Defenses to Negligence Claims and Lawsuits: Assumption of Risk and Waivers

LEARNING OBJECTIVES

After reading this chapter, health/fitness students and professionals will be able to:

1. Understand the legal doctrines of assumption of risk and waivers when used as defenses to personal injury/wrongful death actions arising out of health/fitness activities.
2. Understand the structure of assumption of risk and waiver documents and appreciate the factual and legal requirements for the use of these documents to support defenses to negligence claims and lawsuits.
3. Understand the difference between assumption of risk concepts when compared with waiver doctrines as defenses.
4. Realize the limitations associated with assumption of risk defenses when compared with waiver/release defenses.
5. Know that assumption of risk documents may be the only form of protective documents that may be available for use in health/fitness facilities in some jurisdictions.
6. Understand the use of prospectively executed waivers of liability, also referred to as releases, to bar and defend against negligence claims and lawsuits.
7. Appreciate the effectiveness of such documents in those jurisdictions where releases/waivers are recognized and legally effective.
8. Know the differences as well as the similarities between waivers/releases, assumption of risk documents, and informed consents.
9. Comprehend the limitations of release/waiver documents when used with minors and when applied to derivative claims and lawsuits filed by spouses or dependents of participants, at least in some jurisdictions.
10. Realize that these defensive documents need to be drafted by legal counsel familiar with the requirements applicable to these defenses in the jurisdiction where used.
11. Understand the need to establish guidelines, in conjunction with legal counsel, for the administration and use of these documents by staff members with participants.
As explained elsewhere in this text, risk management for health/fitness facilities involves a number of concepts. Risk management steps include the use of defensive measures that are designed to minimize claims and lawsuits while also providing legal defenses to those untoward events that cannot be totally eliminated. These defensive steps for managing risks include the use of assumption of risk concepts and documents as well as waiver/release documents where possible to help protect against untoward events that may occur within such facilities.

WHAT IS ASSUMPTION OF RISK?

Assumption of risk is a legal doctrine that can be used to assert a defense to a battery or personal injury/wrongful death action. Assumption of risk, among other things, simply involves a participant's voluntarily knowing, understanding, and agreeing to assume those ordinary and reasonable risks associated with certain activities. The doctrine is frequently used in the sports arena and with certain high-risk activities such as race car driving, parachute jumping, hang gliding, and similar activities. The doctrine is also applied to provide permission for contact with another participant, such as in football or boxing, or exposure to the possibilities of injury from certain other risks such as exercise activities.

Assumption of risk can be demonstrated by a participant’s actions or words (implied assumption of risk), or even through his or her execution of a written document, which will then be referred to as an “express assumption of the risk.” Examples of express assumption of the risk documents are included at the end of this chapter. These concepts and documents, if used, should be compared and contrasted with waivers/releases of liability executed in advance of an activity or, in other words, prospectively by the participants, examples of which are also located at the end of this chapter. In the health and fitness facility setting, these documents are often contained within membership agreements but may also be stand-alone documents.

As stated in Hildreth v. Rogers, “Three types of assumption of the risk defenses exist: (a) express or contractual assumption of the risk, (b) primary or “no duty” assumption of the risk, and (c) secondary or implied assumption of the risk.” 1 Express or contractual assumption of the risk is an asserted defense to negligence that appears in a written or contractual form. Primary or “no duty” assumption of the risk is an asserted defense to negligence in which the defendant claims that no duty whatsoever was owed to the injured party. Secondary or implied assumption of the risk is an asserted defense to negligence in which the issue is whether or not a particular risk was assumed in a given activity where the participant knows that another has already acted in a negligent manner or will do so where established procedures, protocols, rules, or warnings are not followed. Although in years past an assumption of risk defense could be a complete bar to an injured party’s right to recovery in a personal injury lawsuit, assumption of risk defenses may not now be a complete bar to recovery, but instead may serve to reduce any applicable recovery based on comparative negligence principles (see Chapter 2).

APPLICATION OF ASSUMPTION OF RISK: CASE LAW EXAMPLES WHERE THE ASSUMPTION OF RISK DEFENSE WAS NOT EFFECTIVE

The application of the express assumption of risk doctrine to health/fitness facilities may perhaps be best illustrated through an examination of a 2001 California case, Santana v. Women’s Workout and Weight Loss Centers, Inc. 2 In this case, the plaintiff was injured while participating in a modified step aerobics class conducted at the defendant center. While participating in the activity that combined step aerobics and
an overhead arm strength training exercise using a Dyna-Band, she fell when she stepped sideways onto a rectangular platform, fracturing her ankle. The injury required surgery to install pins in her leg for immobilization.

The evidence indicated that the instructor apparently led the class participants’ use of the band in front of them and over their heads. According to the defendant, “Participants were instructed to keep their heads facing forward and not to look at their feet while doing the exercise but to look straight ahead at their reflections in a mirror for orientation.” Although the plaintiff was not inexperienced in “normal” step aerobics, the class was her first step experience that also involved the use of a Dyna-Band. After the incident, the plaintiff filed a negligence lawsuit alleging that the “peculiar design of the exercise was ‘unnecessarily hazardous’ in that the simultaneous performance of multiangled upward/downward steps and vigorous overhead arm exercises, combined with the forced inability to see one’s feet in relation to the step platform, made normal balance unduly difficult and dangerous.”

Even though the plaintiff had executed a membership agreement that contained a waiver of liability provision on the back of the agreement, she filed suit against the facility for her injuries. The center, in turn, moved for summary judgment in its favor, contending that the membership agreement barred her action and asserted, among other defenses, assumption of the risk. The court reviewed the evidence in this regard and noted,

The back of the form contained two columns of 8-point type with paragraphs labeled in 12-point type. The last paragraph on the bottom is headed: “ASSUMPTION OF RISK RELEASE & INDEMNITY[.]” It states: “The use of the Facilities naturally involve the risk of injury to you, whether you or someone else cause it. As such, you understand and voluntarily accept this risk and agree that FIT will not be liable for any injury, including without limitation, personal, bodily or mental injury, economic loss or any damage to you, your spouse, guests or relatives resulting from the negligence or other acts of FIT or anyone else using the Facilities. If there is any claim by anyone based on any injury, loss, or damaged [sic] described here, which involves you or your guest, you agree to (1) defend FIT against such claims and pay FIT for expenses relating to the claim and (2) indemnify FIT for all liabilities to you, your spouse, guests, relatives, or anyone else resulting from such claims.”

On the basis of this and other language contained in the agreement, the trial court granted the defense motion. The plaintiff appealed. The appellate court ruled that the waiver was not effective, and as to the assumption of risk defense the appellate court explained,

[The] defendant owes no duty to protect against the risks inherent in the exercise of stepping on and off a platform, such as a sprained ankle. However, “defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.” . . . In this case, defendants were not coparticipants in the sport or activity but were instead in control of it. They provided the instructor who decided what would be done and for how long. The instructor also gave direction on techniques. An instructor/student relationship is to be considered in determining the scope of defendant’s duty. . . . Defendant also supplied necessary equipment, such as the platforms and Dyna-Bands. . . .” Under these circumstances, defendants owed a duty to plaintiff and the other participants not to increase the risks inherent in [step aerobics]. Thus, for example, they owed a duty not to supply faulty equipment.”

Defendant had no duty to eliminate the platforms entirely, which would transform the exercise from step aerobics into something else, and no duty to protect from injury arising from reasonably designed exercises. However, step aerobics does not inherently require exercises which are designed in such a
way as to create an extreme risk of injury, such as, by combining movements that affect the balance and draw the participant’s focus away from the platform while stepping on and off it or requiring the use of a mirror for orientation instead of looking where one’s feet are going. Accordingly, premised on the duty not to utilize dangerously designed exercise, this case falls under the secondary assumption of risk category. Issues pertaining to plaintiff’s comparative fault are for the trier of fact to decide. Plaintiff’s expert’s opinion regarding the design of the exercise is admissible at trial and creates a triable issue of material fact whether the exercise was designed in such a way as to create an extreme risk of injury.

Based on the extract just cited, the trial court’s decision was reversed and the case remanded for trial. As the appellate court’s decision in this case illustrates, those who may prescribe, direct, lead, supervise, or promote certain physical activities will sometimes be prevented from asserting the defense of assumption of the risk where an activity goes “outside the bounds of reasonable conduct and outside the normal risks of play or behavior.”

Other cases dealing with the assumption of risk doctrine have also been determined in other jurisdictions. In the New York case of Mathis v. New York Health Club, Inc., the plaintiff was allegedly injured while using a weight training machine. The plaintiff filed a complaint naming both the health club and trainer who was supervising his training at the time of the injury as defendants. In response to these claims, the defendants moved for summary judgment and contended that the plaintiff assumed the risks that “materialized in his injury.” The trial court denied the defendant’s motion and the plaintiff appealed. On appeal, the appellate court stated,

Defendants have moved to dismiss the complaint, claiming in support of their motion that plaintiff voluntarily assumed the risks that materialized in his injury. While it is clear that plaintiff, who was not a novice to weight training, did assume those risks ordinarily entailed by properly supervised weight training, he cannot be said to have assumed risks in excess of those usually encountered in the activity, particularly unreasonably increased risks attributable to lapses in judgment by a trainer whose qualifications, plaintiff alleges, were not all they had been represented to be by defendant health club at the time plaintiff purchased the club’s specialized training package. According to plaintiff, defendant trainer increased the weight on the training machine. Plaintiff had been using to 270 pounds and, despite plaintiff’s repeatedly expressed doubts as to whether he could handle so much weight, urged plaintiff to continue with his repetitions. Given this scenario, factual issues are raised as to whether plaintiff’s injury, which allegedly occurred in the course of the repetitions urged upon him by defendant trainer, was not the consequence of risks which, although inherent in weight training, were unreasonably augmented by culpable misjudgment as to plaintiff’s capacity to bear so much weight.

In another New York case, Corrigan v. Musclemakers, Inc., the plaintiff, a 49-year-old woman who had never patronized a health club or gym, joined a health club known as Gold’s Gym. Three one-hour personal training sessions were included in the $400 annual membership fee. During her first personal training session, her personal trainer placed her on a treadmill. He set the treadmill at 3.5 miles per hour for 20 minutes and then left her unattended. In addition, the trainer did not instruct the plaintiff on how to use the machine (e.g., operate the control panel, stop the belt, or adjust the speed). Shortly into her walk on the treadmill, she began to drift back on the belt. She attempted to walk faster but was quickly thrown off the machine, sustaining a fractured ankle.

The plaintiff filed a negligence lawsuit against the defendant to seek recovery for her injury. However, the defendant facility moved for summary judgment claiming
“that its duty to the plaintiff was lesser than that generally applicable to landowners . . . it needed only to ensure that the conditions of its facility were ‘as safe as they appeared to be.’ Defendant also claims that the plaintiff’s voluntary participation in this ‘athletic activity’ warrants dismissal of the complaint under the doctrine of primary risk.”

As in the Mathis case, previously described, the trial court denied the defendant’s motion and the defendant appealed. The appellate court ruled that it was “unpersuaded” with the defendant’s argument. In this regard, it stated,

"It is true that “[r]elieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks.” . . . Under such circumstances, "a premises owner continues to owe a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, [the] plaintiff has consented to them and [the] defendant has performed its duty” . . . In our view, however, the fitness activity undertaken by plaintiff was not a “sporting event” for which this lesser standard of care should be applied. Moreover, offering only the conclusory affidavit of its general manager, defendant did not establish as a matter of law that the risks associated with the use of the treadmill to plaintiff, a novice, were fully appreciated or perfectly obvious.

In an attempt to establish that plaintiff voluntarily participated in an “athletic” activity and was aware of the inherent risks of using a treadmill, defendant makes repeated references to her status as a “former professional ice skater.” Had plaintiff been injured while engaging in this type of activity, this fact might be relevant. What is relevant, is that plaintiff had never been on a treadmill, had not skated professionally for 16 years prior to this incident and had specifically informed the personal trainer that she was “very sedentary” and a newcomer to working out in a gym. It is undisputed that the personal trainer failed to ensure that plaintiff “understood the treadmill’s operation before using it.” Notably, the operator’s manual for the machine states that this is a guideline for safe operation.

Nor do we find, under the doctrine of primary assumption of risk, that plaintiff assumed the risks inherent in using this piece of equipment. “Primary assumption of the risk may be applied in cases where there is an elevated risk of danger, typically in sporting and recreational events” . . . We are unpersuaded that plaintiff’s first time on the treadmill falls within the reach of this principle. . . . As noted, the risk of being ejected from this machine was not readily apparent. . . . Under these circumstances, a jury should assess whether plaintiff’s injuries are the result of any breach of duty by defendant.11

It should be apparent from reviewing these cases that the assumption of risk defense is based on the facts and circumstances of each case. The defense as raised in response to personal injury/wrongful death lawsuits may often be difficult to prove. Questions of material fact related to this defense are very frequently left for a jury to determine. Therefore summary disposition of such cases is often difficult for defendants to achieve. Even when express—or written—assumption of risk defenses are asserted in defense of personal injury or wrongful death lawsuits, the delineation of risks contained within such documents may be insufficient to address risk issues successfully, and thus completely defend against these actions. It should also be pointed out, however, that sometimes no other similar defense may otherwise be available, such as those based on releases or waivers where the laws or statutes of particular states preclude the use of such protective documents. For example, in the state of New York, the use of waivers/releases in the health/fitness facility setting is precluded by state statute.12
APPLICATION OF ASSUMPTION OF RISK: CASE LAW EXAMPLES WHERE THE ASSUMPTION OF RISK DEFENSE WAS EFFECTIVE

In a New York case, Weithofer v. Unique Racquetball and Health Clubs, Inc., the plaintiff slipped and injured himself while playing “walleyball” on an indoor court operated by the defendant health club. “According to the plaintiff, the court was damp and covered with water puddles. Despite this condition, the plaintiff chose to play anyway and injured himself during the game. Notably, the plaintiff had played on the same court, under similar conditions, several times in the past.” The defendant moved for summary judgment, which the trial court denied. On appeal of this decision, the appellate court noted,

The record demonstrates that the injury-producing defect was not concealed and that the plaintiff was fully aware of its existence prior to his voluntary participation in the game . . . As previously noted, the plaintiff stated that he had played on the very same court on prior occasions when similar conditions existed. Under these circumstances, the doctrine of assumption of the risk warrants the granting of judgment to the defendant.

In another case, Rutnik v. Colonie Center Court Club, Inc., the defendant was also successful in using the assumption of risk defense. In this case, a 47-year-old man who was an experienced racquetball player collapsed and died from a cardiac arrest while playing in a racquetball tournament at the defendant club. The defendant refuted the wrongful death action filed by the decedent’s estate, claiming the decedent assumed the risks when he volunteered to participate in the tournament. The appellate court concurring with the defendant stated, “relieving an owner or operator of a sporting facility from liability for the inherent risk of engaging in sports is justified when the consenting participant is aware of the risk, has an appreciation of the nature of the risks and voluntarily assumes the risk.” Because the decedent had previously participated in similar tournaments and was an experienced racquetball player, the court indicated he must have known and appreciated the risk of cardiac arrest while playing racquetball.

Even though assumption of risk, particularly when used as a defense by health/fitness facilities to personal injury/wrongful death actions where no express or written document is secured may be somewhat difficult to assert successfully, the following case may seem by some in this field to go somewhat “overboard” in its application of the defense in this setting. In a somewhat significant 2006 California case, Rostai v. Neste Enterprises, the court summarized its application of the assumption of risk doctrine to a health/fitness facility based on the particular facts of this case. In this regard it summarized the case as follows:

In this case we hold that the doctrine of primary assumption of risk is a complete defense to an action for damages based on the alleged negligence of a personal fitness trainer in failing to investigate the cardiac risk factors of a client as a result of which the client allegedly suffered a heart attack during his first training workout. Masood Rostai, plaintiff and appellant (hereafter plaintiff) sued Neste Enterprises, doing business as (dba), Gold’s Gym (hereafter Gold’s Gym), and Jared Shoultz, defendants and respondents (hereafter referred to either individually by name or collectively as defendants), for damages based on negligence. In his complaint, plaintiff alleged that he had entered into an agreement with defendants to provide him with a customized physical fitness program; defendants owed plaintiff a duty to investigate his health history, including his current physical condition and cardiac risk factors; on September 11, 2002, plaintiff participated in his first training session at Gold’s Gym with defendant Shoultz; defendant Shoultz knew plaintiff was not physically fit and was overweight; defendant Shoultz was aggressive in his training of plaintiff; near the end of the 60-minute training session, after complaining several times
to defendant Shoultz that he needed a break, plaintiff suffered a heart attack; and defendants’ negligence was a proximate cause of plaintiff’s injury.

In their answer to plaintiff’s complaint, defendants asserted among other defenses that plaintiff’s injury was the result of a risk inherent in strenuous physical activity; that defendants’ neither increased that risk nor concealed any of the inherent risks; and therefore the doctrine of primary assumption of the risk bars plaintiff’s claim. Defendants moved for summary judgment asserting the doctrine of primary assumption of the risk as the basis for their motion. Gold’s Gym also asserted that it had no liability for the acts of defendant Shoultz because Shoultz is an independent contractor. Defendants prevailed on summary judgment and plaintiff appeals. We will affirm for reasons we now explain.18

Although the plaintiff contended that the doctrine of primary assumption of risk should apply only to “sports activities” and that “fitness training is not a sport,” the court, on appeal of the trial court’s grant of the defendant’s motion for summary judgment, disagreed and used the doctrine to provide a complete defense to this action. In so ruling, the court, although admitting that no California case had previously dealt with the specific issue, “namely whether fitness training under the guidance of a personal trainer is an activity to which the doctrine of primary assumption of the risk applies,” determined there were numerous cases in which the doctrine had been employed in sports-related cases and those involving students and instructors. Because the court determined that “fitness training under the guidance of a personal trainer is an activity in which a student learns from and is directed by an instructor,” the court determined to rely on those cases in resolving the instant case.

Applying those principles from the other cases it cited, the court determined that “fitness training under the guidance of a personal trainer is . . . an activity,” participation in which might be “chilled if the primary assumption of risk doctrine was not imposed so as to avoid assuming a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.” The court determined that “primary assumption of the risk is not limited to sports but applies to any physical activity that involves an element of risk or danger as an integral part of the activity.”19 In its application of the doctrine in this case, the court noted,

18 The obvious purpose of working out with a personal trainer is to improve physical fitness and appearance. In order to accomplish that goal, the participant must engage in strenuous physical activity. The risks inherent in that activity include physical distress in general and in particular . . . muscle strains, sprains, tears and pulls, not only of obvious muscles such as those in the legs and arms, but also of less obvious muscles such as the heart. Stress on the cardiovascular system as a result of the physical exertion that is an integral part of fitness training with a personal trainer is a risk inherent in the activity. Eliminating that risk would alter the fundamental nature of the activity.19

The court also further added,

Although plaintiff phrases his claim against defendant Shoultz in terms of failing to adequately assess plaintiff’s physical condition and in particular his cardiac risk factors, the essence of plaintiff’s claim is that Shoultz, in his capacity as plaintiff’s personal fitness trainer, challenged plaintiff to perform beyond his level of physical ability and fitness. That challenge, however, is the very purpose of fitness training, and is precisely the reason one would pay for the services of a personal trainer. Like the coach in other sports or physical activities, the personal trainer’s role in physical fitness training is not only to instruct the participant in proper exercise techniques but also to develop a training program that requires the participant to stretch his or her current abilities in order to become more physically fit. The trainer’s function in the training
process is, at bottom, to urge and challenge the participant to work muscles to their limits and to overcome physical and psychological barriers to doing so. Inherent in that process is the risk that the trainer will not accurately assess the participant’s ability and the participant will be injured as a result.\textsuperscript{20}

The court determined that the primary assumption of risk doctrine barred the plaintiff’s suit because there was no duty imposed on the defendant to protect the plaintiff from those particular risks that the court identified and discussed. The court also determined that the plaintiff was required to “prove that the trainer acted either with intent to cause injury or that the trainer acted recklessly in that the conduct was ‘totally outside the range of ordinary activity’ . . . involved in [personal fitness training].” Because the appellate court determined that the plaintiff alleged only a claim of ordinary negligence, it could not prevail against the defendants based on the court’s ruling. Although the court determined that “at most,” the defending personal trainer did not accurately assess plaintiff’s level of physical fitness and that the trainer “may have interpreted plaintiff’s physical complaints, including his tiredness, shortness of breath, and profuse sweating, as the usual signs of physical exertion due to lack of conditioning rather than as symptoms of a heart attack,” the court found no claim or evidence of recklessness, intent to injure, nor evidence of any increased risks in the activity itself. Because the claim against the facility was for vicarious liability owing to the acts of the trainer, the court similarly found no liability against the facility on either that basis or directly.

APPLICATION OF ASSUMPTION OF RISK DOCTRINE TO INFORMED CONSENTS

In those health/fitness facilities that provide staff-interpreted health/fitness assessments or other similar services—perhaps analogous to those that might otherwise be considered to be medical in nature—the informed consent process is used to disclose those risks associated with the procedures or activities to be undertaken. For example, prior to conducting health/fitness assessments, an informed consent should be properly administered. See Chapter 7 for a sample informed consent for this purpose. In this situation, the assumption of the risk “may be considered to be ‘built in’ to the informed consent process.”\textsuperscript{6}

In the case of Smogor v. Enke,\textsuperscript{21} a participant with a prior history of a heart attack went to an emergency department of a hospital complaining of chest pain. Certain tests were performed or scheduled, including an exercise stress test to be performed the following day by one of the defendants, a cardiologist. The test was stopped in the last stage once the participant experienced chest pain. He died the following day, and suit was subsequently brought by his family. They contended that the cardiologist and a family physician defendant were negligent. As to the defendant cardiologist, they contended that he “failed to inform [the deceased patient] of risks of stress test or obtain . . . [the patient’s] informed consent to undergo test.” The informed consent document risk disclosure provision however, included the explicit disclosure of “risk of death.” A jury returned a defense verdict, which, on appeal, was affirmed.

Assumption of risk documents are different in a legal sense than informed consent forms but have similar aspects. Such documents are also different than waiver/release forms as described later. Although the processes asserted with each document and the forms may seem at first brush to be similar, they are different. “A release discharges its recipient from liability . . . a consent [on the other hand] gives permission to act in the future.”\textsuperscript{22} Comparing the assumption of risk doctrine with the informed consent process, both require a disclosure component\textsuperscript{23} “which enables facility personnel to engage in a particular process with the participant or to lead the . . . participant in activity.”\textsuperscript{24} Contrasting the assumption of risk doctrine with the release/waiver process indicates, at least in theory, that an assumption of the risk “supplies evidence to establish a defense to a possible negligence action,”\textsuperscript{25} whereas a release/waiver provided prospectively—in advance of contemplated activity—theoretically precludes successful suit because the participant has prospectively given up or relinquished his right to sue based on claims of negligence.\textsuperscript{26}
If, however, research involving human subjects is carried out by facilities, the use of an institutional review board (IRB) may be a necessary prerequisite for the conduct of such research. Federal law requires that informed consent be obtained in reference to all such research. That requirement involves not only securing written consent from all participants, but requires the provision of information as to applicable risks associated with the research. The use of written assumption of risk documents may be permissible, but the use of waivers/releases in such settings would not be permissible.27

APPLICATION OF ASSUMPTION OF RISK IN AGREEMENTS TO PARTICIPATE

An agreement to participate is a type of an express assumption of risk document. Whether signed by adults or even minors, these documents may not amount to enforceable contracts or even operate like informed consents. However, they serve two major purposes. Such documents (a) help to establish the primary assumption of risk defense by providing documentary evidence that the plaintiff, whether an adult or a minor, knew, understood, and appreciated the inherent risks of activity and voluntarily assumed those risks; and (b) help to establish a type of secondary assumption of risk (contributory fault) by showing the plaintiff knew the rules, regulations, expected behaviors, and so on, of the activity and agreed to adhere to them.28 Because such documents do not include exculpatory clauses as do waivers, they are often best used with minors and in states where waivers are against public policy or prohibited otherwise, such as by state statutory law as in New York.

STRENGTHENING THE ASSUMPTION OF RISK DEFENSE

As discussed earlier, the assumption of risk defense can be used as an effective strategy to help refute negligence claims and lawsuits in some situations. To strengthen this defense, health/fitness facilities should consider adopting the following procedures:

- To make effective use of this defense, assumption of risk documents should be secured in writing and signed by the participant and a staff member who participated in the process.
- Written assumption of risk documents should describe the inherent risks associated with the activity—minor and major injuries and even death, and supplement the delineation of risks with a catch-all phrase indicating there are also other nonspecific risks—and the process should be supplemented by an opportunity for questions to be answered by the administering staff member.
- When assumption of risk documents are secured, the advising staff member should provide sufficient information, especially to “new” participants, as to what they will be doing so they may realize, know, understand, and appreciate the inherent risks of the activity they will pursue. Facility records should be documented in this regard.
- Misuse of equipment, failures to follow instructions, to heed warnings, or to obey participation rules should be noted, and such behavior corrected by staff members and facility records noted accordingly.
- Periodic evaluation of staff service delivery should be observed, evaluated, and recorded by supervisors to help ensure that services are properly provided in accordance with the standard of care, and in so doing help avoid the creation of incidents that otherwise could be determined by a jury in the event of needless injury followed by an otherwise avoidable claim and suit.

Sample express assumption of risk documents are included in Appendix 4 as follows:

Form 4-1: Express Assumption of Risk for Participation in Specified Activity
Form 4-2: Express Assumption of Risk Combined with Prospective Waiver of Liability and Release Agreement
WHAT ARE WAIVERS/PROSPECTIVE RELEASES?

Prospectively executed releases or waivers of liability are contractual-type documents, which, like all contracts, must be supported by adequate consideration, something of value, by which one party—in advance of contemplated activity—agrees to release the other party for responsibility for mishaps—including those owing to ordinary negligence—which may occur during activity to be carried on thereafter. Although the law on this subject varies from state to state, and even though such documents are also referred to as “waivers,” the requirements generally include execution by a competent adult party, possessed with the legal ability to contract (be of the age of majority and not under some disability) under circumstances where that party gives up and relinquishes claims related to defined, known, and/or reasonably contemplated acts or risks, so-called foreseeable events. It is different from an express assumption of risk because release/waiver documents also include the relinquishment of the right to assert a claim or institute successful suit as an additional contractual-type clause. Waiver and releases include an exculpatory clause, which basically means to relieve or clear one of blame.

As reviewed previously, most personal injury or wrongful death actions against health/fitness facilities are based on allegations of negligence. A legal cause of action for negligence requires certain elements, including proof of duty by one person toward another. Waivers and releases, where effective, circumvent or nullify the duty element necessary to establish a cause of action for negligence. Once such documents are executed, the party so released is waived of his or her obligations imposed by the duty element otherwise required by law for negligence actions to be successfully prosecuted by an injured party. Waivers/releases are generally effective in most states for the release of ordinary negligence claims but not for gross negligence, willful, wanton, reckless, or criminal conduct. Assumption of risk concepts, in contrast, provide evidence of the acceptance of inherent risks associated with certain activity, or even the acceptance of the risk of the negligence of another, sometimes referred to as secondary assumption of risk.

The law surrounding the use of releases/waivers in the health/fitness setting has developed a substantial body of decisions that have accumulated over a significant number of years. Sometimes the question of whether or not such documents should be enforced depends on public policy considerations, which the courts are often asked to determine and balance against other considerations such as the right to freely contract. When public policy issues are raised, the balancing of interests—those of the consumer versus those of the provider—when viewed from an overall societal perspective are often examined by the courts to address whether prospectively executed waivers/releases of liability are in the public interest—in other words, whether such documents are contrary to or against public policy. Public policy is a difficult concept to define but amounts to a judicial determination of society’s mores and views as to what is best for a civilized and enlightened community balanced against certain other constitutional interests and other basic concepts such as freedom of choice, freedom to contact, and other similar concepts.

Perhaps the seminal case used in determining whether or not prospectively issued waivers/releases should be enforced by the judicial system came from a 1963 California decision, *Tunkl v. Regents of the University of California*, which concerned the validity of a “release from liability for future negligence imposed as a condition for admission to a charitable research hospital.” The California Supreme Court, which addressed this issue, concluded that these exculpatory contracts could only be valid if the public interest was not adversely impacted. To decide this question, the court developed a test to be
used to make such determinations. In this regard, it decided that the following questions needed to be addressed in reviewing such contracts:

1. Is the business in question of a type generally thought suitable for public regulation?
2. Is the party seeking exculpation engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public?
3. Does the party performing the service hold himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards?
4. As a result of the essential nature of the service and in the economic setting of the transaction, does the party invoking exculpation possess a decisive advantage of bargaining strength against any member of the public who seeks his services?
5. In exercising a superior bargaining power does the party seeking an adhesion contract of exculpation make no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence?
6. As a result of the transaction, is the person or property of the purchaser placed under the control of the seller, thereby subject to the risk of carelessness by seller or his agents?

Although the California Supreme Court determined that the contract in the Tunkl case could not withstand such an inquiry and it was against public policy, cases from that and other states that have been decided in the health/fitness industry have not usually reached such a conclusion. However, the Tunkl decision is often used to examine whether such contracts are violative of public policy considerations. For example, in the case of Banfield v. Louis, a Florida court of appeals determined that a triathlon participant release used by the City of Fort Lauderdale was not against public policy because it was not "readily injurious to the public good" nor did it involve "an activity of great public interest" or "a necessary service" when analyzed through the Tunkl six-factor test. Therefore, the use of the release in that action was upheld. However, some states in this regard have determined that these documents will not be enforced in those states as they have been determined to be contrary to or against public policy. These states include Virginia, New Jersey, Louisiana, Montana, and Connecticut.

**Language Considerations in Waivers**

The language of release/waiver documents (see Appendix 4 for examples of waivers) generally includes a provision such as the following: "The undersigned does hereby waive, release, acquit, and discharge a named health/fitness facility from any responsibility or liability for any injury, damage, or loss of whatsoever description, which may arise or be sustained by one while engaged in any activities at the facility." Although actual release/waiver language is generally more comprehensive and detailed than this example and may vary from jurisdiction to jurisdiction, the general thrust of all releases is that they contain the same basic provisions.

Release/waiver documents generally are made binding on the party executing them and often others. Efforts are sometimes made to make waiver/release contracts binding on executors, administrators, heirs, and even spouses and other dependents. Sometimes, spouses of participants are also asked to execute such documents and thereby become parties to these contracts. Questions also arise as to whether such documents can be binding when signed by parents or guardians on behalf of their minor children. A somewhat substantial body of law on this subject is in the process of being developed and will be examined because a good many minors participate in activities carried on at most health/fitness facilities, particularly at YMCAs, YWCAs, and JCCs.

One of the earliest waiver/release cases to be reviewed in the health/fitness facility setting was reported in 1964. The **Owen v. Vic Tanny’s Enterprises** case involved a plaintiff who fell near the defendant’s pool and subsequently brought suit claiming the defendant was negligent. A release containing an exculpatory provision—one purportedly...
releasing the defendant from liability—was executed by the plaintiff prior to his participation in activity. The court was faced with the question of whether or not the membership agreement containing the exculpatory clause—one releasing the defendant from liability for negligence—would be enforced so as to bar the plaintiff’s lawsuit. The document in question provided as follows:

Member, in attending said gymnasiums and using the facilities and equipment therein, does so at his own risk. Tanny shall not be liable for any damages arising from personal injuries sustained by Member in, on or about the premises of any of the said gymnasiums. Member assumes full responsibility for any injuries or damages . . . which may occur to Member in, on or about the premises of said gymnasiums and he does hereby fully and forever release and discharge Tanny and all associated gymnasiums, their owners, employees and agents from any and all claims, demands, damages, rights of action, or causes of action, present or future, whether the same be known, anticipated or unanticipated, resulting from or arising out of the Member’s use or intended use of the said gymnasium or the facilities and equipment thereof.34

Even though the court ruled that such clauses should be “strictly construed against the party whom it favors” and that “other terms of the instrument may be considered in weighing the parties intent with regard to the clause,” the court determined that the release should be enforced, and it overturned the trial court’s determination that denied the defendant’s request to grant judgment in its favor notwithstanding a jury’s verdict of $2,000. In its response, the court viewed the contract, quoted from an earlier New York case35 and stated,

The wording of the contract in the instant case expresses as clearly as language can the intention of the parties to completely insulate the defendant from liability for injuries sustained by plaintiff by reason of defendant’s own negligence, and, in the face of the allegation of the complaint charging merely ordinary negligence, such agreement is valid.36

The Owen court further stated,

We believe the foregoing pronouncements in Ciofalo v. Vic Tanney [sic]Gyms, Inc., apply here. The scarcity of facilities for gymnastic and reducing activities hardly creates such a disparity of bargaining power that plaintiff is forced to accept such terms without alternatives. If the public interest is involved, it is for the legislature to make such pronouncements. Absent appropriate legislative action, we must hold that the instant exculpatory clause barred plaintiff’s suit, and the court erred in not directing a verdict for the defendant and in denying defendant’s motion for a judgment notwithstanding the verdict.36

In a case rendered some 20 years later, Neumann v. Gloria Marshall Figure Salon,37 a court of appeals reviewed another similar case. In this case, the plaintiff joined the Gloria Marshall Figure Salon in 1982. Upon joining, she signed a contract agreeing to pay a specified sum for a specific number of visits. That membership contract also contained the following language:

Patron specifically assumes all risks of injury while using any equipment or facilities at the salon and waives any and all claims against Gloria Marshall Management Company and the owners and employees of the salon for any such injury.38

Shortly after joining the facility, the plaintiff allegedly injured her back while using one of the defendant’s exercise machines. She contended that one of the defendant’s employees (after her selection of a machine) placed the leg portion of the machine in a downward position before turning it on and leaving the room. While the machine was activated, the plaintiff felt sharp, stabbing pains in her back but nevertheless continued
with her exercises on the machine. She alleged that the defendant’s employee did not determine whether or not she was lying properly on the table prior to leaving the room. After the initial session on the exercise machine, the plaintiff advised the spa employee that she had experienced the excruciating back pain while the machine was operating with the leg portion of the machine in a downward position. Allegedly the employee advised the plaintiff not to repeat the exercise with the machine in that position. However, the plaintiff completed the program that night, including the use of the same machine with the leg portion in the upward position, even though she continued to experience back pain. Thereafter the plaintiff obtained medical treatment that revealed a ruptured disk. A lumbar laminectomy was required in an effort to treat the plaintiff.

Suit was later filed alleging, among other things, negligence of the spa and its employees. Although the plaintiff attempted to raise several factual issues, the court determined that the exculpatory clause was enforceable because it clearly stated the range of activities to which it applied. In reviewing the Gloria Marshall exculpatory clause as contained within its membership application, the court noted, “The provision explicitly mentions ‘injury while using any equipment’ and waiving claims against defendant for ‘any such injury.’” Although finding the form was sufficient to bar the plaintiff’s action, the court held that the use of the word “negligence” was not required. The court concluded,

[I]n this case, plaintiff assumed the risk that due to an employee’s negligence and whether or not the employee was an expert, she may be injured by using a machine. As a result, plaintiff could have reasonably altered her conduct, for example, by stopping the exercise immediately after experiencing the excruciating pain or by consulting an employee of defendant immediately regarding the possibility of improper usage.

Inasmuch as the court found that the exculpatory clause in this case was not against public policy or otherwise invalid, the plaintiff’s cause of action was dismissed. In yet another Illinois case, Garrison v. Combined Fitness Center, Ltd., the plaintiff signed a membership agreement that purported to release the club “of all liability for injury arising out of the use of its facilities and equipment.” The document was couched in terms of an assumption of risk and indemnity agreement. It stated,

It is further agreed that all exercise including the use of weights, number of repetitions, and use of any and all machinery, equipment and apparatus designed for exercising shall be at the Member’s sole risk. Notwithstanding any consultation on exercise programs which may be provided by Center employees it is hereby understood that the selection of exercise programs, methods and types of equipment shall be Member’s entire responsibility, and COMBINED FITNESS CENTER shall not be liable to Member for any claims, demands, injuries, damages, or actions arising due to injury to Member’s person or property arising out of or in connection with the use by Member of the services and facilities of the Center or the premises where the same is located and Member hereby holds the Center, its employees and agents, harmless from all claims which may be brought against them by Member or on Member’s behalf for any such injuries or claims aforesaid.

The plaintiff club member was injured in early 1985 while doing bench presses with 295 pounds. In response to this suit, the health club moved for summary judgment, contending the plaintiff had previously released the club from all responsibility related to the use of this equipment by reason of the previously executed release. The trial court granted summary judgment in favor of the club, even though the plaintiff club member contended he did not contemplate releasing the club from liability stemming from defective equipment when he signed the release and that the document was in violation of public policy.
The appellate court disagreed with the plaintiff’s argument and found the plaintiff’s complaint to be without “substantive merit.” The court found that according to Illinois law, “a party may contract to avoid liability for his own negligence and, absent fraud or willful or wanton negligence, the contract will be valid and enforceable.”41 Although the court did indicate that there were exceptions to this general rule, the contract in this case “could not have been more clear or explicit. It stated that each member bore the ‘sole risk’ of injury that might result form the use of weights, equipment or other apparatus provided and that the selection of the type of equipment to be used would be the ‘entire responsibility’ of the member.”

In a number of other cases, analyzed and published in The Exercise Standards and Malpractice Reporter between 1987 and 2006, similar results have been reached. However, where gross negligence or intentional conduct is involved, such releases are not generally upheld. For example, in the case of Universal Gym Equipment, Inc. v. Vic Tanny International, Inc.,42 the court recognized that it would not enforce a release for grossly negligent conduct. In this case, the plaintiff, a member of a Vic Tanny health club, filed suit against Universal Gym Equipment, Inc. “after she was injured at a Vic Tanny health club while using an exercise machine manufactured by Universal.” However, because she had signed a membership contract that contained a release, she did not name the club as a defendant. The plaintiff reached a settlement agreement with the equipment manufacturer for $225,000. Thereafter, the equipment manufacturer filed suit against the defendant club for failure to maintain safe premises and alleged it had an obligation to indemnify (or, in other words, to protect and hold another party harmless—to make them whole) the manufacturer or to contribute toward the settlement. The club moved for summary judgment in its favor on the basis that it could not be liable for indemnification or contribution where it possessed a valid defense to the member’s action because of her execution of the release. The trial court granted the club’s motion and the equipment manufacturer appealed.

On appeal, the club contended the release was unenforceable as against public policy and that the defense of the club based on the release was not a bar to its action. Although the manufacturer conceded on appeal that the release was enforceable in cases of ordinary negligence, it argued the release did not act so as to bar claims of gross negligence, which it contended existed in the case and to which argument the court agreed—if present—would be against public policy. The court also dealt with certain other procedural and substantive law issues but held that the club could only be liable for contribution if the club was grossly negligent because the release would not then be valid if such claims were proven.

These documents are also sometimes questioned on the basis that they do not indicate the real intentions of the parties with sufficient clarity so as to spell out unambiguously the matters to which the release applies. In some cases, release documents that propose to cover participation in exercise activity have been held not to apply to slips on a shower room floor so as to bar a lawsuit for injuries relating to such falls,43 or to activities that were not spelled out in a release document.44 Other similar decisions have also been reached in other cases where participant activities that caused injury were not delineated in release documents.45

Sometimes factual issues related to the question of whether or not releases cover an activity that results in injury are left for jury determination.46 Failures to follow statutorily mandated language in release document can also result in rulings making such documents “unenforceable.”47 Agreements that are less than clear—ambiguous in their word choices and language—can also fail to protect health/fitness clubs from liability. In such a case from the state of Oregon, Landgren v. Hood Rivers Sports Club, Inc.,48 a plaintiff club member was injured when a sauna bench, on which he was standing, collapsed and threw him to the floor causing injuries. He filed suit for negligence and the defense moved for summary judgment on the basis of a release he had signed. The release was part of “a membership contract that incorporated Defendants Policies and Procedures handout.” At the top of the last page of this handout, a section
was included, entitled Use of Property. The Use of Property section contained a paragraph entitled Liability of the Club and the Members. The language of this paragraph provided as follows:

Any member, guest, nominee member or other person who in any manner makes use of or accepts the use of any apparatus, appliance, facility, privileges or service whatsoever owned and operated by the club, or who engages in any contest, game, function, exercise, competition, or other activity operated or organized, arranged or sponsored by the club, either on or off the club’s premises, shall do so at his or her own risk, waives any legal claims against the club, its agents or employees and shall [hold] the club, its owners, employees, representatives and agents harmless from any and all loss, cost, claim, injury, damages and all liability sustained or incurred by him or her resulting therefrom, and/or resulting from any act of any owner, employee, representative or agent of the club.49

In response to the defendant’s motion for summary judgment, the plaintiff responded. Although he acknowledged the existence of the language in the Policies and Procedures handout, he contended the release was unenforceable because he alleged it was inconspicuous and did not exonerate the defendant clearly and unambiguously for liability based on its own negligence. When it analyzed the language of the release, the court determined that the law of Oregon provided as follows:

A presumption exists against an intention to contract for immunity from the consequences of one’s own negligence, and contracts will not be construed to provide immunity or indemnity unless the intention to do so is ‘clearly and unequivocally expressed. . . . An ambiguous agreement is to be construed against the drafter. . . . Additionally, agreements to limit the ability of one party to a contract for its own tortuous conduct are enforceable only under three circumstances: (1) the limitation of the liability was bargained for; (2) the provision was called to the other party’s attention; or (3) the provision is “conspicuous.”50

In applying this law to the facts of the case, the court determined that the language of the release was in the middle of a paragraph on the back page of the handout and the language of the release, except for the title section, was in the same typeface and size as all of the other information in the handout. Therefore, the court determined that the tort liability limitation section found in the handout was not conspicuous and should not be enforced. More importantly than the foregoing, however, the court examined the language of the release and compared it to what transpired when the plaintiff was injured and determined as follows:

The club is a place where the members go to work out and engage in physical activity, some of which involve a risk of injury. It is reasonable for a club of this type to limit its liability for members who exceed their physical limitations, misuse equipment or suffer usual sports-related injuries and most members would understand the language to cover these types of injuries. However, it is not reasonable for a club to limit its liability for injuries to its members that occur in the auxiliary areas [of such facilities], such as locker rooms, showers, saunas or restaurants, that result from the club’s failure to appropriately maintain these areas.51

Because the language of the release provision dealt with a member’s physical use of equipment owned and operated by the club and participation in physical activities organized and sponsored by the club, the language of the release in the court’s opinion, “does not clearly cover a member injured by a loose locker in the locker room or a broken chair in the reception area, or, as in the case at hand, a broken bench in a sauna.” The court determined that the defendant failed to limit its liability for negligently maintaining the sauna,
and as a consequence, its motion for summary judgment was denied. Therefore, the plaintiff was entitled to pursue his negligence claim against the defendant.

The preceding case is very similar to a previously determined California case that was not cited in the Oregon court’s opinion but was based on very similar facts and resulted in essentially the same ruling, *Leon v. Family Fitness Center, Inc.* In that case, a facility member was injured while he was lying on a sauna bench. The court determined that the release used in that case pertained to hazards “known to relate to the use of the health club facilities,” which the court in that case defined as hazards related to equipment use or from slipping in the locker room shower. The *Leon* court determined, as did the Oregon court, that the release in question did not apply to injuries that resulted from “simply reclining on a sauna bench.” As a consequence, the release used in the *Leon* case did not apply to bar his claims, just like the release in the Oregon case did not bar that plaintiff’s claims. Facilities would be well advised to ensure that release language is not only conspicuous but clearly applies to those situations that might arise, including those that relate in some way to the use of ordinary furniture and other similar items that may be located in such facilities.

**WAIVERS AND EXECUTION ISSUES**

In other situations in which releases have been held unenforceable, courts have ruled that “contracts attempting to limit the liability of one of the parties will not be enforced unless the limitation [on liability] is fairly and honestly negotiated and understood by both parties.”

Releases have been used to bar actions related to injuries suffered on exercise machines, facilities, a hot tub, falls from a treadmill, injuries suffered in aero-bics or even water aerobics, climbing gym walls, and even as to allegedly defendant emergency response procedures (although in this regard perhaps specific additional wording should be included in such releases to cover these circumstances; see Appendix 4). Sometimes certain expert testimony can assist in overcoming the defense provided by a release in a negligence claim such as where a questioned document examiner brings into issue the question of whether a release was “easily readable” by the party signing it. The taking of medication that might also affect a signer’s judgment can also call into question the validity of a release in particular circumstances. Language added to release documents acknowledging that the participant is not under the influence of drugs, medication, or alcohol that impairs his or her ability to contract might be effective in avoiding such judgments. Even release documents that evidence indicates were signed but lost and electronically “signed” release documents might be valid and bar claims against health and fitness facilities in appropriate circumstances.

Some health/fitness facilities, as well as other business entities, provide for the execution of release/waiver documents by spouses, if any, of participants so as to bar their own causes of action for loss of consortium—interference with the marital relationship— in the event of injury to or death of their participant spouse. However, in other instances, no such execution by a spouse is required if such a cause of action depends on or, in other words, is “derivative” to the claim of the injured spouse. In those states where a loss of consortium claim—interference with a relationship, usually a marital one—depends on the injured spouse’s right to sue—Alabama, Kansas, Maryland, New York, and others—separate execution of release documents by such a spouse is probably not necessary to bar a spouse’s acts by loss of consortium. In other states, however, including Florida, Ohio, and Massachusetts, among others, one spouse’s execution of a release document will probably not bar suit by the noninjured spouse for loss of consortium unless that spouse signs too, and then only under circumstances where the release is otherwise upheld since in those states the loss of consortium claim is an independent one.

To illustrate this concept, in the 1992 case of *Bowen v. Kil-Kare, Inc.*, the Ohio Supreme Court determined that the wife’s cause of action for loss of consortium due
to the claimed negligence of another was not barred by her husband's execution of release documents for his participation in race car driving. The Ohio Supreme Court also indicated that the release might not bar any action by the couple's children for loss of parental consortium because of the injuries the husband/father suffered in the race accident. Even though the husband/father executed two separate express assumption of risk/indemnity/covenant not to sue agreements, the court noted that the wife's cause of action "is her separate and personal right arising from the damages she sustains as a result of the tortfeasor's conduct" and that "the right of the wife to maintain an action for loss of consortium occasioned by her husband's injury is a cause which belongs to her and which does not belong to her husband." The court determined that her cause would continue even if her husband was ultimately barred from pursuing his claim due to his execution of the release documents. The court used this same reasoning as to the potential for a child's cause of action for loss of parental consortium and remanded the whole case to the trial court for full consideration of all of the issues.

Although this Ohio case was not definitive on the issue of a child's right to compensation for loss of parental consortium—interference with the parent-child relationship—it brings up some potentially troubling issues for health/fitness professionals. If a spouse/child's cause of action is not barred by a participant's/member's execution of release documents, much of the potential benefit of these documents to the facilities (e.g., avoidance of claim and suit, reduced insurance rates) may be lost, unless the spouse's signature on such release documents is secured or unless the member agrees to indemnify the facility from any action brought by the member's spouse or children/heirs.

As to minor children seeking to hold a facility or program liable for injuries to a parent or for death, the children's signatures on contract documents would be invalid because of their inability to contract as adults. However, facilities could include indemnification provisions within the documents, whereby the contracting party would agree to indemnify the facilities for any claim brought by any member's spouse, children, or heirs. So long as the member would be collectible in the event of suit by the spouse or child, such a provision may reduce the likelihood of suit and provide a source from which remuneration might be sought in the event of suit despite such a provision within a release document. Some such provisions, however, may be invalid as discussed later.

Despite the ruling in the Ohio case just cited, however, some states have ruled that a spouse's action for loss of consortium will be barred by an injured spouse's execution of a release. In the case of Byrd v. Matthews, the Supreme Court of that state ruled:

This Court, until otherwise convinced, reaffirms long-established Mississippi case law by holding that a defense available against a plaintiff in his or her personal-injury action (in this case, assumption of risk) is available against the spouse's derivative consortium action. The circuit court, therefore, properly directed a verdict in favor of the defendants.

Given the differences in various laws, health/fitness programs should consider whether or not participant spouses need to execute such documents in addition to participants. Legal counsel has to be consulted in this regard.

The first edition of ACSM's Health/Fitness Facility Standards and Guidelines provided for the use of waiver/release documents for some clients where individuals who should have medical clearance prior to beginning an exercise or activity program refused to do so. The second and third editions of that publication included similar recommendations, as did the ACSM/AHA Scientific Statement from 1998. Although these latter two statements recognized that the legal system may limit a facility's ability to exclude a patron from participation when he or she refuses to obtain medical clearance or to sign a waiver/release/assumption of risk document, for the most part, only the federally enacted Americans with Disabilities Act (ADA) and any similar state local laws may affect such determinations. The ADA does, however, allow the use of safety requirements in eligibility criteria provided such requirements
are not based on speculation, stereotypes, or generalizations about individuals with disabilities.68

In October 2000, the federal Electronic Signatures in Global and National Commerce Act (S. 761) became law. The new act allows for the enforceability of “internet contracts.” Such contracts may well include those involving health/fitness facility releases.

WAIVERS AND MINORS

Minors cannot lawfully contract owing to their legal incapacity because they are under the age of majority. As a consequence, they cannot sign binding and enforceable waivers of liability, and these documents are voidable by them at their election.69 Questions also arise as to whether or not parents may execute binding releases on behalf of their children. Many facilities, including health and fitness clubs, use prospectively executed waivers of liability to limit their potential exposure to personal injury and wrongful death claims that may occur within their physical plants. Often, facilities have parents execute such documents on behalf of their children so as to provide a line of defense from claims related to injuries to or death of their children. Recent decisions from the states of Colorado and California indicate that in some jurisdictions, a parent may prospectively release a child’s personal injury claims, whereas in other states they may not do so.

In the California cases, Lashley v. East County Gymnastics,70 a minor (9-year-old) child was injured while participating in a gymnastics class in 1999. Prior to her participation in this instructional class, her mother executed a release and waiver of liability and indemnity agreement on her behalf. The injury occurred when, according to the plaintiff’s complaint, the appellant fell from the upper bar of uneven parallel bars onto a portion of a floor not protected by a mat, resulting in a severe injury to her elbow with accompanying nerve damage. The complaint alleged that the defendants negligently failed to provide mats in the area where the appellant was working out and failed to adequately supervise and instruct the child or to provide a spotter. The complaint also alleged inadequate training of the defendant’s employees. In response to these claims, the defendant facility asserted the release and moved for summary judgment on the basis of the release and on the alternative grounds of express and primary assumption of the risk. The trial court granted summary judgment, finding that the mother clearly signed the release with the intent to release the facility and to assume the risks of injury to her child. The court of appeals to which the injured child by and through her mother appealed held that “given the inherently dangerous nature of teaching gymnastics to young children, the requirement of this waiver as a condition of participation is reasonable,” and therefore concluded that “the releases barred respondents’ negligence liability for appellant’s injuries.”71 The court reached this conclusion without any discussion of the ability of the parent to execute the waiver on behalf of the child.

In a second California case from March 15, 2002, McGowan v. West End YMCA,72 another child, while participating in the defendant’s summer day care camp, was injured when another child actually struck the plaintiff in the head with a baseball bat. Following the injury, the plaintiffs filed suit contending that the YMCA “negligently operated the daycare center and negligently supervised”73 the child and other children enrolled in the program. The defendants moved for summary judgment on the ground that the plaintiff’s lawsuit was barred by a release that the mother executed. The court determined “the uncontradicted extrinsic evidence established as a matter of law that the release was executed by Ms. McGowan on . . . [the child’s] behalf and applied to him”74 so as to bar the other claims that were asserted by the mother on behalf of her minor child. Again, the court did not include in its opinion any discussion of the ability of the parent to execute on behalf of her child a prospective waiver releasing the defendant from liability for negligence. This decision may be questioned because of later California court decisions.
In the Colorado case, Cooper v. Aspen Skiing Company, however, the issue of a parent’s ability to execute a prospective release or waiver of liability on behalf of a child was analyzed and discussed with some thoroughness. The Colorado Supreme Court based its decision on an analysis of not only Colorado law but the law from several other states, including Utah and Washington, both holding that parents lacked the ability to execute a release on a prospective basis barring their child’s cause of action for personal injuries. The Colorado Supreme Court, in adopting the reasoning of these states, determined that the release the child’s mother executed prior to his participation in training on a ski race course, where he lost control and suffered extreme injuries, including blindness, did not bar the 17-year-old’s claim against the defendant because the court held that “Colorado’s public policy disallows a parent or guardian to execute exculpatory provisions on behalf of his minor child for a prospective claim based on negligence.” The court further held “that a parent or guardian may not release a minor’s prospective claim for negligence and may not indemnify a tortfeasor for negligence committed against his minor child.” Thus Colorado joined the states of Utah and Washington in prohibiting the execution on a prospective basis of such releases while rejecting decisions allowing such releases to be executed by parents including another decision like the California decisions, which was determined by the Ohio Supreme Court in Zivich v. Mentor Soccer Club, Inc.

In another extremely significant decision from the state of California, a Court of Appeals determined that prospectively executed releases given in reference to child care are invalid and void as against public policy. In this case, Gavin W. v. The YMCA of Metropolitan Los Angeles, a child and the child’s parents sued the YMCA and certain of its employees for damages arising out of an incident of sexual touching between the child and another child in the YMCA’s child care program. At the time that the child was enrolled in the child care program, on June 4, 1996, the child’s parents signed a YMCA release and waiver of indemnity agreement that provided as follows:

1. THE UNDERSIGNED, HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the YMCA, its directors, officers, employees, and agents (hereinafter referred to as “releasees”) from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any loss or damage, and any claim or demands therefore on account of injury to the person or property or resulting death of the undersigned, whether caused by the negligence of the releasees or otherwise while the undersigned or such children is in, upon, or about the YMCA premises or in any way observing or using any facilities or equipment of the YMCA or participating in any program affiliated with the YMCA.

2. THE UNDERSIGNED HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the releasees and each of them from any loss, liability, damage or cost they may incur due to the presence of the undersigned in, upon or about the YMCA premises or in any way observing or using any facilities or equipment of the YMCA or participating in any program affiliated with the YMCA whether caused by the negligence of the releasees or otherwise.

3. THE UNDERSIGNED HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of releasee or otherwise while in, about or upon the premises of the YMCA and/or while using the premises or any facilities or equipment thereon or participating in any program affiliated with the YMCA.

Despite the parents’ execution of the agreement just cited, they instituted suit against the YMCA and some of its employees for breach of contract, negligence, fraud, and several other intentional torts following the incident as previously described. The complaint alleged that the YMCA had knowledge of the other child’s propensities to inappropriate sexual conduct, and in light of that knowledge they contended the YMCA should have taken steps to protect their child from his assailant. The complaint was later amended to include certain other claims, including negligent supervision and failure to warn. In response to these claims, the YMCA set forth the executed release as a defense.
The trial court ruled that the release was enforceable and not void as against public policy. It therefore dismissed the cause of action based on breach of contract and the three negligence causes of action. Ultimately the trial court dismissed all claims but the one based on fraud, and a jury returned a unanimous verdict in favor of the YMCA on that issue. Judgment was entered in August 2001 and the appeal by the plaintiffs followed.

On appeal, the parents and child alleged that the release was void as against public policy. The court determined that “to permit a child care provider to contract away its duty to exercise ordinary care is, in any event, antithetical to the very nature of child care services.” In this regard the court also noted in its conclusion, “Because we believe child care should live up to its name, we hold that exculpatory agreements that purport to relieve child care providers of liability for their own negligence are void as against public policy.” As a consequence, the decision of the trial court was reversed, and the case was remanded to that court for further proceedings not inconsistent with the opinion.

Sports medicine clinics, health/fitness facilities, and a variety of other similar institutions often provide day care services while parents engage in rehabilitation or health and physical fitness activities within such facilities. The decision just described may clearly impact the use of releases in those settings and what services are provided in this regard. Perhaps language can be included within such releases to distinguish the impact of the case, but such a task requires very careful drafting and consideration.

Based on the holdings in these cases, facilities would be well advised to consult with their individual legal counsel to determine when and under what circumstances a parent may execute prospectively a waiver of liability or release agreement on behalf of a child. Even under circumstances in which such documents are not permissibly executed by a parent, there may be other defenses that can be asserted based on concepts such as express or primary assumption of the risk.

The law dealing with the legal nuances of prospectively executed waivers/releases varies from state to state and is subject to various judicial constructions of law principles and then application to particular facts. See Table 4-1 for a summary of the applicable state-by-state positions on the use of waivers/releases in this industry that demonstrates the various state positions in this regard.

Because of these requirements and other drafting principles applicable to the development of potentially enforceable prospective release documents, lawyers knowledgeable with the process should be involved in assisting programs considering the development and use of these documents. Where recognized, the use of these protective writings should be part of any risk management plan for health and fitness facilities. However, in those states where state statutory provisions or court decisions bar the use of waiver/release documents, other risk management techniques such as using written or express assumption of risk documents might be necessary. The following sections (Ten Tips for Writing a Waiver and Five Tips for Administering a Waiver) have been adapted with permission from an article published in *ACSM's Health & Fitness Journal.*

**TEN TIPS FOR WRITING A WAIVER**

It is important that health/fitness facilities seek out a lawyer who is knowledgeable or willing to become knowledgeable to write a waiver. The “Sample Waivers” in the appendix to this chapter and the tips for writing and administering a waiver should assist all providers and their lawyers in this regard. However, no waiver should ever be used in any health/fitness facility without a legal analysis because it has to reflect the requirements of individual state law. Although waivers (and other protective documents) can be drafted by health/fitness professionals, they must at least be reviewed.
### TABLE 4-1 Review of the Enforceability of Prospectively Executed Waivers in Health and Fitness Facilities by State

<table>
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<tr>
<th>State</th>
<th>States Where Waivers Are Generally Permissible and Enforced</th>
<th>States Where Waivers May or May Not Be Readily Enforced But Subject to Close Judicial Examination</th>
<th>States Where Waivers Are Not Enforced or Are Prohibited</th>
<th>States Where the Enforceability of Waivers Is Unknown</th>
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(Continued)
and edited by a knowledgeable lawyer prior to their implementation. Many factors need to be considered when writing a waiver. The following 10 suggestions represent “major” factors to consider when writing a waiver:

1. Some experts recommend a stand-alone waiver or at least one that is conspicuous, which is titled in capitalized, bold, or large letters. This makes the waiver conspicuous.
2. Be sure the “consideration” requirement for a contract as discussed previously is adequately stated.
3. The exculpatory clause should be bold or otherwise conspicuous, and it may be best to include the note that applies to “ordinary negligence” but not to gross negligence, willful/wanton, or intentional/criminal conduct.
4. The language should be broad. For example, phrases such as “any and all present and future claims” in the exculpatory clause as well as “using the facilities and equipment” and “activities or any activities incidental thereto” are broad to cover all types of situations. Some courts have not upheld certain waivers used by health/fitness facilities because they did not include broad enough language to clearly indicate “any and all” activities.
5. The duration of the waiver should be clear and apply to “present and future claims.”
6. All parties (in addition to the signer) who are waiving any and all claims resulting from ordinary negligence should be clearly identified and stated. These include family, perhaps—spouses and children—the person’s estate, executors, administrators, heirs, and assigns.

TABLE 4-1  Review of the Enforceability of Prospectively Executed Waivers in Health and Fitness Facilities by State (Continued)

<table>
<thead>
<tr>
<th>State</th>
<th>States Where Waivers Are Generally Permissible and Enforced</th>
<th>States Where Waivers May or May Not Be Readily Enforced But Subject to Close Judicial Examination</th>
<th>States Where Waivers Are Not Enforced or Are Prohibited</th>
<th>States Where the Enforceability of Waivers Is Unknown</th>
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7. The document should include a clause covering inherent risks of activity as well as any specific tasks associated with participation.
8. An indemnification clause may be needed. Such a clause might be advisable, especially for cumulative clauses.
9. A “severability” clause should be included so that if a court finds any portion of the waiver to be invalid, the remainder of the waiver would still be in effect.
10. A clause in the waiver should indicate that the individual is of legal age (affirms “contractual capacity” discussed earlier) and that the individual has read and understands the form he or she is signing. It is best to place this statement right above the participant's signature. Courts generally assume that individuals take responsibility for documents they sign.

In addition to these tips for writing a waiver, there also needs to be some thought given to the administrative process surrounding the actual execution of the waiver.

**FIVE TIPS FOR ADMINISTERING A WAIVER**

Proper administration of the waiver is just as important as the content of the waiver. The following five tips should help health/fitness professionals establish practical and correct administrative procedures for the execution process of the actual signing of a waiver:

1. Explain verbally, in an honest and clear manner, the purpose of the waiver. Courts may not uphold waivers unless the signer is told the reason for his or her signature. If a different reason is given (e.g., this is just for insurance purposes), the waiver may be void because this may constitute “fraud” or “misrepresentation.”
2. Allow adequate time for individuals to read the waiver because courts have invalidated waivers when individuals were asked to sign quickly. Health/fitness facilities should establish a set procedure for those administering waivers, asking each participant if they have read and understood the waiver. Documenting that this was done will help refute a claim of ignorance of what was signed. Also, take the time to obtain a copy of one piece of reliable identification verifying the age of the individual. This helps affirm that the individual is of legal age and free to enter into this contract.
3. Read the waiver to nonreaders. Even though courts generally rule that persons are responsible for what they sign, it may be best for health/fitness facility staff to establish a procedure to actually read the waiver to those who cannot read but understand English. Translation into other languages may also be necessary in some situations.
4. Develop a policy regarding the retention of waivers. Participants can file a lawsuit years after an injury occurs because many statutes of limitations allow for the filing of lawsuits within one, two, or more years of the time an untoward event occurs. The time allowed depends on the particular state’s statutes of limitations. Therefore, the retention period depends on individual state law.
5. Preserve the waiver documents securely so they can be obtained quickly and easily. It will be difficult to demonstrate in a court of law that a waiver was administered if it is misplaced or destroyed. Also, be sure waivers are secure from access by unauthorized parties.

Sample Waiver/Release Documents and clauses are included in the appendix to this chapter as follows:

- Form 4–7: User’s Representations, Express Assumption of All Risks and Release of Liability Agreement
- Form 4–8: Example of a Waiver Upheld Twice in a Rigorous State
- Form 4–9: Illustrative Stand-Alone Waiver
SUMMARY

The application of the assumption of risk defense by health and fitness facilities can assist in the overall risk management process for such entities. Written documents evidencing such assumptions can help demonstrate knowledge and acquaintance of such an assumption by participants. The use of prospectively executed waivers/releases presents a very real risk management technique to be implemented to limit claim and suit from ever being asserted or filed, while also providing an effective bar to successful suits in many jurisdictions if those documents are properly drafted and executed. Such documents should be used where permissible and in those jurisdictions where these agreements have been upheld. The services of knowledgeable legal counsel familiar with the drafting and use of such documents are necessary to ensure that the agreements are properly prepared and executed.

RISK MANAGEMENT ASSIGNMENTS

1. Explain how assumption of risk defenses are used to negate personal injury/wrongful death lawsuits against facilities and personnel.

2. Describe those limitations that may be applicable to the assumption of risk defense in reference to health and fitness facilities.

3. Compare and contrast those benefits and drawbacks of the express assumption of risk doctrine when compared with the application of the doctrine without a written document.

4. Develop a list comparing and contrasting assumption of risk, informed consent, and waiver/release documents to be used by health/fitness facilities in their development of relationships with clients.
5. Delineate the risks that are applicable to one or more of the typical activities carried on in most health/fitness facilities that could be included within assumption of risk documents for these entities.

6. List those risks that should be described in facility waiver/release documents for a particular activity such as free weight lifting.

7. Determine if releases/waivers executed in advance of activity are valid in a particular state.

8. Decide if a parent may lawfully execute a prospective release/waiver of liability in a particular state on behalf of his or her children.

9. Determine how long an executed waiver/release should be retained by a facility based on a particular state's statute of limitation for personal injury and wrongful death actions.

10. List those states where releases/waivers may not be recognized when executed in advance of particular activities.
KEY TERMS

<table>
<thead>
<tr>
<th>Exculpatory clause</th>
<th>Loss of consortium</th>
<th>Public policy</th>
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<tbody>
<tr>
<td>Express/contractual assumption of risk</td>
<td>Loss of parental consortium</td>
<td>Secondary assumption of risk/ implied assumption of risk</td>
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<tr>
<td>Indemnify</td>
<td>Primary/no duty assumption of risk</td>
<td>Statute of limitations</td>
</tr>
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REFERENCES

29. Tunkl v. Regents of the University of California, 60 Cal.2d 92 (Cal., 1963).
30. Tunkl v. Regents of the University of California, 60 Cal.2d 92 (Cal., 1963), 92.
31. Tunkl v. Regents of the University of California, 60 Cal.2d 92 (Cal., 1963), 98–101.
| FORM 4-1 | Express Assumption of Risk for Participation in Specified Activity |
| FORM 4-2 | Express Assumption of Risk/Prospective Waiver of Liability and Release Agreement |
| FORM 4-3 | Example of an Agreement to Participate |
| FORM 4-4 | Illustrative Agreement to Participate (for Use with Adults) |
| FORM 4-5 | Illustrative Agreement to Participate (for Use with Minors) |
| FORM 4-6 | Informed Consent For Participation in an Exercise Program for Apparently Healthy Adults |
| FORM 4-7 | User’s Representations, Express Assumption of All Risks, and Release Liability Agreement |
| FORM 4-8 | Example of Waiver Upheld Twice in a Rigorous State |
| FORM 4-9 | Illustrative Stand-Alone Waiver |

**EDITORIAL NOTE: CAUTION!**

No form should be adopted by any program until it has first been reviewed by legal counsel in the state where the form is to be used, as well as by the medical director/adviser/risk manager for the program. To be acceptable, each form must be written in accordance with prevailing state laws by knowledgeable legal counsel and should state to the participant the reasons for the procedure, the risks and benefits, etc., in a manner specific to the program activities for which consent or other form of contractual document is being obtained. The forms here reproduced are protected by copyright and may not be reproduced in any form, by any means. They are reproduced here with permission of the copyright holder (PRC Publishing, Inc., 3976 Fulton Drive NW, Canton, OH 44718, 1-800-336-0083, www.prcpublishingcorp.com) from those publications identified later herein.
FORM 4-1

Express Assumption of Risk for Participation In Specified Activity

I, the undersigned, hereby expressly and affirmatively state that I wish to participate in __________________________. I realize that my participation in this activity involves risks of injury, including but not limited to (list) __________________________ and even the possibility of death. I also recognize that there are many other risks of injury, including serious disabling injuries, which may arise due to my participation in this activity and that it is not possible to specifically list each and every individual injury risk. However, knowing the material risks and appreciating, knowing, and reasonably anticipating that other injuries and even death are a possibility, I hereby expressly assume all of the delineated risks of injury, all other possible risk of injury, and even death which could occur by reason of my participation.

I have had an opportunity to ask questions. Any questions which I have asked have been answered to my complete satisfaction. I subjectively understand the risks of my participation in this activity and knowing and appreciating these risks I voluntarily choose to participate, assuming all risks of injury or even death due to my participation.

Witness Participant

Dated:_____________________

NOTES OF QUESTIONS AND ANSWERS

____________________________________________________________________________________

____________________________________________________________________________________

This is, as stated, a true and accurate record of what was asked and answered.

Participant

TO BE CHECKED BY PROGRAM STAFF

CHECKED INITIALS

I. RISKS WERE ORALLY DISCUSSED _________ _________

II. QUESTIONS WERE ASKED AND THE PARTICIPANT INDICATED COMPLETE UNDERSTANDING OF THE RISKS _________ _________

III. QUESTIONS WERE NOT ASKED, BUT AN OPPORTUNITY TO QUESTION WAS PROVIDED AND THE PARTICIPANT INDICATED COMPLETE UNDERSTANDING OF THE RISKS _________ _________

Staff Member Date

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FORM 4-2
Express Assumption of Risk/Prospective Waiver of Liability and Release Agreement

I, the undersigned, hereby expressly and affirmatively state that I wish to participate in fitness assessments, activities and programs and in the use of exercise equipment at various sites, including home, club or worksite, that may be provided or recommended by (______) (hereinafter “Facility”). I realize that my participation in these activities or in the use of equipment involves various risks of injury including but not limited to (list) ________________________ and even the possibility of death.

I also recognize that there are many other risks of injury, including serious disabling injuries, that may arise due to my participation in these activities or in the use of equipment and that such risks, including remote ones, have been reviewed with me. I also understand, that under some circumstances I may choose to engage in activity in a non-supervised setting under circumstances where there is no one to respond to any emergency that may arise as a result of my participation or use of equipment on an individual basis, in an unsupervised setting. Despite the fact that I have been duly cautioned as to such unsupervised and unattended activity or equipment use, and despite the fact that I have been advised against such activity and equipment use in an unsupervised and unattended setting, I, knowing the material risks and appreciating, knowing, and reasonably anticipating that other injuries and even death are a possibility as a result of my participation in fitness assessments, activities, or programs or in the use of equipment in supervised/attended and unsupervised/unattended settings (within which settings I acknowledge that the risks of injury or death may be greater than in other settings), I hereby expressly assume all of the delineated risks of injury, all other possible risks of injury and even the risk of death which could occur by reason of my participation in any or all settings.

IF YOU UNDERSTAND AND AGREE, PLEASE INITIAL _____.

I have had an opportunity to ask questions regarding my participation in various activities and in the use of exercise equipment. Any questions I have asked have been answered to my complete satisfaction. I subjectively understand the risks of my participation in various activities or in the use of equipment and knowing and appreciating these risks, I voluntarily choose to participate, assuming all risks of injury and death which may arise due to my participation.

IF YOU UNDERSTAND AND AGREE, PLEASE INITIAL _____.

I further acknowledge that my participation in the activities and use of equipment is completely voluntary and that it is my choice to participate and/or use equipment or not to participate as I see fit.

IF YOU UNDERSTAND AND AGREE, PLEASE INITIAL _____.

In consideration of being allowed to participate in the activities and programs provided through (Facility) and/or in the use of its facilities, equipment and machinery, I do hereby waive, release and forever discharge (Facility), and all of its directors, officers, agents, employees, representatives, successors and assigns, and all others from any and all responsibility or liability for injuries or damages resulting from my participation in any activities at Facility or elsewhere. I do also hereby release all of those mentioned and any others acting upon their behalf from any responsibility or liability for any injury or damage to myself, including those caused by the negligent act
or omission of any of those mentioned or others acting on their behalf or in any way arising out of or connected with my participation in any of the contemplated activities or in the use of equipment and machinery through the Facility or otherwise. I understand that this release is given in advance of any injury or damage to me and that it includes injury or damage to me caused by the ordinary negligence of those released hereby but not from gross negligence, willful/wanton/intentional or criminal conduct. **IF YOU UNDERSTAND AND AGREE, PLEASE INITIAL _____**.

I understand and am aware that strength, flexibility and aerobic exercise including the use of equipment is a potentially hazardous activity. I also understand that fitness activities involve a risk of injury and even death and that I am voluntarily participating in these activities and using equipment with knowledge of the dangers involved. **IF YOU UNDERSTAND AND AGREE, PLEASE INITIAL _____**.

I do further declare myself to be physically sound and suffering from no condition, impairment, disease, infirmity or other illness that would prevent my participation in any of the activities and programs provided through Facility or in the use of equipment and machinery except as hereinafter stated: ______________ ___________________________________________. I do hereby acknowledge that I have been informed of the need or desirability for a physician’s approval for my participation in exercise/fitness activity or in the use of exercise equipment. I also acknowledge that it has been recommended that I have a yearly or more frequent physical examination and consultation with my physician as to physical activities, exercise and as to the use of exercise equipment so that I might have recommendations concerning these physical activities and equipment use. I acknowledge that I have either had a physical examination and have been given my physician’s permission to participate or that I have decided to participate in activity and/or use of equipment without the approval of my physician and do hereby assume all responsibility for my participation and activities or in the utilization of equipment without that approval. **IF UNDERSTAND AND YOU AGREE, PLEASE INITIAL _____**.

I, the undersigned spouse of the participant, do hereby further acknowledge that my spouse/participant wishes to engage in certain activities and programs provided by Facility including the use of various facilities and equipment. In consideration of my spouse/participant’s voluntary decision to engage in such activities, and in consideration of the provision of such activities and equipment to spouse by Facility, I the undersigned do hereby waive, release and forever discharge Facility and its directors, officers, agents, employees, representatives, successors and assigns and all others from any and all responsibility or liability for any injuries or damages resulting from my spouse’s participation in any activities or in my spouse’s use of equipment as a result of participation in any such activities or otherwise arising out of that participation. I do further release all of those above mentioned and any others acting upon their behalf from any responsibility or liability for any injury to or even death of my spouse including those caused by the negligent act or omission of any of those mentioned or others acting upon their behalf or in any way arising out of or connected with my spouse’s participation in any of the activities provided by Facility or in the use of any equipment at any location. I specifically acknowledge that my execution of this prospective Waiver and Release relinquishes any cause of action that I may have either directly, through my spouse or independently by way of a loss of consortium or other type of action of any kind or nature whatsoever and I do hereby further agree to my spouse’s participation in the activities as
above mentioned and in the use of any equipment at any location. **IF SPOUSE UNDERSTANDS AND AGREES, SPOUSE TO INITIAL HERE _____.**

IN WITNESS WHEREOF, the participant and the participant’s spouse, if any, have executed this Express Assumption of Risk/Prospective Waiver of Liability and Release Agreement this ____ day of ____________, 20__, which shall be binding upon each of them and their respective heirs, executors, administrators and assigns. Each does hereby further agree to indemnify and hold Facility and all those identified or named herein absolutely harmless in the event that anyone claiming any cause of action as a result of any injury and/or death to participant or spouse attempts at any time to institute any claim or suit against the Facility arising out of any of the activities or programs herein or in the use of any equipment.

Signed in the presence of:

________________________________________
Participant

________________________________________
Participant’s Spouse

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FORM 4-3
Example of an Agreement to Participate†
Agreement to Participate
(Acknowledgement of Risks)

I am aware that the activities I am participating in, under the arrangements of Brown’s Fort family recreation center; its agents, employees, and associates, involves certain inherent risks. I recognize that white water rafting . . . and other activities, scheduled or unscheduled have an element of risk which combined with the forces of nature, acts of commission, or omission, by participants or others, can lead to injury or death.

I also state and acknowledge that the hazards include, but are not limited to the loss of control, collisions with rocks, trees and other man made or natural objects, whether they are obvious or not obvious, flips, immersions in water, hypothermia, and falls from vessels, vehicles, animals, or on land.

I understand that any route or activity, chosen as a part of our outdoor adventure may not be the safest, but has been chosen for its interest and challenge . . . I . . . understand and agree that any bodily injury, death or loss of personal property, and expenses thereof, as a result of my . . . participation in any scheduled or unscheduled activities, are my responsibility. I hereby acknowledge that I and my family . . . have voluntarily applied to participate in these activities. I do hereby agree that I and my family . . . are in good health with no physical defects that might be injurious to me and that I and my family are able to handle the hazards of traffic, weather conditions, exposure to animals, walking, riding, and all and any similar conditions associated with the activities we have contracted for . . .

I and my family . . . agree to follow the instructions and commands of the guides, wranglers, and others in charge at Brown’s Fort recreation center with conducting activities in which I and my family are engaged.

Further, and in consideration of, and as part payment for the right to participate in such trips or other activities . . . I have and do hereby assume all the above risks and will hold Brown’s Fort . . . its agents, employees, and associates harmless from any and all liability, action, causes of action, debts, claims, and demands of any kind or nature whatsoever which I now have or which may arise out of, or in connection with, my trip or participation in any other activities.

The terms of this contract shall serve as a release and assumption of risk for my heirs, executors and administrators and for all members of my family, including any minors accompanying me . . .

I have carefully read this contract and fully understand its contents. I am aware that I am releasing certain legal rights that I otherwise may have and I enter into this contract in behalf of myself and my family of my own free will.

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FORM 4-4
Illustrative Agreement to Participate
(for Use with Adults)
Agreement to Participate in Racquetball
(Substitute Information Appropriate to Other Activities for Italicized Sections)

Participation in all sports and physical activities involves certain inherent risks and, regardless of the care taken, it is impossible to ensure the safety of the participant. *Racquetball* is an activity requiring considerable coordination, agility, and a high level of cardiovascular fitness. It involves vigorous activity for as long as an hour or more, many quick bursts of speed, and being alert to fast moving objects in a confined space. While it is a reasonably safe sport as long as safety guidelines are followed, some elements of risk cannot be eliminated from the activity.

A variety of injuries may occur to a *racquetball* participant. Some examples of those injuries are: 1. Minor injuries such as scrapes, bruises, strains, and sprains; 2. More serious injuries such as broken bones, cuts, concussions, and loss of vision; 3. Catastrophic injuries such as heart attacks, paralysis, and death.

These, and other injuries, sometime occur in *racquetball* as a result of hazards or accidents such as slips, being struck by a ball, being struck by a racquet, colliding with another player, colliding with the wall, falling to the floor, or stress placed on the cardiovascular system.

To help reduce the likelihood of injury to yourself and to other participants, participants are expected to follow the following rules:

1. All participants are expected to wear proper footwear.
2. All participants are expected to keep the racquet strap around the wrist during play.
3. All participants are expected to wear protective eyewear during play.
4. All participants are expected to avoid swinging when it might endanger another player.
5. All participants are expected to follow all posted safety rules plus the rules of racquetball.

I agree to follow the preceding safety rules, all posted safety rules, and all rules common to the sport of *racquetball*. Further, I agree to report any unsafe practices, conditions, or equipment to the management.

I certify that 1) I possess a sufficient degree of physical fitness to safely participate in *racquetball*; 2) I understand that I am to discontinue activity at any time I feel undue discomfort or stress; and 3) I will indicate below any health related conditions that might affect my ability to play *racquetball* and I will verbally inform activity management immediately.

Circle:  Diabetes  Heart Problems  Seizures  Asthma  Other _____
I have read the preceding information and it has been explained to me. I know, understand, and appreciate the risks associated with participation in racquetball and I am voluntarily participating in the activity. In doing so, I am assuming all of the inherent risks of the sport. I further understand that in the event of a medical emergency, management will call EMS to render assistance and that I will be financially responsible for any expenses involved.

______________________________ _________________
Signature of Participant Date

WAIVER OF LIABILITY: In consideration of being permitted to play racquetball, on behalf of myself, my family, my heirs, my assigns, my executors, and administrators, I hereby release the service provider from liability for injury, loss, or death to myself, while using the facility, equipment, or in any way associated with participating in the activity of racquetball now or in the future, resulting from the ordinary negligence of the service provider, its agents, or employees.

___________________________ __________________
Signature of Participant Date

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FORM 4-5
Illustrative Agreement to Participate
(for Use with Minors)
Agreement to Participate in Racquetball
(Substitute Information Appropriate to other Activities for Italicized Sections)

Participation in all sports and physical activities involves certain inherent risks and, regardless of the care taken, it is impossible to ensure the safety of the participant. Racquetball is an activity requiring considerable coordination, agility, and a high level of cardiovascular fitness. It involves vigorous activity for as long as an hour or more, many quick bursts of speed, and being alert to fast moving objects in a confined space. While it is a reasonably safe sport as long as safety guidelines are followed, some elements of risk cannot be eliminated from the activity.

A variety of injuries may occur to a racquetball participant. Some examples of those injuries are: 1. Minor injuries such as scrapes, bruises, strains, and sprains; 2. More serious injuries such as broken bones, cuts, concussions, and loss of vision; 3. Catastrophic injuries such as heart attacks, paralysis, and death.

These, and other injuries, sometime occur in racquetball as a result of hazards or accidents such as slips, being struck by a ball, being struck by a racquet, colliding with another player, colliding with the wall, falling to the floor, or stress placed on the cardiovascular system.

To help reduce the likelihood of injury to yourself and to other participants, participants are expected to follow the following rules:

1. All participants are expected to wear proper footwear.
2. All participants are expected to keep the racquet strap around the wrist during play.
3. All participants are expected to wear protective eye wear during play.
4. All participants are expected to avoid swinging when it might endanger another player.
5. All participants are expected to follow all posted safety rules plus the rules of racquetball.

I agree to follow the preceding safety rules, all posted safety rules, and all rules common to the sport of racquetball. Further, I agree to report any unsafe practices, conditions, or equipment to the management.

I certify that 1) I possess a sufficient degree of physical fitness to safely participate in racquetball, 2) I understand that I am to discontinue activity at any time I feel undue discomfort or stress, and 3) will indicate below any health related conditions that might affect my ability to play racquetball and I will verbally inform activity management immediately.

Circle: Diabetes Heart Problems Seizures Asthma Other _____
I have read the preceding information and it has been explained to me. I know, understand, and appreciate the risks associated with participation in *racquetball* and I am voluntarily participating in the activity. In doing so, I am assuming all of the inherent risks of the sport. I further understand that in the event of a medical emergency, *management will call EMS to render assistance and that I will be financially responsible for any expenses involved.*

_________________________  ______________________
Signature of Participant          Date

_________________________  ______________________
Signature of Parent             Date

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FORM 4-6
Informed Consent for Participation
in an Exercise Program for
Apparently Healthy Adults
(without known or suspected heart disease)

1. Purpose and Explanation of Procedure
I hereby consent to voluntarily engage in a program of exercise conditioning. I also give consent
to be placed in program activities which are recommended to me for improvement of my general
health and well-being. These may include dietary counseling, stress reduction, and health edu-
cation activities. The levels of exercise which I will perform will be based upon my cardiorespi-
ratory (heart and lungs) fitness as determined through my recent laboratory graded exercise
evaluation. I will be given exact instructions regarding the amount and kind of exercise I should
do. I agree to participate three times per week in the formal program sessions. Professionally
trained personnel will provide leadership to direct my activities, monitor my performance, and
otherwise evaluate my effort. Depending upon my health status, I may or may not be required
to have my blood pressure and heart rate evaluated during these sessions to regulate my exer-
cise within desired limits. I understand that I am expected to attend every session and to follow
staff instructions with regard to exercise, diet, stress management, and smoking cessation. If I
am taking prescribed medications, I have already so informed the program staff and further
agree to so inform them promptly of any changes which my doctor or I have made with regard
to use of these. I will be given the opportunity for periodic assessment with laboratory evalua-
tions at 6 months after the start of my program. Should I remain in the program thereafter, addi-
tional evaluations will generally be given at 12 month intervals. The program may change the
foregoing schedule of evaluations if this is considered desirable for health reasons.

I have been informed that during my participation in exercise, I will be asked to complete the
physical activities unless symptoms such as fatigue, shortness of breath, chest discomfort or
similar occurrences appear. At that point, I have been advised it is my complete right to decrease
or stop exercise and that it is my obligation to inform the program personnel of my symptoms.
I hereby state that I have been so advised and agree to inform the program personnel of my
symptoms, should any develop.

I understand that during the performance of exercise, a trained observer will periodically
monitor my performance and, perhaps measure my pulse, blood pressure or assess my feelings
of effort for the purposes of monitoring my progress. I also understand that the observer may
reduce or stop my exercise program, when any of these findings so indicate that this should be
done for my safety and benefit.

2. Risks
It is my understanding, and I have been informed, that there exists the remote possibility during
exercise of adverse changes including abnormal blood pressure, fainting, disorders of heart
rhythm, and very rare instances of heart attack, stroke or even death. Often injuries to bones,
muscles, tendons, ligaments and other parts of my body may also occur. Every effort, I have
been told, will be made to minimize these occurrences by proper staff assessment of my condition before each exercise session, through staff supervision during exercise and by my own careful control of exercise efforts. I have also been informed that emergency equipment and personnel are readily available to deal with unusual situations should these occur. I understand that there is a risk of injury, heart attack or even death as a result of my exercise, but knowing those risks, it is my desire to participate as herein indicated.

3. Benefits to be Expected and Alternatives Available To Exercise
I understand that this program may or may not benefit my physical fitness or general health. I recognize that involvement in the exercise sessions will allow me to learn proper ways to perform conditioning exercises, use fitness equipment and regulate physical effort. These experiences should benefit me by indicating how my physical limitations may affect my ability to perform various physical activities. I further understand that if I closely follow the program instructions, that I will likely improve my exercise capacity after a period of three (3) to six (6) months.

4. Confidentiality and Use of Information
I have been informed that the information which is obtained in this exercise program will be treated as privileged and confidential and will consequently not be released or revealed to any person without my express written consent or as required bylaw. I do however agree to the use of any information which is not personally identifiable with me for research and statistical purposes so long as same does not identify my person or provide facts which could lead to my identification. Any other information obtained however, will be used only by the program staff in the course of prescribing exercise for me and evaluating my progress in the program.

5. Inquiries and Freedom of Consent
I have been given an opportunity to ask certain questions as to the procedures of this program. Generally these requests which have been noted by the interviewing staff member and his/her responses are as follows:

I further understand that there are also other remote risks that may be associated with this program. Despite the fact that a complete accounting of all these remote risks is not entirely possible, I am satisfied with the review of these risks which was provided to me and it is still my desire to participate.

I acknowledge that I have read this document in its entirety or that it has been read to me if I have been unable to read same.

I consent to the rendition of all services and procedures as explained herein by all program personnel.
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User’s Representations, Express Assumption of All Risks and Release of Liability Agreement

PURPOSE OF THIS BINDING AGREEMENT:

By reading and signing this document, “You”, the undersigned, sometimes also referred to as “User” or “I”, will agree to release and hold [Club Name] (“Club” or “We”) harmless from, and assume all responsibility for all claims, demands, injuries, damages, actions or causes of action to persons or property, arising out of, or connected with your use of the Club’s facilities, premises or services. The agreement and release is for the benefit of the Club, its employees, agents, independent contractors, other users of the Club and all persons on the Club’s premises. This agreement includes your release of these persons from responsibility for injury, damage or death to yourself because of those acts or omissions claimed to be related to the ordinary negligence of these persons. This agreement also includes your representations as to important matters which the Club will rely upon.

A. REPRESENTATIONS

The undersigned, You, represent: (a) that you understand that use of the Club premises, facilities, equipment, services and programs includes an inherent risk of injury to persons and property, (b) that you are in good physical condition and have no disabilities, illnesses, or other conditions that could prevent you from exercising and using the Club’s equipment/facilities without injuring yourself or impairing your health, and (c) that you have consulted a physician concerning an exercise program that will not risk injury to yourself or impairment of your health. Such risk of injury includes, but is not limited to, injuries arising from or relating to use by you or others of exercise equipment and machines, locker rooms, spa and other wet areas, and other Club facilities; injuries arising from or relating to participation by you or others in supervised or unsupervised activities or programs through the Club; injuries and medical disorders arising from or relating to use of the Club’s facilities such as heart attacks, sudden cardiac arrest, strokes, heat stress, sprains, strains, broken bones, and torn muscles, tendons, and ligaments, among others, and accidental injuries occurring anywhere in the Club including lobbies, hallways, exercise areas, locker rooms, steam rooms, pool areas, Jacuzzis, saunas, and dressing rooms. Accidental injuries include those caused by you, those caused by other persons, and those of a “slip-and-fall” nature. If you have any special exercise requirements or limitations, you agree to disclose them to the Club before using the Club’s facilities and when seeking help in establishing an exercise program, you hereby agree that all exercise and use of the Club’s facilities, services, programs, and premises are undertaken by you at your sole risk. As used herein, the terms “include,” “including,” and words of similar import are descriptive only, and are not limiting in any manner.

You also acknowledge and represent that you realize and appreciate that access to and use of the Club’s facilities during non-supervised times increases and enhances certain risks to you. You realize that if you use the Club during non-supervised hours, any emergency response to you in the
event of need for same may be impossible or delayed. While we encourage you to use the Club’s facility with a partner during non-supervised times, you may choose to do so without a partner, therefore enhancing and increasing the risks to you as to the provision of first aid and emergency response. You realize that a delay in the provision of first aid and/or emergency response may result in greater injury and disability to you and cause or contribute to your death. Use of the Club with no one else present to supervise or watch your activities is not recommended and would not be allowed unless you agree to assume all risks of injury, whether known or unknown to you.

You do hereby further declare yourself to be physically sound and suffering from no condition, impairment, disease, infirmity or other illness that would prevent your participation or use of equipment or machinery except as hereinafter stated. You do hereby acknowledge that you have been informed of the need for a physician’s approval for your participation in an exercise/fitness activity or in the use of exercise equipment and machinery. You also acknowledge that it has been recommended that you have a yearly or more frequent physical examination and consultation with your physician as to physical activity, exercise and use of exercise and training equipment so that you might have his recommendations concerning these fitness activities and equipment use. You acknowledge that you have either had a physical examination and have been given your physician’s permission to participate, or that you have decided to participate in activity and use of equipment and machinery without the approval of your physician and do hereby assume all responsibility for your participation and activities, and utilization of equipment and machinery in your activities.

YOU HAVE READ THE FOREGOING, ACKNOWLEDGE THAT YOU UNDERSTAND THE TERMS AND CONDITIONS SET FORTH IN THE PRECEDING PARAGRAPHS AND AGREE TO SAME.

Initials: _________________________

B. EXPRESS ASSUMPTION OF ALL RISKS

You have represented to us and acknowledged that you understand and appreciate all of the risks associated with your participation in various activities at the Club and in the use of equipment/facilities at the Club, including the risks of injury, disability, and death. You have also acknowledged that there are greater, enhanced, and even other risks to you if you decide to use the Club’s facility during non-supervised times. Knowing and appreciating all of these risks and enhanced risks, you have knowingly and intelligently determined to expressly assume all risks associated with all of your activities and use of equipment/facilities at the Club.

You understand and are aware that strength, flexibility and aerobic exercise, including the use of equipment is a potentially hazardous activity. You also understand that fitness activities involve the risk of injury and even death, and that you are voluntarily participating in these activities and using equipment and machinery with knowledge of the dangers involved. We have also reviewed the risks with you on the date when you signed this Agreement and answered any questions that you may have had. You hereby agree to expressly assume and accept any and all risks of injury or death including those related to your use of or presence at this facility, your use of equipment, and your participation in activity, including those risks related to the ordinary negligence of those released by this Agreement, and including all claims related to ordinary negligence in the selection, purchase, set
up, maintenance, instruction as to use, use and/or supervision of use, if any, associated with all equipment and facilities.

YOU HAVE READ THE FOREGOING, ACKNOWLEDGE THAT YOU UNDERSTAND THE TERMS AND CONDITIONS SET FORTH IN THE PRECEDING PARAGRAPHS AND AGREE TO SAME.
Initials:___________________________

C. AGREEMENT AND RELEASE OF LIABILITY

In consideration of being allowed to participate in the activities and programs of the Club and to use its equipment/facilities, machinery in addition to the payment of any fee or charge, you do hereby waive, release and forever discharge the Club and its directors, officers, agents, employees, representatives, successors and assigns, administrators, executors, and all others from any and all responsibilities or liability from injuries or damages resulting from your participation in any activities or your use of equipment/facilities or machinery in the above-mentioned activities. You do also hereby release all of those mentioned and any others acting upon their behalf from any responsibility or liability for any injury or damage to yourself, including those caused by the negligent act or omission of any of those mentioned or others acting on their behalf or in any way arising out of or connected with your participation in any activities of the Club. This provision shall apply to ordinary acts of negligence but shall not apply to gross acts/omissions of negligence, willful or wanton acts/omissions or those of an intentional/criminal nature.

YOU HAVE READ THE FOREGOING, ACKNOWLEDGE THAT YOU UNDERSTAND THE TERMS AND CONDITIONS SET FORTH IN THE PRECEDING PARAGRAPHS AND AGREE TO SAME.
Initials:___________________________

D. LOSS OR THEFT OF PROPERTY

The Club is not responsible for lost or stolen articles. You should keep any valuables with you at all times while using the facilities. Storage space or lockers do not always protect valuables. Consequently, by executing this Agreement and any accompanying documents, you do hereby agree to assume all responsibility for your own property and that of any dependent(s) and to insure that property against risk of loss as you see fit. By the execution hereof, you expressly, on behalf of yourself, and any dependents, do hereby knowingly agree to forego, waive, release and prospectively give up any right to institute any claim or action against the Club relating to lost or stolen property, including property lost or stolen due to the negligent act or omission of the Club. You agree to indemnify and save the Club and all of its personnel harmless from any action, claim, suit or subrogated claim or suit instituted at any time hereafter against the Club related to the theft or loss of your or your dependents’ property at the Club. The Club shall be indemnified by you for all costs, expenses, fees, including attorney fees, incurred by the Club or its personnel by reason of any such action.

YOU HAVE READ THE FOREGOING, ACKNOWLEDGE THAT YOU UNDERSTAND THE TERMS AND CONDITIONS SET FORTH IN THE PRECEDING PARAGRAPHS AND AGREE TO SAME.
Initials:___________________________
User shall receive a copy of the foregoing Agreement at the time of its initialing and signing and hereby acknowledges User’s receipt of same.

YOU HAVE READ THE FOREGOING, ACKNOWLEDGE THAT YOU UNDERSTAND THE TERMS AND CONDITIONS SET FORTH IN THE PRECEDING PARAGRAPHS AND AGREE TO SAME.
Initials: ______________________

This Agreement shall be interpreted according to the laws of the State of _______. If any part of this Agreement should ever be determined by a court of final jurisdiction to be invalid, the remaining portions hereof shall be deemed to be valid and enforceable.

YOU HAVE READ THE FOREGOING, ACKNOWLEDGE THAT YOU UNDERSTAND THE TERMS AND CONDITIONS SET FORTH IN THE PRECEDING PARAGRAPHS AND AGREE TO SAME.
Initials: ______________________

ACKNOWLEDGMENT
I have read and received a completed copy of this Agreement and all of its Exhibits, as well as any Rules and Regulations of the Club which are incorporated herein by reference. I agree to be bound by the terms and conditions of the Agreement and the Rules and Regulations of the Club, as same exist or as same may be amended from time to time hereafter. This Agreement shall be binding upon me and my spouse, my heirs, my estate, my executors, my administrators and my successors and/or assigns. I realize that this Agreement is designed to prevent me and/or them from filing any personal injury or other lawsuit based upon ordinary negligence, including negligent battery, or even negligent wrongful death, loss of consortium or any other similar lawsuit arising out of any injury to me which I or they may possess hereafter.

The undersigned, on behalf of myself and my heirs, executors, administrators, successors and assigns hereby agree to indemnify the Club and all those hereby released and to hold them absolutely harmless if anyone, including the undersigned, should hereafter file suit against the Club or those released hereby for any matter intended to be released by this Agreement including claims based upon ordinary negligence such as but not limited to personal injury, wrongful death, loss of consortium or other similar actions.

Signature __________________________ Date: ______________________
Print Name: ___________________________________________________________
Address: __________________________________________________________________
Phone Number: (________) _________________________________________________

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FORM 4-8
Example of a Waiver Upheld Twice in a Rigorous State*

“YMCA OF METROPOLITAN LOS ANGELES”
RELEASE AND WAIVER OF LIABILITY AND
INDEMNITY AGREEMENT

IN CONSIDERATION of being permitted to enter the YMCA for any purpose, including, but not limited to observation, use of facilities or equipment or participation in any way, the undersigned; hereby acknowledges, agrees and represents that he or she has or immediately upon entering will, inspect such premises and facilities. It is further warranted that such entry in the YMCA for observation, participation or use of any facilities or equipment constitutes an acknowledgment that such premises and all facilities and equipment thereon have been inspected and that the undersigned finds and accepts same as being safe and reasonably suited for the purposes of such observation or use.

IN FURTHER CONSIDERATION OF BEING PERMITTED TO ENTER THE YMCA FOR ANY PURPOSE INCLUDING, BUT NOT LIMITED TO OBSERVATION, USE OF FACILITIES OR EQUIPMENT, OR PARTICIPATION IN ANY WAY, THE UNDERSIGNED HEREBY AGREES TO THE FOLLOWING:

THE UNDERSIGNED HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUIT the YMCA; (hereinafter referred to as releasees”) from all liability to the undersigned: for any loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise, while the undersigned is in, upon, or about the premises or any facilities or equipment therein.

THE UNDERSIGNED HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the releasees and each of them from any loss, liability, damage or cost they may incur due to the presence of the undersigned in, upon or about the YMCA premises or in any way observing or using any facilities or equipment of the YMCA whether caused by the negligence of the releasees or otherwise.

THE UNDERSIGNED HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of releasees or otherwise while in, about or upon the premises of the YMCA and/or while using the premises or any facilities or equipment hereon.

THE UNDERSIGNED further expressly agrees that the foregoing RELEASE, WAIVER AND INDEMNITY AGREEMENT is intended to be as broad and inclusive as is permitted by the law of the State of California and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

THE UNDERSIGNED HAS READ AND VOLUNTARILY SIGNS THE RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT, and further agrees that no oral representations, statements, or inducement apart from the foregoing written agreement have been made.
I HAVE READ THIS RELEASE
Date:____________________________

___________________________________________
Signature of Applicant

*This waiver has been upheld in two separate cases in California (a state classified as Rigorous): Randas v. YMCA of Metropolitan Los Angeles, Cal., 1993; and Los Angeles v. The Superior Court of Los Angeles County, Cal., 1997.

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FORM 4-9
Illustrative Stand-Alone Waiver
WAIVER AND RELEASE OF LIABILITY

Disclaimer: Winner’s Health and Fitness Club (WHFC) is not responsible for any injury (or loss of property) suffered while participating in club activities, using equipment, or on club premises, for any reason whatsoever, including ordinary negligence on the part of WHFC, its agents, or employees.

In consideration of my membership and being able to use Winner’s Health and Fitness Club (WHFC) facilities and equipment, I hereby release and covenant not to sue WHFC, its owners, its employees, instructors, or agents from any and all present and future claims resulting from ordinary negligence on the part of WHFC or others listed for loss, damage, or theft of personal property, personal injury or death, arising as a result of using the facilities and equipment of WHFC and engaging in any WHFC activities or any activities incidental thereto, wherever, whenever, or however the same may occur. I hereby voluntarily waive any and all claims resulting from ordinary negligence, both present and future that may be made by me, my family, estate, heirs, or assigns.

Further, I am aware that health and fitness club activities may range from vigorous cardiovascular activity (i.e., aerobics, bicycles, steppers, or racquetball) to the strenuous exertion of strength training (i.e., free weights, weight machines). I understand that these and other physical activities at WHFC involve certain risks, including but not limited to, death, serious neck and spinal injuries resulting in complete or partial paralysis, heart attacks, and injury to bones, joints, or muscles. I am voluntarily participating in club activities with knowledge of dangers involved and hereby agree to accept any and all inherent risks of property damage, personal injury, or death.

I further agree to indemnify and hold harmless WHFC and others listed for any and all claims arising as a result of my engaging in club activities or any activities incidental thereto, wherever, whenever, or however the same occur.

I understand that this waiver is intended to be as broad and inclusive as permitted by the laws of this state (specify) and agree that if any portion is held invalid, the remainder of the waiver will continue in full legal force and effect. I further affirm that the venue for any legal proceedings shall be in this state (specify).

I affirm that I am of legal age and am freely signing this agreement. I have read this form and fully understand that by signing this form, I am giving up legal rights and/or remedies which may be available to me for the ordinary negligence of WHFC or any of the parties listed above.

______________________________ Date:_________________________
Signature of Participant

______________________________ Date:_________________________
Signature of Parent or Minor

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