

# INCONSISTENT JUDICIAL INTERPRETATIONS OF THE UTAH INHERENT RISK OF SKIING STATUTE AND ECONOMIC IMPLICATIONS.

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## INTRODUCTION

Over the past four decades, ski law in Utah has gone through several transformations that have resulted in a difficult, unpredictable, and inconsistent body of law. Several implications have resulted from the inconsistent interpretations the courts have implemented when applying the Utah Inherent Risk of Skiing Act.<sup>1</sup> The Utah Legislature adopted the Act forty-one years ago.<sup>2</sup> This law was codified in an effort to shield ski area operators from liability resulting from injuries sustained while skiing and snowboarding. Courts have interpreted this statute differently over time; seemingly on a case-by-case basis. This has led to a great deal of confusion in regard to what the law actually is. Summary judgment is almost unheard of in any Utah ski case and the law has become so incomprehensible that even the Advisory Committee for model jury instructions has failed to publish a functional set of model jury instructions for cases relating to the Act.

The confusion has left ski area operators all across the state of Utah in a quagmire, unable to predict how, or if, the Statute will protect them. The uncertainty surrounding the courts' interpretation of the Act, has caused operators and their attorneys simply assume that the Act will offer no protection at all. For this reason, many insurance companies are completely unwilling to offer coverage to ski area operators; and if they do, the price is exorbitant. This is clearly contradictory to the legislative intent in

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<sup>1</sup> Utah Code Ann. §1953 78B-4-402 (2020).

<sup>2</sup> Originally enacted as Utah Code Ann. 1953, § 78-27-51 in 1979.

making the law in the first place. After all, why propound a law to protect ski operators if that law is functionally irrelevant?

Although the current state of Utah ski law is somewhat scattered, there has been encouraging progress in the law and there is certainly still room for improvement as opportunities to define the bounds of the law continue to reveal themselves.

## I. HISTORY

To fully understand the ski law landscape in the state of Utah, it is important to understand the history of the law as it has progressed through the years. The ski industry in Utah started with westward expansion and the gold rush era.<sup>3</sup> In the early to mid-twentieth century, the rush for gold and precious metals in the mountains across the United States was beginning to wane. Many mines had ceased to produce a profitable amount of valuable minerals and the nation's economy was shifting to a posture less favorable to mining and land-grabbing. While some mining areas became defunct and deserted, such as areas like the West Desert and Tooele County, Utah, there were a number of mining corporations and other mine owners that pivoted their business models from mining to recreation – particularly ski resorts.<sup>4</sup> Examples of mining districts turned world class ski resorts are Alta, Park City, and Deer Valley resorts, just to name a few.<sup>5</sup> Bastions of the mining heritage of these areas still exist with streets being named after old mining terms, developments bearing the same names as the old iconic mining companies like Talisker and Prospector, and establishments themed after the old mining days like The Gold Miner's Daughter at Alta Ski Resort.<sup>6</sup>

The rise of ski resorts created a whirlwind of liability and litigation. Particularly popular was personal injury litigation against area operators. In response, the legislatures in several states implemented statutory protections for ski resorts to shield them from liability, and allow them to continue their operations.

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<sup>3</sup> 80 Years of Skiing at Alta, Alta.com, <https://www.alta.com/stories/80-years-of-skiing-at-alta> (last visited Feb. 16, 2020).

<sup>4</sup> Id.

<sup>5</sup> Ski Utah Resort Histories: Alta Ski Area, SkiUtah.com, <https://www.skiutah.com/blog/authors/lexi/ski-utah-resort-histories-alta-ski> (last visited Feb. 16, 2020).

<sup>6</sup> Id.

Today, more than half of the United States maintains statutes insulating ski area operators for liability for risks that are deemed to be “inherent” to the sport of skiing.<sup>7</sup> It is extremely important to note that none of these statutes bar plaintiffs from recovering for negligent or purposeful acts of ski resorts and are by no means an absolute shield to liability, nor should they be. The Utah Inherent Risk of Skiing Act, which was enacted in 1979, also does not bar a plaintiff’s recovery against any other skier, only the ski resort operator.<sup>8</sup> Instead, nearly all statutes bar recovery for inherent risks, defined risks that cannot be “reasonably mitigated” by ski area operators.<sup>9</sup> This shields operators from liability from those risks which are beyond their control.

These liability insulating statutes were devised by their respective state legislatures to shield the new, popular, and lucrative business of ski area operation from the immense liability that faced the budding industry.<sup>10</sup> Even in the mid-twentieth century, legislators were able to see the value of skiing as an economic engine, acting as a tourist attraction, mode of recreation, and a way to sell real estate that might otherwise be worthless.

The Inherent Risk of Skiing Act in the state of Utah has had an unsteady history, being interpreted in several ways, leading to irregular judicial findings.<sup>11</sup> There are a few ambiguities in the law that have led to this confusion. The largest concern though, that has caused the most confusion, is how to define an “inherent risk.” No guidance is offered by the Statute, so the courts have tried time and time again to define what it means to encounter an “inherent risk.” For instance, the Statute explicitly lists some “inherent risks,” but does not lend any guidance in determining whether other risks are inherent or not.<sup>12</sup> There are also several problems with coverage. The Statute says that a skier may not recover for injuries “resulting from” any inherent risk of skiing,<sup>13</sup> but this brings up the question of proximate cause. Utah Code

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<sup>7</sup> Colorado, Maine, Michigan, Idaho, and Arizona are all examples.

<sup>8</sup> Utah Code Ann. §1953 78B-4-402 (2020).

<sup>9</sup> *Id.*

<sup>10</sup> Utah Code Ann. §1953 78B-4-401 (1)(a) (2020).

<sup>11</sup> *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991); *White v. Deseelhorst*, 897 P.2d 1371 (Utah 1994).

<sup>12</sup> Utah Code Ann. 78B-4-403 (2020).

<sup>13</sup> *Id.*

Ann. § 78B-4-403 (2020). The phrase “resulting from” creates an extremely broad standard that courts will bend as liberally or restrictively as they see fit.

Waivers have also posed a serious question under Utah law, as no mention of waivers was made anywhere in the statute before the 2020 legislative session.<sup>14</sup> Some waivers have been upheld as a release from liability while others have not.<sup>15</sup> Cases involving children are much less willing to recognize a waiver as valid than in cases involving adults.<sup>16</sup>

### A. *Clover Era*

The trouble really began in 1992 when the Utah Courts grappled with their decision in *Clover v. Snowbird*.<sup>17</sup> *Clover* is based on a ski collision between an employee at Snowbird Ski Resort and the Plaintiff, Ms. Clover. The Snowbird employee was traveling to his job at a slope-side restaurant when he decided to take a jump that was well known at the resort and had several markings indicating that caution should be exercised around the area. As soon as the employee crested the hill, he struck Ms. Clover, who was skiing slowly down the groomed run, and injured her severely.

The court in *Clover* set forth a test for determining whether or not a particular risk was “inherent to the sport of skiing,” implementing a two-step process to decide if the risk was (1) a risk a skier might wish to encounter, or (2) a risk that no one would want to encounter.<sup>18</sup> This was a poorly written and highly subjective test, which was obviously dependent upon the skill and desire of any one particular skier, produced an unprecedented amount of confusion in the law. The test lacked any modicum of practicability because it possessed no reasonable expectation of uniformity. This distinction between types of risks also seemed to be arbitrary, because nowhere in the Inherent Risk Statute was there ever mentioned risks that skiers “might want to encounter”

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<sup>14</sup> Utah Code Ann. 78B-4-405 (2020). Previous versions of the code do not contain this language.

<sup>15</sup> *Rutherford v. Talisker Canyons Fin., Co., LLC*, 445 P.3d 474 (Utah 2019).

<sup>16</sup> *Id.*

<sup>17</sup> *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

<sup>18</sup> *Id.* at 1047.

nor risks that “no one would want to encounter.” This test left the door open to the possibility of a whirlwind of litigation where plaintiffs might ski, become injured, and then bend the ambiguity of the two-part test to their favor by saying that they did not want to encounter the dangerous circumstance which led to their injury.<sup>19</sup> This was a large problem, because of course a plaintiff will always say that they did not wish to encounter the risk that hurt them as they testify after the fact. Ski resorts, lawyers, insurance companies, and even judges were left wandering in the dark, searching for a way to apply the impractical *Clover* test.

The post-*Clover* era in Utah was one of great confusion, leading to many unprecedented verdicts as courts grappled with the question of whether a skier wished to encounter the danger that injured them. This created even more confusion as many skiers, in an effort to recover damages, purported that they had not wished to encounter the specific danger that injured them on the ski hill. This confusion has had deeper reaching implications as insurance companies were unable to properly predict the likelihood of a plaintiff’s ability to recover on their personal injury claims against area operators and were thus forced to raise premiums in order to secure their business models.<sup>20</sup> Ski area operators, in turn, had to raise their rates, passing on these elevated insurance premiums directly to skiers while simultaneously decreasing their spending on other budget items and employees in order to stay profitable. These economic effects were the direct result of inconsistent judicial interpretation, thus stifling the growth of the ski industry and the tourism economy in Utah.

### *B. Rutherford Era*

The Utah Supreme Court’s recent decision in *Rutherford*<sup>21</sup> adds another chapter to the story of the Statute in Utah. *Rutherford* was a case involving a child skier who was skiing at Park City Mountain Resort in Park City, Utah when he came into

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<sup>19</sup> A plaintiff will always claim that they did not intend to encounter the risk which injured them, otherwise they might be subject to the rule of purposeful availment.

<sup>20</sup> Utah Code Ann. § 78B-4-401 (1) explains that few insurance companies are willing to cover ski area operators and that premiums have risen sharply.

<sup>21</sup> *Rutherford v. Talisker Canyons Fin., Co., LLC*, 445 P.3d 474 (Utah 2019).

contact with some machine-made snow of an irregular consistency. The sudden change in snow condition caused five-year-old Levi Rutherford to crash, resulting in severe injuries including brain damage.

The case quickly moved through the Trial Court and Court of Appeals, eventually reaching the Utah Supreme Court. The Utah Supreme Court grappled for months on end, and heard oral arguments on the matter three times over the span of several months before handing down their decision in *Rutherford*. Essentially, the Supreme Court was tasked with determining how the Inherent Risk of Skiing Statute should be applied and how to define an “inherent risk”, after the courts in Utah had been delivering inconsistent decisions and tests for years since *Clover*.<sup>22</sup>

Recently, the Utah Supreme Court finally handed down their decision from *Rutherford* and the confusion seemed to be clarified; at least in part. The court simplified the confusing and outdated test from *Clover*,<sup>23</sup> streamlining the two-part test into a single-step objective analysis that simply asks “Whether a skier reasonably expects to encounter the risk when skiing.”<sup>24</sup> This test appears much more coherent, less arbitrary, and more in line with similar tort law, using a reasonableness standard to determine the nature of the risk. Of course, there has not been a significant amount of litigation pertaining to the inherent risk statute in Utah since this decision, so it has yet to be determined how this new test will impact the consistency with which the law is applied.

### *C. 2020 Legislative Amendments*

*Rutherford*<sup>25</sup> set the stage for the amendments the legislature added to the Utah Inherent Risk Statute this past 2020 legislative session. The changes the legislature made to the Statute are by and large fairly mechanical, cleaning up some grammar and increasing readability. There are, however, a few changes that will have a stronger impact on future judicial decisions.

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<sup>22</sup> *Clover*, 808 P.2d at 1037.

<sup>23</sup> *Id.*

<sup>24</sup> See *Rutherford*, 445 P.3d at 474.

<sup>25</sup> *Id.*

Section 78B-4-405<sup>26</sup> added an entirely new section to the Utah Inherent Risk Statute that deals with waivers and liability release forms. In the past, there was great confusion over whether or not pre-injury liability waivers would be upheld in court. This section of the Statute was added during the 2020 session and provides that skiers and snowboarders may enter into pre-injury agreements to waive liability and release the ski area operator from an otherwise permissible claim. Subsection 2 of this title deals with waivers signed on behalf of minors or by minors. The language of this section completely negates any waivers or releases that are signed by or for minors. This subsection is a direct result of *Rutherford*, where a main issue was whether or not the waiver signed by Levi Rutherford's parents was a valid shield against liability. This section will have far-reaching implications which will effectively shield resorts from liability for accidents involving adult skiers. Additionally, it will allow minors to potentially recover damages for injuries by not upholding any waivers signed by a child (which is an obvious result under basic contract law) or waivers signed by a parent on their behalf.

Next, is the new language that comprises section 78B-4-406<sup>27</sup> which effectively limits damages in suits that are properly brought under the Statute by plaintiffs. This new language is novel to the statute and prevents a plaintiff from recovering more than \$1,000,000.00. This section is a tool the legislature has given to ski area operators to help them with predictability issues.

These new tools and protections added to the Inherent Risk Statute<sup>28</sup> provide a great deal of clarification, guidance, and predictability for ski area operators and their insurers. Hopefully the legislative efforts will help soothe the confusion of earlier decades and result in insurance premiums that are more manageable for area operators to cope with, in turn allowing for expansion, profitability, health, tourism, and economic growth.

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<sup>26</sup> Utah Code Ann. 78B-4-405 (2020).

<sup>27</sup> Utah Code Ann. 78B-4-406 (2020).

<sup>28</sup> Utah Code Ann. 78B-4-401 (2020).

## II. ECONOMIC IMPLICATIONS

In the wake of all the uncertainty that has been brought about by this lively revolution in Utah ski law, the state's economy has arguably been the victim to pay the highest price. The past thirty years of inconsistency has led insurance companies to charge ski area operators astronomic premiums in an effort to cover their unknown and unpredictable risk. These premiums have harmed ski areas by obliterating their balance sheets.

The annual operating budget for an average ski area is very steep. Millions of dollars are spent on food, amenities, facility maintenance, trail maintenance, marketing, and most importantly, insurance premiums. On its face, the business of operating a ski area may seem like a lucrative business, but costs are exorbitant and profit margins are slim for owners and shareholders. The cost of the necessary real estate alone could bankrupt the average business, especially in a tourist laden economy that already experiences elevated pricing. The biggest line item on a ski area's annual budget is likely the cost of insurance. This large expense is an ongoing struggle. In the same way they cannot really afford their insurance, they cannot afford not to have it. Under-capitalizing or under-insuring a ski area would open up the resorts and their owners to copious amounts of liability, even personal liability in some instances. Due to the severe risks involved with under-insuring, ski areas are forced to pay the high cost in order to remain in business. Most budget adjustments must be made elsewhere in the budget resulting in the subtraction from other line items like marketing and expansion.

Marketing is imperative to the ski industry in Utah. While many locals are avid skiers, the ski areas in Utah bring in hundreds of thousands of out-of-state visitors every year. Marketing is uniquely important to resorts like Alta, Deer Valley, and Solitude which operate independently of the large companies like Vail, who has grown to be such a leviathan in the ski industry that they certainly possess the resources to do a great deal of advertising for all of their associated resorts. Without budgets to put on marketing campaigns, these independent resorts must seemingly rely more heavily on word-of-mouth and online reviews,

which are weak in comparison to the power of other, more substantial modes of advertising.<sup>29</sup>

Acquiring land to expand their ski area boundary is also a huge consideration that many areas have placed high on their priority list. As the public's desire to ski all types of terrain and own slope-side property increases, it creates somewhat of a race for which area can brand themselves as the largest resort and attract the most customers and investors. Other hurdles exist that also make expansions financially difficult. The proximity of these resorts to National Forest Boundaries often makes it difficult to expand without expensive leases and permitting. Further, the cost of real estate in these ski towns has skyrocketed as visitors fall in love with mountain scenery and the high-end luxury that accompanies the sport of skiing. Were it not for elevated insurance premiums, these ski resorts could better afford to grow and accommodate the desires of new customers and investors.

### III. RECOMMENDATIONS MOVING FORWARD

Although the courts and legislature have moved forward to protect our highest producing and most venerable economic engines, there are still steps that can be taken to ensure that ski resorts are protected from unpreventable liability and are able to budget in ways that make expansion and improvements possible.

The first step would be to regulate the premiums that insurance companies can charge ski resorts. This course of action would probably have to incentivize the insurance companies to do business in Utah in some way. After all, if the insurer's business model is altered by the state in a way that reduces profits, there needs to be some type of "carrot on a stick" to get them to still do business in the state. Perhaps offering tax incentives and lower licensing fees would be enough to attract insurers, even under a regulated business model. As it stands, there is very little to stop a large insurer from charging an area operator an astronomic and insurmountable premium. To cease this predatory activity by insurance companies would be to cut the cost of operations for

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<sup>29</sup> 10 Marketing Strategies for Ski and Snowboard Resorts, Peek.com, <https://www.peek.com/pro/marketing/10-marketing-strategies-for-ski-and-snowboard-resorts> (last visited Feb. 16, 2020).

area operators. Perhaps these savings on insurance premiums could even be passed on to skiers as they purchase their season passes and lift tickets, making Utah a more attractive ski destination for tourists and boosting our economy.

The second recommendation would be for the courts to create uniformity surrounding their decisions to uphold or invalidate certain waivers or release forms. Too many times in the past, plaintiffs have artfully argued their way out of release agreements they have signed and this has led to uncertainty surrounding their enforceability. Perpetuating uniformity in this area will provide another point of consistency and predictability that area operators can count on. This could look like a hard-lined rule that upholds all waivers unless there is some sort of undue influence or capacity issue, which would be perfectly acceptable, as courts have consistently upheld an individual's right to contract.

A third way to create uniformity would be to issue a workable and understandable set of jury instructions for courts to use as they try cases involving the question of ski area liability. Having this consistency for juries would lead to a more predictable outcome that would be beneficial to area operators, insurers, and the state.

### CONCLUSION

In total, the lack of judicial certainty surrounding the Utah Inherent Risk Statute has caused a great deal of inefficiency, economic stifling, and liability exposure. This has harmed the Utah economy by exposing our largest economic asset, the ski industry, to unpredictable liability; the same liability that the Utah legislature sought to end by providing the Inherent Risk Statute. If it were not for the decades of confusion and impracticability that Utah has experienced, the growth of the tourism industry and the ski industry could have grown together, hand-in-hand, to be even more prosperous and healthy than it is today. Recent binding precedent in *Rutherford* and legislative revision in the 2020 legislative session have made an encouraging attempt to alleviate the repercussions of the past, but there is still room for improvement. These three recommendations, at least in theory, will stabilize the law and shield ski area operators in an

even more robust way that would allow for continued economic growth, public good, and the continuation of the sport of skiing.

