PROTECT OREGON RECREATION

How We Got Here

For almost a century, Oregon courts uniformly enforced clear, unambiguous anticipatory liability waivers so long as the good or service was not an essential public service, including liability waivers signed by participants in recreational sports. In 2014, in Bagley v. Mt. Bachelor, without any input from the Oregon Legislature, the Oregon Supreme Court pronounced a new public policy and changed the law, reversing both the trial court and the Oregon Court of Appeals, and held that pre-injury liability waivers executed by recreational participants were unconscionable and unenforceable.

Waiver reform advocates seek to restore the balance between personal and provider responsibility in Oregon law. Reform proposals, which would only allow enforcement of pre-injury releases for ordinary negligence (not gross negligence or intentional misconduct), restores the balance that existed for decades in Oregon, and aligns Oregon public policy with all other western states, including Washington, California, Idaho, Colorado and Utah.

A look at the Oregon trails that were blazed prior to 2014

The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations. W.J. Seufert Land Co. v. Greenfield, 262 Or 83, 90-91 (1972).

"It is elementary that public policy requires that …contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice, and it is only when some other overpowering rule of public policy…intervenes, rendering such agreement illegal, that it will not be enforced." Eldridge et al v. Johnston, 195 Or 379, 405 (1952). *"The principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises."* Restatement (Second) of Contract, Intro. Note to Ch. 8 (1981)

With respect to liability waivers, *"there is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please, unless to permit them to do so would contravene the public interest."* Irish & Swartz Stores v. First Nat'l Bank, 229 Or 362, 375 (1960). Thus, prior to the Bagley decision, a liability release was only found void against public policy where it (1) violates a law or policy that has been expressly articulated by the Oregon legislature or other governing lawmaking body; or (2) violates the judicially-stated requirements that the release be (a) unambiguous; (b) limited to "ordinary negligence"; and (c) not involving an "essential public service."

When a plaintiff claimed that a liability waiver was unconscionable, Oregon courts applied a substantive rigor to a plaintiff seeking to avoid the consequences of contracts they freely signed. Oregon courts recognized that *"the doctrine of unconscionability does not relieve parties from all unfavorable terms that result from the parties' respective bargaining positions; it relieves them from terms that are unreasonably favorable to the party with greater bargaining power. Oregon courts have been reluctant to disturb agreements between parties on the basis of unconscionability."* Hatkoff v. Portland Adventist Medical Center, 252 Or App 210 (2012).

Prior to the Bagley decision, and in line with Oregon principles of personal responsibility, economic freedom and freedom of contract, Oregon courts uniformly enforced these strong contractual freedom principals in evaluating anticipatory waivers, with the sole exception being essential public services, such as public utilities, banking, common carriers, etc., being where the court found such releases unconscionable against public policy.

Decisions upholding such contract waivers include the following:

K-Lines v. Roberts Motor Co., 273 Or 242, 248 (1978):
The court enforced a liability waiver in a commercial sales agreement, stating, "there is nothing inherently bad about a contract provision which exempts one of the parties from liability. The parties are free to contract as they please, unless to permit them to do so would contravene the public interest."

Mann v. Wetter, 100 Or App 184, rev den 309 Or 645 (1990):
The court enforced a liability waiver in a scuba diving school contract, including for the school's own negligence, because the diving school does not provide an essential public service, and the waiver was clear and unambiguous.

Harmon v. Mt. Hood Meadows Ltd., 146 Or App 215 (1997):
The court enforced an executed liability waiver in a season pass application because the release was clear and unambiguous, and expressly included ordinary negligence, which was plaintiff's claim, and skiing was not an essential public service.

Steele v. Mt. Hood Meadows Ltd., 159 Or App 272 (1999), rev den 329 Or 10:
The court enforced an executed liability waiver in a season pass application in a wrongful death case because the release was clear, unambiguous and included specific reference to the operator's ordinary negligence.

Silva v. Mt. Bachelor, Inc., 2008 WL 2889656 (D. Or. 2008):
The court enforced an executed liability waiver recognizing that "no Oregon court has held that a release from liability in a recreational contract…offends public policy and is unenforceable." "Further, the release from liability is not invalid as a contract of adhesion, because plaintiff voluntarily chose to ski at Mt. Bachelor and the ski resort does not provide essential public services."

With such longstanding case law already in place, how did we get to here?

Bagley v. Mt. Bachelor, Inc.

A legal maxim states "Hard Cases Make Bad Law," meaning that sometimes courts bend or contort the law because strict application of the law, under the facts of that case, would create an unfair result. Such was the Bagley case. The problem is that the Bagley ruling now applies generally to all contractual waivers in Oregon. This over-expansion of the Bagley court's public policy pronouncement has created unintended consequences far beyond the ski industry to businesses like gyms, trail and river guides and mountain biking operations.

Myles Bagley was a lifetime skier and snowboarder. He was exceptionally- skilled and experienced. He was a season pass holder at Mt. Bachelor and had been for each of the three years before he was injured. He classified himself as an "advanced expert." He spent the vast majority of his time at Mt. Bachelor in the terrain parks (contained portions of the ski area where the ski area builds features for skiers and snowboarders to jump and perform other activities), performing jumps and aerial tricks, including back-flips, front-flips and 900 degree spins. In the season in which he was injured he was 17 years old when his father signed a release of liability on his behalf as his guardian. He rode the lifts no less than 119 times on 26 days and he celebrated his 18th birthday before his injury. Tragically, he was partially paralyzed as the result of his injury and subsequentially filed a lawsuit against Mt. Bachelor.

Mt. Bachelor filed a motion in the trial court to dismiss Bagley's lawsuit on the grounds that he had executed a clear and unambiguous waiver when he obtained a season pass. The trial court, applying the well-established law set forth above, granted the motion and dismissed the claims. Bagley appealed and the Court of Appeals affirmed the trial court. It issued a well-reasoned opinion applying Oregon precedent from Mann, Steele and Harmon. It concluded:

"Accordingly, given existing case law and the aforementioned substantive rigor that we apply in assessing claims of unconscionability…we conclude that the terms of Mt. Bachelor's release were not substantially unconscionable under these circumstances. That is, the inclusion of the release provision did not constitute 'one of those rare instances' where the terms of the contract were so unreasonable favorable to Mt. Batchelor that they were unconscionable."

The Bagley's then appealed to the Oregon Supreme Court, and the Oregon Trial Lawyers Association filed an amicus brief seeking to throw out Bagley's liability waiver. The Oregon Supreme Court discarded decades of Oregon precedent and held that anticipatory liability waivers were unconscionable as a matter of law. The Court created a test for procedural and substantive unconscionability out of whole cloth, not supported by prior Oregon law, holding that courts must apply four highly factual factors for procedural unconscionability, and three highly factual factors for substantive unconscionability, including such vague and one-sided concepts as "substantial disparity in the parties' bargaining power," and "whether enforcement of the release would cause a harsh or inequitable result."

The Oregon Supreme Court made little to no effort to explain why it was departing from decades of Oregon precedent, or to justify its holding in light of the majority of states enforcing such releases. Oregon's strong culture of freedom of contract was abrogated in a single decision by seven justices.

Of particular note is the **Oregon Supreme Court's departure** from Oregon's long-standing precedent of the distinction between anticipatory liability waivers **in cases involving essential public services and cases involving non-essential services** like skiing and other recreational activities. This distinction was and is critically important. An individual does not need to ski and snowboard, or exercise at a gym, or go on a guided rafting trip. These are voluntary, yet often inherently dangerous, recreational activities. This has been an important feature of Oregon law since Mann v. Wetter.

As the Court of Appeals said in its decision in the Bagley case, "unlike the skier," an individual who cannot obtain automobile insurance or rent a place to live, the skier does not have a "need for these goods and services, merely a desire." "The skier merely faces the prospect of a ski-less weekend." The Oregon Supreme Court wrongfully discarded this important distinction. Oregon's recreation and fitness providers enable individuals to access recreational and fitness activities.

These are leisure activities. If an individual does not want to execute a release, they can access these activities on their own, without the benefit of the skill, expertise and services of Oregon's providers. This is a voluntary exchange between competent adults of the provision of recreational services in exchange for a user agreeing to be responsible for their own safety, and to release the operator from claims for ordinary negligence (not intentional misconduct or gross negligence).

While the Bagley decision purports to allow a situation in which releases could still be enforced, the actual factors created by the court make it impossible to enforce this type of release contract. In the ten years since the Bagley case, not a single release like the one in *Bagley v. Mt. Bachelor Inc*. has been upheld by an Oregon court. This is a dramatic change in Oregon law. Such dramatic changes in law and public policy should be made only by the elected Oregon Legislature, not by the Oregon Supreme Court.

After all of the various courts weighed in on the tragic incident, what did that final supreme court decision mean for the case of Bagley v Mt. Bachelor Inc?

It simply meant that the waiver could not be enforced, and therefore the lawsuit that the Bagley family filed against Mt. Bachelor could then proceed. The opportunity to take the facts of the case before a jury and ask them to determine if there was any negligence by either party, or if the injuries were caused by the inherent risks of the activity, was available to both parties. However, the two parties then chose not to take the facts to a jury. The case was settled out of court. The two parties had the opportunity to argue the facts, and they chose not to. The plaintiff's claim against the ski area, and the ski area's defense against the claim, were mutually and legally settled.

The Unintended Consequence: Oregon Became Out of Alignment with Other Western States

While the specific case that knocked Oregon off balance stemmed from a ski area, there is nothing in the text of the supreme court decision that speaks specifically to releases only used at ski areas. The new precedent, was that all releases of liability like that one signed by the Bagley family, were no longer enforceable. The same types of waivers used by rock climbing and river rafting guides, fitness centers, golf facilities, for rodeo athletes, bike and running races, etc. The list goes on and on. Opponents of proposed reform work hard to make the situation appear as though it only affects ski areas and therefore a ski area only solution is the fix. The public record and legal facts verify the contrary.

The unintended consequences of the 2014 Oregon supreme court decision should be legislatively corrected because Oregon is now out of alignment with other Western states, putting our recreational providers at a serious disadvantage. Releases are enforceable in our neighboring states of Idaho, Washington and California. California is widely recognized as being one of the most regulatorily onerous states in the nation, and yet even California enforces parties' voluntary agreements to waive claims for ordinary negligence.

They are also enforceable in other traditionally progressive states, like Massachusetts and New Jersey. The Bagley court explicitly relied upon decisions in Utah and Vermont, but Utah courts enforce liability releases, and Vermont's ski industry has been significantly and negatively impacted by the inability to freely contract with skiers and snowboarders. See Penunuri v. Sundance Partners, Ltd., 2013 UT 22, ¶ 25, 301 P.3d 984 (2013) ("i]t is well settled that preinjury releases of claims for ordinary negligence can be valid and enforceable.").

In an industry in which consumers often have the choice to recreate in any state, Oregon operators are at a significant disadvantage in competing with operators in other states because Oregon operators' costs are significantly higher due to higher insurance premiums as a result of the Bagley decision, and some operators refuse to operate in the state due to the inability to freely contract with their customers as to risk allocation. Releases Do Not Violate Public Policy. Personal injury lawyers (who are the chief opponents of waiver reform because their personal wealth depends on preventing recreational operators from freely contracting with their customers) claim that anticipatory releases violate public policy.

This claim is false for a lot of reasons. First, the long-standing Oregon line of cases discussed above demonstrates otherwise. Second, it is the province of the Oregon Legislature to determine public policy, not the Oregon Supreme Court, and the Oregon Legislature has never outlawed such releases. Third, most outdoor recreation in Oregon takes place on federal public lands and the U.S. Congress and President Biden, in a rare bipartisan moment, recently passed the Federal EXPLORE Act which, among other things, makes it clear that exculpatory releases are enforceable under federal law on federal land and should include the United States as a releasee. See Section 319 of the EXPLORE Act. The federal government has now clearly stated that it is the public policy of the United States to allow the use of releases on its land. Oregon should also enforce that reasonable public policy.

Waivers are consistent with public policy because they operate as warnings to participants that they are responsible for their own safety and they encourage participants to be cognizant of the risks they are taking with their own actions.

Advocates wanting to Protect Oregon Recreation seek to restore the balance between personal and provider responsibility in Oregon. The Oregon Supreme Court improperly ignored long-standing Oregon precedent and invaded the province of the Oregon Legislature by pronouncing new public policy when it decided the Bagley case. The Legislature should restore Oregon public policy by passing this commonsense reform, which provides a reasonable and balanced approach, protects users and providers, and realigns Oregon with other western states including California, Washington, Idaho, Utah and Colorado.

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