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## Gyms don't get free ride with liability injuries

Statutes in Illinois require more exacting language with exculpatory clauses; broad brush doesn't work

The Olympic Games in Rio served as the latest example of an elite athlete suffering a gruesome injury. Few will forget the disturbing footage of French gymnast, Samir Ait Said's, mangled leg after performing a seemingly innocuous vault.

Certainly, when a gymnast, or any athlete, pushes their body to perform at the highest level, even the slightest misstep can cause horrific injury.

This reality exposes sports organizations and recreational facilities to myriad potential claims from weekend warriors and elite athletes alike. Increasingly, many recreational facilities and organizers of sport incorporate exculpatory clauses in an attempt to elude liability.

An exculpatory clause is a contract provision that relieves one party of liability if damages are caused during the execution of the contract. Seemingly omnipresent, these waivers are now found in nearly every gym membership agreement and recreational facility usage contract.

Exculpatory clauses, by their very nature, pit two public policy interests against each other. *Jew-*

*lers Mutual Insurance Co. v. Firststar Bank Illinois*, 341 Ill. App. 3d 14 (1st Dist. 2003). At odds — the interest in holding one liable for negligent breach of duty against the interest in allowing a person to freely contract his affairs. *Simmons v. Columbus Venetian Stevens Buildings Inc.*, 20 Ill. App. 2d 1 (1st Dist. 1958).

While "Illinois law does not favor exculpatory clauses," certain provisions can be enforceable. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill.2d 378, 395 (1986).

*The appellate court held that the YMCA's exculpatory agreement did not relieve the defendant from liability. The court found that the exculpatory agreement was inadequate to immunize the defendant from liability for the injury caused by the falling weight.*

Because they are disfavored, courts construe these provisions strictly against the parties they benefit. *Scott & Fetzer Co.*, 112 Ill.2d at 395. Thus, in order to be enforceable, the clause must "spell out the intention of the parties with great particularity and will not be construed to defeat a claim which is

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WILLIAM T. GIBBS



William T. Gibbs is a trial attorney at Corboy & Demetrio P.C., representing victims of negligence. He currently represents several former NFL and NHL athletes and their families. He can be reached at WTG@corboydemetrio.com.

not explicitly covered by their terms." Id.

Courts have interpreted the "great particularity" requirement as follows: "an exculpatory agreement must contain clear, explicit and unequivocal language referencing the type of activity, circumstance or situation that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care." *Evans v. Lima Lima Flight Team Inc.*, 373 Ill. App. 3d 407 (1st Dist. 2007).

Stated differently, "The plaintiff must be put on notice of the range of dangers for which he assumes

while he used a weight machine which was in a state of disrepair. 149 Ill. App. 3d 1037 (2d Dist. 1986).

The appellate court held that the YMCA's exculpatory agreement did not relieve the defendant from liability. The court found that the exculpatory agreement was inadequate to immunize the defendant from liability for the injury caused by the falling weight.

Read in its entirety, the court reasoned that the exculpatory clause only protected the defendant from injuries caused by the plaintiff's own physical limitations or weaknesses. Id. at 1043.

The court reversed summary judgment for the defendants because the form did not contain "a clear and adequate description of certain activities" sufficient to exculpate the defendant from the injury caused.

Consider a scenario in which the French gymnast suffered the same injury in a training facility in Illinois after signing a generalized exculpatory agreement. If the injury was due to his own error in the performance of the vault, an exculpatory agreement relieving the training facility from liability for that injury may be valid and enforceable.

If, on the other hand, the gymnast's injury was caused by a defective mat, an unsecured vault apparatus, or other negligent actions, such danger could not have possibly been contemplated by the gymnast when signing the agreement.

It would contravene public policy to allow a waiver to exculpate the defendant, as the gymnast had no way of knowing or mitigating the increased risk created by the defendant's negligent actions.

To enforce the exculpatory agreement in this context would be tantamount to giving the defendant a "get out of jail free card." Surely, Illinois law wouldn't deprive this poor gymnast of a remedy?