Civil Actions - Waiver Thwarts Injured Skiers Negligence Lawsuit

By John T. Wolohan
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Comments (1)

When trying to determine whether a waiver is valid, one of the first things the courts do is attempt to determine whether the service provider informed the injured individual about the waiver. Next, the court examines whether the individual (assuming his or her injury was caused by the negligence of the service provider) knowingly and willingly relinquished his or her right to sue the provider.

In cases in which individual waivers aren't feasible (athletic or recreational facilities, for example, that admit thousands of people onto their property each day), service providers usually try to protect themselves by placing a waiver on the back of the individual's admission ticket. In these cases, since the service provider is trying to enforce a waiver against someone who may not even be aware of its existence — who therefore may not knowingly have intended to release the service provider from liability — such waivers are often found to be void.

Ski areas are one notable exception, as demonstrated by the United States District Court for the District of Oregon's decision in Silva v. Mt. Bachelor [2008 U.S. Dist. LEXIS 55942]. David Silva, an avid skier who had skied at numerous resorts throughout the United States, purchased an all-day pass at Mt. Bachelor, an Oregon ski resort that offers nearly 3,700 acres of varied terrain. At each of Mt. Bachelor's ticket windows, signs are posted stating, "[T]he back of your ticket contains a release of all claims against Mt. Bachelor and its employees or agents. Read the back of your ticket before you ski or ride the lift or use any of the facilities of the area. . . . If you do not agree to be bound by the terms and conditions of the sale of your ticket, please do not purchase the ticket or use the facilities at Mt. Bachelor." On the back of every Mt. Bachelor ski ticket, there is the following language:

> **READ THIS RELEASE AGREEMENT**
> In consideration for each lift ride, the ticket user releases and agrees to hold harmless and indemnify Mt. Bachelor, Inc., and its employees and agents from all claims for property damages, injury or death which he/she may suffer or for which he/she may be liable to others, arising out of the use of Mt. Bachelor's premises, whether such claims are for negligence or any other theory of recovery, except for intentional misconduct.

While skiing in an ungroomed area, Silva fell and injured his knee. Silva filed a lawsuit against Mt. Bachelor, alleging that the resort failed to maintain the ski area in a reasonably safe manner. At trial, Silva argued that as an invitee onto the property, Mt. Bachelor owed him certain legal

duties or obligations, including: 1) to inspect the facility to discover defects or hidden hazards; 2) to remove or repair dangerous conditions; and 3) to warn users of hidden hazards or dangerous conditions. Mt. Bachelor, however, denied all liability and moved for summary judgment, arguing that Silva's claims were barred by the release from liability on the back of all Mt. Bachelor tickets, to which Silva voluntarily agreed when he purchased his ticket.

While conceding that one party may contract to limit another party's liability for negligence, Silva challenged Mt. Bachelor's summary judgment motion by claiming that the release on the back of his Mt. Bachelor ski pass was not a valid release of liability. Silva presented three arguments. First, he claimed that the release was not enforceable because the parties did not negotiate the terms at arm's length in a commercial setting. Second, he argued that since he did not sign anything, he did not knowingly agree to the release. Finally, he argued that the terms of the release were overly broad because it purported to cover all claims under any theory of recovery except intentional misconduct.

In rejecting Silva's first argument, the court found that no court in Oregon had ever held that a release from liability in a recreational context was void for violating public policy. In support of this finding, the court noted that Silva voluntarily chose to ski at Mt. Bachelor and that the ski resort does not provide essential public services. The release from liability, therefore, was valid and could not be deemed a "contract of adhesion" (defined as a contract so imbalanced in favor of one party that there is a strong implication it was not freely bargained).

As for Silva's second argument, the court ruled that even if Silva did not read the release on the back of his ski pass or any of the signs at the ticket windows, the pass and signs clearly advise skiers of the significance of the release agreement. In addition, the court found that since Silva was an experienced skier, he knew or should have known that his lift ticket would contain a release. Silva even admitted at trial that he expected that his lift ticket would contain a release and that he understood the terms of the release. As a result, the court ruled that Silva could not claim that the release was invalid because he did not see it or because Mt. Bachelor did not make the release and its terms known to him.

Silva's final argument was also rejected by the court, which ruled that in order to show that the release was overly broad, Silva would have to first show that, as applied, the terms of the release were unenforceable on grounds of public policy. As stated already, Mt. Bachelor's release did not violate Oregon public policy. Therefore, the court ruled, regardless of whether the waiver attempted to release Mt. Bachelor from other theories of liability besides negligence, it still did not preclude enforcement of the release in Silva's case, since Silva was claiming negligence and agreed that Mt. Bachelor had the right to limit its liability for negligence.

While there is no harm in including a waiver on the back of an admission ticket (baseball teams have for years warned spectators of the dangers of foul balls entering the seating bowl), the use of such waivers by service providers outside the ski industry will probably not stand up in court. Once again, in most cases, in order for a release to be valid, an injured individual must first be notified of all the risks associated with an activity, and then he or she must voluntarily accept those risks by willingly relinquishing the right to sue the service provider if he or she was injured due to the negligence of the provider. The major difference with regard to the ski industry is that

it is so inherently dangerous that most states with ski resorts have enacted legislation specifically protecting them from liability.

Finally, while the court did not address the issue at trial in the Mt. Bachelor case, it should be noted that a person's status as an invitee is usually only granted for a designated area and purpose. Therefore, it could have been argued that once Silva left the groomed area of the mountain, his legal status changed from invitee to a licensee, and Mt. Bachelor did not owe him the same high standard of care. This argument, however, would probably only work if the area in which Silva was injured was not just ungroomed, but roped off from the public.

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