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Court Flexes its Muscle to Strengthen the Enforceability of Liability Waivers

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THE COURT POINTED OUT THAT THE MEMBERSHIP AGREEMENT INSTRUCTED THE PLAINTIFF TO REFRAIN FROM SIGNING IT UNTIL READING THE ENTIRE AGREEMENT, PRONOUNCED THAT THE TERMS OF THE AGREEMENT WERE CONTAINED ON BOTH SIDES OF THE DOCUMENT, AND STATED THAT THE AGREEMENT CONSTITUTED THE ENTIRE AGREEMENT BETWEEN THE PARTIES. BASED UPON THESE CIRCUMSTANCES, THE COURT FOUND THE WAIVER TO BE CLEAR ENOUGH TO RELIEVE THE DEFENDANTS OF LIABILITY.

An *en banc* panel of the Pennsylvania Superior Court recently reinforced the validity of liability waivers in contracts for recreational activities. In *Hinkal v. Pardoe*, the court tackled the issue of whether a waiver in a gym membership agreement protected the gym against liability after a gym member injured herself during a workout.

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Procedural History

The case arises from an August 2010 incident in which the plaintiff suffered a neck injury while using a piece of exercise equipment at Gold's Gym. The plaintiff sued the gym and one of its trainers, claiming that the defendants acted negligently when the trainer put too much weight on the equipment and encouraged her to continue exercising without recognizing she was hurt. The trial court entered summary judgment in the defendants' favor based upon the plaintiff's execution of a membership agreement which stated that she had waived any claims for personal injury.

On April 24, 2015, a divided three-judge panel of the Superior Court reversed and found the liability waiver to be unenforceable. The waiver provided in pertinent part as follows:

> **WAIVER OF LIABILITY; ASSUMPTION OF RISK:** Member acknowledges that the use of Gold's Gym's facilities, equipment, services and programs involves an inherent risk of personal injury to Member …. Member voluntarily agrees to assume all risks of personal injury to Member … and waives any and all claims or actions that Member may have against Gold's Gym, any of its subsidiaries or other affiliates and any of their respective officers, directors, employees, agents, successors and assigns for any such personal injury ….

The court held that the liability waiver was invalid because it was insufficiently conspicuous to provide the plaintiff with notice of its content. The court explained that the agreement was a single, two-sided document that contained a signature line on the front side, but not the back. The liability waiver was the 12th of 13 terms on the reverse side of the membership agreement, and was three-quarters of the way down the page. It was printed in light gray ink and not distinguishable from the surrounding terms by its font or in any other meaningful way.

After issuing its ruling, the Superior Court agreed to rehear the case *en banc*.

Court's *En Banc* Decision

On January 22, 2016, the *en banc* panel affirmed the validity of the liability waiver. The court's decision was premised on the general rule that a liability waiver is enforceable if it: (1) does not contravene public policy; (2) is between two persons relating to their own private affairs; (3) is not one of adhesion; and (4) contains clear language that a person is being relieved of liability for his own acts of negligence. The court found that the first two conditions were easily satisfied because the waiver was in an agreement between

a private individual and a private entity, and did not address matters of public interest. The court also found that the third condition was met because the plaintiff was under no compulsion to join a gym and did so to voluntarily avail herself of a recreational activity. The fourth condition was where the court focused its analysis.

In considering the fourth condition, the court carefully examined the language of the liability waiver in the context of the membership agreement as a whole. The court noted that the waiver expressly stated the intention to bar all lawsuits for personal injuries arising out of the use of the exercise equipment. The court also pointed out that the membership agreement instructed the plaintiff to refrain from signing it until reading the entire agreement, pronounced that the terms of the agreement were contained on both sides of the document, and stated that the agreement constituted the entire agreement between the parties. Based on these circumstances, the court found the waiver to be clear enough to relieve the defendants of liability.

The court rejected the plaintiff's argument that the waiver was unenforceable because she had never read it. Noting that Pennsylvania law imposes a duty upon a person who is about to sign a contract to read it, the court held that the plaintiff's failure to read the membership agreement – which she had signed – did not render it unenforceable. The court also dismissed plaintiff's claim that no one from the gym had ever made her aware of the waiver and that the waiver was inconspicuous. Although the Legislature requires certain contract terms to be conspicuous (e.g., warranty disclaimers), the court noted that there are no such requirements for liability waivers, nor is conspicuousness an essential element of contract formation.

Significantly, the court distinguished its holding from its earlier decision in *Beck-Hummel v. Ski Shawnee, Inc.*, where it had previously declined to uphold the enforceability of a liability waiver that appeared on the back side of a snow tubing ticket. The court explained that the determinative issue in both cases was whether there had been a meeting of the minds to establish the existence of a binding contract. The court found the waiver in the *Hinkal* case to be valid because it was contained in a signed agreement, but the waiver in the *Beck-Hummel* case to be invalid because it was contained on an entry ticket that did not require any express acknowledgment that its terms had been accepted.

Conclusion

Businesses that offer recreational and similar type activities can protect themselves from liability by requiring customers to sign liability waivers. To minimize the risk that a customer challenges the validity of the waiver, businesses should:

- use unambiguous words in the liability waiver to make clear that the customer is agreeing to relieve the business from liability
- incorporate language plainly stating that the customer is assuming the risk of personal injury and that the customer is waiving all claims for personal injury
- print the waiver in bold capital letters or some other type of conspicuous font to provide the customer with notice of its content and legal significance
- make the waiver part of an agreement that the customer is required to sign, rather than simply publishing the waiver on a receipt or ticket stub
- insert a statement above the signature line of the agreement that prompts the customer to read the entire agreement and requires the customer to acknowledge doing so
- require the customer to print his or her initials underneath the waiver or to make some other affirmative acknowledgment that the customer has read it
- include an integration clause stating that the agreement is the entire agreement between the parties, and supersedes all prior agreements, whether written or oral, with respect to such matter.