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To: Wisconsin Association of Campground Owners

From: Mark B. Hazelbaker, Legal Counsel

Re: Why Legislation Is Needed To Address Liability Issues

Liability reforms proposed by Governor Scott Walker have created an opportunity to bring special concerns of the tourism and camping industry to the attention of the Legislature. Adoption of Special Session bill 1, in and of itself, will be good for the business climate in Wisconsin and the tourism industry. But there are specific areas beyond the current scope of the bill which need attention. This memo summarizes the legal rationale for the three which WACO proposes.

Lawyers and Citizens Will Win Too

Opposition to SS1 fell into the familiar pattern of lawyers trotting out injured parties complaining that they will be left without recourse by the legislation. My 28 years of experience in practicing includes both defense and plaintiff work. I'm proud of recoveries I've won for injured parties. But I see our tort and insurance system as more akin to a liability lottery than a compensation system. A few people get large awards because they have severe injuries caused by well-insured defendants. The excesses of the tort system are a drag on our economy which hinders our competitiveness nationally and internationally. If we do not create wealth as a society, no one will be compensated. The tort system does not create money; it merely moves it from one party to another.

Abraham Lincoln, before serving as President, was one of the preeminent trial lawyers of the 19th Century. He made a fortune in litigation. And yet, his best advice on lawsuits was "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough." My experience shows this is true. Lawyers will find plenty of work building the new economy we need to compete with China and India. The growth which results will make it possible to take care of all injured parties, not just the lucky few who win large awards.

WACO'S AGENDA

1. **Make waivers and releases of liability effective.**

Everyone is familiar with tickets, signs and notices that inform patrons that baseball stadiums, ice arenas, dirt bike tracks, swimming pools, and the like, are not liable for injuries. Few are aware that Wisconsin law makes those warnings and even signed releases all but useless.

In Yauger v. Skiing Enterprises, Inc., 206 Wis.2d 76, 557 N.W.2d 60 (1996), the plaintiffs were the surviving parents of a minor who was killed when she struck the concrete base of a ski tower. When the parents purchased the season ticket for the ski area, they signed a release which stated "There are certain inherent risks in skiing and that we agree to hold Hidden Valley Ski Area/Skiing Enterprises Inc. harmless on account of any injury incurred by me or my Family member on the Hidden Valley Ski Area premises." The parents sued the ski area for damages alleging their daughter's death was caused by the ski area's negligence. The circuit court dismissed the complaint, relying on the liability waiver signed by the child's parents. The Wisconsin Supreme Court reversed the circuit court, holding that the waiver was unenforceable. The Supreme Court invalidated the waiver because the waiver did not clearly, unambiguously and unmistakably inform the signer that they were waiving all claims. The Supreme Court concluded the form was not understandable. Candidly, that holding defies common sense. The language quoted is plain on its face. The Supreme Court simply disliked the result.

The Supreme Court revisited liability waivers nine years later in Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc., 2005 WI 153, 286 Wis. 2d 170, 706 N.W.2d 95 (2005), the Wisconsin Supreme Court noted, candidly, that every reported case reviewing a contract waiving liability after 1980 had found the waiver unenforceable. Rainbow Country Rentals, 2005 WI 153, 286 Wis. 2d 170, 192, 706 N.W.2d 95, 105.

The Rainbow Rentals case arose when the plaintiff's phone listing was not included in the yellow pages, despite the defendant phone company having signed a contract promising to do so. The plaintiff sought damages for the losses resulting from its omission from the yellow pages. The phone company relied on the advertising contract's provisions limiting its liability in the event of errors in the publication of the yellow pages.

The Supreme Court in Rainbow Rental rejected the suggestion that the contract was unenforceable because of Wisconsin disfavoring exculpatory clauses. Instead, the Court upheld the contract at issue because the Court characterized the disputed language as a stipulated damages clause. Perhaps most troubling is that the Supreme Court set forth an intricate framework for evaluating the validity of such clauses:

> We next turn to the question of whether the stipulated damages clause is a valid and enforceable provision for liquidated damages. "[A] trial court's decision concerning the validity or invalidity of a clause involves factual and legal determinations, and they will be reviewed as such." *Koenings v. Joseph Schlitz*

> *Brewing Co.*, 126 Wis.2d 349, 358, 377 N.W.2d 593 (1985) (citing *Wassenaar v. Panos*, 111 Wis.2d 518, 525, 331 N.W.2d 357 (1983)). "The overall single test of validity is whether the clause is reasonable under the totality of circumstances." *Wassenaar*, 111 Wis.2d at 526, 331 N.W.2d 357 (citations omitted); *see also Westhaven Assocs., Ltd. v. C.C. of Madison, Inc.*, 2002 WI App 230, ¶ 17, 257 Wis.2d 789, 652 N.W.2d 819. To determine reasonableness, we consider: (1) whether the parties intended to provide for damages or for a penalty; (2) whether the injury caused by the breach would be difficult or incapable of accurate estimation at the time of entering into the contract; and (3) whether the stipulated damages are a reasonable forecast of the harm caused by the breach. *Wassenaar*, 111 Wis.2d at 529-30, 331 N.W.2d 357. "Essentially, we must look at both the 'harm anticipated at the time of contract formation and the actual harm at the time of breach.' " *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶ 30, 266 Wis.2d 124, 667 N.W.2d 751 (quoting *Wassenaar*, 111 Wis.2d at 532, 331 N.W.2d 357). " 'The factors are not meant to be mechanically applied, and courts may give some factors greater weight than others.' " *Id.* (quoting *Westhaven*, 257 Wis.2d 789, ¶ 17, 652 N.W.2d 819); *see also Koenings*, 126 Wis.2d at 361-62, 377 N.W.2d 593.

Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc., 2005 WI 153, 286 Wis. 2d 170, 187-88, 706 N.W.2d 95, 103 (2005).

The framework identified by the Supreme Court is a good example of the adage that an interesting case for a lawyer is a disaster for the client. A liability waiver which does no more than increase the likelihood of a favorable outcome in litigation is not particularly useful. A waiver that is so clearly enforceable that it avoids litigation entirely is needed.

As a response to these issues, WACO should suggest that the statutes be amended to establish minimum standards for liability waivers. There is a model. The Wisconsin Consumer Act has detailed standards for the form of disclosures in credit transactions, see, sec. 422.303, Wis. Stats. A similar set of standards would assure that recreation patrons would receive fair and adequate notice. If a patron chooses to engage in a recreational activity after being given that notice, the law should preclude them from suing the operator unless the operator intentionally harmed them. If a patron sues despite having signed a valid waiver, the operator should be awarded their attorneys' fees and costs if they obtain dismissal.

2. Parity For Private And Public Campgrounds.

Public campground operators are protected from liability for decisions which involve the exercise of discretion by sec. 893.80, Wis. Stats. Only in exceptional cases where park officials ignored a "known danger" can the patrons of public campgrounds recover damages resulting from injuries sustained on public property.

The seminal case teaching the known danger duty is Cords v. Anderson, 259 N.W.2d 672, 80 Wis.2d 525 (1977). In Cords, a state park official was alleged to be negligent, and not shielded by immunity, because a 90-foot sheer drop into a gorge near a hiking trail was not marked, and the trail was not closed at dusk, causing several people to fall into the gorge. *Id.* at 675-77. The

court agreed, holding that "the duty to either place warning signs or advise superiors of the conditions is, on the facts here, a duty so clear and so absolute that it falls within the definition of a ministerial duty." *Id.* at 680. Since Cords, courts have examined individual fact situations to determine if a known danger makes an official's discretionary duty ministerial. If it is not ministerial, and not willful or malicious, the action is within the official's discretion, and therefore shielded by immunity from liability.

There is no reason why private campground operators should not enjoy the same protection from liability. No recreational activity can be made perfectly safe. Every operation involves judgments that reflect a comparison of risks with the cost of achieving perfect safety. Of course, there is no such thing as perfect safety. WACO members will not stay in business if they run "death trap" campgrounds. They also will have trouble staying in business if they must bear unreasonable defense costs for making the same kind of business decisions which their public sector counterparts make under the shield of discretionary immunity.

"Loser Pays" Provisions To Buttress Liability Limits

There already are statutes which purport to protect recreational activities and operators from liability. These statutes, such as sec. 895.525, Wis. Stats., do help win cases. Summary judgment dismissing a plaintiff's complaint is a victory only from a lawyer's perspective. The $10,000 or more in fees it requires to obtain such a result make that a Pyrrhic victory.

Wisconsin follows the "American Rule" under which each side bears its own fees unless there is a fee-shifting statute. There is a provision in law for awards in frivolous cases, but that statute is rarely invoked. WACO should not be either bold or foolish enough to suggest taking on the American Rule across the board. However, it is not a great leap to assert that if the Legislature has already adopted statutes conferring protection from liability, there should be meaningful protection from suit.

Therefore, I suggest that a "loser pays" provision be added to the existing statutes on recreational immunity: sec. 895.481, equine liability; sec. 895.52, recreational activities, sec. 895.525, participation in recreational activities, and sec. 895.527. sport shooting activities.

There are undoubtedly other issues which will warrant attention. However, these three priorities would make a significant difference for WACO members by reducing exposure to litigation. Competition among insurance companies will reduce premiums. Even more important, freedom from fear of litigation will unleash the creative energy of the Wisconsin tourism industry, creating jobs and tax base.

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