

**JONES  
WALDO**  
Park City Group



## The Park City Practice

**WELCOME TO THE FOURTH EDITION OF THE PARK CITY PRACTICE**, a newsletter featuring legal information for the Park City community. This edition of the Park City Practice focuses on how businesses in the outdoor recreation community can limit their legal exposure through the use of well-crafted liability waivers. It also announces the newest resident of the Jones Waldo Park City Office, M. Alex Natt. Future editions of the Park City Practice will feature articles on real estate, family law, estate planning, litigation and business law.

### Do Liability Waivers Really Protect My Business from Claims?

You've heard the story before. Weekend Warrior comes to Park City on vacation for his annual ski trip with his buddies. In the lift line, the group engages in a round of testosterone-fueled chest thumping. Succumbing to peer pressure, the Warrior decides to ski beyond his ability level and injures himself. Sometime later, after listening to others who convince him that his injury couldn't possibly be his fault, he files suit.

"Aha" you say. "But, I have a signed liability waiver. I'm protected." Maybe. Maybe not.

For business owners who operate recreation-focused businesses, there always exists the potential for legal claims from those clients who choose to engage in activities that most of us would consider risky. Skiing, riding, climbing, biking, flying are obvious examples of high risk activities where most people have encountered liability waivers. But, even those businesses providing services such as fishing, yoga, dance and gymnastics instruction, health clubs and personal training should consider utilizing legally sound pre-injury releases.

**The bottom line?** In most instances a properly worded liability waiver can be an effective defense against claims; but as with most things, the devil is in the details.

The Utah Courts have recently clarified the law on the use of liability waivers in the recreational context. If you are a recreational provider, you should pay close attention to what the Court has said.

Utah law has historically followed the principle that individuals are free to contract away their legal rights as long as the language of

the release is "clear and unequivocal." In other words, individuals must be able to understand what rights they are agreeing to forego in exchange for the service to be provided.

This position appeared to be eroding in 2001 when the Utah Supreme Court published its decision in Hawkins v. Peart, 37 P.3d 1062 (Utah 2001). In Hawkins, an eleven year old child was injured at a family reunion while riding a horse provided by the defendant, a purveyor of guided horse rides. As a condition of riding, the defendant required that the child's parent sign a liability waiver. Attorneys for the child attacked the sufficiency of the waiver and the Court agreed. After Hawkins, it is the law of the State of Utah that pre-injury releases which seek to waive the rights of minor children will not be upheld. This is not to say you shouldn't seek waivers from children and their parents. At the very least they may be evidence that the child knew of, and assumed the risks before participating. And, notwithstanding the Hawkins decision, the parents are still able to waive any claims they personally may have which arise from the injuries sustained by their minor child.

The decision in Hawkins raised the question of whether the Court intended to discard all waiver law in Utah. However, in Hawkins, the waiver was not found insufficient, but instead the Court found an overwhelming public policy reason not to enforce it. The Court believed that it would violate the public policy of the State of Utah if it supported a system where parents and children were potentially set at odds over a parent's decision to waive a child's rights.

In the past 12 months, the Utah Supreme Court has clarified its holding in Hawkins in three cases arising from recreational

activities. These decisions are entitled Berry v. Greater Park City Company, 171 P.3d 442 (Utah 2006), Rothstein v. Snowbird, 175 P.3d 560 (Utah 2007), and Pearce v. Utah Athletic Foundation, 179 P.3d 760 (Utah 2007).

The Berry case involved an adult male who was injured at a ski cross competition held at Park City Mountain Resort. In Berry, the Utah Supreme Court unanimously held that Mr. Berry's claims against the Resort were barred by a well drafted liability waiver. Mr. Berry argued that the Hawkins decision announced that Utah was following a national trend against pre-injury releases and that ski racing was of such great import to the State of Utah that it could be considered an essential service that the state should regulate. The Court declined to follow his argument and held that adult competitors in ski competition are free to contract away their own legal rights absent the existence of any strong public policy considerations.

However, only a few months later, the same Supreme Court held in Rothstein that releases which seek to insulate Utah ski resorts against claims from their recreational guests will not be upheld. The Rothstein decision reiterated the Court's traditional position that releases that are sufficiently clear and unambiguous will be enforced unless there is a strong public interest. But, unfortunately for Snowbird, the Court held, (in a tortured analysis), that the importance of ski resort tourism to the State of Utah compelled the Court to invalidate the waiver on public policy grounds.

Thankfully for most Utah based recreational providers, the Court has now held emphatically, in Pearce v. UAF, that pre-injury releases in a recreational setting will be enforced absent the considerations discussed in Pearce, Berry, and Rothstein. In Pearce, a tourist riding the Olympic Park bobsled ride injured his back and sued for compensation. The claim was denied due to the Park having obtained a clear pre-injury release. In the decision, the Court took great pains to harmonize its prior decisions and declared that in most recreational settings, a well crafted pre-injury release will be upheld.

So what should you, as a recreational provider, take from these decisions? The overall lesson is that it remains your responsibility to ensure that any pre-injury release that you use clearly and unambiguously communicates to your customer that (1) the activity you provide is dangerous, (2) that he/she is agreeing to release certain legal rights by engaging in the activity, and (3) that he/she is releasing you even for claims arising out of your own negligence.

**“As always, consult with competent legal counsel to be sure you are protected.”**

You should then consider whether your insurance coverage is sufficient and whether your corporate form protects your personal assets.

But those are topics for another day.



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## The Outdoor Sports Practice Group at Jones Waldo

Jones Waldo's Outdoor Sports Practice Group is composed of a select group of highly skilled professionals who share a passion for the outdoors.

Our attorneys trained at the best law schools in the nation and could practice anywhere. They choose to practice here because Utah's recreational opportunities are as limitless as its business opportunities.

Fortunately, they're not alone in making this choice. Utah is home to all sorts of businesses revolving around the great outdoors. If you're here to take advantage of Utah's unique business and recreational opportunities, we can help. We're one of Utah's oldest and largest law firms and we offer specialized legal services for businesses and their employees. We are also comfortable outside our borders and have attorneys who speak Spanish, German, Japanese, French and other languages to help you when your business goes overseas.

Attorneys within Jones Waldo's Outdoor Sports Practice Group have assisted ski resorts, tour companies, gear manufacturers, Olympic sport governing bodies, world class athletes and retailers do business for years. We represent a diverse range of enterprises,

from closely held start ups to Fortune 500 companies. Whether you are making the gear, selling the gear, or using the gear, we can help you with industry insights and sound business counsel.

The Outdoor Sports Practice Group can help you with corporate organizations, mergers and acquisitions, employment issues, government compliance, real estate, distribution questions, intellectual property protection, sponsorship and licensing, event organization, risk management, and litigation before all courts and regulatory agencies. Our attorneys are experts in water law, taxation, resort development, personal injury litigation, patent prosecution and environmental law.

We would like to discuss with you how we can provide legal services to help your business grow. Let us use our skills to help carry your company where you want to go. Kind of like Sherpas with briefcases.

Call or email any of us, and we'll get you to the right lawyer to help you meet your challenge. You might have to try a couple of us on a powder day, but then again, what are you doing calling on a powder day?

## New Resident Attorney in Park City Office



*M. Alex Natt* 435. 647.5975, ANATT@JONESWALDO.COM

Matthew Alexander ("Alex") Natt has been practicing law in Park City for twelve years and has recently joined Jones Waldo's Outdoor Sports Practice Group. After seven years as In House Legal Counsel to the United States Ski and Snowboard Association, Alex will now offer his services to the Park City community. His practice includes counseling non-profit and tax exempt organizations, negotiating sponsorship and major event agreements, giving advice on intellectual property protection, and providing general counsel services to companies both small and large, in Park City and beyond. Feel free to give Alex a call if you want to talk about your business, you might even get a free lunch out of it.

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