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Testimony of Arthur Towers
OTLA Political Director
In Opposition to SB 754
Before the Senate Committee on Judiciary
February 15, 2023

Chair Prozanski, Vice=Chair Thatcher, and members of the committee, thank you for the opportunity to submit testimony in opposition to SB 754.

Blanket immunity for recreational activities has no place in Oregon law
Negligent wrongdoers need to be held accountable

Special interests will try to convince you that ski resorts and other recreational corporations should get a "free pass" when it comes to responsibility for their negligence causing injuries to their customers.

Senate Bill 754 allows recreational facilities to force their customers to waive their rights to compensation and to their day in court if they are harmed due to negligence. And consumers often don't even know they are waiving their rights because it is part of purchasing a lift ticket or in the fine print on the ticket they purchased.

The recreational immunity offered in **SB 754** is the equivalent of a "free pass" or a permanent "stay out of court" card for wrongdoers. It gives them the power to act negligently without regard to public safety or health, with no fear of accountability or being held responsible for their actions. The growing push for immunity via legislation represents a major threat to our system of civil justice and any concept of accountability.

Under SB 754, facilities that cut corners on safety matters get precisely the same protections as those that go the extra mile to keep customers safe. Many Oregon businesses play by the rules and prioritize safety, put money and resources into making sure they are following safety standards, and their employees are fully trained. This legislation would create an incentive for companies to NOT invest in safety features, training for staff and maintenance of equipment because there would be no accountability if their failure to do so caused harm or death to a customer.

Inherent risk is still a factor when determining responsibility. Nothing in the Bagley Supreme Court decision (2016) changed that. Many outdoor activities like skiing, mountain

biking and whitewater rafting have dangers associated with them. We all know those activities are inherently risky. Paying customers need to access their own limitations and act accordingly. In some instances, the injury is the fault of the skier or biker or rafter doing things beyond their skill level or being careless. Skiers crash. Mountain bikers can hit rocks or be riding too fast for a turn. Those are examples of inherent risk and do not constitute negligence by the business. In 1979, the legislature passed an industry-backed law regarding inherent risk that still remains on the books.

The Oregon Supreme Court ruled in December, 2014 Bagley decision that a ski resort has " ... the expertise and opportunity to foresee and control hazards of its own creation on its premises, and to guard against the negligence of its employees" (Bagley v. Mt. Bachelor ruling, www.publications.ojd.state.or.us/docs/S06 l 82 l .pdf, p.563)

The Court ruled that enforcement of the waivers of liability or releases that are on ski resorts' lift tickets are "unconscionable." Unconscionable is one of the strongest terms of art that the Court uses. In the court's eyes, something is unconscionable if it is "oppressive" or "unfair."

One important factor the Court considered was that one party to the contract was a commercial entity and the other was a family, who would be required to sign the release on a take-it-or-leave-it basis as a condition of using the facilities. This alone (p.561-562) would not be enough to make the waiver or release unconscionable, but the widespread use of these contract clauses at all such facilities gives families no alternative of skiing or snowboarding in Oregon. "Business owners and operators have a heightened duty of care towards patrons - invitees - with respect to the condition of their premises that exceeds the general duty of care to avoid unreasonable risks of harm to others." (p. 563)

While there certainly is an inherent risk of skiing, under that statute (the Skier Responsibility Law), “skiers do not assume responsibility for unreasonable conditions created by a ski area operator insofar as these conditions are not inherent to the activity.” (p 564).

“Ski resorts, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises and train their employees in risk management. They alone can insure against risks and effectively spread the cost of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct risks of harm and they cannot insure against the ski areas’ negligence.” (p 567).

SB 754 eliminates the right of injured people to tell their story to a jury. That is why the Oregon Supreme Court ruled nearly a decade ago that waivers, denying people this right, are unconscionable. Not every injured person is injured due to negligence, but every injured person due to negligence deserves to be able to tell their story to a jury. It is their constitutional right.

VOTE NO on Senate Bill 754