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Enforceable Exculpatory Agreements: Do They Still Exist? Contract Law in Wisconsin Offers Guidance on Drafting Enforceable Agreements, More

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Eight years ago I wrote an article for *Wisconsin Lawyer* entitled "Enforceable Exculpatory Agreements" that included detailed suggestions about how to draft and otherwise create such agreements.³ Earlier this year, the Wisconsin Supreme Court in *Atkins v. Swimwest Family Fitness Center* again considered the enforceability of exculpatory agreements. With its decision in *Atkins*, the court has now considered exculpatory agreements in a total of six cases in 25 years and has, *in every one of those cases*, found the agreement at issue unenforceable.⁴

Given the opinions of Justices Wilcox and Roggensack quoted below, and the abysmal track record that exculpatory agreements have had before the Wisconsin Supreme Court, it is prudent for lawyers to consider what the majority actually says in *Atkins*. Is there such a thing as an enforceable exculpatory agreement in Wisconsin anymore? And if so, how does an attorney draft one that will be enforced by the courts?

"[T]he majority opinion will render it virtually impossible to enforce any exculpatory agreement in Wisconsin."

Justice Wilcox, dissenting in *Atkins v. Swimwest Family Fitness Center*¹

"[T]he court has effectively removed the ability of most businesses that operate paid recreational facilities to limit any type of liability by contract."

Justice Roggensack, concurring in *Atkins v. Swimwest Family Fitness Center*²

What Happened in *Atkins*

The *Atkins* case arose out of an accident in which Dr. Charis Wilson drowned while swimming in a lap pool at a Madison fitness center. Wilson went to the center to do physical therapy. As a condition of being allowed to use the fitness center, she had to first complete a guest registration and waiver release statement form. The form was preprinted on a 5.5-inch by 5.5-inch card. The entire card was printed in capital letters all of the same size, font, and color. The actual "waiver language" on the card was limited to that shown in [Figure 1](#). A Swimwest employee testified that Wilson "was slow to fill out the card and ... it took her a long time to eventually sign the card."⁵ There was only one signature line on the card. Wilson knew how to swim, but soon after she started swimming laps in the 4-foot-deep lap pool, an employee of the center spotted her lying motionless near the bottom of the pool. Although the lifeguard on duty attempted a rescue and resuscitation, Wilson died the next day. The medical examiner indicated the cause of death as drowning (although it was classified as a "dry drowning" - no water was found in the lungs - which indicated that for some reason Wilson had stopped breathing while in the pool).⁶

Figure 1

Representation of Swimwest's Waiver Statement

WAIVER RELEASE STATEMENT
I AGREE TO ASSUME ALL LIABILITY FOR MYSELF WITHOUT REGARD TO FAULT, WHILE AT SWIMWEST FAMILY FITNESS CENTER. I FURTHER AGREE TO HOLD HARMLESS SWIMWEST FITNESS CENTER, OR ANY OF ITS EMPLOYEES FOR ANY CONDITIONS OR INJURY THAT MAY RESULT TO MYSELF WHILE AT THE SWIMWEST FITNESS CENTER. I HAVE READ THE FOREGOING AND UNDERSTAND ITS CONTENTS.

After Wilson's death, her minor son's guardian commenced a lawsuit on the son's behalf against the fitness center, alleging that Swimwest was negligent in operating the facility (particularly in managing and observing the pool area), that procedures to prevent drowning were not followed, and that the staff's negligence caused Wilson's death.⁷

The circuit court dismissed the lawsuit on the ground that Wilson had read and signed the waiver of liability form when she arrived at the fitness center. The court of appeals certified the issue of whether the agreement in question was enforceable to the Wisconsin Supreme Court on the ground that:

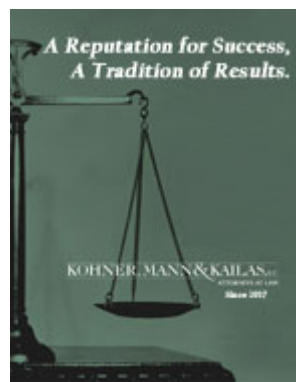
"[t]he Wisconsin courts have yet to formulate a clear, uniform test for the enforceability of broadly worded exculpatory clauses. We believe that this is an issue that will frequently recur, and that the supreme court should take this opportunity to further clarify the applicable law."⁸

The Wisconsin Supreme Court accepted the certification.

The Majority's Decision

The Wisconsin Supreme Court reversed the circuit court in a decision authored by Justice Crooks (and joined by four other justices). The majority decision began with the reminders that "Wisconsin case law does not favor [exculpatory] agreements," and "[w]hile this court has not held that an exculpatory clause is invalid per se, we have held that such a provision must be construed strictly against the party seeking to rely on it."⁹

The majority then discussed its two most recent exculpatory agreement cases, *Yauger v. Skiing Enterprises Inc.* (a 1996 case involving a girl who was killed when she skied into a ski-lift support tower) and *Richards v. Richards* (a 1994 case involving a woman who was injured while riding with her husband, a truck driver, on a work trip).¹⁰



In *Richards* the court articulated numerous factors it would consider when making a "public policy" determination as to whether a particular exculpatory agreement was enforceable, including whether there existed an "opportunity to bargain."¹¹ In *Yauger* the court appeared to articulate a two-prong test to determine whether such agreements are enforceable: 1) does the waiver "clearly, unambiguously and unmistakably inform the signer what is being waived"?; and 2) does the form, looked at in its entirety, "alert the signer to the nature and significance of what is being signed"?¹² The majority acknowledged that those two cases "place different weight on the public policy factors used to invalidate exculpatory agreements."¹³ The majority sidestepped resolving the conflicting approaches in those two cases because it believed that under either approach the agreement Wilson signed would be invalid.¹⁴

The majority held that the agreement in *Atkins* was invalid on public policy grounds for three reasons: 1) the agreement was "overly broad and all inclusive"; 2) the form "served two purposes" (guest registration and waiver of liability) and therefore failed to make clear whether Wilson was fully notified of the significance of the document; and 3) the facts did not indicate that Wilson had "any opportunity to bargain."¹⁵

As to being "overly broad and all inclusive," the form indicated that Wilson was assuming all liability for injury no matter what the cause. Such language clearly violated public policy as set forth in Wisconsin case law because it was broad enough to cover liability for reckless or intentional acts, for which liability can never be waived.¹⁶ The majority also indicated that the breadth of the waiver made it difficult to ascertain exactly what was within Wilson's or the center's contemplation when Wilson signed the form.¹⁷ Wilson, the majority said, "likely would not have contemplated drowning in a four-foot deep pool with a lifeguard on duty, when she signed the guest registration and waiver form."¹⁸

As to the form's failing to provide adequate notice of the waiver's nature and significance, Swimwest's form was defective in two ways: 1) it served two purposes (registration and waiver), rather than just one; and 2) there was nothing conspicuous about the paragraph containing the "Waiver Release Statement."¹⁹ The court noted, "Identifying and distinguishing clearly between those two contractual arrangements [registration and waiver] could have provided important protection against a signatory's inadvertent agreement to the release."²⁰ The entire form also was printed on one card, using the same font style and size and ink color, and provided only one signature line.²¹

Finally, the majority indicated the agreement would not be enforced because there was no opportunity for Wilson to bargain over the form's exculpatory language.²² Even though Wilson was told the form included

a waiver, took some time to read the form, and had the opportunity to ask questions, the court held that these facts were not sufficient to demonstrate a bargaining opportunity, saying "[t]he form itself must provide an opportunity to bargain."²³ To the majority, it was significant that Wilson would not have been allowed to use the facility unless she signed the form. "She was *forced* to either sign the form or not swim at Swimwest"²⁴ (emphasis added).

Justice Roggensack's Concurrence

Justice Roggensack agreed with the majority that the trial court erred when it granted Swimwest summary judgment, but for an entirely different reason. Justice Roggensack believed summary judgment was not warranted because an issue of fact existed as to whether Wilson "contemplated the possibility of her own death when she signed the waiver of liability."²⁵ Justice Roggensack would have remanded the case, so that the cause of Wilson's death could be established (that is, why she stopped breathing, "as there may have been medical circumstances that contributed to Wilson's death that had nothing to do with her being submerged in a pool") and to allow the jury to decide the issue of whether when Wilson signed the waiver she contemplated that cause of death.²⁶

"It is as if the court keeps asking 'can you hear me now?' and lawyers and businesses that draft such agreements keep ignoring what the court has said."

Unlike the majority, Justice Roggensack would have relied solely on the two-prong test the court articulated in *Yauger*.²⁷ Justice Roggensack criticized the majority's resurrection of the "bargaining" element first articulated in *Richards* as a test for enforceability:

"[The majority] implies that the lack of an opportunity to bargain could be sufficient to invalidate a release when it asserts, 'The form itself must provide an opportunity to bargain.' This is an unnecessary broadening of the law that heretofore has set the framework for the analysis of an exculpatory contract on public policy grounds."²⁸

Justice Roggensack noted that while the lack of an opportunity to bargain can be considered in evaluating the totality of the circumstances surrounding the execution of a waiver, that element can never be the sole ground on which a waiver is invalidated.²⁹ "It would be unrealistic to require an employee be authorized to bargain about the terms of a release of liability, and it would be unrealistic that an owner always be present at the facility."³⁰ Requiring bargaining "will result in an increase in lawsuits and in fewer swimming and other paid recreational facilities for Wisconsin citizens to enjoy, a result that does not further the public good."³¹

Justice Wilcox's Dissent

Justice Wilcox in his dissent strongly criticized the majority's decision. Justice Wilcox believed the majority misapplied the factors set forth in *Yauger* and *Richards* and "fail[ed] to articulate a clear test as to what type of exculpatory agreements are enforceable in this state."³² He concluded:

"The majority applies the above three factors in such a fashion so as to leave little possibility that any exculpatory agreement could be enforceable in this state."³³

Justice Wilcox chastised the majority for "revert[ing] back to the test used in *Richards* while ignoring the lessons of *Yauger*."³⁴

To Justice Wilcox, it was obvious that a reasonable person would understand that a waiver at an aquatic facility would cover the risk of drowning, and he believed it unnecessary for a waiver to list "each and every conceivable form of negligence that may result in injury to a patron."³⁵ The form did not serve two purposes, said Justice Wilcox, and it adequately notified Wilson of the waiver's nature and significance.³⁶ He repeated the argument that he originally made in his 1994 *Richards* dissent: "[i]t is entirely impractical to require 'bargaining' in this context."³⁷

Justice Wilcox bemoaned the fact that the majority did not resolve the disagreement between *Yauger* and *Richards*: "The majority fails to resolve this dispute and leaves open the possibility that even an exculpatory clause that is expertly drafted, conspicuous, and appears on a separate document may be invalidated merely because the signer had no 'opportunity to bargain.'"³⁸

Drafting Exculpatory Agreements Post-*Atkins*

In light of *Atkins*, can an exculpatory agreement be crafted to be enforceable? The majority of justices have indicated that they will not hold all exculpatory agreements invalid, so it should be possible to create an enforceable exculpatory agreement. In addition, the court of appeals has on several occasions enforced

reasonably well-drafted exculpatory agreements.³⁹ Thus, it is not impossible to draft an enforceable exculpatory agreement, but to be enforceable an agreement must be drafted very carefully.

Much of what *Atkins* tells us is not new; therefore all of the drafting suggestions set forth in the earlier *Wisconsin Lawyer* article on this topic remain valid⁴⁰ and should be read in tandem with the drafting suggestions presented here.

Two factors that bear further discussion do stand out in *Atkins*: 1) the form must not serve two purposes, and 2) the form must indicate that the signer had the "opportunity to bargain." To ensure that a form intended to be a waiver of liability does not serve two purposes, a lawyer must focus on two issues. First, the lawyer must focus on the language used in the waiver of liability agreement. Does that language only relate to the risks associated with the activity and the waiver of liability associated with such risks? Based on *Atkins*, drafters should remove clauses unrelated to liability that are commonly seen in waiver of liability agreements (for instance, indemnification clauses and provisions granting a facility or event organizer the right to use a participant's image without compensation). Instead, put such clauses in separate agreements.

Second, the attorney must focus on what the client does with the carefully drafted waiver language to ensure that the language is kept entirely separate from registration/enrollment agreements. Ideally, the waiver agreement should be on a separate page. If the waiver must appear on a page with other text, the lawyer should ensure that a different font or ink color is used to make the waiver conspicuous. When the user signs the waiver agreement, there should be no question that the user clearly knows that he or she is signing a waiver of liability. There should be a signature line for the waiver and a separate signature line or lines for other agreements or registrations. Finally, lawyers should advise their clients never to camouflage waivers of liability. The enforceability of the most carefully drafted exculpatory clause can be severely undermined if the client prints the waiver on stationery or an event brochure featuring graphics that in any way convey the impression that what is being signed is not an important legal document. (For an example of what not to do, see the snowflake and skier graphics used on the release form in *Yauger*).⁴¹



The second *Atkins* factor that bears further discussion is the "opportunity to bargain." Until the supreme court resolves the issue of whether just one missing factor is sufficient to invalidate an exculpatory agreement, drafters and businesses ignore the issue of bargaining at their peril. In addition, note that the *Atkins* majority opinion makes it clear that the form itself must demonstrate that there is a "bargaining opportunity."⁴²

There are several ways that a form could demonstrate that the signer at least considered the issue of bargaining. Because there are no Wisconsin cases that have held an exculpatory agreement form adequately addresses the bargaining issue, lawyers are left to speculate as to how to effectively draft one. No other jurisdiction in the nation has articulated a similar bargaining opportunity factor,⁴³ and so looking to cases from other jurisdictions also provides no guidance. While there is no guidance from the courts, drafters should consider the following suggestions. At a minimum, an exculpatory agreement should state something like "I hereby waive the right I have to bargain for different waiver of liability terms." That may not be sufficient, but it is at least some evidence that the signer considered the issue. A drafter might also include:

"I have considered that if this waiver of liability was not as broad as it is, the cost for my use of the facility [or participation in the event] would be considerably higher, and as I do not wish to pay a considerably higher cost, I waive the right to bargain for different waiver of liability terms."

If one wants to go further, a drafter could include language something like that shown in Figure 2.

Figure 2
Sample Waiver Language

I have read the attached waiver of liability agreement. I realize I am not required to sign the agreement. I freely choose either option A or option B:

A. Pay an extra \$500, and not sign the agreement:⁴⁴
_____ A

OR

B. Pay nothing extra, and sign the agreement of my own free will:
_____ B

It is unclear, however, if the language in Figure 2 actually constitutes "bargaining" as that term is used by the *Atkins* majority, because the participant is only given an option regarding price, and the form itself does not provide a bargaining opportunity.

From a drafter's perspective, it seems unworkable for "the form itself [to] provide a bargaining opportunity" - unless the *Atkins* court used the term "bargaining" differently than in its usual sense. What does it actually mean for a form itself to provide a bargaining opportunity? Can a form bargain? Must an event waiver form have text indicating something like: "I offer to sign the below Release of Liability and pay a registration price of \$_____" and then an additional section on the form where the parties offer and counter offer regarding the proposed price? Such a requirement seems highly unrealistic for the circumstances in which most public recreational activities are conducted. Perhaps the supreme court in a future case will provide clarification. The above text examples are only suggestions, of course, and it may be that, once the supreme court clarifies whether a bargaining opportunity is an essential element of an enforceable exculpatory agreement, an otherwise well-drafted form will not be invalidated merely because it does not provide a bargaining opportunity.

Conclusion

The Wisconsin Supreme Court has now considered exculpatory agreements in six cases in 25 years, and each time has found the agreement as drafted to be unenforceable. (Of course, as noted by the court of appeals and Justices Wilcox and Roggensack, it would be helpful if the supreme court would speak clearly on this topic, that is, to "formulate a clear, uniform test"⁴⁵ in this area). Until the court announces such a test, lawyers who draft exculpatory agreements must: 1) carefully draft such an agreement applying what the court has said so far, and 2) give thorough consideration to the circumstances surrounding the signing of the agreement. *Atkins* indicates that if this is not done, it is highly likely the courts will not enforce the waiver.

About The Author

Alexander "Sandie" Pendleton is a shareholder with Kohner, Mann & Kailas, S.C. who has over 20 years of experience as a business litigator and counselor. As a trial lawyer, Sandie has handled hundreds of business related lawsuits over his career, including many jury trials, appeals, mediations and arbitrations. As a business counselor, Sandie has handled business transactions, contracts, securities law issues, mergers, acquisitions, insurance coverage questions, shareholder disputes and general business guidance. He has impressive experience negotiating the resolution of complex and contentious disputes. He has served on corporate boards, as general counsel and has experience with corporate governance issues and documentation. Sandie has worked with many entrepreneurs, start-ups and early-stage companies to help structure and grow their businesses

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Endnotes

¹*Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI 4, ¶ 44, 277 Wis. 2d 303, 691 N.W.2d 334.

²*Id.* ¶ 38.

³Alexander T. Pendleton, [Enforceable Exculpatory Agreements](#), 70 Wis. Law. 10 (Nov. 1997).

⁴The five Wisconsin Supreme Court exculpatory cases prior to *Atkins* are: *Merten v. Nathan*, 108 Wis. 2d 205, 321 N.W.2d 173 (1982); *Arnold v. Shawano County 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); *Dobratz v. Thomson*, 161 Wis. 2d 502, 468 N.W.2d 654 (1991); *Richards v. Richards*, 181 Wis. 2d 1007, 513 N.W.2d 118 (1994); and *Yauger v. Skiing Enter. Inc.*, 206 Wis. 2d 76, 557 N.W.2d 60 (1996).

⁵These facts are from *Atkins*, 2005 WI 4, ¶¶ 3-5, 41, 277 Wis. 2d 303, and the Certification by the Wisconsin Court of Appeals at p. 2, *Atkins v. Swimwest Family Fitness Ctr.*, No. 03-2487 (Wis. Ct. App. April 20, 2004) (hereinafter "Certification").

⁶*Atkins*, 2005 WI 4, ¶ 6 n.2, 277 Wis. 2d 303.

⁷*Id.* ¶ 8.

⁸Certification, at p. 5.

⁹*Atkins*, 2005 WI 4, ¶ 12, 277 Wis. 2d 303.

¹⁰*Id.* ¶¶ 15-18.

¹¹*Richards*, 181 Wis. 2d at 1017.

¹²*Yauger*, 206 Wis. 2d at 84.

¹³*Atkins*, 2005 WI 4, ¶ 18 n.7, 277 Wis. 2d 303.

¹⁴*Id.*

¹⁵*Id.* ¶ 2.

¹⁶*Id.* ¶ 14; *see also* Restatement (Second) of Contracts § 195(1) (1981).

¹⁷*Atkins*, 2005 WI 4, ¶ 21, 277 Wis. 2d 303.

¹⁸*Id.*

¹⁹*Id.* ¶¶ 23-24.

²⁰*Id.*

²¹*Id.*

²²*Id.* ¶¶ 25-26.

²³*Id.* ¶ 25.

²⁴*Id.* ¶ 26 & n.9 (emphasis added).

²⁵*Id.* ¶ 31.

²⁶*Id.* ¶ 41.

²⁷*Id.* ¶ 33.

²⁸*Id.* ¶ 36.

²⁹*Id.* ¶ 36.

³⁰*Id.* ¶ 37.

³¹*Id.* ¶ 38.

³²*Id.* ¶ 44.

³³*Id.* It is interesting to note that the Wisconsin Supreme Court in November 2004 ruled that the economic loss doctrine *does not* bar tort claims relating to service contracts. *Insurance Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462. That is, a provider of services (as opposed to products) is now completely barred by Wisconsin law from limiting through contract the service provider's exposure to the fairly open-ended and unpredictable liability and damages that can exist under Wisconsin tort law. If one characterizes the owner of a fitness center as a provider of services, one could argue under *Cease* that, as a matter of law, the owner is barred from limiting liability through contract. The same characterization might be made of many other providers of recreational opportunities. To date, the reported Wisconsin decisions have kept exculpatory agreements and the economic loss doctrine in separate categories, but that could change in the future.

³⁴*Atkins*, 2005 WI 4, ¶ 44, 277 Wis. 2d 303.

³⁵*Id.* ¶ 52.

³⁶*Id.* ¶ 54.

³⁷*Id.* ¶ 63.

³⁸*Id.* ¶ 60.

³⁹*See Trainor v. Aztalan Cycle Club Inc.*, 147 Wis. 2d 107, 432 N.W.2d 626 (Ct. App. 1988) (motocross motorcycle race waiver upheld) (review denied); *Werdehoff v. General Star Indem. Co.*, 229 Wis. 2d 489, 600 N.W.2d 214 (Ct. App. 1999) (motorcycle race waiver upheld); *see also Rose v. National Tractor Pullers Ass'n*, 33 F. Supp. 2d 757 (W.D. Wis. 1988) (tractor-pull contest waiver upheld). But see also the first exculpatory agreement decision released by the court of appeals since the supreme court's *Atkins* decision: *Mettler v. Nellis*, 2005 WI App 73, ___ Wis. 2d ___, 695 N.W.2d 861 (holding exculpatory agreements used by horse riding stable void on public policy grounds because agreements were broad enough to cover

intentional acts, too broad in the category of individuals released, and "confusing and ambiguous") (review denied).

⁴⁰See Pendleton, *supra* note 3, www.wisbar.org/wislawmag/1997/11/pendleton.

⁴¹See *Yauger*, 206 Wis. 2d at 90.

⁴²*Atkins*, 2005 WI 4, ¶ 25, 277 Wis. 2d 303.

⁴³Courts in other jurisdictions that have considered the issue of "bargaining" in exculpatory agreement cases usually have done so in the context of whether something like "grossly disparate bargaining power" existed between the parties and whether the injured party had other options regarding the service provided. See, e.g., *Rowan v. Vail Holdings Inc.*, 31 F. Supp. 2d 889, 897-98 (D. Col. 1998); *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 828 (Minn. Ct. App. 2001); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1113 (N.M. 2003); *Moore v. Hartley Motors Inc.*, 36 P.3d 628, 631-32 (Alaska 2001); *Clanton v. United Skates of Am.*, 686 N.E.2d 896, 899 (Ind. Ct. App. 1997); *Vodopest v. MacGregor*, 913 P.2d 779, 786 (Wash. 1996).

⁴⁴The precise amount of a "pay extra" clause is a business issue that can only be resolved by a client after the client weighs such factors as 1) the likelihood of injuries; 2) the likely amount of damages due to injuries; 3) the cost of handling claims; 4) the likelihood that clients will choose the "pay extra" option; and 5) the availability of insurance. The higher the amount chosen for a "pay extra" clause, however, the more likely it would seem that a court will conclude that no "realistic" choice was offered.

⁴⁵Certification, at p. 5.