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SENATE BILL NO. 246

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 27, 2012)

(Patrons Prior to Substitute—Senators Obenshain and Deeds)

A BILL to amend the Code of Virginia by adding in Chapter 3 of Title 8.01 an article numbered 25, consisting of sections numbered 8.01-227.11 through 8.01-227.23, relating to the limitation of liability for winter sports area operators.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 8.01 an article numbered 25, consisting of sections numbered 8.01-227.11 through 8.01-227.23, as follows:

Article 25.

Winter Sports Safety Act.

§ 8.01-227.11. Definitions.

As used in this article, unless the context requires a different meaning:

"ANSI Ski Lift Code" means the American National Standard (B77.1-2006): Passenger Ropeways - Aerial Tramways, Aerial Lifts, Surface Lifts, Tows and Conveyors - Safety Requirements, as published by the American National Standards Institute, including any supplements thereto or revisions thereof.

"Competition" means any contest or event operated by a winter sports area operator or any other party authorized by the operator at a winter sports area involving comparison of skills, including, but not limited to, a ski race, mogul contest, jumping event, freestyle event, snowcross contest, or other similar contest or event. "Competition" includes training sessions or practice for a contest or event.

"Competition terrain" means any part of a winter sports area in which an operator has authorized a competition to take place.

"Competitor" means a winter sports participant who actually is engaged in a competition in any portion of a winter sports area made available by the winter sports area operator.

"Designated trail" means a winter sports area trail on which a participant is permitted by the operator to participate in a winter sport.

"Freestyle terrain" and "freestyle terrain park" means any portion of a winter sports area that has been designated as such by the operator for freestyle skiing, freestyle snowboarding, or similar freestyle winter sports and includes, but is not limited to, the terrain park itself and features such as rails, boxes, jumps, hits, jibs, tabletops, spines, ramps, banks, pipes, half-pipes, quarter-pipes, tables, logs, or other man-made features such as buses and other vehicles, propane tanks, and tractor tires; snowcross terrain and features; and other constructed or natural features, but does not include moguls, bumps, or rollers or jumps not built by the operator, unless they are within a designated freestyle terrain park.

"Freestyler" means a winter sports participant utilizing freestyle terrain or a freestyle terrain park.

"Helmet" means a type of molded headgear equipped with a neck or chin strap specifically designed by the manufacturer to be used while engaged in the winter sport of alpine skiing or snowboarding.

"Inherent risks of winter sports" or "inherent risks of the winter sport" include:

1. Existing and changing weather conditions and visibility;

2. Hazards associated with varying surface or subsurface conditions on a single trail or from one trail to another, including but not limited to hazards such as participant use, snow in any condition and changing snow conditions, man-made snow, synthetic snow, ice, synthetic ice, snow or ice falling from a tree or natural or man-made structure, crust, slush, soft spots, ridges, rollers, knobs, holes, grooves, tracks from winter sports area vehicles, bare spots, rocks, boulders, stumps, logs, and brush or other forest growth or debris, or piles thereof;

3. Variations in difficulty of terrain, whether natural or as a result of slope use, slope design, or both;

4. Trails that have, or fall away or drop off toward, natural or man-made obstacles or hazards, including but not limited to sharp corners, ridges, jumps, bumps, rollers, moguls, valleys, dips, compressions, cliffs, ravines, drop-offs, streams, rivers, ponds, lakes, stream beds, open water or water with thin ice, holes, steep, flat, and uphill sections, and all variants and combinations thereof;

5. The potential for collision with other participants or other individuals, including with winter sports area personnel, whether or not those personnel are on duty or off duty; with wild or domestic animals; or with equipment or objects such as winter sports area infrastructure, snowmaking equipment, buildings and posts, and stationary and moving lit or flagged winter sports area vehicles;

6. The potential for a participant to act in a negligent or reckless manner that may cause or contribute to the injury or death of the participant or other individuals or damage to property;

7. The location, construction, design, layout, configuration, and condition of trails, freestyle terrain,

60 and competition terrain;

61 8. The fact that use of trails, freestyle terrain, and competition terrain and participation in or being
62 near races or other competitions or events, including but not limited to as a participant, employee at a
63 winter sports area, spectator, or observer, involves the risk of serious injury or death or damage to
64 property;

65 9. The fact that a helmet may not afford protection in all instances and that failure to wear a helmet
66 that is properly sized, fitted, and secured may increase the risk of injury or death or the risk of more
67 severe injury; and

68 10. The fact that the use of passenger tramways may be hazardous to passengers, including but not
69 limited to risks resulting from loading or unloading a tramway and the potential for a passenger to fall
70 from a tramway.

71 "Operator" or "winter sports area operator" means any person who has responsibility for the
72 operations of a winter sports area, including its officers, directors, and employees and agents acting
73 within the scope of their employment.

74 "Participant" or "winter sports participant" means an individual of any age or physical or mental
75 ability who is an amateur or professional invitee of the operator or a trespasser and who participates in
76 a winter sport at the winter sports area, whether or not consideration is paid to participate in the
77 winter sport and whether or not the participant holds a valid admission ticket for all or a portion of the
78 winter sports area, and any employee of the operator who participates in a winter sport either as part
79 of his employment duties or as recreation.

80 "Participates in a winter sport" or "participating in a winter sport" means:

81 1. Using a trail or other terrain at a winter sports area to engage in a winter sport;

82 2. Participating in training or lessons for a winter sport as either an instructor or a student;

83 3. Being a spectator, observer, bystander, or pedestrian of or to any activity on a trail or other
84 terrain at or near a winter sports area; or

85 4. Being a passenger on a passenger tramway.

86 "Passenger" means any individual, including a winter sports participant, while being transported or
87 conveyed by a passenger tramway, while waiting in the immediate vicinity for such transportation or
88 conveyance, while moving away from the disembarkation or unloading point of a passenger tramway to
89 clear the way for the following passengers, or while boarding or embarking upon or unloading or
90 disembarking from a passenger tramway.

91 "Passenger tramway" means any ski lift, chairlift, gondola, tramway, cable car, or other aerial lift
92 and any rope tow, conveyor, t-bar, j-bar, handle tow, or other surface lift used by an operator to
93 transport participants, spectators, observers, or pedestrians at a winter sports area, and any associated
94 components including, but not limited to, lift towers, concrete tower foundations, tower bolts, tower
95 ladders, lift terminals, chairs, gondolas, t-bars, j-bars, conveyors, and other structures relating to
96 passenger tramways.

97 "Person" means any individual, corporation, partnership, association, cooperative, limited liability
98 company, trust, joint venture, government, political subdivision, or any other legal or commercial entity
99 and any successor, representative, agent, agency, or instrumentality thereof.

100 "Snowmaking equipment" means any machine used to make snow, including but not limited to snow
101 guns and any associated towers, components, pipe, hydrant, hose, or other structures or equipment,
102 including electrical equipment.

103 "Trail" or "winter sports area trail" means any slope, trail, run, freestyle terrain, or competition
104 terrain located in a winter sports area. "Trail" includes edges and transition areas to other terrain, but
105 does not include a tubing park.

106 "Tubing" means sliding on inflatable tubes, minibobs, sleds, toboggans, or any other comparable
107 devices down a prepared course or lanes at a winter sports area.

108 "Tubing park" means an area designated by an operator for tubing.

109 "Winter sport" means a recreational or sporting activity, including sliding, jumping, walking, or
110 traveling on a winter sports area trail for alpine skiing; Nordic skiing; telemark skiing; freestyle skiing;
111 snowboarding; freestyle snowboarding; snowshoeing; tobogganing; sledding; or use of a snowmobile,
112 minibob, snowbike, or comparable device; or any similar activity or use of a device that takes place at
113 any time of the year on natural snow, man-made snow, ice, synthetic snow, synthetic ice, or any other
114 synthetic surface, including a competition or the use of any device by a disabled or adaptive participant
115 for a winter sport. "Winter sport" does not include ice skating or tubing.

116 "Winter sports area" means all the real and personal property under control of the operator or on
117 the premises of such property that is being occupied by the operator by fee simple, lease, license,
118 easement, permission, or otherwise, including but not limited to any and all trails, freestyle terrain,
119 competition terrain, passenger tramways, or other areas of real property. "Winter sports area" does not
120 include a tubing park except for any passenger tramway serving a tubing park and the immediate
121 vicinity of such a passenger tramway in which individuals embark upon or disembark from the

passenger tramway.

"Winter sports area infrastructure" means:

1. Passenger tramways;
2. Snowmaking equipment;
3. Towers, buildings, shacks, fixtures, furniture, and other structures, including utility infrastructure, located on the winter sports area property; and
4. Signs, fences, ropes, flags, posts, poles, and any other materials or structures used for posting signs or to manage or direct winter sports participants, spectators, observers, or pedestrians or any combination thereof.

"Winter sports area vehicle" means a vehicle used on a winter sports area trail in the operation and maintenance of winter sports areas and competitions and includes, but is not limited to, snowmobiles, all-terrain vehicles, and any other similarly sized vehicles as well as larger maintenance vehicles such as snow grooming equipment.

§ 8.01-227.12. Warnings and other winter sports area operator requirements.

A. Each winter sports area operator shall include the following warning on each ticket, season pass, and written contract for professional services, instruction, or the rental of equipment to a winter sports participant and on each sign required by this subsection:

"WARNING: Under Virginia law, a ski area operator or other winter sports area operator is not liable for an injury to or death of a winter sports participant in a winter sport conducted at this location, or for damage to property, if such injury, death, or damage results from the inherent risks of the winter sport or from the participant's own negligence. The inherent risks of a winter sport include, among others, risks associated with the land, equipment, other participants, and animals, as well as the potential for you or another participant to act in a negligent manner that may contribute to the injury, death, or damage. You are assuming the inherent risks of participating in a winter sport at this location. Complete copies of the applicable Virginia law and the participant responsibility code published by the National Ski Areas Association are available for review at each ticket sales office of this winter sports area and online at [insert website for winter sports area]."

Every ticket, season pass, and written contract for professional services, instruction, or the rental of equipment to a participant shall contain the warning required by this subsection in clearly readable print. Every sign required by this section shall contain the warning required by this subsection in black letters, with each letter to be a minimum of one inch in height. An operator also may print on a ticket; season pass; written contract for professional services, instruction, or rental of equipment to a participant; or any sign required by this section any additional warning it deems appropriate. The warning required by this section does not constitute a preinjury contractual release and nothing in this section alters the common law of Virginia with regard to preinjury contractual releases.

B. Each operator shall install and maintain a sign containing the warning set forth in subsection A (i) at each designated ticketing office, (ii) at each front desk at each building or facility at which guests check in, (iii) at or near each ticket sales office of the winter sports area, and (iv) at, near, or en route to the loading area of each passenger tramway.

C. Each operator shall install and maintain at or near the beginning of each designated trail a sign that contains the name of the trail and any of the applicable difficulty-level words and emblems contained in this subsection, as determined by the operator. Directional arrows may be included on any sign, but shall be included if the sign is located at such a distance or position relative to the beginning of a trail that it would not be understandable by a reasonably prudent participant without directional arrows. As applicable, the signs shall indicate: (i) "Easiest" and include a green circle emblem, (ii) "More Difficult" and include a blue square emblem, (iii) "Most Difficult" and include a black diamond emblem, (iv) "Expert" or "Extreme Terrain" and include a two black diamond emblem, (v) "Freestyle Terrain" and include an orange oval emblem, or (vi) "Closed" and include a border around a black figure in the shape of a skier inside with a band running diagonally across the sign.

D. Each operator shall install and maintain at, near, or en route to the loading area for each passenger tramway that does not service trails that are designated by the operator as "Easiest" a sign that includes the following warning:

"WARNING. This lift does not service any trails that are designated Easiest (green circle emblem). All of the trails serviced by this lift are designated [as applicable, More Difficult (blue square emblem), Most Difficult (black diamond emblem), Expert (two black diamond emblem), or Freestyle Terrain (orange oval emblem)]."

E. Each operator shall install and maintain at, near, or en route to the entrance to each trail containing freestyle terrain a sign that indicates the location of the freestyle terrain. Each sign shall be denoted by an orange oval emblem, a stop sign emblem, and the statements "Freestyle skills required" and "Helmets are recommended." Each sign also may include any other freestyle warning the operator deems appropriate.

183 F. Whenever trail grooming or snowmaking operations are being undertaken, or trail grooming
184 equipment is being operated, on a trail that is at that time open to the public, the operator shall place
185 or cause to be placed a sign to that effect at the top or beginning of the trail.

186 G. An operator may vary from the specific location requirements required by this section provided
187 that the location is substantially the same as the location required by this section and that the sign is
188 plainly visible to a reasonably prudent winter sports participant abiding by all of the participant's duties
189 and responsibilities.

190 H. Each operator shall make available, by oral or written report or otherwise, information
191 concerning the daily conditions of its trails.

192 I. Each operator that offers a winter sport at nighttime shall meet the lighting standards for that
193 winter sport provided by Illuminating Engineering Society of North America RP-6-01, Sports and
194 Recreational Area Lighting § 6.24, including any supplements thereto or revisions thereof.

195 J. Each operator shall, upon request, provide (i) a freestyler who holds a valid admission ticket to
196 the winter sports area's freestyle terrain a reasonable opportunity to view the freestyle terrain and (ii) a
197 competitor who has properly registered for the competition a reasonable opportunity to visually inspect
198 the portion of the winter sports area designated by the operator for the competition.

199 K. Each operator shall provide a ski patrol and first-aid services.

200 L. Each operator shall make available on the winter sports area's website and at each ticket sales
201 office of the winter sports area for review by any winter sports participant, upon request, a copy of the
202 participant responsibility code posted and available at each winter sports area and a copy of this
203 article.

204 § 8.01-227.13. Winter sports area trail maps.

205 Each operator, upon request, shall provide to a participant a trail map of all trails located in the
206 operator's winter sports area. The maps shall be available at each ticket sales office and at other
207 locations at the winter sports area such that the maps are easily accessible to participants. All trail
208 maps shall indicate the skill-level designation for each trail at the winter sports area as designated in
209 subsection C of § 8.01-227.12.

210 § 8.01-227.14. Freestyle terrain.

211 In addition to providing the signage and warnings set forth in subsections C and E of § 8.01-227.12,
212 an operator shall construct a barricade through use of fencing, flagging, or similar means at the
213 entrance to any trail containing freestyle terrain. The barricade shall contain an entrance opening not
214 wider than 30 feet.

215 § 8.01-227.15. Winter sports area vehicles.

216 An operator shall install and maintain on or near the top of each winter sports area vehicle that is
217 present on any designated trail of a winter sports area during the operating hours of any passenger
218 tramway serving that trail a flashing or rotating light that flashes or rotates whenever the vehicle is on
219 any such trail. An operator also shall install and maintain on any snowmobile, all-terrain vehicle, or
220 any other similarly sized vehicle that is present on any designated trail during the operating hours of
221 any passenger tramway serving that trail a red or orange flag that is at least 40 square inches in size
222 and is mounted at least five feet from the bottom of the vehicle's tracks or tires.

223 § 8.01-227.16. Passenger tramways.

224 A. Each operator shall be responsible for the safe operation and maintenance of each passenger
225 tramway in its winter sports area whenever the tramway is in use, and for the safe construction of any
226 passenger tramway that the operator constructed. At least once during each calendar year, each
227 operator shall have all passenger tramways within the operator's winter sports area inspected by an
228 individual who is qualified pursuant to Virginia law to inspect passenger tramways for compliance with
229 the requirements of the ANSI Ski Lift Code and shall not operate a passenger tramway that is not in
230 compliance until that passenger tramway is certified by such an individual as being in compliance. An
231 operator's compliance with this inspection requirement does not by itself preclude potential liability on
232 the part of the operator for any failure to operate or maintain a passenger tramway safely.

233 B. If a participant or a passenger using a passenger tramway at a winter sports area with the
234 permission of the operator is unfamiliar with the use of a passenger tramway and asks for instruction
235 on its use, the operator shall provide a reasonable opportunity for such instruction. In addition to the
236 signs required by subsections A, B, and D of § 8.01-227.12, an operator shall install and maintain at or
237 near the loading area for each passenger tramway in the winter sports area a sign stating that if a
238 participant or other passenger is unfamiliar with the use of the passenger tramway and asks for
239 instruction for its use, the operator will provide a reasonable opportunity for such instruction.

240 § 8.01-227.17. Duties and responsibilities of winter sports participants and certain other individuals.

241 A. A winter sports participant has a duty and responsibility to:

242 1. Exercise reasonable care in engaging in winter sports at the winter sports area, including, but not
243 limited to, the exercise of reasonable care in:

244 a. Participating in a winter sport at a winter sports area only on designated trails that are not

marked "closed" and refraining from participating in a winter sport in any portion of a winter sports area that is not a designated trail or is marked "closed";

b. Knowing the range of his ability to participate in the winter sport in which he is participating and acting within the limits of that ability;

c. Being the sole judge of his knowledge of and ability to successfully negotiate any trail or passenger tramway and refraining from negotiating any trail or passenger tramway until obtaining sufficient knowledge and ability to do so;

d. Heeding and obeying all warnings, notices, and signs provided by an operator and not altering, defacing, removing, or destroying any such warning, notice, or sign;

e. Maintaining control of his speed and course at all times and maintaining a proper lookout so as to be able to avoid other participants and objects;

f. Staying clear of any winter sports area vehicle or infrastructure, other than when embarking on or disembarking from a passenger tramway or when present at or in a residential building or other building that is open to the public;

g. Wearing retention straps, ski brakes, or other devices to prevent runaway equipment;

h. Making a visual inspection of any winter sports area competition terrain and viewing any freestyle terrain the participant intends to use;

i. Acting in a safe manner that will avoid contributing to the injury or death of himself or others or the damage to property, including refraining from participating in a winter sport when the participant's ability to do so safely is impaired by the consumption of alcohol or by the use of any narcotic or other drug or while under the influence of alcohol or any narcotic or other drug, or placing, fabricating, or shaping any object in a trail;

j. Embarking on a passenger tramway only with the authority of the operator;

k. Boarding or dismounting from a passenger tramway only at a designated area;

l. Acting in a manner while riding a passenger tramway that is consistent with posted rules and that will not interfere with the proper and safe operation of the passenger tramway;

m. Refraining from throwing or expelling any object while riding on a passenger tramway, and from placing an object on or about the uphill track, the entry area, or the exit area of any passenger tramway;

n. Crossing the uphill track of a passenger tramway only at designated locations; and

o. When involved in a winter sports collision or other accident involving another individual who the participant knows or reasonably should know is in need of medical or other assistance, obtaining assistance for that individual, notifying the proper authorities, and not leaving the scene of the collision or accident without giving the participant's personal identification, including his name and local and permanent address, to an employee or representative of the operator or to someone providing assistance to the individual, except for the purpose of obtaining assistance for the individual, in which case the participant shall give his personal identification to an employee or representative of the operator or to someone providing assistance to the individual after obtaining such assistance; and

2. When requested, provide his personal identification to an employee or representative of the winter sports area or operator.

B. Each passenger using a passenger tramway with the permission of an operator shall abide by and fulfill each duty and responsibility set forth in subsection A that is applicable to use of a passenger tramway.

C. Each participant, and each passenger using a passenger tramway with the permission of an operator, shall be deemed as a matter of law to have seen and understood all postings, signs, and other warnings provided by the winter sports area operator as required by this article.

D. An operator is entitled to assume that each passenger who boards a passenger tramway has sufficient knowledge, ability, and physical dexterity to embark upon, disembark from, and negotiate the passenger tramway. Any passenger who is unfamiliar with the use of a passenger tramway or who believes he does not have sufficient knowledge to embark upon, disembark from, and negotiate a passenger tramway shall ask the operator for instruction on such use or to provide such knowledge. Nothing in this article shall be construed to extend liability to an operator for injury to or death of a participant or other individual or damage to property resulting from a passenger who is unfamiliar with the use of a passenger tramway or believes he does not have sufficient knowledge to embark, disembark from, or negotiate a passenger tramway and does not ask the operator for instruction on such use or to provide such knowledge, or who does not have the ability or physical dexterity to embark upon, disembark from, or negotiate a passenger tramway.

E. Any individual who is not authorized by the operator to use or be present at the winter sports area shall be deemed a trespasser.

§ 8.01-227.18. Helmets.

Each winter sports participant, or the parent or legal guardian of, or adult acting in a supervisory

306 position over, a participant under the age of 18, shall be responsible for determining whether the
307 participant will wear a helmet and whether the helmet is sufficiently protective and properly sized, fitted,
308 and secured.

309 Nothing in this article shall be construed to extend liability to an operator for injury to or death of a
310 participant or other individual or damage to property resulting from a participant not wearing a helmet
311 while participating in a winter sport.

312 § 8.01-227.19. Assumption of risks.

313 A. A winter sports participant shall be presumed to have known the inherent risks of the winter sport
314 in which he participates, to have fully appreciated the nature and extent of such risks, and to have
315 voluntarily exposed himself to such risks, even if a particular risk was not specifically presented or
316 stated to the participant by the operator. A passenger who uses a passenger tramway with the
317 permission of an operator shall be presumed to have known the risks of winter sports that are
318 applicable to the use of passenger tramways, to have fully appreciated the nature and extent of such
319 risks, and to have voluntarily exposed himself to such risks, even if a particular risk was not specifically
320 presented or stated to the individual by the operator. Such presumption may be rebutted by the
321 participant or passenger by proving that the participant or passenger did not know the particular
322 inherent risk of winter sports that proximately caused the injury or death or damage to property at
323 issue, did not fully appreciate the nature and extent of such risk, or did not voluntarily expose himself to
324 such risk.

325 B. An operator's negligence is not an inherent risk of winter sports, and a participant or passenger
326 is not presumed to have accepted the risk of such negligence and the injuries proximately caused
327 therefrom.

328 C. In determining if the presumption set forth in subsection A applies in a particular case, whether a
329 particular circumstance or set of circumstances constitutes an inherent risk of winter sports shall be a
330 question of law, and whether the participant or passenger assumed the particular inherent risk of winter
331 sports shall be a question of fact.

332 D. Nothing herein shall prevent a participant or passenger from offering evidence that he did not
333 know the particular inherent risk of winter sports that proximately caused the injury or death or damage
334 to property at issue, did not fully appreciate the nature and extent of such risk, or did not voluntarily
335 expose himself to such risk.

336 § 8.01-227.20. Liability of winter sports area operator.

337 A. A winter sports area operator shall be liable if the operator does any of the following:

338 1. Commits an act or omission related to a winter sport that constitutes negligence or gross
339 negligence regarding the safety of an individual, or of property, and that act or omission proximately
340 causes injury to or the death of the individual or damage to property; or

341 2. Recklessly, knowingly, or intentionally commits an act or omission related to a winter sport that
342 proximately causes injury to or the death of a winter sports participant or other individual or damage
343 to property.

344 B. No operator shall be liable and no individual or individual's representative may recover from an
345 operator under subdivision A 1 or subsection C if the individual is found to have assumed the risk of
346 his injury or death, or damage to property, pursuant to § 8.01-227.19 or if a proximate cause of the
347 injury, death, or damage was his own negligence, provided that in any action for damages against an
348 operator pursuant to subdivision A 1 or subsection C, the operator shall plead, as appropriate, the
349 affirmative defense of (i) assumption of the risk by the individual, (ii) contributory negligence by the
350 individual, or (iii) both assumption of the risk and contributory negligence.

351 C. A winter sports area operator shall not be considered a common carrier under Virginia law but
352 shall be liable for any injury to or death of an individual or damage to property caused by the
353 operator's failure to operate a passenger tramway in a reasonable manner or to comply with any
354 mandatory provision of the ANSI Ski Lift Code.

355 D. The liability of a winter sports area operator to another individual who is not authorized by the
356 operator to use or be present at the winter sports area shall be only the liability for the duty owed
357 under Virginia law to a trespasser.

358 § 8.01-227.21. Common law regarding minors.

359 Nothing in this article shall abrogate Virginia common law regarding either (i) the capacity of a
360 minor to be contributorily negligent or to assume a risk or (ii) the standard for measuring the conduct
361 of a minor.

362 § 8.01-227.22. Failure to fulfill duty or responsibility not negligence per se.

363 An operator's or participant's failure to abide by or fulfill a duty or responsibility under this article
364 shall not constitute negligence per se.

365 § 8.01-227.23. Applicability of article.

366 Any liabilities and presumptions pursuant to this article apply only with regard to actions or
367 potential actions between an operator and a participant or passenger. This article has no applicability

368 *to actions between a participant or passenger and any other person.*