SIGNED AWAY OR STILL IN PLAY?

Understanding Liability Waivers and Risk Assumption in Missouri Fitness Centers[1]

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Does your hospital offer a fitness center as a service to the public or to its employees? If so, you almost certainly have members and employees sign a Release of Liability and Assumption of Risk Agreement (a **"Release Agreement"**) prior to giving them access. But is such an agreement enforceable in Missouri?

The answer is an unequivocal "perhaps." In fact, in the leading case evaluating the enforceability of such an agreement in Missouri, our Supreme Court held that while exculpatory clauses in contracts like this are disfavored, they are not void against public policy. Indeed, while the court in *Alack v. Vic Tanny Intern. of Missouri, Inc.*[2] declined to enforce the Release Agreement in that particular case on grounds that its terms did not expressly release the health club from its own negligence, the court generally recognized the validity of exculpatory provisions, and outlined specific requirements for enforceability.[3]

More specifically, the court articulated the following standard for evaluating exculpatory clauses in fitness center (and other) agreements:

> The better rule is one that establishes a bright-line test, easy for courts to apply, and certain to alert all involved that the future "negligence" or "fault" of a party is being released. The words "negligence" or "fault" or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs. There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving.

So where does that leave us? If you operate a fitness center, you should immediately a) verify that participants sign a Release Agreement prior to being granted admission, and b) evaluate your current Release Agreement form to ensure that it complies with current Missouri law. In doing so, you should look for the following:

1. **Explicit Language:** The release must clearly and explicitly state that it covers the facility's own negligence. The terms "negligence" or "fault" or their equivalents must be used conspicuously to ensure a clear and unmistakable waiver and assumption of risk.[4]
2. **Conspicuous Presentation:** The exculpatory language must be presented in a clear and conspicuous manner. It should not be hidden in fine print, concealed on the back side of the document, or obscured by other text. Its language must be unambiguous and unmistakable. Consider having members specifically initial the waiver section indicating that it has been called to the member's attention and that they explicitly agree to its terms.[5]

3. **Specificity:** General language will not suffice. The release must specifically notify the member that they are releasing the facility from claims arising out of the facility's own negligence.

CONCLUSION

While there are no guarantees as to how a given court might construe specific release language, Missouri courts do hold compliant exculpatory provisions enforceable against negligence claims, including claims of a facility's own negligence, when the "magic language" is used. Following the guidelines outlined above will maximize the likelihood that your Release Agreement is held enforceable, while at the same time ensuring that your facility obtains the protection that it bargained for in its agreements with those who use the facility.

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[2] *Alack v. Vic Tanny Intern. Of Missouri, Inc.,* 923 S.W.2d 330 (Mo. banc 1996). *See also McNearney v. LTF Club Operations Company, Inc.,* 486 S.W.3d 396 (Mo. App. E.D. 2016)(holding that the exculpatory clause contained in a gym member usage agreement was sufficiently clear, explicit, and enforceable to bar Plaintiff's negligence claims—the agreement contained a section entitled **"RELEASE OF LIABILITY"** in large, bold capital letters, and stated as follows: "I waive any and all claims or actions that may arise against Life Time Fitness, Inc., its affiliates, subsidiaries, successors or assigns. . . as a result of such injury, loss, theft or damage to any such person, including, and without limitation, personal, bodily or mental injury, economic loss, or any damage to me, my spouse, my children, or guests resulting from the negligence of Life Time Fitness or anyone using a Life Time Fitness Center. I agree to defend, indemnity and hold Life Time Fitness harmless against any claims arising out of the negligent or willful acts or omissions of me, any person that is part of my membership, or any guest under this membership." The next paragraph stated in large, bold capital letters: **"I HAVE READ AND AGREE TO THE TERMS AND CONDITIONS ABOVE, INCLUDING, BUT NOT LIMITED TO, THE ASSUMPTION OF RISK AND RELEASE OF LIABILITY, AND I HAVE RECEIVED A COMPLETE COPY OF MY MEMBER USAGE AGREEEMENT.").**

[3] Note that, according to the *McNearney* court, Missouri law is clear that a party cannot release itself from its own r*ecklessness*. *McNearney*, 486 S.W.3d at 405. Similarly, the court in *Alack* held that: ". . . there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." *Id.* at 337.

[4] An example might read as follows: "**I ACKNOWLEDGE THAT I AM KNOWINGLY AND VOLUNTARILY USING THE FACILITY AND ALL OF ITS EQUIPMENT WITH AN EXPRESS UNDERSTANDING OF THE RISK INVOLVED AND HEREBY AGREE TO ACCEPT AND ASSUME ANY AND ALL RISKS OF INJURY, DISABILITY, DEATH, AND/OR PROPERTY DAMAGE OR LOSS ARISING OUT OF MY USE OF THE FACILITY, WHETHER CAUSED BY THE ORDINARY NEGLIGENCE OF THE FACILITY OR OTHERWISE.** This Release of Liability and Assumption of Risk does not, however, apply to gross negligence or intentional torts."

[5] An example might read as follows: "I specifically agree that the Facility shall not be responsible for any injuries, damages, loss, or theft **EVEN IN THE EVENT OF THE FACILITY'S OWN NEGLIGENCE**, whether such negligence is present upon the signing of this Release of Liability and Assumption of Risk or takes place in the future. This Release of Liability and Assumption of Risk does not, however, apply to gross negligence or intentional torts.
_____ [INITIAL HERE TO ACKNOWLEDGE THE PROVISION STATED ABOVE]"