**Appeal No. 04-0239** **Cir. Ct. No. 02CV000063**

**WISCONSIN COURT OF APPEALS**
**DISTRICT II**

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**RAINBOW COUNTRY RENTALS AND RETAIL, INC., D/B/A OCONOMOWOC RENTAL CENTER,**

**PLAINTIFF-APPELLANT,**

**V.**

**AMERITECH PUBLISHING, INC., D/B/A AMERITECH ADVERTISING SERVICES,**

**DEFENDANT-RESPONDENT.**

**FILED**

**OCT 27, 2004**

Cornelia G. Clark
Clerk of Supreme Court

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## CERTIFICATION BY WISCONSIN COURT OF APPEALS

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Before Anderson, P.J., Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether the court's holding in ***Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Co.***, 117 Wis. 2d 587, 345 N.W.2d 417 (1984), that an exculpatory clause in a yellow pages advertising contract was unconscionable as against public policy is still viable today given the changes that have occurred in the telecommunications industry in the two decades since that decision.

## FACTS

Rainbow Country Rentals and Retail, Inc., d/b/a as Oconomowoc Rental Center, and Ameritech Publishing, Inc., d/b/a Ameritech Advertising Services, (API) contracted for the listing of Rainbow's business in the 1999 Oconomowoc and Waukesha Ameritech Yellow Pages and the 2000 Watertown Ameritech Yellow Pages, all of which were published by API. API omitted Rainbow's listing from each of the directories. Rainbow commenced this breach of contract action to recover damages for business losses resulting from API's error in the directories.[1] API filed a motion for summary judgment, raising as a defense the following clause from the advertising contract between Rainbow and itself:

> IN ORDER TO MAINTAIN OUR PRICING SCHEDULES, WE CANNOT AND DO NOT ACCEPT LIABILITY FOR LOST PROFITS OR FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF ERRORS OR OMISSIONS…. IF AN ERROR OR OMISSION SHOULD OCCUR, UNLESS A GREATER LIMIT TO OUR LIABILITY HAS BEEN AGREED TO BY US IN WRITING FOR WHICH YOU HAVE AGREED TO PAY ADDITIONAL CHARGES FOR OUR TAKING A GREATER RISK OF LOSS, YOU AGREE THAT THE FOLLOWING MAXIMUM ADJUSTMENTS TO THE INVOICED AMOUNTS WILL APPLY AS A FINAL RESOLUTION:
>
> ….
>
> h. Complete omission of an advertising unit … 100% plus a future PAGESPLUS advertising credit of like amount.
>
> UNDER NO CIRCUMSTANCES (1) WILL OUR LIABILITY FOR ANY ADVERTISING UNIT EXCEED THE AMOUNT YOU HAVE ACTUALLY PAID FOR IT

[1] Rainbow's complaint also alleged a claim of negligence; however, Rainbow later conceded that the economic loss doctrine barred this claim.

> TOGETHER WITH A FUTURE PAGESPLUS ADVERTISING CREDIT OF LIKE AMOUNT NOR (2) WILL WE HAVE ANY OBLIGATION TO RECALL, SUPPLEMENT OR OTHERWISE AMEND DIRECTORIES.
>
> ….
>
> IF YOU WISH TO NEGOTIATE ANY ONE OR MORE DIFFERENT TERMS THAN THOSE ABOVE, INCLUDING HIGHER LIABILITY LIMITS, YOU MAY DO SO.

In its brief opposing summary judgment, Rainbow responded that the clause was exculpatory, invalid and unenforceable as against public policy based on the supreme court's 1984 decision in ***Discount Fabric***. The trial court upheld the limitation on liability clause and the contract. The court determined that the changed conditions in the telecommunications industry rendered ***Discount Fabric*** inapplicable. Rainbow now appeals from the trial court order granting summary judgment in favor of API.

## DISCUSSION

This case presents the supreme court with an opportunity to revisit the recurring question of whether a relief from liability provision in a yellow pages advertising contract is unenforceable as against public policy. As noted, in the 1984 case, ***Discount Fabric***, the court determined that a contract for directory advertising which, as here, specifically limited the telephone company's liability for errors or omissions to a refund of the applicable charges was an exculpatory contract, unconscionable and unenforceable as contrary to public policy. *See* ***id.*** at 604. The tremendous changes in the telecommunications industry over the last two decades since that decision have called into question the continued viability of the policy concerns that formed the basis for the ***Discount Fabric*** holding.

In ***Discount Fabric***, a drapery business brought an action against the telephone company for the omission of its "long-standing" corporate name from the company's advertisement in the 1978 Wisconsin Telephone Yellow Pages directory and sought to recover damages for business losses resulting from the telephone company's error. ***Id.*** at 589. The telephone company, which was a monopoly regulated by the Public Service Commission, raised as a defense a "limited liability provision" from the advertising contract between the parties. ***Id.*** at 589-90, 593.

In a well-reasoned opinion, which acknowledged the limited supporting authority from other jurisdictions, the court first determined that the contract was exculpatory by nature. ***Id.*** at 592. The court then explained that the exculpatory contract was void as against public policy because (1) the contract arose out of a private business transaction of the telephone company which in all other respects had been recognized as a monopoly and had been regulated by the Public Service Commission in performing its services, (2) the telephone company was engaged in a business that performed a service of great importance to the public in that it distributed a yellow pages book without cost to every telephone customer, (3) the telephone company without question held itself out as willing to give reasonable public service to all who applied for an advertisement in the yellow pages, and (4) the telephone company possessed a decisive advantage of bargaining strength. ***Id.*** at 593-96. In determining that the telephone company possessed such an advantage in bargaining power, the court reasoned:

> The telephone company has an exclusive private advertising business which, if not legally monopolistic, is tied to its public utility service of providing telephone service. Without additional or identifiable charges, every telephone customer receives the yellow pages free with the telephone service. There is nothing in this record to show that there is any other mode of advertising available to

> Discount Fabric House which reaches as many customers, is of a similar nature as the yellow pages, and is inexorably tied to the telephone service.
>
> Therefore, when the telephone company states to a customer that the ad will be carried but on its terms, and if negligently done the telephone company may not be held for damages, there is definitely a decisive advantage of bargaining strength possessed by the telephone company.

***Id.*** at 594-95.

Since ***Discount Fabric*** was decided in 1984, the legislature has deregulated telecommunications services in Wisconsin. *See* ***MCI Telecommunications Corp. v. Public Serv. Comm'n***, 164 Wis. 2d 489, 476 N.W.2d 575 (Ct. App. 1991). "The monopoly days of the Ma Bell of either our youth or of our institutional memory are gone…. And competition among Ma Bell's progeny and others seeking a slice from the telecommunications pie is fierce." ***Wisconsin Bell, Inc. v. Public Serv. Comm'n***, 2003 WI App 193, ¶2, 267 Wis. 2d 193, 670 N.W.2d 97. Thus, unlike Wisconsin Telephone in ***Discount Fabric***, Ameritech Corporation, the parent company of API and Wisconsin Bell, faces competition from several local service competitors including TDS Metrocom, MCI and AT&T. Furthermore, unregulated yellow pages advertising services throughout the state are now provided not only by API but also several competitors including USXchange and Yellow Book USA (formerly known as Sprint). Although these competitors did not have the depth of distribution or penetration that API had at the time Rainbow signed its contract, data compiled by independent survey companies reflect that since the late 1990s there has been a substantial increase in the percentage of consumers who consult directories distributed by API's competitors. Finally, and perhaps most importantly, API and its directory competitors now make their yellow pages directories available on the internet, which obviously was not a factor in ***Discount Fabric***.

In ***Discount Fabric***, Wisconsin Telephone's Yellow Pages, the company invoking the exculpation, was "an exclusive private advertising business" linked directly to its telephone service monopoly. ***Discount Fabric***, 117 Wis. 2d at 594. Simply put, Discount Fabric had no other mode of advertising available that would reach as many consumers and was so linked to the telephone and, as a result, it had to accept the terms of Wisconsin Telephone's contract. *See* ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶31, 259 Wis. 2d 587, 657 N.W.2d 411 (noting that in ***Discount Fabric*** "the customer had only one viable option for reaching people through an ad in the telephone book"). While no other yellow pages directory company had close to the depth of API's market penetration, Ameritech does not enjoy a monopoly on telephone services and API certainly did have competition from other publishers and resources available on the internet. Rainbow then had options, albeit limited, for advertising its business to telephone customers, and therefore, potentially had more leverage in the bargaining process.

Thus, we question whether the policy reasons supporting the ***Discount Fabric*** court's determination that an exculpatory provision in a yellow pages contract is unconscionable and unenforceable as against public policy remain valid in today's telecommunications market. *See* ***Deminsky***, 259 Wis. 2d 587, ¶31 (substantive unconscionability found where "a party has, in effect, no choice but to accept the contract offered, often where the buyer does not have the opportunity to do comparative shopping or the organization offering the contract has little or no competition"). However, we are an "error correcting" court and it is not our place to set policy on issues covered by existing precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997); ***Deegan v. Jefferson County***, 188 Wis. 2d 544, 559, 525 N.W.2d 149 (Ct. App. 1994). Therefore, we

respectfully ask the supreme court to provide definite guidance on the question, which is likely to arise in the future as the yellow pages directory market becomes more saturated.