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"Enter at your own Risk": Skiing and the United States Legal System[1]

Skiing has endured as a human pursuit since ancient times. Throughout the centuries, it has remained more unchanged in its original form than almost any other activity on Earth. That said, the cultural and societal aspects of the sport have changed drastically. Skiing is unique in that it has both a straightforward and complex history and evolution, depending on the lens of analysis. Archeologists in Scandinavia have unearthed ski-related artifacts dating as far back as 3200 B.C.E., along with disputed artifacts from Russia and China which redate the Scandinavian discovery by thousands of years.[2] Of course, these earlier skiers carried out the activity due to environmental necessities. The fascinating history began when this fundamental act of survival became a physical sport, and then even further as it transformed into a recreational pastime now bearing the trappings of big business.

According to E. John B. Allen, a historian for the New England Ski Museum, skiing emerged as a sport in the United States around 1870.[3] It originally gained popularity through

[1] For interviews on this topic, I reached out to the Human Resource Departments of 3 famous western resorts: Snowbird, Alta, and Vail. Unfortunately, because the ski season has not yet begun, they were not able to connect me with counsel and the lodging associates I spoke with did not have any interaction with the legal system. I also reached out to multiple personal injury firms that deal with skiing accidents, including Zinda Law Group and Davis Law Group, and these firms instructed me to leave information and that they would respond at a later date–and have since not responded. I do believe that the research presented is sufficient to present a picture of the evolution of skiing and the legal system in the U.S. without an additional interview, although I would have liked to include the perspective of an additional interview.

[2] Livia Gershon, "Archaeologists Extract 1300-Year-Old Wooden Ski From Norwegian Ice." *Smithsonian Magazine*, (c. 2021), https://www.smithsonianmag.com/smart-news/ancient-pair-of-skis-discovered-in-norwegian-ice-180978819/. (Accessed 18 November 2023).

[3] Ibid, 59.

Swedish and Norwegian immigrants, who brought their skis and apparel with them on the journey across the Atlantic.[4] Celebrities such as Norwegian explorer Fridtjof Nansen, famed for trekking across Greenland on cross-country skis, as well as a host of winter Olympic athletes, praised the activity for its physical fitness benefits, and urged the general public to take up the practice.[5] Much of modern sport is regarded as being equal in opportunity; with athletic ability being the determining factor of progression. This was not the case with skiing in the United States. The earliest "ski clubs" were even more exclusive than the hyper-expensive resorts of the modern era. There were many groups which discriminated based on sex and national origin. Sel Hannah, captain of the Dartmouth race team in 1912, recalls that half the time meetings were conducted in Norse at the expense of other Americans.[6] Later, when women were admitted to university and regional ski clubs, they were still largely barred from competition.[7] Colleges led the way in the development of the sport. As seventeen-time national champion and Olympic skier Dick Durrance put it: "College skiing *was* skiing," and it was not until the growth of the winter Olympic games that women gained greater access to the sport.[8]

With the opening of Sun Valley ski resort in Ketchum, Idaho in 1936, the age of big western resorts was born. Averell Harriman, the owner of the Union Pacific Railroad, with the help of his partner, Austrian Count Felix Schaffsgotsch, first opened his retreat to increase the number of riders on his western rail lines. His gambit proved successful, and many followed in his footsteps.[9]

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[4] Ship Skis, "10 Things You Didn't Know About the History of Skiing in the U.S." *Ship Skis*,(c. 2022), https://www.shipskis.com/blog/10-things-you-didnt-know-about-the-history-of-skiing-in-the-u-s/. (Accessed 18 November 2023).
[5] Allen, "Values and Sport: The Development of New England Skiing, 1870-1940," 60.
[6] Ibid, 62.
[7] Ibid.
[8] Ibid, 65.
[9]
Sun Valley. "Field Trip - Sun Valley – America's First Ski Resort." *Thanks for the adventure, Field Trip users!*, (c. 2023), http://www.fieldtripper.com/c/lu6eC6jt1WQ=/. (Accessed 18 November 2023).

Not long after, the industry began to boom, insurance companies became involved, citizens sued resorts and each other, and thus, recreational skiing collided with the American legal system. The oldest federal law dealing with skiing is 16 U.S. Code § 497b, passed in 1915, which gave the Secretary of the Department of Agriculture the authority to issue ski area permits on lands within the National Forest System.[10] In order to receive these permits, individuals and

> "[they] shall be subject to a permit fee based on fair market value in accordance with applicable law;
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> [they] shall encourage outdoor recreation and enjoyment of nature;
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> [they] shall be authorized in accordance with **(i)** the applicable land and resource management plan; and **(ii)** applicable laws (including regulations)."[11]

After the passage of this federal act, most ski-related laws were left to state governments, as each state had different conditions regarding their winter tourism economy and safety regulation needs. The Colorado Ski Safety Act of 1979 (CSSA) is a prime example of the intersection of law and ski economy. It was enacted primarily because insurance companies were [12] The act is intended to spell out the responsibilities of ski areas and skiers as well as The provisions of the CSSA have remained relevant to this day and 27 other states have modeled their ski safety laws from the original Colorado statue.[13] Resorts are charged with creating safety guidelines such as marking trails, providing chairlift instructions, posting warnings, creating certain safety structures, and other precautions. Cfulfill their task. Skiers, on the other hand, are responsible for heeding this information, skiing within their ability, maintaining speed, and so forth. As a

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[10] Legal Information Institute. "16 U.S. Code § 497b - Ski area permits | U.S. Code | US Law | LII / Legal Information Institute." *Law.Cornell.Edu*, (c. 2023), https://www.law.cornell.edu/uscode/text/16/497b. (Accessed 18 November 2023).
[11] Ibid.
[12] CSCUSA Staff. "Skiing, Safety and the Law." *Colorado Ski Country*, (c. 2013), https://www.coloradoski.com/blog/skiing-safety-and-the-law/. (Accessed 18 November 2023).
[13] Ibid.

"gravity fed activity," there is assumed danger such as changing weather conditions and these laws have been enacted to protect ski resorts from endless litigation so that insurance companies may be willing to invest. There is evidence to suggest these acts were lobbied for heavily by personal injury lawyers looking to make fortunes by suing large resorts.[14]

One of the most common legal tactics used by ski resorts in legal defense is the doctrine of "primary implied assumption of risk." This rule prevents any party with previous knowledge of the inherent risks of an activity from recovering damages against a tortfeasor, for these purposes a ski resort, for any harm sustained within that implied risk.[15] Ski areas, when acting as defendants in court, use this to counter claims of negligence. They ensure that plaintiffs understand the risks involved in skiing and have them sign waivers before entering the mountain acknowledging that injury is a possibility and that the ski area is not liable. However, the doctrine of implied assumption of risk is not always a "magic bullet" in legal battles, as complex circumstances can arise which put ski resorts at risk even though participants had signed a waiver beforehand. It becomes clear through case analysis that the laws in place certainly favor the business of skiing over the individuals that chose to participate.

The 2009 case Jakubovsky v. Blackjack Ski Corporation and American Home Assurance Company in the United States District Court for the Eastern District of Wisconsin outlines a scenario in which potential negligence by a ski resort resulted in the court system upholding the immunity of resorts and enforcing the precedent that skiers largely bear the responsibility of accidents encountered on mountains.[16] Amy Jakubovsky, a resident of Wisconsin who had traveled to Michigan to ski at Blackjack resort with her family, was injured on the mountain after a collision with a snowboarder. She and her sister were skiing down a "Blue Square" marked

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[14] Ibid.
[15] Stoy Law. "Assumption of the Risk | Legal Terms | Warriors For Justice." *Stoy Law Group*, (c. 2023), https://www.warriorsforjustice.com/legal-terms/assumption-of-the-risk/. (Accessed 19 November 2023).
[16] *Jakubovsky v. Blackjack Ski Corporation*, Case No. 08-C-206 (E.D. Wis.) 1 at 1 (2009)

trail (medium difficulty) when a snowboarder merged down from an unmarked area of the mountain and crashed into Jakubovsky, sending her careening into a wooden fence, which promptly splintered and allowed Jakubovsky to fall further down a steep incline, resulting in extensive injuries to her back and ribs.[17] The resort contended that under the Michigan Ski Area Safety Act (SASA), skiers must accept the risks inherent to the sport, which include skier-to-skier collision, and the resort is not liable for her injuries. Ms. Jakubovsky, on the other hand, claimed that Blackjack is not entitled to immunity under SASA because it failed to meet certain safety qualifications. Namely, it failed to warn skiers of others entering marked trails from unmarked trails–such as the snowboarder who collided with her. Blackjack was also liable in 's view because the resort exhibited common law negligence in the construction of the fence which caused her injury, which is not protected by SASA immunity. Therefore, she believed valid.[18] The plaintiff felt Jakubovsky was o

In analyzing the legal issues of this case, District Judge William Greisbach found that, based on precedent, skiers are responsible for their own injuries occurring from collisions, regardless of their location. Furthermore, the fact that some skiers violate the rules of the mountain resulting in the injury of others does not make the resort liable for said injuries.[19] Blackjack was also accused of negligence in the construction of the fence which caused Ms. Jakubovsky's injuries. Previously, the Michigan Supreme Court found that SASA's list of hazards in skiing were "illustrative and not exhaustive," and therefore did not have to include every possible potential hazard. There is also precedent from other states that constructions such

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[17] *Jakubovsky v. Blackjack Ski Corporation*, Case No. 08-C-206 (E.D. Wis.) 1 at 2 (2009)
[18] *Jakubovsky v. Blackjack Ski Corporation*, Case No. 08-C-206 (E.D. Wis.) 1 at 3 (2009), Summary judgment is the practice of a ruling based on statements and evidence without going to trial. It is a judge's decision and is issued based on the merits of a case. In this instance, summary judgment would be made based on the overarching stipulations of SASA and tend to side with the resort, but the plaintiff argues that there are other relevant factors that necessitate a trial.
[19] *Jakubovsky v. Blackjack Ski Corporation*, Case No. 08-C-206 (E.D. Wis.) 1 at 4 (2009), *Barr v. Mount Brighton, Inc.,* 215 Mich.App. 512, 546 N.W.2d 273 (1996)

as fences are dangers which [20] Ultimately, the court ruled in favor of the defendant, Blackjack Ski Corporation, because did not present sufficient evidence to avoid summary judgment, and it was found that Blackjack did not violate SASA and was therefore immune to the liability of Jakubovsky's injuries.[21] This is only one case in a long history of courts siding with the business interest of sports over the individual athletes. In the case of skiing, the courts repeatedly underscore the doctrine of implied risk and the protection of the corporations that provide access to consumers. This pattern has remained consistent over the life of recreational skiing in the United States, with the ultimate goal of allowing ski areas to continue operation without the additional costs of litigation and settlements. In this light, the courts act in the interest of all skiers, while unfortunately not in the interest of individual skiers who have suffered injuries on the mountain.

This practice is not new to the twenty-first century, and the relevant doctrines have been in place since the 1970s and 80s when states passed their Ski Safety Laws. Similarly, in 1997, Michelle Glover sued the Vail Corporation for injuries sustained in a collision with another skier who was an off-duty employee of the resort. Once again, in holding with previous and future judgements, the Colorado district court cited the Colorado Ski Safety Act (the blueprint for many other states) and found that Glover could not recover damages from the resort due to the inherent danger in skiing. In the years since many state governments have passed their own version of the CSSA, court rulings have generally held consistent in their deference to the regulations of any given state, both in the cases of individuals suing resorts, and individuals suing one another.[22]

[20] *Berniger v. Meadow Green–Wildcat Corp.,* 945 F.2d 4 (1st Cir.1991)
[21] *Jakubovsky v. Blackjack Ski Corporation*, Case No. 08-C-206 (E.D. Wis.) 1 at 13 (2009)
[22] *Glover v. Vail Corporation*, 955 F.Supp. 105 (D. Colorado) (1997)

There are also many examples of skier-on-skier collision lawsuits, which shape the relationship between skiing and the legal system. For example, in the 2023 case Foster v M.B., Mr. Foster, a collegiate Alpine champion who skied for the University of Colorado, aged 67, was "t-boned" (or blindly struck) by a 16-year-old skier at Steamboat Spring Resort in Colorado.[23] Because the defendant was a minor, his full name has been excluded from the court record and only his initials appear in the court proceedings.[24] Under the Colorado Ski Safety Act, which describes that each skier must be in control of his or her speed, M.B. was found guilty of reckless action and ordered to pay over 435,000 dollars to Mr. Foster for medical bills and "pain and suffering" costs due to the older man's fractured hip which resulted from the collision.[25] Personal negligence is legally different from resort negligence, as there are specific laws to protect ski businesses and their insurers. Injury cases between individual skiers are very common, although they usually result in out-of-court settlements rather than jury verdicts.[26]

Personal collision cases have also garnered national attention in recent years, specifically in the case of famous actress Gwyneth Paltrow. She was involved in a collision with another skier, Terry Sanderson, at Utah's Deer Valley resort in 2016, yet the case just concluded in March of 2023, finding that Sanderson was "100% at fault" for the collision.[27] Although witness testimony identified that Sanderson was the "uphill skier," the retired optometrist decided to sue anyway; according to Paltrow: "to exploit her celebrity and wealth."[28] He originally attempted to recover 3.1 million dollars from the actress as a payment for damages, although later amended it

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[23] *Foster v M.B.,* Routt County District Court, Case No. 2022CV030020 (2023)
[24] Chalat Law. "$435000 Jury Verdict for Skier Injured at Steamboat." *Chalat Law*, (c. 2023), https://chalatlaw.com/recent-ski-cases/435000-jury-verdict-for-skier-injured-at-steamboat/. (Accessed 20 November 2023).
[25] Ibid.
[26] Ibid.
[27] Minyvonne Burke. "Gwyneth Paltrow ski crash trial: Summary and timeline." *NBC News*, (c. 2023), https://www.nbcnews.com/pop-culture/pop-culture-news/gwyneth-paltrow-ski-crash-trial-summary-timeline-rcna77570. (Accessed 20 November 2023).
[28] Ibid.

to 300,000 dollars on the advice of his counsel. Paltrow countersued for a ceremonial one-dollar recovery so that her reputation would not be besmirched. Ultimately, the jury sided in Paltrow's favor after a trial over the course of the spring of 2023.[29]

Beyond injury lawsuits, which are the most common in the realm of skiing, other legal disputes have arisen as well. In the case of City of Sun Valley v. Sun Valley Company, the ski corporation sued the city over their imposition of sales tax on lift tickets. Ultimately, the case was appealed to the Idaho supreme court who found that the city could not apply sales tax to tickets as "admission charges," so they were able to tax the tickets as a receipt for services rendered at a recreational facility.[30] Aside from lift tickets, the taxation of ski equipment has also been an issue in court. Equipment manufacturer Ski Haus Inc. sued the New Jersey Taxation Division Director over the attempt to subject ski boot rentals to New Jersey sales tax. The New Jersey Tax Court found that ski boot rentals were exempt from sales tax because they could not be adapted to regular footwear for "general use." Furthermore, tax exemptions were not "unreasonable, arbitrary, capricious, or unduly onerous," and it was within the manufacturers authority to maintain the exemption. History has proven that anything involving additional taxes will likely make its way into court, and the findings seem to favor industry over states seeking additional sales taxes.[31] As with any large enterprise, property rights are essential to the function of ski resorts, and this notion has also been tested by the legal system. In California v. Auburn Ski Club in 1966, a California department of public works in Placer County appealed a decision in which Auburn Ski Club was awarded 201,050 dollars when the state seized the land using the doctrine of "eminent domain" to construct a highway. The petitioners felt that this was an excessive amount, and they were owed compensation. The superior court sided with the resort

[29] Ibid.
[30] *City of Sun Valley v. Sun Valley Company*, 123 Idaho 665 (1993)
[31] *Ski Haus v. Taxation Div. Director*, 5 N.J. Tax 26 (1982)

and affirmed the previous ruling because the Auburn Ski Club (mainly a jumping resort) had affirmed the value of the property only three years prior in 1963 and had improved the property with lodges and other facilities. This decision was a victory for ski resorts, as it affirmed the value of their property and made it more difficult for the government to seize ski resort land without proper compensation.[32] Many social developments have also shaped the history of skiing in the United States. It has become a very popular national pastime that has shaped the identity and culture of entire regions of the country. Over the course of its evolution, skiing has gone from an extremely exclusive sport dominated by young Scandinavian men to an activity that can be enjoyed by almost all of society, provided they live in an area with snow or can travel.[33] However, modern skiing is not without controversy. There are still those who believe that it is far too dangerous, expensive, and "aristocratic." It is true that the sport has been expanded to women and the greater public, but there are still many barriers preventing average families from enjoying large resorts. Many have blasted the activity for being "White-washed," and say that American minorities do not have a true place within skiing society. When looking at statistics, their claims are not unfounded:

> "Over 60 percent of skiers in the United States earn a six-figure salary, and about 85 percent of skiers identify as non-Hispanic whites. Ski towns like Jackson Hole, Wyoming and Aspen, Colorado are fever dreams of the U.S. social hierarchy, where beautiful vacation homes lie empty much of the year while a shocking number of workers sleep in their cars."[34]

Furthermore, there is a history of ski resorts hiring Hispanic laborers who are largely kept out of the way and do not have access to the sport that they help to provide for wealthy white families.

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[32] *California v. Auburn Ski Club*, 241 Cal. App. 2d 781 (1966)
[33] Allen, "Values and Sport: The Development of New England Skiing, 1870-1940."
[34] Michael Solomons. "The Socialist Case for Skiing Current Affairs." *Current Affairs*, (c. 2021), https://www.currentaffairs.org/2021/04/the-socialist-case-for-skiing. (Accessed 20 November 2023).

Colorado historian Annie Coleman explains that “the ski industry has crafted unusually "white" settings within the American west.”[35] This fact undermines the work of minority laborers in ski towns across the country, keeping them out of an industry that would likely benefit from their greater inclusion.[36] Unfortunately, the legal system has played into this narrative. States and the federal government have inadvertently raised the cost of lift tickets and ski resort services by increasing ski corporations’ operating costs through the passage of regulations that force resorts to comply with certain safety guidelines. However, when the courts take the side of resorts, as they almost always do, they drive down the cost of insurance, allowing ski resorts a smaller operating budget, cutting back on ticket costs. In this way, the development of “ski law” and legal culture has both helped and hurt the growth of the sport among less wealthy individuals.

The future of the institution does not bode well for skiers hoping that lift tickets will fall in price. Currently, the United States is facing a rapid consolidation of ski mountains by massive recreation corporations. In 1970, there were over 1,000 privately owned and operated ski resorts across the country; however, for the 2022-23 season, there were only 473, and of those 473,103 were owned by just 11 conglomerates.[37] The leader of this consolidation movement is Vail Resort Group, who generated over 2.5 billion dollars in sales over the last year. The main factor driving up consolidation and service prices is increased operating costs. According to Stephen Kircher, CEO of Boyne Resorts, “The cost of investment and underlying infrastructure costs have gone up way faster than inflation, lift technology in particular.”[38] It seems as though this pattern is destined to continue. It does not help that the ski season has been made shorter by

[35] Annie Gilbert Coleman. “The Unbearable Whiteness of Skiing.” *Pacific Historical Review* 65, no. 4 (1996): 583–614. https://doi.org/10.2307/3640297, 584.
[36] Ibid, 585.
[37] Brent Thomas. “The Future of Ski Resort Ownership and Viability.” *SnowBrains*, (c. 2022), https://snowbrains.com/the-future-of-ski-resort-ownership-and-viability/. (Accessed 20 November 2023).
[38] Ibid.

climate change concerns, with the average season being 34 days shorter than it was in 1982.[39] This decrease in the calendar days of profitable operations means that resorts must

Since World War II, skiing and winter tourism has been an economic boon to the United States, especially in the west.[40] Beyond the enterprise , and Park City, which would otherwise have no reason to be profitable, are now some of the richest areas in the nation. The law has developed over the last century to meet the growing needs of this new sector of the economy, and although it has intervened to protect consumers and the businesses that serve them, the increasing cost of skiing has sparked much cause for concern. Lifelong skiers continue to impart their love of the sport onto the next generation, and ski culture in the United States will likely continue for centuries to come as a unique way to engage with the nature of the nation. The legal system will continue to adapt to meet changing conditions, especially as decreasing snowfall stemming from climate change threatens the industryas long as there are snow-covered mountains, Americans will flock to the slopes to enjoy om they provide.

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[39] Ibid.

[40] Annie Gilbert Coleman. "The Unbearable Whiteness of Skiing." *Pacific Historical Review* 65, no. 4 (1996): 583–614. https://doi.org/10.2307/3640297, 584.

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[41] I have cited these cases as they appeared on WestLaw or CaseText. I am not positive of the meaning of the various numbers, but they were presented in this form and I felt it important to include the citations as they appeared in their original form, rather than to edit.

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Jakubovsky v. Blackjack Ski Corporation, Case No. 08-C-206 (E.D. Wis.) (2009)

Sanderson v. Paltrow, UT (2023)[42]

Ski Haus v. Taxation Div. Director, 5 N.J. Tax 26 (1982)

[42] I was unable to find the official volume number for the *Paltrow* case, likely due to the fact that it was closed so recently, and felt that it was important to include all the information I had access to.