Pre-Activity Recreational Release Issue in Oregon

For: OR. HB 4146 (section 7) workgroup considering (b) "Barriers to expansion and maintenance of recreational tourism in each tourism region."

Date: August 2016

Subject: The recent Oregon Supreme Court decision regarding the use of recreational activity liability releases.

Background: The use of pre-activity recreational releases had been common law and practice in Oregon for over 35 years. Liability waivers and releases inform the participant of the inherent (and other) risks associated with the activity for which they are about to participate in, and make it clear that the participant assumes such risks. Such releases also often set forth the rules of use, contain warnings, and further educate the participant regarding the nature of the activity. In exchange for choosing to participate in a risky activity, the participant releases the provider from ordinary negligence by signing a prospective liability release. Such releases do not shield the provider from claims for gross negligence or intentional misconduct.

In 2014, however, the Oregon Supreme Court radically changed release law in Oregon when it handed down its decision in Bagley v. Mt. Bachelor. In Bagley, the Court found that the release on a ski season pass was "unconscionable and therefore unenforceable." In making this ruling, the Court adopted an extreme minority position. The vast majority of states, either by judicial decision or statute, permit the use of prospective liability waivers and releases. The plaintiff's bar in Oregon is now using Bagley to attack the enforceability of any release used in a recreational context.

Note: Safety is a top priority for ski area operators. There is no reason why an operator would intentionally or willfully want to cause a guest injury, however natural obstacles exist, and yes, human error and accidents do happen. In the ski industry in particular, the State of Oregon, through its 1979 Oregon Skier Statute, has previously determined that ski areas should not bear the burden of defending themselves against claims arising from accidents that occur as a result of the sport's inherent risks.

Analysis: The citizens of Oregon and visitors to this state should enjoy a maximum ability to participate in sports and recreational opportunities. Citizens and visitors to this state should also have a fundamental right and responsibility to make decisions concerning the activities in which they desire to enter. Individuals are accustomed to making these conscious choices on their own behalf. Such choices, when voluntarily made upon consideration of appropriate information, should not be ignored and should be afforded the same value and legal effect as other choices and contractual obligations.

It is logical to conclude that this court ruling could be applied across the broad spectrum of recreation businesses and organizations who engage in inherently risky activities. It appears that many people and even our lawmakers and policymakers are not yet completely aware of this issue and its potential sweeping affect. Oregon businesses and organizations who will be affected by this could include landowners who allow access to their land for recreation, parks and recreation programs, outfitter/guides, amusement parks, youth soccer, youth summer camps, resorts, running events such as marathons, mudders, triathlons and the like, indoor recreation facilities such as bike parks & climbing gyms, and even progressive public/private partnerships such as "Biketown," Portland's new bike sharing program. Liability waivers and releases encourage the availability and affordability of sports, support services, and recreational opportunities.

In light of Bagley, pre-activity releases can no longer be relied upon to keep a recreation operator out of court, and many small independent businesses simply cannot afford the costs of defending themselves from lawsuits based on inherent risks of the activity in which their customers engage. As a consequence, the breadth and depth of recreational activities offered in the state is at risk, and in turn, virtually every Oregonian who recreates will be affected. In addition, ancillary businesses such as renters, retailers and manufacturers of outdoor equipment, as well as various other tourism sector partners, will be negatively affected by this.

This development strikes at the heart of Oregon's outdoor ethos, and its reputation as a destination for quality recreation. It flies in the face of our heritage, our cherished access to the great outdoors, our active lifestyle, as well as general health and well being, and that of our children.

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