. 161 Wis. 2d 502, 468 N.W.2d 654 (1991).

harm caused by the negligent acts of others.[181]

For years the Wisconsin Supreme Court has evolved its analysis regarding exculpatory contracts, yet has failed to offer any sort of concrete guidance on how to draft an enforceable agreement.[182] However, with the enactment of Wisconsin Act 168, the legislature has created those "magic words," and as a result, ski resorts essentially have a checklist,[183] fulfillment of which enables them to escape liability, and thus, eliminates the need for its participants to sign an exculpatory agreement.

B. Survey: Are Wisconsin Ski Resorts Still Using Release Forms?

This nonexhaustive survey is intended to reveal whether ski resorts in Wisconsin have moved away from the no-longer-needed release agreements per Wisconsin Statutes section 895.526(4)(a). After examining three different ski resorts, I found that only one resort has completely abandoned exculpatory agreements. Both Granite Peak[184] and Grand Geneva[185] still require participants to fill out release of liability forms. On the other hand, Alpine Valley Resort no longer requires participants to fill out a release of liability form.[186]

While this may seem surprising or even somewhat discouraging, one should keep a few things in perspective. Wisconsin Act 168 was enacted February 29, 2016 and the effective date was March 2, 2016.[187] Accordingly, as of the time of this publication, the statutory amendments have not even been in place for two years. More importantly, a possible reason these resorts still "rely" on the

---

181. *Id.* at 525 (emphasis added).

182. *See, e.g.*, Roberts v. T.H.E. Ins. Co., 2016 WI 20, 367 Wis. 2d 386, 879 N.W.2d 492; Atkins v. Swimwest Family Fitness Ctr., 2005 WI 4, 277 Wis. 2d 303, 691 N.W.2d 334; Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 557 N.W.2d 60 (1996); Richards v. Richards, 181 Wis. 2d 1007, 513 N.W.2d 118 (1994); *Dobratz*, 161 Wis. 2d at 502; Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 117 Wis. 2d 587, 345 N.W.2d 417 (1984); Arnold v. Shawano Cty. Agric. Soc'y, 111 Wis. 2d 203, 330 N.W.2d 773 (1983), *overruled on other grounds by* Green Spring Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987); Merten v. Nathan, 108 Wis. 2d 205, 321 N.W.2d 173 (1982).

183. *See generally* 2015 Wis. Act 168.

184. *Releases and Waivers*, GRANITE PEAK, https://www.skigranitepeak.com/contactUs/releasesWaivers.cfm [https://perma.cc/4G8C-ZMLC] (last visited Sept. 29, 2017).

185. *Release of Liability: Ski*, GRAND GENEVA, http://www.grandgeneva.com/pdf-lake-geneva-vacation/documents/release_of_liability.pdf [https://perma.cc/4MRF-C4YK] (last visited Sept. 29, 2017).

186. *See Documents/Forms*, ALPINE VALLEY RESORT, http://www.alpinevalleyresort.com/the-resort/documents/ [https://perma.cc/YP2D-XBMQ] (last visited Sept. 29, 2017).

187. 2015 Wis. Act 168.

use of exculpatory agreements is to keep insurance premiums down.[188] In return, the ski resort is able to offer rental tickets and equipment at a reduced price.[189] Whatever the case may be, as evidenced by Alpine Valley Resort, the ski industry seems to be moving away from exculpatory contracts and relying on the statutory protection.

C. Wisconsin Statutes Section 895.52—Recreational Activities; Limitation of Property Owners' Liability

Before the court in *Roberts* resolved the issue concerning the waiver of liability form, the court answered the question of whether or not Sundog was entitled to immunity under Wisconsin Statutes section 895.52.[190] This recreational immunity statute protects property owners from potential liability when they open their lands to the public.[191] In *Roberts*, Sundog argued that section 895.52 was applicable, and as a result, should have been entitled to immunity.[192]

The Wisconsin Supreme Court, however, held that Sundog was not entitled to the recreational immunity under the statute because "Sundog . . . [was] not an owner under the statute . . . and the hot air balloon was not 'property' because

---

188. *See, e.g.*, Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 117 Wis. 2d 587, 599–600, 345 N.W.2d 417, 423 (1984) ("This exculpatory clause may have kept the company's insurance premiums down.").

189. *See* Bruett, *supra* note 2, at 1081.

190. Roberts v. T.H.E. Ins. Co., 2016 WI 20, ¶ 47, 367 Wis. 2d 386, 879 N.W.2d 492. If the Wisconsin Supreme Court did in fact find that Sundog was entitled to the recreational immunity under section 895.52, the court would not have even addressed the waiver of liability form at issue.

191. *Id.* ¶ 28; *see also* WIS. STAT. § 895.52 (2015–2016). Section 895.52(2) states:

> (2) NO DUTY; IMMUNITY FROM LIABILITY.
>
> (a) Except as provided in [subsections] (3) to (6), no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:
>
> 1. A duty to keep the property safe for recreational activities.
>
> 2. A duty to inspect the property, except as provided under [section] 23.115(2).
>
> 3. A duty to give warning of an unsafe condition, use or activity on the property.
>
> (b) Except as provided in [subsections] (3) to (6), no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property.

Id. § 895.52(2)(a)–(b).

192. *Roberts*, 2016 WI 20, ¶ 29.

it [was] not a 'structure.'"[193] While the court in *Roberts* did not grant recreational immunity to Sundog, the court did cite to cases in which the defendant was entitled to immunity under section 895.52.[194] This suggests the court's willingness to grant statutory protection when applicable. Thus, had Sundog been protected under the statute, the need for Patti Roberts to sign the waiver of liability form would have been eliminated.

V. A STATUTE IN THE RIGHT DIRECTION: THE SOLUTION

Nearly nineteen years ago, a Marquette Law School student, Keith Bruett, wrote a comment questioning whether businesses could safely rely upon exculpatory contracts to limit their liability.[195] Well, fast-forward to present day, and you will find that the Wisconsin Supreme Court has made it nearly impossible to draft an enforceable exculpatory contract, causing many Wisconsin-practicing attorneys to ask the same question.[196] So, if Wisconsin businesses cannot safely rely upon exculpatory contracts to limit their liability, what is the solution?

In that same article written nineteen years ago, Bruett suggested that the best solution lies in the hands of the legislature.[197] He proposed two different options, both of which called for legislative action: (1) completely ban the use of exculpatory contracts or (2) codify the requirements for the use of exculpatory contracts.[198] Of the two options, Bruett seemed to favor the codification of requirements when drafting an exculpatory contract.[199] However, as he correctly noted, codifying requirements regarding exculpatory contracts "would not preclude a reviewing court from invalidating an exculpatory agreement that contravenes public policy."[200]

---

193. *Id.* ¶ 46. Under section 895.52, owner means "[a] person, including a governmental body or nonprofit organization, that owns, leases or occupies property." WIS. STAT. § 895.52(1)(d).

194. *Roberts*, 2016 WI 20, ¶¶ 28–32; *see, e.g.*, Hall v. Turtle Lake Lions Club, 146 Wis. 2d 486, 487, 431 N.W.2d 696, 697 (Ct. App. 1988); Weina v. Atl. Mut. Ins. Co., 179 Wis. 2d 774, 776, 508 N.W.2d 67, 68 (Ct. App. 1993).

195. Bruett, *supra* note 2.

196. *See* Fenner, *supra* note 167; *see also* Schuster, *Do Liability Waivers Really Work?*, *supra* note 92.

197. Bruett, *supra* note 2, at 1098.

198. *Id.* at 1098–99.

199. *Id.* ("While [prohibiting the use of exculpatory contracts] would provide certainty, the cost to businesses would be greater liability exposure and higher insurance premiums. Rather than bear these costs, businesses would likely pass these costs onto the consumer [which] may nevertheless adversely affect businesses if escalating costs kept patrons away.").

200. *Id.* at 1099.

While I too believe legislative action is the correct solution, the best approach is to follow the blueprint already created by the legislature, such as the blueprint found in sections 167.33 and 895.526(4)(a).[201] This approach eliminates the need for exculpatory contracts, all the while affording recreational businesses the necessary protection.[202] This solution takes an already highly regulated recreational business, like snow skiing,[203] and codifies safety requirements.[204] If the recreational business satisfies all the requirements within the statute, then the business owes no further duty to its customers. As a result, the statute eliminates the need to use exculpatory contracts.

Moreover, codifying safety requirements for recreational businesses, and thus, eliminating the need for exculpatory contracts, also eradicates the broad discretion used by the Wisconsin Supreme Court when analyzing an exculpatory contract under public policy grounds. Under this proposal, when a party brings a negligence claim against a recreational business, the court's analysis will now consist of checking whether the business has satisfied all the requirements set out in the statute. If the business fails to satisfy all the statutory requirements, and as a result the consumer is injured, the court will hold the recreational business liable for such injuries. However, if the business has satisfied all the statutory requirements, the recreational business will be afforded the liability protection under the statute.

VI. CONCLUSION

Given the current status of Wisconsin's law regarding exculpatory contracts, recreational businesses cannot safely rely upon exculpatory language or release waivers in order to limit liability. The court's ability to use broad discretion under the public policy analysis has led to the consistent holding: void as against public policy.[205] Codifying safety requirements for recreational

201. *See* WIS. STAT. §§ 167.33(3)–(4), 895.526 (2015–2016).

202. *See generally id.*

203. *See generally Safety Programs*, NATIONAL SKI AREA ASSOCIATION, http://www.nsaa.org/safety-programs/ [https://perma.cc/5MJL-6588] (last visited Jan. 9, 2018); *NSAA Ski Lift Safety Fact Sheet*, NATIONAL SKI AREA ASSOCIATION, http://www.nsaa.org/media/310500/Lift_Safety_Fact_Sheet_2017.pdf [https://perma.cc/2754-3WM6] (last visited Jan. 9, 2018).

204. *See* WIS. STAT. §§ 167.33(3)–(4), 895.526(4).

205. *See, e.g.*, Roberts v. T.H.E. Ins. Co., 2016 WI 20, 367 Wis. 2d 386, 879 N.W.2d 492; Atkins v. Swimwest Family Fitness Ctr., 2005 WI 4, 277 Wis. 2d 303, 691 N.W.2d 334; Yauger v. Skiing Enters., Inc., 206 Wis. 2d 76, 557 N.W.2d 60 (1996); Richards v. Richards, 181 Wis. 2d 1007, 513 N.W.2d 118 (1994); Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 117 Wis. 2d 587, 345 N.W.2d 417 (1984); Merten v. Nathan, 108 Wis. 2d 205, 321 N.W.2d 173 (1982).

businesses will eliminate the court's broad discretion. Additionally, those recreational businesses that abide by the applicable requirements will be afforded statutory protection against potential liability. Moreover, the new statutory requirements will strive to ensure safety to those consumers who choose to participate in the recreational activity.

BLAKE A. NOLD*

* Senior Articles Editor, Marquette Law Review, J.D. 2018, Marquette University Law School, M.B.A./B.A. Assumption College. A special thanks to the following people: my parents, John and Alexis, and younger brother, Gabe, for supporting my decision to attend law school and always pushing me to be the very best I can be. To my fiancée, Alie, for her constant love and support—signing with Assumption turned out to be the best decision I have ever made. To Attorney Josh Cannon for inspiring me to write this Comment, and to Michael Anspach, Rachel Scott, and Apallonia Wilhelm for their thoughtful edits and remarks.