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CAN WISCONSIN BUSINESSES SAFELY RELY UPON EXCULPATORY CONTRACTS TO LIMIT THEIR LIABILITY?

I. INTRODUCTION

Exculpatory contracts are found predominantly, but not exclusively, in the landlord-tenant and participatory venture contexts. They exempt one party from responsibility for the consequences of his or her actions. Wisconsin businesses rely upon exculpatory contracts to limit their exposure to lawsuits and reduce the cost of their insurance premiums. In return for the benefits adduced from these agreements, businesses offer their products or services at a reduced cost to the consumer. However, the unpredictable manner in which Wisconsin courts have assessed the validity of exculpatory agreements has jeopardized businesses’ ability to confidently rely upon these agreements.

The absence of legislative parameters governing the use of exculpatory contracts has required Wisconsin courts to assess the validity of these agreements on a public policy basis. The amorphous nature of public policy grants courts broad discretion in determining whether specific exculpatory agreements are valid. It also inhibits businesses’ ability to draft valid agreements. The two concepts are interrelated. Because courts have exercised their discretion unpredictably, businesses have been unable to know what is required to survive the court’s scrutiny. Two recent cases decided by the Supreme Court of Wisconsin illustrate this point.

In *Yauger v. Skiing Enterprises, Inc.*, the supreme court held invalid an exculpatory agreement wherein Michael Yauger acknowledged that there were “inherent risks in skiing” and agreed to hold the ski area

1. “Participatory ventures” refer to businesses that allow patrons to engage in recreational activities including but not limited to skiing, motor sports and jetskiing.

2. See Dobratz v. Thomson, 468 N.W.2d 654, 656 n.1 (Wis. 1991) (defining exculpatory contracts as seeking “to release one or more of its parties from at least some liability resulting from any negligent act or omission or other wrongful act by that party.”).

3. See infra note 141.


5. 557 N.W.2d 60 (Wis. 1996).
"harmless on account of any injury." The court found the agreement invalid because it failed to define "inherent risks in skiing" and because the exculpatory provison was not sufficiently identifiable within the context of the entire agreement.

In Richards v. Richards, Jerilyn Richards sought authorization from her husband’s employer to accompany her husband on his commercial trucking run. In exchange for a waiver of liability, the employer granted its authorization. The supreme court held that the exculpatory agreement violated public policy because the agreement was drafted on a standardized form, serving more than one purpose, and the agreement’s language was "broad and all-inclusive."

This comment focuses on the validity of exculpatory contracts in Wisconsin and the approach Wisconsin courts have taken in addressing that issue. Section I discusses the purposes that exculpatory contracts serve and examines the rationale behind the general rule that exculpatory contracts are not invalid per se. Section II examines whether Wisconsin has consistently applied its public policy analysis in determining the validity of particular exculpatory contracts. Section III discusses the deficiencies of public policy as a means of assessing exculpatory contracts. Finally, Section IV proposes alternatives to the current Wisconsin approach. For businesses that rely upon exculpatory agreements to limit their liability, these alternatives will provide greater certainty that their agreements will be upheld.

II. RATIONALE UNDERLYING THE VALIDITY OF EXCULPATORY CONTRACTS

The term “exculepatory clause” is defined as “[a] contract clause which releases one of the parties from liability for his or her wrongful acts.” These clauses have been referred to as “hold harmless agree-

7. Id. at 63-64.
8. 513 N.W.2d 118 (Wis. 1994).
10. The form containing the waiver of liability agreement also included the authorization agreement, permitting Jerilyn to accompany her husband. Id.
11. Id.
12. Wisconsin’s approach to determining the validity of exculpatory contracts is not exclusive to Wisconsin. This comment, however, will focus on Wisconsin as representative of the public policy approach to exculpatory agreements.
13. BLACK’S LAW DICTIONARY 566 (6th ed. 1990); see also Merten v. Nathan, 321 N.W.2d 173, 176 (Wis. 1982) (defining exculpatory contracts as “contracts which relieve a party from liability for harm caused by his or her own negligence”).
ments."\textsuperscript{14} While "the law does not favor exculpatory clauses,"\textsuperscript{15} they are not invalid \textit{per se}.\textsuperscript{16} The justification for upholding the validity of exculpatory clauses has been grounded in "the freedom of contract guaranteed by the federal and state constitutions."\textsuperscript{17} Courts have also recognized the applicability of tort principles to transactions in which parties employ the use of exculpatory clauses.\textsuperscript{18} 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]."\textsuperscript{19}

\textbf{A. Principles of Contract Law}

As a justification for the validity of exculpatory clauses, freedom of contract recognizes that people should be able to transact business without government intervention.\textsuperscript{20} Freedom of contract requires that parties engage in the bargaining process "freely and voluntarily."\textsuperscript{21} When this requirement is satisfied, "[t]he law of contracts protects the justifiable expectations of individuals who choose to enter into agreements."\textsuperscript{22} Almost 100 years ago, the United States Supreme Court articulated its view concerning the importance of freedom of contract:

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.\textsuperscript{23}

This principle weighs in favor of upholding exculpatory agreements when parties have freely and voluntarily entered into them.

\begin{itemize}
\item \textsuperscript{14} Richard J. Lind, \textit{Express Contracts of Indemnity}, 65 J. KAN. B. Ass'N. 36, 36 (1996) (distinguishing between exculpatory clauses and indemnity clauses).
\item \textsuperscript{15} Dobratz v. Thomson, 468 N.W.2d 654, 658 (Wis. 1991) (citation omitted). The law disfavors exculpatory agreements because they excuse "conduct in the given area of activity or pursuit which conduct is below the acceptable standard of ordinary and reasonable care applicable to that activity or pursuit." \textit{Id}.
\item \textsuperscript{16} 17 AM. JUR. 2d \textit{Contracts} § 297 (1991); \textit{see also} Dobratz, 468 N.W.2d at 658; Arnold v. Shawano County Agric. Society, 330 N.W.2d 773, 777 (Wis. 1983),\textit{ overruled on other grounds by} Green Springs Farm v. Kersten, 401 N.W.2d 816 (Wis. 1987).
\item \textsuperscript{17} Queen Ins. Co. of Am. v. Kaiser, 135 N.W.2d 247, 248-49 (Wis. 1965).
\item \textsuperscript{18} \textit{See}, e.g., Richards v. Richards, 513 N.W.2d 118, 121-22 (Wis. 1994); \textit{see also} Arnold, 330 N.W.2d at 777.
\item \textsuperscript{19} Richards, 513 N.W.2d at 121.
\item \textsuperscript{20} \textit{Id} at 121.
\item \textsuperscript{21} \textit{Id}.
\item \textsuperscript{22} Kellar v. Lloyd, 509 N.W.2d 87, 94 (Wis. Ct. App. 1993) (citing Merten v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982)).
\item \textsuperscript{23} Baltimore & Ohio SW. R.R. Co. v. Voigt, 176 U.S. 498, 505 (1900).
\end{itemize}
B. Principles of Tort Law

In the context of exculpatory agreements, principles of contract law collide with principles of tort law. In contrast to the principles of contract law, the principles of tort law militate against upholding exculpatory agreements. Individuals who have been harmed as a result of the unreasonable conduct of another may obtain compensation under tort law. This is predicated on the principle that those responsible for causing harm through negligent conduct should bear the cost of the harm and should not be allowed to circumvent this duty through contract. Holding an actor liable for his negligent conduct also "serves the 'prophylactic' purpose of preventing future harm." The possibility of pecuniary loss to a negligent actor provides an incentive to act according to a reasonable level of care. Consequently, the principles of tort law reflect a reluctance "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 competing principles of contract and tort law must be considered when assessing the validity of exculpatory agreements.

C. Balancing the Principles of Contract Law and Tort Law

When courts are called upon to determine the validity of exculpatory contracts, they balance the principles of contract law against the principles of tort law. Principles of contract law account for the recognition that exculpatory agreements are not invalid per se. On the other hand, tort principles dictate that exculpatory agreements maintain a disfavored position in the law. Due to the disfavored position of these agreements, courts construe them strictly against the party seeking to rely on them. When a clause is found to contravene public policy, the

24. Richards v. Richards, 513 N.W.2d 118, 121-22 (Wis. 1994); see also Kellar, 509 N.W.2d at 94.
26. Richards, 513 N.W.2d at 122.
27. Merten, 321 N.W.2d at 177.
28. Discount Fabric, 345 N.W.2d at 420 (quoting Merten v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982)).
29. See Richards v. Richards, 513 N.W.2d 118, 121 (Wis. 1994).
30. See id. at 121-22.
clause will be held invalid. While the validity of exculpatory agreements is determined on a case-by-case basis, the Restatement (Second) of Contracts section 195 provides a number of situations where exculpatory contracts will be held invalid as against public policy. Wisconsin's adoption of section 195 of the Restatement eliminated some of the uncertainty surrounding exculpatory contracts. The courts, however, have preserved their broad discretion by emphasizing that the list laid out in the Restatement was not exhaustive. In addition, the unpredictable manner in which the courts have exercised their discretion has offset the certainty provided by the Restatement.

III. WISCONSIN'S INCONSISTENT APPLICATION OF PUBLIC POLICY

In Wisconsin, exculpatory contracts have been used in varied contexts: landlord-tenant relationships, horseback-riding lessons, horseback-riding lessons, race-tracks, advertising, waterski shows, and snow skiing. In assessing the validity of exculpatory agreements in these contexts, courts have es-

32. Exculpatory contracts will be held invalid in the following situations:
(1) A term exempting a party from liability for harm caused intentionally or recklessly...
(2) A term exempting a party from tort liability for harm caused negligently...
   (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
   (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... unless the term is fairly bargained for and is consistent with the policy underlying that liability.


34. See, e.g., Merten v. Nathan, 321 N.W.2d 173, 178 (Wis. 1982).
36. Merten, 321 N.W.2d at 173.
40. Yauger v. Skiing Enter., Inc., 557 N.W.2d 60 (Wis. 1996).
established rules to guide their decision-making process. However, courts have applied these rules inconsistently. Additionally, at times courts have ignored these rules altogether, opting instead to craft rules to suit the particular facts of the case currently before the court.41

A. Active v. Passive Negligence42

In Queen Insurance Co. v. Kaiser,43 the Supreme Court of Wisconsin established the distinction between active and passive negligence as critical to whether an exculpatory agreement would be upheld. The court defined active negligence as "some positive act or some failure in a duty of operation which is the equivalent of a positive act."44 Passive negligence, on the other hand, denotes "the failure to do something that should have been done."45 The court held that an exculpatory agreement will be ineffective when the injury or damages sustained resulted from active negligence.46 Passive negligence, however, will not be sufficient to nullify an otherwise valid exculpatory clause.47

In Queen Insurance, the exculpatory provision was included in an industrial lease agreement.48 The lessee's merchandise sustained water damage caused by a maintenance worker's failure to close the door to the roof.49 The court considered the negligence passive, and thus held that the exculpatory clause prohibited the lessee's suit.50

The supreme court, in College Mobile Home Park & Sales, Inc. v. 

41. See infra Section II.B.
42. The active/passive negligence distinction arises most frequently in the landlord-tenant context. It is, however, not exclusive to any particular factual setting.
43. 135 N.W.2d 247 (Wis. 1965).
44. Queen Ins. Co. of Am. v. Kaiser, 135 N.W.2d 247, 250 (Wis. 1965) (quoting 65 C.J.S. 322, Negligence § 1(e)).
45. Id.
46. Id.
47. Id.
48. The exculpatory provision read:
Lessor shall not be liable for any damage occasioned by failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or sewerage or the bursting, leaking or running of any cistern, tank, washstand, watercloset or the waste-pipe in, above, upon or about said building or premises nor for the damage occasioned by water, snow or ice being upon or coming through the roof, sky-light, trap door or otherwise, or for any damage arising from acts or neglect of cotenants or other occupants of the same building.
50. Id. at 250.
Hoffmann,51 declined to follow precedent concerning the active/passive negligence distinction. In Hoffmann, Carl Hoffmann (Hoffmann) rented a mobile home from College Mobile Home Park & Sales, Inc. (College).52 Hoffmann’s lease contained a clause wherein College would “not be responsible for damage to trailers or any other personal property; nor accidents nor injury to tenants; fire, theft or loss of valuables in or around trailers.”53 Hoffmann nonetheless sued College54 alleging personal injury to himself and his family as a result of College’s failure to maintain adequate heating.55

The supreme court affirmed the lower court’s ruling that the breadth of the exculpatory provision violated public policy. In its analysis, the court rejected the distinction between active and passive negligence, finding it “somewhat artificial and arbitrary.”56 Rather, the court held that the validity of exculpatory agreements should be considered according to the facts and circumstances under which the agreement was negotiated.57

The exile of active and passive negligence, however, was short-lived. In State Farm Fire & Casualty Co. v. Home Insurance Co.,58 the Wisconsin Court of Appeals held an exculpatory agreement ineffectual because the property damage sustained was caused by active negligence. The facts were similar to those present in Queen Insurance. Charlotte Kirsch rented a first floor apartment from Manuel Mendez.59 Kirsch’s lease included a clause that exempted Mendez from liability for damage caused by the plumbing, gas, water, steam or other pipes.60 Nonetheless, Kirsch’s insurer, State Farm Fire and Casualty Company, brought suit after it was required to indemnify Kirsch for losses resulting from water damage caused by Mendez’ failure to properly insulate the vacant air conditioning sleeve in the Kirsch’s apartment.61 The court held that

51. 241 N.W.2d 174 (Wis. 1976).
52. College Mobile Home Park & Sales, Inc. v. Hoffmann, 241 N.W.2d 174, 175 (Wis. 1976).
53. Id.
54. Hoffmann’s action arose as a counterclaim after College sued Hoffmann for defaulting on the rent and utility payments. Id.
55. Id.
56. Id. at 177.
57. Id.
60. Id.
61. Id. at 350.
Mendez' failure to insulate the air conditioning sleeve constituted active negligence, and therefore the exculpatory agreement was ineffectual. The court cited Hoffmann in its decision, but did not address that portion of the opinion that had abolished the active/passive negligence distinction. Consequently, the court did not explain the reasoning for reviving the distinction that had been discarded only three years earlier.

The inconsistent application of the active/passive negligence distinction highlights how muddied the waters are in the area of exculpatory agreements. In its most recent discussion of that issue, a state court of appeals noted that the supreme court has shown "little enthusiasm" for active versus passive negligence as a basis for assessing exculpatory contracts. Can businesses confidently read this as the death of active and passive negligence? Are businesses safe bargaining for a waiver of liability that covers active negligence, or might a reviewing court hold this ineffectual? Even if the court of appeals's comment on the supreme court's current thinking is accurate, this provides little assurance that the active/passive negligence distinction may not again be revived, as in State Farm. In short, Wisconsin's treatment of active and passive negligence offers virtually no guidance to businesses that attempt to draft exculpatory agreements that will withstand the scrutiny of a reviewing court.

B. Creating New Law to Avoid Harsh Results

While the courts have erratically applied the active/passive negligence distinction, they have been even less predictable when they create new rules and apply these rules to the case currently before the court. This has frequently been the case when courts have been called upon to assess the validity of exculpatory agreements related to participatory ventures. In these cases, where upholding an exculpatory agreement may lead to harsh results, courts have invented new law to avoid the harsh results.

Participatory ventures commonly employ exculpatory contracts to limit liability. Robert Hirshchorn, chairman of the tort and insurance practice section of the American Bar Association, has recognized that the validity and fairness of exculpatory contracts is an issue "of national

62. Id. at 352.
63. Id. at 351.
importance for ski areas as well as amusement parks, junior hockey leagues, school field trip operators and others. Wisconsin recognizes exculpatory contracts as valid in the context of participatory ventures. However, when upholding the validity of an exculpatory agreement would prohibit an action seeking recovery for serious bodily harm or death, Wisconsin courts have been disinclined to do so. Rather, the courts have seemed willing to craft new rules, distort existing law, or stretch the limits of common sense in order to strike down exculpatory contracts in such cases. The following cases illustrate this point.

Richards v. Richards provides a stark example of how courts have dealt with exculpatory contracts in an unpredictable manner. The supreme court in Richards fashioned new rules and altered existing principles concerning exculpatory contracts. The court then proceeded to hold the exculpatory contract at issue invalid for failure to comport with these rules.

Richards arose from the following set of facts. In 1990, Monkem Company (Monkem) hired Leo Richards as an over-the-road truck driver. Leo requested permission from Monkem to allow his wife, Jerilyn, to accompany him as a passenger in his truck. Monkem did not object, but required Jerilyn to sign a form entitled "Passenger Authorization". The form was a one page document consisting of two sections entitled “FULL AND FINAL RELEASE . . .” and “PASSENGER INFORMATION.” The terms of the release stated that Jerilyn agreed to

fully and forever release an [sic] discharge the said Monkem Company, Inc., and all affiliated, associated, or subsidiary com-

67. See, e.g., Yauger v. Skiing Enter., Inc., 557 N.W.2d 60 (Wis. 1996) (invalidating exculpatory provision where ten-year-old girl died after colliding with concrete base of ski lift); see also Richards v. Richards, 513 N.W.2d 118 (Wis. 1994) (invalidating exculpatory clause where woman sustained serious injuries while accompanying her husband on commercial trucking run); see also Dobratz v. Thomson, 468 N.W.2d 654 (Wis. 1991) (invalidating exculpatory provision where man died participating in ski show; invalidated for vagueness and ambiguity, rather than public policy grounds). But see Trainor v. Aztalan Cycle Club, Inc., 432 N.W.2d 626 (Wis. Ct. App. 1988) (upholding exculpatory provision where motorcycle racer sustained serious injuries at defendant's racetrack).
68. 513 N.W.2d 118 (Wis. 1994).
70. Id.
71. Id.
72. Id. at 120.
panies, partnerships, individuals or corporations and all other person, firms, and corporations, and their heirs, administrators, executors, successors, and assigns from any and all actions, causes of actions, claim and demands of whatsoever kind or nature on account of any and all known and unknown injuries, losses, and damages by me/us or my/our property sustained or received while a passenger in any and all equipment, vehicles, or while located on any/all Monkem Company, Inc./Joplin Hiway, Inc. property.73

Jerilyn signed the release, as did Leo as driver, and C.L. McCarley as the representative of Monkem.74 According to the contract, Monkem granted Jerilyn permission to be a passenger in Leo’s truck “starting 6/1/90 and ending 9/1/90.”75

During the period covered by the contract, Jerilyn accompanied Leo on one of his scheduled trips and was trapped inside the truck after it overturned.76 She commenced an action against Monkem77 based on her injuries resulting from the accident.78 The circuit court granted Monkem’s motion for summary judgment, upholding the validity of the exculpatory contract.79 The court of appeals affirmed the circuit court’s judgment.80

The supreme court, however, determined that a combination of three factors required the court to find that the form signed by Jerilyn was unenforceable as against public policy.81 The first factor was that the form served two functions82 and that the functions “were not clearly identified or distinguished.”83 The court found troubling the fact that “it [was] not reasonably clear to the signer of a form entitled ‘Passenger Authorization’ that the document would in reality be the passenger’s agreement to release the Company . . . from liability.”84 The court was

73. Id.
74. Id. at 121.
75. Richards v. Richards, 513 N.W.2d 118, 120 (Wis. 1994).
76. Id. at 121.
77. Jerilyn’s husband, Leo, was also named as a defendant, but the court’s opinion dealt only with Monkem. Id. at 118.
78. Richards, 513 N.W.2d at 121.
79. Id. at 119.
82. The two functions served by the form were: (1) to grant authorization for Jerilyn to accompany her husband on his commercial trucking route, and (2) to exempt Monkem from liability. Id. at 122.
83. Id.
84. Id.
troubled despite its opinion that the written terms of the form signed by Jerilyn "clearly state[d] that the document [was] a release of liability." The court also acknowledged that a signatory has duty to read and understand the document to be signed.

The court's discussion of this first concern contains obvious contradictions that the court did not attempt to reconcile. The court opined that the form did not clearly indicate to the signer that the form was a release of liability. Yet, the court then indicated that the form did clearly state that it was a release of liability. The discussion supporting the court's concern runs afoul of basic common sense.

The second factor contributing to the court's finding that the agreement was against public policy was the "extremely broad and all-inclusive" nature of the agreement. The fact that the agreement released not only Monkem, but all its affiliates as well was disconcerting to the court. The court was also concerned that the release of liability was not limited to a specific time period and that the agreement purported to excuse intentional and reckless conduct.

The third factor concerning the court was that the agreement between Jerilyn and Monkem was a "standardized agreement." The court held that this type of agreement forecloses the parties' ability to freely and voluntarily negotiate. The combination of these factors resulted in the court's finding that the exculpatory contract was void as against public policy. The court, however, pointed out that none of these factors alone would necessarily have warranted the invalidation of the contract.

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85. Id.
86. Id.
87. Richards v. Richards, 513 N.W.2d 118, 122 (Wis. 1994).
88. Id.
89. Under the court's reading of the agreement, the established time frame applied only to the authorization, not the release of liability. Id. Such a narrow reading is unnecessary. Because Jerilyn would have no right to be in her husband's truck beyond the period specified in the authorization, she would have no cause of action against the trucking company. Logically, then, the waiver of liability would be governed by the same time frame as the authorization.
90. Id. The agreement is silent concerning reckless or intentional conduct. The court found that the agreement excused this conduct based on the broad language included in the release. The court did not need to decide this issue because there were no allegations of either intentional or reckless conduct.
91. Id. at 123.
92. Richards v. Richards, 513 N.W.2d 118, 123 (Wis. 1994).
93. Id.
94. Id. (holding that the combination of the three factors tipped the scales in favor of
Richards sends a disturbing message to businesses that commonly rely upon exculpatory contracts. In Richards, the supreme court expressed a willingness to create new law and apply it to the case before it. No Wisconsin court previously had expressed concern over the inclusion of an exculpatory provision within a document that serves dual purposes. Also, the court for the first time expressed the view that the use of standardized forms as a method for drafting exculpatory contracts will weigh against the validity of such contracts. Finally, the court created a new approach to dealing with exculpatory contracts containing broad provisions. Wisconsin had previously recognized that "[e]xculpatory agreements that are broad and general in terms will bar only those claims that are within the contemplation of the parties when the contract was executed." Despite recognizing this general rule, the Richards court treated the broad provisions as a factor weighing against the validity of exculpatory contracts.

Businesses that utilize exculpatory contracts should be wary of the court's "combination" approach created in Richards. The court emphasized that "none of these factors alone would necessarily have warranted invalidation of the exculpatory contract." The court apparently left open the possibility that, in the future, one of these factors may be sufficient to invalidate an exculpatory contract. However, even where one factor alone will not invalidate an agreement, the court did not indicate what combination will be required before an exculpatory contract is considered against public policy. May a business confidently continue to use a standardized form serving dual purposes so long as the provisions of the agreement are narrowly drawn? May a business use a standardized form that includes a broad and all-inclusive release so long as the sole purpose of the form is to provide a release of liability? Will the court uphold the validity of a broad and all-inclusive exculpatory contract so long as it serves a single purpose and the form is not pre-printed? Richards raises, but does not answer these questions.

The most recent Wisconsin case dealing with the validity of an exculpatory contract in the participatory venture context is Yauger v. tort principles to compensate injured persons over contract principles to protect freedom of contract).


96. Richards, 513 N.W.2d at 127.

97. Id. at 123 (emphasis added).
Skiing Enterprises, Inc.93 The agreement at issue in Yauger involved nearly identical concerns to those present in Richards. Disappointingly, however, Yauger failed to clear up the uncertainty surrounding the manner in which Wisconsin determines the validity of exculpatory contract.

In Yauger, Michael Yauger purchased a family ski pass at Hidden Valley Ski Area for the 1992-93 season.99 Hidden Valley required Yauger to fill out an application in order to receive the season pass. The one-page application required Yauger to identify the names, ages and relationship of the family members to be covered by the pass.100 Additionally, the application included a prohibition on resale, pertinent rules of the ski area, penalties for violation of those rules, and an exculpatory clause.101 The exculpatory clause provided that “[t]here 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 family member on the Hidden Valley Ski Area premises.”102 Michael Yauger’s signature indicated his adoption of that statement.

On March 7, 1993, Michael’s daughter, Tara, was killed after colliding with the concrete base of the chair lift while skiing at Hidden Valley.103 Although the accident occurred within the time frame covered by the exculpatory contract and Tara was included on the season pass application, Michael and his wife, Brenda, commenced an action against Hidden Valley.104 The suit alleged that Hidden Valley negligently failed to provide proper padding at the base of the chair lift.105 The circuit court held that the exculpatory contract barred the Yaugers’ action and granted summary judgment for Hidden Valley.

The court of appeals affirmed the circuit court’s judgment, upholding the validity of the exculpatory contract.106 The exculpatory contract at issue contained each of the factors found to be problematic in Richards: the broad nature of the agreement, the use of a standardized form,
and the dual purposes served by the form. Nonetheless, the court of appeals held the agreement valid. Hidden Valley's inclusion of the exculpatory clause on a form that served another purpose did not greatly concern the court. Rather, the court pointed out that the clause was set off in an individual paragraph. The court emphasized that "[a]ny break in the text requires the reader to pause and thus provides a moment for reflection." Furthermore, the court did not perceive the situation as one in which Hidden Valley attempted to trick season pass holders into signing away their rights.

The court also was not significantly troubled by the broad language contained in the exculpatory clause. The court rejected Yauger's argument that the clause's broad language rendered the clause ambiguous. After noting that broad language will not necessarily render a clause ambiguous, the court found that the language plain and simply described "the risks that arise whenever one's skis are in contact with the slopes."

Finally, Hidden Valley's decision to use a standardized form to obtain waivers of liability from participants was a non-issue for the court. The court recognized that the Richards court found the use of a standardized form troubling, but did not comment on the form of the waiver in this case. The court held that the aforementioned factors did not individually require the court to find the exculpatory clause invalid. Nor did the combination of the factors, as in Richards, necessitate such a result.

The supreme court, however, reversed the court of appeals, finding that the exculpatory clause violated public policy and was therefore ineffectual. After reviewing Wisconsin case law on point, the court delineated two applicable principles: a waiver of liability "must clearly, unambiguously, and unmistakably inform the signer of what is being

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107. Compare Yauger, 538 N.W.2d at 838-40, with Richards v. Richards, 513 N.W.2d 118, 122-23 (Wis. 1994).
108. Yauger, 538 N.W.2d at 839.
109. Id. at 840.
110. Id.
111. Id. at 839 (citing Wilke v. First Fed. Sav. & Loan Ass'n, 323 N.W.2d 179, 181 (Wis. Ct. App. 1982)).
113. Id. at 839.
114. Id. at 840.
115. Id.
"inherent risks in skiing" did not clearly inform the signer of what was being waived. The court pointed to differences between jurisdictions concerning the definition of "inherent risks in skiing." Based on this difference, the court reasoned, "[i]f judges disagree on the meaning of the term ‘inherent risks,’ how can this court infer that a reasonable person would understand what rights he or she was signing away?" Accordingly, Hidden Valley’s failure to articulate whether its negligence was one of the inherent risks of skiing invalidated the clause.

The exculpatory clause at issue in Yauger also failed to comport with the second principle—requiring the form to "clearly and unequivocally communicate to the signer the nature and significance of the document being signed." The court held that there was nothing conspicuous about the manner in which the exculpatory clause was written that would make it stand out from the rest of the form. The court determined that setting the clause out in an individual paragraph was insufficient to alert the signer to the nature and significance of the waiver at the time of execution. However, the court did provide suggestions as to what may suffice to put a signer on notice.

117. Id. at 63.
118. Id. at 63-64.
119. Id. In support of its position that the phrase "inherent risks of skiing" is ambiguous, the court pointed to the definitions assigned that phrase by the Supreme Court of New Jersey and the Michigan Court of Appeals. Id. New Jersey defined the phrase as "those risks that ‘cannot be removed through the exercise of due care if the sport is to be enjoyed.’” Id. at 63 (quoting Brett v. Great Am. Recreation, Inc., 677 A.2d 705, 715 (N.J. 1996)). Michigan interpreted inherent risks of skiing to “include natural conditions and ‘types of equipment that are inherent parts of a ski area, such as lift towers.’” Id. at 63-64 (quoting Schmitz v. Cannonsburg Skiing Corp., 428 N.W.2d 742 (Mich. Ct. App. 1988)). I disagree with the court’ opinion that these definitions are sufficiently different to support the proposition that judges have been unable to agree on the definition of “inherent risks of skiing” and a fortiori the phrase is ambiguous.
120. Yauger, 557 N.W.2d at 64
121. Id.
122. Yauger v. Skiing Enter., Inc., 557 N.W.2d 60, 64 (Wis. 1996).
123. Id.
124. Id. at 64-65 n.2 (suggesting using larger print size, using different color print, preferably red, italicizing or boldfacing the waiver and refraining from the use of legal jargon). For further discussion of suggestions for conspicuousness, see Stephanie J. Greer & Hurlie H. Collier, The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc., 35 S. TEX. L. REV.
IV. DEFICIENCIES OF THE WISCONSIN APPROACH

Richards and Yauger demonstrate the unpredictability of the court's public policy approach in determining the validity of exculpatory contracts. In both cases, the circuit court and the court of appeals scrutinized the respective exculpatory clauses and determined that neither clause violated public policy. The supreme court, however, reversed in both instances, finding the clauses void as against public policy after engaging in the same analysis as the lower courts. In Yauger, the court posed the question, "[i]f judges disagree on the meaning of the term 'inherent risks,' how can this court infer that a reasonable person would understand what rights he or she was signing away?" Wisconsin businesses familiar with the court's treatment of exculpatory contracts should be asking themselves—if judges disagree on whether an exculpatory contract is valid, can a reasonable business safely rely upon exculpatory contracts to limit its liability?

Richards and Yauger send a duplicitous message to businesses that commonly use exculpatory contracts. On one hand, these cases provide some guideposts that weigh in favor of upholding the validity of exculpatory agreements. While none of these are dispositive, businesses are put on notice that using standardized forms, using multi-purpose forms, including broad provisions, and failing to define certain terms will potentially expose an exculpatory agreement to invalidation. By providing guideposts, these decisions assist businesses in drafting exculpatory contracts that will survive the courts' scrutiny.

On the other hand, Richards and Yauger stand for a much different proposition. The supreme court in these cases displayed its willingness to "invent new 'rules' without precedent or support". The court for the first time in Richards expressed its displeasure with the use of stan-

125. Yauger, 557 N.W.2d at 64.
126. For reaction to the supreme court's decision in Yauger, see generally Wes Smith, Wisconsin Puts Liability Waivers on Slippery Slope—Small Print Can't Bar Lawsuits, Court Rules, CHI. TRIB., Jan. 16, 1997, at 1, and Steven Walters, Ski Hill Operator Sees Ruling as Peril to Industry—Court Orders Trial Over Negligence Suit in 1993 Skiing Death, MILWAUKEE J. & SENTINEL, Dec. 20, 1996, at 4B.
127. See Richards v. Richards, 513 N.W.2d 118, 122-23 (Wis. 1994).
128. See Yauger v. Skiing Ent., Inc., 557 N.W.2d 60, 63-64 (Wis. 1996).
129. Richards, 513 N.W.2d at 124 (Day, J., dissenting). In his dissent, Justice Day criticized the majority's combination of factors as a justification for holding the exculpatory provision invalid. Justice Day also criticized each individual factor relied upon by the majority. See generally id. at 124-133 (Day, J., dissenting).
The court also created new law regarding broadly written provisions and how they would be handled. Consequently, exculpatory contracts that comport with the existing guideposts may yet be invalidated by a new public policy rule invented by the court and applied to the case before it.

Richards and Yauger accentuate the deficiencies of Wisconsin's public policy approach in determining the validity of exculpatory contracts. Public policy has been recognized as "a broad, not easily defined concept...[that] embodies the community common sense and common conscience. Public policy is 'that principle of law under which freedom of contract or private dealings is restricted by law for the good of the community.'" However, the subjective nature of courts' post hoc analysis affords parties to exculpatory contracts little opportunity to know if their private dealings run afoul the communal good. This conflicts with the notion that the law be should be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited." This notion is expressed in the void-for-vagueness doctrine. While the doctrine is not applicable in the context of determining the validity of exculpatory agreements, the principles behind it are. Sufficient definiteness in the law allows ordinary people to act in a manner

130. Wisconsin courts had previously encountered exculpatory agreements drafted on standardized forms without taking issue with the form. See, e.g., Arnold v. Shawano County Agric. Soc'y, 330 N.W.2d 773 (Wis. 1983), overruled on other grounds by Green Spring Farms v. Kersten, 401 N.W.2d 816 (Wis. 1987). In support of the argument that standardized forms further public policy see Richards, 513 N.W.2d at 129-32 (Day, J., dissenting).

131. Wisconsin courts had previously encountered exculpatory provisions drafted on multi-purpose forms without taking issue with the form. See, e.g., College Mobile Park Home & Sales, Inc. v. Hoffmann, 241 N.W.2d 174, 174-75 (Wis. 1976) (providing the rules under the lease and waiver of liability on the same form).

132. The rule prior to Richards had been that "[e]xculpatory agreements that are broad and general in terms will bar only those claims that are within the contemplation of the parties when the contract was executed." Arnold, 330 N.W.2d at 778. The Richards court, however, determined that the broad and general language included in the exculpatory agreement should militate against upholding the agreement. Richards, 513 N.W.2d at 123.

133. See Yauger v. Skiing Enter., Inc., 557 N.W.2d 60, 64 (Wis. 1996) (holding invalid an exculpatory contract that failed to "unequivocally communicate to the signer the nature and significance of the document being signed"). Id. at 64.


136. The requirements of the void-for-vagueness doctrine apply exclusively to penal statutes. Id.
that conforms with the law. 137 Sufficient definiteness, furthermore, discourages arbitrary and discriminatory enforcement. 138

V. ALTERNATIVES TO THE WISCONSIN APPROACH

The uncertainty surrounding whether reviewing courts will uphold the validity of exculpatory agreements has caused great concern to operators of public attractions in Wisconsin. 139 Businesses rely upon exculpatory contracts to avoid paying higher insurance premiums and limit their exposure to lawsuits that are ubiquitous in today's litigious society. 140 However, under the current approach taken by Wisconsin courts, businesses cannot safely rely upon these agreements. One response businesses may adopt to deal with this problem is to make exculpatory agreements available, but not mandatory, for participation. A lower rate would then be charged to those who opt to execute an exculpatory agreement. This reduced price would reflect the savings to the business, in the form of limited exposure 141 and lower insurance premiums, generated by the exculpatory agreement. Furthermore, this arrangement would be grounded upon the principle of freedom of contract, the principle upon which the validity of exculpatory contracts rests. Rather than participation hinging on a customer's willingness to sign an exculpatory agreement, a customer would be free to decide whether to enter into such an agreement. Both parties would receive pecuniary benefits from such an agreement.

This response, however, may not alleviate the problem. Under this approach, exculpatory contracts would still be subject to invalidation as against public policy.

The better approach is legislative action. One route the legislature could take would be simply to prohibit the use of exculpatory contracts. 142 While this approach would provide certainty, the cost to busi-

137. Id.
138. Id.
139. See, e.g., Smith, supra note 65.
140. In 1995, 10,500 lawsuits were filed in Wisconsin alleging personal injury or property damage. An additional 17,300 lawsuits were filed in the areas of contracts and real estate. Telephone interview with Robert Brick, staff for the Director of State Courts (Feb. 21, 1997).
141. See Queen Ins. Co. of Am. v. Kaiser, 135 N.W.2d 247, 249 (Wis. 1965) (recognizing that tenant received a lower rent in return for waiver of liability); see also Yauger v. Skiing Enter., Inc., 538 N.W.2d 834, 838 (Wis. Ct. App. 1995) (recognizing that plaintiff received discounted skiing in return for releasing defendant from liability).
142. As late as 1982, the Wisconsin Supreme Court acknowledged that the broad question of whether exculpatory contracts were valid remained open. Merten v. Nathan, 321
nesses would be greater liability exposure and higher insurance premiums. Rather than bear these costs, businesses would likely pass these costs onto the consumer. This approach may nevertheless adversely affect businesses if escalating costs kept patrons away.

Another route the legislature could take would be to codify requirements for the use of exculpatory contracts. Courts have disingenuously stated that exculpatory contracts cannot be evaluated through a mechanical approach. However, there are objective criteria that emerge from the case law. Codification of these criteria would provide greater certainty to those businesses that utilize exculpatory contracts. For example, legislation may include such things as: (1) a prohibition against the inclusion of exculpatory agreements on multipurpose forms; a requirement that the term “negligence” explicitly appear in the contact in order to exempt a business for liability for its own negligence; a requirement that the exculpatory provision be separately signed; or (4) a requirement that exculpatory provisions must be drafted in bold or italicized print.

Codifying these technical aspects would not preclude a reviewing court from invalidating an exculpatory agreement that contravenes public policy. Codification, however, would reduce the number of arrows contained within the public policy quiver, and deny reviewing courts unfettered discretion in the area of exculpatory contracts.

VI. CONCLUSION

Public policy as a means of assessing the validity of exculpatory contracts has proven inadequate. It deposits too much discretion in the courts and provides too little guidance to businesses seeking to rely upon exculpatory agreements to limit their liability. Courts have exercised their discretion in an unpredictable manner, vacillating in their application of established rules and demonstrating a willingness to create new rules that apply retroactively. Legislative rules governing the validity of exculpatory contracts would be preferable to the current approach. Legislation would continue to protect individuals from unknowingly signing away valuable rights, and at the same time provide

N.W.2d 173, 176 n.3 (Wis. 1982).
143. See Richards v. Richards, 513 N.W.2d 118, 122 (Wis. 1994).
144. See Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508-09 (Tex. 1993) (applying the “express negligence doctrine”).
145. See Yauger v. Skiing Enter., Inc., 557 N.W.2d 60, 64 (Wis. 1996).
146. See id. at 64 n.2.
certainty to businesses that rely upon exculpatory contracts. Under the current public policy approach, the individual is protected with businesses bearing the cost.

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