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The Exculpatory Contract and Public Policy

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THE EXCULPATORY CONTRACT AND PUBLIC POLICY

RALPH C. ANZIVINO*

Across the country, lawyers have searched for the magic formula to draft an exculpatory contract that would successfully exculpate their client in the event someone was injured while participating in a recreational activity sponsored by the client. Some examples of events would include snow skiing, swimming at a guest-only pool, horseback riding, white-water rafting, camping, running in a marathon, visiting a haunted house at Halloween, or a myriad of other events. The uniform standard by which the enforceability of these exculpatory clauses is measured is whether the exculpatory contract is against public policy.

The public policy of any state can be discerned by examining the various statutes passed by the legislature in that particular state. Many states have passed laws that provide immunity from civil liability for the sponsor of various recreational activities provided the sponsor complies with enumerated statutory requirements. This Article examines all the recreational statutes enacted in Wisconsin to discern Wisconsin's public policy on the enforceability of exculpatory contracts.

The legislature has made clear that absent an overriding public purpose (opening up one's land for free public use) the legislature is loath to grant civil immunity for a sponsor's negligent conduct that causes injury to another. The public policy of tort law to provide just compensation to one who has been injured supersedes the contract principle of the party's freedom of contract. However, even though the public policy is not to permit exculpation for a sponsor's negligence, it is equally clear that the legislature does permit exculpation for the inherent risks in that activity. Therefore, the primary task of the lawyer in drafting an enforceable exculpatory contract is to clearly specify in the contract those risks inherent to the activity and be able to prove that the participant was aware of those risks at the time of contracting.

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I. INTRODUCTION	748
II. THE EXCULPATORY CONTRACT	749
III. PUBLIC POLICY AND ITS USE TO RENDER CONTRACTS UNENFORCEABLE	750
IV. THE PUBLIC POLICY CONFLICT ON EXCULPATORY CONTRACTS	751
V. CURRENT LAW ON A CONTRACT EXCULPATING FOR NEGLIGENCE.	752
A. Restatement of Contracts (2d).....	752
B. Wisconsin Courts	753
VI. THE LEGISLATURE’S APPROACH TO CIVIL IMMUNITY	754
A. Targeted Recreational Immunity Statutes.....	755
B. Wisconsin’s Recreational Immunity Statute	765
C. Wisconsin’s Assumption of Risk Statute for Recreational Activity	768
VII. THE EXCULPATORY CONTRACT AND NEGLIGENCE	769
VIII. THE EXCULPATORY CONTRACT AND INHERENT RISKS	771
IX. CONCLUSION.....	775

I. INTRODUCTION

An exculpatory contract is one that permits a contracting party to relieve one’s self from liability for harm caused by his or her own negligence. The Wisconsin Supreme Court has decided seven cases on the enforceability of exculpatory contracts where personal injury was involved, and none of the exculpatory contracts have been upheld. The court has indicated that the germane analysis in deciding on the enforceability of exculpatory contracts is public policy. The public policy debate involves balancing the contract principle of freedom of contract versus the tort principle that one should be held accountable for one’s negligent conduct.

By definition, the legislature is the preeminent source of public policy. The Wisconsin legislature has passed a number of statutes providing immunity from civil liability, provided one complies with the statutory mandates. The statutory areas where civil immunity has been provided are alpine sports, equine activities, camping, agricultural tourism, sport shooting, and of course, the recreational immunity statute. Since the immunity statutes were in large part passed after the court had struck down all of the exculpatory contract cases that came before it, it is instructive to compare the principles established by the court with the principles established by the legislature.

Exculpatory contracts are a very difficult and problematic area for lawyers. Lawyers continue to search for the means to create an enforceable one. The Wisconsin Supreme Court decisions offer clues but not solutions. Rather, the legislature has shone the way. Based on an analysis of the legislature’s

pronouncements on public policy and immunity from civil liability, the answers can be found. The purpose of this Article is to indicate the means by which a lawyer can create an enforceable exculpatory contract.

II. THE EXCULPATORY CONTRACT

An exculpatory contract is defined as a contract that “relieve[s] a party from liability for harm caused by his or her own negligence.”¹ Courts have broadly construed the concept of what constitutes an exculpatory contract. For example, in *Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Co.*,² a drapery business brought an action against a telephone company for negligent omission of its corporate name from the telephone company’s “yellow pages” advertisement. In the advertising contract between the parties, there was a clause that provided that the telephone company was not liable for errors or omissions beyond the cost of the advertisement.³ The telephone company argued that the contract clause was a limited liability provision, and not an exculpatory contract.⁴ The court concluded the clause was an exculpatory contract.⁵ The court reasoned that “for the telephone company to [be able to] return the charges, which were not earned due to its negligent breach of the contract, [would ignore] the resulting injury to the customer caused by its negligent or tortious act in not publishing the advertisement for which the customer had contracted.”⁶ As a result, the court concluded that the clause was not a limiting clause but, rather, the clause “made the contract an exculpatory one in its nature.”⁷

Despite indicating that exculpatory contracts in recreational settings⁸ are not automatically unenforceable, the Wisconsin Supreme Court has never upheld one, albeit they have had numerous opportunities to do so.⁹ The court has indicated on a number of occasions that the germane analysis to determine

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

2. 117 Wis. 2d 587, 345 N.W.2d 417 (1984).

3. *Id.* at 589.

4. *Id.* at 590.

5. *Id.* at 591.

6. *Id.* at 590–91.

7. *Id.*

8. *Richards v. Richards*, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118, 121 (1994); *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 81, 557 N.W.2d 60, 62 (1996).

9. *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*, 206 Wis. 2d at 76; *Richards*, 181 Wis. 2d at 1007; *Dobratz v. Thomson*, 161 Wis. 2d 502, 468 N.W.2d 654 (1991); *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); *Disc. Fabric House*, 117 Wis. 2d at 587.

whether an exculpatory contract is enforceable is a public policy analysis.¹⁰ In other words, Is it good public policy to permit an enterprise engaged in a recreational activity to be able to exculpate itself through its contract for its negligence while sponsoring that recreational activity? That is one of the questions this Article intends to answer.

III. PUBLIC POLICY AND ITS USE TO RENDER CONTRACTS UNENFORCEABLE

Public policy is a very broad, but not easily defined concept.¹¹ It is said to embody the community common sense and common conscience.¹² As a legal proposition, public policy is generally defined as “the collective rules, principles, or approaches to problems that affect the commonwealth or . . . promote the general good.”¹³ More specifically, it is the “principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.”¹⁴ In our tripartite nature of government, the legislative branch sets the public policy, the executive branch administers the public policy, and the judicial branch interprets the public policy enactments.¹⁵ The courts have stated that the wisdom and vision of our founders “enabled them to see the setting of public policy [w]as most satisfactorily and democratically accomplishable by the legislative branch.”¹⁶

Public policy is concerned with matters of substance that relate to the public welfare.¹⁷ Public policy is that principle of law under which freedom of contract or private dealings are sometimes restricted by law for the good of the community.¹⁸ “In general, parties may contract as they wish, and courts will enforce their agreements without passing on [the merits]. Sometimes, however, a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce [the contract] on grounds of public policy.”¹⁹ The decision in each particular case turns on the

10. *Yauger*, 206 Wis. 2d at 86; *Roberts*, 2016 WI 20, ¶ 49; *Atkins*, 2005 WI 4, ¶ 13.

11. *Merten*, 108 Wis. 2d at 213; *Disc. Fabric House*, 117 Wis. 2d at 595.

12. *Merten*, 108 Wis. 2d at 213; *Disc. Fabric House*, 117 Wis. 2d at 595.

13. *Public Policy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

14. *Id.*

15. *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 867, 236 N.W.2d 1, 16–17 (1975) (citing U.S. CONST. art. I, as to legislative powers; art. II, as to executive powers; and art. III, as to judicial powers).

16. *Id.*

17. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 5, intro. note (AM. LAW INST. 1981).

18. *Merten v. Nathan*, 108 Wis. 2d 205, 213, 321 N.W.2d 173, 178 (1982); *Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co.*, 117 Wis. 2d 587, 595–96, 345 N.W.2d 417, 421 (1984).

19. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 5, intro. note (AM. LAW INST. 1981).

delicate balance of freedom of contract versus some other conflicting public policy consideration.²⁰

IV. THE PUBLIC POLICY CONFLICT ON EXCULPATORY CONTRACTS

The laws of contracts and torts serve different purposes. The law of contracts is based on the principle of freedom of contract in that contracting parties should be able to govern their own affairs without governmental interference. The courts should protect these contracting parties by ensuring that each party receives the benefit of his or her bargain. In essence, contract law was created to protect each party's justifiable expectations and honor the security of the transaction.²¹ Following this principle, exculpatory agreements should be enforceable.

The law of torts is directed toward compensation of individuals for injuries sustained as the result of another's unreasonable conduct. In addition, tort law "serves the 'prophylactic' purpose of preventing future harm" in that the payment of damages provides a strong incentive for potential future tortfeasors not to engage in the same conduct.²² Adherence to principles of tort law tend to make a court reluctant to allow parties to shift by contract the burden of negligent conduct from the negligent actor to the innocent victim. Following this principle, exculpatory agreements should be unenforceable.

Courts often have great difficulty when adjudicating cases dealing with exculpatory contracts. The germane analysis in determining whether an exculpatory contract is enforceable is public policy.²³ When reviewing an exculpatory agreement for violation of public policy, the court attempts to accommodate the tension between the principles of contract and tort law that are inherent in such an agreement. As a result, "[e]xculpatory contracts are not favored by the law because they tend to allow conduct below the acceptable standard of care applicable to the activity."²⁴ On the other hand, exculpatory contracts are not automatically void and unenforceable as contrary to public policy.²⁵

20. *Id.*

21. *Merten*, 108 Wis. 2d at 205.

22. *Id.* at 211–12.

23. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 86, 557 N.W.2d 60, 64 (1996); *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.

24. *Richards v. Richards*, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118, 121 (1994); *Yauger*, 206 Wis. 2d at 81.

25. *Yauger*, 206 Wis. 2d at 81.

V. CURRENT LAW ON A CONTRACT EXCULPATING FOR NEGLIGENCE.

A. *Restatement of Contracts (2d)*

The Restatement of Contracts (2d) provides three circumstances where a term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy.²⁶ The first is where the term exempts an employer from liability to an employee for injury in the course of his employment.²⁷ An employer should not be permitted to exempt himself from liability to his employee for negligently causing the employee's injury.²⁸ Rather, this is the province of worker's compensation law.²⁹ The second is where a 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.³⁰ For example, a common carrier or a public utility that undertakes to perform a public service for compensation should not be permitted to exempt itself from liability to the one being served for negligent breach of that duty.³¹ Finally, the last circumstance would be where the other party is a member of a class protected against the class to which the other party belongs.³² An example would be where the Court of Appeals of Colorado found an exculpatory clause unenforceable against a tenant after a landlord inserted an exculpatory clause in a lease agreement.³³ It is very important to note that the Restatement indicates that these categories are not intended as an exhaustive list of situations in which exculpatory contracts are unenforceable on the grounds of public policy.³⁴

26. RESTATEMENT (SECOND) OF CONTRACTS § 195(2) (AM. LAW INST. 1981).

27. *Id.* § 195(2)(a).

28. *Id.* § 195 cmt. a.

29. *See* WIS. STAT. § 102 (2017–2018)

30. RESTATEMENT (SECOND) OF CONTRACTS § 195(2)(b) (AM. LAW INST. 1981).

31. *Id.* § 195 cmt. a.

32. *Id.* § 195(2)(c) (AM. LAW INST. 1981).

33. *Stanley v. Creighton Co.*, 911 P.2d 705, 708 (Colo. App. 1996) (“A public policy that protects tenants from a waiver clause is more compelling here, under a form residential lease, than it would be under a commercial lease.”); *see also* *Coll. Mobile Home Park & Sales, Inc. v. Hoffmann*, 72 Wis. 2d 514, 519, 241 N.W.2d 174, 177 (1976).

34. RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (AM LAW INST. 1981); *Merten v. Nathan*, 108 Wis. 2d 205, 213, 321 N.W.2d 173, 178 (1982); *Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co.*, 117 Wis. 2d 587, 595–96, 345 N.W.2d 417, 421 (1984).

B. Wisconsin Courts

Similar to the Restatement (2d) of Contracts, Wisconsin courts have identified four generic situations in which exculpatory contracts will be declared void on public policy grounds:

[1] a contract arises out of a business generally thought suitable for public regulation; [2] the party seeking exculpation is engaged in performing a service of great importance to the public; [3] the party seeking exculpation holds itself out as willing to give reasonable public service to all who apply; and [4] the party invoking exculpation possesses a decisive advantage of bargaining strength.³⁵

It is again important to note that the Wisconsin courts have concluded that these categories are not intended as an exhaustive list of situations in which exculpatory contracts are unenforceable on the grounds of public policy.³⁶

Since 1982, the Wisconsin Supreme Court has decided seven exculpatory contract cases where death or serious injury was involved and, in every case, declared the exculpatory contract unenforceable.³⁷ The circumstances are quite diverse and involved the following types of activity: swimming at a members' only swimming pool,³⁸ snow skiing at a public ski hill,³⁹ riding along with a spouse at work,⁴⁰ race car driving at a race track,⁴¹ hot air balloon rides at a public event,⁴² water skiing at a water show,⁴³ and horseback riding at a stable open to the public.⁴⁴

Despite the fact that the Wisconsin Supreme Court has never upheld an exculpatory contract, the court continues to insist that these exculpatory

35. *Merten*, 108 Wis. 2d at 212; *Disc. Fabric House*, 117 Wis. 2d at 593.

36. RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (AM. LAW INST. 1981); *Merten*, 108 Wis. 2d at 213; *Disc. Fabric House*, 117 Wis. 2d at 595.

37. *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 v. Thomson*, 161 Wis. 2d 502, 468 N.W.2d 654 (1991); *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*, 108 Wis. 2d 205.

38. *Atkins*, 2005 WI 4.

39. *Yauger*, 206 Wis. 2d at 76.

40. *Richards*, 181 Wis. 2d at 1007.

41. *Arnold*, 111 Wis. 2d at 203, *overruled on other grounds by Green Spring Farms*, 136 Wis. 2d at 304.

42. *Roberts*, 2016 WI 20.

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

44. *Merten v. Nathan*, 108 Wis. 2d 205, 321 N.W.2d 173 (1982).

contracts are not automatically void and unenforceable as contrary to public policy.⁴⁵ Rather, a court should closely examine whether such agreements violate public policy.⁴⁶

VI. THE LEGISLATURE'S APPROACH TO CIVIL IMMUNITY

At the same time that the Wisconsin Supreme Court was rendering every recreational⁴⁷ exculpatory contract that came before it unenforceable, the Wisconsin legislature was creating statutory immunity for enterprises that were conducting various recreational activities.⁴⁸ Since the legislature is the penultimate authority that defines public policy, a review of their legislation and the approach utilized by the legislature in granting immunity in various recreational settings should suggest the means whereby immunity can be granted by contract in other recreational settings. The most compelling question, of course, is whether the legislature, through its enactments, provides statutory immunity for an enterprise's negligent conduct. If so, there is every reason to believe that, if an enterprise in its contract follows the same approach the legislature used to provide immunity in a recreational setting, then contractual immunity is achievable for an enterprise's negligent conduct. On the other hand, if the legislature did not provide statutory immunity for an enterprise's negligent conduct, then it seems a fair conclusion that the public policy of the state is not to favor granting immunity for an enterprise's negligent conduct when sponsoring recreational activity. An examination of the current statutes that grant immunity in various recreational settings should indicate the current public policy on immunity from civil liability for an enterprise's negligence.

It is an important public policy of the State of Wisconsin that enterprises offer recreational activities to the public.⁴⁹ In this regard, Wisconsin has enacted three different types of statutes that are designed to decrease uncertainty regarding the legal responsibility for deaths or injuries that result from participating in recreational activities. The first type is those statutes that are specifically directed at a particular recreational activity and provide statutory immunity from civil liability to those enterprises that offer said recreational activity to the public.⁵⁰ More specifically, statutory immunity is

45. *Richards*, 181 Wis. 2d at 1015.

46. *Id.*; *Merten*, 108 Wis. 2d at 213.

47. One exception is *Richards*, 181 Wis. 2d at 1014, which was not a recreational activity, but, rather involved a wife riding along with her husband while he was driving his work vehicle.

48. WIS. STAT. §§ 895.481, 895.524, 895.526, 167.33, 895.527, 895.519, 895.52 (2017–2018).

49. *Id.* § 895.525(1).

50. *Id.* §§ 895.481, 895.524, 895.526, 167.33, 895.527, 895.519.

provided for enterprises that offer the opportunity to participate in equine activities,⁵¹ agricultural tourism,⁵² alpine sports,⁵³ sport shooting,⁵⁴ and camping.⁵⁵ The second type is a statute that provides a broad grant of statutory immunity to a real property owner who opens up his or her land to the public for non-commercial, recreational use.⁵⁶ This statute is commonly known as the “recreational immunity statute.”⁵⁷ Finally, the third type is a statute, which is not a statutory immunity statute, but rather an assumption of risk statute that specifies the responsibilities of participants in recreational activities.⁵⁸

A. Targeted Recreational Immunity Statutes

The first type of immunity statute is one that is specifically directed at a particular recreational activity and provides statutory immunity from civil liability to those enterprises that offer said recreational activity to the public.⁵⁹ Like Wisconsin, many other states’ legislatures have enacted similar statutes protecting equine activities,⁶⁰ alpine sports,⁶¹ sport shooting,⁶² agricultural

51. *Id.* § 895.481.

52. *Id.* § 895.524.

53. *Id.* §§ 895.526, 167.33.

54. *Id.* § 895.527.

55. *Id.* § 895.519.

56. *Id.* § 895.52.

57. *Lang v. Lions Club of Cudahy Wis., Inc.*, 2018 WI App 69, ¶ 2, 384 Wis. 2d 520, 920 N.W.2d 329.

58. Wis. STAT. § 895.525.

59. *Id.* §§ 895.481 (equine activities), 895.519 (private campgrounds), 895.524 (agricultural tourism activity), 895.526 (alpine sports), 895.527 (sport shooting).

60. ALA. CODE. § 6-5-337 (2018); ARIZ. REV. STAT. ANN. § 12-553 (2019); COLO. REV. STAT. § 13-21-119 (2018) (statute also covers llamas); CONN. GEN. STAT. §§ 52-557p, 52-557s (2019) (statute also covers donkeys and mules); FLA. STAT. § 773.03 (2018); HAW. REV. STAT. § 663B-2 (2018); IDAHO CODE § 6-1802 (2018); 745 ILL. COMP. STAT. 47/15, 47/20 (2018); IND. CODE § 34-31-5-1 (2018); LA. STAT. ANN. § 9:2795.3 (2018); MICH. COMP. LAWS § 691.1663 (2018); MISS. CODE ANN. § 95-11-5 (2018); MO. REV. STAT. § 537.325 (2018); N.J. STAT. ANN. § 5:15-5 (West 2019); N.M. STAT. ANN. § 42-13-4 (2019); N.C. GEN. STAT. § 99E-2 (2018); OHIO REV. CODE ANN. § 2305.321 (West 2018); OR. REV. STAT. § 30.691 (2018); 4 PA. CONS. STAT. § 602 (2018); S.C. CODE ANN. § 47-9-720 (2018); S.D. CODIFIED LAWS §§ 42-11-2, -3 (2018); TENN. CODE ANN. § 44-20-103 (2018); UTAH CODE ANN. § 78B-4-202 (West 2018); VA. CODE ANN. § 3.2-6202 (2018); W. VA. CODE § 20-4-5 (2018).

61. ARIZ. REV. STAT. ANN. § 5-706; COLO. REV. STAT. § 33-44-113; CONN. GEN. STAT. § 29-212; IDAHO CODE § 6-1107; MASS. GEN. LAWS ch. 143, § 71P (2018); N.J. STAT. ANN. §§ 5:13-5, 24:15-14; N.C. GEN. STAT. § 99C-3; OR. REV. STAT. § 30.980; TENN. CODE ANN. § 68-114-103; UTAH CODE ANN. § 78B-4-403; W. VA. CODE § 20-3A-6; WYO. STAT. ANN. § 1-1-123.4 (2018).

62. ALA. CODE. § 6-5-341; IDAHO CODE § 6-2702; MICH. COMP. LAWS § 691.1542.

tourism,⁶³ and landowner liability in the context of recreational activities.⁶⁴ Scholars have suggested that Wisconsin's legislature act and codify more statutes relating to the exculpation of liability in recreational activities.⁶⁵ The types of other activities which have drawn the attention of the legislatures in other states include, skating;⁶⁶ motor sports;⁶⁷ baseball facilities;⁶⁸ hockey facilities;⁶⁹ bowling;⁷⁰ paddle sports;⁷¹ and pools, gymnasiums, places of public amusement, or recreation.⁷²

Wisconsin's alpine sports statute and equine activity statutes were passed after the Wisconsin Supreme Court addressed whether particular exculpatory contracts were enforceable in skiing and horseback riding cases.⁷³ In both cases, the court determined that the exculpatory contracts were unenforceable as contrary to public policy.⁷⁴ Subsequently, however, the legislature passed statutes, which provide immunity from civil liability in alpine sports and equine activities. It is instructive to examine how the legislature created statutory immunity and balanced the public policy concerns after the Supreme Court held such contractual immunity unenforceable.

The first case involves an eleven-year-old girl who was skiing and crashed into the concrete base of a lift tower.⁷⁵ Upon entering the ski resort, her father

63. ALA. CODE. § 6-5-347; COLO. REV. STAT. § 13-21-121; HAW. REV. STAT. § 663-1.54; IDAHO CODE § 6-3004; IND. CODE §§ 34-31-9-10, 34-31-11.4-2; LA. STAT. ANN. § 9:2795.5; ME. STAT. tit. 7, § 252 (2018); MINN. STAT. § 604A.40 (2018); N.C. GEN. STAT. § 99E-31; OR. REV. STAT. § 30.673; TENN. CODE ANN. § 43-39-102; TEX. CIV. PRAC. & REM. CODE ANN. § 75A.002 (2017); UTAH CODE ANN. § 78B-4-512; VA. CODE ANN. § 3.2-6401.

64. ALA. CODE. § 6-5-345; CONN. GEN. STAT. § 52-557f, g; FLA. STAT. § 773.05; KY. REV. STAT. ANN. § 411.190 (West 2018); MICH. COMP. LAWS § 700.5109; MINN. STAT. § 604A.23; MO. REV. STAT. § 537.346; N.C. GEN. STAT. § 38A-4; OHIO REV. CODE ANN. § 1533.181; TEX. CIV. PRAC. & REM. CODE ANN. § 75.002; UTAH CODE ANN. § 57-14-201.

65. *E.g.*, Blake A. Nold, Comment, *Codify This: Exculpatory Contracts in Wisconsin Recreational Businesses*, 101 MARQ. L. REV. 573 (2017).

66. ALA. CODE § 6-5-342; 745 ILL. COMP. STAT. 72/25 (2018); IND. CODE § 34-31-6.5-4; N.C. GEN. STAT. § 99E-13; S.C. CODE ANN. § 52-21-50 (2018).

67. ARIZ. REV. STAT. ANN. § 12-556 (2019); FLA. STAT. § 549.09; HAW. REV. STAT. § 663-10.95; LA. STAT. ANN. § 9:2795.4.

68. ARIZ. REV. STAT. ANN. § 12-554; COLO. REV. STAT. § 13-21-120; 745 ILL. COMP. STAT. 38/10.

69. 745 ILL. COMP. STAT. 52/10.

70. 745 ILL. COMP. STAT. 41/15; MICH. COMP. LAWS § 691.1584 (2018).

71. MO. REV. STAT. § 537.327 (2018); W. VA. CODE § 20-3B-5 (2018).

72. N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 2018).

73. *Merten v. Nathan*, 108 Wis. 2d 205, 321 N.W.2d 173 (1982); *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 557 N.W.2d 60 (1996); Wis. STAT. §§ 895.481, .526 (2017–2018).

74. *Merten*, 108 Wis. 2d at 206–07; *Yauger*, 206 Wis. 2d at 78.

75. *Yauger*, 206 Wis. 2d at 79.

had signed an exculpatory contract for the entire family.⁷⁶ There were several reasons why the court found the exculpatory contract to be against public policy. First, the court noted that an exculpatory contract must “clearly, unambiguously, and unmistakably” inform the signer that the waiver exculpates negligence.⁷⁷ Second, the exculpatory contract must define and notify the signer of the inherent risks in the activity.⁷⁸ Lastly, the owner must “clearly and unequivocally communicate to the signer the nature and significance of the document being signed.”⁷⁹ In other words, not only must the exculpation be clear and unequivocal, but it also must be conspicuous to the signer. The exculpatory contract for the skiing accident failed in all three regards.⁸⁰

As noted, Wisconsin passed a limitation of liability statute for participation in alpine sports after the aforementioned skiing case.⁸¹ The statute takes a three-pronged approach to protecting the ski operator by limiting civil liability, specifying various assumptions of risk by the participants, and placing certain responsibilities on the participant.⁸² First, the statute limits civil liability by providing that a ski operator who fulfills all of his or her duties as specified by the statute⁸³ owes no further duty of care to a participant and is not liable for any injury or death that occurs as a result of any conditions or risks associated with alpine sports.⁸⁴ The conditions and risks of alpine sports are defined by the statute to include “[c]hanges in weather or visibility”;⁸⁵ “[t]he presence of surface or sub surface conditions,” such as ice, slush, mud, rocks, puddles, and forest growth, or debris, including stumps, logs, or brush;⁸⁶ “[r]idges, sharp corners, bumps, moguls, valleys, . . . cliffs, ravines, and double fall lines”;⁸⁷ “[v]ariations in the difficulty of terrain, surface conditions, or subsurface conditions” on the trails;⁸⁸ “[t]he risk of injury or death on trails and terrains that fall away or drop off toward hazards”;⁸⁹ “[t]he risk of collision with

76. *Id.*

77. *Id.* at 84.

78. *Id.* at 84–85.

79. *Id.* at 86–87.

80. *Id.* at 88–89.

81. WIS. STAT. § 895.526 (2017–2018).

82. *Id.*

83. *Id.* § 167.33(3)–(4).

84. *Id.* § 895.526(4)(a).

85. *Id.* § 167.33(2)(a).

86. *Id.* § 167.33(2)(b).

87. *Id.* § 167.33(2)(c).

88. *Id.* § 167.33(2)(d).

89. *Id.* § 167.33(2)(e).

other participants, employees of a ski area operator, or ski area infrastructure”;⁹⁰ “[v]ariation in the location, construction, configuration, or steepness of trails or terrains”;⁹¹ and finally, “[t]he greater risk of collision, injury, or death in treed areas, in areas where competitions are held, and in areas of freestyle terrain.”⁹²

The critical condition precedent that must be satisfied before the ski operator owes no further duty of care to a participant and is not liable for any injury that occurs as result of any conditions or risks associated with alpine sports is that the ski operator fulfills all of the duties specified by the statute. The statutory duties of the ski operator that must be complied with are divided into two categories—signage/notice⁹³ and other duties.⁹⁴ The signage/notice duties require the ski operator to post signs of various sizes warning the participants about the afore-described conditions and risks of the alpine sport;⁹⁵ recommending the wearing of helmets;⁹⁶ specifying the participant’s duties;⁹⁷ assessing the difficulty of the trails;⁹⁸ warning of the ski area vehicles in the area;⁹⁹ and indicating that a copy of the alpine sports statute is available for the participant to read.¹⁰⁰ “Every participant in an alpine sport at a ski area is statutorily presumed to have seen and understood the signage provided by the ski area operator.”¹⁰¹

The other statutory duties include a requirement that “[e]ach ski operator . . . post and maintain a map of the trails and terrains in the ski area”;¹⁰² “mark hydrants, water pipes, and any other man-made structures on the ski area that are not readily visible to participants in an alpine sport”;¹⁰³ “adopt a written policy determining which man-made ski area infrastructures require protective padding and determine the type, height, thickness, and color of the padding”;¹⁰⁴

90. *Id.* § 167.33(2)(f).

91. *Id.* § 167.33(2)(g).

92. *Id.* § 167.33(2)(h).

93. *Id.* § 167.33(3).

94. *Id.* § 167.33(4).

95. *Id.* § 167.33(3)(a)–(b).

96. *Id.* § 167.33(3)(b)(2).

97. *Id.* § 167.33(3)(d)–(em).

98. *Id.* § 167.33(3)(f).

99. *Id.* § 167.33(3)(i).

100. *Id.* § 167.33(3)(c).

101. *Id.* § 895.526(2)(b).

102. *Id.* § 167.33(4)(a).

103. *Id.* § 167.33(4)(ag).

104. *Id.* § 167.33(4)(ar).

and finally, follow the various statutory requirements regarding ski area vehicles.¹⁰⁵

Next, the statute addresses assumption of risk in a number of ways. First, it provides that every participant in an alpine sport accepts the aforesaid conditions and risks of the alpine sport.¹⁰⁶ “Second, every participant in an alpine sport . . . accepts that failure to wear a helmet or wearing a helmet that is improperly sized, fitted, or secured increases the risk of injury or death or the risk of a more severe injury.”¹⁰⁷ Third, every participant in an alpine sport accepts that natural or man-made obstacles, “including ski area infrastructure and ski area vehicles, may be unpadded or not heavily padded and accepts that there may be a higher risk of injury or death associated with a collision with an obstacle that is unpadded or not heavily padded.”¹⁰⁸

Finally, the statute places various duties upon the participants. The duties are primarily safety rules that if the participant fails to follow the rules will likely be evidence of contributory negligence by the participant.¹⁰⁹ In addition, the statute provides that every participant in an alpine sport is responsible for choosing whether to wear a helmet or not while participating.¹¹⁰ “And, if the participant chooses to wear a helmet, he or she has the responsibility to ensure that the helmet is of the correct size and fit and to ensure that it is properly secured while [participating] in the alpine sport.”¹¹¹

Much can be learned from the legislature’s adoption of the alpine sports statute after the Wisconsin Supreme Court’s decision in *Yauger* concerning the balance between civil liability immunity and public policy. Recall, the *Yauger* case involved an eleven-year-old girl who was skiing and crashed into the concrete base of a lift tower.¹¹² There were three reasons why the Supreme Court found the exculpatory contract to be against public policy. First, the court noted that a contract must clearly, unambiguously, and unmistakably inform the signer that the waiver exculpates negligence.¹¹³ However, the alpine statute does not exculpate for a ski operator’s negligence. In fact, it is a condition precedent to civil immunity that the ski operator fulfills all of the statutory duties required by the statute before any immunity protection arises.¹¹⁴ Even

105. *Id.* § 167.33(4)(b).

106. *Id.* § 895.526(2)(a).

107. *Id.* § 895.526(2)(c).

108. *Id.* § 895.526(2)(d).

109. *Id.* § 895.526(3)(a).

110. *Id.* § 895.526(3)(b).

111. *Id.* § 895.526(3)(b).

112. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 79, 557 N.W.2d 60, 61 (1996).

113. *Id.* at 84.

114. WIS. STAT. § 895.526(4)(a).

though the statute provides that one of the conditions and risks of participating in an alpine sport is the risk of collision with the ski area infrastructure,¹¹⁵ one of the duties statutorily imposed upon the ski operator is that a “ski operator shall adopt a written policy determining which man-made ski area infrastructures require protective padding and determine the type, height, thickness, and color of the padding.”¹¹⁶ It would clearly be a question of fact for the jury to determine whether the ski operator was negligent in determining the type, height, thickness, and color of the padding on the concrete bases of the lift towers. Another example indicating that the alpine statute does not exculpate for the ski operator’s negligence is the statute’s treatment of ski area vehicles.¹¹⁷ Among other statutory requirements, the alpine sports statute mandates that an employee operating a ski area vehicle¹¹⁸ must possess a valid driver’s license;¹¹⁹ that the operator of a ski area vehicle may not operate a vehicle “at a rate of speed greater than is reasonable”;¹²⁰ and the person operating a ski area vehicle within the ski area during the hours in which a lift is being operated shall give skiers the right-of-way.¹²¹ The ski area operator’s failure to satisfy any of the aforesaid requirements concerning ski area vehicles can lead to a claim of negligence. In sum, the ski operator is not exculpated or granted immunity from any acts of negligence by the alpine sports statute.

Second, the court required that the exculpatory contract must define and notify the signer of the inherent risks in the activity.¹²² The statutory requirements of signage and notice clearly provide ample notice to every participant of all the inherent risks involved in alpine sports, including making available a copy of the Wisconsin alpine sports statute for their review. Finally, the court required that the owner “clearly and unequivocally communicate to the signer the nature and significance of the document being signed.”¹²³ Again, the statutory requirements of signage and notice clearly and unequivocally communicate to each participant that there is a limitation of liability by the ski operator, assumption of risk by the participants regarding the conditions and risks inherent in alpine sport, and also, that the participant must follow all safety rules to avoid injury or death to the participant or a third-party participant.

115. *Id.* § 167.33(2)(f).

116. *Id.* § 167.33(4)(ar).

117. *Id.* § 167.33(4)(b).

118. *Id.* § 167.33(1)(k).

119. *Id.* § 167.33(4)(b)(5).

120. *Id.* § 167.33(4)(b)(7).

121. *Id.* § 167.33(4)(b)(8).

122. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 84–85, 557 N.W.2d 60, 63 (1996).

123. *Id.* at 86.

In drafting the alpine sports statute, the legislature adopted only two of the three rationales for the *Yauger* decision. First, the court required that the exculpatory contract define and notify the signer of the inherent risks in the activity.¹²⁴ The alpine sports statute accomplishes that through its signage requirements of the conditions and risks of participating in alpine sports¹²⁵ and by requiring that the ski operator offer a copy of the alpine sports statute to any participant.¹²⁶ Second, the court required that the owner “clearly and unequivocally communicate to the signer the nature and significance of the document being signed.”¹²⁷ The alpine sports statute satisfies that principle through its signage requirements to all participants.¹²⁸ Finally, the court required that any exculpatory contract must use the word negligence.¹²⁹ Significantly, however, the alpine sports statute does not provide civil liability immunity for a ski area operator’s negligence. In fact, there are numerous instances where the ski operator will be liable for its negligence under the statute.¹³⁰ The only immunity from civil liability is for the inherent risks integral to participating in alpine sports, and not for the ski area operator’s negligence.¹³¹ This analysis is supported by the legislative history accompanying the adoption of the alpine sports statute where in it indicates that “a ski operator who fulfills all of his or her duties, as described in the Act, . . . is not liable for any injury or death that occurs as a result of any condition or risk accepted by the participant.”¹³² In other words, the immunity runs only to the inherent risks in participating in the alpine sport.

The second case involves a person who was injured while taking a horseback riding lesson.¹³³ The *Merten* court concluded that the exculpatory clause violated public policy because the stable owner interjected a misrepresentation concerning insurance coverage into the bargaining process before the exculpatory contract was executed.¹³⁴ After the case was decided by the Wisconsin Supreme Court, Wisconsin enacted a limitation of liability

124. *Id.* at 84–85.

125. WIS. STAT. §§ 895.526(2)(a), 167.33(2)–(3).

126. *Id.* § 167.33(3)(c).

127. *Yauger*, 206 Wis. 2d at 86.

128. WIS. STAT. §§ 895.526(2)(b), 167.33(3)(c).

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

130. *See* WIS. STAT. §§ 895.526(3)(b), 167.33(1)(k), 167.33(4)(ar), 167.33(4)(b), 167.33(4)(b)(7), 167.33(4)(b)(8).

131. *Id.* § 895.526(3)(b).

132. ANNE SAPPENFIELD, WIS. LEGIS. COUNCIL ACT MEMO, 2011 WISCONSIN ACT 199, LIABILITY OF SKI AREA OPERATORS AND SNOW SPORT DUTIES (Apr. 13, 2012).

133. *Merten v. Nathan*, 108 Wis. 2d 205, 206, 321 N.W.2d 173, 174 (1982).

134. *Id.* at 214–15.

statute for equine activities.¹³⁵ The statute provides that, with some exceptions, a person, including an equine activity sponsor¹³⁶ or an equine professional,¹³⁷ “is immune from civil liability for acts or omissions related to his or her participation in equine activities if a person participating in the equine activity is injured or killed as the result of an inherent risk of equine activities.”¹³⁸ An “inherent risk of equine activities” is “a danger or condition that is an integral part of equine activities.”¹³⁹ Those inherent risks are defined as the propensity of an equine to behave in an erratic manner; the “unpredictability of an equine’s reaction to a sound, movement or unfamiliar object, person, or animal”; “[a] collision with an object or another animal”; the potential for another person participating in an equine activity to act in a negligent fashion; or a natural hazard, including surface and subsurface conditions.¹⁴⁰ Significantly, a person seeking immunity under the statute cannot receive immunity if the person provides equipment that “he or she knew or should have known was faulty and the faulty equipment . . . causes the injury or death”; or “[p]rovides an equine to a person and fails to make a reasonable effort to determine the ability of the person to engage in the equine activity or to safely manage the particular equine . . . based on the person’s representations of his or her ability”; or “fails to conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property.”¹⁴¹ Notably, the legislature has chosen to exculpate the owner only for the inherent risks of the activity and not for negligent activity by the owner. Unfortunately, the details regarding the circumstances surrounding the plaintiff’s injury in *Merten* were not reported in the court’s opinions.¹⁴² Therefore, one cannot surmise whether the statute would have had any impact on the resolution of the case.

Besides the two statutes that were enacted as a result of Wisconsin Supreme Court cases, there are three additional Wisconsin statutes that were enacted to provide immunity from civil liability for owner/operators that offer recreational activities. One statute addresses private campgrounds,¹⁴³ another covers sport shooting,¹⁴⁴ and a third relates to agricultural tourism activities.¹⁴⁵ The private

135. Compare *id.*, with 1995 Wis. Act 256.

136. WIS. STAT. § 895.481(1)(b)(9)(c).

137. *Id.* § 895.481(1)(b)(9)(d).

138. *Id.* § 895.481(2).

139. *Id.* § 895.481(1)(e).

140. *Id.*

141. *Id.* § 895.481(3).

142. See *Merten v. Nathan*, 108 Wis. 2d 205, 206–09, 321 N.W.2d 173, 174–76 (1982).

143. WIS. STAT. § 895.519.

144. *Id.* § 895.527.

145. *Id.* § 895.524.

campground statute provides that an owner or operator of a private campground and any of its employees or officers are immune from civil liability for acts or omissions that relate to camping at a private campground if a person is injured or killed or property is damaged as a result of an inherent risk of camping.¹⁴⁶ The inherent risks of camping are defined as a danger or condition that is an integral part of camping, including the dangers posed by: “[f]eatures of the natural world, such as trees, tree stumps, roots, rocks, mud, sand, and soil; [u]neven or unpredictable terrain; [n]atural bodies of water; [a]nother camper or visitor at the . . . campground acting in a negligent manner where the campground owner or employees are not involved; [a] lack of lighting, including lighting at campsites; [c]ampfires in a fire pit or enclosure provided by the campground”; or weather, insects, birds, and other wildlife.¹⁴⁷

Notably, there are at least two instances anticipated by the campground statute that would cause a private owner/operator to be responsible for its negligent conduct. First, if the owner/operator fails to “conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property that he or she owns, leases, rents, or is otherwise in lawful control of or possession.”¹⁴⁸ And, second where another camper or visitor at the private campground acts in a negligent manner and the campground owner or employee is involved.¹⁴⁹ In sum, the owner/operator of a campground is not civilly liable for the “inherent risks of camping” but is responsible for his or her negligent conduct.

The second statute provides immunity from civil liability for the owner/operator of a sport shooting range.¹⁵⁰ The statute provides immunity from civil liability that relates to the noise resulting from the operation of the sport shooting range¹⁵¹ and immunity from any civil action based *solely* on the negligent act of a user of the sport shooting range.¹⁵² Arguably, if the owner/operator in any way contributed to the negligent act of a user of the sport shooting range, the owner/operator would be responsible for its negligent conduct. Notably, the statute does not provide any immunity for the negligent conduct of the owner/operator while operating the range. There should be no inherent risks of injury or death at a sport shooting range, and the statute understandably does not address such risks.

146. *Id.* § 895.519(2).

147. *Id.* § 895.519(1)(am).

148. *Id.* § 895.519(3)(c).

149. *Id.* § 895.519(1)(am)(4).

150. *Id.* § 895.527.

151. *Id.* § 895.527(2).

152. *Id.* § 895.527(9).

Finally, the third statute provides immunity from civil liability for participation in an agricultural tourism activity.¹⁵³ Agricultural tourism activity is an:

educational or recreational activity that takes place on a farm, ranch, grove, or other place where agricultural, horticultural, or silvicultural crops are grown or farm animals or farmed fish are raised, and that allow members of the general public, whether or not for a fee, to tour, explore, observe, learn about, participate in, or be entertained by an aspect of agricultural production, harvesting, or husbandry that occurs on the farm, ranch, grove, or other place.¹⁵⁴

The agricultural tourism activities statute indicates that a “provider is immune from civil liability for injury to or the death of an individual who is participating in an agricultural tourism activity on the property owned, leased, or managed by the agricultural tourism provider” if the participant is injured or killed as a result of a “risk inherent in the agricultural tourism activity” and the agricultural tourism provider posts and maintains a statutorily required sign in a clearly visible location at each entrance to the property.¹⁵⁵ The “risks inherent in an agricultural tourism activity” means:

a danger or condition that is an integral part of an agricultural tourism activity, including all of the following: (1) the surface and sub surface conditions of land and the natural condition of vegetation and water on the property; (2) the unpredictable behavior of wild, domestic, or farm animals on the property; (3) the ordinary dangers of structures or equipment ordinarily used where agricultural, horticultural, or silvicultural crops grown or farm animals or farmed fish are raised; or, (4) the possibility that a participant in an agricultural tourism activity may act in a negligent manner, including by failing to follow instructions given by the agricultural tourism operator or by failing to exercise reasonable caution while engaging in the agricultural tourism activity, that may contribute to the injury to that participant or to another participant.¹⁵⁶

Notably, the statute is silent on the provider’s responsibility for negligent conduct. The statute only provides immunity from civil liability for the “risks inherent in the agricultural tourism activity,” and not negligent conduct by the provider. Thus, it seems clear that if a participant was injured by a provider’s

153. *Id.* § 895.524.

154. *Id.* § 895.524(1)(a).

155. *Id.* § 895.524(2)(a).

156. *Id.* § 895.524(1)(e).

employee improperly operating a piece of equipment, the statute will provide no immunity from that negligent conduct.

B. Wisconsin's Recreational Immunity Statute

None of the aforesaid specific recreational immunity statutes provide immunity to the owner/operator for the owner/operator's negligence that injures someone who is participating in the defined activity. However, four of the separately defined recreational immunity statutes specifically provide that nothing in each individual statutory section affects the limitation of a property owner's liability under Wisconsin's recreational immunity statute.¹⁵⁷ This is the second type of statute, which provides a broad grant of statutory immunity from civil liability arising from recreational activity but is not directed at any particular recreational activity. Wisconsin's recreational immunity statute is the only statute in Wisconsin that provides statutory immunity for an owner/operator's negligence that injures a person while that person is participating in a recreational activity on the owner/operator's land.¹⁵⁸ The recreational activities enumerated in the statute are not exclusive, and other recreational activities that are substantially similar to those enumerated in the statute are also protected.¹⁵⁹ Further, the legislation is to be liberally construed in favor of the property owner.¹⁶⁰

The statute protects governmental bodies,¹⁶¹ nonprofit organizations,¹⁶² and private property owners.¹⁶³ The statute provides that "no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in an recreational activity: (1) a duty to keep the property safe for recreational activities; (2) a duty to inspect the property . . .; or (3) a duty to give warning of an unsafe condition, use or activity on the property."¹⁶⁴ An example of the application of the recreational immunity statute is *Held v. Ackerville Snowmobile Club, Inc.*¹⁶⁵ In *Held*, the plaintiffs were on a snowmobile traveling on a dark trail when they collided with an abandoned trail grooming sled.¹⁶⁶ Both plaintiffs suffered injuries.¹⁶⁷ The plaintiffs brought

157. *Id.* §§ 895.481(7), 895.519(4), 895.524(4), § 895.526(5).

158. *Id.* § 895.52.

159. 1983 Wis. Act 418, § 1.

160. *Id.*

161. WIS. STAT. § 895.52(1)(d).

162. *Id.*

163. *Id.* § 895.52(1)(d)(2).

164. *Id.* § 895.52(2).

165. 2007 WI App 43, 300 Wis. 2d 498, 730 N.W.2d 428.

166. *Id.* ¶ 2.

167. *Id.*

claims against the Ackerville Snowmobile Club, alleging it had “negligently maintained the grooming equipment, failed to move the drag from the trail, and failed to provide any warning of the hazard to trail users.”¹⁶⁸ Ackerville answered by alleging that the negligence claims were barred by Wisconsin’s recreational immunity statute.¹⁶⁹

The trial court explained, when granting Ackerville’s motion for summary judgment, that the issue before the court was not whether Ackerville was negligent, but rather whether Ackerville enjoys statutory immunity.¹⁷⁰ On appeal, the appeals court affirmed the grant of summary judgment.¹⁷¹ When discussing the recreational immunity statute, the appeals court noted that “Wisconsin’s recreational immunity statute recognizes ‘the dramatic shrinkage of the public’s access to recreational land in an increasingly crowded world’ and encourages landowners to open their property to the public for recreational use.”¹⁷² In return for opening their land to the public’s use, the legislature determined that the recreational users should bear the risk of the recreational activity, including the owner’s¹⁷³ negligence.¹⁷⁴

The recreational immunity statute, however, has been carefully circumscribed so as not to grant too broad an immunity for an owner/operator’s negligence. There are three significant limitations to the scope of the immunity granted by the statute. First, “its stated purpose is to limit [a property owner’s] liability in order to encourage property owners to open their land to the public.”¹⁷⁵ None of the cases interpreting Wisconsin’s recreational immunity statute have granted immunity to a party who was not responsible for opening up his or her land to the public.¹⁷⁶ “The legislature did not enact the . . . statute to stop landowners from engaging in negligent behavior, but to induce property owners to open their land for recreational use.”¹⁷⁷ As a result, recreational users are to bear all the risks of the recreational activity.¹⁷⁸ Granting immunity to a

168. *Id.* ¶ 4.

169. *Id.*

170. *Id.* ¶ 5.

171. *Id.* ¶ 1.

172. *Id.* ¶ 8 (quoting *Kosky v. Int’l Ass’n of Lions Clubs*, 210 Wis. 2d 463, 477, 565 N.W.2d 260 (Ct. App. 1997)).

173. Owner is a broadly defined term and included the Ackerville Snowmobile Club as an occupier. *See id.* ¶ 19.

174. *Id.* ¶ 20.

175. *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20, ¶ 28, 367 Wis. 2d 386, 879 N.W.2d 492.

176. *Id.* ¶ 33.

177. *Held*, 2007 WI App 43, ¶ 20.

178. *Id.*

party that does not open his or her land to the public is not supported by Wisconsin case law.¹⁷⁹

Second, the legislature intended by the statute to “limit the liability of property owners toward others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit.”¹⁸⁰ In this regard, the statute specifically provides that it does not provide immunity if the private property owner “collects money, goods, or services in payment for the use of the owner’s property for the recreational activity” in an amount greater than \$2,000 during the year in which the death or injury occurs.¹⁸¹ Clearly the intent of the legislature was to protect the owner who opens up his/her land for recreational use and not commercial use.

Finally, the last limitation on the grant of immunity is that the only type of negligence that can be exculpated under the recreational immunity statute is negligence that is directly connected to the land or related to the condition or maintenance of the land.¹⁸² If the negligence does not relate to the land, there is no immunity; an owner’s negligence not connected to the condition or maintenance of the land is actionable. For example, the allegedly negligent conduct of a club and its agents regarding detonation of fireworks for a public fireworks display was held not related to the condition or maintenance of the land, and thus the recreational immunity statute did not bar the volunteer’s lawsuit against the club and its agents for injuries sustained when he was cleaning a firing tube and an explosion occurred.¹⁸³ Similarly, when a child drowned at a city pond, and it was subsequently alleged that the city’s paramedical services provided were negligent, it was held that “the City was acting independent of its functions as owner of recreational land and that its

179. *Roberts*, 2016 WI 20, ¶ 41.

180. 1983 Wis. Act 418, § 1.

181. WIS. STAT. § 895.52(6)(a) (2017–2018).

182. See *Wilmet v. Liberty Mut. Ins. Co.*, 2017 WI App 16, 374 Wis. 2d 413, 893 N.W.2d 251; *Carini v. ProHealth Care, Inc.*, 2015 WI App 61, 364 Wis. 2d 658, 869 N.W.2d 515, *rev. denied*, 2016 WI 81, 371 Wis. 2d 610, 887 N.W.2d 894; *Kosky v. Int’l Ass’n of Lions Clubs*, 210 Wis. 2d 463, 565 N.W.2d 260 (Ct. App. 1997), *rev. denied*, 215 Wis. 2d 424, 576 N.W.2d 280 (1997); *Kostroski v. County of Marathon*, 158 Wis. 2d 201, 462 N.W.2d 542 (Ct. App. 1990), *rev. denied*, 465 N.W.2d 656 (Wis. 1990); *Sauer v. Reliance Ins. Co.*, 152 Wis. 2d 234, 448 N.W.2d 256 (Ct. App. 1989), *rev. denied*, 449 N.W.2d 277 (Wis. 1989); see also *Lasky v. City of Stevens Point*, 220 Wis. 2d 1, 582 N.W.2d 64 (Ct. App. 1998), *rev. denied*, 585 N.W.2d 158, 220 Wis. 2d 366 (1998) (holding that plaintiff who fell because of a negligently maintained bridge was barred from recovery under 895.52); *Verdoljak v. Mosinee Paper Corp.*, 192 Wis. 2d 235, 531 N.W.2d 341 (Ct. App. 1995), *rev. granted*, 537 N.W.2d 570 (Wis. 1995), *aff’d*, 200 Wis. 2d 624, 547 N.W.2d 602 (1996) (inferring that plaintiff who struck closed gate on property was barred from recovery based on 895.52).

183. *Kosky*, 210 Wis. 2d at 476–77.

public paramedic services rendered were unrelated to the City's role as owner of the Pond.¹⁸⁴ The City's immunity for its functions as owner of recreational land could not shelter its liability for negligently performing another function."¹⁸⁵

It is clear that the legislature has carefully chosen the one circumstance where it will grant immunity for an owner/operator's negligent conduct when that owner/operator is offering a recreational activity to the public. "[T]he impetus for the [recreational immunity statute] is the continual shrinkage of the public's access to recreational land in the ever more populated modern world."¹⁸⁶ In that one limited circumstance, the legislature has decided that it is good public policy to provide immunity for the property owner's negligent conduct if the property owner opens up his or her land for the public's recreational use. Significantly, it is also important to note that the legislature has provided that once the recreational activity goes from a recreational motive to a commercial one, there is no longer any immunity for the property owner's negligence. Finally, the legislature has carefully limited the scope of the property owner's immunity for negligent conduct by requiring that the only type of negligence that can be exculpated under the recreational immunity statute is negligence that is directly connected to the land or related to the condition or maintenance of the land. These limitations indicate that the legislature believes it is good public policy to provide immunity for an owner's negligence only when there is a greater public policy to be served, such as opening up private land for the public's recreational use, not the owner's commercial use.

C. Wisconsin's Assumption of Risk Statute for Recreational Activity

The third type of statute that provides protection to enterprises that offer recreational activity opportunities is not a statutory immunity statute, but rather an assumption of risk statute that specifies the responsibilities of participants in recreational activities.¹⁸⁷ Significantly, the statute provides that "[a] participant in a recreational activity engaged in on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities accepts the risks inherent in the recreational activity of which the

184. *Linville v. City of Janesville*, 184 Wis. 2d 705, 711, 516 N.W.2d 427, 428–29 (1994).

185. *Id.*

186. *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20, ¶ 28, 367 Wis. 2d 386, 879 N.W.2d 492 (quoting *Hall v. Turtle Lake Lions Club*, 146 Wis. 2d 486, 489, 431 N.W.2d 696, 698 (Ct. App. 1988)).

187. WIS. STAT. § 895.525 (2017–2018).

ordinary prudent person is or should be aware.”¹⁸⁸ Further, the statute places certain responsibilities on each participant in a recreational activity:

[to] act within the limits of his or her ability; [h]eed all warnings regarding participation in the recreational activity; [m]aintain control of his or her person in the equipment, devices, or animals the person is using while participating in the recreational activity; [and] [r]efrain from acting in any manner that may cause or contribute to the death or injury to himself or herself or to other persons while participating in the recreational activity.¹⁸⁹

VII. THE EXCULPATORY CONTRACT AND NEGLIGENCE

The germane analysis to determine whether an exculpatory contract is enforceable is public policy.¹⁹⁰ Since 1982, the Wisconsin Supreme Court has decided seven exculpatory contract cases where death or serious injury was involved,¹⁹¹ and in five of those cases the court concluded that each exculpatory contract violated public policy.¹⁹² Prior to public policy being the germane analysis, the court used contract principles to determine the validity of exculpatory contracts.¹⁹³ Since the legislature is the penultimate arbitrator of public policy, an analysis of the legislature’s enactments on statutory immunity or exculpation provides insight and guidance on the public policy of the State when addressing immunity (exculpation) for enterprises that offer recreational opportunities to the public.

Wisconsin has enacted seven statutes, in total, that are designed to protect owner/operators who provide recreational activities to the public.¹⁹⁴ Five of those seven statutes are designed to protect owners/operators who are providing

188. *Id.* § 895.525(3).

189. *Id.* § 895.525(4)(a)(1)–(4).

190. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 86, 557 N.W.2d 60, 64 (1996); *Roberts*, 2016 WI 20, ¶ 49; *Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI 4, ¶ 13, 277 Wis. 2d 303, 691 N.W.2d 334.

191. *Roberts*, 2016 WI 20; *Atkins*, 2005 WI 4; *Yauger*, 206 Wis. 2d at 76; *Richards v. Richards*, 181 Wis. 2d 1007, 513 N.W.2d 118 (1994); *Merten v. Nathan*, 108 Wis. 2d 205, 321 N.W.2d 173 (1982); *Dobratz v. Thomson*, 161 Wis. 2d 502, 468 N.W.2d 654 (1991); *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).

192. *Roberts*, 2016 WI 20; *Atkins*, 2005 WI 4; *Yauger*, 206 Wis. 2d at 76; *Richards*, 181 Wis. 2d at 1007; *Merten*, 108 Wis. 2d at 215.

193. *Dobratz*, 161 Wis. 2d at 502; *Arnold*, 111 Wis. 2d at 203, *overruled on other grounds by Green Spring Farms*, 136 Wis. 2d at 304.

194. WIS. STAT. §§ 895.481 (equine activities), 895.519 (private campgrounds), 895.524 (agricultural tourism activity), 895.526 (alpine sports), 895.527 (sport shooting), 895.52, (recreational immunity), 895.525 (assumption of risk by participant).

specifically targeted recreational activities to the public.¹⁹⁵ The protection is afforded by providing immunity from civil liability under specified circumstances.¹⁹⁶ None of the five specifically targeted immunity statutes provides immunity from the owner/operator's negligent conduct.¹⁹⁷ On the other hand, the recreational immunity statute¹⁹⁸ does provide immunity for the landowner's negligence if a person is injured on the landowner's land.¹⁹⁹ And finally, the assumption of risk statute²⁰⁰ does not address immunity, but rather provides that the participant assumes the inherent risks of participating in that recreational activity.²⁰¹

The public policy on exculpatory contracts is fairly discernable from an analysis of the seven statutes that were designed to protect owner/operators who provide recreational activities to the public. The legislature has made it very clear that it is not the public policy of Wisconsin to exculpate an owner/operator from its negligence when providing opportunities for the public to participate in recreational activities. The only exception to that conclusion is where the legislature has provided immunity from an owner's negligence in the recreational immunity statute. And of course that is easily understandable by the fact that the legislature has made the public policy decision to encourage landowners to open up their private land for the public's use and in return has provided immunity from the landowner's negligence should that occur.²⁰² The legislature has made the policy decision that it is more important to open up private land to the public than to compensate an individual for the landowner's negligence.²⁰³ This immunity protection, however, does not extend to malicious conduct by the landowner.²⁰⁴ The principle that it is not the public policy of Wisconsin to provide immunity for an owner/operator's negligent conduct when offering a recreational activity to the public comports with the Wisconsin Supreme Court, which indicated, when balancing the conflicting principles of contract and tort law: "Under the circumstances in the case at bar,

195. *Id.* §§ 895.481 (equine activities), 895.519 (private campgrounds), 895.524 (agricultural tourism activity), 895.526 (alpine sports), 895.527 (sport shooting).

196. *Id.*

197. *See* discussion, Targeted Recreational Immunity Statutes, *supra* pp. 755–65.

198. WIS. STAT. § 895.52.

199. *See* discussion, Wisconsin's Recreational Immunity Statute, *supra* pp. 765–69.

200. WIS. STAT. § 895.525.

201. *See* discussion, Wisconsin's Assumption of Risk Statute for Recreational Activity, *supra* p. 769.

202. *Held v. Ackerville Snowmobile Club, Inc.*, 2007 WI App 43, ¶ 20, 300 Wis. 2d 498, 730 N.W.2d 428.

203. *Id.*

204. WIS. STAT. § 895.52(6)(b-c).

a combination of these factors demonstrates that adherence to the principle of freedom of contract is not heavily favored. The principle of tort law, to compensate persons for injuries resulting from unreasonable conduct of another, prevails.”²⁰⁵

There are other factors, as well that support the conclusion that it is not good public policy to permit an owner/operator, who negligently injures another, to be able to contractually exculpate for the owner/operator’s unreasonable conduct. An exculpatory contract that excuses unreasonable conduct will lead to more unreasonable conduct in the industry, which will, in turn, lead to a downward spiral of all standards in the industry. Lower standards will logically lead to more injuries. Also, the net effect of the exculpatory contract is to place the emotional and financial loss on the innocent participant. It is certainly a public policy issue whether a participant should solely bear the costs of providing such recreational events.²⁰⁶ Rather, the solution which seems best to comport with public policy is to require the owner/operator to provide insurance, which can best be used to spread the risks through the ticket prices, which can be adjusted to incorporate the insurance costs.²⁰⁷ Let the public decide through the marketplace if the recreational activity is worthy of their support.²⁰⁸

VIII. THE EXCULPATORY CONTRACT AND INHERENT RISKS

Although they do not provide immunity for negligent conduct by the owner/operator, all of the aforesaid specifically targeted immunity statutes, with the exception of the sport shooting statute, provide immunity from civil liability if a participant is injured by an inherent risk in that recreational activity.²⁰⁹ Obviously, there should be no inherent risks of injury in recreational sport shooting. Also, the recreational immunity statute does not address inherent risks.²¹⁰ Each statute, with the exception of the recreational immunity statute, the assumption of risk statute, and the sport shooting statute, spells out with particularity the inherent risks in each targeted recreational activity. The assumption of risk statute, however, does provide that the inherent risks of the recreational activity are assumed by the participant, although they are not

205. *Richards v. Richards*, 181 Wis. 2d 1007, 1020, 513 N.W.2d 118, 123 (1994).

206. *Arnold v. Shawano Cty. Agric. Soc’y*, 111 Wis. 2d 203, 213, 330 N.W.2d 773, 778–79 (1983), *overruled on other grounds by* *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987).

207. *Id.*

208. *Id.*

209. See discussion, Targeted Recreational Immunity Statutes, *supra* pp. 755–65.

210. See discussion, Wisconsin’s Recreational Immunity Statute, *supra* pp. 765–69.

spelled out with any particularity.²¹¹ Based on the foregoing analysis of the recreational immunity statutes, the legislature has made it very clear that it is the public policy of Wisconsin to exculpate an owner/operator from civil liability when a participant is injured by an inherent risk in that recreational activity.

The phrase “inherent risk,” however, is an ambiguous term.²¹² For example, some states define an inherent risk in the skiing context as “one that cannot be removed through the exercise of due care if the sport is to be enjoyed.”²¹³ On the other hand, other states define an inherent risk as including a collision with the ski lift towers.²¹⁴ There does, however, seem to be agreement that the inherent risk for any recreational activity does not include the owner/operator’s negligent conduct.²¹⁵

It is an established principle that an exculpatory contract must clearly and unmistakably inform the signer that they are waiving particularized, identified claims against the other party that are within the contemplation of the parties at the time of contracting.²¹⁶ Thus, the failure to define the inherent risks of the activity in an exculpatory contract will almost assuredly cause the contract to be rendered unenforceable.²¹⁷ Also, there is a practical advantage to carefully describing the inherent risks in the exculpatory contract. The common practice in these exculpatory contract cases is for the defense to move for summary judgment based on the exculpatory contract signed by the plaintiff.²¹⁸ However, the motion for summary judgment cannot be granted if there is a genuine issue of material fact.²¹⁹ The typical issue of material fact raised by the plaintiff, who is opposing the defendant’s motion, is the scope of the exculpatory contract.²²⁰ In other words, Was the injury caused by a risk particularly described in the

211. See discussion, Wisconsin’s Recreational Immunity Statute, *supra* pp. 765–69.

212. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 84–85, 557 N.W.2d 60, 63 (1996).

213. *Brett v. Great Am. Recreation, Inc.*, 677 A.2d 705, 715 (N.J. 1996) (suggesting that any risk that can be obviated should be, such as paddling the lift structures on the ski hills).

214. MICH. COMP. LAWS § 408.342(2) (2018).

215. *Yauger*, 206 Wis. 2d at 85 (citing *Dalury v. S–K–I, Ltd.*, 670 A.2d 795, 800 (Vt. 1995) (finding that a ski owner’s negligence is not an inherent risk of skiing)).

216. *Id.* at 84; *Dobratz v. Thomson*, 161 Wis. 2d 502, 522, 468 N.W.2d 654, 661–62 (1991); *Arnold v. Shawano Cty. Agric. Soc’y*, 111 Wis. 2d 203, 212, 330 N.W.2d 773, 778 (1983), *overruled on other grounds by Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987).

217. *Yauger*, 206 Wis. 2d at 84–85.

218. *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20, ¶ 1, 367 Wis. 2d 386, 879 N.W.2d 492; *Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI 4, ¶ 1, 277 Wis. 2d 303, 691 N.W.2d 334; *Yauger*, 206 Wis. 2d at 80; *Richards v. Richards*, 181 Wis. 2d 1007, 1010, 513 N.W.2d 118, 119 (1994); *Dobratz*, 161 Wis. 2d at 507; *Arnold*, 111 Wis. 2d at 207, *overruled on different grounds by Green Spring Farms*, 136 Wis. 2d at 304; *Merten v. Nathan*, 108 Wis. 2d 205, 206–07, 321 N.W.2d 173, 174–75 (1982).

219. WIS. STAT. § 802.08(3) (2017–2018)

220. *Arnold*, 111 Wis. 2d at 212, *overruled by Green Spring Farms*, 136 Wis. 2d at 304.

contract? If the risk is not particularly described, then the scope of the release is a jury question,²²¹ and the motion for summary judgment will be denied.²²²

Two cases illustrate the analysis when the exculpatory contract fails to clearly define the inherent risk in the activity. In *Hammer v. Road America, Inc.*,²²³ Mr. Hammer, a professional motorcycle driver, fell off “his motorcycle while negotiating a turn during a race at the Road America Race Track, Elkhart Lake, Wisconsin.”²²⁴ When he fell off his motorcycle, he slid into a protective barrier along the side of the track.²²⁵ He was “severely injured and was rendered a paraplegic.”²²⁶ Mr. Hammer had signed an exculpatory contract before participating in the race.²²⁷ The defendants raised the exculpatory contract as a defense to the action.²²⁸ The court held that the exculpatory contract was valid and enforceable.²²⁹ The court noted that that Mr. Hammer was injured while negotiating a turn, which is “the touchstone of the sport of racing.”²³⁰ The court further reasoned that “[t]here was nothing about this accident that was not in the reasonable contemplation of the parties when the exculpatory agreement was signed.”²³¹ Rather, Mr. Hammer “voluntarily, knowingly, and expressly chose to confront the risks and to bear their potential costs.”²³² “No public policy prohibited him from doing so, and no public policy precludes [the] court from giving effect to his written promise not to hold the defendants responsible should he be overcome by the hazards of his chosen sport.”²³³ The court upheld the exculpatory contract because the injuries resulted from an inherent risk in the recreational activity.²³⁴ The case could have been resolved by motion had the inherent risk been defined in the contract.

By comparison, in *Arnold v. Shawano County Agricultural Society*,²³⁵ Mr. Arnold brought a negligence action against the sponsor of a stock car race

221. *Id.*

222. *Id.*

223. 614 F. Supp. 467 (E.D. Wis. 1985), *aff'd*, 793 F.2d 1296 (7th Cir. 1986).

224. *Id.* at 468.

225. *Id.* at 471.

226. *Id.* at 468.

227. *Id.*

228. *Id.*

229. *Id.* at 472, *aff'd*, 793 F.2d 1296 (7th Cir. 1986).

230. *Id.* at 470.

231. *Id.* at 471.

232. *Id.* at 470.

233. *Id.*

234. *Id.* at 472.

235. 111 Wis. 2d 203, 330 N.W.2d 773 (1983), *overruled by* *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987).

seeking damages for severe personal injuries that rendered him a quadriplegic.²³⁶ The injuries were sustained by Mr. Arnold while participating in a stock car race at the Shawano county fairgrounds.²³⁷

The car operated by [Mr.] Arnold crashed through a guardrail, left the track, and then struck a utility pole and a lumber pile located outside of the guardrail causing a fire in the automobile. As a part of the rescue operations, fire extinguishing chemicals were sprayed on the burning vehicle without removing [Mr.] Arnold from the vehicle. The chemicals allegedly caused the plaintiff to sustain severe brain damage.²³⁸

The defendants moved for summary judgment on the basis of the exculpatory contract.²³⁹ The trial court granted the defendant's motion for summary judgment, and ordered judgment dismissing the complaint with prejudice and with costs.²⁴⁰ On appeal, the court of appeals reversed the circuit court and remanded the case for further proceedings.²⁴¹ "The court of appeals held the case should not be decided by a motion for summary judgment, finding a question of fact as to the intent of the parties in executing the release."²⁴² On the final appeal, the supreme court also found an issue of material fact and concluded that the trial court abused its discretion by granting the motion for summary judgment.²⁴³ The supreme court could not conclude that the exculpatory contract was meant to cover negligent rescue operations.²⁴⁴ Rather, the supreme court believed that an issue of material fact existed as to whether the risk of negligent rescue operations was within the contemplation of the parties at the time the exculpatory contract was executed.²⁴⁵ The court affirmed the appeals court decision to remand the case to the trial court to determine if the injuries did or did not result from an inherent risk in the recreational activity.²⁴⁶ Importantly, the court noted that if the parties meant to include rescue operations, it certainly could have been written into the agreement.²⁴⁷

236. *Id.* at 204.

237. *Id.*

238. *Id.* at 205.

239. *Id.* at 206.

240. *Id.* at 208.

241. *Id.*

242. *Id.* at 208–09.

243. *Id.* at 212.

244. *Id.*

245. *Id.*

246. *Id.* at 215.

247. *Id.* at 214.

These cases reinforce the concept that for many reasons, it is essential to clearly and carefully define the inherent risks of the activity in the exculpatory contract.

IX. CONCLUSION

The Wisconsin Supreme Court has indicated that the germane test to determine whether an exculpatory contract is enforceable is public policy. The legislature is the ultimate arbiter of public policy, and as such, it has enacted seven statutes that provide immunity from civil liability under various circumstances. The statutes allocate the responsibility for a participant's injuries caused by the inherent risks in the activity and the owner/operator's negligence.

The legislature has made it very clear that it is not the public policy of Wisconsin to exculpate an owner/operator from its negligence when providing opportunities for the public to participate in recreational activities. None of the statutes exculpate for negligence, with one understandable exception.

On the other hand, all of the specifically targeted immunity statutes, with one understandable exception, provide immunity from civil liability if a participant is injured by an inherent risk in that recreational activity.²⁴⁸ In addition, the assumption of risk statute provides that the inherent risks of the recreational activity are assumed by the participant, although they are not spelled out with any particularity. The legislature has again made it clear that it is the public policy of Wisconsin to exculpate an owner/operator from civil liability when a participant is injured by an inherent risk in that recreational activity.

The net result of the statutory analysis is that the public policy of Wisconsin does not permit exculpation for an owner/operator's negligence but does permit exculpation for the inherent risks in that recreational activity. It is a common practice in other states to recognize this statutory distinction between negligence and inherent risks in exculpatory contracts.²⁴⁹ Finally, the concept of inherent risks is recognized as an ambiguous term, and, therefore, it is critically important to carefully describe and identify the particular inherent risks in the activity in the exculpatory contract.

248. See discussion, Targeted Recreational Immunity Statutes, *supra* p. 769.

249. *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003). The Equine Liability Act expresses in general terms a public policy of the legislature that equine operators should be accountable for injuries due to their own fault, but not for events beyond their control. *Id.*