

Tom Buchanan

Postal Address: PO Box 261 ~ Londonderry ~ Vermont ~ 05148
802-824-4243 (Legacy) 802-451-6097 (Mobile)
Email: BuchananVermont@gmail.com

Representative Maxine Grad, Chair
Mike Bailey, Committee Assistant
Vermont House Committee on Judiciary

Re: S.18, “An act related to consumer justice enforcement”

March 5, 2019

I am writing to the House Committee on Judiciary regarding [S.18](#), which passed out of the Vermont Senate last week and is likely to be taken up by the House next week. S.18 has drawn my attention because it would advantage commercial operators of high risk recreational activities (such as ski resorts), while disadvantaging individual participants. I hope you will share my comments with members of the House Committee on Judiciary in anticipation of the arrival of this bill.

I have been employed in Vermont as a ski and snowboard instructor for 17 years. I also worked for 25 years as a contracted skydiving instructor, including a brief period at Vermont Skydiving Adventures in Addison, Vermont. And I have been employed teaching and guiding fly fishing programs in Southern Vermont for 13 years. I have participated in numerous recreational/adventure activities and sports including skiing, heli-skiing, snowboarding, skydiving, BASE jumping, piloting (fixed wing and gliders), bungee jumping, rock climbing, zip lining, ropes challenge courses, circus arts trapeze/aerials, SCUBA diving, kayaking, white water rafting, fishing (river, lake, ocean), hiking, backcountry camping, archery, shooting sports, mountain biking, and others. Along the way I have been compelled to sign hundreds of contracts/waivers that include obviously unconscionable terms, but always hoped that those terms would be rejected by reasonable courts if there was a credible basis to do so.

GENERAL CONCERNS

S.18 is generally good legislation designed to protect consumers from unconscionable contract terms, and it handles that task reasonably well. Unfortunately the Senate Committee on Judiciary deleted a challenged description of legislative intent and replaced it with a new troubling clause as part of a last minute ‘strike all’ (see page 208 of the [Journal of the Senate](#), draft language: 9 V.S.A. §6055(e)(2)). This replacement language offers extraordinary protection for large commercial ski operators and other commercial recreational activity, sports, and competition operators, while disadvantaging the interests of actual people, and potentially upending the delicate balance of Vermont Workers Compensation.

I urge your committee to recognize the harms of exempting the ski and recreational industry from this otherwise favorable legislation, and to instead protect the hundreds of thousands of people who

use Vermont ski mountains and other recreational/sports facilities each year; the thousands of individuals who are injured while using these facilities; and Vermont employees, many of whom face unnecessary and easily mitigatable risks and are increasingly being subjected to unconscionable liability waivers designed to encompass hazards directly controlled by business entities.

As an example of unconscionable language that compels a participant to waive a right to assert claims or seek remedies otherwise provided by State law, please see paragraphs two and three of the attached “Resort Activity” waiver required by Vail Resorts for guests using lesson, rental, or other services at both Stowe Mountain and Okemo Mountain Resorts in Vermont. The Resort Activity contract/waiver compels participants to assume “*ALL INHERENT DANGERS AND RISKS of the Activity,*” and then goes on to require the participant to “*expressly acknowledge and assume all additional risks and dangers that may result in property damage, physical injury and/or death, which may be above and beyond the inherent dangers and risks of the Activity*” (emphasis in the original). The contract/waiver then lists multiple risks, including many that are exclusively under the control of the resort/provider and can’t be reasonably identified or mitigated by the participant. These obviously unconscionable contract/waiver terms are a blatant attempt to infinitely expand the concept of “inherent risk” beyond anything contemplated by [12 V.S.A. §1037](#) (“*Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.*”)

ACTUAL RISKS UNKNOWN

There are certainly “inherent risks” associated with many of the activities contemplated for exemption under S.18, but there are also plenty of risks that may not be obvious to participants or necessary, and unexpected injuries are far too common. There are no regulations requiring ski resorts to track on mountain hazards, fatalities, or injuries, and it is almost impossible for a typical consumer to determine how risky a resort or ski trip might be. The same applies to most other recreational activities and sports that S.18 seeks to exempt from prohibitions of unconscionable contract/waiver terms, rendering it impossible for a typical consumer to provide informed consent.

The Vermont ski industry often points to roughly four million annual Vermont skier days as economic value that justifies special consideration for the industry, but I caution you to think instead of the thousands of actual participants who will be directly harmed by corporate liability relief for the ski industry and other activity providers. Notably, based on [fatality](#) and [catastrophic injury rates](#) quietly published by the National Ski Area Association (a national trade organization representing ski operators), Vermont’s four million annual skier days likely result in roughly 2.7 annual on-mountain fatalities and at least 3 annual catastrophic injuries. NSAA is almost certainly underreporting catastrophic injury rates, and NSAA doesn’t make any effort to catalog less serious injuries, as explained by the California based [Snow Sport Safety Foundation](#), an independent education, research and public information organization. A reasonably conservative injury reporting rate of 2.5 per 1,000 skier days published in the [American Journal of Sports Medicine](#) (1999) yields a staggering 10,000 annual skier injuries in Vermont (mostly non-life threatening). It is doubtful the

typical ski participant understands the level of risk they are exposed to. Many of these injuries and fatalities are preventable, and the industry shouldn't be given relief from liability that is not afforded other Vermont industries. Each of the additional recreational activities and sports covered by the broad language of draft §6055(e)(2) has its own unique risks, many unknown and unknowable to consumers, and unexamined by the Senate Committee on Judiciary when it moved S.18 along.

POLICY RATIONAL

Ski businesses, like other recreational and sports businesses, often market themselves as safe family fun, and should be held to a high standard that compels near-maximum protection of public participants. Contracts/waivers that release ski businesses and other commercial operators from liability for hazards directly within their control (such as unmarked or dangerously positioned man-made features, improper maintenance of equipment, negligence or failure of ski area employees, collision with snowmobiles, etc.) are unconscionable and unfairly disadvantage individual participants. Often these contracts/waivers are written in dense legalese, and are presented to participants at the last minute long after a trip or activity has been booked and paid for. Participants are rarely in a position to reject the contract/waiver, understand the risks they will be exposed to, or the remedial actions that could mitigate those risks.

I fully appreciate the concerns that ski areas have regarding litigation and the risk of burdensome financial judgments that sometimes result. Ski areas (and other businesses) have two main ways of controlling these litigation risks. First, they can reduce the actual hazards, which directly reduces injuries and fatalities. Second, they can make it so difficult for an injured party to recover damages that litigation all but goes away. Unfortunately some ski and adventure operators are not willing to mitigate hazards unless there is meaningful pressure of litigation. Reducing the litigation risk by allowing ski operators and other providers to insert unconscionable terms or otherwise compel participants to completely waive easily corrected risks will have the effect of increasing actual injuries (and fatalities) to real people, and runs counter to state interests as expressed by the Vermont Supreme Court in [Dalury v. S-K-I, Ltd](#) (1995):

"The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. Defendants [ski areas], 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 area's negligence."

* * *

“If defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed, with the public bearing the cost of the resulting injuries. It is illogical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control.”

S.18 is well guided when it seeks to prohibit unconscionable contract/waiver terms, but it is deeply flawed when it exempts ski areas and other recreational activities from these logical prohibitions.

WORKERS COMPENSATION

My initial concerns about S.18 involve consumer level contracting in which individuals are presented with mandatory contracts/waivers that could affect their ability to recover damages when a commercial operator makes serious mistakes or takes shortcuts with risk management. An equal concern is the affect S.18 could have on the rights of an employee to be protected from workplace injury, and to have access to Workers Compensation coverage.

S.18 defines certain types of contract terms as “unconscionable,” but then exempts those terms from contracts involving participation in recreational activity, sport or competition, yet it makes no distinction between individual consumer level participation and participation in those activities as part of employment. Courts could easily interpret the language in S.18 as legislative intent to allow employers in recreational activity and sports to compel employees to sign away their right to Workers Compensation coverage for injuries that naturally arise out of and in the course of employment. For example, please see paragraph three of the Vail Resorts (Stowe/Okemo) “Voluntary Employee Activities” contract/waiver (attached and as follows):

*“I acknowledge that this agreement applies to all voluntary Activities and that I, as an employee, **AM NOT COVERED BY WORKERS’ COMPENSATION BENEFITS** while participating in voluntary activity, regardless of whether I am utilizing an employee ski pass or wearing a uniform or whether the Activity is sponsored by my employer. I agree to check with my manager if I am unsure whether an Activity is voluntary or not” (emphasis in the original)*

This extraordinary language would likely be prohibited under paragraph (a)(2) of the current draft of S.18, (“A waiver of the individual’s right to assert claims or seek remedies provided by State or federal statute”) but that prohibition would then be excluded by the troubling final clause of the current version of S.18. The language in the above “Voluntary Employee Activities” contract allows an employer to arbitrarily and unilaterally define some activities as voluntary, including when an ski/snowboard instructor is checking trails and preparing for lessons, practicing techniques that will be used in a lesson or tested in a certification exam, participating in training programs sponsored by the employer, or participating in activities such as a demonstration ‘torchlight parade’ in which the employees ski and snowboard down mountain trails at night holding burning road flares for the entertainment benefit of resort guests watching the ‘show’ from below.

It is my understanding that the Senate Committee on Judiciary did not consider how contracts/waivers and policy currently in use by ski areas are designed to deny Workers Compensation coverage to ski industry employees, and how these contract/waivers run afoul of Workers Compensation statutes. The potential legal harm of recognizing specific terms as “unconscionable” but then allowing ski resorts and other recreational/sports providers to use these very terms in contracts/waivers, including those related to employment, is staggering.

Even if the intent of S.18 is not to change Workers Compensation coverage, the establishment of specific terms as unconscionable, yet allowed in contracts/waivers for high risk recreational and sports activities (including employment), may have a far reaching effect on access to Workers Compensation coverage.

CONCLUSION

The bottom line is that unconscionable contract terms should be prohibited, regardless of what industry is presenting them.

I hope that the House Committee on Judiciary will carefully examine S.18 upon its arrival. This is generally good legislation that prohibits contract/waiver terms that are clearly one sided and unconscionable, but it should not exempt Vermont businesses that hold out to the public and that feature unique risks of injury or death that are controlled by the business and often uncontrollable by participants.

I will be happy to meet with the House Committee on Judiciary (or any other legislative committee) to discuss my experience in the ski and adventure industry, the types of actual inherent risks that routinely exist, and examples of real-world risks and hazards that fall outside the definition of “inherent risk.”

Sincerely,



Tom Buchanan

CC: Vermont State Representative Kelly Pajala (Londonderry)

Attachments:

- 1) Vail Resorts, Stowe/Okemo “Voluntary Employee Activities Release of Liability”
- 2) Vail Resorts, Stowe/Okemo “Employee & Dependent Pass Application”
- 3) Vail Resorts, Stowe/Okemo “Resort Activity, Ski School & Equipment Rental”