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WAIVERS

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Abstract: Waiver contracts are agreements in which one party promises not to sue the other for injuries that occur during their contractual relationship. Waivers are controversial in the consumer context, especially when presented in standard form, take-it-or-leave-it contracts. The law on waivers appears muddled, with no consistent doctrine or policy among the courts on enforceability. The aim of this paper is to offer a consistent set of policies that can form the foundation of a consistent set of doctrines, leading ultimately to a more apparently consistent treatment of waivers in the courts. The most basic piece of this paper's framework is a contract theoretic analysis of the wealth (or welfare) created by a contractual provision. In this framework, waivers should be enforceable when they are likely to increase the welfare of the contracting parties, and otherwise not enforceable. Waivers are likely to increase the welfare of the parties when litigation is likely to reduce their welfare. Litigation is wealth reducing when the social value of the deterrence created through litigation is low relative to the costs of litigation. The social value of deterrence is low, in turn, when the productivity of precaution, in terms of accident avoidance, is low – in other words, additional precaution has little or no "bang for the buck". These general propositions send me on a search for the factual conditions associated with low productivity precaution. The most important ones are inherency of risk and the existence of multiple causal factors. I find the cases are consistent with this precautionary productivity thesis. The immediate implication is that waivers generally are not enforceable or unenforceable according to their language. Waivers are enforceable contextually, conditional on facts indicating inherency of risk or weak causation.

Keywords: waiver, standard form contract, exculpatory clause, precautionary productivity, adhesion contract, public policy doctrine, inherent risk

JEL Classification: K10, K12, K13, K40

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1. Introduction

Waiver contracts are agreements in which one party promises never to sue, to hold harmless, the other for injuries that may occur in the course of their contractual relationship. The agreements typically appear in settings where the promisor is a potential victim of some injury that might be caused by or attributed to the promisee. Waivers are common in the ski industry, where skiers sign agreements not to sue the resort for injuries that occur on the resort premises.[1] Waivers also appear in the business–to–business setting, as where a shipper agrees with a common carrier not to sue for loss or damage to property during transport.[2]

Waivers are controversial in the consumer context, especially when presented in standard form, take-it-or-leave-it contracts. They have become more controversial of late as the law has moved gradually to a more permissive stance toward waiver and similar types of agreement (e.g., arbitration).[3] The obvious concern is that a consumer or user of a product or service might sign away his right to sue without ever having looked at the standard form contract, and without ever having the waiver clause brought to his attention, or without ever having a chance to seek to have the waiver provision removed.

These are all intuitively reasonable concerns, and yet the standard form contract remains dominant in commercial life, and the waiver remains a standard provision within certain industries, particularly recreational services.

More importantly, the law on waivers appears muddled, with no consistent doctrine or policy among the courts on enforceability. At the same time, there are posts from lawyers noting that waivers are so seldom enforced that they are "not worth the paper they are written on,"[4] and articles suggesting that waivers are being enforced too much.[5]

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[1] For a survey of the case law on ski resort waivers, see C. Connor Crook, *Validity and Enforceability of Liability Waivers on Ski Lift Tickets*, 28 Campbell L. Rev. 107 (2005).

[2] *See, e.g.*, Liverpool and Great Western Steam Company v. Phenix Insurance Company, 129 U.S. 397 (1889). (holding waiver unenforceable).

[3] Specifically, the Supreme Court's arbitration case law has become more tolerant of arbitration agreements. For critiques of Supreme Court's changes in arbitration law over the last several decades, see Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3057 (2015). For a defense of Supreme Court arbitration case law, see Steven W. Feldman, *Italian Colors and Freedom of Contract under the Federal Arbitration Act: Has the Supreme Court Enabled Disappearing Claims and the Erosion of Substantive Law*, 2016 MICH. ST. L. REV. 109 (2016).

[4] *See, e.g.*, Waiver Agreements: Not Worth the Paper They're Written Upon, posted by Adam Fitzpatrick, Oct 28, 2021, https://www.corneillelaw.com/waiver-agreements-not-worth-the-paper-their-written-upon; Waivers of Liability: Are They Worth the Paper They Are Written On?, May 30, 2013, Timothy D. Fenner, https://www.axley.com/publication_article/waivers-of-liability/.

[5] Ryan Martins, Shannon Price, and John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1268-69 (2020). ("…this Article traces the process by which the waiver contract has become a real life version of *The Walking Dead*, haunting tort law anew… Part III assesses the significance of the doctrinal trends and concludes that Americans are on the verge of living in a waiver society."); Alfred C. Yen and Matthew Gregas, *Liability and Participation Rates in Youth Sports: An Empirical Investigation*, 10 ASU

The aim of this paper is to examine the critiques of waivers and to offer a consistent set of policies that can form the foundation of a consistent set of doctrines, leading ultimately to a more apparently consistent treatment of waivers in the courts. The most basic piece of this paper's framework is a contract theoretic analysis of the ex ante joint wealth (or welfare) created by a contractual provision, under ideal conditions. Contracts are socially beneficial because they can increase the welfare of contracting parties. In this framework, waivers should be enforceable when they are likely to increase the welfare of the contracting parties, and otherwise not enforceable. Waivers are likely to increase the welfare of the parties when the litigation option is likely to reduce their welfare.[6]

This obviously leads to the question, when is litigation likely to reduce the welfare of contracting parties? Litigation is wealth reducing when the social value of the deterrence created through the litigation threat is low relative to the costs of litigation.[7] The social value of deterrence is low, in turn, when the productivity of care, in terms of accident avoidance, is low – in other words, additional precaution has little or no "bang for the buck".

These general propositions send me on a search for the specific factual conditions associated with low productivity precaution. The most important ones are *inherency of risk* and the existence of *multiple causal factors*. When a potentially negligent actor takes all of the important measures to reduce the accident risk associated with his activity, the remaining risk factors tend to be inherent to the activity, or attributable to other causal factors. For example, once a ski resort adopts the most important precautions to reduce the risk of injury, the remaining risks tend to inherent to the activity of skiing. Inherency of risk thus emerges as an important factor in determining whether precautionary productivity is low, and therefore the waiver should be enforceable.

The last step of the analysis is an examination of cases, to see if the outcomes are consistent with the framework of this paper. I examine the same cases presented in two recent and prominent critiques of waiver law.[8] I find the cases are consistent with the precautionary productivity thesis. The immediate implication, of course, is that waivers generally are not enforceable or unenforceable according to their language, but according to their language and the facts of the case. Specifically, waivers are enforceable contextually, conditional on facts indicating inherency of risk or weak causation.

A contract theoretic approach may seem odd, and out of place, in the standard-form contracting context. However, this is an extremely useful starting point for an analysis of any contractual provision. If a waiver cannot enhance welfare under ideal contractual conditions, then obviously it will do no better under less than ideal conditions – for example, under the sub-ideal condition

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SPORTS & ENT. L. J. 1 (2020) (finding no statistical association between waivers for youth sports and participation in youth sports, undermining a key justification for youth sports waivers).

[6] *See* Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An. Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000) (examining private and social incentives to form waiver and arbitration agreements).

[7] *See* Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982) (examining private and social incentives to litigate).

[8] *See* Edward K. Cheng, Ehud Guttel, and Yuval Procaccia, *Unenforceable Waivers*, VAND. L. REV., forthcoming (2023); Martins, Price, and Witt, *supra* note 5.

of informational asymmetry.[9] Conversely, if it is possible that a waiver agreement could enhance the joint welfare of contracting parties, then it is important to understand precisely under what conditions such a result can obtain.

In Part 2, I discuss the basic questions of waiver law. I look closely at the doctrines on enforceability, or rather unenforceability. In the courts, life is hard for a waiver. Several legal doctrines fully justify a court in refusing to enforce one. I try to provide a useful survey, mainly to get a sense of how plausible it is to view waivers as likely to be enforced.

In Part 3, I present some policy critiques of waivers. These are broad-brush arguments against enforcement of any waiver, ranging from rule of law arguments, to delegation concerns, to worries about harm done to human dignity. I am, of course, critical of the critiques. Most of them do not account for the difficulty involved in enforcing a waiver, and seem to adopt the premise that courts are enforcing waivers readily. The arguments on case trends – suggesting a move by the courts toward enforcing waivers, and stripping consumers and workers of rights – ignore the science that has developed on trial selection.[10]

Part 4 presents the core theoretical model of this paper, in the form of a numerical illustration. I show the conditions under which waivers can enhance the welfare of contracting parties. The model/numerical illustration presented in this part is general in form, and applicable to any specific area of law where parties have a choice to waive litigation.[11] This part of the paper also takes a close look at the economics of standard form contracts, a subject that has received too little analysis despite being a topic of controversy in the law journals for many years. Under ideal conditions of perfectly informed parties, the standard form contract emerges as the set of options that jointly maximize the welfare of the contracting parties. The contract typically does not include choices for alternative provisions, because the alternatives would only make the parties worse off. Because the provisions are jointly optimal for the parties, they would emerge under competitive or under monopolized conditions.

Part 5 examines the limits of the core model. Specifically, I show the conditions under which the waiver reduces joint welfare. I then consider other limitations, such as imperfect information,

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[9] Generally, contracts under informational asymmetry exhibit inefficient features. In the labor contracts setting, for example, models of contracting under informational asymmetry yield inefficient unemployment, rather than wage reductions, during downturns. The reason is that, assuming the firm has the information advantage with respect to market demand conditions, the firm must inefficiently reduce output during downturns in order to commit to telling the truth about market conditions. *See* Oliver D. Hart, *Optimal Labour Contracts under Asymmetric Information: An Introduction*, 50 REV. ECON. STUD. 3 (1983); Russell Cooper, *A Note on Overemployment/Underemployment in Labor Contracts under Asymmetric Information,* 12 ECONOMICS LETTERS 81 (1983). If the firm did not inefficiently reduce output (and employment), then it would have an incentive to lie to workers about the state of market demand, in order to cut wages.

[10] The first and best known article in this literature is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[11] One potential application of this model, not considered in this paper, is to waivers of the duty of care, or of the duty of loyalty, in corporate law. On waivers of the duty of care in corporate law, see J. Robert Brown Jr. & Sandeep Gopalan, *Opting Only In: Contractarians, Waiver of Liability Provisions, and the Race to the Bottom*, 42 Indiana Law Journal 285–315 (2009). On waivers of the duty of loyalty in corporate law, see Gabriel Rauterberg & Eric L. Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 Colum. L Rev. 1075 (2017).

that muddy the ideal-conditions analysis. Obviously, if consumers cannot assess with reasonable accuracy the relative risks of contractual options, the ideal conditions analysis will generate invalid prescriptions. I also consider rights pessimism as another factor requiring a modification of the model. A "rights pessimist" believes his legal rights are not valuable to begin with, and so may sell them, through a waiver agreement, too cheaply. The rights pessimism problem introduces a political marginalization issue in the enforcement of waivers, since marginalization induces rights pessimism.[12] An updated enforcement doctrine should incorporate political marginalization as a factor to consider in enforcement.

Part 6 translates the theory into guidelines for courts. I identify the factors consistent with precautionary productivity model. They are basically two, inherency of risk and multiple causal factors. Part 7 then takes the guidelines and applies them to actual cases. In part 8, I consider how the rights pessimism problem can be incorporated into modern legal tests. Part 9 concludes.

2. What Are Waivers, and Are They Enforceable?

A. Waiver Example

Probably the best way to start an analysis of waivers is to look at one. In *Dalury v. S-K-I Ltd.*,[13] the plaintiff, Dalury, sued defendants S-K-I Ltd. and Killington Ltd., operators of the Killington Ski Area, after he suffered injuries from colliding with a metal pole that formed part of the control maze for a ski lift line.[14] Before the season started, Dalury had purchased a season pass and signed a form that included the following waiver clause.

> RELEASE FROM LIABILITY AND CONDITIONS OF USE
>
> 1. I accept and understand that Alpine Skiing is a hazardous sport with many dangers and risks and that injuries are a common and ordinary occurrence of the sport. As a condition of being permitted to use the ski area premises, I freely accept and voluntarily assume the risks of injury or property damage and release

[12] I mean marginalization in the broadest sense to include social and economic marginalization as well as political marginalization. *See, e.g.*, NDI, Political Inclusion of Marginalized Groups ("Marginalization can be understood as persistent inequality and adversity resulting from discrimination, social stigma and stereotypes"), https://www.ndi.org/political-inclusion-of-marginalized-groups; Liberties, What Is Marginalization? Definition And Coping Strategies ("[T]here are three main types of marginalization: social marginalization, economic marginalization and political marginalization….People who are socially marginalized don't have the same social opportunities as others. They can't go to the same clubs, reasonably access the same shops or services, and they often even live in segregated, socially excluded communities….Economic marginalization means that people do not have the same chances as others to contribute to and benefit from the economy….Political marginalization means that some groups of people are not able to participate democratically in the decision-making process.), https://www.liberties.eu/en/stories/marginalization-and-being-marginalized/43767.

[13] 670 A.2d 795 (Vt. 1995)

[14] *Id*. at 796.

> Killington Ltd., its employees and agents from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operations of the ski area, actions or omissions of employees or agents of the ski area or from my participation in skiing at the area, accepting myself the full responsibility for any and all such damage or injury of any kind which may result.[15]

The *Dalury* waiver is quite broad in scope, though not unusual among waiver provisions in standard form contracts.[16] The *Dalury* waiver's requirement that the skier assume "full responsibility for any and all such damage or injury of any kind" would seem to waive liability even for an intentional killing. However, such an interpretation is unlikely, in a court. It is a bedrock principle of tort law that one cannot waive the law's protection against an intentional killing, or even a battery threatening serious bodily harm.[17] No court has recognized a right to waive liability for an intentional infliction of death or serious bodily harm.[18]

The *Dalury* court could have refused enforcement to the waiver provision on the ground that it is overly broad in scope, as other courts have done.[19] However, some courts choose to ignore overly broad language and focus, instead, on the whether the particular injury complained of is due to negligence, gross negligence, recklessness, or intentional conduct. If the injury is due to negligence, the court reads the waiver, even though broadly worded, as applying solely to that particular type of fault,[20] which courts consider a fair subject of waiver agreements.

B. Waivers versus Settlements

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[15] *Id*.

[16] Standard templates for waivers are typically broad in scope, as exemplified by the many samples readily available online. *See, e.g.*, Legal Templates, Free Waiver Template Downloads, https://legaltemplates.net/form/release-of-liability-waiver/.

[17] In the mutual combat context, the majority of states hold that consent is not a defense to battery, see Adams v. Waggoner, 33 Ind. 531 (1870); McNeil v. Mullin, 79 P. 168 (Kan. 1905); Barholt v. Wright, 12 N.E. 185 (Ohio 1887); Royer v. Belcher, 131 S.E. 556 (W. Va. 1926). The minority rule holds that consent to engage in mutual combat is a defense to battery so long as the evidence indicates that the prevailing party did not use excessive force or act with an intention to severely injure the other party. *See* Hart v. Geysel, 294 P. 570, 572 (Wash. 1930).

[18] Return to the mutual combat cases, *supra* note 17. The majority rule on mutual combat precludes consent as a defense to battery, and the minority rule precludes consent when the intention is to severely injure. Under both rules, courts deny victims the option to waive liability for intentional infliction of death or serious bodily harm. As for the waiver cases, the law is clear: "a promise not to sue for future damage caused by simple negligence may be valid; but an attempted exemption from liability for future intentional tort or willful act or gross negligence is generally declared to be void." Kuzmiak v. Brookchester, 111 A.2d 425, 427 (N.J. Super. Ct. App. Div. 1955). *See also*, Winterstein v. Wilcom, 293 A.2d 821, 824 (Md. Ct. Spec. App. 1972) ("Generally, exculpatory agreements otherwise valid are not construed to cover the more extreme forms of negligence — wilful, wanton, reckless or gross. Nor do they encompass any conduct which constitutes an intentional tort.").

[19] Fisher v. Stevens, 584 S.E.2d 149, 152 (Ct. App. 2003); Richards v. Richards, 513 N.W.2d 118 (Wis. 1994); Jesse v. Lindsley, 233 P.3d 1 (Idaho 2008).

[20] *See, e.g.*, Hanks v. Powder Ridge, 885 A. 2d 734, 747 (Conn. 2005) ("[W]e find it significant that many states uphold exculpatory agreements in the context of simple negligence, but refuse to enforce such agreements in the context of gross negligence.")

The closest type of contract to the waiver is the settlement agreement. They are much alike, since both types of agreement extinguish legal claims. However, the waiver is, in effect, a settlement that occurs before the injury, while the settlement agreement occurs after the injury. The settlement, as Robert Bone puts it, is a *sale* of the legal claim by the plaintiff to the defendant.[21] The waiver, by contrast, is a sale of the legal *right* by the potential plaintiff to the potential defendant. The two contracts are different in their implications for the behavior of contracting parties, since the settlement, coming into formation after the injury has occurred, can have no effect on the incentive of the injuring party to take care to avoid the injury. The waiver, by contrast, removes any pressure on the potential defendant to take care to avoid the type of injury the agreement addresses.

The waiver and the settlement also differ in the sort of consideration made in return for the defendant's relief from legal claims. The settlement obviously involves money, or some payment in kind in the form of an "injunctive settlement,"[22] from defendant to plaintiff. The consideration given by the defendant in exchange for the plaintiff extinguishing his legal claim in settlement is obvious to the plaintiff, and to others who observe the settlement, though the precise amount may not be disclosed to the public.[23] The payment made by the potential defendant in exchange for the waiver, by contrast, is often unclear even to the potential plaintiff, particularly in the case of standard form contracts. It often appears as if the potential defendant simply imposes the waiver on the potential plaintiff with no compensation or negotiation, just take it or leave it.

In spite of this appearance of an imposition without any sort of exchange, under the standard form contract, there is a type of compensation or consideration that gets transferred in exchange for the waiver. This is a topic I will address in Part 5. For now, it should be sufficient to say that the particular provisions of the standard form contract may constitute the only set that meets consumer preferences and at the same time survives in a competitive market.

C. Enforceability

[21] ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 72 (2003) (describing and analyzing settlement as a sale to the defendant of the plaintiff's legal claim).

[22] An injunctive settlement (or injunctive relief settlement) gives the plaintiff the change in entitlements that he seeks. For example, such a settlement in the nuisance setting would require the defendant to shutter its activity, as part of the settlement agreement. On the economics of injunctive settlements, see Keith N. Hylton & Sungjoon Cho, *The Economics of Injunctive and Reverse Settlements*, 12 AM. LAW. & ECON. REV. 181 (2010).

[23] Of course, most settlements amounts are not public information; only the parties know what was exchanged in return for extinguishment of the claim, and in some cases whether there was a settlement at all. On the issues surrounding secrecy in settlements, see Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 KAN. L. REV. 1457 (2006); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007); Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECON. 661 (1999). In the waiver context, by contrast, the consumer, unless given a menu of options, may not know what he receives in exchange for the promise not to sue.

It should be clear from the foregoing that waiver agreements are enforceable. I mean this in the sense that there is no general rule across common law jurisdictions that waivers are unenforceable. However, every jurisdiction places restrictions on the enforceability of waivers, and some jurisdictions prohibit enforcement of waivers in the consumer contracting setting.[24]

One limitation on the enforceability of waivers is basic offer and acceptance doctrine. Courts ask whether the facts indicate a "meeting of the minds" as evidenced by an accident that would appear to be within the contemplation of both parties to the contract at the time of contract formation.[25] In *Russo v. The Range*,[26] for example, the plaintiff bought a ticket to an amusement park bearing a waiver on the reverse side.[27] The plaintiff decided to try out the giant slide.[28] He discovered on his way down that his body took flight above the surface at a few points, leading to his injury at the bottom of the slide.[29] The court rejected the defendant's contention that the plaintiff assumed the risk, and had voluntarily waived liability, on the ground that the accident experienced by the plaintiff was unusual and outside of the set of risks one would ordinarily anticipate in connection with riding down a slide.[30] The court reversed a summary judgment for

[24] Waivers for personal injury are generally unenforceable in Louisiana, Montana, and Virginia. *See* Hiett v. Lake Barcroft Community Assn., 418 S.E.2d 894, 895 (Va. 1992); Ramirez v. Fair Grounds Corp., 575 So.2d 811 (La. 1991); Mont. Code Ann. § 28-2-702 (2021) (statutorily prohibited for any contracts to exempt anyone from responsibility for fraud, willful injury to person or property, or for violation of the law, whether willful or negligent.). However, each state has narrow statutory exceptions. Montana has a statutory exception to its waiver prohibition for sports and recreational activities, see Mont. Code Ann. § 27-1-753 (2021) (allowing waivers that disclaim liability for inherent risks of the sport or recreational activity). In Virginia, waivers for personal injury in equine activity, agritourism activity, and ox activity are allowed, but may apply only to injuries resulting from inherent risks of such activity. *See* Va. Code Ann. § 3.2-6204 (equine); Va. Code Ann. § 3.2-6202 (ox); Va. Code Ann. § 3.2-6401 (agritourism). Louisiana has a statute that limits the duty of care with respect to inherent risks for "equine professionals," but does not sanction waivers for personal injury liability. La. R.S. § 9:2795.3.

[25] Quinn v. Mississippi State University, 720 So. 2d 843, 851 (Miss. 1998) ("In construing the release against the university, the party who drafted it, we hold that reasonable minds could differ as to what types of risks the Quinns were assuming by signing the release."); Korsmo v. Waverly Ski Club, 435 NW2d 746, 749 (Iowa App.1988) ("The parties need not have contemplated the precise occurrence which occurred as long as it is reasonable to conclude the parties contemplated a similarly broad range of accidents."); Hawkins v. Capital Fitness, Inc., 29 NE 3d 442, 451 (Ill. App. Ct. 2015) ("[R]easonable minds could differ on the issue of whether the incident here is an ordinary risk associated with the use of a fitness facility. Whether a particular injury is one which ordinarily accompanies a certain activity and whether a plaintiff appreciates and assumes the risks associated with the activity often constitute a question of fact. … Because a broad release does not encompass all accidents without limit …, a genuine issue of fact arises as to whether the exculpatory clause in the membership agreement includes potential injury due to a mirror falling off a wall."); Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) ("The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds ..."); Burd v. KL Shangri-Law Owners, L.P., 67 P.3d 927, 930 (Okla. Civ. App. 2003) ("there was no intent, and thus no meeting of the minds, to exculpate [the defendant]…"); Monitronics Int'l, Inc. v. Veasley, 746 S.E.2d 793, 802 (Ga. Ct. App. 2013) ([B]ecause exculpatory clauses may amount to "an accord and satisfaction of future claims and waive substantial rights, they require a meeting of the minds on the subject matter and must be explicit, prominent, clear and unambiguous.")

[26] 76 Ill.App.3d 236, 395 N.E.2d 10 (1979).

[27] 76 Ill. App at 237.

[28] *Id.* at236.

[29] *Id*. at 236-37.

[30] *Id*. at 239.

the defendant, so that the lower court could determine if the plaintiff had assumed the specific risks presented by the defendant's activity.

This notion, in *Russo*, of "specific risk knowledge", provides a powerful set of tools for courts in reviewing the enforceability of waiver agreements. It implies that whenever the risk that materializes is nonobvious and foreign to the experience of the plaintiff, the waiver may not be enforced unless the specific risk is brought to the attention of the plaintiff before the transaction generating the injury occurs. If the specific risk knowledge doctrine were the only restraint placed by courts on the enforceability of waivers, it might be sufficient by itself to ensure that waivers are enforced only under special conditions.

However, the specific risk knowledge doctrine is not the only constraint courts place on the enforcement of waivers. The law on adhesion contracts provides another set of restraints on waiver enforceability. Adhesion contracts are take-it-or-leave-it standard form contracts given to consumers in the mass-market context.[31] Courts will not enforce the adhesion contract unless the plaintiff knowingly consented and the terms of the contract are within the reasonable expectations of the parties.[32] In *Obstetrics and Gynecologists v. Pepper*,[33] the Nevada Supreme Court upheld a lower court's decision to allow the plaintiff's negligence action to proceed, in spite of a provision in the contract signed by the plaintiff requiring disputes to go to binding arbitration. The court, after determining that the contract was an adhesion contract, based its decision on the lack of evidence that the plaintiff's consent was knowing. Like consumers in many mass-market settings, the plaintiff alleged that she did not remember signing the agreement or ever seeing the arbitration provision.

Unconscionability doctrine provides another constraint on the enforcement of waiver provisions.[34] Unconscionability theory divides into substantive and procedural categories, with

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[31] *See, e.g.*, Rudbart v. N. Jersey Dist. Water Supply Comm'n, 605 A.2d 681, 685 (N.J. 1992) ("the essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars.").

[32] Bering Straight Sch. Dist. v. RLI Ins. Co. 873 P.2d 1292, 1294-95 (Alaska 1994); Graham v. Scissor-Tail, Inc., 171 Cal. Rptr. 604, 612 (Cal. 1981); Nw. Fin. Miss. Inc. v. McDonald, 905 So.2d 1187, 1194 (Miss. 2005); Woodruff v. Bretz, Inc., 218 P.3d 486, 491 (Mont. 2009); Obstetrics & Gynecologists Ltd. v. Pepper, 693 P.2d 1259, 1260 (Nev. 1985); Spears v. Shelter Mut. Ins. Co., 73 P.3d 865, 868-69 (Okla. 2003). Some courts include a third requirement that the terms of the contract must not be "unconscionable," but I will follow the definition adopted in Obstetrics and Gynecologists v. Pepper, 693 P. 2d 1259 (Nev. 1985), and treat unconscionability as a separate basis for refusing enforcement.

[33] 693 P. 2d 1259 (Nev. 1985).

[34] Baker v. City of Seattle, 484 P.2d 405, 407 (Wash. 1971) ("In the instant case, the disclaimer was contained in the middle of the agreement and was not conspicuous. To allow the respondent to completely exclude himself from liability by such an inconspicuous disclaimer, would truly be unconscionable."); Orlett v. Suburban Propane, 561 N.E.2d 1066, 1068 (Ohio App. 1989) ("[T]he Orletts, as consumers of liquid propane for heating and cooking purposes, are dependent on Texgas for their living needs. Therefore, allowing a supplier of propane gas, such as Texgas, to insulate itself from liability as a result of its own possible negligence, is wholly oppressive and unconscionable, and against public policy."); Storm v. NSL Rockland Place, LLC, 898 A.2d 874, 884 (Del. Super. Ct. 2005) ("Rockland's attempt to invoke the primary assumption of the risk defense fails because it cannot demonstrate that Mr. Storm chose to be sick or that he consented to allow Rockland to exercise less than ordinary care when it provided healthcare services to him. Even assuming arguendo that Mr. Storm was aware of the risks associated with independent living, he accepted these risks only because he was in need of medical care. Moreover, by accepting the risks inherent in the Rockland treatment environment, he did not in any way consent to allow

the former referring to extreme unfairness in the terms of the contract, and the latter referring to the procedure by which the contract is formed.[35] A waiver contract that absolves the potential defendant of liability for "any harms no matter how caused" might be considered unconscionable on its face because it appears to preclude liability even for intentional harms.[36] A waiver contract foisted on an individual, while suffering a medical emergency, as a precondition to gain access to an emergency room might be a procedurally unconscionable provision.[37]

Perhaps more important than the foregoing constraints on waiver enforcement is the public policy doctrine of *Tunkl v. Regents of University of California*,[38] under which enforcement depends on the following factors:[39]

> (1) [The contract] concerns a business of a type generally thought suitable for public regulation. (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity … (3) The party holds [it]self out as willing to perform this service for any member of the public who seeks it,… (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength … (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [the seller's] agents.

Rockland to exercise less than what the applicable standards of care required of it when providing services. Permitting a primary assumption of the risk defense under these circumstances would simply be unconscionable.")

[35] Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17-20 (1993) (explaining, in light of the theory of "property rules," the difference between substantive and procedural unconscionability).

[36] One famous formulation of the unconscionability principle comes from Carlson v. Hamilton, 332 P.2d 989, 989 (Utah 1958): "It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability." Applying this principle, a contract that immunizes one party for a reckless or intentional infliction of serious bodily harm would appear to be unconscionable. Crossing-Lyons v. Towns Sports Int'l, Inc., No. A–3908–15T3, 2017 WL 2953388, at *2 (N.J. Super. Ct. App. Div. 2017) (holding release "unconscionable, as the fitness center has attempted to shield itself from all liability based on a one-sided agreement that offered no countervailing or redeeming societal value."); Stelluti v. Casapenn Enterprises, LLC, 975 A.2d 494, 508 (N.J. Appellate Div. 2009) ("In a variety of contexts, case law and statutes have described conduct that is more severe than ordinary negligence, affixing a variety of labels to such behavior… We further conclude that it would be substantively unconscionable for a disclaimer to insulate a health club from the harm caused by such egregious behavior."). Until overruled by the Supreme Court in AT&T Mobility LLC. v. Concepcion, 563 U.S. 333 (2011), California had held, in Discover Bank v. Superior Court, 113 P.3d 1100 (2005), that contracts prohibiting class actions for low-value claims are substantively unconscionable.

[37] Sosa v. Paulos, 924 P.2d 357 (Utah 1996) (holding arbitration agreement presented to patient less than one hour before surgery procedurally unconscionable).

[38] 383 P.2d 441 (Cal. 1963).

[39] *Id.* at 445-46 (footnotes omitted).

Applying these factors, the *Tunkl* court held that a waiver imposed as a condition for admission to a charitable research hospital was unenforceable, as a violation of public policy. While many courts have adopted *Tunkl* wholesale,[40] some have modified the *Tunkl* test to suit their purposes.[41] In most of the modified versions, the test boils down to an analysis of whether the contract affects "a public interest," and whether it was fairly entered into.[42] A third group of courts has adopted a "totality of the circumstances" approach to the public policy question.[43]

Yet another constraint on the enforceability of waivers is the theory that an overly broad exculpatory clause is unenforceable,[44] for the reason alluded to earlier that it purports to exclude liability even for intentional harms, and therefore removes the courts, save for criminal prosecutions, from policing basic rights to personal security. If a contracting party, who presumably has some resources, can attempt to murder the other party and face no risk of liability for his actions because of a waiver contract, then the laws protecting personal security are to some degree under the control of intentional tortfeasors.

These constraints taken together – specific risk knowledge, adhesion contract doctrine, unconscionability, public policy, exculpatory overbreadth – set up a gauntlet that any defense based on the existence of a waiver agreement must run. There is no empirical evidence on how many waivers survive the gauntlet and are enforced in the end. However, the sheer number of doctrines restricting enforceability suggests that waivers are by no means as easy to enforce as to incorporate in a standard form contract.

As it stands, no empirical studies exist on the degree to which waivers are enforced. One recent study that at least hints at a quantitative assessment, authored by Martins, Price, and Witt (part of the Waiver Society Project), argues that the United States has moved into a period of ubiquitous waiver contracts, threatening the death of tort law.[45] However, there is a difference between observing numerous waiver provisions in standard form contracts, and observing *enforceable*

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[40] *See, e.g.*, Wagenblast v. Odessa School District, 758 P.2d 968, 971-73 (Wash. 1988); Kyriazis v. University of W. Va., 450 S.E.2d 649, 654-55 (W. Va. 1994); Anchorage v. Locker, 723 P.2d 1261, 1265 (Alaska 1986); Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn.1977).

[41] One exception is Virginia, which prohibits waivers for personal injury on public policy grounds. *See* Hiett v. Lake Barcroft Community Assn., 418 S.E.2d 894, 895 (1992) ("[T]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct. . . can never be lawfully done where an enlightened system of jurisprudence prevails.").

[42] *See* Jones v. Dressel, 623 P.2d 370, 376 (Colo.1981). (Colorado Supreme Court four-part inquiry to analyze the validity of exculpatory agreements: (1) existence of a duty to the public, (2) the nature of the service performed, (3) whether the contract was fairly entered into, and (4) whether the intention of the parties is expressed in clear and unambiguous language.); see also Milligan v. Big Valley Corp., 754 P.2d 1063, 1066-67 (Wyo. 1988) (same); Rawlings v. Layne & Bowler Pump Co., 465 P.2d 107, 110-11 (Idaho 1970) ("express agreements exempting one of the parties for negligence are to be sustained except where: [1] one party is at an obvious disadvantage in bargaining power; [2] a public duty is involved [public utility companies, common carriers]").

[43] *See* Wolf v. Ford, 335 Md. 525, 535, 644 A.2d 522 (1994) (declining to adopt *Tunkl* factors because "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations"); Dalury v. S-K-I, Ltd., 670 A.2d 795, 798 (1995) (same); Hanks v. Powder Ridge Restaurant Corp., 885 A. 2d 734, 743-44 (Conn. 2005).

[44] Fisher v. Stevens, 584 S.E.2d 149, 152 (Ct. App. 2003); Richards v. Richards, 513 N.W.2d 118 (Wis. 1994); Jesse v. Lindsley, 233 P.3d 1 (Idaho 2008); Gross v. Sweet, 400 N.E.2d 306, 309 (N.Y. 1979).

[45] Martins, Price, and Witt, *supra* note 5. On the Waiver Society Project, see https://www.waiversociety.org/.

waiver provisions. Simply because a standard form contract contains a waiver does not mean that a court will enforce the waiver.[46]

The Martins, Price, and Witt study also suggests that the courts have become more favorable to enforcing waiver contracts. However, one important lesson of trial selection theory is that trends in the case law are difficult to evaluate.[47] If one observes numerous decisions finding physicians innocent of medical malpractice, one might be inclined to draw the conclusion that a trend favoring physicians exists in the case law. However, the same "trend" could be generated by a process in which courts are no more lenient to doctors than they were in the past, and consequently those who are guilty of malpractice settle immediately, leaving only the innocent doctors to battle in court. Similarly, a trend suggesting courts have become more lenient toward the enforceability of waiver contracts may be illusory. Perhaps courts are no more lenient or favorable, but the best-case scenarios for enforceability show up to court in droves, and stay to final judgment, while the weakest cases for enforceability settle early and quietly.

Even the language of the cases should be read with care, and a little skepticism. If some courts use language that seems favorable to enforcement, such as finding a public policy of freedom of contract,[48] that may tell us little about whether there has been a recent change in the enforceability of waivers. Language highly favorable to enforcement may simply reflect the underlying facts of the cases before the courts using such language.[49] The language may mean nothing more than "based on these facts, I really favor a finding of nonliability, and if it helps to point to the waiver provision of the standard form contract to bolster my conclusion I will do so."

Part of the trend toward more favorable views of waiver contracts in the courts should arguably include recent Supreme Court decisions on arbitration agreements.[50] These are not decisions on waiver contracts. Arbitration agreements are nothing more than agreements to carry out disputes within an arbitration forum rather than in the courts. Another sense in which this trend is distinguishable from the law on waiver contracts is that the Supreme Court case law inevitably involves questions of federal law, while the less assuming decisions on waivers are simple contract law decisions. Still, with these two distinctions in mind, the recent arbitration case law in the Supreme Court does cast a shadow over the waiver case law, mainly because arbitration agreements can, in a worst-case scenario, operate in a manner equivalent to waiver agreements. An extremely one-sided arbitration forum, favoring the contract writer, may operate in effect as a

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[46] In their examination of the "current landscape" of waiver cases, Martins, Price, and Witt discuss cases in which the waiver is enforced. *See id*. at 1294-98. However, even within their own sample, the enforcement rate is not 100 percent. Of nine cases discussed in their section on the current landscape, the waiver is enforced in eight (88.9% enforcement rate).

[47] Keith N. Hylton, *A Note on Trend-Spotting in the Case Law*, 40 B.C. L. REV. 891 (1999) (on trial selection theory and trends in the case law).

[48] *See* Ryan Martins, Shannon Price, and John Fabian Witt, *supra* note 5, at 1294-95.

[49] Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 21 J. Legal Stud. 187, 204 (1993) (discussing implications of trial selection theory for interpreting language in court opinions).

[50] In particular, AT&T Mobility LLC. v. Concepcion, 563 U.S. 333 (2011) (holding FAA preempts California rule, established in Discover Bank v. Superior Court, 113 P.3d 1100 (2005), that contracts prohibiting class actions for low-value claims are substantively unconscionable); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that arbitration clauses requiring class-action waivers are enforceable, even though it may be prohibitively expensive to arbitrate a federal antitrust claim).

"waiver forum." Thus, the Supreme Court decisions on arbitration may have contributed to a view among commentators that the law has developed in a manner that favors waiver agreements. But, again, this falls far short of demonstrating that there is any trend toward enforcement of waivers in the courts.

3. Critiques

There are some powerful, broad-brush critiques of waiver contracts in the literature. In this part, I will survey the arguments and the views of commentators associated with them. I have summarized the arguments in four categories below: rule of law erosion, harmful external effects, derogation of the lawmaking process, and harms to dignity.

A. Rule of Law

One criticism leveled against waivers, particularly the standard form variety, is that they weaken or erode the rule of law. This argument is made most forcefully by Radin,[51] though there are others who have offered versions of it.[52]

How do waivers erode the rule of law? Because consumers, workers, and others subject to standard form waivers are injured and only later discover that their remedies are severely circumscribed by the waivers they signed in the past. This is a surprise discovery for many individuals subject to standard form waivers, because they are often unaware, or at most vaguely aware, of the provisions in spite of having agreed to the contracts containing them.[53]

The rule of law critique is not unlike the much older "dog law" complaint of Bentham.[54] Common law was "dog law" according to Bentham, because people learn about the common law in the same way that a dog learns about the law of his master's house; he breaks the law and then suffers a beating.[55] In the same sense, people learn the common law by breaking it, and then suffering a lawsuit and adverse judgment.[56] In the case of waivers included in standard form contracts, the problem is similar, though in a twisted order: individuals suffer an injury and then discover that the law provides no remedy. Perhaps the problem created by standard form

[51] Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law? in* Private Law and the Rule of Law 292 (Lisa M. Austin & Dennis Klimchuk eds., 2014).
[52] Sabbeth & Vladeck, *supra* note 3; Glover, *supra* note 3.
[53] Radin, *supra* note 51, at 299 ("Recipients most likely will not read the terms of boilerplate, primarily because they would not understand them if they did read them, so it isn't worth their time, and also because, very often, heuristic bias makes people think that they will never have need of legal rights.")
[54] JEREMY BENTHAM, *Truth Versus Ashhurst, in* 5 THE WORKS OF JEREMY BENTHAM 233, 235 (John Bowring ed., Russell & Russell 1962).
[55] *Id*.
[56] *Id*.

waivers should be called "mirage law" – you thought that you were protected by the law, but discover, after becoming a victim, that the law is not there to protect you after all.

Standard form waivers selectively sweep out the remedies provided for violations of the law. Law without remedies, or with unreliable remedies, is almost the same as having no law at all.[57] Ordinary consumers and workers who confront standard form waivers are put in the position of having to fend for themselves.[58] Mirage law undermines real law.

If I have gone on too long in the statement of this critique, it is only to give a fair summary of the argument. If all of the propositions of the mirage law argument are correct, in meaning and implication, it sums up to a powerful critique of the standard form waiver, and the case law enforcing such provisions. However, not all of the propositions are correct.

The mirage law critique paints a distorted as well as dystopian picture of the law on waivers. First, as noted in the previous part of this paper, there are numerous common law doctrines that obstruct the enforcement of waivers, to the point where more than one lawyer has suggested that waivers are "not worth the paper they are written on."[59] The real mirage is the misperception, implicit in the rule of law critique, that waivers are generally enforced. None of the cases in which courts enforce waivers involves intentional torts.[60] Adhesion contract law authorizes courts to scrutinize the facts to ensure that the waiver itself, or its application, was not a surprise to the injured party.[61] Contract doctrine goes further and authorizes courts to ensure that the

[57] Radin, *supra* note 51, at 289 ("[T]he background rules of the institutions of private law, including contract, property, and tort, must be maintained and properly enforced by government, if these institutions are to be said properly to exist.")

[58] *Id*. at 297 ("But at least if we believe deterrence is necessary and efficacious, such degeneration of background rules into default rules allows firms to be irresponsible and leaves recipients on their own for avoiding harms that may threaten them in their everyday lives. It leaves to recipients sole responsibility for avoiding all harms that threaten them from careless activities of others."

[59] *Supra* note 4.

[60] Kuzmiak v. Brookchester, 111 A.2d 425, 427 (N.J. Super. Ct. App. Div. 1955) ("a promise not to sue for future damage caused by simple negligence may be valid; but an attempted exemption from liability for future intentional tort or willful act or gross negligence is generally declared to be void."); Winterstein v. Wilcom, 293 A.2d 821, 824 (Md. Ct. Spec. App. 1972) ("Generally, exculpatory agreements otherwise valid are not construed to cover the more extreme forms of negligence — wilful, wanton, reckless or gross. Nor do they encompass any conduct which constitutes an intentional tort.").

[61] Obstetrics and Gynecologists v. Pepper, 693 P. 2d 1259 (Nev. 1985); Broemmer v. Abortion Services of Phoenix, Ltd., 840 P.2d 1013, 1017 (Ariz. 1992) (holding arbitration clause outside of reasonable expectation due to inconspicuous placement of clause in contract and lack of explanation of clause); Wofford v. M.J. Edwards & Sons Funeral Home Inc., 490 S.W.3d 800, 824 (Tenn. Ct. App. 2015) (holding arbitration clause unenforceable due to unclear terms within, placing its enforcement outside reasonable expectations of ordinary person); Sears Roebuck and Co. v. Avery, 593 S.E.2d 424, 432 (N.C. Ct. App. 2004) (arbitration clause unenforceable because its addition to the contract by unilateral amendment was outside reasonable expectations of consumer); Wheeler v. St. Joseph Hosp., 133 Cal.Rptr. 775, 783 (Cal. Ct. App. 1976) (plaintiff did not assent to adhesive arbitration clause because it was outside reasonable expectations of average hospital admittee); Yauger v. Skiing Enterprises, Inc., 557 N.W.2d 60, 65 (Wis. 1996) (ski area's liability release invalid because it did not give reasonable signer notice of its nature or importance).

risks that materialized were not outside of the contemplation of an ordinary person participating in the activities the defendant facilitates.[62]

There is quite a lot of law regulating the standard form waiver. The law implies little room for the standard form waiver to surreptitiously strip victims of rights without the threat of scrutiny by a court. As long as this legal framework exists, the waiver has poor prospects of eroding the rule of law.

Even where courts find waivers enforceable, there is not necessarily an immediate implication that the defendant is guilty of the tort alleged by the plaintiff. In other words, some court decisions on waivers likely would reach a negative conclusion for the plaintiff even if the court took no position on the enforceability of the waiver. Decisions of this sort, in any empirically-based assessment (such as "waivers are eroding the rule of law"), would have to be swept out of the sample of decisions enforcing waivers. They would inevitably have their justification in the very same law that the plaintiff relies on to bring a complaint. The court's invocation of the waiver agreement, in such cases, is no more than a gloss designed to signal to potential litigants that the court views the facts of the case as favorable to the defendant.

This last point generates the question why businesses continue to include standard form waivers, even when courts are unlikely to enforce them.[63] One possibility, suggested in the literature, is "hoodwinking" plaintiffs.[64] But hoodwinking raises the possibility of punitive damages, or judicial sanctions, if the defendant keeps employing waiver clauses solely to fool plaintiffs.[65] An alternative explanation is that defendants are looking to create common law based on the concept of "no duty". Findings that the waiver provision is enforceable, to a specific set of facts, are equivalent to holdings that the defendant has no duty of care to the victim in similar factual settings.[66] Of course, the concept of duty is already present in tort law. A defendant's effort to take advantage of this concept to create some set of predictable circumstances in which tort immunity applies would be nothing new to the law.

The rule of law erosion complaint is admittedly troubling in its implications, but the law appears to hold an answer: waivers are heavily regulated by the law. In the end, empirical analysis of the

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[62] E.g., Russo v. The Range, 76 Ill.App.3d 236, 395 N.E.2d 10 (1979); Edwards v. Wilson, 364 S.E.2d 642, 644 (Ga. Ct. App. 1988) (broadly worded waiver releasing racetrack's liability from "all claims" did not reach car crash caused by negligence of racetrack marshal); Weiner v. Mt. Airy Lodge, Inc., 719 F.Supp. 342, 345 (M.D. Penn. 1989) (broad release did not reach negligence claims resulting from ski instructor's failure to fit bindings and choosing icy, steep slope for novice lessons); Ghionis v. Deer Valley Resort Co., 839 F.Supp. 789, 792-93 (D. Utah 1993) (ski resort's liability waiver too ambiguous to cover employee's negligent coupling of plaintiff's ski boots and bindings); Larsen v. Vic Tanny Int'l, 474 N.E.2d 729 (Ill. App. Ct. 1984) (gym's liability waiver did not bar negligence claims resulting from employee's negligent handling of cleaning supplies, creating hazardous vapors).

[63] Cheng, Guttel, & Procaccia, *supra* note 8.

[64] *Id*. *See also* Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1 (2017) (study of 70 Boston area residential leases demonstrating use of unenforceable terms in leases).

[65] Cheng, Guttel, Procaccia, at 48-55.

[66] *See, e.g.*, Benedek v. PLC Santa Monica, LLC, 129 Cal. Rptr. 2d 197, 201 (Cal. Ct. App. 2002) ("An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. A release may negate the duty element of a negligence action."(citations omitted)).

cases would be helpful to determine if the rule of law complaint has any degree of support in the court opinions.

B. Externalities

Similar to the "rule of law" complaint is the argument that the standard form waiver has the effect of diminishing, hiding, or eroding the law.[67] If plaintiffs are deterred from asserting their rights, because of the existence of the waiver, then fewer victims will sue, and the laws will fall into desuetude, and fail to develop with changing factual conditions and norms.

This argument is reminiscent of the more famous argument by Owen Fiss that settlement of litigation stunts the development of the law.[68] As more cases settle, according to Fiss, the law ceases to develop as it should.[69] Novel questions that should be examined publicly in court become the subject of backroom bargaining between plaintiff and defendant. Culture, technology, and tastes change but the law fails to keep up with or to drive those changes. For example, technology now permits many people to telecommute to their work, changing the nature of interactions during worktime. But the fact that many work meetings are no longer in person has not changed the prevalence of work-related sexual harassment.[70] A regime in which all cases settle fails to update the law to address harassment over telecommunication networks. Fiss's argument obviously extends to waiver and arbitration agreements. If, because of such agreements, victims are unwilling or unable to bring cases to court, the law will not update itself to incorporate implications of technological change.

This theory of the effect of waivers on legal development leaves out the effects of uncertainty on incentives to litigate. Uncertainty in the law drives litigation.[71] Settlement, by contrast, is likely

[67] Sabbeth & Vladeck, *supra* note 3, at 807 ("Privatizing the enforcement of statutory rights erodes those rights, as rights that are not enforced publicly vanish from the public's eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the laws' violations."); Glover, *supra* note 3, at 3057 (claiming that recent arbitration decisions in the Supreme Court "authorized private parties to use mandatory private arbitration clauses to construct procedural rules that have the foreseeable, indeed possibly intended, consequence of preventing certain claims from being asserted at all, rendering those claims mere nullities")

[68] Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

[69] *Id*. at 1087 ("My universe includes those cases in which there are significant distributional inequalities; those in which it is difficult to generate authoritative consent because organizations or social groups are parties … and those in which … there is a genuine social need for an authoritative interpretation of law.")

[70] *See, e.g.*, Margaret Taylor, Remote working has a huge sexual harassment problem, WIRED https://www.wired.co.uk/article/remote-working-harassment-zoom.

[71] OLIVER WENDELL HOLMES, THE COMMON LAW 111-29 (1881); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 21 J. LEGAL STUD. 187 (1993). Uncertainty drives litigation in the same sense as it drives betting over sports games. Parties bet over the outcome of games because they have different predictions on the outcome. In the same sense, uncertainty about the law, or its application, generates different predictions among litigants about the outcome of their dispute in court. Those different predictions compel the parties to pursue litigation rather than settle.

to occur when the law is relatively clear.[72] If changes in technology introduce questions about how existing law applies to new factual settings, one should observe a reduction in the rate of settlement, because of the resulting uncertainty.[73] Similarly, if waivers (somehow) successfully shield some questions from judicial scrutiny in particular settings, the build-up of uncertainty over time regarding those questions would eventually result in litigation. In other words, to the extent waiver and arbitration clauses shield some questions generated in legal disputes from scrutiny by the courts, they also contribute to uncertainty about those questions as conditions change. Thus, uncertainty has an equilibrating tendency on the development of the law; any effort to hide some set of legal issues from judicial scrutiny only enhances legal uncertainty surrounding those questions, which, in turn, generates pressure to litigate, until the legal uncertainties are resolved.[74]

C. Democratic Control of Lawmaking Power, Delegation of Lawmaking Power

Another category of criticisms of standard-form waiver contracts, attributable to David Slawson for the most part, is that they derogate from democratic control of the power to make laws.[75] Starting with the view that democratic majorities control the development of law, whether through the legislatures or through the courts, these arguments hold that standard form waiver (and arbitration) agreements are vessels through which private parties can construct rules inconsistent with the will of the democratic majority. In a similar vein, Horton argues that mass-market arbitration contracts effectively delegate lawmaking power to the issuers of the standard forms.[76]

The first question raised by the Slawson-Horton thesis is why its proponents limit it to standard form contracts. All contracts create private common law between contracting parties.[77] Indeed,

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[72] *See, e.g.*, Priest & Klein, *supra* note 10.
[73] *See, e.g.*, Hylton, *supra* note 6, at 243-247 (critiquing Fiss's argument).
[74] A second sense, not stressed in the literature, in which waivers could stunt legal development is observed in litigated cases. When there is a waiver clause in a tort dispute, the question of waiver clause interpretation dominates other legal questions – because the question of duty precedes that of breach. The court should, from a legal development perspective, address the application of the negligence test, but the court never gets the chance to do so because the entire opinion focuses on interpretation of the waiver clause. In this argument, the process by which waivers might stunt the development of the law is not clear. The question of negligence and the enforceability of a waiver provision are distinct questions in a dispute involving a waiver. There is nothing to prevent a court from addressing both questions. Given this, it is difficult to see precisely how a defendant who had issued a standard form waiver can use that provision to hide from judicial scrutiny the practices that gave rise to the plaintiff's injury.
[75] W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).
[76] David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011). Of course, the standard form contract issuers do not directly create substantive law. What the issuers create, according to the argument, is a private procedural system that has the power to control both procedural and substantive rights. *Id*. at 441-42.
[77] This is one of the major lessons of relational contract theory. *See* Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974); *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 340 (1978).

all long-term (or non-short term, spot market) relationships involve governance rules that, in effect, detract from the authority of the legislature.[78] Yet no one would argue that such contracts should be disfavored by the law. One could imagine, for example, a corporate campus, where the firm dictates that all automobiles drive on the left side of the road. Would such a campus-specific driving rule detract from the power of the legislature? Unless the corporate campus were somehow put beyond the reach of the legislature, it would seem that the legislature could override the campus-specific rule at any time. The same goes for standard form contracts. The legislature and the courts have allowed them to exist, including their waiver and arbitration clauses.

Indeed, there is the contradiction in the derogation-delegation thesis that all of these standard forms exist openly within the law.[79] The legislatures and the courts have permitted and regulated the standard form. They have the power to recall the delegation, or reverse the derogation, of power. That this derogation or delegation seems to exist is evidence that it is not a serious derogation of power.

As for the delegation part of the argument, one can draw loose analogies to the cases in which the Supreme Court invalidates, as an unconstitutional delegation of legislative power, some scheme involving private parties who, in effect, are given the power to issue legal rules, but these analogies are imperfect.[80] There is nothing coming out of the standard form contract that receives governmental approval to become operable law.

The second question raised by the derogation-delegation thesis is why democratic majority control should be a desideratum in the contract setting. If democratic majority control is generally preferable, then it should extend to the design of products and services as well as to the contracts. However, any business is likely to know more than the legislature about how best to design its products and services. To the extent the standard form is a default feature of the product or service itself, this is also something that should, in the first instance, be left to the judgment of the supplier. What would prevent the supplier from offering the most unfair contract terms imaginable? The freedom of the consumer to walk away from the deal, and competition from other firms offering the same product or reasonably close substitutes.[81] Such

[78] Take, for example, informal and formal dispute resolution mechanisms adopted by contracting parties in relational contracts. Arguably, such mechanisms detract from the state's dispute resolution framework. On dispute resolution in relational contracting, see Macneil, *Relational Contract Law*, *supra* note 77, at 876-880.

[79] Of course, to say that some arrangement or institution exists openly within the law is not to condone it. Slavery and other morally objectionable regimes have existed openly within the law, yet that status provides no reason by itself to defend the institution. *See* Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1217-19 (2004) (rejecting anti-retroactivity argument against slavery reparations).

[80] In A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-23 (1935), the Court held unconstitutional, as a delegation of power, an arrangement under the National Industrial Recovery Act that enabled trade groups to propose codes of unfair competition, for their industries, to become operable law upon approval by the President. The reason this analogy is imperfect is that there is nothing coming out of the standard form contract that receives presidential or legislative approval.

[81] On competition and consumer choice as defenses for seemingly one-sided arbitration clauses, see Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006).

competition implies that if a firm offers truly unfair terms, a rival could offer a relatively close substitute, with better contract terms, and take a substantial share of customers away. If no firm offers a "fairer" provision – for example, no firm offers a standard form contract that does not have a waiver or arbitration provision – then this is a sign that no firm could compete successfully by varying its contract along this dimension.

D. Dignity

Yet another critique of the standard form waiver, due to Encarnacion,[82] is that it is inconsistent with the dignity of the consumer. This is a novel and different argument from the others, yet it raises several difficulties making it somewhat distasteful as an argument for banning the standard form waiver. The argument runs roughly as follows. Dignity is a high-ranking status accorded to each member of the political community.[83] The government respects this high-ranking status by according each member the right to enter court and have his grievances addressed.[84] Standard form waiver contracts undermine this inherent dignity by forcing the complainant out of public view, with no public agency available for redress of his grievances against the contract issuer.[85]

The notion of a high-ranking status conferred on all citizens is a starting point that is difficult to accept. High-ranking, by definition, means ranking above other citizens. In other words, an individual cannot be high ranking unless there are other individuals who are low ranking – or at least not so highly ranked. The concept of ranking individuals in society has a rather bad smell to it, given what some societies that have bought into the concept of inherent social rank (for example, South Africa under apartheid) have accomplished with the idea. This is a sufficient reason, in my view, to reject the dignity argument. However, let us suppose for the sake of argument that a society can consist of all highly ranked individuals.

Respecting the dignity of an individual would seem to require, at a minimum, some respect for the person's autonomy as well.[86] The standard form contracts that exist in the market do,

[82] Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L. J. 1305 (2019).
[83] *Id*. at 1308. Although there is nothing immediately objectionable about this claim, it is a view of dignity that is quite different from the more familiar Kantian conception of dignity as an inherent quality of rational humans. *See, e.g.*, Dieter Schönecker & Elke Elisabath Schmidt , *Kant's Ground-Thesis. On Dignity and Value in the Groundwork*, 52 J. VALUE INQUIRY 81, 82 (2018) ("Kant claims that human beings as autonomous beings are ends in themselves that possess dignity and value.").
[84] Encarnacion, *supra* note 82, at 1333.
[85] *Id*. at 1134.
[86] MARK WHITE, KANTIAN ETHICS AND ECONOMICS: AUTONOMY, DIGNITY, AND CHARACTER 21 ("According to Kant, rational beings are imbued, as an implication of their autonomy, with *dignity* … Kant famously contrasted things and persons, the former having a price and the latter possessing a dignity above price…"). Thomas E. Hill, Jr, *Kantian perspectives on the rational basis of human dignity*, 215-221, at 215, Chapter 22, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY, edited by Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth, Published online by Cambridge University Press: 05 March 2015 ("This moral law requires respect for human dignity because all human persons, good or bad, must, from the standpoint of practice, be presumed to have the capacities and predispositions of rational autonomy. In treating humanity as an end in itself and following the moral principles of an ideal moral commonwealth, we will be giving appropriate recognition to the autonomy of each

whatever one thinks of their fairness, reflect an element of consumer choice. After all, no one holds a gun to the head of the consumer to make him go to the Killington Ski Resort, discussed in the *Dalury* waiver opinion. The ski consumer has many choices in addition to Killington, should the standard form waiver there appear to be too onerous.[87]

The law on adhesion contracts already permits the consumer to escape the confines of the contract when there is good evidence that he was unaware of the waiver provision.[88] Should we then go further, under the dignity principle, and hold that the consumer should be absolutely unencumbered by any waiver provision that he signs on the ground that such a provision would insult the consumer's dignity? To do so would imply an insult to the consumer's autonomy, specifically his freedom to make decisions, if suitably informed, about his own welfare.

One can argue about how much consumer choice or consumer sovereignty plays a role in the standard form contract setting. However, the argument that consumer choice plays no role whatsoever is a more difficult brief to carry. If the dignity thesis, setting aside its fundamentally unsound base in the ranking of individuals, relies on a view that consumers do not exercise choice in the market, then it has to be regarded as doubtful.

4. Why Do People Sign Waivers? Ideal Conditions Analysis

In this part, I consider the incentives to enter into waiver agreements. I will start by examining a best-case scenario where both sides of the contract understand exactly the costs and benefits of the standard form waiver. Under this assumption of perfect information, it is easier to see what factors lie behind waiver agreements. I will show that under certain conditions, waiver agreements can enhance the joint wealth (or welfare) of the contracting parties,[89] and under other conditions, waivers can only reduce their wealth.

Return to the ski resort waiver, exemplified by *Dalury*. Why would a skier sign a waiver, and why would a ski resort present a waiver to a patron? Suppose the ski resort has a choice whether

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person and shaping our lives by general policies that we can rationally regard as permissible for anyone to follow."); Schönecker & Schmidt, *supra* note 83, at 85 ("Thus, when it comes to be an end in itself, the relevant rationality is moral rationality and thus autonomy. These terms, in turn, are related to the term 'dignity', because autonomous beings are ends in themselves; and since ends in themselves have dignity, autonomous beings have dignity.")

[87] How many ski resorts exist in the USA? Roughly 470, see Statista, Number of ski resorts operating in the U.S. from 1990/91 to 2019/20, https://www.statista.com/statistics/206534/number-of-ski-resorts-operating-in-the-us-since-1990/. Not all of them require the standard form waiver, see, e.g., Chauvlier v. Booth Creek Ski Holdings, 35 P.3d 383 (Wash. Ct. App. 2001) (plaintiff had choice between day pass without waiver and a season pass including waiver).

[88] Obstetrics and Gynecologists v. Pepper, 693 P. 2d 1259 (Nev. 1985) (parenthetical here) (cases)

[89] I am treating wealth and welfare as synonymous in this analysis. By wealth (or welfare) I mean the sum of "consumer surplus" and "seller surplus." Consumer surplus is the difference between the actual transaction price and the consumer's maximum willingness to pay. Seller surplus is the difference between the actual transaction price and the minimum demanded by the seller to sell. These concepts are familiar in antitrust law. *See, e.g.* RICHARD A. POSNER, ANTITRUST LAW 19-20 (2d ed. 2001); KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 3-4 (2003).

to adopt additional precautions to reduce the risk of injury to skiers or to offer the skiers an option to waive tort liability in exchange for a reduction in the price of a season pass. An example of additional precautions is provided by the facts of *Dalury*: the resort could redesign the ski lift maze poles in order to reduce injuries resulting from collisions with metal poles.

The additional precautions will cost the resort $600 per skier in a season, which is the private information of the ski resort. If the ski resort takes no additional steps to enhance safety, the likelihood of an injury during the season to the typical skier is 20%. If the resort adopts the additional precautions,[90] the likelihood of an injury is 10%.[91] The expected harm from an injury is $10,000.[92]

If an injured skier sues the resort, his litigation expense is $3,000. The resort suffers the same litigation cost. Obviously, if a skier is injured, he will have an incentive to sue since the damage award he will seek ($10,000) is well in excess of the cost of litigation ($3,000). To simplify, I will assume liability is strict,[93] so that the skier definitely wins his award of $10,000 if he sues.

Given that the skier will sue, the ski resort will compare its overall costs when it adopts the precautions to its overall costs under the assumption it does not adopt the precautions. If the resort does not adopt the precautions, it faces expected liability costs of[94]

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[90] I will sometimes use the expression "take care" as if synonymous with additional precautions.

[91] The per-season probability of an injury to a skier in the U.S. is difficult to determine from industry statistics. The National Ski Areas Association (NSAA) estimates that in the 2015/2016 season, 8.4 million people participated in either skiing or snowboarding, see, e.g., Snow Brains, Catastrophic Ski/Snowboard Related Injuries Per Year at U.S. Ski Resorts, https://snowbrains.com/catastrophic-skisnowboard-related-injuries-per-year-u-s-ski-resorts/. A study by Johns Hopkins researchers estimates that roughly 600,000 people are injured each year from skiing or snowboarding, see Adil H. Haider, Taimur Saleem, Jaroslaw W Bilaniuk, Robert D Barraco, *An Evidence-Based Review: Efficacy of Safety Helmets in the Reduction of Head Injuries in Recreational Skiers and Snowboarders*, 73 J TRAUMA ACUTE CARE SURG. 1340, 1341 (2012) ("Approximately 600,000 ski- and snowboarding-related injuries occur in North America each year, with head injuries accounting for up to 20% of all injuries."). Using these numbers, the probability in a season that a typical skier will suffer an injury is roughly 7 percent. Since 20% of all injuries consist of head injuries, the probability in a season that a skier will suffer a head injury is 1.4 percent.

[92] The Haider et al. study, *supra* note 91, at 1341, reports that "A study from Canada evaluated the per-patient cost of snow sport related injuries in children from 1991 to 1997 and reported it in terms of 'hospital treatment, outpatient services and lost parental income' at $27,936, $15,243 and $1,500 respectively. Another study from the U.S. in children in 1996 reported the average cost of in-patient treatment of skiing injuries at $22,000 per patient." The average cost in Canada for snow sport related injuries to children (1991 to 1997) sums to $44,679. By not including costs borne by the parents in personal spending on medical devices (e.g., crutches), these estimates likely understate the costs of injuries to children from snow sport related injuries. These estimates obviously suggest that the $10,000 injury loss assumption in my numerical illustration is lower than the average experience.

[93] If I were to assume, instead, that liability is based on negligence, the injured skier would win his liability suit only in the case where the ski resort failed to adopt the additional precautions. The reason is that the negligence rule results in liability to the ski resort only when the incremental loss avoided by care is greater than the cost of the additional care *and* the resort fails to adopt the precautions. In this model, the incremental loss avoided by care is (.20 - .10)($10,000) = $1,000, which is greater than the cost of the additional care, $600. Thus, *the resort would be held negligent if it failed to adopt the precautions* and would be free of liability if it adopted the precautions. Although the analysis becomes more complicated under negligence, the lessons of this model are the same under negligence as under the simpler strict liability assumption in the main text. I will demonstrate this point in the margins below.

[94] The *expected* liability cost, when the resort does not adopt the precautions, is the product of the probability of the accident, assuming no additional precautions, and the amount of the liability. The probability of the accident,

$$.20 \times \$10{,}000 = \$2{,}000$$

plus the expected litigation expenses[95]

$$.20 \times 3{,}000 = \$600,$$

for a total expected liability of $2,600 per skier, per season. If the resort adopts the precautions, it faces the overall costs of $600 for the precautions, plus

$$.10 \times \$10{,}000 = \$1{,}000$$

in expected liability, and expected litigation expenses of

$$.10 \times 3{,}000 = \$300$$

Thus, the resort's total expected cost (liability plus precautionary) if it adopts the precautions sums to $1,900 per skier, per season. Given that the total cost given the precautions, $1,900, is less than the total cost without the precautions, $2,600, the resort will, in the absence of immunity or protection from liability, adopt the precautions.[96]

A. Emergence of the Standard Form Waiver

Now let the resort offer the skier a waiver contract. The waiver would reduce the expected liability of the firm (resort) to zero. Under the waiver agreement, the firm's overall cost when it adopts the precautions is $600, and its overall costs when it does not adopt the precautions is $0. The firm therefore forgoes the precautions under the waiver agreement.

What is the value of the waiver to the resort? Since the resort will adopt the precautions under the threat of liability, the value of the waiver consists of two parts. First, the waiver eliminates the expected liability, $1,000, and the expected litigation cost, $300, for the resort. Second, because the waiver eliminates liability, the resort will no longer adopt the precautions, $600. Thus, the value or *offer price* of the waiver, representing the *maximum amount the resort is willing to pay for immunity from tort lawsuits* by skiers, is $1,900.[97]

assuming no additional precautions, is 20 percent. The amount of the liability is $10,000. Thus, the *expected* liability is (.20)($10,000) = $2,000.

[95] The *expected* litigation expense is the product of the probability that the skier will incur the expense and the amount of the expense. If the resort does not adopt the precautions, the probability of an accident is 20%. The actual litigation expense is $3,000. Thus, the *expected* litigation expense, when the resort does not adopt the additional precautions, is (.20)($3,000) = $600.

[96] If I change the model to assume negligence instead of strict liability, the result is the same: the ski resort prefers to adopt the additional precautions (total cost $900) rather than forgo the additional precautions (total cost $2,600).

[97] If I assume negligence is the underlying liability rule, the offer price is only $900, because the $1,000 in expected liability goes away. The $1,000 expected liability is not a cost to the resort, under negligence, because the resort is not liable for the skier's injury when it has adopted the additional precautions.

How much will the skier demand to sign a waiver? Since the resort will not adopt the precautions, after acquiring immunity from liability as a consequence of the waiver agreement, the expected loss borne by the skier under the waiver agreement is (.20)($10,000) = $2,000.

Now consider the skier's expected costs in the absence of the waiver. Because liability is strict, the skier would be fully compensated for any injury at the resort, so he suffers an expected injury loss of $0.[98] In spite of this, the skier would still bear the expected cost of seeking compensation, (.10)($3,000) = $300.

The *asking price* for the waiver is the loss in wealth suffered by the skier in moving from an arrangement where he receives compensation for his injury to one where he does not:[99]

$2,000 - $300 = $1,700.

Notice that the asking price of the skier for a waiver, $1,700, is less than the maximum offer price that the resort is willing to pay for the waiver, $1,900.[100] Thus, a waiver agreement can be reached for a sum, paid by the resort to the skier, anywhere from $1,700 to $1900. In other words, there is a $200 surplus available from including a waiver clause in the season pass contract.

Suppose, in the absence of a waiver, the resort would charge a price of $2,700 for a season pass. If the resort offers the waiver and discounts the season pass price to $900, it will have effectively split the surplus from the waiver deal in half with the skier. The skier receives a benefit of $1800 for the waiver, when he was willing to accept a waiver for only $1,700. The resort pays the skier $1,800 for the waiver when it was willing to pay as much as $1,900.

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[98] To simplify this discussion, I have not addressed the question of care on the part of the skier, implicitly assuming that he takes reasonable care. However, strict liability (assumed here to simplify) fails to provide the skier (victim) incentives to take reasonable care. *See, e.g.*, John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973). Given this, one benefit of the waiver is that it provides the skier an incentive to take care. The same point holds under negligence if there are substantial risks of errors in court favoring the skier (victim).

[99] Here is a more laborious derivation of the asking price. The asking price is equal to the difference in the expected cost borne by the skier under the waiver, which is $2,000, and the expected cost borne by the skier when he retains the litigation option. The expected cost when the skier retains the litigation option is equal to: *expected loss – expected compensation + expected litigation cost* = $1,000 – $1,000 + $300 = $300. Thus, the asking price for the waiver is $2,000 – $300.

[100] Continuing the comparison with the negligence rule, the asking price of the skier under negligence is $2,000 - $1,300 = $700. The reason for the $1,300 cost in the absence of the waiver is that the skier litigates and loses under this scenario, given the negligence rule. The offer price under negligence is $900. The $200 bargaining surplus is the same as under strict liability. This demonstrates the assertion made above, *supra* note 85, that the model is not sensitive to the assumption that liability is strict.

However, there is a change in the model, under the negligence assumption, that would alter the outcome. If I assume that the skier *knows* whether or not the ski resort was negligent, then the skier would not sue when the ski resort took the additional precautions (unless there is a chance of error in the courts). In this case, there are no litigation costs borne by the parties when the ski resort adopts the additional precautions. As a consequence, the bargaining surplus for the waiver agreement disappears.

I consider this assumption of "perfect knowledge on court outcomes" ruled out by the prior assumption that the cost of precaution is the private information of the ski resort. The "perfect knowledge on court outcomes" assumption generates the implausible result that no resort (seller) would fail to adopt the precautions and no skier (consumer) would ever sue.

One might ask why the resort would choose to split the waiver contract surplus with the skier, rather than take all of the surplus to itself. Profit maximization would lead the firm to share as little of the surplus as possible with the consumer, resulting in a price deduction of $1,701, and corresponding season pass price of $999. However, competition is the countervailing force to profit maximization. Competition from similar firms would tend to compel the resort to share the entire contract surplus, resulting in a price deduction approaching $1,900 and corresponding season pass price of $800. Competition would lock in the standard form waiver as the contract that generates the most surplus to consumers. However, I do not need the assumption of vigorous competition to sustain the argument that the standard form waiver would emerge as the only contract type. It is sufficient from a contractual perspective that both skier and resort gain mutually from the waiver. Even if the ski market were monopolized, with the resort being the only provider, the parties would adopt the standard form waiver.[101] The only difference between competition and monopoly is in the splitting of the contract surplus.

In this hypothetical, I have assumed that the ski resort offers a menu of prices to the skier, with a season pass price of $2,700 without the waiver of liability, and a price of $900 with the waiver of liability.[102] The consumer is better off in this example under the waiver contract. Based on the valuations of consumers, the season pass coupled with the waiver offers higher utility (or utility net of risk) to consumers than does the season pass without the waiver. Note that these are consumers who are perfectly informed, able to accurately assess the costs and benefits of the different options before them. Under this perfect information scenario, consumers choose to waive tort liability in exchange for the implicit compensation – provided that compensation at least meets the consumer's demand price – offered along with the waiver provision.

If the resort is aware of the preferences of consumers, it will perhaps not go through the trouble of offering a menu. Or, the resort may offer a menu for the first time, and then never offer it again after seeing the choices of consumers. The waiver contract emerges as the standard form.

B. Stability of Standard Form with Heterogeneity

[101] This is consistent with the empirical evidence from Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008) (finding that market structure has no effect on the apparent one-sidedness of standard form contracts in the software sector). Under the model presented here, market structure does not matter because the contract increases the joint wealth of the parties.

[102] An alternative contract not considered here is one in which the consumer accepts a waiver and the firm agrees to take care, subject to the proviso that the waiver is no longer effective once it discontinues taking care. This type of contract is a *conditional waiver* – that is, a waiver conditional on exercising precaution. The one difficulty with this alternative contract is that it requires the consumer/potential plaintiff to determine whether the firm is taking care or not. One could also argue that this type of agreement tries to partially replicate the negligence rule, and would be unnecessary given the negligence standard. In any event, if the parties could be relatively certain of the potential plaintiff's ability to determine whether care is being exercised, this type of contract opens up the possibility for the parties to waive liability. A conditional waiver would be exchanged in this example because the consumer's minimum asking price, (.10)($10,000 – $3,000) = $700, is definitely less than the firm's maximum offer price, (.10)($10,000 + $3,000) = $1,300. Thus, the reduction in the price of the season pass would range from $700 to $1,300 under the conditional waiver proposal.

It is not surprising that the standard form waiver would emerge as the only contract type, in the preceding example, given the assumptions on the preferences of consumers, and the assumption that the consumers are the same. Introducing heterogeneity, however, does not necessarily weaken the prospects for the standard form waiver. Suppose a minority of consumers would prefer the more expensive contract without the waiver provision – that is, they prefer enhanced safety and insurance, through tort liability, against loss. There are reasons those consumers' preferences may not be reflected in the market outcomes.

First, if precaution is a public good, in the sense that once provided to one it has been provided to all, then consumers may have an incentive not to reveal their interest in the arrangement with greater precautions and without the waiver provision.[103] Complaining about safety takes time, and may require a little research, and the typical consumer might prefer to let someone else do it. In addition, if the consumers who wish to express their preference for greater safety and firm liability believe they are likely to be the ones who are charged most of the cost of providing the additional precautions and insurance, while all consumers enjoy the benefits of greater safety, then those consumers who desire additional safety and insurance may choose to remain silent about their preferences.[104] Given this tendency toward silence, the firm never observes the full degree of consumer interest in safety. As a result, the standard form remains the only option.

Second, suppose a rival firm enters that offers the greater set of precautions without the waiver. The consumers with a preference for greater safety shift to the rival. However, if the preference for safety is the private information of the consumer, a process of *adverse selection* may develop.[105] If, as seems plausible, the consumers with the greater demand for safety and insurance include the more risk-prone consumers,[106] the more precautionary firms may find that

[103] This analysis of safety as a public goods problem is entirely analogous to the safety problem in the workplace. On the public goods problem and the provision of safety in the workplace, see Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, 51 PUB. INTEREST 69, 71 (1979); Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 478 (1993).

[104] Freeman and Medoff, *supra* note 103, at 69, 71-72. Freeman and Medoff rely on the theory of the Prisoner's Dilemma game to explain the reluctance to speak up in favor of additional safety and other public goods in the workplace. The same incentives exist in the market for consumer contracts: no consumer has an incentive to speak up in favor of public goods in consumption. Safety at a ski resort is an example of a public good in consumption.

[105] Adverse selection occurs, in the insurance market, when the risk characteristics of potential insurance customers vary in a manner that is unobservable to the insurer. Low-risk customers reject the insurance contract offer and high-risk customers accept, leading to financial losses for the insurer. *See, e.g.*, KARL H. BORCH, ECONOMICS OF INSURANCE 317 (Knut K. Aase & Agnar Sandmo eds., 1990). In the context of the standard waiver contract described here, the preference for safety is private information of the consumer. The consumers with the most intense demand for safety may reject the standard form waiver and "peel off" to go the more precautionary firm that does not impose the standard form waiver.

[106] Note that I am not equating the risk prone with the risk seeking. An individual may be quite averse to risk and still be risk prone. For example, a family may consist of risk averse parents and risk prone children. I posit that the set of consumers with a greater demand for safety and insurance (through tort liability) are likely to include the more risk prone. Knowing that their accident risk is higher than average, the risk prone will tend to seek contracts that incorporate liability offered by more precautionary firms. For the ski industry, the incidence of significant injuries is highest for males, children, and teens younger than 17 years. *See* Haider et al., *supra* note 56, at 1340. It follows that a family with male teens would be more risk prone on the ski trails than the average family.

their injury liability experience exceeds their expectations every season, forcing them to raise their prices every season.[107] Eventually, these precautionary firms lose too much market share to be viable, to cover their fixed costs. The precautionary firms exit the market, leaving as the only choice the firms offering the lower level of safety along with the standard form waiver.

This discussion suggests that it is not entirely correct to say that consumers are free to retain their tort rights without the standard form, and not free under the standard form. The standard form emerges precisely from a process of consumer choice. However, once it has emerged, consumers may not be free to choose a different contract type until there is a dramatic shift in consumer preferences opening the economic survivability of alternative contracting options.[108]

C. Some Policy Implications

Given that the standard form waiver arises out of consumer choice in the illustration here, a decision by a court not to enforce the waiver arguably reverses the choice of consumers. However, perhaps the best way to analyze the enforcement question is to ask what the immediate result of a decision not to enforce would be. To have an immediate impact, a decision not to enforce would have to be a surprise to the firm, because if the firm believes that the waiver is not enforceable, the firm will not alter its actions in reliance on the waiver.[109] Since court

[107] Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 667–68 (1985). (adverse selection is relatively diminished in the car insurance industry because of the customizable nature of insurance coverage, but the process likely occurs in the mandatory insurance tied to car sales under a strict products liability regime); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1564 (1987) ("Those consumers who use products in typically less, rather than more, risky ways are likely to drop out of the consumer pool if tort law requires the manufacturer to insure all consumer uses."); Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2484 (2013) ("When the producer adds an insurance premium to the price, that premium will be based on an estimate of the average expected claim. Since the average among low-risk customers is lower than the population average of the product's consumers, the low-risk consumers will find the insurance premium excessive, and may prefer a relatively safe alternative product, or perhaps to do without the product …"). Note that the adverse selection process appears to differ in the goods markets under products liability and in the market for consumer contracts described in the text. In the case of products liability, relatively safe consumers are likely to go without the product or to find a safer alternative. In the market for consumer contracts as modeled, relatively risk prone consumers leave the standard form issuer. However, the difference is largely superficial. In both models, the risk prone are following the insurance contract.

[108] Put another way, if there are enough consumers with heterogeneous preferences (e.g., demand for additional precautions or insurance through liability), the market may support different types of standard form contracts. Empirical evidence of such differentiation is provided in Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677 (2007) (finding that younger and larger firms tend to offer more seller-favoring terms on limitations of liability, and older and smaller firms offer more buyer-favoring terms on liability limitations).

[109] Return to the model, and suppose Q is the probability that the waiver is unenforceable. If the firm adopts the precautions, given Q, its total liability related cost will be \$600 + Q(\$1,000 + \$300). If the firm does not adopt the precautions, given Q, its total liability related cost will be Q(\$2,000 +\$600). Clearly, if the waiver is unenforceable – that is, $Q = 1$ – then the firm will choose to adopt the precautions, and continue to do so while the waiver is in effect. The waiver, being unenforceable, has no effect on the resort's incentives to take care.

enforcement of any contract provision is never a certainty, the firm's actions will depend to a large degree on the probability of enforcement.

If the probability of enforcement is low, say nearly zero, a decision by a court not to enforce the standard form waiver would have no impact on the firm's actions. In such a scenario, the firm would have taken no actions in reliance on the waiver. It would not have forgone any cost-efficient precautions, nor would it have offered a discount in price to the consumer.[110] A decision by a court not to enforce would merely validate a rational expectations equilibrium in which firms include waivers in their contracts, take no actions in reliance on the waivers, and consumers and courts routinely ignore the waiver language in the process of litigation.

If the probability of waiver enforcement is high, as implicitly assumed in the analysis so far, a decision by a court not to enforce the standard form waiver would cause the firm to change its actions, provided that the court's decision is understood by the firm as a sufficient signal that the enforcement likelihood would be much lower from that point on.[111] Specifically, the firm would invest additional resources in precaution and substantially reduce or eliminate the discount provided to consumers in exchange for the waiver. That would be an undesirable result, given the preferences of consumers.

Should it matter to the enforcement question whether the consumer has actually read the waiver provision? Under the assumptions of this illustration, it should not. The standard form waiver provides the consumer with the greatest utility net of risk. This is valid whether or not the consumer reads the contract.[112] The "reading question" is analogous to the question, in products liability law, whether a consumer should be able to hold a product manufacturer strictly liable for a design feature that is unobservable. Over time, products liability law has answered that

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[110] Again, return to the model, as described *supra* note 109. Given the probability of unenforceability Q, the resort will continue with precautions if $\$600 + Q(\$1{,}000 + \$300) < Q(\$2{,}000 + \$600)$, or $Q > 6/13$. Thus, if the probability that the waiver is unenforceable is above a critical threshold of 6/13, the firm will continue with precautions in spite of the waiver.

[111] Return to the same model as in the previous footnote. If the probability that the waiver is unenforceable is less than the critical threshold of 6/13, then the firm will not adopt the precautions after issuing the waiver. If a court then finds the waiver unenforceable, the firm will update its estimate of the probability that the waiver is unenforceable. If the updated value goes above the critical threshold of 6/13, the firm will adopt the precautions and cancel the discount.

[112] The process by which contract terms evolve, in this model, is through profit-maximization and competition. Profit-maximization induces the firm to introduce "surplus increasing" contract terms, and competition induces the firm to share most or all of the new surplus with the consumer. Reading is irrelevant to this process. As for empirical evidence on reading, see Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1 (2014) ("We track the Internet browsing behavior of 48,154 monthly visitors to the Web sites of 90 online software companies to study the extent to which potential buyers access the end-user license agreement. We find that only one or two of every 1,000 retail software shoppers access the license agreement and that most of those who do access it read no more than a small portion."). Apparently so few consumers read standard form contracts that it is unlikely that an informed minority of consumers effectively polices the terms for the general consumer. On the theory, contradicted by the Bakos, Marotta-Wurgler, and Trossen study, that a minority of reading consumers can ensure that contract terms remain optimal for the remainder of consumers, see Alan Schwartz and Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979); Steven Salop and Joseph Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493 (1977).

question by moving from strict products liability based on the consumer expectation test to a negligence-like analysis under the risk-utility test.[113] In the same sense, the analysis of this part suggests that the standard form waiver should be judged on risk-utility grounds – specifically, whether the consumer is better off in terms of net utility (utility net of risk) under the waiver contract.

Should it matter to the enforcement question that the consumer has not had an opportunity to negotiate over the terms of the standard form waiver? Under the assumptions of this analysis, again, the answer is no. The waiver is the preferred option. If the underlying assumptions are changed to allow for heterogeneity among consumers, then there may be a set of "hold-out" consumers who reject the waiver under the terms of the contract. One possible solution to the hold-out consumers is to simply charge them for the additional cost they impose on the firm. Based on the initial analysis of the population, that additional cost is just the sum of the expected liability and litigation costs for each hold-out: (.20)($10,000 + $3,000) = $2,600. Adding this to the discounted season pass price of $900 results in a new price, just for the hold-out consumer, of $900 + $2,600 = $3,500. But this analysis is surely incorrect. The reason these consumers are hold-outs is that their preferences – or, more precisely, their expected injury losses – differ from the main population.[114] Since they are hold-outs because their expected losses are larger, any estimate of their additional costs to the firm based on a survey of the entire consumer population would understate their costs. The resort might find itself in the position of not knowing what price to charge the hold-outs.[115] In addition, any particular price might induce a process of adverse selection among the hold-outs, resulting in economic losses.

Summing up, this analysis points to a straightforward defense of the standard form waiver. *If* the waiver is mutually advantageous for both consumer and firm, as shown here, it will be adopted, whether the firm is in a competitive environment or a monopoly. Competition will tend to give to consumers the entire welfare gain from the contract, and in so doing permit the firms that offer waivers to gain market share relative to competitors subject to the same cost conditions. It follows that under the assumptions of this illustration, the waiver should be enforced.

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[113] *See* Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk Utility*, 74 BROOK. L. REV. 1061, 1062 (2009); James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 887 (1998); Hylton, *supra* note 107, at 2469-70.

[114] The expected losses of the hold-out consumers (as is true of all consumers) determine the price at which they are willing to sell their right to sue through a waiver. The expected loss is the product of the probability of loss and the amount of the loss. Thus, the hold-out consumers could have higher loss probabilities (i.e., they are accident prone), or higher losses in a given accident (i.e., they are especially fragile compared to the average skier).

[115] If the resort knew the percentage of the hold-outs in the population, and the expected losses of the non-hold-outs, it could infer the expected losses of the hold-outs. But suppose the resort knows neither the percentage of the hold-outs nor the losses specific to either group. Then the resort is in the position of having to guess the expected losses of the hold-outs. To see adverse selection in action, suppose the non-hold-outs have an expected or average injury loss of $1,500. The ski resort assumes the hold-outs make up half of the skiers with an average loss of $2,500. Under this assumption, the average injury loss is $2,000, as originally assumed. But suppose instead that the hold-outs actually make up a third of skiers with an average loss of $3,000. If the ski resort charges the hold-outs an additional $2,600, then the one-third of hold-outs will accept, and the resort will lose money on the hold-outs, forcing it to charge more to the hold-outs the next season.

5. Reasons to Question the Ideal Conditions Analysis

The foregoing section provides a best-case scenario defense of the standard form waiver. That scenario depends on empirical assumptions that may not be satisfied in all cases. In this part, I discuss the limitations of the preceding analysis and reasons it may be invalid in its implications.

A. Role of Litigation Costs and Productivity of Care

While it is not in my view a drawback of the analysis, it is important to highlight the assumptions about the productivity of care and the magnitude of litigation costs in the numerical illustration of the previous part. That analysis explains the merits of the standard form waiver, under special conditions. To the extent that its implications are consistent with observations on the prevalence of waivers, the analysis may be validated.

The finding in Part 4 that the waiver enhances welfare for both the firm and the consumer depends on a few important features of the illustration. First, one assumption has to do with the "productivity" of precaution – that is, how much "work" precaution does in avoiding accidents. In the illustration of Part 4, precaution reduces the expected accident losses from (0.2)($10,000) to (0.1)($10,000), a difference of $1,000. The cost of the precaution necessary to get this reduction is $600. So, while care is productive, it is only moderately so. In addition to this, care is induced through the threat of litigation, which itself costs in expectation (0.1)($3,000 + $3,000) = $600. So the "deterrence benefit" from litigation is $1,000 – $600 = $400, while the cost of getting this benefit is $600. The waiver potentially enhances the welfare of both firm (ski resort) and consumer (skier) precisely because the deterrence benefit from litigation is less than the cost of litigation.[116]

In general care is more productive as each dollar devoted to care results in a greater reduction in expected accident losses – that is, the "bang for the buck" devoted to care increases. If care is highly productive and litigation costs relatively small, retaining the litigation option is likely to enhance the joint welfare of the contracting parties. Conversely, if care is not productive, or only weakly so, and litigation costs are relatively large, litigation is likely to reduce welfare, and welfare can therefore be enhanced by the waiver.

Let us reverse the illustration's assumption, so that the deterrence benefit is greater than the cost of litigation. Now, a welfare-enhancing waiver will not be feasible. To see this, suppose the cost per-skier of additional precaution is only $100, instead of $600 as originally assumed. This

[116] When the deterrence benefit from litigation (the avoided harms net of avoidance costs) is less than the total cost of litigation (sum of plaintiff's and defendant's costs), then litigation is generating a negative social return. Unless there are significant externalities provided by litigation, society could increase its total wealth by banning litigation. *See* Shavell, *supra* note 7.

means that the overall expected cost of the resort, when it adopts the precaution, is lower by $500. Now the waiver offer price, the most the resort will pay for a waiver, is reduced by $500, so it is $1,400 instead of $1,900. The asking price for the waiver remains at $1,700, as originally derived. Since the offer price of the resort is less than the asking price of the skier, there is no possibility of the parties reaching a waiver agreement.

My point here is not to say that the illustration presented in Part 4 is dependent on its assumptions. That is a truism that applies to all models. My point is to show that the underlying model provides a positive theory of waiver agreements, *and also of the instances where waiver agreements are not or should not be observed*. Waiver agreements enhance the joint welfare of the contracting parties when precaution is only modestly productive and litigation costs relatively high. Conversely, waiver agreements reduce the joint welfare of the parties when the productivity of precaution is high and litigation costs relatively low. Below, I will rely on this distinction to set out the basis for a legal test to distinguish enforceable and unenforceable waivers.

B. Misperception and Discounting

The model assumes the parties are perfectly informed about all of the risks they face. Obviously, this assumption may not be valid. Skiers, like other consumers, may misperceive the risks they face on the slopes.[117] Perhaps misperception of risk is one of the factors behind the sport's popularity.

If the skier is not perfectly informed, he may underestimate the risk of injury. Suppose the skier assumes the risk of injury at the resort is only 10% in a season, instead of the accurate level of 20%, when the resort fails to take precautions. This misperception will lead to a lower asking price for a waiver than in the original discussion of the model. Instead of asking for $1700, the skier's asking price would be $700. This lower price will result in the waiver being sold too cheaply by the skier. If there is heterogeneity among skiers in their asking prices, or heterogeneity among ski resorts in their offer prices, skier underestimation of risk will generate too many waivers – that is, waivers that are not welfare enhancing, if welfare is measured accurately, for the two parties.

Misperception of the sort described here would not justify a total ban on waiver agreements. Saying that some agreements are not welfare enhancing is not the same thing as saying that all such agreements are not welfare enhancing. However, consumer underestimation of risk does

[117] On misperception of risk generally, and the case for liability, see A. Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561 (1977). Actual perceptions of risk vary, according to Viscusi; overestimating low-probability risks and underestimating higher probability risks, see W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 64 (1991). However, there are entire fields, such as medical malpractice, where the asymmetry in information about risk is so great that the notion of waivers based on informed perceptions of risk seems farfetched. On liability waivers and medical malpractice, see Jennifer Arlen, *Contracting Over Liability: Medical Malpractice and the Cost of Choice*, 158 U. PA. L. REV. 957 (2010).

justify taking a close look at waiver agreements and refusing to enforce in instances where misperception of risk is likely.

Discounting of future risks is another type of misperception, whenever the injurious event is not close in time to the signing of the waiver. Alan Schwartz argues that discounting is likely and more problematic as the time between waiver signage and actual injury increases.[118] One reason discounting may be prevalent is that when there is a significant time lag between signing and the experience of the risk, the consumer may have only an idealized vision of the risk at the time of signing. That idealized vision is likely to become closer to reality as the consumer approaches the moment of actually experiencing the risk. For example, a novice skier may envision himself doing quite well on skis before the actual experience, and therefore view the risk of injury as minimal. However, once the novice skier actually attempts to ski, his perception of the risk may update to a significantly larger magnitude. In the discounting theory, there is misperception at the time of the signing of the waiver, but the skier's perception of risk may be fully accurate by the time of the actual experience of skiing.

C. Rights Pessimism

When a consumer signs a waiver, he effectively sells his right to bring a tort action against the seller of whatever service or product he consumes. If the consumer believes that he is likely to receive a complete remedy from the courts if he should sue, he will tend to set a high price on the right that he transfers to the seller. However, suppose the consumer is pessimistic about his rights, and believes he is unlikely to receive a complete remedy from the courts. Such a consumer would tend to set a low price on his right.[119]

It requires no clairvoyant to predict who would likely be optimistic about their rights, and who would be pessimistic. The optimism versus pessimism line divides society according to wealth and perceived privilege.[120] Now, of course, this distinction may not matter much if we limit our analysis to ski resorts, since they are known to be playgrounds of the entitled.[121] However,

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[118] Alan Schwartz, *Commentary on "Towards a Market in Unmatured Tort Claims": A Long Way Yet to Go*, 75 VA. L. REV. 423–30 (1989).

[119] For an economic analysis of waivers in the context of right pessimism, see Keith N. Hylton, Selling and Abandoning Legal Rights (March 28, 2022). Boston Univ. School of Law Research Paper No. 22-6, available at SSRN: https://ssrn.com/abstract=4069024 or http://dx.doi.org/10.2139/ssrn.4069024.

[120] For empirical evidence on disparities in the strength of legal remedies, see Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017) (racial and gender discrimination in the calculation of compensatory damages awards); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L. J. 99 (2005) (racial discrimination in wrongful death awards); Bitton, Yifat and Kricheli Katz, Tamar, *Disparities on the Basis of Nationality, Ethnicity and Gender in Road Accident Compensation in Israel* (February 25, 2022). Journal of Law and Courts 2022, Available at SSRN: https://ssrn.com/abstract=4043807. ("We show that although in Israel the reliance on sex and race based statistical data to calculate damages in tort cases is a prohibited practice, courts tend to reach lower estimates of the future lost earnings of Mizrahi Jews, Arabs, and women than the future lost earnings of otherwise similarly situated Ashkenazi Jewish men.")

[121] For an interesting historical perspective, see Annie Gilbert Coleman, *The Unbearable Whiteness of Skiing*, 65 PACIFIC HISTORICAL REV. 583 (1996).

waivers reach considerably deeper into the social order. As Cheng, Guttel, and Procaccia note,[122] waivers extend to such activities as riding in a medical transport vehicle,[123] participating in a bicycle rideshare program,[124] attending a political rally,[125] and even going to work or going to a hospital in the presence of Covid-19 risk.[126] Perhaps more alarmingly, Martins, Price, and Witt offer the following list of activities where waivers have been introduced:[127] apartments and housing developments,[128] daycare centers,[129] nursing homes,[130] and hair salons.[131]

Since the politically marginal will tend to be pessimistic about their rights, and since pessimism leads individuals to sell their rights cheaply, it follows that waivers, as they apply to more activities involving ordinary consumers and workers, will disproportionately affect the politically marginal. This implies, further, that waivers among the relatively poor and less privileged groups within society often will not meet the welfare ideal of the ski resort illustration.

6. A Theory of Waiver Enforceability

To this point, I have set out a positive theory of waiver contracts. Under certain ideal circumstances, according to the theory, waivers are welfare enhancing as between the contracting parties. Under other circumstances, they are welfare reducing. The ideal circumstances assume perfect information. The perfect information assumption specifically precludes misperceptions of risk, misperceptions due to the discounting of risk, and pessimism about the strength of legal rights. If all of these assumptions hold, we can specify conditions under which waivers are potentially welfare enhancing.

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[122] Cheng, Guttel, and Procaccia, *supra* note 8, at 5–6.
[123] Copeland v. HealthSouth/Methodist Rehabilitation Hosp., LP, 565 S.W.3d 260, 264 (Tenn. 2018).
[124] Corwin v. NYC Bikeshare, LLC, 238 F. Supp. 3d 475, 485-86 (S.D.N.Y. 2017).
[125] Cheng, Guttel, and Procaccia, *supra* note 8, at 5.
[126] Cheng, Guttel, and Procaccia, *supra* note 8, at 11; see also Nicolas P. Terry, Liability, Liability Shields, and Waivers (February 15, 2021). Burris, S., de Guia, S., Gable, L., Levin, D.E., Parmet, W.E., Terry, N.P. (Eds.) (2021). COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future. Boston: Public Health Law Watch., Available at SSRN: https://ssrn.com/abstract=3809455.
[127] Martins, Price, and Witt, *supra* note 5, at 1267-68.
[128] Fuller v. TLC Prop. Mgmt., LLC, 402 S.W.3d 101 (Mo.App. S.D., 2013); Milligan v. Chesterfield Vill. GP, LLC, 239 S.W.3d 613 (Mo. Ct. App. 2007); Alack v. Vic Tanny Int'l of Mo., Inc. , 923 S.W.2d 330 (Mo. banc 1996); Crosby v. Sahuque Realty Co., 234 So. 3d 1190 (La. Ct. App. 2017), writ denied, 239 So. 3d 294 (La. 2018); Tolliver v. 5 G Homes, LLC, 563 S.W.3d 827 (Mo. Ct. App. 2018); Crawford v. Buckner, 839 S.W. 2d 754 (Tenn, 1992).
[129] City of Santa Barbara v. Superior Court, 161 P.3d 1095, 1102–03 (Cal. 2007); Gavin W. v. YMCA of Metro. L.A., 131 Cal. Rptr. 2d 168 (Ct. App. 2003); Lotz v. Claremont Club, No. B242399, 2013 WL 4408206 (Cal. Ct. App. Aug. 15, 2013).
[130] Gates v. Sells Rest Home, Inc., 57 S.W.3d 391 (Mo. Ct. App. 2001); STV One Nineteen Senior Living, LLC v. Boyd, 258 So. 3d 322 (Ala. 2018).
[131] Dixon v. Manier, 545 S.W.2d 948 (Tenn. Ct. App. 1976); Baker v. Stewarts' Inc., 433 N.W.2d 706 (Iowa 1988). I should note that *Dixon* is a relatively rare case of waiver enforcement coupled with strong "freedom of contract" language. However, by 1992, in Crawford v. Buckner, 839 S.W.2d754 (Tenn. 1992), Tennessee moderates its language on contract enforcement and voids a contract on public policy grounds.

A. Precautionary Productivity Test

In this part, I translate the policy analysis of the preceding part into a test that courts can use to distinguish cases where waiver enforcement is consistent with increasing welfare, and where waiver enforcement is not consistent with increasing welfare. Since this is an objective test, I will look for factors that courts can identify in the cases that signal whether waiver enforcement is socially desirable.

Waivers are welfare enhancing when the productivity of precaution is low, and litigation costs high. What does it mean to say that the productivity of precaution is low? The best way to think of this is to use the Learned Hand Test of tort law.[132] Under the Learned Hand Test, an actor is negligent if he fails to take care when the burden of taking care is less than the expected loss avoided by taking care.[133] If B represents the burden of taking care, L the loss, and P the probability of an accident, an actor is negligent under the Hand Formula if he fails to take care when $B < P \times L$.[134] Now, let us translate this notion into the *productivity* of care. Care is relatively unproductive if B is close to or greater than $P \times L$. The reason is that if B is close to or greater than $P \times L$, then there is not much accident avoidance purchased per dollar of precaution – in other words, the "bang for the buck" of precaution is low.[135] Another way of saying this is to note that if B is close to or greater than $P \times L$, the *net benefit of care*, $P \times L - B$, is low, or negative. In less quantitative and more qualitative terms, if the productivity of care is low, the relevant actor is *not clearly negligent*, or *weakly negligent*. Conversely, if the net benefit of care is high, that is, $P \times L - B$ is a relatively large number, then the actor is *strongly negligent*.

Delving further into the analysis, the productivity of care is low when care has reached a point economists refer to as "diminishing returns."[136] Taking care may have large consequences in accident reduction initially, when potentially negligent actors start by taking the precautions that most efficiently reduce the likelihood of an accident. After these initial, highly productive precautions are taken, the remaining precautions have much smaller effects on accident prospects, hence the term diminishing returns. One feature of the diminishing returns, low productivity environment is that much of the remaining risk will be virtually unavoidable at reasonable costs. Put another way, much of the remaining risk will be *inherent* to the underlying

[132] The Learned Hand Test is stated (by Judge Learned Hand) in United States v. Carroll Towing, 159 F.2d 169 (2d. Cir. 1947).
[133] *Id*. at 173.
[134] *Id*.
[135] In other words, in the low productivity scenario, the ratio of expected accidents avoided to the cost of care, $(P \times L)/B$ is close to or even less than one.
[136] Diminishing returns set in when capital is fixed in the short run, and additional labor (or some other variable input) increases output, but at a decreasing rate. In visual terms, the production function is concave-down over the range of diminishing returns. On the concept of diminishing returns, see Stanley L. Brue, *Retrospectives: The Law of Diminishing Returns*, 7 J. ECON. PERSPECTIVES, 185 (1993).

activity.[137] The clearest way to avoid such remaining risk is to change the activity altogether, or to discover some new technology that dramatically reduces inherent risk.[138] To return to the skiing example, after the resort adopts the major precautions, such as maintenance of ski lifts, slopes, trails, employing competent safety personnel, and implementing crowd control measures,[139] the remaining substantial risks are mostly inherent in the activity of skiing. The ski resort undoubtedly has some duty to ensure the skiers adopt appropriate safety measures too, but there are limits on how much a resort can do to protect skiers from their own carelessness.

In addition to inherency being a feature of the low precautionary productivity environment, causative weakness may also be a feature. One reason taking additional care may do little to reduce the accident probability is that other causes, or the victim's own conduct, may dominate the accident generating process.[140] Where other causal factors contribute substantially to the accident probability, the productivity of care will be low.[141]

The other fundamental component of the theory presented here is litigation costs. Recall that waivers are welfare enhancing when the productivity of precaution is low and the costs of litigation relatively high. The net benefit *from litigation* is the expected loss avoided by precaution, net of the sum of precaution and litigation costs. Using the symbols introduced above, the net benefit from litigation is $P \times L - B - C$, where C is the sum of the parties' litigation costs. Clearly, if the productivity of precaution is low and the sum of litigation costs high, litigation is likely to be a net welfare loss for the parties, and the waiver a net gain.

Of course, in many real world settings, information on the amounts invested into litigation will not be available. We know that litigation costs are substantial, but we do not know how much the parties spend on litigation. Given this, the fact that litigation costs are likely substantial implies an additional buffer to the weak negligence test suggested by this analysis. That is, if the

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[137] This definition of inherent risk is consistent with that used by some courts. *See* Brett v. Great American Recreation, Inc. 677 A.2d 705, 715 (N.J. 1996) (defining "inherent risks of skiing" as those risks that "cannot be removed through the exercise of due care if the sport is to be enjoyed.").

[138] Once the new technology is discovered, the productivity of precaution likely jumps, leading to more negligence claims. On this paradox, see Mark F. Grady, *Why Are People Negligent Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988).

[139] *See, e.g.*, FindLaw, When Is a Ski Resort Liable for Injuries? https://www.findlaw.com/legalblogs/personal-injury/when-is-a-ski-resort-liable-for-injuries/. *See also*, FindLaw, Ski Lift Accident: When is Ski Resort to Blame? https://www.findlaw.com/legalblogs/personal-injury/ski-lift-accident-when-is-ski-resort-to-blame/.

[140] One case illustrating problems of inherency and causation in the waiver cases is Benedek v. PLC Santa Monica, LLC, 129 Cal. Rptr. 2d 197 (Cal. Ct. App. 2002). The plaintiff, a fitness center member, noticed that the television mounted above the elliptical training machine he intended to use was facing in the opposite direction, away from the machine. He reached up to move the television, and it started to slide out of its rack, forcing him to hold the television above his head, and leading to a knee injury. The court enforced the waiver clause even though the accident had nothing to do with the inherent risks of using fitness equipment. However, there was also no evidence suggesting negligence. If hypothetically viewed as an invitee case (California abolished the invitee category in Rowland v. Christian, 443 P.2d 561 (Cal. 1968)), which would put the most stringent duty on the defendant, it is still a weak negligence theory. First, the plaintiff likely exceeded the scope of his invitation once he set out to change the position of the overhead-mounted television, which would remove the plaintiff from the "hypothetical invitee" category. There was no evidence presented that the defendant knew of the defect or could reasonably have discovered it before the accident. The television may have been moved by another club patron.

[141] On the association between the productivity of care and causation, see generally Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799 (1983).

facts of a case generate the inference that additional precaution would have been unproductive, then including litigation costs into the analysis, under the assumption such costs are nontrivial, tips the case into the negative welfare category. In short, the following "waiver enforcement test" emerges: *If the facts suggest "weak" or ambiguous negligence, then the waiver likely was welfare enhancing,* and *if the facts suggest "strong" or unambiguous negligence, the waiver likely was not welfare enhancing. In the absence of risk misperception or rights pessimism, courts should enforce welfare enhancing waivers*.

B. Some Application Details

The foregoing waiver enforcement test builds on the premise that the parties are perfectly informed about risks. Given this, the enforcement test should be coupled with some examination of whether the preconditions are plausible.

Certainly one feature that is consistent with perfect information is obviousness of the risks addressed by the waiver. If the risks involved are obvious, then it is at least remotely plausible that the consumer was familiar with the risks before agreeing to the waiver. In addition, the waiver enforcement test incorporates an examination of whether the risks were inherent to the parties' activity. The reason it incorporates such an examination is that the test looks for diminishing returns in precaution, and diminishing returns are associated with inherent, unavoidable risks.

These considerations suggest four categories of concern. The first consists of risks that are obvious (to the reasonable skier) and inherent. This set of risks constitutes the strongest case for finding that the waiver is enforceable. In the ski resort example, this first category includes the simple slip and fall ski accident. Such accidents will remain likely even after all plausible (not just reasonable) precautions are taken by the ski resort operator. The second category consists of risks that are obvious and contingent (extrinsic, alien). A mass shooting at a ski resort, for example, might fall within this category.[142] The risk of a mass shooting is now obvious in America, in almost any location or setting. But it is clearly alien to the activity of skiing. The third category has risks that are hidden and inherent. In this category are certain defects in the land, such as rocks or tree stumps that are neither known nor discoverable with reasonable care by the resort operator.[143] Such risks are inherent to the activity of skiing. The fourth category involves risks that are hidden and contingent, extrinsic, or alien.

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[142] Mass shootings have happened at ski resorts. *See, e.g*., 2 die in shooting at ski resort, L.A. Times Archives Dec. 31, 2008 12 AM PT, https://www.latimes.com/archives/la-xpm-2008-dec-31-na-briefs31.s5-story.html. (describing mass shooting at ski resort).

[143] For example, the risk of an avalanche would appear to be both hidden and inherent to the activity, see Reuters, Colorado judge rules ski resort not immune from lawsuit in avalanche death, By Keith Coffman, June 19, 2014, https://www.reuters.com/article/usa-colorado-avalanche/colorado-judge-rules-ski-resort-not-immune-from-lawsuit-in-avalanche-death-idUSL2N0P100T20140620; Denver Post, Jury rules for ski resort in Vail avalanche death, by Randy Wyrick, June 21, 2018, https://www.denverpost.com/2018/06/21/taft-conlin-vail-avalanche-death/ (articles

Enforcement of the waiver is strongest under this theory in the first category involving obvious and inherent risks. Enforcement is, on the other hand, not easy to defend in the remaining categories. Indeed, there is an oxymoronic quality to the second category, involving risks that are obvious and at the same time contingent and alien. If the risk is contingent and alien, it is not part of the inherent risks of the activity, which remain after reasonable precautions have been taken. If, in addition, the risk is obvious in the sense of being foreseeable, then precaution probably could have worked to prevent the harm. Return to the mass shooting example. If the risk of a mass shooting is foreseeable, then it is unlikely that a court would shield such a potentially strong case of negligence from liability by enforcing a waiver. This category seems an ill fit for waiver enforcement under the test.

The third and fourth categories, involving hidden risks, are presumptively excluded by the precondition that perfect information be at least a remotely plausible description of the consumer's position. However, there is a difference between the two categories. The fourth category, involving contingent and hidden risks, is excluded from waiver enforcement under this model. The third category, consisting of inherent and hidden risks, involves the same tension as the second category (obvious and contingent risks). Because of the conflict between being an inherent risk and a hidden risk at the same, a court could find a waiver enforceable if the facts suggest that the inherency factor dominates. I will try to put flesh on these abstract conjectures by discussing cases next.

7. Application to Cases

Dalury, a decision against waiver enforcement, fits easily within this framework. Recall that the plaintiff in *Dalury* sustained injuries after colliding with a metal pole that was part of the control maze for a ski lift line. The plaintiff's theory was that the metal pole had been negligently designed and constructed. While the court did not elaborate on precisely why the pole design may have been negligent, the likely explanation is that injuries from collisions were highly foreseeable. Under the test of this paper, the metal pole design is likely not within the set of inherent risks of the activity of skiing, and was almost surely a hidden risk from the perspective of the plaintiff.

Seemingly in conflict with *Dalury* is *Chauvlier v. Booth Creek Ski Holdings*,[144] a case of waiver enforcement. The plaintiff in *Chauvlier* was injured when he skied down the Debbie's Gold trail at Alpental.[145] Employees had left "bump/jumps" and half pipes on the trail, in preparation for a

on lawsuit resulting from avalanche death at ski resort); Outside, Resort Skiing Is Dangerous. And It Always Will Be, https://www.outsideonline.com/outdoor-adventure/snow-sports/taos-avalanche-risk-in-bounds/ ("Avalanches are an inherent risk of resort skiing and snowboarding. And they always will be. No matter how many explosives ski patrol tosses, the risk never goes to zero.").

[144] 35 P.3d 383 (Wash. Ct. App. 2001).

[145] *Id.* at 384.

competition later in the day.[146] The plaintiff, a recreational skier, claimed that he could not see these objects from the top of the trail, and found himself airborne. He complained that the resort should have posted warnings. Since the bump/jumps are manmade objects, *Chauvlier* seems at first glance similar to *Dalury*, and therefore a case where non-enforcement would be appropriate. However, there are important differences. First, the plaintiff in *Chauvlier* was offered a choice between a day pass that did not include a waiver, and a discounted season pass that included the waiver. Moreover, the waiver in the discounted season pass specifically referred to manmade objects on the trails. Second, Alpental appears to be unusual, with a description in a local news article as "the place your mother doesn't ski."[147] The same article notes that Debbie's Gold is blue, but would be black anywhere else.[148] The picture that emerges is that Alpental caters to experienced skiers, most of whom could presumably handle Debbie's Gold even with the bump/jumps littering the path. While it is not clear that *Chauvlier* is consistent with the waiver enforcement test, it may be reconcilable with it. Inherent risks seem to be of a higher order at Alpental, and the contract itself may have given sufficient notice to remove the hiddenness or hidden character of the risk.

Of course, this is not a study of ski resort liability. Let us consider some of the waiver cases discussed by commentators. In their descriptive account of the prevalence of waivers, Martins, Price and Witt discuss several cases suggestive, in their view, of the overuse of waivers in society and their growing over-acceptance by the judiciary. One case is *Lovelace v. Figure Salon, Inc.*,[149] a decision to enforce. Martins, Price, and Witt are particularly concerned about the language in the opinion asserting that "it is the paramount public policy" in Georgia that courts will not "lightly interfere" with freedom of contract, and the court's heavy reliance on contract-based justifications for enforcing the waiver.[150] However, the facts of *Lovelace* suggest reasons for the enforcement decision. Plaintiff Lovelace said

> [s]he had been advised by her doctor to undergo a hysterectomy and to strengthen her abdominal muscles before her operation. She informed one of defendant's employees what her doctor had recommended and the employee said she must first take a "fitness test." The fitness test consisted of various stretching and lifting exercises. Mrs. Lovelace said the employee asked her to perform repetitions on the leg curling machine and increased the tension until she was lifting 80 pounds. After she completed the leg lifts, her knee was hurting and she felt "all stretched." That night the leg and back pain began. She had a myelogram and a CT scan performed on the lumbar region of her back. Those procedures showed everything was normal. Finally, a neurologist performed a "lumbar laminectomy" which

[146] *Id.*
[147] Yvette Cardozo, Alpine Skiing / Alpental, Nov. 12, 1998, Special to The Seattle Times, https://archive.seattletimes.com/archive/?date=19981112&slug=2782996.
[148] *Id.*
[149] 345 S.E.2d 139 (Ga. Ct. App. 1986).
[150] Martins, Price, and Witt, *supra* note 5, at 1294.

> alleviated the pain. She still has pain, but not as severe as it was prior to the operation.[151]

The plaintiff's complaint alleges "a failure to exercise ordinary care," and only one specific omission: a failure to warn of the "danger and consequences in overexertion and lifting too much weight."[152]

It is unclear, in this account, what defendants could have done to reduce substantially the likelihood of injury to the plaintiff. The injury involves an obvious risk, inherent to the activity of using weights for exercise. To warn the plaintiff of the danger of overexertion would have been to state the obvious. The vague assertion that the defendant failed to exercise ordinary care adds little to the complaint.[153] Under the theory presented here, this is a clear case of "weak negligence," in the sense that the defendant was not negligent at all or perhaps ambiguously negligent at worst. Given that litigation is costly, a waiver increases the wealth of the contracting parties by discouraging or disincentivizing litigation in cases of this sort.

Another case offered by Martins, Price, and Witt illustrating the increasing over-acceptance of waivers in the courts is *Reed v. University of North Dakota*.[154] Plaintiff Reed, a college hockey player, ran a 10-kilometer charity road race sponsored by North Dakota Association for the Disabled (NDAD). He collapsed from severe dehydration, leading to extensive damage to his kidneys and liver. As a result, Reed underwent one kidney and two liver transplants. He sued NDAD for negligence, arguing that NDAD failed to provide adequate water stations over the course, and failed to have medical personnel available to treat race injuries.[155]

Before participating in the race, Reed signed a waiver which included the provision:

> I am entering this event at my own risk and assume all responsibility for injuries I may incur as a direct or indirect result of my participation. For myself and my heirs, I agree not to hold the participating sponsors and their directors, employees, and/or agents responsible for any claims. I also give permission for the free use of my name and/or picture in a broadcast, telecast, or other account of this event.[156]

Martins, Price, and Witt note that this provision would have been a fair target for nonenforcement under the exculpatory overbreadth doctrine followed by many courts.[157] However, in a twist on this convention, the court read the provision as strong evidence of the intent of the parties to waive liability, and enforced the waiver.

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[151] *Lovelace*, 345 S.E.2d, at 139.
[152] *Id.*
[153] "Negligence in the air, so to speak, will not do." POLLOCK, TORTS [13th ed], at 468. Pollock's famous quote appears in a chapter titled "Evidence of Negligence." His point is that vague allegations of negligence, or even specific allegations that have no causal connection to the injury, are irrelevant in a tort action,
[154] 589 N.W.2d 880, 885 (N.D. 1999).
[155] *Id.* at 887.
[156] *Id.* at 885.
[157] *See infra* text accompanying note 44.

As disconcerting as this twist on waiver doctrine may seem, the facts of *Reed* suggest that this was a case of an obvious and inherent risk, and therefore appropriate for waiver enforcement under this model. Dehydration is always a risk in a lengthy road race. The opinion indicates that some water stations were available,[158] though it does not say precisely how many. In any event, the number of water stations adequate for one participant might be inadequate for another. Moreover, even if as many as 10 water stations were available – one per kilometer – there is no guarantee that a committed runner would actually stop by a water station, competitive drive might push him to run by them all.[159] In short, there are questions having to do with the level of reasonable care and causation that would bedevil any attempt to determine an objective negligence standard in *Reed*. Dehydration is also a condition that gives warning to the victim, so there will be some runners who, heeding the warning, will stop and rest before collapsing, and others who will run until collapse.

Cheng, Guttel, and Procaccia discuss a different set of waiver cases, largely to show, contrary to Martins, Price, and Witt, that waivers generally are not enforced. The main puzzle or problem they identify is that firms, even among the legally sophisticated, continue to use unenforceable waivers – and even some of the same firms that have suffered adverse court rulings on the enforceability of their waiver provisions. For example, Cheng, Guttel, and Procaccia note that the Killington Ski Area continues to include a waiver provision in its contract with skiers even after the unenforceability holding in *Dalury*.[160] I will discuss some of their cases, and then turn to the puzzle of widespread use of purportedly unenforceable waivers.

The first cases discussed by Cheng, Guttel and Procaccia are *Dalury* and *Hanks v. Powder Ridge Restaurant Corp*,[161] both deciding against enforcement. *Hanks* is heavily influenced by *Dalury*, and in fundamental respects similar. The plaintiff, Hanks, traveled to defendant's facility to snowtube, bringing three of his own children and one of their friends. He signed a waiver. While snowtubing, Hanks's right foot became caught between his snowtube and the manmade bank of the snowtubing run, resulting in injuries that required multiple surgeries to repair.[162] Hanks sued for negligence, presenting several theories of defective design. The defendants, Hanks asserted, could have substantially reduced the probability of injury through numerous modifications, such as increasing the size of the snowtubes, or lining the banks with hay bales, and other modifications.

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[158] *See Reed* at 887 ("Reed argues NDAD and UND acted in concert in the organization and administration of the race, including the number and location of water stations and the availability of emergency medical care.") The plaintiff's reference to "the number and location" of water stations implies that some water stations were available.
[159] The factual causation problem in *Reed* is analogous to that in a famous case, N.Y. Cent. R.R. v. Grimstad, 264 F. 334 (2d Cir. 1920). In *Grimstad*, the plaintiff sued the defendant for negligence for failing to equip a barge with lifebuoys, after the plaintiff's decedent, a barge captain, fell into the water and drowned. The plaintiff lost on factual causation grounds. The court noted that even if the boat had been equipped with lifebuoys, there was no guarantee that the plaintiff would have been able to grab the lifebuoy, throw it sufficiently close to the captain to be useful, and the captain to grab it securely, all in time to prevent the drowning.
[160] Cheng, Guttel, and Procaccia, *supra* note 8, at 4.
[161] 885 A.2d 734 (Conn. 2005)
[162] Hanks, at 736.

Hanks is in essence a defective design claim. The snowtube runs at Powder Ridge were designed and manufactured. There is nothing inherent or obvious about the risk presented by the design flaw identified by the plaintiff, and resulting in his injury. Under the framework of this paper, this should have been a case of nonenforcement, as it was.

Cheng, Guttel, and Procaccia also discuss *Walters v. YMCA*,[163] a New Jersey decision refusing enforcement, suggesting that it stands for the proposition that waivers are unenforceable with respect to public recreational activities. However, *Walters* distinguishes another New Jersey decision involving a recreational facility, *Stelluti v. Casapenn Enters., LLC*,[164] in which the waiver was enforced. In *Walters*, the plaintiff slipped and fell on a negligently maintained stairway. In *Stelluti*, the plaintiff fell when the handlebars of an exercise bike she was using dislodged during a spin class.[165] The court in *Stelluti* required evidence of unambiguous or gross negligence on the part of the defendant fitness center,[166] and there was no evidence of the defendant's negligence in the maintenance or care of the exercise equipment.[167] The court described the accident in *Stelluti* as within the inherent risks of patronizing a fitness center, while the accident in *Walters* was a straightforward breach of the land possessor's duty to an invitee.[168] *Walters* and *Stelluti* are consistent with the precautionary productivity hypothesis of this paper, which predicts that weak or ambiguous cases of negligence are subject to waiver enforcement. Rather than supporting the proposition that waivers in the context of recreational activities are unenforceable in New Jersey, *Walters* implies that waivers will be enforced conditionally, depending on the inherent versus extrinsic nature of the materialized risk.

Once we accept the concept of conditional enforcement, the puzzle identified by Cheng, Guttel, and Procaccia resolves easily. Firms continue to include waiver provisions in their contracts with consumers even after court holdings of unenforceability because the unenforceability holdings are often conditional on the facts of the case, in spite of the expansive rhetoric often employed by the courts. Inherency of risk and causation are major factors influencing decisions whether to enforce waiver contracts. These factors are case specific.

The claim that waiver enforcement is conditional should not be regarded as surprising. Many state courts have said that a waiver is not enforceable in the context of an intentional or reckless injury, while the same clause may be enforceable in the context of negligence.[169] This basic

[163] 96 A.3d 323 (N.J. Super. Ct. App. Div. 2014)
[164] 1 A.3d 678 (N.J. 2010).
[165] *Id*., at 683.
[166] *Id*., at 694.
[167] *Id*.
[168] The cases involving landlords that have included waivers in their leases are similar in this respect. *See* Fuller v. TLC Prop. Mgmt., LLC, 402 S.W.3d 101 (Mo. App. S.D., 2013) (reversing summary for defendant property manager, and finding waiver unenforceable); Milligan v. Chesterfield Vill. GP, LLC, 239 S.W.3d 613 (Mo. Ct. App. 2007) (reversing summary judgment for defendant, waiver may be unenforceable with respect to property manager); Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330 (Mo. banc 1996) (defendant not entitled to directed verdict, waiver unenforceable because ambiguous); Crawford v. Buckner, 839 SW 2d 754 (Tenn. 1992) (waiver unenforceable as violation of Tennessee public policy).
[169] *See, e.g.*, Hanks v. Powder Ridge, 885 A. 2d 734, 747 (Conn. 2005) ("Moreover, we find it significant that many states uphold exculpatory agreements in the context of simple negligence, but refuse to enforce such agreements in the context of gross negligence. *See, e.g.*, Farina v. Mt. Bachelor, Inc., 66 F.3d 233, 235-36 (9th Cir.1995) (Oregon

proposition of waiver law renders enforcement conditional on presented facts. However, there is a deeper level of conditionality that this framework identifies.

This is not to say that there is nothing to Cheng, Guttel and Procaccia's argument that many firms continue to use waivers in order to hoodwink plaintiffs into believing that the waiver provisions are enforceable, and thereby discourage plaintiffs from litigating. However, the hoodwinking theory requires an unusual mixture of curiosity and laziness on the part of the injured consumer, and a great deal of laziness on the part of plaintiffs' lawyers. Curiosity and laziness combine in the injured consumer, because he must be sufficiently curious to read the waiver form, and sufficiently lazy not to bother with consulting an attorney. Laziness on the part of the attorney because the theory requires him to be deterred from filing a claim by a waiver that is "not worth the paper it is written on."

The theory offered here provides an explanation for this curious state of affairs. We are not observing an equilibrium in which worthless waivers are included in contracts and routinely ignored by litigants and courts. Nor are we observing an equilibrium in which waivers deter lawsuits because they are routinely enforced, this is clearly not the case – they neither deter lawsuits, nor are they routinely enforced. Under the theory of this paper, we are observing an equilibrium in which waivers are enforced with some probability, increasing with facts giving inherency of risk a greater weight, and such waivers deter some lawsuits with some probability, again increasing with facts showing inherency of risk. This is a complicated picture, but it seems to be consistent with the case law on waiver enforcement.

8. Public Policy Doctrine Revisited: Reforming *Tunkl*

One part of this paper's framework that remains to be woven into legal doctrine is the concept of rights pessimism. Recall that the rights pessimist believes that his rights will not be accorded full respect in the courts, and therefore is willing to sell them, through a waiver agreement, cheaply.

There is a difference between imperfect information and rights pessimism. Imperfect information implies that the consumer is unable to assess with reasonable accuracy the relative risks of the waiver versus non-waiver contract options. Hence, the misperceiving consumer may sell his rights too cheaply, because he cannot determine correctly the costs he will suffer as a

law); Wheelock v. Sport Kites, Inc., 839 F. Supp. 730, 736 (D.Haw.1993), superseded in part by Haw. Rev. Stat. § 663-1.54 (1997) (recreational providers liable for simple negligence in addition to gross negligence); McFann v. Sky Warriors, Inc., 268 Ga. App. 750, 758, 603 S.E.2d 7 (2004), cert. denied, 2005 Ga. Lexis 69 (January 10, 2005); Boucher v. Riner, 68 Md. App. 539, 543, 514 A.2d 485 (1986); Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. 17, 18-19, 687 N.E.2d 1263 (1997); Schmidt v. United States, 912 P.2d 871, 874 (Okla.1996); Adams v. Roark, 686 S.W.2d 73, 75-76 (Tenn.1985); Conradt v. Four Star Promotions, Inc., 45 Wash. App. 847, 852, 728 P.2d 617 (1986); see also New Light Co. v. Wells Fargo Alarm Services, 247 Neb. 57, 62-65, 525 N.W.2d 25 (1994)…").

result of transferring his tort rights to the firm. The rights pessimist, by contrast, misperceives the *value of the rights* that he sells, and in the case of undervaluation sells them too cheaply.

It might seem that the *Tunkl* doctrine is the perfect path through which to address the rights pessimism problem. However, *Tunkl* refers to the disparity in *bargaining power* between the consumer and firm.[170] From a contract theory perspective, disparity in bargaining power means that the party with the bargaining power advantage takes most of the surplus from any potential agreement.[171] The agreement, however, remains positive in terms of utility for both sides. Given this, contract theory might justify regulation of the terms of the contract, to readjust the split of the bargaining surplus, but not a ruling that the contract is unenforceable.

The real problem highlighted by misperception and rights pessimism is that the weaker party may not get any utility at all from the contract, when evaluating the risks and the value of rights correctly. A rule rendering the contract unenforceable makes sense in these scenarios. If the contract is one that gives negative utility to the consumer, and positive utility to the firm, then a rule prohibiting enforcement effectively cancels such transactions.

There is already a tool in the doctrine for curing the effects of misperception, and that is the "specific risk knowledge" requirement suggested by cases such as *Russo v. The Range*.[172] But there is currently no doctrine in the case law on waiver unenforceability that addresses the rights pessimism problem.

Courts should modify *Tunkl* to address rights pessimism. In exchange for deleting the fourth prong of *Tunkl*, which refers to "the essential nature of the service" and the purchaser's "decisive advantage of bargaining strength," courts should include in its place a new *Tunkl* factor, as follows: *The perceived rights of the purchaser are much weaker, in terms of likelihood of assertion and of full satisfaction by a court, than the perceived rights of the seller*.

9. Conclusion

[170] *Tunkl*, 383 P.2d 441, 445-46 (Cal. 1963) ("As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against [the purchaser]…"). There is a long history of courts pointing to a disparity in bargaining power as the basis for invalidating exculpatory clauses. *See* Carnival Cruise Lines, Inc. v. Shute, 499 US 585, 598 (1991) ("Exculpatory clauses in passenger tickets have been around for a long time. These clauses are typically the product of disparate bargaining power between the carrier and the passenger, and they undermine the strong public interest in deterring negligent conduct. For these reasons, courts long before the turn of the century consistently held such clauses unenforceable under federal admiralty law.").

[171] Intuitively, if parties have equal bargaining power, they should split the bargaining surplus equally. If, on the other hand, there is unequal bargaining power, one expects the party with greater bargaining power to take most of the surplus. On bargaining power and the splitting of surplus, see, e.g., Subrato Banerjee, *Effect of Reduced Opportunities on Bargaining Outcomes: An Experiment with Status Asymmetries*, 89 THEORY AND DECISION 313 (2020).

[172] 76 Ill.App.3d 236, 395 N.E.2d 10 (1979).

Waivers have been around for a long time now. In view of this, it is surprising that the law on enforceability seems muddled, and inconsistent from jurisdiction to jurisdiction. It happens that the law is complicated, and the cases have three major parts – the language of the contract, the applicable law, and the facts of the injurious event – that courts take into account in deciding the enforceability question. What I have done in this paper is set out a policy framework for enforcement, and translate the framework into legal tests. The framework lends itself to a positive theory of the doctrine on enforceability as well as a suggestion for reform of the case law.