

## OUTDOORS

# Future of Oregon outdoor recreation at stake as Legislature takes up liability bill

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It's been an expensive few years for Steve Koch, owner of Diamond Lake Resort in southern Oregon.

Koch and his family have owned the resort since 1956 and offer recreation year-round, including renting snowmobiles, boats, skis and snowshoes, while offering cat skiing and snow tubing on a lake nestled between Mount Thielsen and Bailey east of Roseburg.

He and other Oregon recreation business owners are facing an unexpected challenge to their bottom line: the rising cost of liability insurance following an Oregon Supreme Court decision and recent lawsuits.

“Our insurance went way up, and at first we couldn't get some of our activities covered,” Koch said. “It was a surprise. We used to have one policy that covered almost everything, but they wouldn't renew and we've ended up having to buy insurance from a bunch of different companies to cover all of our activities. We finally got it, but it's very expensive and restrictive. It wouldn't cover our guided snowmobiling, so we had to drop that.”

“It makes it tough when we're trying to keep prices moderate for the families that come up here,” he added. “Right now, Oregon is making it pretty hard to have outdoor recreation.”

To remedy the problem, a bipartisan group of lawmakers introduced state Senate Bill 754. The bill would essentially restore the legal power of liability waivers — an agreement that a person assumes the risk of a ski area or mountain bike park if they get injured.

“With this legislation, Oregon would return to the same standard as every other western state,” the group Protect Oregon Recreation, which is supporting the bill, said in a news release.

The bill faces opposition from the Oregon Trial Lawyers Association. They say the bill will make it harder for victims who are injured, paralyzed or even killed due to shoddy jumps or facilities to get needed money to pay for medical expenses.

“This bill would allow a recreational facility’s negligence to go unchecked,” the OTLA said in a statement. “It gives them blanket immunity and reason to not follow safety standards.”

The bill is scheduled for its first public hearing at 1 p.m. Wednesday in the Senate Judiciary Committee.

## **How did we get here?**

In 2006, 18-year-old Myles Bagley was paralyzed from the waist down when he crashed after going off an expert-level jump in the terrain park at Mount Bachelor.

Bagley and his lawyers claimed the resort was responsible because the jump’s design was flawed and the liability waiver he signed — when he purchased a season pass — was “unconscionable.”

The Deschutes County Circuit Court and the Oregon Court of Appeals ruled that by signing a liability release, Bagley had waived his right to sue.

But the Oregon Supreme Court disagreed and in December 2014 overturned the previous court decisions, ruling the waiver represented an “unconscionable contracts.”

“Plaintiff had no opportunity in this case to negotiate for different terms or pay an additional fee for protection against defendant’s negligence,” Justice David Brewer wrote in the decision. “Simply put, plaintiff had no meaningful alternative to defendant’s take-it-or-leave-it terms if he wanted to participate in downhill snowboarding.”

The lawsuit was allowed to continue and Bagley and the ski resort settled out of court for an undisclosed amount.

The issue simmered for years but burst back to the forefront last May when a Multnomah County jury awarded \$11.4 million to Gabriel Owens after he was injured while mountain biking at Mt. Hood Skibowl. The former professional mountain biker was riding an expert-level trail when he hit a drainage ditch, lost control and slammed into a signpost that left him paralyzed.

After the payout, Skibowl announced it was closing its mountain biking trails.

“Eliminating all risks with recreational activities — especially in downhill mountain biking through forests at high speed — is something that is just not possible,” the resort wrote.

## **Spike in insurance costs leads to increased prices**

The state Supreme Court decision and other verdicts have had a widespread impact across Oregon’s recreation businesses, according to Jordan Elliott, president of the Pacific Northwest Ski Areas Association, and multiple recreation business owners.

“What we’ve seen is more lawsuits filed for things that would normally be considered inherent risk — the stopgap has just been eliminated,” Elliott said. “The consequence is that insurance premiums are going up because they have to worry about paying out a lawsuit. It’s now a lot more expensive to operate a recreation business in Oregon than in other states. That cost gets passed on to Oregonians, making recreation more expensive, or eliminates it altogether.”

Safehold Special Risk, a custom insurance company, said they’d seen “a significant decrease in carrier underwriting appetite in Oregon for all types of recreational risks,

which has resulted in correlated increases to premiums.”

In some cases, the insurance crunch has resulted in small businesses being unable to even get insurance.

Peter Lunoak, owner of Flywheel Bicycle in Talent, said he wanted to offer a small number of mountain bikes for rental but couldn't get the needed insurance.

“It wasn't going to be a huge part of the business, but the idea was that people could pay a rental fee and take one of our high-end mountain bikes out for a trail ride and see if they wanted to buy it,” said Lunoak, who rebuilt the business after it burned down in the Almeda Fire. “It seemed like that would be simple but my insurance broker couldn't find anyone to cover it. She was really surprised. And since it's not a primary part of my business, I just dropped it for now.”

This is Elliott's main fear — that getting liability insurance will become such a hassle recreation businesses will simply drop it, damaging an industry that generates \$16.75 billion in economic activity in Oregon and employs 245,000 Oregonians in rural and urban areas.

“Without waiver reform, Oregonians risk losing access to their favorite outdoor activities across our state's mountains, trails, lakes and rivers,” he said in a news release.

## **Ski area response**

Oregon's largest ski areas have responded to the Supreme Court decision in different ways. At Mt. Hood Meadows, skiers now have the option of signing a “bifurcated release” — meaning if someone doesn't want to sign a liability release they can pay a little extra, Meadows spokesman Dave Tragethon said.

“This is to satisfy a condition in the Bagley ruling that the guest didn't have a choice except the sign the release. We've been doing that with season passes for several years and this year we have added that option to all of our day lift ticket, lesson and rental products,” he said.

“We would prefer that liability releases be enforceable so we don’t have these added steps and costs.”

## **Victims don't want resorts to have blanket immunity**

The Oregon Trial Lawyers Association, the main opponent of the bill, didn’t address the rise in insurance premiums facing recreation businesses but stressed the bill would make it harder to get relief for people injured by the negligence of another person or business.

Bagley and Owens, for example, weren’t cases of a snowboarder or mountain biker simply falling down or running into a tree. Both cases rested on the fact they were paralyzed by questionable design work and negligence by two major ski areas.

In the Owens case, the former professional mountain biker won a multi-million dollar judgement, from a jury, because he "crashed after hitting an unavoidable drainage ditch that the defendant built across the entire width of the Cannonball trail – a hazard that Skibowl’s own employees had warned the company about, was easily fixable and violated safety standards,” wrote Michael Rosenbaum, an attorney that represented Owens, to The Oregonian/OregonLive. “(Then) he struck a 4x4 post that had been placed far too close to the trail.

“He is paralyzed for life and faces millions of dollars in hospital bills. Skibowl is even scapegoating Gabriel as the reason it is suspending mountain biking operations on its website. As a result, my client has been receiving hate mail.”

Bagley, who was 18 at the time of the accident, was injured by what his lawyers called a faulty jump design at Bachelor's terrain park.

“You can’t give big corporations, like the out-of-state corporation operating Mt. Bachelor, a free pass on negligence,” Bagley said in a statement to the Statesman Journal. “I was just 18 years old and an expert snowboarder when my life was forever changed by their defective, man-made jump design. I’ll never walk again, and I can’t stomach the idea of that happening to someone else with no accountability or incentive for businesses and corporations to ensure safety for their patrons.”

Elliott said the goal of the legislation isn't to provide blanket immunity, but rather to give recreation businesses some protection against lawsuits and ease insurance costs.

“If a business is being grossly negligent, they will still face accountability,” he said. “But right now, it has become too easy to file a lawsuit. The hope here is to restore balance.”

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