

USING RELEASES OF LIABILITY AS A FIRST LINE OF DEFENSE

written by David Herbert | June 15, 2016

As I pointed out in my first article on this website, releases of liability, also known as waivers, are often used with personal training clients for those clients to give up or relinquish their right to sue in advance of the occurrence of any untoward event based upon ordinary negligence which might happen during activity. Such given documents are really a first line of defense for [fitness professionals](#) if a client is injured or dies as a proximate result of his or her participation in exercise activities recommended, led or supervised by a fitness professional.

In this context, releases are contractual-type documents by which individuals give up in advance of an event of their right to successfully seek damages for personal injury predicated upon ordinary negligence as opposed to gross negligence or willful – intentional type activity. In this latter situation, releases are generally against public policy in as much as the judicial system will not give effect to releases for such kinds of conduct.

If release documents are made binding upon heirs, executors, administrators and such other personal representatives, these documents may also bar the right of such parties to seek damages for a client's death arising out of training activities. In the vast majority of states^[1] prospectively given releases/waivers of liability are given full legal effect assuming they are properly written and appropriately administered. In some states such documents may also bar or at least limit wrongful death actions litigated by a personal representative of the individual who signed same.

To highlight how these documents are used in the event of the occurrence of an untoward event leading to the filing of a lawsuit, a review of a number of cases from various jurisdictions should be helpful. In a case from Illinois applying Minnesota law,^[2] the Plaintiff joined a health club and executed a fitness service agreement which included a release. The release provided:

It is agreed * * * you [the Buyer] are purchasing a membership from L.A. Fitness according to the terms on both pages of this Membership Agreement and the current Membership Policies and Club Rules and Regulations ('Agreement'). Also, 'By signing this Agreement, Buyer acknowledges that Buyer * * * has read and understands the entire Agreement including * * * the Release and Waiver of Liability and Indemnity, [and] all other Additional Terms and Conditions on the

reverse side hereof * * *." The signature block at the bottom of this page dated February 6, 2009, contains the signatures of Hussein and an agent of L.A. Fitness.

The following language appears on the reverse side of the page and is emphasized by a black frame and

bold font: 'IMPORTANT: RELEASE AND WAIVER OF

LIABILITY AND INDEMNITY. You hereby acknowledge and agree that Member's use of L.A. Fitness' facilities, services, equipment or premises involves risks of injury to persons * * * and Member assumes full responsibility for such risks. * * * Member hereby releases and holds L.A. Fitness * * * harmless from all liability to Member * * * for any loss or damage, and forever gives up any claim or demands therefore, on account of injury to Member's person or property,

including injury leading to the death of Member, whether caused by the active or passive negligence of L.A. Fitness or otherwise, to the fullest extent permitted by law, while Member is in, upon, or about L.A. Fitness premises or using any L.A. Fitness facilities, services or equipment. * * * Member has read this release and waiver of liability * * *.

After joining the club, the Plaintiff was injured while using a piece of exercise equipment and became a quadriplegic. He subsequently filed suit claiming that the club failed to properly monitor, supervise or instruct him in the use of the facility's equipment. The trial court dismissed the case on the basis of the release and applied Minnesota law in reaching its decision since the contract documents specified that the law of that state would apply to the case. The Plaintiff appealed contending that the agreement was confusing and unlawful. The appellate court affirmed the lower court's decision.

In another case from Maryland,[\[3\]](#) a parent's execution of a release agreement for his child was upheld. In this case, the agreement provided:

BJ's Incredible Kids Club (the 'Play Center') is a benefit offered to me as a part of my BJ's Wholesale Club membership. I further acknowledge that I have read, understood and I voluntarily agree to abide by all of the rules appearing above and/or rules as posted in the Play Center and registration area. In consideration for this service, I, individually and on behalf of my child, do hereby waive, release and forever discharge BJ's Wholesale Club, Inc.; its subsidiaries and affiliates and their respective agents, employees, officers, directors, shareholders, successors and assigns from any and all claims and causes of action of any kind or nature which are in any way related, directly or indirectly, to the use of Play Center which I may have or that hereafter may accrue including any such claims or causes of action caused in whole or in part by the negligence of BJ's Wholesale Club, Inc., its subsidiaries and affiliates, and their respective agents, employees, officers, directors, successors and assigns. I understand that my child is here at my own risk and expense and agree that neither I nor my child will bring any claim or cause of action of any kind or nature against BJ's Wholesale Club, Inc., its subsidiaries and affiliates and their respective agents, employees, officers, directors, successors and assigns... I further agree to indemnify, defend and hold harmless BJ's Wholesale Club, Inc., its subsidiaries and affiliates and their respective agents, employees, officers, directors, successors and assigns from any claims or causes of action of any kind arising from my or my child's use of the Play Center. By placing my signature below, I acknowledge and agree that I have read this agreement, understood all of the terms and conditions contained herein, and that this agreement will be in full force and effect during each of my or my child's visit to the Play Center. This agreement shall remain in full force and effect at all times whether my child

is dropped off at the Play Center by me or anyone else.

Thereafter, the parent dropped his son off at the club and went shopping. The child was thereafter severely injured while under the care of the club. Suit was thereafter filed based upon negligence. The trial court granted the club's motion for summary judgment upon the basis of the release. The plaintiff appealed and an intermediate court of appeal reversed the trial court's decision finding that enforcement of the release would be against public policy. The club sought a further appellate review of the case which resulted in a reversal of the appellate court's prior decision and upheld the release as executed by the client's father.

In yet a third case^[4] applying Illinois law, the plaintiff was injured while she was participating in a personal training session at the defendant club. She brought suit and alleged negligence among other claims. In response to the suit, the club and the personal trainer defended the case based upon the plaintiff's prior execution of a release. The waiver provisions in the membership agreement provided as follows:

I have been informed that Fitness Formula Clubs (the Clubs) and its affiliated clubs and its owners, officers and employees will not be liable in lawsuits including negligence lawsuits brought against them by members or their guests. As material consideration for Fitness Formula Clubs and its affiliated clubs permitting members and guests to use the Club or its facilities, each member or guest agrees to specifically assume all risks of personal injury, property loss or other damages including risk associated with fitness classes and equipment, sports exercise, all locker room facilities and fitness advisory services and all other facilities. Further, all members and their guests waive any and all claims against any Fitness Formula Club, its affiliated clubs and the owners, officers, and employees of the Club for any personal injury, property loss or other damages connected to or arising out of any of the associated risks.

The trial court granted the defendants' summary judgment motion and the plaintiff appealed. On appeal the higher court affirmed the trial court's grant of summary judgment finding that the release was valid even though the plaintiff claimed not to have read it.

As these three cases should readily illustrate, prospectively executed release documents signed in the fitness setting should be valid in the vast majority of U.S. states if properly written and administered. While assertions are often put forth to the effect that such documents are against public policy and should not therefore be enforced, these agreements, except in those minority of states previously mentioned or where gross negligence or willful conduct is involved, are effective to bar personal injury and often wrongful death claims. Other excuses such as "I didn't, read it" or "I didn't understand what I signed" are typically disposed of by the courts on the basis that one should not sign that which they haven't read or don't understand.

Parents are sometimes permitted to sign prospectively executed waivers in some jurisdictions to bind their children to those documents but not in all states. Releases which provide for the indemnity of a

facility in the event that a suit is brought contrary to the agreement are upheld in some jurisdictions but not in others. Despite these and other similar issues, fitness professionals should have these documents drafted by knowledgeable legal counsel familiar with the law in those states where the forms will be utilized. Advice should also be obtained from such professionals on the proper administration procedures to be followed in getting these documents signed. When properly written and administered, these forms are an effective first line of defense against later claim and suit.

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Adapted from a Declaration of Principles of the American Bar Association and Committee of Publishers and Association

[1] Prospectively executed releases/waivers of liability are generally valid in all United States' jurisdictions, except in states such as Virginia, Louisiana and Montana. Other states such as Arizona , West Virginia, New Mexico, Connecticut, Wisconsin and Vermont may not give them effect. Still others, such as New York, may limit their use by state statute in some facilities such as gymnasiums or places of recreation where a fee is paid.

[2] Hussein v L.A. Fitness International, LLC, 369 Ill. Dec. 833, (Ill. App. 1 Dist. 2013).

[3] BJ's Wholesale Club, Inc. v. Rosen, 112713 MDCA, 99, November 27, 2013.

[4] Cox v. U.S. Fitness LLC, 121813 IL CA 1, 1-12-2442.