Arkansas Association of Defense Counsel

February 15, 2016

Don't Let Your Clients Hurt Themselves

by Cole Truitt

A valid, comprehensive release is typically the first and strongest line of defense against a personal injury suit. Recently, our firm defended a suit against a fitness center, Fitness Universe,[1] and its personal trainer after a plaintiff was allegedly traumatically and permanently injured during the plaintiff's first fitness session. The plaintiff signed a release as part of her fitness contract. Because the personal trainer did not act recklessly or intentionally to hurt the plaintiff, the case could have been ripe for a simple summary judgment win.

Instead, a number of decisions that were intended to limit legal liability combined to make for a difficult, complicated case. First, each Fitness Universe location was organized under a separate limited liability company so that, even if a single location failed, the entire business would survive. Second, Fitness Universe created an electronic, uniform application process for a new member to sign up for services – including a release – that was both easy for potential new members to complete and automatically stored by Fitness Universe for later use. Finally, there was exculpatory clause language that clearly identified Fitness Universe and the fitness activities, the Fitness Universe location, and its employees who would be released. All of these steps were wholly prudent planning by Fitness Universe's corporate counsel.

What defeated the release was Fitness Universe's expanding business. It had recently decided to move into offering more intensive exercise classes at one of its locations. As it had done for all of its locations, Fitness Universe set up a new LLC for the new location. However, Fitness Universe wanted to market the more intensive activities under a name that was related to Fitness Universe while being distinct as an exciting alternative offering. It settled on the name "Extreme Universe." Though it was a new venture for Fitness Universe, Extreme Universe was still in its core business of exercise services, so it felt comfortable moving forward. As such, Fitness Universe did not consult with its corporate counsel about Extreme Universe.

To further complicate matters, Extreme Universe struggled in its niche, and went through a number of rebranding efforts. It was, by turns, marketed as: Extreme Universe, Extreme Fitness Universe, Fitness Universe Extreme, Fitness Universe+, and Universal Extreme. All of these names, in one way or another, made it onto the contract form's introduction or signature blocks. Crucially, though, the actual exculpatory clause still recited the original name "Fitness Universe" and no other name.

Arkansas law on exculpatory clauses is well-settled. Exculpatory clauses are disfavored, and are only enforceable if they explicitly state the released negligent conduct and parties by name. *See, Finagin v. Ark. Dev. Fin Auth.*, 355 Ark. 440, 455, 139 S.W.3d 797, 806 (2003). The validity of the exculpatory clause also relies on three factors: Whether the party is knowledgeable of the potential liability being released;

[1] Pseudonym.

whether the party is benefiting from the activity leading to harm; and whether the contract was fairly entered into. *See*, *Kotcherquina v. Fitness Premier Mgmt., LLC*, 2012 WL 682733 (E.D. Ark. Mar. 2, 2012).

Against this clear law, our firm was forced on summary judgment to argue that the many references to the variously branded names used to market the intense fitness program of Fitness Universe combined with the exculpatory clause language put the injured new member on notice that she was actually releasing Extreme Universe. We were forced to make this argument despite the fact that Fitness Universe and Extreme Universe were separate legal entities. Not surprisingly, we lost.

Had the exculpatory clause correctly recited the name Extreme Universe, the case would likely have been over on summary judgment. Unfortunately the owners of Fitness Universe went astray by attempting to cut and paste its existing contract into a new business venture without even seeking a review of the new membership contracts by an attorney. It is a familiar error, but one that we attorneys allow our corporate clients to commit too often. Clients must understand that the cost of regular reviews of their business activities and contracts is significantly less than even initial litigation fees. Avoiding a modest review fee of a few hundred dollars can expose a business to hundreds of thousands of dollars in litigation costs, and in some cases damages that would have otherwise been avoided.

Directly based on the experience of this case, I now take the following steps with my corporate clients:

- In my initial engagement letter, I now customize my scope of representation language to more particularly describe what the client tells me about the purpose and intent of documents I will draft.
- I have added to my letter enclosing drafted documents a recommendation that we touch base annually to review the client's business activities to identify potential gaps in liability protection.
- For clients who resist their annual reviews, I send a separate letter quoting the initial engagement letter, reminding them that their liability shield only extends at best to those particular circumstances. This letter is particularly important because it puts the client on notice. If the client relationship devolves to a malpractice claim against me, this letter will be Exhibit "A" in my defense.

This article is a simple reminder that even the best release has limits. A release written for one specific purpose does not lend itself to "do-it-yourself" lawyering. We serve our clients best when we help them understand that they should keep an ongoing dialogue with us about their ever-evolving business in order for us to provide preventive legal advice. In our business an ounce of prevention is indeed better than a pound of cure.

We welcome your articles and thoughts for future editions.

The thanks of the AADC go out to Cole Truitt of Matthews, Campbell, Rhoads, McClure & Thompson, P.A. for drafting this article.

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