

SB 1517 -1, -3, -6, -7 STAFF MEASURE SUMMARY

Senate Committee On Judiciary

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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.

FISCAL: Has minimal fiscal impact

REVENUE: Has minimal fiscal impact.

ISSUES DISCUSSED:

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

EFFECT OF AMENDMENT:

-1 The amendment 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.

-6 The amendment replaces the measure and allows recreation operators to require a liability release from patrons for ordinary negligence for injuries sustained while in the act of performing the sport, fitness, or recreational activity.

Detailed Summary

- Defines 'operator' to include persons who offer the opportunity to participate in a sport, fitness or recreational activity, or who provides a facility or place for the activity
- Defines 'sport, fitness or recreational activity' to include indoor or outdoor activity involving elements of inherent risk, and it gives examples
- Excludes claims which cannot be waived with a liability release, including claims for greater than ordinary negligence and claims relating to:
 - Injuries not sustained during the act of performing the activity
 - Equipment or safety gear that the operator designed, used, manufactured, provided, maintained, or inspected
 - Negligent hiring and supervision
 - Failure to warn of known hazards that are not inherent risks
 - Vehicle operation, maintenance, or use, unless the participant uses the vehicle as part of the activity

-7 The amendment incorporates the -6 amendment but removes "fully" as it modifies the word "disclose" in the requirement that a conspicuous release disclose risks associated with the activity and that signing the release waives liability regarding those risks.

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*. A possessor of land has a duty to make the premises safe for persons who visit at the possessor's express or implied invitation and who provide economic interest with their presence. See *Oregon Uniform Civil Jury Instructions 46.08, 46.09*. "The possessor must exercise reasonable care to discover any condition that creates an unreasonable risk of harm to the invitee and either eliminate the condition or warn any foreseeable invitee of the risk so the invitee can avoid the harm." See *Oregon Uniform Civil Jury Instructions 46.09*. The visitor (invitee) also has a duty "to exercise reasonable care to avoid harm from a condition on the premises of which the invitee knows or, in the exercise of reasonable care, should know." See *Oregon Uniform Civil Jury Instructions 46.10*.

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.