

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. HB 204 is bad public policy and violates our constitutional right 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." HB 204 instead seeks to afford a speedy immunity for recreational providers that may negligently injure people.

The true purpose of HB 204 is "shielding providers of such activities from claims resulting from conduct that constitutes ordinary negligence"

Page 1, lines 25-26:

Providers already have protections under the Montana Recreation Responsibility Act "for risks that are inherent in the sport or recreational opportunity." HB 204 seeks to do by one sided contracts what that Act specifically prohibits: "(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."

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.**

There is no provision in the actual bill requiring "appropriate information" be included in any waiver or release for participants to consider. Page 1, line 19. What would be waived?

Ordinary Negligence is the failure to exercise reasonable care under the circumstances - how a reasonable provider would act under similar circumstances.

Example: Whitewater rafting has inherent risks - including drowning - and providers can act negligently.

Inherent Risk - Whitewater provider outfits participants in appropriate flotation devices and head gear, participants go through rapids and a dude falls from the raft and drowns - that's an inherent risk and there is no liability to the provider.

Negligence - Same scenario, but provider fails to assure that a flotation device is appropriate for the size of the dude and that it is properly fitted. A dude falls from the raft, the ill fitting flotation device is pulled off and he drowns - that's negligence.

HB 204 allows the negligent provider to escape responsibility with a waiver signed by an unsuspecting dude who sought the provider's service precisely because he doesn't know how to whitewater raft safely.

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 for ski areas [*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.

The Court reiterated this in *Oberson* [*Oberson v. U.S.*, 2007 MT 293] in 2007:

¶ 22 We conclude that Oberson has proven, beyond a reasonable doubt, that the "gross negligence" provision in § 23-2-653, MCA (1995), is "over broad," extends "beyond" its stated purpose and fails to pass rational basis review. Brewer, 234 Mont. at 115, 762 P.2d at 230; Trull, ¶ 30. The gross negligence standard of care in the snowmobile liability statute, Mont.Code Ann. § 23-2-653 (1996), violates the Montana equal protection clause, Mont. Const. art. II, § 4.

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.

Protections for "non-profit entities" - this is a red herring, Section 27-1-732 already provides immunity of nonprofit corporation officers, directors, and volunteers.

HB 204 is wrong for Montana – it violates our Constitution, it has no safeguards for participants and it allows a negligent provider to escape responsibility with a waiver signed by an unsuspecting participant who sought the provider's service precisely because the participant did not know how to enjoy the activity appropriately and safely.