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Survey of Illinois Law: The Latest Twist On The Illinois Recreational Use of Land And Water Areas Act: Clamping Down on Landowner Immunities

by

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SURVEY OF ILLINOIS LAW: THE LATEST TWIST ON THE ILLINOIS RECREATIONAL USE OF LAND AND WATER AREAS ACT: CLAMPING DOWN ON LANDOWNER IMMUNITIES*

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The December 2003 decision of the Illinois Supreme Court in *Hall v. Henn*[1] upset the long-settled expectations of many rural landowners by narrowing the scope of liability protection available under the Illinois Recreational Use of Land and Water Areas Act ("Recreational Use Act").[2] In a shift from previous lower appellate court decisions,[3] the court held that protection under the Recreational Use Act for ordinary negligence liability is available only to landowners who open their property to the general public.[4] Protection would no longer be available to landowners who open their property for recreational or conservation use by only select individuals.[5]

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1. 208 Ill. 2d 325, 802 N.E.2d 797 (Ill. 2003).
2. 745 ILL. COMP. STAT. 65/1–65/7 (2002). All references to the Recreational Use Act in the text of this article are in the version of the Act appearing in the Illinois Compiled Statutes (2002) unless otherwise noted.
3. *See, e.g.*, Johnson v. Stryker, 70 Ill. App. 3d 717, 388 N.E.2d 932, 935 (1st Dist. 1979) (holding that the Recreational Use Act protected landowners who open their lands for recreational use on merely a casual basis); Phillips v. Cmty. Center Found. and Children's Farm, 238 Ill. App. 3d 505, 606 N.E.2d 447, 453 (1st Dist. 1992) (stating that the landowner's "generosity should not be penalized because some might conclude that the property owner was not generous enough" in opening the land to everyone); Turgeon v. Commonwealth Edison Co., 258 Ill. App. 3d 234, 630 N.E.2d 1318, 1328 (2d Dist. 1994) (applying Act's protections even where defendant did not allow access to the public); Cacia v. Norfolk & W. Ry. Co., 290 F.3d 914, 916, 919 (7th Cir. 2002) (applying Act where landowner "never permitted the public to enter onto or use [its property] . . . without specific authorization"). *See also* A. Bryan Endres, *A Closer Look at the* Hall v. Henn *Decicion and its Impact*, ILLINOIS RURAL POLICY DIGEST 6 (Vol. 2. No. 3, Spring 2004) (on file with the author) (discussing judicial interpretation of the Recreational Use Act prior to the *Hall v. Henn* decision).
4. *Hall*, 208 Ill. 2d at 331, 802 N.E.2d at 800.
5. *Id.* The Illinois Recreational Use Act defines "Recreational or conservation purpose" as "any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure on land owned by another." 745 ILL. COMP. STAT. 65/2(c)(2002). Under this definition, recreational or conservation purpose presumably includes a wide variety of outdoor activities such as hiking, hunting, fishing, bicycling, horseback riding, bird watching, motorcycling, operating an all-terrain

The effect of the Illinois Supreme Court decision was predictable. Increased fear of premises liability, or even the threat of lawsuits alleging responsibility for injuries sustained on their property, has compelled many landowners to restrict access to their land to all except their closest friends and relatives. As a direct result of the court's decision, many users of rural open-space have seen their access to privately-owned land restricted and their attendant recreational activities eliminated or pushed onto already oversaturated public lands.[6] Meanwhile, a vast area of privately-owned land[7] with high recreational potential lies underutilized within the state.[8] In the

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vehicle, sledding, skiing, rock climbing, cave exploring and sightseeing.

6. Scott Richardson, *Bill Would Preserve Hunting on Private Land*, THE PANTAGRAPH, Oct. 24, 2004, at E1 (noting the "chilling effect on outdoor activities" as landowners rethink "the tradition of opening their land to friends for outdoor activities" in light of the *Hall v. Henn* decision); Scott Richardson, *Take Notice of Ruling on Land Access*, THE PANTAGRAPH, May 16, 2004, at E1 (noting likely restrictions on access in response to the *Hall v. Henn* decision); Amanda Vogt, *Landowners Make Area Hunters Feel Cornered: Development Closing Areas Open to Sport*, CHI. TRIB., Nov. 26, 2000, at 1 (noting the displacement of accessible open space due to development pressure, lack of publicly-owned areas open for hunting and growing reliance on privately-held property for sporting activities); David Mendell, *Kids' Play is a Crime in Law of the Street, Tinley Park Statutes Bans any Games on Roads, Sidewalks*, CHI. TRIB., June 6, 1999, at 1 (describing city ordinance prohibiting children from engaging in recreational sports on city streets and sidewalk and noting lack of public parks); John Husar, *Canoeists Trying to Get More than Foot in the Water*, CHI. TRIB., Sept. 19, 1996, at 5 (noting that Illinois has 33,000 miles of streams at least 20-feet wide, but only two percent are available for public use).

7. For the purposes of this article, "land" includes "roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty." 745 ILL. COMP. STAT. 65/2(a) (2002).

8. John Husar, *Sportsmen's Land Access Pursued: State Panel Searches for Ways to Open Private Areas*, CHI. TRIB., May 17, 1992, at 15 (noting that ninety-five percent of Illinois' land base is under private control and that the public has relatively few opportunities for outdoor recreation that are not overcrowded). Although the site of several large metropolitan areas, Illinois ranks forty-sixth in the percentage of land owned by state and federal governments, ahead of only Rhode Island, Nebraska, Kansas and Iowa. *See* National Wilderness Institute, *State by State Government Land Ownership*, *at* http://www.nwi.org/Maps/LandChart.html. Other states with large urban concentrations have much higher percentages of government owned land that is potentially available for public recreational use: California (52%), New York (37%), New Jersey (18%) and Pennsylvania (16%). *Id.*

The lack of publicly-owned land is not the only obstacle facing outdoor recreants. The right of the public to use waterways in Illinois for recreational purposes, such as canoeing or fishing, is more limited than in many states. In streams not subject to the "ebb and flow of the tide," the owner of the adjacent land also owns the stream bed. Braxon v. Bressler, 64 Ill. 488, 493 (Ill. 1872). As the owner of the stream bed, the landowner has a right to prohibit entry into the stream unless the stream is "navigable in fact." Schulte v. Warren, 218 Ill. 108, 118, 75 N.E. 783, 785 (Ill. 1905). Under Illinois law, "[a] stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for row boats or small launches answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable." *Id.* Only if the stream is navigable in fact does the public enjoy a right of easement for transportation. *Id.*

wake of the *Hall v. Henn* decision, the Illinois General Assembly had reason to amend the Recreational Use Act and reestablish landowner incentives (reduced liability risk) to open private lands for recreational use on even a selective basis.

In Part I of this article, the authors briefly discuss the operational elements of the Recreational Use Act and the legal issues addressed by the Illinois Supreme Court in *Hall v. Henn*. Part II examines legislative proposals designed to mitigate the impact on rural landowners of the court's interpretation of the statute, while preserving negligence-based premises liability in many other situations. Part III of the article contains the authors' conclusions regarding the amendment actually adopted by the 94th Illinois General Assembly, and offers alternative statutory language that reflects a reasonable compromise between landowner incentives to open land for recreational and conservation purposes, and the allocation of responsibility for maintaining premises in a reasonably safe condition for recreants. In the paragraphs that follow, any references to the Recreational Use Act, or specific parts thereof, refer to the Act before the amendment passed by the 94th Illinois General Assembly, unless otherwise expressly noted.

I. THE RECREATIONAL USE ACT AND THE AFTERMATH OF *HALL v. HENN*

The intent of the Recreational Use Act is to encourage landowners to allow members of the public use of their privately-owned land for recreational or conservation purposes.[9] In exchange for providing land for recreational

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Accordingly, a vast number of streams capable of navigation by canoe, kayak, or other small watercraft are closed to public use and lie under the control of the private landowner.

Even if the stream is navigable in fact, and thus the public has a right of easement for transportation, under Illinois law, the public has no right to fish in the stream. *Id.* at 786. By way of comparison, both Missouri and Wisconsin allow public fishing in all waters navigable in fact. *See* Elder v. Delcour, 269 S.W.2d 17, 26 (Mo. 1954) ("Since the ownership of the fish in the stream belonged to the state and since respondent was not a trespasser in passing down the stream by boat or by wading, he had the right to fish and to take fish from the stream in a lawful manner."); Willow River Club v. Wade, 76 N.W. 273, 277 (Wis. 1898) ("[T]he public should have the right to fish in all the public navigable waters of the state, including all public navigable rivers and streams of the state.")

9. The stated purpose of Illinois' Recreational Use Act "is to encourage owners of land to make land and water areas available to the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes." 745 ILL. COMP. STAT. 65/1 (2002). This statement of purpose was probably adopted from the 1965 model recreational use statute proposed by the Council of State Governments. *See* Council of State Governments, *Public Recreation on Private Lands: Limitations on Liability*, 24 SUGGESTED STATE LEGISLATION 150 (1965).

activities, landowners receive limited premises liability protection.[10] With a lower risk of liability, a greater percentage of rural landowners will permit members of the public to enter their land for recreational or conservation purposes.[11]

A. The Landowner's Duty of Care to Recreants

At common law, as modified by the Illinois Premises Liability Act,[12] landowners owe all permitted entrants a duty of reasonable care to keep the premises safe or to warn entrants of dangerous conditions on the land.[13] Accordingly, landowners owe a general duty of reasonable care to individuals they allow to use their land for recreational or conservation purposes. The duty of reasonable care, however, exposes rural landowners to a relatively high risk of liability for injuries resulting from hazardous conditions on their land. Common examples of potential injury causing conditions found on rural farmland include: wire fences (including electric fences for livestock), machinery, farm outbuildings, abandoned wells, drainage ditches/tile systems, natural streams, ponds with thin ice, groundhog holes, and the proverbial slippery slopes. Fulfilling the farmland owner's duty of care to permitted recreational entrants by eliminating or issuing a warning regarding each of these potential hazards places an undue burden on the landowner/farm operator and discourages opening the land to members of the public for mere gratuitous recreational use.[14]

The Recreational Use Act eliminates the landowner's burden of reasonable care and, thereby, removes some of the liability risk. Specifically,

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10. *See infra* notes 13–18 and accompanying text.
11. *See infra* note 14 and accompanying text.
12. 740 ILL. COMP. STAT. 130/1 to 130/5 (2002). The Premises Liability Act eliminated the common law distinction between invitees and licensees with respect to the duty owed by the owner or occupier of the premise. 740 ILL. COMP. STAT. 130/2. The Act establishes that the landowner owes a duty of reasonable care to both invitees and licensees. *See* Phillips v. O'Donnell, 137 Ill. App. 3d 639, 484 N.E.2d 1209 (2d Dist. 1985).
13. *See, e.g.*, Strode v. Baker, 206 Ill. App. 3d 398, 564 N.E.2d 875 (4th Dist. 1990) (holding that owner or occupier of land has a duty to exercise ordinary care to a person rightly on the land regardless of whether that person is an invitee or a licensee); Skoczylas v. Ballis, 191 Ill. App. 3d 1, 547 N.E.2d 565 (5th Dist. 1989) (holding that the duty owed to both invitees and licensees is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them).
14. *See* Harrision v. Middlesex Water Co., 403 A.2d 910, 914 (N.J. 1979) (noting difficulty in taking precautions to render rural open space safe for invited persons engaging in outdoor activities and elimination of that duty would encourage landowners to open those lands to others); Wymer v. Homes, 412 N.W.2d 213, 219 (Mich. 1984) (noting impracticability of keeping rural lands safe for public use in contrast to the relative ease to supervise and monitor residential areas for hazards).

when the Recreational Use Act applies, "an owner of land owes no duty of care to keep the premises safe for entry or use by any person for recreational or conservation purposes, or to give any warning of a natural or artificial dangerous condition, use, structure, or activity on such premises to persons entering for such purposes."[15] Moreover, a landowner inviting or permitting without charge[16] any person to use his or her land for recreational or conservation purposes does not "extend any assurances that the premises are safe for any purpose . . . [or] [a]ssume responsibility for or incur liability for any injury to such person or property caused by an act or omission of such person or any other person who enters upon the land."[17] The Act, however, does not limit landowner liability "for willful and wanton failure to guard or warn against a dangerous condition, use, structure, or activity."[18] Accordingly, the Recreational Use Act provides landowners protection for negligence-based premises liability,[19] but does not bestow immunity for willful and wanton acts or omissions.[20]

B. Interpreting the Recreational Use Act: What Constitutes "Available to the Public"

The issue before the Illinois Supreme Court in *Hall v. Henn*, however, was not whether the landowner engaged in willful and wanton conduct, but rather the extent to which a landowner must open his or her land to the public in order to qualify for the Recreational Use Act's protections.[21]

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15. 745 ILL. COMP. STAT. 65/3 (duty of care or warning of dangerous condition).
16. The Act does not provide liability protection to landowners who "charge" persons who enter the land for recreational purposes. 745 ILL. COMP. STAT. 65/6 (willful and wanton acts; injury suffered by persons paying admission). The statute defines a "charge" as "an admission fee for permission to go upon the land, but does not include: the sharing of game, fish or other products of recreational use; . . . or contributions in kind, services or cash made for the purpose of properly conserving the land." 745 ILL. COMP. STAT. 65/2 (definitions). *See also* Lundquist v. Nickels, 238 Ill. App. 3d 410, 424, 605 N.E.2d 1373, 1383 (1st Dist. 1992) (holding that fee of $4 per dirt bike was a "charge" even though the injured person did not own the bike or pay the fee). A charge probably also includes performance of services such as assistance with the harvest or repair of fences or drainage tile if made for business as opposed to "conservation" purposes.
17. 745 ILL. COMP. STAT. 65/4(a), (c) (effect of invitation or permission).
18. 745 ILL. COMP. STAT. 65/6 (willful and wanton acts; injury suffered by persons paying admission).
19. For a more comprehensive discussion of premises liability concerns for rural landowners, *see generally* Harold W. Hannah, *Uncertainty about the Premises Liability of Illinois Farmers*, 21 S. ILL. U. L.J. 61 (Fall 1996) (discussing liability for injuries to farm entrants).
20. *See* Torf v. Commonwealth Edison Co., 268 Ill. App. 3d 87, 90, 644 N.E.2d 467, 469 (2d Dist. 1994) (noting that because Recreational Use Act applied, city could only be held liable for willful and wanton conduct).
21. *Hall*, 208 Ill. 2d at 327, 802 N.E.2d at 798.

In *Johnson v. Stryker Corp.*,[22] the first Illinois appellate court decision to interpret the Recreational Use Act, the court directly addressed the issue of whether a landowner, to obtain protection under the Act, must make the land available to the general public. The defendant in *Johnson v. Stryker Corp.* owned land that included a pond where children occasionally swam. Before swimming, the children were supposed to ask for permission.[23] In addition, the defendant posted signs warning individuals that the pond was "private property."[24] At trial, the plaintiff successfully argued that the property was not "open to public" as required by the Recreational Use Act and, therefore, the defendant was not entitled to the Act's protection from negligence liability.[25] The court of appeals reversed, holding that the legislature never intended to limit application of the statue to only those landowners who opened their land to the general public.[26] The court found that the Recreational Use Act was intended to protect landowners who open their lands for recreational use on merely "a casual basis."[27]

Citing the reasoning of *Johnson*, the court of appeals stated in *Phillips v. Community Center Foundation and Children's Farm*,[28] that "[s]urely the law would not remove the immunity of the Recreational Use Act simply because the owner of the property sought to restrict the number of people who could use his land for those purposes. Generosity should not be penalized because some might conclude that the property owner was not generous enough."[29] The Second Appellate District in *Turgeon v. Commonwealth Edison Co.*,[30] concurred with the logic of *Stryker* and *Phillips*. In *Turgeon*, defendant ComEd prohibited all entry into the water under its direct control.[31] Although the defendant plainly did not make its water area "available to the public," the court nonetheless applied the Recreational Use Act to immunize ComEd from allegations of ordinary negligence.[32]

The U.S. Court of Appeals for the Seventh Circuit also has considered the extent to which defendant-landowners must make their land available to the public to qualify for protection under the Recreational Use Act. In *Cacia*

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22. 70 Ill. App. 3d 717, 388 N.E.2d 932 (1st Dist. 1979).
23. *Id.* at 719, 388 N.E.2d at 933.
24. *Id.*
25. *Id.*
26. *Id.* at 722, 388 N.E.2d at 935.
27. *Id.* at 720, 388 N.E.2d at 934.
28. 238 Ill. App. 3d 505, 606 N.E.2d 447 (1st Dist. 1992).
29. *Id.* at 515, 606 N.E.2d at 453.
30. 258 Ill. App. 3d 234, 630 N.E.2d 1318 (2d Dist. 1994).
31. *Id.* at 247, 630 N.E.2d at 1328.
32. *Id.* at 248, 630 N.E.2d at 1328.

v. Norfolk & Western Railway Co.,[33] defendant Norfolk & Western "never permitted the public to enter onto or use [it's] abandoned rail beds . . . without specific authorization."[34] The court rejected plaintiff's argument that the statute requires the landowner to open the land, even on a limited basis, to the public. Rather, the Seventh Circuit held that the Recreational Use Act protects "landowners whose property is used gratuitously, with or without permission, for recreational purposes."[35] So long as the individual entered the land for recreational (or presumably conservation) purposes, without charge, the willingness of the owner to open the land to the general public was irrelevant.

C. *Hall v. Henn*—Swinging the Pendulum

The Illinois Supreme Court's ruling in *Hall v. Henn*[36] reversed this seemingly well-settled area of law.[37] The court held that protection under the Recreational Use Act for ordinary negligence liability is available only to landowners who open their property to the general public.[38] Liability protection would no longer be available to landowners who open their property for recreational or conservation use by only select individuals.[39]

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33. 290 F.3d 914 (7th Cir. 2002).
34. *Id.* at 916.
35. *Id.* at 919 (quoting Johnson v. Stryker Corp., 70 Ill. App. 3d 717, 388 N.E.2d 932) (1st Dist. 1979)..
36. 208 Ill. 2d 325, 802 N.E.2d 797 (Ill. 2003).
37. Appellate courts interpreting similar statutes in Nebraska and Pennsylvania reached conclusions in accordance with the *Johnson v. Stryker* line of decisions. *See* Holden v. Schwer, 495 N.W.2d 269, 273–74 (Neb. 1993) (holding that "a landowner need allow only some members of the public, on a casual basis, to enter and use his land for recreational purposes to enjoy protection of the act); Gallo v. Yamaha Motor Corp., U.S.A., 526 A.2d 359, 364 (Pa. Super. Ct. 1987) (holding that "[a] defendant landowner . . . is entitled to immunity when three conditions coalesce: (1) the landowner did not willfully or maliciously fail 'to guard or warn against a dangerous condition . . .' on the land; (2) the landowners did not charge the plaintiff for the recreational use of the land; and (3) the injured plaintiff entered the land for 'recreational purposes.' The grant of immunity . . . simply does not depend on whether the landowner has encouraged the plaintiff to enter the land." (internal citations omitted)). *See also*, Hannah, *supra* note 19, at 70 (noting that "[a]pplication of the [Illinois Recreational Use] Act should not be contingent on the attitude of the owner toward admitting members of the public generally. If there is permission followed by a recreational use, that should be sufficient."). *But see* Snyder v. Olmstead, 261 Ill. App. 3d 986, 634 N.E.2d 756 (3d Dist. 1994) (holding the Recreational Use Act does not apply where owner does not open property to public but simply invites a few private persons to a picnic, but specifically noting that the landowner need not allow all persons to use the property at all times in order to qualify under the Act); Bier v. Leanna, 305 Ill. App. 3d 45, 711 N.E.2d 773 (2d Dist. 1999) (following *Snyder* and holding that five-member homeowners' association that owned a private beach open only to members and invited guests was not protected by the Recreational Use Act).
38. *Hall*, 208 Ill. 2d at 331, 802 N.E.2d at 800.
39. *Id.*

The injury resulting in the *Hall v. Henn* litigation arose out of the recreational use of a sled run in the backyard of defendants Tim and Sue Henn. The sled run, complete with steps, a platform and a luge-like course constructed of snow, was sprayed with water and allowed to harden into ice.[40] Defendants did not open the sled run to the general public, but made it available to friends and neighbors.[41] The Henns required users to obtain permission and allowed use only when they were present to supervise.[42] In January 2001, a neighbor requested and received permission to use the run along with plaintiff and plaintiff's family.[43] After several successful runs, plaintiff slipped on the stairs leading to the sled run and suffered severe injuries.[44] Plaintiff filed a negligence action against the Henns.[45]

On summary judgment, the trial court ruled that the Recreational Use Act shielded the Henns from premises liability for ordinary negligence.[46] The court of appeals for the Second District reversed, and the Illinois Supreme Court granted defendants' petition for leave to appeal.[47]

The Illinois Supreme Court affirmed the Illinois Court of Appeals, holding that the Recreational Use Act "applies only to those landowners who open their property to the general public."[48] The court first noted that the purpose of the Recreational Use Act, outlined in Section One of the statute, was to encourage owners of land to open their property "to the public." Sections Three and Four of the statute immunized landowners from negligence with respect to "any person" entering the property for recreational purposes. Reading the provisions together, the court concluded that the Act "immunize[d] landowners from negligence liability with respect to any person who enters their property for recreational purposes, *provided that such property is open to the public*."[49] The court further reasoned that to immunize a landowner from negligence liability with respect to any person who enters the land for "exercise, education, relaxation or pleasure" would encompass "just about every purpose, absent commerce, for which a person is invited onto another's property" and would "largely eliminate premises liability in

40. *Id.* at 327, 802 N.E.2d at 798.
41. *Id.*
42. *Id.* at 327-28, 802 N.E.2d at 798.
43. *Id.* at 328, 802 N.E.2d at 798.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 330, 802 N.E.2d at 799.
49. *Id.* at 331, 802 N.E.2d at 800 (emphasis in original).

this state."[50] Accordingly, the court held that landowners who open their land for recreational use only to invited guests or selected individuals do not qualify for immunity under the Recreational Use Act.

The *Hall v. Henn* decision left unanswered whether landowners may restrict access to the general public during certain times of the year, but maintain immunity under the Recreational Use Act.[51] For example, a farmer may open up fields after harvest for all-terrain recreational vehicles but, for obvious reasons, would prohibit such use during field preparation or the growing season. Similarly, a rural landowner who enjoys hunting may wish to restrict public access the week before the opening of deer season so as to not disturb wildlife. From a conservation perspective, landowners may which to occasionally restrict access so as not to disturb a particular area during nesting season for an endangered bird.[52] During these intervals, the property is not "open to the public" but one would hope the landowner would otherwise receive statutory immunity for injuries arising during the period in which the general public was allowed access.

In addition, the court did not address whether landowners retain the Act's protections if they refuse permission for some recreational activities, but allow the general public access for other recreational purposes.[53] For example, a farmer, out of concern for soil conservation, may wish to prohibit the use of motor-bikes or off-road motor vehicles that create ruts or compact the soil. Likewise, a rural landowner may prohibit public access for hunting or trapping, but allow hiking, canoeing and bird watching. Surely, the court would not require a landowner to permit all types of recreational activity in order to qualify under the Act for protection. In *Synder v. Olmstead*,[54] the

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50. *Id.*

51. *See* A. Bryan Endres, *A Closer Look at the Hall v. Henn Decision and its Impact*, ILLINOIS RURAL POLICY DIGEST 7–8 (Vol. 2, No. 3, Spring 2004) *available at* http://www.farmdoc.uiuc.edu/policy/digest/pdfs/policy_irpd-su2004.pdf.

52. Opening land to the general public also may have a significant impact on wildlife populations. For example, a farmer who previously allowed a few recreational hunters or anglers access would not have to open the property to all who requested. This may result in over hunting/fishing and may create a safety problem if too many hunters are in the fields simultaneously. *Id.* at 7. On the other hand, if rural landowners, as a result of premises liability concerns, restricts all access and, thus all deer hunting, there may be an overpopulation of deer and greater hazards for rural motorists. *See* Richardson, *supra* note 6, at E1 (noting role hunters play in controlling deer populations and number of deer-vehicle accidents).

53. *See* Endres, *supra* note 51, at 7–8.

54. 261 Ill. App. 3d 986, 991, 634 N.E.2d 756, 761 (3d Dist. 1994) ("[W]e wish to stress that in order to seek protection under the Act, a landowner need not 'allow all persons to use property at all times.' Farmers who cannot open their property to everyone at all times, might nonetheless open their land for one season, such as hunting season or winter, or on certain days of the week." (internal citation omitted)).

Illinois Appellate Court, Third District, noted the desirability of landowners' ability to make such timing-based restrictions. However, the Illinois Supreme Court in *Hall v. Henn* did not indicate whether this behavior would satisfy the Act's requirement that landowners open their property to the general public in order to receive immunity from negligence based lawsuits. Perhaps, under the current state of the law, landowners would only qualify for immunity from negligence-based suits for injuries to recreants engaging in activities that the landowner did not restrict to selected individuals. For example, if the landowner only permits hiking by the general public, the landowner would be immune from lawsuits brought by injured hikers, but would not be protected from a lawsuit filed by a hunter who was granted access on a selective basis.

II. THE LEGISLATIVE RESPONSE TO THE *HALL v. HENN* DECISION

In addition to upsetting the well-settled expectations of the many rural landowners who had opened their lands to select friends and neighbors for recreational or conservation activities, the court's decision was likely to frustrate the purpose of the Recreational Use Act. Landowners were expected to react to the decision by restricting access to their land, thus reducing opportunities for outdoor recreation and conservation in Illinois, rather than opening their property to the general public.[55]

While the court's decision in *Hall v. Henn* was expected to curtail access to rural land for recreational and conservation purposes, the court correctly recognized the competing importance of preservingsome form of premises liability within the State. Premises liability rules developed, in part, to encourage landowners to keep their property in a reasonably safe condition and to compensate individuals injured as a result of the landowner's negligence or other wrongful acts.[56] On the other hand, in light of the

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55. *See* Endres, *supra* note 51, at 7–8; D.L. Uchtmann and A. Bryan Endres, *Liability Risk and Recreational Use of Land after* Hall v. Henn*: Illinois Landowners Beware*, AGRICULTURAL LAW AND TAXATION BRIEFS, vol. 04, no. 10, at 6, (May 2004), *available at* http://www.farmdoc.uiuc.edu/legal/otherlaw/articles/ALTB_04-10/ALTB_04-10.pdf; *see also* Richardson, *supra* note 6, at E1 (noting the "chilling effect on outdoor activities" as landowners rethink "the tradition of opening their land to friends for outdoor activities" in light of the *Hall v. Henn* decision).

56. *See generally*, D.L. Uchtmann and A. B. Endres, *Recreational Use of Land & Liability Risk: Is New Legislation Needed?*, ILLINOIS RURAL POLICY DIGEST 3 (Vol. 2. No. 3, Spring 2004) *available at* http://www.farmdoc.uiuc.edu/policy/digest/pdfs/policy_irpd-su2004.pdf (noting competing public policy goals of (1) encouraging landowners to maintain property in reasonably safe condition and (2) encouraging landowners to open their private lands to others for recreational and conversation use).

sustained population shift from rural to urban and suburban areas,[57] coupled with limited land designated for recreation by state and local governments,[58] the Illinois Recreational Use Act and similar statutes in all fifty states[59] serve an important public goal of incentivizing landowners to make their property available for use by members of the public.

Since initial passage of the Illinois Recreational Use Act in 1965,[60] the Illinois legislature has attempted to maintain a reasonable balance between these competing goals. As the relative importance of these goals changed over the first twenty years of the Act's existence, the legislature passed various minor amendments to the Act.[61] Then, in 1987, the legislature significantly expanded the scope of the Act's protection from negligence-based premises liability[62] in response to a national study of the effectiveness of recreational use statutes in the various states.[63] After the Illinois Supreme Court's rebalancing of these priorities in the *Hall v. Henn* decision, Illinois legislators, in 2004, and again in 2005, attempted to harmonize the competing public policy objectives of maintaining premises in a reasonably safe condition (premises liability) with opening land to members of the public for

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57. David A. McGranahan & Calvin L. Beale, *Understanding Rural Population Loss*, RURAL AMERICA vol. 17, no. 4 at 1 (2002) (noting that over twenty-five percent of non-metropolitan counties lost population between 1990 and 2000, despite an overall decline in rural poverty rates) *available at* http://www.ers.usda.gov/publications/ruralamerica/ra174/ra174a.pdf.

58. *See supra* note 8 and accompanying text. *See also* Stuart J. Ford, Comment, Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges, 1991 WIS. L. REV. 491, 492 (noting, in addition to a decline in public recreational space available to urban residents, an increase in material wealth and leisure time that enables individuals to spend more time on recreation, "an increased awareness of the health and fitness benefits of recreation, a concern to provide the public with opportunities to enjoy the benefits of modern environmental control, and . . . increased private tort litigation of recreational accidents").

59. Terence J. Centner, *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities*, 9 BUFF. ENVT'L. L.J. 1, 25–26 (2001) (listing recreational use statutes for each state).

60. 1965 Ill. Laws 2263.

61. *See, e.g.*, Pub. Act No. 78–489, § 1, 1973 Ill. Laws 1409; Pub. Act No. 80–1287, § 1, 1978 Ill. Laws 821; Pub. Act No. 81–545, § 1, 1979 Ill. Laws 2222.

62. Pub. Act No. 85–959, 1987 Ill. Laws 4282. *See also infra* note 74 and accompanying text (discussing the 1987 amendments to the Recreational Use Act).

63. *See generally*, W.L. CHURCH, REPORT ON PRIVATE LANDS AND PUBLIC RECREATION (1979) (report of national survey of effectiveness of recreational use statutes in several states). *See also*, John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?*, 24 IND. L. REV. 1587, 1590–92 (1991) (describing the Church study).

recreational and conservation purposes (recreational use).[64] These proposals, discussed below, sought to revise the legislative purpose stated in Section One of the Act, as well as the definitions of "Land" and "Recreational and conservation purpose" contained in Section Two.

A. Amending the Legislative Purpose: "Public" Includes "Selected Individuals"

As discussed in Section II.C., above, the Illinois Supreme Court in *Hall v. Henn* interpreted the term "available to the public" in Section One of the Recreational Use Act as meaning the "general public" rather than selected individual members of the public. Accordingly, the court held that landowners must open their land to the "general public," and not merely "any individual member" of the public, in order to qualify for immunity under the Act.[65]

House Bill 7331 was introduced in the 93rd General Assembly by Representatives Brauer, Black, Mitchell and Poe, and Amendment No. 1 to Senate Bill 2184 was introduced in the 93rd General Assembly by Senator Brady. Although these bills failed to garner sufficient support in the 93rd General Assembly, legislators introduced four similar bills in the 94th General Assembly.[66] Senate Bill 251 (94th General Assembly), introduced by Senator Demuzio, passed both houses on May 28, 2005, and was sent to the governor for signature on June 28, 2005.[67] Senate Bill 251 overruled the *Hall v. Henn* decision by amending Section One of the Act as follows:[68]

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64. Non-legislative solutions for landowners may include insurance policies specifically covering landowner's potential liability for negligently-caused injuries and liability release waivers. *Cf.* Martha L. Noble, *Recreational Access to Agricultural Land: Insurance Issues*, 24 IND. L. REV. 1615 (1991) (discussing insurance issues relating to recreational use of land). A complete discussion of insurance coverage and liability waivers relating to premises liability, however, is beyond the scope of this article.

65. *See Hall*, 208 Ill. 2d at 329-32, 802 N.E.2d at 799–800 (discussing the legislative purpose stated in Section One of the Act to encourage landowners to open land to the public and holding that public means "general public" as opposed to individual members of the public).

66. *See* H.B. 334, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H.B. 932, 94th Gen. Assem., Reg. Sess. (Ill. 2005); S.B. 124, 94th Gen. Assem., Reg. Sess. (Ill. 2005); S.B. 251, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

67. As of August 2, 2005, the governor has not yet signed S.B. 251 into law.

68. H.B. 7331 and Amendment No. 1 to Senate Bill 2184 are identical bills introduced in the 93rd General Assembly. Accordingly, for brevity's sake, the text of this article will refer to only House Bill 7331. Note that House Bill 334, introduced in the 94th General Assembly on January 21, 2005, by Rep. William B. Black, Jim Watson, David Reis, Rich Brauer, Dave Winters, and others, is similar, but would use the following language in describing the purpose of the Act:

> Sec. 1. This Act shall be known and may be cited as the "Recreational Use of Land and Water Areas Act." The purpose of this Act is to encourage owners of land to make land and water areas available to any individual or members of the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes.[69]

This amendment restored the ability of landowners to limit access to their property to only selected individuals while maintaining immunity protection under the Act. It also eliminated the unanswered question lingering after the *Hall v. Henn* decision of whether a landowner would retain the Act's protections if he or she imposed time-based restrictions on recreational entrants.

Competing interest groups within the legislature, however, have echoed the Illinois Supreme Court's concern that a statute providing such broad-based immunity to landowners who selectively open their property for recreational purposes would "largely eliminate premises liability in this state."[70] Accordingly, Senate Bill 251 also narrowed the scope of the Recreational Use Act by revising the current definitions of "Land" and "Recreational or conservation purpose."[71]

B. Preserving Premises Liability by Excluding Residential Buildings

The original 1965 version of the Illinois Recreational Use Act only protected property owners of "land *located outside the corporate limits of a city, village, or incorporated town and not subdivided into blocks and lots* and includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."[72] Although the legislative history is unclear, the apparent legislative intent of the original definition that excluded non-rural landowners from the Act's protection was to encourage the opening of farmlands and other open spaces for outdoor

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> The purpose of this Act is to encourage owners of land to make land and water areas available to any individual or, on State-owned or managed lands and waters, members of the public, for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes. H.B. 334, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

69. S.B. 251, 94th Gen. Assem., Reg. Sess. (Ill. 2005).
70. *See Hall*, 208 Ill. 2d at 331, 802 N.E.2d at 800.
71. S.B. 251, 94th Gen. Assem., Reg. Sess. (Ill. 2005).
72. 1965 Ill. Laws 2263 (emphasis added).

recreational use, and not suburban "backyards" such as the sled run at issue in *Hall v. Henn*.[73]

In 1987, the legislature amended the definition of "Land" to eliminate language restricting the Act's application to rural lands. Specifically, the amendment deleted the phrase "land located outside the corporate limits of a city, village or incorporated town and not subdivided into blocks and lots and" from the original definition.[74]

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73. The original definition of "land" contained in Senate Bill 634, which eventually became the Recreational Use Act, did not restrict application of the Act to only rural lands. An amendment offered by the Senate Judicial Committee changed the original definition to exclude non-rural landowners from immunity. A detailed legislative history of the Act follows.
On March 16, 1965, Senator Ziegler introduced Senate Bill 634 for "[a]n Act to limit the liability of landowners who make their land and water areas available to the public for recreational purposes." 1965 ILLINOIS SENATE JOURNAL at 625. After receiving a recommendation of "do pass" from the Senate Judicial Committee, *id.* at 1358–1360, Senator Ziegler, on behalf of the Senate Judiciary Committee, offered an amendment to the definition of "Land," *Id.* at 1440–1441. As originally drafted, the bill defined "Land" as "watercourses, private ways and buildings, structures, and machinery or equipment when attached to realty." Senator Ziegler's proffered amendment further defined land to include only "land located outside the corporate limits of a city, village or incorporated town and not subdivided into blocks and lots." *Id.* There is no discussion in the Senate Journal why the Senate Judiciary Committee proposed this amendment. However, the effect of the amendment is clear—the liability protections available under the bill would only apply to recreational use on rural lands. The amendment prevailed and Senate Bill 634, as amended, passed the Senate on May 5, 1965. *Id.* at 1580. Five days later, the bill was read for the first time in the House and referred to the Committee on Judiciary, 1965 ILLINOIS HOUSE JOURNAL at 2379, and less than a month later, Representative Mikva, from the Committee on Judiciary, reported that Senate Bill 634 should pass, *Id.* at 3316–3317. On the floor of the House, Representative Kennedy offered an amendment to the Senate Bill that struck language relating to the doctrine of attractive nuisance. *Id.* at 3913. The floor amendment did not change the bill's definition of land. The amendment passed and Senate Bill 634, as amended, was sent back to the Senate where it passed unanimously. *Id.* at 4380; 1965 ILLINOIS SENATE JOURNAL at 3280.

74. *See* Pub. Act No. 85–959, 1987 Ill. Laws 4282. In 1987, three House Bills, H.B. 418, H.B. 683 and H.B. 806, and one Senate Bill, S.B. 37, were introduced to amend the Recreational Use Act. All three House Bills were referred to the Committee on Judiciary where no further action occurred. *See* 1987 ILLINOIS HOUSE JOURNAL at 297, 331, 981 (action on H.B. 418); *see id.* at 384, 407, 444, 511, 1132 (action on H.B. 683); *see id.* at 402, 428, 1238 (action on H.B. 806). While the House Bills languished in the Committee on Judiciary, The Senate Committee of Agriculture and Conservation reported Senate Bill 37 out of committee. 1987 ILLINOIS SENATE JOURNAL at 228. On the Senate floor, Senator Davidson, the original sponsor of the Bill, offered Amendment No. 1, which sought to modify the definition of "Land" and eliminate language restricting the Act's application to rural lands. *See id.* at 487. Specifically, the amendment deleted the phrase "land located outside the corporate limits of a city, village or incorporated town and not subdivided into blocks and lots and" from the Act's existing definition of "Land." *Id.* The motion carried and the Bill passed the Senate unanimously. *See id.* at 487, 982–83. The House initially referred Senate Bill 37 to the House Committee on Judiciary, but later recalled the bill and ordered it to lie on the table. *See* 1987 ILLINOIS HOUSE JOURNAL at 1926, 2088, 3291, 4591. There is no record, however, of further action in the House on Senate Bill 37.
Meanwhile, the House Committee on Judiciary, and eventually the full House of Representatives, approved House Bill 1421, a bill for "An act to add Section 3.1 to 'The Illinois Nursing Act,'" and

The legislature's 2005 efforts to again amend the definition of "Land" preserved the immunity that was obtained for urban and suburban landowners in the 1987 amendments, but excluded all residential buildings regardless of location. Specifically, Senate Bill 251 (94th General Assembly) amended the definition of "Land" stated in Section 2(a) of the Act as follows:

> (a) "Land" includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty, but does not include residential buildings or residential property.

Because this compromise language eliminates previously available immunity for injuries occurring at the residences of rural landowners, this definition, when compared with the 1965 Act, is a net loss of protection for rural landowners. On the other hand, by eliminating immunity for injuries at residences, the amendment encourages the opening of true "open space" for outdoor activities, while maintaining an incentive for landowners to exercise reasonable care in making residential areas safe for permitted visitors. Moreover, the Act's original intent was not to open residential space for recreational purposes, but rather to enlarge the relatively scarce amount of open space available in Illinois for outdoor recreational activities.

C. Narrowing Immunity to only Legislatively-Approved Recreational Activities

Finally, Senate Bill 251 (94th General Assembly) amended the definition of "Recreational or conservation purpose." The evolution of this definition is important to any analysis of the amended definition.

Section 2(c) of the Act contains an expansive definition that includes "any activity undertaken for conservation, resource management, exercise,

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sent the Bill to the Senate for concurrence. *See id.* at 640, 759, 1132, 2015, 3503. The Senate passed House Bill 1421 with an amendment and then delivered the bill back to the House. 1987 ILLINOIS SENATE JOURNAL at 2282, 2305, 2349, 2492, 3443. The House, however, refused to concur with the Senate's amendments and a Conference Committee was formed to resolve the dispute. *See id.* at 4935, 5149; 1987 ILLINOIS HOUSE JOURNAL at 7267, 7614. The Conference Committee agreed to recede from the Senate amendments to House Bill 1421. In addition, the full text of Senate Bill 37, previously approved by the Senate but tabled in the House, was added to the Conference Committee's version of the nursing bill. Accordingly, House Bill 1421, a bill to amend the Illinois Nursing Act, also amended the Recreational Use Act and removed the restriction that the immunities provided by the Act apply to only rural landowners. *See* 1987 ILLINOIS SENATE JOURNAL at 6431 (final passage for House Bill 1421 in the Senate). The full text of the First Conference Committee Report of House Bill 1421 is found on pages 8198–8202, as well as pages 9577–9582 of the 1987 Illinois House Journal.

education, relaxation, or pleasure on land owned by another."[75] The original version of the Act passed in 1965, however, limited protection to a list of common outdoor activities.

> "Recreational Purpose" includes, and is limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, water skiing, water sports, and viewing or enjoying historical, archaeological, scenic or scientific sites.[76]

These activities closely tracked the list provided by the 1965 model act proposed by the Council of State Governments.[77] In 1973, the Illinois legislature amended Section 2(C) to include "snowmobiling" and "motorcycling" as recreational activities within the purview of the statute.[78] In 1978, the legislature added "cave exploring" as another activity warranting protection under the Act.[79] The legislature amended Section 2(c) again the following year to include "bicycling" and "horseback riding."[80] Finally, in 1987 the legislature abandoned the practice of listing specific recreational activities that qualify a landowner for immunity and adopted the current definition.[81]

The 1987 legislative change to the definition of "Recreational or conservation purpose" was in accord with the 1979 study commissioned by the National Association of Conservation Districts. The association commissioned W. L. Church, Associate Dean of the University of Wisconsin Law School, to conduct a study of recreational use statutes and continued landowner concern regarding liability for injuries occurring on their property.[82] The Church study "noted two deficiencies: (1) [l]iability law is generally too protective of users, and injured persons have been granted recoveries so often that landowners are discouraged from opening their land for recreational use; and (2) [existing] laws are too complex and confusing to be either predictable or understood. As a result, landowners are reluctant to

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75. 745 ILL. COMP. STAT. 65/2(c) (2002).
76. 1965 Ill. Laws 2263.
77. *See* Council of State Governments, *Public Recreation on Private Lands: Limitations on Liability*, 24 SUGGESTED STATE LEGISLATION 150, § 2 (1965). The model statute included hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports, and viewing or enjoying historical, archeological, scenic, or scientific sites as activities providing landowner immunity.
78. Pub. Act 78–489, § 1, 1973 Ill. Laws 1409.
79. Pub. Act 80–1287, § 1, 1978 Ill. Laws 821.
80. Pub. Act 81–545, § 1, 1979 Ill. Laws 2222.
81. Pub. Act 85–959, § 2, 1987 Ill. Laws 4282, 4284–85.
82. *See* Becker, *supra* note 63, at 1590 (describing the Church study).

make their land available, and the public has fewer recreational choices."[83] At least part of the landowner confusion was attributed to the listing of certain activities with the apparent exclusion of others. Accordingly, "[t]he 1979 Proposed Model Act resolves the problem of how to treat activities that do not appear on the list by using general terms such as 'any activity undertaken for exercise, education, relaxation or pleasure.'"[84]

House Bill 7331 (93rd General Assembly), despite the deficiencies of a "listing approach" noted in the Church study and the recommendations of the 1979 Model Act, sought a reversion to an itemized list of recreational or conservation activities reminiscent of the 1965 version of the Illinois Recreational Use Act. The proposed revision, although never passed by the Illinois General Assembly, was as follows:

> (c) "Recreational or conservation purpose" means entry onto the land of another to conduct any of the following activities or a combination thereof,including but not limited to: hunting, hiking, pleasure driving, motorcycling, operation of an all terrain vehicle, rock climbing, trapping, horseback riding of the entrant's own horse or horses, fishing, swimming, boating, camping, picnicking, nature study, water or snow skiing, sledding, snowmobiling, other summer and winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites while going to and from or actually engaged therein and other similar activities ~~any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure on land owned by another~~.[85]

When compared to a long list of common recreational activities, an expansive, non-specific definition of "Recreational or conservation purpose," however, is preferred for several reasons. A listing approach poses a significant risk of creating additional issues for litigation, or eliminating a landowners' protection when an entrant is injured while on the property for a

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83. *Id.* at 1591–92.

84. *Id.* at 1600 (quoting W.L. CHURCH, REPORT ON PRIVATE LANDS AND PUBLIC RECREATION App. D, § 2(3) (1979)).

85. H.B. 7331, 93rd Gen. Assem., Reg. Sess. (Ill. 2004). Note that House Bill 334, introduced in the 94th General Assembly on January 21, 2005, would use the following language in defining recreational and conservation purpose:

> "Recreational or conservation purpose" means entry onto the land of another to conduct any of the following activities or a combination thereof, hunting, hiking, recreational shooting, operation of an off-highway vehicle, rock climbing, trapping, horseback riding of the entrant's own horse or horses, fishing, swimming, boating, camping, picnicking, water or snow skiing, sledding, and snowmobiling ~~any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure on land owned by another.~~ H.B. 334, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

legitimate, but non-listed recreational or conservation purpose.[86] Moreover, because courts generally construe derogations of the common law narrowly, the legislature may have to repeatedly update the definition as new recreational activities gain in popularity.[87] The list proposed in 2004 already failed to include many recreational and conservation related activities that were explicitly included in the pre-1987 definition or implicitly covered by the current definition. For example, bicycling and cave exploring were specifically listed as covered recreational purposes prior to the 1987 amendment, but were not included in the proposed revision. Presumably such activities would have been covered under the "other summer and winter sports" catchall, but litigation may have been necessary to resolve this issue.[88] Likewise, roller blading, skateboarding and windsurfing are other common outdoor activities that probably would have been included under the catchall, but could have engendered litigation.[89]

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86. Recreational use statutes in other states have experienced various levels of success with enumerating specific activities that invoke landowner immunity. For example, Wisconsin's recreational use act includes an expansive list of twenty-nine individual activities plus a catchall of "any other outdoor sport, game or educational activity." *See* WIS. STAT. § 895.52(1)(g) (2005). The Wisconsin statute defines "Recreational activity" as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. 'Recreational activity' includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or educational activity. 'Recreational activity' does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place." *Id.* Despite the extensive list, Wisconsin has experienced considerable litigation regarding whether an activity qualifies a landowner for immunity. *See* FORD, *supra* note 58, at 516–523 (discussion litigation under the Wisconsin recreational use statute relating to whether an activity qualifies a landowner for immunity). *See also* BECKER, *supra* note 63, at 1600–01 (discussing litigation over whether an activity is "recreational"). At least one commentator has suggested a more inclusive definition similar to Illinois' current statute that does not enumerate specific recreational or conservation activities. *See* FORD, supra note 58, at 529–30.

87. *See* Harrision v. Middlesex Water Co., 403 A.2d 910, 915 (N.J. 1979) (construing recreational use statute strictly and not extending beyond literal meaning). *But see* 1983 Wis. Act 418, § 1 (amending Wisconsin's recreational use statute and, in the statement of legislative intent, directing courts to "liberally construe [the act] in favor of property owners to protect them from liability").

88. House Bill 334, introduced in the 94th General Assembly does not include the catchall phrase "other summer and winter sports" or even the "included but not limited to" language present in House Bill 7331.

89. For example, whether or not a wiener roast and hayride fell within the definition of "recreational purpose" was the subject of litigation when the definition enumerated specific protected activities. *See* Lane v. Titchenel, 204 Ill. App. 3d 1049, 562 N.E. 2d 1194 (5th Dist. 1990) (holding that a wiener roast and hayride fell within the categories of "picnicking" and "viewing or enjoying . . . scenic sites" under Section 2(c) of the Act).

With respect to conservation related activities, the 2004 proposed list failed to include common activities such as a boy scout or other civic group entering private lands adjacent to a stream used for canoeing to pick up litter and debris along the banks, or volunteers maintaining a hiking trail on a privately owned strip of natural prairie adjacent to a public road. Finally, a search of Illinois case law and periodicals has not revealed an articulated reason for limiting the definition to the specifically enumerated activities.

Despite these deficiencies in a listing approach, the Illinois legislature, via Senate Bill 251, adopted a very restrictive enumerated list of activities. Senate Bill 251 revised the prior definition of recreational or conservation purpose as follows:

> "Recreational of conservation purpose" means entry onto the land of another to conduct hunting or recreational shooting or a combination thereof or any activity solely related to the aforesaid hunting or recreational shooting ~~any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure on land owned by another.~~

Although in *Hall v. Henn* the court correctly expressed concern about the potentially sweeping scope of the Recreational Use Act, given the broad statutory definition of recreational and conservation use,[90] the context for the court's discussion was interpreting a statute that did not expressly limit application of the Act to non-residential areas. By adopting a narrower definition of land–one that excludes residential areas–the legislature limited the scope of the Act in a different way, thus preserving traditional premises liability in residential areas.

III. SUMMARY AND CONCLUSION

House Bill 7331 (93rd General Assembly) and Senate Bill 251 (94th General Assembly) provided an important first step toward amending the Recreational Use Act to fulfill its purpose of increasing the amount of land available for recreational or conservation activities. As noted above, however, the most recent legislative action, in the authors' opinion, unduly restricts the

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90. The Act is sweeping in its scope, immunizing a landowner from negligence liability with respect to any person who enters the landowner's property for, among other things, "exercise, education, relaxation, or pleasure . . . ." Exercise, education, relaxation, or pleasure encompasses just about every purpose, absent commerce, for which a person is invited onto another's property. Consequently, were we to ignore section 1's express caveat that the property in question be made available for such purposes *to the public*, we would largely eliminate premises liability in this state. Hall v. Henn, 208 Ill.2d 325, 329–30, 802 N.E.2d 797, 799–800 (Ill. 2003) (Emphasis in original).

scope of activities subject to the Act's protections. To better serve Illinois' rural landowners and those who wish to use private lands for recreational use, the legislature should expand, rather than limit, the range of activities designated as having a proper recreational or conservation purpose.

In summary, the authors offer the following comments and recommendations regarding Senate Bill 251 and Sections One and Two of the Illinois Recreational Use Act.

Section 1.

Sec. 1. This Act shall be known and may be cited as the "Recreational Use of Land and Water Areas Act."

The purpose of this Act is to encourage owners of land to make land and water areas available to <u>any individual or members of</u> the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes.

This revised statement of purpose makes explicit the legislative objective of providing landowners immunity if they make their land available to an individual or select members of the public, not just the public at large. Of course, a landowner opening their property to all members of the public would retain the Act's current protections.

Section 2(a).

Sec. 2. As used in this Act, unless the context otherwise requires:

(a) "Land" includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty, <u>but does not include residential buildings or residential property</u>.

Senate Bill 251 (94th General Assembly) eliminated immunity for injuries occurring in "residential buildings." This is in accord with the intent of the 1965 model act, as well as the 1979 comprehensive study of recreational use statutes, to increase the amount of rural open space available for recreational activities. There is no finding that legislatures need to encourage the opening of suburban or rural backyards, which are relatively plentiful, for public recreational use. Moreover, recreational use acts in several other states also exclude residential property from coverage.[91]

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91. *See* WIS. STAT. § 895.52(1)(i), (6)(d)2 (2005) (excluding residential property and the land surrounding the building or structure within a 300-foot radius); Harrison v. Middlesex Water Co., 403 A.2d 910, 914 (N.J. 1979) (holding that New Jersey's recreational use statute did not apply to land

In addition, Senate Bill 251 (94th General Assembly) eliminated immunity for injuries occurring on other residential property beyond the buildings. Accordingly, the curtilege, or land immediately adjacent to residential buildings, which are used for residential purposes, are not covered by the Act.[92] The purpose of this exclusion is to encourage residents, whether they live in urban or rural areas, to exercise reasonable care regarding the safety of persons who are allowed to enter the owner's personal residence and the immediately adjacent area. These areas of land are the most common premises visited by social guests and, more importantly, are easier for landowners to maintain in a reasonably safe condition, than large open fields or woodlots.[93]

Section 2(c)

(c) "Recreational or conservation purpose" means entry onto the land of another to conduct hunting of recreational shooting or a combination thereof or any activity solely related to the aforesaid hunting or recreational shooting ~~any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure on land owned by another~~.

As described above, Senate Bill 251 (94th General Assembly) rejected the existing broad definition of recreational or conservation purpose in favor of a list of specific activities. Unfortunately, Senate Bill 251 lists only two activities as recreational or conservation purposes that warrant the Act's protections–hunting and recreational shooting. In so limiting the permitted activities, the legislature has stripped protection from landowners who open their land for any other recreational, educational or conservation purpose, even if the land is opened without restriction to the "general public." In other words, landowners opening their land are no longer protected from premises

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located in residential and populated neighborhoods); Wymer v. Holmes, 412 N.W.2d 213, 219 (Mich. 1984) (holding the Michigan's recreational use statute did not cover urban, suburban and subdivided lands).

92. Wisconsin's recreational use statute further clarifies the definition of residential property. The statute defines "Residential property" as "a building or structure designed for and used as a private dwelling accommodation or private living quarters, and the land surrounding the building or structure within a 300-foot radius." WIS. STAT. § 895.52(1)(I) (2005).

93. *See Harrison*, 403 A.2d at 914–15 (describing relative difficulty of owner to maintain open areas in safe condition as opposed to residential areas). In addition, rural open space may have ongoing business operations, such as farming, forestry, mining, etc, that prohibit removal or warning of all potential hazards. It is unrealistic for a farmer to cease farming operations and repair or warn of all potential hazards before opening land to members of the public. A reasonable farmer wanted to reduce the risk of liability probably would simply prohibit access to the public. *See* Uchtmann & Endres, *supra* note 55, at 3 (discussing farmland owners' reactions to the *Hall v. Henn* decision).

liability claims unless the injured person was hunting or engaged in recreational shooting. Landowners will receive no statutory protection against claims from injured hikers, fishers, swimmers, bicyclers, bird watchers, ATV riders, or any other permitted entrant with the exception of hunters and sport shooters.

If the public policy behind the Act's grant of limited immunity is to encourage landowners to say "yes" when people ask to use the private land for legitimate recreational purposes, shouldn't landowners be encouraged to say "yes" to would-be hikers, fishermen, etc., just as much as they should be encouraged to say "yes" to would-be hunters? Is there really any good public policy reason to elevate the activities of hunting and shooting as being worthy of support through the Recreational Use Act, while withholding that support for other recreational and conservation activities? When citizens pursuing other legitimate recreational activities ask the legislature to add their favorite recreational activity to the recreational activities listed in the Recreational Use Act, legislators will be hard pressed to explain why the list should be limited to hunting and shooting.

In previous versions of the Recreational Use Act, when this term was defined by an enumerated list of activities, frequent amendments were necessary to add an activity, e.g., cave exploring, that, in hindsight, was recreational, but had been omitted from the existing definition.[94] In contrast, the pre-Senate Bill 251 definition encompassed a variety of recreational activities without the requirement of specific enumeration in the statute and provided landowners greater certainty that when they do permit access by others for recreational or conservation purposes, the Act would provide the expected liability protection.

In conclusion, the Illinois Supreme Court's decision in *Hall v. Henn* altered the established premises liability paradigm for many rural landowners. Senate Bill 251 (94th General Assembly) reversed the *Hall v. Henn* decision and (a) allows landowners to control entry onto their open-space lands while retaining some premises liability protection, (b) encourages landowners to allow others on their open-space lands for recreational and conservation purposes without charge, and (c) preserves the time-honored principle of negligence-based premises liability which would apply in residences and back yards across Illinois, and in other areas where the entrant was not on the premises for recreational or conservation purposes without charge. Unfortunately, Senate Bill 251's limitation of the definition of recreational or conservation purpose unduly limits the scope of protected activities.

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94. *See supra* notes 85–88 and accompanying text.

Accordingly, in a future legislative session, the Illinois General Assembly should again amend the Recreational Use Act and re-adopt the general definition of recreational or conservation purpose. This will preempt the difficult and never-ending challenge of legislatively developing a list of specific activities that constitute recreational and conservation use worthy of the Act's support. If the legislature fails to amend the statute, much of Illinois' privately-owned lands with high recreational potential will remain closed to others, and former users of rural open-space for recreational or conservation activities, other than hunting and shooting, will be forced onto limited and already saturated public lands.