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Introduction

Every year millions of people hit the slopes in the United States at nearly 500 resorts in 39 states.[1] Skiers inevitably encounter a variety of signs warning them of the dangers of skiing and most receive liability waivers, often on the back of their lift tickets. Despite this, most skiers never expect to be injured while on the slopes. While the number of sprains, broken bones, and torn ligaments may be unknown, studies show that there are around forty deaths and up to forty serious injuries such as paralysis and serious head trauma in a given year.[2] Skiers are often unaware of their legal rights and may simply accept the information given to them by the resorts. Because many skiers travel to distant states, they may not realize the laws governing ski area liability are different among the states.

This article attempts to highlight some of the important differences in the legal enforceability of waivers.[3] Currently, there is no uniform national standard for what are the "inherent risks" of skiing. Because the variance in liability rules can affect injured skiers so acutely, attorneys representing both ski resorts and injured skiers need to be aware of real differences in the enforceability of waivers in a sport not unfamiliar with serious injuries.

Washington

In *Chauvlier v. Booth Creek Ski Holdings*, a skier encountered unmarked "bump/jumps" and a "half-pipe" that had been erected by

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1. National Ski Area Association, http://www.nsaa.org/nsaa/2004/03-04-sa-state.pdf (last visited Sept. 28, 2005).

2. National Ski Area Association, http://www.nsaa.org/nsaa/safety/facts_about_skiing_and_snowboarding.asp (last visited Sept. 28, 2005).

3. For a more theoretical piece questioning the overall value of ski area liability, *see generally* Arthur Frakt & Janna Rankin, *Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability*, 28 Idaho L. Rev. 227 (1991).

the ski resort on one of its slopes.[4] Mr. Chauvlier, the plaintiff, testified at trial that the obstacles could not be seen from the top of the slope and he hit one and "went airborne."[5]

The Booth Creek ski pass contained a release that warned of the risk of colliding with "man-made structures or objects" and contained a "promise not to bring a claim against or sue Booth Creek."[6] Mr. Chauvlier contended that the language on the liability waiver was ambiguous, inconspicuous, and violated Washington public policy.[7] Regarding the ambiguity, the court cited a previous Washington case holding an application to a ski school promising to hold the school harmless from all claims sufficiently clear to exculpate the school from liability due to its own negligence.[8] The court did not weigh whether the release contained the word "negligence," but did note that the words "Release" and "Hold Harmless and Indemnify" were set off in all capitals throughout the release.[9] The court also brushed aside the issue of whether the release was inconspicuous by noting the release was clearly labeled in all capital letters and set off from the rest of the agreement.[10]

On the issue of violation of public policy, the court relied on a Washington Supreme Court decision.[11] Under *Wagenblast v. Odessa School District:*

> the enforceability of a release depends on whether: (1) the agreement concerns the endeavor of a type thought suitable for *public regulation*; (2) the party seeking to enforce the release is engaged in performing an *important public service*, often one of practical necessity; (3) the party *provides the service to any member of the public* or to any member falling within established standards; (4) the party seeking to invoke the release has *control over the person or property* seeking the service; (5) there is a decisive *inequality of bargaining power* between the parties; and (6) the release is a standardized *adhesion contract.*[12]

While the court found many of the *Wagenblast* factors present in the case, it found that skiing is a private and nonessential activity and,

4. 35 P.3d 383 (Wash. Ct. App. 2001).
5. *Id.* at 384.
6. *Id.*
7. *Id.* at 385-87.
8. *Id.* at 385 (referring to Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992)).
9. *Id.* at 386.
10. *Id.*
11. *Id.* at 387.
12. *Id.* (referring to Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 971-74 (Wash. 1988)).

therefore, held that the most important of the *Wagenblast* factors was not present.[13] Because skiing is not an important public service, according to this court, the exculpatory clause was not void as against public policy and could be enforced by the ski slope.[14] As is clear by the following cases, the majority of courts have not allowed ski resorts to avoid liability for their own negligence on such broad grounds.

Pennsylvania

A Pennsylvania court also upheld an exculpatory clause in a ski lift pass, but on different grounds. In *Small v. Camelback Ski Corp.*, the court found that a skier could not pursue an action against a ski resort alleging negligent placement of snowmaking equipment where the season-pass application the skier signed expressly exculpated the resort for such injuries.[15]

The Pennsylvania court relied on a test set out in *Zimmer v. Mitchell & Ness* to determine the validity of exculpatory clauses.[16] To be valid, the contract must: (1) "not contravene any policy of the law;" (2) "be . . . between individuals relating to their private affairs;" (3) be between parties who are all free bargaining agents, "not simply drawn into an adhesion contract, with no recourse but to reject the entire transaction;" (4) "be construed strictly against the party asserting it;" (5) and "spell out the intent of the parties with the utmost particularity."[17]

The case turned on the last requirement of the *Zimmer* test, the parties' intent. The court granted the ski resort summary judgment based on the fact the hazard presented by "snowmaking equipment" was expressly spelled out in the agreement.[18] While snowmaking equipment may be an inherent obstacle to skiing, especially in the East, man-made jumps and half-pipes, like those in the Washington case discussed above, are certainly not. It is entirely likely from the language of the holding that claims based on injuries from hazards not listed in the waiver would not be barred. In that regard, the Washington case, discussed above, is much broader, holding that the ski resort

13. *Chauvlier*, 35 P.3d at 388.

14. *Id.* at 387. For the premise that skiing is not a matter of public importance, the court also cited Bauer v. Aspen Highlands Skiing Corp., 788 F.Supp. 472, 474 (D. Colo. 1992) (involving a waiver in a contract between a ski school, ski equipment manufacturer, rental shop and a skier).

15. 11 Pa. D. & C.4th 233 (1991), *aff'd* 616 A.2d 726 (Pa. 1992).

16. 385 A.2d 437 (Pa. Super. Ct. 1978), *aff'd per curiam*, 416 A.2d 10 (Pa. 1980).

17. *Id.* at 439.

18. *Small*, 11 Pa. D. & C.4th at 237.

had effectively avoided all liability for injuries occurring on its slopes.[19]

New York

In *Vanderwall v. Troser Management, Inc.*, the plaintiff signed a ski pass application a few months prior to the accident.[20] The application included a "Warning to Skiers" as required by statute, which after listing several specific dangers, warned skiers of "other natural objects, or manmade objects that are incidental to the provision or maintenance of a ski facility in New York State."[21] At trial, plaintiff admitted he had read and understood that written warning.[22] The evidence established the plaintiff had been injured when he skied into an unmarked drainage ditch, which was necessary for the maintenance of a ski facility.[23] The trial court submitted to the jury the issue of whether the language in the ski pass application encompassed the risk plaintiff assumed by reading, understanding and signing the application.[24]

The appellate court upheld the trial court's ruling in favor of the ski slope defendant.[25] The court stated that the general prohibition against total disclaimer of liability on the part of places of public amusement and recreation in New York had to be interpreted in light of the statute and regulations providing the "Warning to Skiers."[26] Under that analysis, the court determined a jury could rationally find that the language of the ski pass application encompassed the actual risk that caused the plaintiff's injury and thus the bar on total disclaimers was not implicated.[27]

In an earlier New York case, *Rogowicki v. Troser Management*, a 16-year-old skier filed suit against a ski resort in New York based on injuries sustained while skiing, but did not know how they were caused because he did not recall the accident.[28] The court denied the ski resort's motion for summary judgment.[29] The court found that the defendants failed to meet their burden of establishing that the plaintiff

19. *Chauvlier*, 35 P.3d at 387.
20. 665 N.Y.S.2d 492, 493 (N.Y. App. Div. 1997).
21. *Id.* (referring to N.Y. GEN. OBLIG. § 18-106[1][a] (McKinney 1988)).
22. *Id.* at 492.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 493 (referring to N.Y. GEN. OBLIG. § 5-326 (McKinney 1976)).
27. *Id.* at 493.
28. Rogowicki v. Troser Mgmt., Inc., 212 A.D.2d 1035, 1035 (N.Y. App. Div. 1995).
29. *Id.* at 1035-36.

had expressly assumed the risk because the cause of the injury was not clear.[30]

Oregon

The Oregon courts have expressly rejected an exculpatory clause. In *Steele v. Mt. Hood Meadows Oregon, Ltd.*, the Oregon Court of Appeals held that the release on a ski ticket stating that the skier "assumes the inherent risks of skiing" did not clearly and unambiguously release the operator from liability for the operator's negligence.[31] In *Steele*, plaintiff's decedent died of injuries sustained while skiing.[32] Plaintiff alleged that the death was the result of Mt. Hood Meadows' negligent failure to warn skiers of a hazard when it was reasonably expected skiers would be recreating in the area.[33]

The ski ticket the decedent had purchased provided that the "holder of this lift ticket agrees to release and indemnify Mt. Hood Meadows from any claims for personal injury . . . arising . . . from the use of this ticket."[34] The court noted that the release on the back of the ski ticket did not specify whether the phrase "any claims for personal injury" included claims for personal injury arising from Mt. Hood Meadows' negligence or whether it was limited to claims for personal injuries arising from other causes.[35] The court also noted that under Oregon precedent, a release need not always specifically refer to negligence to bar a negligence claim.[36]

The court found the waiver ambiguous for three reasons. First, just before the language of the release, the ticket stated that the "user of this ticket accepts and assumes the inherent risks of skiing including man-made objects, changing conditions, natural obstacles, weather, and other skiers."[37] It also stated that "all injuries must be reported to the area medical clinic."[38] The court noted that all of the risks of injury identified by the ticket resulted from the "inherent risks of skiing" rather than the ski resort's own negligence.[39] According to the court, "[g]iven the ticket's explicit focus on injuries resulting from the inherent risks of skiing, the ticket holder reasonably could have

30. *Id.*
31. 974 P.2d. 794 (Or. Ct. App. 1999).
32. *Id.* at 796.
33. *Id.*
34. *Id.* at 795.
35. *Id.* at 797.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

understood that the phrase 'any claims for personal injuries' referred to any claims for injuries arising from those risks, not from the ski operator's negligence."[40]

The court noted a second factor leading to a finding of ambiguity. Signs at Mt. Hood Meadows stated that "failure to notify the ski area operator by certified mail within 180 days of discovery of the injury may bar a claim for injuries," as required by the state's "Skier's Responsibility Code."[41] The court held that the sign implied skiers could retain some claims for injuries, which was contrary to the notion that the release on the ski pass barred all claims for personal injury.[42] Moreover, the reference to "Skier's Responsibility Code," suggested the claims skiers retained were claims arising from the ski operator's negligence.[43]

Finally, the court found there was no evidence of either bargaining or of equality of bargaining positions that would suggest that the decedent reasonably would have understood he was giving up any claims for injuries caused by Mt. Hood Meadows' negligence.[44] Because the release did not "clearly and unequivocally" reflect the parties' intent, the court held the release did not bar claims based on the ski operator's negligence.[45]

Missouri

In *Moffatt v. Snow Creek, Inc.*, Lewis, the plaintiff, rented skis from the defendant and signed a "Snow Creek Ski Area Rental Form" during the process of renting equipment.[46] The form stated:

> I hereby release from any legal liability the ski area and its owners, agents and employees, as well as the manufacturers and distributors of this equipment from any and all liability for damage and injury or death to myself or to any person or property resulting from the selection, installation, maintenance, adjustment or use of this equipment and for any claim based upon negligence, breach of warranty, contract or other legal theory, accepting myself the full responsibility for any and all such damage, injury or death which may result.[47]

40. *Id.*
41. *Id.* at 798 (referring to OR. REV. STAT. § 30.980 (2003)).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. 6 S.W.3d 388, 391 (Mo. Ct. App. 1999).
47. *Id.* at 394.

The form had to be completed before obtaining skis and equipment and she completed it while standing in line.[48] Lewis claimed she felt pressured to move along and did not have an adequate opportunity to read and fully comprehend the rental form.[49]

Lewis fell on ice at Snow Creek and was injured.[50] She filed a petition against Snow Creek alleging that:

> (1) the defendant owed a duty to plaintiff as a business invitee, and breached that duty by failure to warn of the icy condition where the fall occurred; (2) the defendant negligently adjusted and maintained the bindings on Plaintiff's skis because they failed to properly release when plaintiff fell, injuring plaintiff's leg; (3) the defendant created a dangerous condition by making artificial snow; and (4) the defendant was grossly negligent in failing to warn plaintiff of the dangerous condition on its premises.[51]

Snow Creek denied the claims and asserted the affirmative defense of assumption of the risk.[52]

The court first addressed the issue of the duty owed to a business invitee. As a business invitee, Lewis was entitled to reasonable and ordinary care by the ski slope to make the premises safe.[53] Under the court's analysis, the defendant would only be liable if it:

> (a) [knew] or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to invitees; (b) should expect that [invitees] will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect [the invitees] against the danger.[54]

The court held there was insufficient evidence to determine whether the patch of ice that led to the plaintiff's injury was an open and obvious condition on the land as a matter of law.[55] Therefore, it was not clear that the plaintiff should have reasonably been expected to discover the condition.[56]

The court next turned to the defendant's affirmative defense of assumption of risk.[57] The court bifurcated this analysis into two parts:

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48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 391-92.
52. *Id.* at 393.
53. *Id.* at 392.
54. *Id.*
55. *Id.* at 393.
56. *Id.*
57. *Id.*

express and implied assumption of risk.[58] Under the express assumption of risk doctrine, the court first noted that the rental form did not mention injury due to ice and could only relieve the defendant of such liability if the general reference to "negligence" was sufficient to do so.[59] While the use of exculpatory clauses in contracts releasing an individual from future liability are not prohibited, "the words 'negligence' or 'fault' or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risks occurs."[60] The court also noted that a party could never exonerate itself from future liability for intentional torts and gross negligence.[61] Because the release in this case included the broad language of "any claim based on negligence, breach of warranty, contract or *other legal theory,*" which could include intentional torts and gross negligence, the contract was necessarily duplicitous and uncertain, and therefore, void as ambiguous.[62]

Under its implied assumption of risk analysis, the court noted that Missouri, unlike many other states, did not have a statute outlining the risks of skiing.[63] The court found there was no question that plaintiff's injuries arose from falling on an icy area, but would not make the blanket statement that such conditions are an inherent risk of skiing.[64] The court held that implied assumption of risk could only apply to inherent risks of skiing, and therefore denied defendant's motion for summary judgment.[65]

Wisconsin

In *Yauger v. Skiing Enterprises, Inc.*, plaintiff purchased a season family ski pass at Hidden Valley's ski shop.[66] The application form asked for the name, age, and relationship of family members.[67] Immediately following the space provided for this information was the

58. *Id.*
59. *Id.*
60. *Id.* at 394 (quoting Alack v. Vic Tanny Int'l of Mo., 923 S.W.2d 330, 337 (Mo. 1996)).
61. *Id.*
62. *Id.* (emphasis added). The court also found that the title "Snow Creek Area Rental Form" was ambiguous because it did not state that the form was also a release of liability. The actual language of the release was in approximately 5 point type at the bottom of the form.
63. *Id.* at 396.
64. *Id.*
65. *Id.*
66. 557 N.W.2d 60, 61 (Wis. 1996).
67. *Id.*

alleged release, which read: "In support of this application for membership, I agree that: (1) There are certain inherent risks of skiing and that we agree to hold Hidden Valley Ski Area/Skiing Enterprises, Inc. harmless on account of any injury incurred by me or my [f]amily member on the Hidden Valley Ski Premises."[68] The following spring one of plaintiff's daughters collided with the concrete base of a chair lift tower while skiing at Hidden Valley and was killed.[69] Plaintiff brought a wrongful death action against Hidden Valley who filed for summary judgment based on the exculpatory clause contained in the season pass.[70]

The court began its opinion by stating that the only issue in the case was whether the exculpatory clause was against public policy.[71] The court then went on to discuss three Wisconsin cases involving exculpatory clauses that in different ways failed to disclose to the signers the exact rights they were waiving.[72] The clauses in the Wisconsin cases were unenforceable because: the accident that occurred was not within the contemplation of the parties when they signed the agreement,[73] the broad release was ambiguous and unclear such that no contract was formed,[74] and the overbroad, general terms created an ambiguity and uncertainty as to what the signer was releasing making it void as against public policy.[75]

Based on an analysis of the case law, the court found that the two important issues in this case were whether the waiver clearly and unambiguously informed the signer of what rights are waived and whether the form must alert the signer to its nature and significance.[76] The court noted that the form did not include the word "negligence" and failed to exhibit any language expressly indicating the plaintiff's intent to release Hidden Valley from its own negligence.[77]

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 62-63. *See* Richards v. Richards, 513 N.W.2d 118 (Wis. 1994) (involving a passenger authorization to ride with a truck driver), Dobratz v. Thomson, 468 N.W.2d 654 (Wis. 1991) (involving a water skiing show accident), Arnold v. Shawano County Agric. Soc'y, 330 N.W.2d 773 (Wis. 1983) (involving a stock car show accident).

73. *See Arnold*, 330 N.W.2d at 778.

74. *See Dobratz*, 468 N.W.2d at 662.

75. *See Richards*, 513 N.W.2d at 119.

76. *Yauger*, 557 N.W.2d at 63.

77. *Id.*

Moreover, the form did not define the "inherent risks of skiing" referred to in the body of the form.[78] The court referred to a New Jersey decision, which defined inherent risks of skiing as those that "cannot be removed through the exercise of due care if the sport is to be enjoyed."[79] The court also cited the Vermont case of *Dalury v. S-K-I, Ltd.* in which the Vermont court held that a ski owner's negligence is not an inherent risk of skiing.[80] Finally, the court contrasted a Michigan case which held that the inherent risks of skiing include natural conditions and "types of equipment that are inherent parts of a ski area, such as lift towers."[81] Based on the disagreement in other jurisdictions over the definition of "inherent risks of skiing," the court in *Yauger* determined that there was sufficient ambiguity in the release to find it void as against public policy.[82]

The court went on to discuss the second question involving the appearance of the form. The court first noted that the paragraph was not conspicuous in any way, was simply one of five separate paragraphs, and did not require a separate signature.[83] Additionally, the form in this case essentially served two purposes: an application for a season pass and a release of liability.[84] However, the form was entitled only "APPLICATION."[85] The court held that the two purposes had to be clearly identified and distinguished to provide an important protection against an inadvertent agreement to release.[86] Because this form did not do so, it violated the state's public policy.[87]

Vermont

The Vermont Supreme Court took a very different approach to this issue. In *Dalury v. S-K-I, Ltd.*, the plaintiff was injured when he struck a metal pole that formed part of the control maze for a ski lift line.[88] Before the season started, Dalury purchased a season pass and

78. *Id.*

79. *Id.* (quoting Brett v. Great Am. Recreation, Inc., 677 A.2d 705, 715 (N.J. 1996)).

80. *Id.* (citing Dalury v. S-K-I, Ltd., 670 A.2d 795, 796 (Vt. 1995)).

81. *Id.* at 64 (referring to Schmitz v. Cannonsburg Skiing Corp., 428 N.W.2d 742 (Mich. Ct. App. 1988)). The *Brett* and *Schmitz* cases are not discussed in this article because they do not involve waivers or exculpatory clauses.

82. *Id.*

83. *Id.* at 61.

84. *Id.* at 64.

85. *Id.*

86. *Id.*

87. *Id.* at 65.

88. 670 A.2d 795, 796 (Vt. 1995).

signed a form releasing the ski area from liability.[89] The relevant portion reads:

> RELEASE FROM LIABILITY AND CONDITIONS OF USE
> 1. I accept and understand that Alpine Skiing is a hazardous sport with many dangers and risks and that injuries are a common and ordinary occurrence of the sport. As a condition of being permitted to use the ski areas premises, I freely accept and voluntarily assume the risks of injury of property damage and release Killington Ltd., its employees and agents from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operation of the ski area, actions or omissions of employees or agents of the ski area or from my participation in skiing at the area, accepting myself the full responsibility for any and all such damage or injury of any kind which may result.[90]

Because this was a case of first impression, the Vermont court looked to a standard used by the California Supreme Court in a 1994 case, *Tunkl v. Regents of the University of California*.[91]

> An agreement is invalid if: (1) It concerns a business of a type generally thought suitable for public regulation. (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.[92]

The court also cited a 1994 decision by the Maryland Court of Appeals for the premise that the ultimate "determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current socie-

89. *Id.*

90. *Id.*

91. *Id.* at 797 (referring to Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963)).

92. *Id.* at 797-98.

tal expectations."[93] Defendants argued that its contracts with skiers were purely private matters.[94] The court disagreed, holding that while defendants did not provide an essential public service, the facility was open to the public, advertised, and invited skiers of all levels of ability to use their premises.[95] While each transaction for the purchase of a lift ticket was a private matter, the sum total of the sales as a result of the seller's general invitation created a legitimate public interest.[96]

"The major public policy implications are those underlying the law of premises liability."[97] The court reasoned that the policy rationale was to place the responsibility for maintenance of the land on those who control or own it.[98] As such, ski operators have the expertise and opportunity to foresee and control hazards, guard against negligence of employees and agents, and insure against risks and effectively spread the cost of insurance among their thousands of customers.[99] If ski operators were permitted to obtain broad waivers of liability an important incentive for ski areas to manage risks would be removed, placing the burden on the public.[100]

It is interesting to note that while the Vermont court cited the Washington *Wagenblast* decision as a case adopting the *Tunkl* standard discussed above, it still came to an opposite conclusion in determining whether a ski operator could contract out of liability.[101] The Vermont court did not accept the proposition that because ski resorts do not provide an essential service, exculpatory agreements in lift ticket purchases do not affect the public interest.[102] The court held that essential public services do not represent the universe of activities that implicate public concerns.[103] The court compared its restrictions of liability waivers in ski resorts to the prohibition of discrimination in places of public accommodation, in that certain societal expectations may subject an essentially private transaction to important public interests.[104]

93. *Id.* at 798 (quoting Wolf v. Ford, 644 A.2d 522, 527 (Md. Ct. Spec. App. 1994)).
94. *Id.*
95. *Id.* at 799.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 798. *See* Wagenblast v. Odessa Sch. Dist., 758 P.2d 968 (Wash. 1988).
102. *Dalury*, 670 A.2d at 799.
103. *Id.*
104. *Id.* at 800.

North Carolina

In *Strawbridge v. Sugar Mountain Resort, Inc.*, plaintiff was injured when he allegedly skied over a bare spot on the slope.[105] The back of the lift ticket the plaintiff purchased stated that the user of the ticket agreed:

> To assume all risk of personal injury or loss or damage to property as a result of all the inherent risks of skiing whether said risks are known to user. The purchaser or user of this ticket agrees and understands that skiing can be hazardous. Variations in snow, ice, and terrain along with bare spots, bumps, moguls, stumps, forest growth, rocks and debris, and many other hazards or obstacles, including lift towers, snowgroomimg equipment, snowmobiles, and other skiers exist within this ski area. In using this ticket and skiing at the area, such dangers are recognized and accepted whether they are marked or unmarked. The skier realizes that falls and collisions do occur and therefore assumes all the risk of injuries or loss or damage to property and the burden of skiing under control at all times.[106]

Plaintiff also rented ski equipment at Sugar Mountain and, in doing so, signed a form which stated, among other things:

> 3. I agree to hold harmless and indemnify the ski shop and its owners, agents and employees for any loss or damage, including any that results from claims for personal injury or property damage related to the use of this equipment, except reasonable wear and tear.
>
> . . . .
>
> 5. I understand that there are inherent and other risks involved in the sport for which this equipment is to be used, . . . that injuries are a common and ordinary occurrence of the sport, and I freely assume those risks.
>
> . . . .
>
> 7. I hereby release the ski shop and its owners, agents and employees from any and all liability for damage and injury to myself or to any person or property resulting from negligence, installation, maintenance, the selection, adjustment and use of this equipment, accepting myself the full responsibility for any and all such damage or injury which my [sic] result.[107]

The court first addressed the ski rental agreement, which barred all suits "related to the use of the equipment" and "resulting from . . .

105. 320 F.Supp. 2d 425 (W.D.N.C. 2004).
106. *Id.* at 429.
107. *Id.* at 429-30.

use of this equipment."[108] The court, in construing the agreement against the party attempting to enforce it, concluded that the language only referred to injuries caused by the equipment, and did not encompass the plaintiff's claim.[109]

The language of the ski ticket did, however, cover injuries like the ones suffered by the plaintiff.[110] The court then turned to an analysis of whether North Carolina law permitted such exculpatory clauses and noted that they are valid so long as they are not contrary to a substantial public interest or gained through inequality of bargaining power.[111] The North Carolina legislature had addressed this issue in its enactment of a statute entitled "Actions Relating to Skier Safety and Skiing Accidents," which imposes on ski area operators the duty "not to engage willfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties."[112] Therefore, the clause was clearly against stated public policy and void.[113]

The court went on to state that even if the clause did not run contrary to the statute, it would be against public policy as a "party cannot protect himself by contract[ing] against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty"[114] A series of North Carolina state and federal courts have held that this standard is met if an industry is significantly regulated by public authority.[115] Because the North Carolina legislature had enacted legislation regulating the ski industry, the court found that the exculpatory clause encompassing claims for negligence ran counter to a significant public interest and was, therefore, unenforceable.[116]

CONCLUSION

Courts are generally reluctant to enforce exculpatory clauses, especially those that include the negligence of the party attempting to enforce the clause. However, these cases show that courts can take

108. *Id.* at 430.
109. *Id.*
110. *Id.*
111. *Id.* at 433.
112. *Id.* (quoting N.C. GEN. STAT. § 99C-2(c)(7) (1981)).
113. *Id.*
114. *Id.* (quoting Hall v. Sinclair Refining Co., 89 S.E.2d 396, 398 (N.C. 1955).
115. *See* Bertotti v. Charlotte Motor Speedway, Inc., 893 F.Supp. 565, 569 (W.D.N.C. 1995); Tatham v. Hoke, 469 F.Supp. 914, 918 (W.D.N.C. 1979); Alston v. Monk, 373 S.E.2d 463, 466 (N.C. 1988).
116. *Strawbridge*, 320 F.Supp. 2d at 430.

very nuanced approaches to deciding whether to enforce such clauses. In the particular area of ski resort liability, the differences between states are primarily based on how the courts view the regulation of seemingly private contracts within a recreational sport and the definition of "inherent risks" of skiing.

The latter is particularly difficult for practitioners and recreational skiers. By using such clearly ambiguous language, legislatures have opened the door to varying interpretations across a single industry. It is difficult to say that the individual skier who may ski in a number of locales can ever be certain what claims he or she may be waiving when courts and juries in different states cannot agree on the definition of "inherent risks." Likewise, practitioners may find themselves on untouched trails when evaluating a particular claim - an inherent risk of litigation.