When Releases and Waivers Don't Work – Thoughts for Fitness Professionals

written by David Herbert | March 31, 2017

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We have devoted considerable time and space in this column to provide examples of cases filed against fitness professionals, particularly personal trainers. We have recommended the development of a variety of risk management techniques designed to eliminate, avoid, manage and offset the risks of client claims and suits arising out of various fitness activities. However, not all risks of claims and suits may be totally eliminated or even managed through the application of various risk management techniques. In those instances where these kinds of claims are put forth, fitness professionals need to transfer their risks though the use of prospectively executed waivers or releases of liability and as a necessary component of any risk management plan – secure liability insurance.

Liability insurance is the bottom line for any risk management plan and must be secured since all other risk management techniques don't serve to completely avoid all claims and suits. Liability insurance coverage provides an insurance company paid defense against claims and suits as well as the payment of any judgment secured against fitness professionals – so-called indemnification – up to the amount of available insurance coverage for covered liability risks.

The last risk management technique to be utilized before liability insurance steps in to cover the defense of and indemnification from claims and suits is the use of prospectively executed releases or waivers of liability as a proactive next to last risk management step. However, even these risk management documents are not always effective to bar or prevent successful suits.

Fitness professionals must remember that such documents are not given legal effect in all states since a small minority of United States jurisdictions either by case law or state statute don't give these documents legal effect. In the majority of states where these documents are given legal effect, the use of certain language within these documents can nullify what otherwise should be an effective tool to prevent successful claims and suits.

To demonstrate what can happen in this regard, two recent cases should be reviewed and considered by all fitness professionals. The bottom line in both situations points out the need for skilled professionals to draft effective and useful release documents.

In the first and most recent case from Minnesota,[1] the plaintiff, a personal training client was injured when one of the trainers she was working with purportedly dropped a weight on her head. She filed suit but her suit was barred by the trial court based upon an indemnity clause in the documents she signed

prior to receiving fitness services. While the trial court characterized what she signed as a release containing exculpatory language – language that released fitness services providers from liability – the appellate court disagreed and determined that the indemnification clause was ambiguous and not specified in clear and unequivocal terms. In this regard, the appellate court determined: "[A]n indemnification agreement is not clear and unambiguous if it does not apprise the indemnifying party that it is responsible for the indemnified party's own negligence." As a consequence, the case was sent back to the lower court for trial.

In the second case,[2] a member of the defendant club signed an assumption of risk and liability release when she joined the club. Later, after washing her hands, she tripped on a blow dryer cord in a locker room as she turned to leave. She brought suit against the club for negligence and also asserted a claim under Colorado premises liability law. The client put forth the release as a defense and the trial court granted summary judgment to the client. The member appealed but the appellate court determined that the release did not bar her claim because the release focused on the use of exercise equipment and facilities, not upon the possibility of physical injury from non-exercise activity. Due to the language contained in the release, the court determined that the risks associated with washing one's hands in the locker room were not clearly and unambiguously stated. As a consequence, the member's claim for premises liability was returned to the lower court for trial.

Given the decisions rendered in these cases, the following points should be considered by all fitness professionals:

- Have any membership or fitness service documents drafted by experienced legal counsel familiar with the law in the jurisdiction where fitness and related services are provided.
- Make the release documents clear and succinct but broad enough to include all activities carried on in the facility from the time of entry into a facility, through the performance of exercise activities, to the use of the facility's locker room and out to the parking lot! In sum, cover all facility and equipment issues!

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[1] Price v Unverzagt and Associates, LLC, MNCA, A16-1173, Court of Appeals, Minnesota, March 20, 2017.

[2] Stone v Life Time Fitness, Inc., 2016 COA 189, Court of Appeals, Colorado, First Division, December

29, 2016.