

The Montana Trial Lawyers [MTLA] opposes **HB 204** as it relieves recreational providers of accountability and responsibility for their actions or omissions that may harm their clients. MTLA's lobbying position flows from our support of the basic principle that individuals, business entities and governmental entities should be accountable and responsible for their actions or omissions that cause harm to another.

This principle is set forth in Article II, Section 16 of our Montana Constitution which provides that "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character." Article II, section 26 guarantees our right in Montana to a trial by jury in civil matters, as well as criminal matters. This mirrors the 7th Amendment to the U.S. Constitution that protects our right to a trial by jury in civil matters.

If someone violates your rights shouldn't they be held accountable, whether they are an individual, the government or a business? James Madison and John Locke opined that our first right of property is in ourselves, and includes the safety and liberty of our person. When someone takes it from us in violation of our legal rights, compensation for what we have lost is the least that can be expected. It is simply unjust to shield the wrongdoer from the consequences of his misconduct at our expense.

HB 204 is bad public policy and violates our constitutional right to a "speedy remedy afforded for every injury of person, property or character." It instead seeks to afford a speedy immunity for recreational providers that injure people.

Also provided with this is a handout of relevant Montana statutes.

Let's go through the bill -

Page 1, line 12 - 13: protections for "non-profit entities" - this is a red herring, Section 27-1-732 already provides immunity of nonprofit corporation officers, directors, and volunteers. [Page 2 of the statutory handout].

Page 1, lines 17-18: we are not considering two parties in equal bargaining positions, given HB 204's protections, providers will be dominant in a take it or leave it position - "waive your right and expectation to have us act as a reasonable business would under the circumstances or no fun for you."

Page 1, line 19: "upon consideration of appropriate information" - there is no provision in the actual bill requiring "appropriate information" be included in any waiver or release. Many of these same supporters rejected any attempts to include such requirements when the Montana Recreation Responsibility Act was enacted in 2009.

Page 1, line 22: waivers "encourage the availability and affordability" of recreational activities? Really, the only way to encourage providers is to provide them immunity for their negligent actions? Seems that that only encourages providers who are reckless.

Page 1, lines 25-26: the true purpose of HB 204 is "shielding providers of such activities from claims resulting from conduct that constitutes ordinary negligence"

Providers already have protections under the Montana Recreation Responsibility Act "for risks that are inherent in the sport or recreational opportunity." HB 204 essentially seeks to do by one sided contracts that contradict what that Act provides, specifically "(3) Sections 27-1-751 through 27-1-754 do not preclude an action based on the negligence of the provider if the injury, death, or damage is not the result of an inherent risk of the sport or recreational opportunity."

While Montana is one of a few states that has a statute like 28-2-702 specifically prohibiting exculpatory contracts, many states have the same law by case law. Oregon recently prohibited such provider contracts, calling them "unconscionable." Bagley 356 Or 543. Wyoming has a recreational act, but their releases are only valid for inherent risks, not for waiving negligence. *Beckwith*, 2012 WY 62. Alaska prohibits such negligence waiving releases for ski areas [AK Statutes Ann., 05.45.120], as does Utah [*Rothstein*, 175 P3d 560, 564].

When the Montana Supreme Court has considered statutory immunity from recreational provider negligence, it has held: "Although the state has a legitimate interest in protecting the economic vitality of the ski industry, there is no rational relationship between this purpose and requiring that skiers assume all risks for injuries regardless of the cause and regardless of the presence of negligence" *Brewer*, 234 Mont. 109.

HB 204 would likely be overturned by the Montana Supreme Court on public policy grounds on this same basis. The Court, like other courts in the west, would also likely consider such contracts as authorized under HB 204 to be unconscionable and unenforceable.

The supporters of HB 204 got what they wanted in 2009 with the Montana Recreation Responsibility Act. They should use that act, provide participants with releases that outline inherent risks, get their waiver for injuries due to inherent risks, and act responsibly. Instead they want to renege on that act and as stated in the bill, shield "providers of such activities from claims resulting from conduct that constitutes ordinary negligence." You should reject HB 204.