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Increase In State's Skiers Means Increase In Litigation

By Carolyn Matthews
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DENVER — Colorado ski resorts this year are the busiest they have ever been, posting record numbers for the first portion of this winter season. Colorado Ski Country USA announced that its 26 member resorts hosted 3,285,649 skiers and snowboarders through early January, an increase of 7 percent from last year's first period. CSCUSA is the not-for-profit trade association representing Colorado ski and snowboard resorts through lobbying.

Last year, Colorado's resorts set an all-time record for visitation with more than 12.5 million skier visits. With spring skiing still on the way, this year could be another record-breaking season for Colorado slopes.

Over the past three decades, Colorado's ski industry has flourished as skier visits have increased from 800,000 to more than 12 million. For resorts, this growth translates to more ticket sales, hotel reservations and \$10 hamburgers sold.

For attorneys and legislators, the increase equals more bills and billable hours.

Jim Chalats is the state's, if not the country's, leading ski lawyer. He was selected in 2007 and 2006 as a "Colorado Superlawyer" for his work in the niche field. He skied in Michigan throughout college and is still very much an avid skier today. ("With this winter? Are you kidding me?" he said laughing).

Chalats took on his first ski case in 1979 and things have been "downhill" since.



Jim Chalats is a leading, Denver-based ski lawyer.

He tried his second case in the 1981 with law legend Walter Gerash. The pair represented Dr. Jane Gray, who was injured from a collision with another skier. They sued the Steamboat Springs resort for failure to mark terrain change and the skier who, after skiing off a blind jump, hit Gray.

According to Chalats, the pair got their "butts kicked" in the skier-on-skier collision case, but he adds the caveat that they would have won the case easily had it been tried today.

He explains ski law's short history has witnessed drastic changes, many of which are due in part

to Chalats' work in groundbreaking cases. Other major factors affecting ski law include new, more powerful resort owners and the growth of the skiing and the introduction of snowboards.

Chalats' firm breaks down ski law into five categories: collision case, lift cases, fall cases, instructor cases and equipment cases. Each type has been shaped differently by particular legislation and tried or settled suits.

Collision cases are by far the most common of the five. With more skiers, snowboarders and families on the slopes today, the chances of an accident are great-

er than ever. On average, about 26,000 serious injuries occur on the slopes, and about 5 percent, or 1,500, involve collisions, according to Chalats.

Chalats also speculates that those new to the mountains are not investing in the lessons necessary to learn the fundamentals of the sport as well as the rules of the mountain.

"Many people don't have a working knowledge of the general courtesies associated with skiing, and they don't have the knowledge of how to get themselves out of trouble," Chalats said. "There are a lot of people who can't do a kick-turn, which is an essential skill to get your ass out if you're in over your head."

The National Ski Areas Association created a responsibility code in 1966 as a guideline for skiers. The code details common sense rules of the slopes, encouraging skiers to "always remain in control and be able to stop or avoid other people or objects, do not stop where you obstruct a trail or are not visible from above and whenever starting downhill or merging into a trail, look uphill and yield to others."

The rules also state one of the most important elements in a collision case: "Whenever starting downhill or merging into a trail, look uphill and yield to others." Chalats explains that one of the key issues in skier-on-skier cases is who was the uphill, or overtaking, skier.

Collision cases usually are settled outside of civil courts. But, more recently, criminal charges have been pressed against reckless skiers. "I think that con-



The Five Types of Ski Cases

1. **Collision Cases:**
Cases in which skiers collide and one skier sues the other.
2. **Lift Cases:**
Cases in which a skier is injured as a result of a faulty, defective, or improperly maintained lift.
3. **Fall Cases:**
Cases which involve skiers who have an accident while on the mountain and the fault of the injury lies with an improperly designed, maintained, marked or groomed slope.
4. **Instructor Cases:**
Cases in which a skier, under the supervision of an instructor, is led into unmanageable terrain and injures himself, or when a skier, under the supervision of an instructor, injures a third party and that injury is a result of inadequate supervision.
5. **Equipment Cases:**
Cases in which injury is caused by a skier's equipment—generally alpine release bindings.

firm in the eye of the public that if you ski recklessly and kill someone, it's criminal," Chalot said. "If you ski negligently and you hurt someone, that's civil."

In 1994, Chalot represented a Broadway ballerina in a case where Catherine Ulisse was seeking damages for a knee injury sustained after a collision at Snowmass the previous year. Ulisse was awarded \$2.4 million in damages, including past and future earnings.

Federal District Judge Edward Nottingham ruled that commodity trader Alexander Shvartsman's negligence was the sole cause of Ulisse's injuries.

In a briefing, Chalot concludes, that "Ulisse v. Shvartsman, (10th Cir. 1995) determined that the duties created for all skiers and snowboarders under the Ski Safety Act established a presumption that the uphill skier has the last clear chance to avoid, and thus the primary duty to avoid collision; this case also established that amendments to the Act in 1990 explicitly abolished an inherent risk defense based on

being hit by an out of control or unobservant skier."

"The Ulisse case was a big step in terms of the community saying, 'Yeah, these things are real, people can get really badly hurt, there are victims and wrong-doers in these cases,'" Chalot said.

One of these wrong-doers included Nathan Hall. Hall's case was the first in which the Colorado Supreme Court ruled that a reckless skier may stand trial on criminal charges for reckless manslaughter in 2000.

Common evidence in this brand of case is the nature of the injury, witness testimonies and documents from the ski resort including credit card purchases and records tracking the time at which a skier boarded a lift. The latter evidence has been used to determine if a skier purchased alcohol on the hill or how fast he or she was going.

Within the last 15 years, plaintiffs injured by a reckless skier have received significant damages, signifying the public's changing perception inherent risks involved when skiing.

"The Ski act was amended to say that when you go skiing, it's not a risk assumed that you get whacked," Chalot said.

The Ski Safety Act of 1979 became law in Colorado on July 1, 1979. It has seen few changes since its inception. Those amendments that the law has seen tended to favor ski resorts, affecting the four other cases ski attorneys see: lift, fall, instructor and equipment.

The law reads that a skier assumes the risk of any injury to person or property resulting from any of the inherent dangers and risks of skiing and may not recover from any ski area operator for any injury resulting from any of the inherent dangers and risks of skiing including: changing weather conditions; existing and changing snow conditions; bare spots; rocks; stumps; trees; collision with natural objects, man-made objects or other skiers; variations in the terrain; and the failure of the skiers to ski within their own abilities.

In the 1990 legislative declaration, the General Assembly proclaimed that it was in the interest of the State of Colorado to establish reasonable safety standards for the operation of ski areas and for the skiers using them.

The Ski Safety Act was amended in 2004 in several significant respects. Skiers continue to assume the "inherent dangers and risks of skiing." However, where such dangers and conditions were once only those that were an "integral part" of the sport, the 2004 amendments have modified the language to include all those that are "a part" of the sport.

Chalot argues the omission of the word "integral" could be read broadly to mean without regard to the negligence or lack of care by an operator assumption of practically all hazards.

Another amendment to the Act states that the operator's duty to post a sign warning of maintenance equipment on an open slope or trail was narrowed to exclude maintenance equipment going to or from a grooming project.

The Amendments eliminate the ski area operator's prior duty to mark "danger areas," and includes cliffs and other unmarked dangers as one of the "inherent dangers" of the sport. Additionally, ski area operator immunities have been expanded to include all ski area property, not just those areas designated for skiing or competition.

As the ski industry grows, the companies running the lifts are consolidating and collaborating on political efforts to maintain immunities against litigation. Vail Resorts operates four mountain resorts in Colorado that includes Beaver Creek, Breckenridge Mountain Resort, Keystone Resort and Vail Mountain.

Intrawest, a Canadian-based powerhouse vacation company, owns Copper Mountain and Winter Park.

The Aspen Skiing Company is the commercial enterprise that own the four resorts surrounding the town of Aspen. The company is currently owned by the Crown family of Chicago, who are also



Your Responsibility Code

Many resorts use this as a guide for snowboards and skiers today:

- Always remain in control and be able to stop or avoid other people or objects.
- People ahead of you have the right of way. It is your responsibility to avoid them.
- Do not stop where you obstruct a trail or are not visible from above.
- Whenever starting downhill or merging into a trail, look uphill and yield to others.
- Always use devices to help prevent runaway equipment.
- Observe all posted signs and warnings. Keep off closed trails and out of closed areas.
- Prior to using any lift, you must have the knowledge and ability to load, ride, & unload safely.

among the most influential stockholders and board members of defense contractor General Dynamics.

"The resort industry is now dominated by very large, very wealthy, multibillion-dollar international corporations," Chalot said. "The perception that this is just a Ma and Pa operation, with Ma standing by a soup kettle warming it up and Pa running the lift, just isn't the reality any more."

The ski industry brings in an estimated \$2 billion to \$2.5 billion a year.

"The public doesn't view the ski area operator as a sympathetic character anymore," Chalot said. "They're a business operation and they should be held to a reasonable standard of care."

Representing this industry in legislation is the Colorado Ski Country USA, who paid almost \$103,000 to lobbyist company Axiom Strategies in the fiscal year 2006 to voice resort concerns and advocate resort-favorable legislation in Colorado Congress.

Yet, while the law seems to give immunity to the resorts, juries have ruled that these they do have responsibility to their clientele.

“The social perception changed because people recognize ski areas are a controlled environment in which risks can be reduced, hazards can be eliminated and due care is expected,” Chalot said. “When you go skiing now, it isn’t wilderness experience.”

“At some places you pay for a wilderness experience, like the Silverton Mountain ski area. When you go to Vail, you expect

the hazards to be marked, the lifts to work, the ski patrollers to be trained, man-made objects to be readily visible and ski equipment operated with due care.”

In fall cases such as Phillips v. Monarch and Lee v. Aspen, the court held that the duties set out in the Ski Act, pertaining to warning skiers of grooming operations, could not be abrogated by the waiver printed on the lift ticket. The trial courts ruled that as a matter of law, colliding with a snowmobile operated by a ski area employee is not an inherent risk.

Chalot argues that the statutory provisions in the Ski Safety Act are not difficult for resorts to abide by. However, many resorts use waivers as another way of protecting themselves against litigation. Chalot and his family refuse to buy season passes for this reason. Many waivers go one step beyond the protection provided to ski-area operators in Colorado’s Ski Safety Act.

“When the liability laws were passed, ski areas told the legislature they would be responsible for things like safely running lifts and marking slopes with appro-

priate signage and standards,” he told *The Denver Post*.

“Legislators said, ‘Fine. If you do that much, we’ll do this to limit your liability.’ Now come additional liability waivers. I think it’s illegal.”

All season passes sold in Colorado require skiers to sign an additional liability waiver, giving up their rights to sue for negligence. Daily lift tickets buyers do not typically have to sign liability waivers, except at more “extreme” resorts such as Silverton Mountain and Echo Mountain.