The Intake Process for Fitness Clients – Signing Clients Up for Service

written by David Herbert | June 15, 2016

The intake process for fitness clients begins when prospective clients come into a fitness facility seeking fitness service and advice. Often, such contacts may come as a result of advertising, other marketing efforts or even personal referrals. Once a determination is made that such prospects will become clients, paperwork is typically executed providing a framework for the provision of various services or for the granting of membership rights pursuant to defined contractual provisions.

During this intake process, release and waiver documents are frequently used by fitness facilities and professionals to provide a first line of defense from client claims and suits which might arise out of fitness activities. Releases/waivers of liability are contractual documents by which those individuals executing them give up and relinquish their right to sue if those individuals are injured or die as a result of defined activities carried out by or with the person(s) to be released. In those minority of states which don't recognize prospectively executed releases or waivers of liability, express assumption of risk documents are sometimes used to demonstrate client knowledge of the risks associated with personal training and other fitness activities and to evidence their agreement to assume those risks.

Release/waiver of liability documents are generally recognized by most state and federal courts applying state law if properly written and administered. In the vast majority of states, these documents have particular legal effect and significance in the event a fitness client is injured during fitness activity and files a claim or pursues a personal injury lawsuit. Consequently, the drafting of these documents needs to be entrusted to legal counsel familiar not only with the law applicable in the jurisdiction where the fitness professional conducts business but the fitness industry as well.

Too often many facilities and fitness professionals attempt to develop these documents themselves and either leave out important clauses, use the wrong wording or inadequate language or engage in any one of a number of other potential defects in the execution process for such documents. Such deficiencies can result in releases being declared invalid or inapplicable in a given case. Consider the following cases from a number of different jurisdictions to appreciate what can go wrong in this regard.

In a recent 2015 case from Pennsylvania,[i] a Gold's Gym guest brought suit against the facility for personal injuries sustained while the plaintiff was using a piece of exercise equipment in the defendant's facility. In response to the suit, the defendant filed a motion for summary judgment based upon the plaintiff's execution of various documents including a Guest Courtesy Card, a Membership Agreement containing a waiver of liability provision and a Personal Training Agreement. While the trial court granted the defendant's summary judgment motion based upon the release provision contained within the document, the appellate court reversed that ruling. In doing so, the appellate court described

the membership agreement as follows:

The Gold's Gym membership agreement is printed on a single, two-sided page in a carbon copy packet. . . . The only signature line is located at the bottom of the front side. . . . at 1.[4] The first line in the paragraph above the signature line provides, "[d]o not sign this [a]greement until you have read both sides. The terms on each side of this form are a part of this [a]greement." . . . This instruction is not set off from the rest of the paragraph and is not in bold typeface, capital letters, or larger font, even though other terms, such as the "buyer's right to cancel, " appear in bold and capital letters. . . .

On the reverse side of the agreement are 13 additional terms printed in light gray ink on pink carbon paper. . . . All of these terms are single-spaced and printed in the same font size. . . . The "Waiver of Liability; Assumption of Risk" clause at issue in this case is the 12th term, located approximately three-quarters of the way down the page, and is not differentiated in any manner from the surrounding paragraphs.

The following issues were raised on the appeal:

1. Whether the [g]uest [c]ard signed by the Appellant covering the six[-]day trial period had expired before the Appellant's injury occurred[?]
2. Whether the [w]aiver on the back page of the [m]embership [a]greement signed by the Appellant is valid and enforceable[?]
3. Whether the [w]aiver encompasses [r]eckless [c]onduc

In reference to the release, the appellate court noted the following:

The reverse side of the agreement does not have any space for a signature or for initials where a signatory may acknowledge the additional terms. . . . Neither does the front side of the agreement require separate confirmation that the signatory has read and accepted the additional terms on the reverse side. . . . Furthermore, it is undisputed that Appellant did not read the waiver of liability language on the reverse side of the agreement, and that no employee of Gold's Gym verbally informed her that the terms of the agreement included an exculpatory clause.

The appellate court also noted:

. . . we conclude as a matter of law that the exculpatory clause in the Gold's Gym membership agreement is unenforceable because it is not sufficiently conspicuous. . . . As noted above, the exculpatory clause is printed on the reverse side of the one-page document. The exculpatory clause is not in immediate proximity to the signature line, as the signature line is on the front side of the document. Additionally, the font size of the exculpatory clause is not distinct from the other 12 terms on the reverse side, nor is the font size of the sentence advising Appellant to read both sides of the agreement distinct from the surrounding text. This is in contrast, for example, to the font in the paragraph explaining the "Buyers Right to Cancel" on the front side. . . . Rather, the exculpatory clause is printed in light gray ink on pink carbon paper and is difficult to read. Further, it is undisputed that

Appellant did not read the language of the membership agreement, and the language of the agreement itself is not so conspicuous as to, without more, put the user on notice of the exculpatory clause. Notably, the sentence advising Appellant to read both sides of the agreement does not contain a description of the additional terms or an indication of their potential significance. Therefore, we conclude the exculpatory clause in this case is unenforceable as a matter of law

Thus the appellate court reversed the trial court's ruling and returned the case to the lower court for further proceedings. Based upon the ruling in this case, fitness professionals would be well advised to make sure release provisions are legible and conspicuous and that the provisions thereof are read and acknowledged by those signing such documents. While witness and notary provisions would not seem to be absolutely necessary to insure the validity of these agreements, signatures should be on the same page where the release/waiver is located to enhance the enforceability of the document.

In another recent case from California[ii] which we mentioned in a previous article in this column but as to another issue, an injured plaintiff filed suit against 24 Hour Fitness for personal injuries she suffered in a treadmill related incident. The defendant asserted that the plaintiff's claims were barred by an executed release. The plaintiff could not read or speak English but the contract documents, including the release written in English, were allegedly communicated to her in some gesturing manner by a facility employee who did not speak the plaintiff's language. The plaintiff contended that the defendant's membership manager misled and defrauded her into signing the document which she did not understand.

While the trial court granted the defendant's summary judgment motion based upon the release, the plaintiff appealed. The Court of Appeals reversed the trial court's ruling. The appeals court determined the plaintiff's claims of misrepresentation related to the release execution process would have to be determined by a jury.

In yet another case filed in Wisconsin,[iii] a facility user was injured on a weight bench when it allegedly failed. He brought suit and claimed negligence. The client moved for summary judgment based upon a release which the plaintiff had previously signed. The trial court granted the motion and the plaintiff appealed. The appellate court noted that the release was impermissibly overbroad and too all-encompassing since it attempted to go beyond mere negligence claims. Consequently, the appellate court ruled that the release was against public policy and could not be enforced.

Based upon the rulings in just these three cases from separate jurisdictions, fitness professionals should note that there are often strenuous legal requirements associated with the drafting and administration of prospectively executed written release documents. The services of a competent lawyer familiar with not only the law in the jurisdiction where the fitness services are offered but the fitness industry as well, should greatly assist fitness professionals in dealing with the process in efforts to reduce claims and suits. The language used in such documents and the administration process followed to secure client signatures on these documents should be thorough and complete so that executed releases will provide the desired protection to fitness facilities and personnel.

[i] *Hinkal v. Gavin Pardoe & Gold's Gym, Inc*., 042415PASUP, 165 MDA 2014 (April 24, 2015).

[ii] *Jimenez, et al. v. 24 Hour Fitness USA, Inc.,* 237 Cal.App. 4th 546 (2015).

[iii] *Brooten v. Hickok Rehabilitation Services, LLC et al.,* No. 2012NP1940, Court of Appeals, Wisconsin, April 30, 2013.