

# OREGON LAW UPDATE

## Enjoy Snow Sports? Releases Force Participants to do so at Their Own Risk

case in point...

**From the Desk of Jeff Eberhard:** Contracts that include release and indemnity provisions can effectively insulate a party from claims of negligence. These contracts are particularly useful to a proprietor of recreational activities, as there are numerous ways patrons can injure themselves while engaged in such activities. Two issues that can arise are (1) whether the terms of the release are enforceable and (2) if a minor agrees to a release, whether the minor's actions after reaching the age of 18 can ratify the contract and make the release enforceable. A recent case is instructive on both points.

**Claims Pointer:** Insurers should be aware that a "clear and unequivocal" release, placed in a conspicuous location, which clearly states that a contracting party is released from negligence, is likely to be upheld. Moreover, when a minor agrees to such a release, repeated engagement in the activity after the minor turns 18 can ratify a contract that the minor could have otherwise avoided, within a reasonable time, after reaching the age of majority. "Grommets" (a.k.a young snowboarders) who cruise into adulthood, without reevaluating contracts entered into as minors, run the risk of being held to the terms of a release.

Bagley v. Mt. Bachelor, 258 Or. App. 390 (2013).

In September 29, 2005, two weeks prior to Al Bagley's ("Bagley") 18th birthday, he purchased a "season pass" from Mt. Bachelor. Bagley was an experienced snowboarder and he had purchased season passes from Mt. Bachelor in each of the three preceding years. On November 18, 2005, Bagley began to use the pass which contained a release and indemnity agreement that read:

"IN CONSIDERATION OF THE USE OF A MT. BACHELOR PASS AND/OR MT. BACHELOR'S PREMISES, I/WE AGREE TO RELEASE AND INDEMNIFY MT. BACHELOR, INC., ITS OFFICERS AND DIRECTORS, OWNERS, AGENTS, LANDOWNERS, AFFILIATED COMPANIES, AND EMPLOYEES (HEREINAFTER 'MT. BACHELOR, INC.') FROM ANY AND ALL CLAIMS FOR PROPERTY DAMAGE, INJURY, OR DEATH WHICH I/ WE MAY SUFFER OR FOR WHICH I/ WE MAY BE LIABLE TO OTHERS, IN ANY WAY CONNECTED WITH SKIING, SNOWBOARDING, OR SNOWRIDING. THIS RELEASE AND INDEMNITY AGREEMENT SHALL APPLY TO ANY CLAIM EVEN IF CAUSED BY NEGLIGENCE. THE ONLY CLAIMS NOT RELEASED ARE THOSE BASED UPON INTENTIONAL MISCONDUCT."

Bagley used his season pass at least 119 times during the course of 26 days spent snowboarding at the ski area. On February 16, 2006, Bagley suffered serious

injuries, including permanent paralysis, while snowboarding over a "jump" in Mt. Bachelor's terrain. Bagley sued Mt. Bachelor for negligence in design, construction, maintenance and inspection of the jump.

Mt. Bachelor responded by claiming the defense of release, pointing to the release language located on the back of the ski ticket, and an additional release signed by Bagley's father. Mt. Bachelor also moved for summary judgment on the grounds that Bagley failed to disaffirm release within a reasonable time after turning 18. Bagley filed a cross-motion for summary judgment, arguing that, by notifying Mt. Bachelor of his injury with a required notice under ORS 30.980 and by filing his negligence suit within the statute of limitations, he disaffirmed the contract in a timely manner. He also raised, as a defense, the fact that the release was executed before he turned 18. Last, Bagley argued that the question of whether he affirmed the release was an issue for the jury; and the release was procedurally and substantively unconscionable. The trial court agreed with Mt. Bachelor that Bagley's use of the pass following his 18th birthday constituted affirmation of the agreement, and it rejected the argument that the release was unconscionable because snowboarding was not an essential service.

On appeal, both parties continued to make the same arguments they made in trial court. The Court of Appeals held that there was no genuine issue of material fact because no reasonable juror could find that Bagley disaffirmed the release. Bagley used his



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season pass at least 119 times after he turned 18, which objectively manifested his intent to affirm the release. The Court explained that a minor's life experiences are relevant in determining whether a contract had been ratified. The Court emphasized the fact that Bagley signed the release two weeks before his 18th birthday, he had purchased ski passes at other ski resorts, in addition to Mt. Bachelor in the previous three years, and he was an experienced snowboarder, who knew the risks involved in the sport. Additionally, the language of the release was unambiguous, heavily emphasized and omnipresent, as it was printed on the back of the ski pass Bagley was required to carry at all times. Since Bagley ratified the contract, there was no way for him to disaffirm it. The Court also noted that it was irrelevant that Bagley did not know that he could disaffirm the release and that it absolved Mt. Bachelor for its own negligence.

In reaching the issue of whether the release was void under public policy, the Court held that the release "clearly and unequivocally" expressed Mt. Bachelor's intent to disclaim liability for negligence. The Court assessed the parties' obligations and expectations under the contract, noting that Bagley understood the risks involved in snowboarding and the agreement stated that the only claims which were not released were claims for intentional misconduct. The Court also rejected Bagley's argument that the release was unconscionable. The release was not procedurally unconscionable because the activity to which the release applied was recreational. Additionally, there was no unfair surprise because the terms were clear and unambiguous. The Court also rejected Bagley's argument that the release was substantively unconscionable due to the unequal bargaining power of the parties. In coming to its conclusion, the Court noted that ski-related contracts were not impermissibly adhesive.



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