Appeal No. 2016AP82 **Cir. Ct. No. 2015CV41**

WISCONSIN COURT OF APPEALS
DISTRICT II

OKLAHOMA SPECIALTY INSURANCE COMPANY F/D/B/A HOUSTON SPECIALTY INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

SAM PIERCE CHEVROLET, INC. AND WORLD OF WHEELS, INC.,

INVOLUNTARY-PLAINTIFFS,

V.

MECUM AUCTION, INC.,

DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Pursuant to WIS. STAT. RULE 809.61 (2013-14)[1], this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Should the same public policy analysis the supreme court has employed in invalidating exculpatory clauses involving personal injury claims,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

culminating most recently in ***Roberts v. T.H.E. Ins. Co.***, 2016 WI 20, ¶48, 367 Wis. 2d 386, 879 N.W.2d 492, be applied to the release of business losses in a contract between two commercial entities?

BACKGROUND

Sam Pierce Chevrolet, Inc. (Sam Pierce) and World of Wheels, Inc. (WOW) entered into separate contracts with Mecum Auction, Inc., agreeing that in exchange for a fee or a commission Mecum would sell at auction, respectively, a 1957 Chevrolet Bel Air and a 1961 Chevrolet Impala. Both Sam Pierce and WOW signed an "Auction Listing Contract," but only Sam Pierce signed an "Auction Selling Contract." Nevertheless, Mecum claims that the Auction Selling Contract was incorporated into the Auction Listing Contract WOW signed.

At paragraph eight, the Auction Selling Contract provided as follows:

> "Mecum Auctions is not responsible for lost, stolen or damaged properties; or for any and all liabilities."

Paragraph eight was not highlighted or set off in any way from the rest of the document. Other provisions of the Auction Selling Contract discussed sale position, return of the entry fee if an auction entry was canceled, the time when the seller would be paid and the amount Mecum would retain as a commission, rules for cars with liens, and choice of law and forum selection provisions, among other things. The general manager of Mecum, Harold Gerdes, testified that the seller is required to sign the Auction Selling Contract before the car will be auctioned, and that it is a "standard rule contract" in the industry. WOW had done business with Mecum for approximately ten years and had contracted with Mecum for the auction of at least 810 cars.

The Bel Air and the Impala were delivered to Mecum to be sold at an auction in Monterrey, California. The vehicles, however, were stolen off the auction block.

Sam Pierce and WOW filed claims with their insurer, Oklahoma Specialty Insurance Company (Oklahoma), and Oklahoma paid them, respectively, $52,463.00 and $46,933.30 for the loss of their vehicles.

Oklahoma then commenced this subrogation action against Mecum, alleging breach of bailment and negligence,[2] and seeking recovery of the amounts paid for the loss of the vehicles.[3]

Not long after, Mecum moved for summary judgment, arguing that it was relieved of liability under paragraph eight of the Auction Selling Contract.

Oklahoma opposed the motion, arguing that there was an issue of fact as to whether WOW agreed to paragraph eight. However, even if both Sam Pierce and WOW agreed to paragraph eight, it was unenforceable because it was an exculpatory clause that violated public policy. This was so because paragraph eight was impermissibly broad and all-inclusive, it was not highlighted, contained

[2] Where, as here, the allegations are that the bailment was for the benefit of both the bailor and the bailee, the standard of care is ordinary. ***Bushweiler v. Polk Cty. Bank***, 129 Wis. 2d 357, 359, 384 N.W.2d 717 (Ct. App. 1986).

[3] Mecum has not asserted that the economic loss doctrine precludes Sam Pierce and WOW's claims for damages via negligence and bailment claims. We assume without deciding that this is because the nature of the contract Mecum had with Sam Pierce and WOW was for services and not goods. Mecum acted essentially as a broker, bringing buyers and sellers together. *See* ***1325 N. Van Buren, LLC v. T-3 Grp., Ltd.***, 2006 WI 94, ¶29, 293 Wis. 2d 410, 716 N.W.2d 822 (economic loss doctrine does not apply to service contracts).

within a document having multiple purposes, and there was no opportunity to bargain.

In reply, Mecum argued that Oklahoma had not offered any evidence to contradict Mecum's interpretation of the Auction Listing Contract, that it incorporated the Auction Selling Contract, and, thus, there was no issue of fact as to whether WOW had agreed to paragraph eight.[4] Regarding paragraph eight, it was not an exculpatory clause, but an indemnity provision designed to apportion risk. In other words, "[t]he parties agreed to a de facto plan with respect to insurance." Even if it was an exculpatory clause, the public policy analysis Oklahoma relied on applied to personal injury cases and not a commercial agreement between two businesses involving a business risk. To the extent any portion of paragraph eight was unenforceable because it was too broad, it could be severed.

The circuit court granted summary judgment to Mecum, reasoning that it would not disturb the freedom of contract between "two businesses who come to a contract to sell vehicles," which involved neither the general public nor any physical harm to them. The court rejected Oklahoma's argument that paragraph eight had to be invalidated as overbroad if, for example, it absolved

[4] We agree that if paragraph eight is unenforceable, whether WOW agreed to it would become irrelevant. If it is valid, the circuit court found that WOW and Mecum agreed to the Auction Selling Contract. Mecum submitted undisputed evidence that WOW had contracted with Mecum for approximately ten years for the auction of at least 810 cars, that the contract terms had remained the same for many years, that there are no documents other than the Auction Listing Contract and the Auction Selling Contract setting forth the terms of the relationship between Mecum and the seller, and thus, as Mecum's manager testified, it was the parties' intent that the former incorporated the latter (that the explicit incorporation of the "Entry Guidelines" referred to the "Entry Rules" in the Auction Selling Contract). We have no basis to disagree with the circuit court's conclusion.

Mecum of liability even if it stole the vehicles, because those were not the facts of the case. Thus, judgment was entered in Mecum's favor dismissing the complaint.

The Public Policy Analysis

As an initial matter, we note that the subject of this certification is fairly narrow as it addresses negligence claims seeking business losses that are not precluded by the economic loss doctrine as a result of the commercial parties' contractual relationship.

Second, while Mecum maintains that paragraph eight is an indemnity provision, it meets the definition of an exculpatory clause, relieving Mecum of liability "for harm caused by [its] own negligence." ***Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶26, 286 Wis. 2d 170, 706 N.W.2d 95.

Wisconsin law does not favor exculpatory clauses. ***Roberts***, 367 Wis. 2d 386, ¶48. Indeed, over the past thirty-five years, our supreme court has invalidated every one of them, culminating most recently in ***Roberts***. ***Id.***, ¶63; ***Rainbow Country***, 286 Wis. 2d 170, ¶35. In ***Roberts***, our supreme court surveyed the law and outlined the factors that may render an exculpatory clause invalid on public policy grounds: the contract serves two purposes which are not clearly identified or distinguished; the exculpatory clause is too broad and all inclusive; the exculpatory clause is contained in a standardized agreement offering little or no opportunity to bargain; the exculpatory clause does not clearly, unambiguously, and unmistakably explain to the signatory that the risk is being accepted; and the agreement does not alert the signer to the nature and significance of the document being signed. ***Roberts***, 367 Wis. 2d 386, ¶¶51-55. An exculpatory clause is to be

examined closely and strictly construed against the party seeking to rely on it. ***Merten v. Nathan***, 108 Wis. 2d 205, 211, 321 N.W.2d 173 (1982).

As Mecum notes, most of the cases where exculpatory clauses have been invalidated under a public policy analysis have involved claims of personal injury. *See* ***Atkins v. Swimwest Family Fitness Ctr.***, 2005 WI 4, ¶8, 277 Wis. 2d 303, 691 N.W.2d 334; ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 79, 557 N.W.2d 60 (1996); ***Richards v. Richards***, 181 Wis. 2d 1007, 1014, 513 N.W.2d 118 (1994). However, as Oklahoma points out, a public policy analysis is not exclusive to personal injury claims. The supreme court has invalidated an exculpatory clause agreed to by two commercial entities.

In ***Discount Fabric House v. Wisconsin Telephone, Inc.***, 117 Wis. 2d 587, 345 N.W.2d 417 (1984), the plaintiff, a drapery business, sued the Wisconsin Telephone Company for omitting the plaintiff's trade name from an advertisement in the Yellow Pages. ***Id.*** at 589. The telephone company defended on an exculpatory clause contained in the contract between the parties, which relieved the telephone company of liability for errors or omissions. ***Id.*** Our supreme court noted that in the cases involving exculpatory contracts, the rules "reflect the uneasy balance between these principles of contract and tort law." ***Id.*** at 593 (citation omitted). The court outlined four situations where, up to that point, an exculpatory clause had been voided on public policy grounds. ***Id.*** Significant for the ***Discount Fabric House*** court was the nature of the telephone company's business, "a monopoly" in providing telephone service, a service that is of great public importance. ***Id.*** at 593, 596. The nature of the telephone company's business gave it a "decisive advantage of bargaining strength." ***Id.*** at 593. The telephone company provided the Yellow Pages to every telephone customer free with telephone service. ***Id.*** at 593-94. In other words, the telephone

company had "an exclusive private advertising business" that was unlike "any other mode of advertising available to" the plaintiff. ***Id.*** at 594. Further, the telephone company was "performing a service of great, if not essential, importance to the public," and it was holding "itself out as willing to give *reasonable* public service to all who apply to place ads in the yellow pages." ***Id.*** at 596. As a result, the telephone company was required to "perform its private duty to the ad subscriber without negligence or be held [liable] for damages." ***Id.*** at 600. The exculpatory clause was invalid.

We have also invalidated an exculpatory clause agreed to by two commercial entities. In ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, 274 Wis. 2d 719, 685 N.W.2d 154, the plaintiffs, the owners of two automotive dealerships, sold the dealerships to Southside Lincoln-Mercury, a dealer development corporation that Ford Motor Company had formed and controlled. ***Id.***, ¶2. Southside purchased substantially all of the plaintiffs' assets, which it relinquished to Ford so that Ford could, in turn, grant them to Southside. ***Id.***, ¶3. In conjunction with the sale, Southside contracted with the plaintiffs to lease the land and facilities where they had previously operated the dealerships. ***Id.*** Southside stopped doing business, transferred its franchise rights to Ford for no value, and Southside stopped paying the rent due on its leases. ***Id.***, ¶¶3-4. The plaintiffs sued Southside, Ford, and the three persons Ford had named as directors of Southside. ***Id.***, ¶¶3, 5. Against Ford and the directors, the plaintiffs alleged that they had intentionally interfered with the lease agreements. ***Id.***, ¶5. Ford and the directors moved to dismiss that claim based on paragraph twenty in the leases stating that the plaintiffs could not seek recourse for Southside's failure to perform any of its obligations under the leases against any director or successor corporation. ***Id.*** We concluded that the circuit court erred in dismissing the claim

for intentional interference with contract based on paragraph twenty because paragraph twenty was void as against public policy. ***Id.***, ¶¶6, 23.

We held that it was "sound public policy" not to relieve a party of liability "for harm that it intentionally or recklessly causes." ***Id.***, ¶23. In invalidating paragraph twenty, we found persuasive one federal district court case that recognized that under Wisconsin law exculpatory clauses are unenforceable on public policy grounds where the alleged harm is caused intentionally or recklessly, and this rule has not been limited to cases involving consumers or parties of unequal bargaining power. ***Id.***, ¶21 (citing ***RepublicBank Dallas, N.A. v. First Wis. Nat'l Bank of Milwaukee***, 636 F. Supp. 1470 (E.D. Wis. 1986)). Thus, it did not matter that there was no disparity in bargaining power between the parties or that the plaintiffs had relied entirely on personal injury cases in arguing that paragraph twenty should be invalidated. ***Finch***, 274 Wis. 2d 719, ¶¶20, 22.

Based on our reading of ***Discount Fabric House*** and ***Finch***, we do not see any broad rule of law that prohibits us from invalidating the exculpatory clause in this case because, as Mecum argues, "[t]his case does not involve any claims of personal injury," and the exculpatory clause "was contained within a commercial agreement between businesses regarding theft of property." Rather, ***Discount Fabric House*** and ***Finch*** support the view that an exculpatory clause may be invalidated on public policy grounds where the subject of the contract involves a commercial transaction between two commercial entities and the plaintiff seeks business losses. ***Discount Fabric House*** has been cited favorably in subsequent supreme court cases. *See* ***Rainbow Country***, 286 Wis. 2d 170, ¶3; ***Richards***, 181 Wis. 2d at 1014.

That said, ***Discount Fabric House*** and ***Finch*** provide little guidance as to how to apply the public policy factors developed largely in the realm of personal injury cases to release of negligence claims seeking business losses pursuant to a contract between two commercial entities of arguable equal bargaining power. In ***Discount Fabric House***, the telephone company had a monopoly, and no other business could offer the advertising exposure that the telephone company could offer the plaintiff. In essence, freedom of contract was not at stake because the plaintiff had little, if any, bargaining power. But here, there is nothing to suggest that Mecum was the only auctioneer of classic cars, although Oklahoma maintains that this exculpatory clause is standard so that Sam Pierce and WOW could not have chosen a competitor who did not use an exculpatory clause. ***Finch*** involved intentional conduct, but there is no claim here that Mecum was involved in the theft of these cars. *See* ***Brooten v. Hickok Rehab. Servs., LLC***, 2013 WI App 71, ¶10, 348 Wis. 2d 251, 831 N.W.2d 445 ("[An] exculpatory clause may only release claims of negligence; it cannot, under any circumstances—bargained or not—preclude claims based on reckless or intentional conduct.").

Ultimately, the "principle of law" that guides the public policy analysis is whether the freedom to contract should be "restricted … for the good of the community." ***Merten***, 108 Wis. 2d at 213 (citation omitted). There are competing principles at work in contract and tort law, and the public policy analysis attempts "to accommodate [that] tension." ***Richards***, 181 Wis. 2d at 1016. Contract law "is based on the principle of freedom of contract," that "people should be able to manage their own affairs without government interference." ***Id.*** There is no freedom of contract, however, unless the bargain is made "freely and voluntarily … through a bargaining process that has integrity."

Id. The law of contracts "protects justifiable expectations and the security of transactions." ***Id.*** The law of torts, in contrast, "is directed toward compensation of individuals for injuries resulting from the unreasonable conduct of another." ***Id.*** It "also serves the 'prophylactic' purpose of preventing future harm … by imposing liability for conduct below the acceptable standard of care." ***Id.*** (citation omitted). Principles of tort law disfavor allowing parties to shift by contract the burden of negligent conduct from the actor to the victim who has no actual control or responsibility for the conduct causing the injury. ***Merten***, 108 Wis. 2d at 212. In determining whether public policy should invalidate an exculpatory clause, our supreme court has weighed these competing interests to determine which principle is of greater importance. ***Richards***, 181 Wis. 2d at 1016; *see* ***Merten***, 108 Wis. 2d at 214.

Since the time of ***Discount Fabric House***, our supreme court has roundly developed the public policy analysis in cases involving claims of personal injuries, but we see little development of the public policy analysis as applied to commercial bargains as compared to consumer transactions. We question whether that same analysis, as employed in cases like ***Roberts***, is transferrable to a case such as this involving a release of claims seeking business losses pursuant to contract between commercial entities. Specifically, whether the factors appropriately balance the competing principles at work in contract and tort law as applied to two commercial entities—including freedom of contract and the good of the community.

Certainly most of the public policy factors outlined in ***Roberts***, if applied literally without accounting for the commercial context, and construed strictly against Mecum, would support invalidating the exculpatory clause.

For example, Mecum's standardized contract serves two purposes which are not clearly identified or distinguished. The agreement does not alert the signer to the nature and significance of the exculpatory clause.

The exculpatory clause is not clear and is very broad and all-inclusive. The exculpatory clause absolves Mecum of liability for "lost, stolen or damaged properties; or for any and all liabilities." It is unclear whether "properties" includes, for example, a damaged radio inside the car or a broken antenna, or the car itself. *See* ***Roberts***, 367 Wis. 2d 386, ¶60 (holding that waiver was unclear as to whether it applied to waiting in line for balloon ride). The release of claims for "any and all liabilities" encompasses both negligent and intentional conduct—without specifying the same. In fact, even if Mecum had stolen the cars itself, it could not be held liable because of the exculpatory clause. Although each case is fact specific, the supreme court has repeatedly declared void exculpatory agreements that are so broad they would absolve the defendant from any injury "for any reason." ***Richards***, 181 Wis. 2d at 1015-16 (citation omitted).

Mecum responds that the exculpatory clause must be applied only to the underlying facts of the case and not hypothetical situations. But, the ***Roberts*** public policy analysis has not limited broad exculpatory clauses to the claims. Even when the claims involved negligence, clauses that were so broad as to purport to exculpate intentional and/or reckless conduct were struck down. *See* ***Atkins***, 277 Wis. 2d 303, ¶¶18-19; ***Richards***, 181 Wis. 2d at 1017-18.

Arguably this was not always the case. In ***Arnold v. Shawano County Agricultural Society***, 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), the supreme court said that "[e]xculpatory agreements that are

broad and general in terms will bar only those claims that are within the contemplation of the parties when the contract was executed." ***Id.*** at 211. In that case, the plaintiff was injured while participating in a stock car race. The court remanded because there was a question of fact as to whether the release of negligent rescue operations was within the contemplation of the parties at the time the exculpatory contract was executed.

In ***Richards***, the supreme court apparently limited the language of ***Arnold***, narrowing the focus of contemplated claims to the "activity" at issue, i.e., whether the subject matter of the release included the activity, such as rescue operations. ***Richards***, 181 Wis. 2d at 1018-19. The court found public policy precluded enforcement of an exculpatory clause with extremely broad and all-inclusive language. ***Id.*** at 1012-13, 1017-18. It rejected the lower courts' reliance on ***Arnold***. ***Richards***, 181 Wis. 2d at 1019. It also rejected the argument that the exculpatory clause should be upheld because the plaintiff's claim for injuries suffered while riding as a passenger in a truck allegedly negligently operated by her husband, and owned by the defendant, her husband's employer, was clearly within the contemplation of the parties at the time the exculpatory contract was executed. ***Id.*** at 1032-34 (Day, J., dissenting).

Most recently, in ***Roberts***, the supreme court said this: "Our analysis of an exculpatory contract begins with examining the facts and circumstances of the agreement to determine if it covers the activity at issue." ***Roberts***, 367 Wis. 2d 386, ¶49 (citing ***Atkins***, 277 Wis. 2d 303, ¶13). "If the contract covers the activity, we proceed to a public policy analysis, 'which remains the "germane analysis" for exculpatory clauses.'" ***Roberts***, 367 Wis. 2d 386, ¶49 (quoting ***Atkins***, 277 Wis. 2d 303, ¶13); ***Yauger***, 206 Wis. 2d at 86 (the ***Yauger*** court stated that although ***Arnold*** was decided on a "contractual" basis, i.e., whether the

release associated with race car driving included rescue operations, ***Richards*** "departed from the contractual analysis and rested on public policy"; thus, public policy was the "germane analysis").

We question whether in a contract between two commercial entities such an approach is warranted—given that the "good of the community" is less compelling in commercial transactions in which the injured party seeks business losses. ***Roberts***, 367 Wis. 2d 386, ¶49 ("We generally define public policy as that principle of law under which freedom of contract or private dealings is restricted by law for the good of the community." (citation omitted)).

Presumably, striking an exculpatory clause that precludes a claim for intentional and/or reckless conduct even when the only claim is for negligence serves as a deterrent in the personal injury context. Persons injured by intentional and/or reckless conduct may be discouraged from even bringing suit where there is a broad exculpatory clause, thinking that they waived all their rights away. Striking an overly broad exculpatory clause where there is only a claim of negligence sends a message, that those who wish to enforce exculpatory clauses must draft them consistently with the law—that exculpatory clauses may only release claims of negligence. ***Brooten***, 348 Wis. 2d 251, ¶10.

But, in a contract between two commercial entities, a more measured approach may be appropriate as to negligence claims seeking business losses. Commercial entities tend to have greater bargaining power than the average consumer, making such one-sided provisions less prevalent, and the need for deterrence less pressing. If the exculpatory clause is overbroad, but the claim seeking business losses is for negligence, then the exculpatory clause could still be enforced to that extent or the objectionable portion could be severed. *See*

RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. b, illus. 4 (AM. LAW INST. 1981) (using as an illustration, A contracts with B to fix B's roof, and contract includes provision agreeing that B will not hold A liable for willful or negligent breach of duty; although the part of the provision absolving A for willful conduct is unenforceable on public policy grounds, because the contract was "fairly bargained for," the other part absolving A for negligent conduct is enforceable).

Here, the exculpatory clause explicitly absolved Mecum of responsibility for stolen property. However, it also released Mecum from "any and all liabilities." Although extremely broad and all-inclusive, one could argue that these commercial parties contemplated releasing Mecum for negligent conduct resulting in a stolen car and business losses. Or, our public policy analysis, even in the case of commercial contracts, could employ a severance analysis only when the parties agree to explicitly release negligence. ***Atkins***, 277 Wis. 2d 303, ¶¶16, 20 ("While this court has never specifically required exculpatory clauses to include the word 'negligence,' we have stated that 'we consider that it would be very helpful for such contracts to set forth in clear and express terms that the party signing it is releasing others for their negligent acts.'" (citation omitted)). In either event, applying a more limited approach to commercial contracts would recognize that justifiable expectations and security of transactions are met when the claims released were contemplated by the parties. That the contract served two purposes, or was otherwise unclear or overly broad, is of no import when the signer contemplated releasing the claim at issue. Freedom of contract and the good of the community are both protected.

Another consideration is that sophisticated entities to a commercial contract may be able to insure against business risks involving the subject matter of the contract. In fact, such was the case here. For example, WOW had

contracted with Mecum for the sale of hundreds of cars and had insurance to cover the vehicles in case they were stolen. There may be a variety of circumstances that call for shifting the risk of loss to the party better able to bear it. For example, here, it may have been too expensive for Mecum to insure every vehicle on its premises or it would have resulted in Mecum taking a higher commission. In contrast, individual car owners, who presumably have insurance anyway, can more readily bear the cost and retain more of the profit if their car is sold. Sophisticated entities can take into account these different economic considerations in deciding who should bear the risk of loss and drafting a contract that benefits both parties. In such a situation it may be better to favor the public policy of freedom of contract by leaving the parties where they are rather than allowing the courts, who are not experts in economic matters, to rewrite their contract. While the public policy factors take into account unequal bargaining power, we are unaware of Wisconsin case law that might guide us in how we might take into account these other economic considerations in a public policy analysis.

We also note the difference in bargaining power where a consumer is involved in contrast to a sophisticated business entity, which may affect the public policy analysis. As noted, Oklahoma contends that this exculpatory clause is standard, and is also standard in the industry, so that Sam Pierce and WOW could not have chosen a competitor who did not use an exculpatory clause. Our supreme court has stated that "[t]he form itself must provide an opportunity to bargain." ***Id.***, ¶25. Should that analysis be applicable where, as here, over the course of the relationship, WOW had contracted with Mecum to auction at least 810 cars and had agreed to the same terms for many years? This history would seem to suggest that WOW would have had some bargaining power—or that it

was satisfied accepting the insured risk. Our supreme court has said that underlying "the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered." ***Discount Fabric House***, 117 Wis. 2d at 601. If the service can be obtained only "from one source (or several sources on non-competitive terms) the choices … are limited to acceptance of the terms offered or doing without" which "may not be a realistic alternative." ***Id.*** If there was some disparity in bargaining power between the parties but not on the same level as in a consumer case, how should we account for that difference in applying a public policy analysis? For example, should the analysis in the commercial contract incorporate the larger market—such as here, whether there were presumably other options for selling the cars?

And even if there is no bargaining power, such as with a standardized form, where the market has addressed the risk with insurance, should that change the factors largely employed to protect the legally unsophisticated individual with unequal bargaining power? Again, each of the public policy factors applied in personal injury cases serve to identify and protect consumers and individuals who lack legal knowledge and equal bargaining power from waivers that are not voluntarily and knowingly agreed to. If the specific risk is agreed to by a commercial entity with contract experience and know-how, and the ability to insure that risk, the factors are, at best, less relevant.

Is Unconscionability a More Appropriate Framework to Strike Exculpatory Clauses in Contracts Between Two Commercial Parties?

More generally, we note that the parties limit themselves to discussing whether the public policy analysis should be applied to this contract between two commercial entities. In ***Discount Fabric House***, 117 Wis. 2d at 593,

602, the supreme court applied both a public policy and an unconscionability analysis.

Generally, "unconscionability" means the absence of a meaningful choice on part of one party, together with contract terms that are unreasonably favorable to the other party. The unconscionability analysis involves a balancing approach between procedural and substantive factors, with a certain quantum of both necessary to render the term unconscionable. ***Id.*** at 602. "Procedural unconscionability" relates to factors bearing on meeting of minds of contracting parties, while "substantive unconscionability" pertains to reasonableness of contract terms themselves. Procedural factors include the "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question," while substantive "embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable." ***Id.*** (citations omitted).

The parties here do not address unconscionability, including how the analysis differs from a public policy analysis, and whether unconscionability is a more appropriate framework for analyzing exculpatory clauses in contracts between two commercial entities. Our independent research suggests that there is some overlap between the two doctrines, the analysis is not identical, and the balancing between factors designed to address the principles of contract and tort law are different. *See* ***id.*** at 600-04 ("When considering the procedural and substantive factors in the relationship of the parties to this exculpatory contract, the balancing tips in favor of a finding that the clause is unconscionable and against public policy and we so find."); *see also* ***Bagley v. Mt. Bachelor, Inc.***, 340

P.3d 27, 34-35 n.5 & n.6 (Or. 2014) (noting that it had "not distinguished between contracts that are illegal because they violate public policy and contracts that are unenforceable because they are unconscionable," that the two doctrines address similar concerns, but that it was not deciding whether they are identical doctrines).

The difference between the two bodies of law appears to be that in the public policy analysis there is some threat to the public interest, such as form contracts presented to legally unsophisticated individuals releasing personal injury claims, whereas the unconscionability analysis is concerned with the particular bargain and bargaining process between the parties. *See* ***Phoenix Ins. Co. v. Rosen***, 949 N.E.2d 639, 647-48 (Ill. 2011) (noting that its public policy analysis asks whether the contract provision "threatens harm to the public as a whole," whereas "an unconscionability analysis asks whether the agreement, by its formation or by its terms, is so unfair that the court cannot enforce it consistent with the interests of justice"); *see also* ***Bagley***, 340 P.3d at 34 (stating that "the doctrine of unconscionability reflects concerns related specifically to the parties and their formation of the contract, but it also has a broader dimension that converges with an analysis of whether a contract or contract term is illegal because it violates public policy"); RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. Note (AM. LAW INST. 1981) (The argument that a contract is invalid because it violates public policy "touch[es] upon matters of substance related to the public welfare rather than aspects of the bargaining process between the parties.").

Notably, an unconscionability analysis permits a court to tailor a remedy by striking unconscionable provisions. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (if a court finds a contract term unconscionable, it has the option of refusing to enforce the contract, enforcing the remainder of the contract without the unconscionable clause, or limiting the

application of any unconscionable clause as to avoid any unconscionable result); *see also* U.C.C. § 2-302 (2016) (same analysis regarding unconscionable contract provisions in the sale of goods); ***Riley v. Extendicare Health Facilities Inc.***, 2013 WI App 9, ¶45, 345 Wis. 2d 804, 826 N.W.2d 398 (2012) (severance of arbitration clause under unconscionability analysis).

Should the supreme court accept certification, we respectfully recommend it address the interplay between these two doctrines, including whether an unconscionability analysis that permits severance of unconscionable provisions is more appropriate as applied to claims seeking business losses pursuant to exculpatory clauses in contracts between commercial parties.

In sum, should the public policy analysis permit waiver of the specific risk at issue (negligence resulting in stolen cars) even when the exculpatory clause is broad and overly inclusive, arguably unclear and ambiguous, contained in a contract that does not separate out the waiver, or make clear to the signer exactly what is being released? When, as the circuit court found, the parties engaged in an arms-length business transaction that did not involve personal injury or the general public, should the analysis take into account the fact that WOW had agreed to these terms multiple times and that both Sam Pierce and WOW insured the risk? And, when the above analysis is employed, do each of the standard public policy factors intended to protect a legally unsophisticated consumer or individual with unequal bargaining power become less relevant?

We believe the supreme court should accept certification of this appeal. A decision from the supreme court will help "develop, clarify [and] harmonize the law" on the validity of exculpatory clauses, as applied to a commercial contract. WIS. STAT. RULE 809.62(1r)(c). The supreme court is the

appropriate body to provide guidance on the application of a public policy analysis to contracts between two commercial entities. Further, the question is one of law, and it is likely to recur. RULE 809.62(1r)(c)3. Settling this issue will provide businesses with predictability in their transactions and allow them to take measures to insure against potential liabilities.