

SB 1517 -1, -3 STAFF MEASURE SUMMARY

Senate Committee On Judiciary

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Meeting Dates: 2/4, 2/11, 2/16

WHAT THE MEASURE DOES:

The measure allows a ski area to enforce a release of liability signed by an adult skier waiving negligence claims against the ski area. It specifies exceptions and requires ski areas to allow patrons to opt out of the waiver for a fee. It also creates statutory duties for ski area operators and permits a negligence action when a violation of the standards causes the injury.

Detailed Summary

- Specifies exceptions to enforceability of ski area waivers by adults for:
 - claims for greater than ordinary negligence, including gross negligence
 - injuries not sustained during the act of skiing
 - injuries involving motorized vehicles and equipment used by the ski area
 - claims arising out of the statutory duties created by the measure
- Creates statutory duties for ski areas to do the following:
 - inspect slopes and trails for hazards beyond the inherent risks of skiing
 - warn of certain hazards
 - design, construct, and maintain constructed features consistent with industry best practices for the feature
 - comply with American National Standards Institute safety standards for passenger ropeways, aerial tramways, aerial lifts, surface lifts, tow and conveyors
- Requires ski area operators to allow a person to opt out of a waiver by paying a fee that does not exceed 10 percent of the ticket or pass purchase price
- Applies to claims that arise on or after the measure's effective date

FISCAL: May have fiscal impact, but no statement yet issued.

REVENUE: May have revenue impact, but no statement yet issued.

ISSUES DISCUSSED:

- Provisions of the measure
- State policy options to provide insurance for outdoor recreation businesses

EFFECT OF AMENDMENT:

-1 Creates a cause of action against a person acting under color of law for deprivations of rights, privileges or immunities secured by the United States Constitution.

-3 The amendment replaces the measure and makes changes to laws providing landowners immunity from damages arising out use of land for recreational purposes without charge.

Detailed Summary

- Conditions immunity on a lander user's use of for recreational activities instead of use of the land for recreational purposes
- Extends immunity to landowners who charged for entry for limited use, if the damages arise from the land user's forbidden or unexpected use
- Removes condition that the owner directly or indirectly permitted the entry

- Extends immunity to damages arising from trails, paths, stairs and bridges that are accessible on foot, horse, or bicycle, improvements on the land, private roads, and machinery or equipment on the land, unless the owner intended to cause harm
- Repeals laws granting these extended immunities only to local governments for use of unimproved rights of way

BACKGROUND:

To succeed in a negligence claim, a plaintiff must prove that: (1) the defendant's conduct was negligent, (2) the defendant's negligent conduct was a cause of harm to the plaintiff; and (3) the harm was reasonably foreseeable. See *Oregon Uniform Civil Jury Instructions 20.01*.

Negligence claims are "common law" claims pre-existing Oregon statehood, honed by the courts over many years. The common law of contracts also predates statehood, and Oregon jurisprudence recognizing the courts' authority to refuse to enforce unconscionable contracts dates to at least 1886. Procedural unconscionability factors include oppression and surprise, while substantive unconscionability turns on whether the contract's terms contravene public interest or public policy. *Bagley v. Mt. Bachelor*, 356 Or. 543, 551-556 (2014) (en banc).

In the *Bagley* case, the Oregon Supreme Court weighed factors for and against enforcement and unconscionability of a ski resort's anticipatory release waiving negligence claims for a snowboarder injured while executing a jump in a terrain park the resort constructed. The court found supporting procedural factors included disparity in bargaining power between the parties and that the release was take-it-or-leave-it. It reviewed substantive unconscionability through the lens of businesses' heightened duty of care toward paying patrons (invitees) on their premises. It found that enforcing the waiver would create a harsh and inequitable result because defendant was in a better position than invitees to "guard against the risk of harm to its patrons arising from its own negligence in designing, creating, and maintaining its runs, slopes, jumps, and other facilities" and the resort had a "superior ability to absorb and spread the costs associated with insuring against those risks." The court also concluded that performance of the resort's duties under premises liability law affected the public interest. Finally, the court found that public policy favors deterrence of negligent conduct, reasoning that ski area operators would lack a legal incentive to avoid creating unreasonable risks of harm without potential exposure to liability. *Id.* at 572-573.