Letter to insurance company
June 15, 2013

Tamara Scott
Registered Agent
National Life and Casualty Insurance Company
One City Center Plaza
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Re: Snow King

Dear Tamara:

Thank you for your letter clarifying the position of your Rating Department. We have researched the relevant cases and would like to present our position on why the recreational use statute (Columbia Civil Code section 846, hereinafter "the statute") will apply.

I. The recreational use statute will apply because SKMR is operated for recreational purposes
A. The statutory list does not purport to be complete, but is only illustrative
In Schneider, Plaintiff walked down Defendant's beach steps to drink her coffee and got injured by tripping. Plaintiff sued because she intended none of the enumerated activities in the statute. However, the court held that the manifest purpose of Defendant's preserve was recreational. The statutory list does not purport to be complete, but is only illustrative. Any number of clearly recreational activities suggest themselves. Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named. The statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. They range from risky activities to more sedentary pursuits. Some require a large space while others can be done in a more limited setting. There is no distinction between natural and artificial conditions Thus, Plaintiff's presence was occasioned by the recreational use of the property, and her injury was the product thereof. The preserve obtained summary judgment, and the court affirmed it.

Much like in Schneider, although the use of SKMR's resort for mountain biking is not enumerated in the statute, it falls under the definition of "recreational purpose." Mountain biking is a clearly recreational activity. SKMR is excited to set up its resort to allow people in their 20s to partake in the "extreme sport." SKMR used to be a ski-only resort and is now expanding its activities beyond skiing. Accordingly, SKMR is a resort intended to allow its patrons to enjoy various recreational activities, and thus falls within the protection of the statute.

B. Even if not enumerated by the statute, determining whether an activity falls within the statute should be based on the totality of the circumstances
In Gerkin, the court stated that determining whether an activity falls within an enumerated statutory activity should not be based on Plaintiff's state of mind. It must be made through a consideration of TOTC. Plaintiff's subjective intent is merely relevant to show purpose. In this case, Plaintiff crossed Defendant's (Saint Clara Valley Water District's) property because it was the shorted route between Plaintiff's apartment and the supermarket and was a method regularly used by residents. Thus, Plaintiff was not "hiking" within the commonly understood recreational sense of the word. The court in Gerkin discussed that language and historical background of the statute show that the legislature did not intend to immunize landowners from liability for all use of their properties, but only those uses which could justifiably be characterized as "recreational" in nature. For example, "all types of vehicular riding" does not mean anyone traveling in a car but only recreational vehicular activity such as motorcycling for pleasure or dune buggying.

Here, Kyle Mills' letter explicitly states that mountain biking would attract people in their 20s attracted

to the image of extreme sports. Manuel Lopez's letter mentions that mountain bikers could access the mountain and trails, where wildlife viewing is popular. It also says there will be a name change from Snow King Ski Area to the Mountain Resort, which further indicates recreation. Your (Tamara's) letter suggests that mountain biking is accompanied by natural atmosphere and is done every weekend, presumably for recreation. Thus, these facts demonstrate that mountain biking is a recreational activity that falls within the purview of the statutory language.

II. SKMR's commercial status is not relevant to the determination of whether the statute applies

A. Michigan and Louisiana statutes were not intended for commercial enterprises, but Columbia's statute makes no mention of it

Your letter mentions that the Rating Department does not think the statutory immunity applies to commercial operations under Danaher and Pratt. These Michigan and Louisiana cases do say that their recreational use statutes are not intended to apply to private lands that constitute commercial enterprises (Danaher 2nd paragraph; Pratt LRUS quoted in 3rd paragraph).

In Columbia, however, its statute makes no mention of commercial enterprises. While Michigan and Louisiana case law are relevant and persuasive, they are not binding in Columbia. Thus, Michigan and Louisiana's exception should not apply to SKMR's commercial status.

B. Requiring consideration makes SKMR's commercial nature irrelevant

Any charge for access was found to be sufficient to preclude application of the statute (Thompson cited in Jones). Consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities (Moore cited in Jones). In Jones, Plaintiff paid a dollar to rent a tube but not to enter the park. Plaintiff could have used the park without paying if she had brought her own tube. Johnson also mentions what constitutes consideration. The phrase "where consideration has been received from others" suggests that consideration is not limited only to direct payment of entrance fees -- a landowner must gain immediately and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration applies. The courts of appeals in Michigan have held that it did apply to where consideration was in the form of an "entrance fee" (Danaher). Thus, entrance fees are definitely considered consideration.

SKMR's patrons will not be charged to use the trail, so there will be no transfer of consideration, and no statutory exception to apply. Thus, SKMR's mere nature as a commercial entity is not a relevant factor in determining whether the statute's immunity applies.

C. SKMR is not employing a hold-harmless agreement

The statute provides an exception where liability otherwise exists where permission to enter has been granted for a consideration. Under Johnson, courts should construe the exceptions for consideration narrowly. In this case, a hold harmless (indemnity) agreement by a landowner that allowed the public to use without charge for recreational purposes was a remote, potential "benefit" that did not constitute consideration to Plaintiff. Since it was not consideration, the exception to immunity did not apply here.

Unlike in Johnson, SKMR is not allowing the public to use without charge for recreational purposes. It plans to charge for aerial trams and parking (no definite plans for mountain biking trail). Further, it rejected the idea of waivers or hold-harmless clauses to access to the trails. SKMR is a situation that does not fit with the facts of Johnson. Thus, there is one fewer source of consideration given to SKMR.

Please take a look and forward these considerations to the Rating Department. Thank you.

Sincerely,
Applicant

Letter to Manuel Lopez
To: Manual Lopez
From: Applicant
Date: June 15, 2013
Re: Snow King operation

Dear Manuel,

Thanks for forwarding me your plan on transforming your resort to an all-year one. I have done some research on relevant case law and come up with some recommendations for you to maximize your chance that Columbia's recreational use statute (hereinafter "the statute") will apply.

I. Do not charge access fees for the mountain biking trail
A. Entry fees are treated as consideration that excepts landowners from statutory protection
There are cases that clearly establish that an entry fee counts as consideration that would take SKMR out of the protection of the use statute. In Thompson cited in Jones, any charge for access was found to be sufficient to preclude application of the statute. Under Moore cited in Jones, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities.

Kyle Mills has already mentioned that allowing guests (whose privileges include tram and parking privileges) to bike without feeling they're paying for trails, parking or the tram would be great for sales. He also says trail access fees are not necessarily for profitable operations. He projects that attracting mountain bikers would have substantial returns even without selling bikes, tram tickets or trail passes. Thus, it is clear that SKMR should not charge a fee to access the bike trail in addition to the existing aerial tram fee and parking fee.

B. Nominal charges for entry may be acceptable
On the other hand, the court in Pratt mentions that nominal charges (25-50 cents were charged for use of the pool in that case) did not indicate a managerial philosophy oriented toward profit maximization and thus did not render Defendant's nature commercial. This suggests that nominal fees for entry may not take SKMR out of the purview of the statutory protection.

You mentioned that mountain biking would be the cheapest new activity to add. We only need to add a few trails and signage and print trail maps. Thus, if you wish, a nominal fee might cover these small expenses and make the trails an operation that brings it up to a break-even operation if considered by itself (since other activities done by the bikers will make it profitable overall, as Kyle mentioned).

II. Bike-tram charges are OK
As mentioned, type of entrance fee or charge for permitting a person to use specially constructed facilities would comprise consideration that takes SKMR out of the statutory protection (Jones). However, fees unrelated to entry would not be a problem. In Jones, Plaintiff paid a dollar to rent a tube but not to enter the park. Plaintiff could have used the park without paying if she had brought her own tube.

You were considering a bike-tram charge. Sally Johnson proposed adding exterior hooks to carry the bikes in the aerial tram. Both of these would not pose a problem because those fees would not be for entry onto SKMR. However, as Sally's and Kyle's memos suggest, letting bikers bring their bikes for free would be beneficial overall. Nonetheless, the option for charging for bringing bikes is still open.

III. Selling and renting bikes are OK
A similar analysis as Part II applies. Consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities (Moore cited in Jones). Fees unrelated to entry

would not be a problem. In Jones, Plaintiff paid a dollar to rent a tube but not to enter the park. Plaintiff could have used the park without paying if she had brought her own tube.

If you allowed interested bikers to buy and rent bikes, this would be consideration for use of the bikes rather than entry. Thus, it would not be a source of liability under the statute.

I hope these analyses helped you with your business strategy. I also forwarded a letter to your insurance company to persuade them that mountain biking is not of high risk. If all goes well, the premium quote will lower. I look forward to hearing good news.

Sincerely,
Applicant

Total time: 3:07