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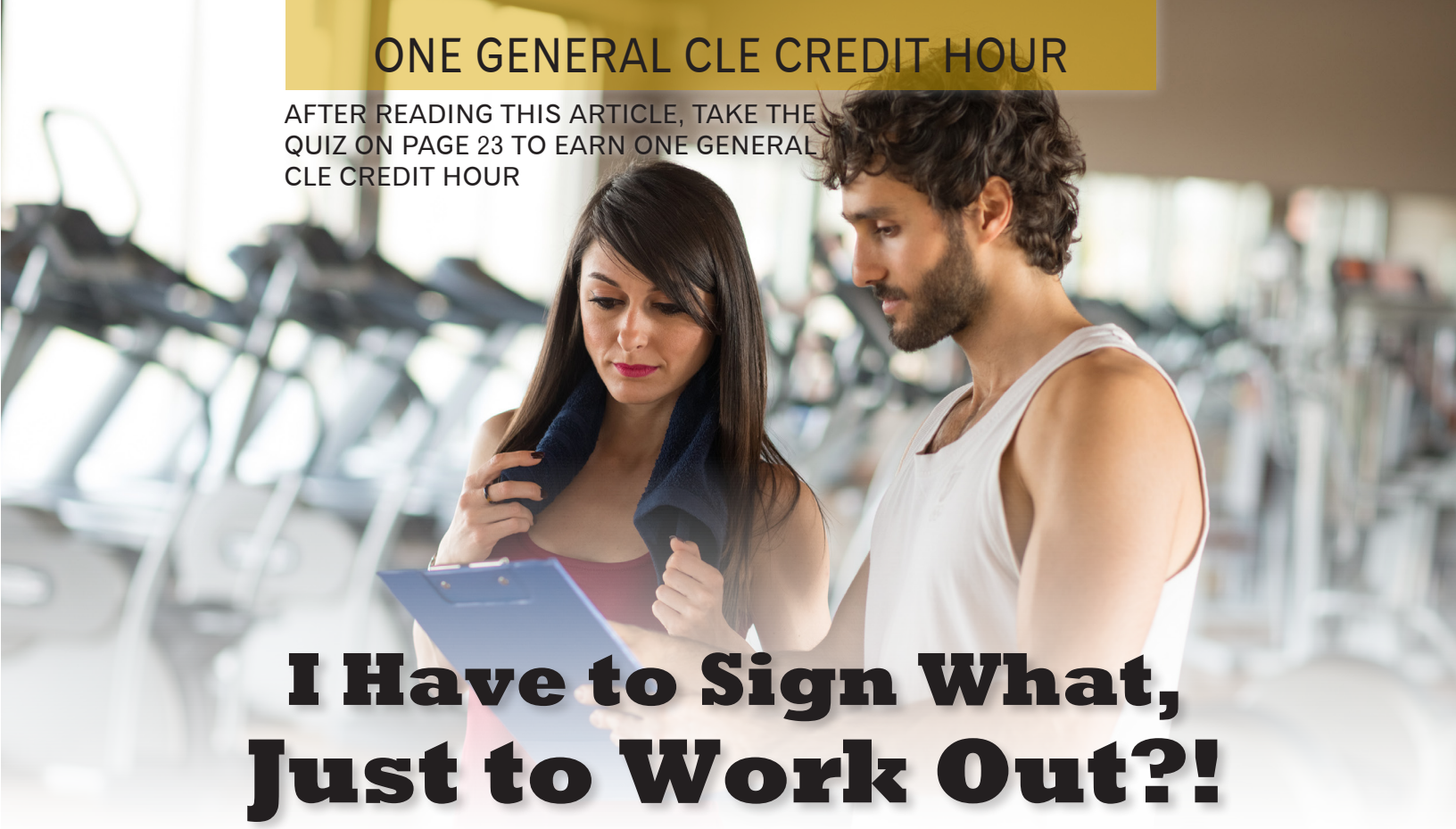

I Have to Sign What, Just to Work Out?!

The Enforceability of Fitness Club Waivers

BY KEVIN R. DIAMOND, ESQ. & ALEXANDRA B. MCLEOD, ESQ.

"I finally got off the couch, brushed the crumbs off my chest, put on my sweats and drove myself to the gym. Now I have to sign a waiver to work out?!" The short answer is a resounding, "Yes."

"The modern health or fitness club is a place where a person can attain physical health and fitness. It is also a place where a person can get hurt." *Lund v. Bally's Aerobic Plus*, 78 Cal. App. 4th 733, 735, 93 Cal. Rptr. 2d 169 (2000). For this reason, most fitness clubs advise patrons of the risk of injury and require them to agree that they understand and voluntarily accept this risk and, further, to agree that the club will not be liable for injuries suffered by patrons while they are using the facilities. As lawyers tasked with drafting such waivers, it is instructive to review the factors Nevada courts must consider in determining their enforceability.

NEVADA LAW

While the Nevada Supreme Court has never considered a fitness center release in a published opinion, there are three Nevada cases that assist with this issue. First, the court in *Renaud v. 200 Convention Ctr.* (102 Nev. 500, 728 P.2d 445 (1986)) cited two requirements that must be met to prove a plaintiff has assumed a risk:

First, there must have been voluntary exposure to the danger. Second, there must have been actual knowledge of the risk assumed…. A risk can be said to have been voluntarily assumed by a person only if it was known to him and he fully appreciated the danger. *Sierra Pacific v. Anderson,* 77 Nev. 68, 358 P.2d 892 (1961).

In *Renaud,* the plaintiff sustained injury while using a free-fall simulator. A release had been required. The court reversed the granting of summary judgment, because the trial court failed to evaluate whether the plaintiff had actual knowledge of the risks assumed—an essential element of the defense. The court stated that it was necessary to evaluate all circumstances that existed at the time the release was obtained. "Considerations should include (but are not limited to) the following: the nature and extent of the injuries, the haste or lack thereof with which the release was obtained, and the understandings and expectations of the parties at the time of signing." *Renaud*, 102 Nev. at 502.

Second, in *Mizushima v. Sunset Ranch,* 103 Nev. 259, 262, 737 P.2d 1158 (1987), the Nevada Supreme Court examined a case in which, after signing a waiver, a plaintiff was thrown from a horse. The *Mizushima* court affirmed that an express assumption of risk serves as an enforceable bar to liability that "stems from a contractual undertaking that expressly relieves a putative defendant from any duty of care to the injured party; such a party has consented to bear the consequences of a voluntary exposure to a known risk." *Id.* at 262. In sum, that court determined that implied assumption of risk doctrine failed to survive the enactment of Nevada's comparative negligence statute, except as an affirmative defense. *Id.* at 264, 737 P.2d at 1161.

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The Enforceability of Fitness Club Waivers

In our third case, *Turner v. Mandalay Sport Entertainment, LLC,* 124 Nev, 213, 221-222, 180 P.3d 1172, 1177 (2008), the Supreme Court examined assumption of the risk as part of its duty analysis, and the "strained language" of *Mizushima* was clarified. The *Turner* court agreed with sister states that have recognized that the primary implied assumption of risk doctrine merely "goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." *Id*. The court explicitly overruled *Mizushima* to the extent that it held that the primary implied assumption of risk doctrine was abolished by Nevada's comparative negligence statute. Assumption of the risk should be incorporated into the district court's initial duty analysis, not be treated as an affirmative defense to be decided by a jury. The court also overruled *Mizushima* to the extent that it left the determination of duty in negligence cases to the jury, as part of the comparative negligence analysis. *Turner*, 124 Nev. at 221 n. 30 (*citing Mizushima*, 103 Nev. at 264 n. 7, 737 P.2d at 1161 n. 7). Instead, "the question of whether a 'duty'... exists is a question of law solely to be determined by the court." *Id. (citing Lee v. GNLV Corp.* 117 Nev. at 295, 22 P.3d at 212.)

Additionally, *Kerns v. Hoppe* (128 Nev. 910 (2012)) is edifying, as that court found mere acknowledgment of a risk is not enough for an express assumption of risk, but that the individual signing the waiver "must have agreed to assume the risk of injury caused by [releasee's] negligence, if any." *Kern* also held that the releasor must appreciate and fully understand the risks at issue in executing a waiver. Other Nevada cases emphasize that waivers must be strictly construed, and spell out the intention of the parties and release issues with great specificity. However, overall, our Supreme Court agrees that waiver clauses are *not* invalid as against public policy, especially when freely contracted to by the parties. *See Agricultural Aviation v. Board of Clark County Commissioners*, 106 Nev. 396, 794 P.2d 710 (1990); *Miller v. A&R Joint Venture*, 97 Nev. 580, 636 P.2d 277 (1981).

A fitness club membership agreement and exculpatory clause were examined in light of these precedents by the federal court sitting in Nevada when a gym member slipped and fell in the gym's steam room. *Moffitt v. 24 Hour Fitness USA, Inc*., 2013 WL 1080441 (D. Nev. 2013). The court explained that in order for it to be enforceable, a contractual exculpatory provision must set forth the parties' intentions with "the greatest particularity" and expressly state the intent to release liability. *Id*. at 2 (*citing Agric. Aviation Eng'g Co. v. Bd. of Clark Cnty. Comm'rs,* 794 P.2d 710, 712–13 [Nev.1990]). Although the plaintiff tried to avoid summary judgment by contending issues of fact remained regarding the parties' intentions, the court properly noted that, unless there is ambiguity in the contract language, contract interpretation is a question of law. Ultimately, the federal court upheld the membership agreement because it contained an express, unambiguous exculpatory clause which identified the potential risk of injury and stated that by entering into the agreement, the plaintiff consented to assume the risk of injury caused by the gym's negligence. *Id*. at 3.

OTHER STATES

The majority of courts from other states hold that a release is sufficient as long as it contains a clear and unequivocal waiver with specific reference to a defendant's negligence. Also, courts throughout the country have overwhelmingly held waivers releasing fitness clubs from liability are not void as to public policy. *See, e.g., Lund*, 78 Cal. App. 4th at 739. Courts have held fitness club releases to be conspicuous when the waiver: is immediately under a signature block, is labeled in bold, is in capitalized type, ends with a sentence referring to waiving any right to assert a claim for negligence and discusses a member's agreement to release a health club from liability for its own negligence. *See Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 448–450, 54 P.3d 161 (2002).

TAKE AWAYS FROM CASE LAW

An attorney representing a fitness club should consider advising the client as follows:

1. Prospective patrons should be given time and opportunity to read the membership agreement prior to its execution;
2. The waiver should be explained by sales employees to the prospective members;
3. The waiver must include clear language expressly stating the intent to release the club (and its employees) from liability, including for the club's own negligence;
4. The language should be over-inclusive, utilizing terms such as "any and all;"
5. The waiver language should appear right above or below the signature block, in all capitals and bold lettering; and
6. The client should give patrons a copy of the membership agreement, even if they sign up online.

People have options when it comes to selecting fitness clubs. One can choose many fitness alternatives, including not joining a club at all and buying home equipment instead, using podcasts, hiring a personal trainer, etc. *See Ramirez v. 24 Hour Fitness USA, Inc.*, 2013 U.S. App. LEXIS 24893, 2013 WL 6571710 (5th Cir. Tex. Dec. 16, 2013) (unpublished). Because gym membership is not a "compelling need" like utilities or housing, waivers as a condition for membership are not violative of public policy. Moreover, there are public benefits to enforcing waivers, such as reducing the cost of club memberships and making additional options affordably available. *See Hill v. 24 Hour Fitness USA, Inc.*, Docket No. A100636, 2003 Cal. App. Unpub. LEXIS 4569, *1, 2003 WL 21054726 (May 9, 2003). The fitness club also benefits, by limiting its exposure to liability.

Now… get off that couch, sign a waiver and start working out! **NL**

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