IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION COURT

C.A. No. 06 L 007663

LOIS M. FOWLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY FOWLER, DECEASED,
Plaintiff,

v.

BALLY TOTAL FITNESS, CORP.,
Defendants

PLAINTIFF FOWLER'S MEMORANDUM IN OPPOSITION TO DEFENDANT BALLY'S MOTION TO DISMISS

Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, Deceased ("Fowler"), by her attorney, for her Memorandum in Opposition to the Motion to Dismiss filed by Defendant, Bally Total Fitness Corp. ("Bally"), states as follows:

INTRODUCTION

In ruling on Bally's Motion to Dismiss, this Court must decide two questions. First, whether to follow the decision of the Second District in Salte v. YMCA, 351 Ill. App. 3d 524 (2d Dist 2004), or whether to recognize that Salte has been implicitly overruled recently by the Illinois Supreme Court in Marshall v. Burger King, 222 Ill.2d 422 (2006).

Second, the court must decide whether to enforce a waiver of liability provision in the standard Bally membership agreement, used nationwide and signed by Gary Fowler in Maryland in 2003, where:

(1) deficient emergency response by Bally was neither expressly waived nor contemplated as a risk being waived;

(2) Bally later acknowledged the limited nature of the waiver by modifying it to refer to negligent emergency response explicitly; and

(3) Such a waiver of negligent emergency response would, in any event, be void as contrary to public policy by 2005, given the clear and strong encouragement provided by local, state and federal governments for widespread public access defibrillation prior to 2005, and especially given Bally's admitted awareness of the large number of members suffering fatal cardiac events in its facilities and its attempt to shield itself from liability rather than address the problem in a timely and effective manner.

Salte does not control and the Bally release does not bar Fowler's claims. Bally's Motion to Dismiss under Sections 2-615 and 2-619 should be denied.

ALLEGATIONS OF THE COMPLAINT

A summary of the allegations of the Complaint, which must be accepted as true at this stage, is attached hereto as Exhibit A.

ARGUMENT

Fowler's Allegations Establish Bally's Duty to Fowler and Breach of That Duty

A motion to dismiss under Section 2-615 of the Code challenges the legal sufficiency of the complaint. Dismissal is appropriate "only if it is clearly apparent that no set of facts can be proven which will entitle a plaintiff to recover." Illinois Graphics Co. v. Nickum, 159 Ill.2d 469, 488 (1994). The court accepts as true all well-pled facts and reasonable inferences that can be drawn from those facts. City of Chicago v. Beretta U.S.A. Corp., 213 Ill.2d 351, 364 (2004). The allegations must also be construed the light most favorable to the plaintiff. Id.

A motion under Section 2-619 presents "affirmative matter" apart from the complaint "which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." Illinois Graphics Co. v. Nickum, 159 Ill.2d 469, 486 (1994). At issue "is whether there is a genuine issue of fact and whether the defendant is entitled to judgment as a matter of law." Id. at 494.

The Substantive Tort Law of Illinois Applies

Illinois substantive tort law applies to Bally's conduct as alleged in Fowler's Complaint. Illinois follows the Restatement (Second) of Conflict of Laws, which provides four factors in determining the most significant relationship: (1) place of injury; (2) place of conduct causing the injury; (3) domicile, residence, place of incorporation, and place of business of the parties; and (4) place where the relationship, if any, between the parties is centered. Miller v. Hayes, 233 Ill. App.3d 847, 849 (1992); Leane v. Joseph Entertainment Group, Inc., 267 Ill. App. 3d 1036, 1042 (1994).

The issue here is the tort standard for Bally's conduct. Bally is based in Chicago. Fowler alleges that Bally's breach of duty occurred in Chicago, at Bally's headquarters, where the decision was made not to install AEDs in all Bally clubs prior to November, 2005. That decision had nationwide consequences. All Bally clubs, including the one in Gaithersburg, are owned and

operated by Bally (as opposed to franchisees using the name, but able to make their own decisions). Under Illinois choice of law rules, notwithstanding Fowler's death in a Bally club in Maryland, this would give Illinois the kind of significant interest that would support application of Illinois law.

Maryland law confirms the application of Illinois tort law. Maryland's Wrongful Death Act ("Act") §3-903 states "If the wrongful act occurred in another state… a Maryland court shall apply the substantive law of that jurisdiction." The Act defines "wrongful act" in §3-901 as "an act, neglect or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if the death had not ensued." By §3-903, Maryland has signaled that where wrongful death occurs in Maryland, but the wrongful act occurred in another state, that other state's substantive law applies. See, Jones v. Prince Georges County, 378 Md. 98, 108-110 (2003). This confirms the propriety of the application of Illinois tort law by this court.

Bally Is Actually Asking This Court to Determine Breach as a Matter of Law, an Approcah the *Marshall* Court Rejected

Bally owed a duty of reasonable care to Fowler as a business invitee and club member. Whether Bally breached this duty, by failing to equip its club with an AED, is an issue for the jury to decide. Although the existence of a duty is sometimes said to be a matter of law for the Court, where a general duty of reasonable care exists between plaintiff and defendant, and a defendant argues for lack of duty as to a particular kind of precaution or protection, "[i]t is inadvisable for courts to conflate the concepts of duty and breach in this manner." Marshall v. Burger King, 222 Ill.2d at 443 (2006); see, also, Kennedy v. Medtronic, 366 Ill. App. 3d 298, 305 (2006), app. denied, 221 Ill.2d 640 (2006), citing Bajwa v. Metropolitan Life Insurance Co., 208 Ill.2d 414, 422, 804 N.E.2d 519 (2004).

In Marshall, the plaintiff customer, while inside the restaurant, was hit by a car which crashed through the restaurant wall. The plaintiffs alleged that (1) such occurrences were foreseeable; (2) that reasonable protection was available and feasible; and (3) that building codes, public safety recommendations, and industry standards recommended protection. The defendant argued that there was no duty to protect the plaintiff from a freak accident caused by a third party's negligence. The trial court dismissed, and both the Second District and the Supreme Court reversed, squarely rejecting the argument:

> [Defendants] are actually requesting that that we determine, as a matter of law, that they did not breach their duty of care. It is inadvisable for courts to conflate the concepts of duty and breach in this manner…. Thus, the issue in this case is not whether the defendants had a duty to install protective poles, or a duty to prevent a car from entering the restaurant, or some such fact-specific formulation. Because of the special relationship between defendants and the decedent [business invitee], they owed the decedent a duty of reasonable care. The issue is whether, in light of the particular circumstances of this case, defendants breached that duty. The question cannot be answered at this stage of the proceedings.

Marshall, 222 Ill.2d at 443-444.

Marshall discusses at length the legal principles that govern this case: the business inviter/invitee duty of reasonable care and the application of Restatement (Second) of Torts §314A. The Court described the duty of care owed by a premises owner:

> as a specific statement of the general rule articulated in Section 314A of the Restatement, and long recognized by this court, that certain special relationships may give rise to an affirmative duty to aid or protect another against unreasonable risk of physical harm.

Marshall, 222 Ill.2d at 438 (emphasis added). Maryland adopts the same approach. Patton v. USA Rugby, 851 A.2d 566;381 Md. 627 (2004).

The Marshall decision is dispositive of Bally's motion to dismiss: whether Bally breached its duty to Fowler "cannot be answered at this stage." The allegations of the Complaint are more than sufficient to allege duty, as well as breach. Marshall also renders obsolete Salte v. YMCA, 351 Ill.App.3d 524 (2d Dist. 2004), relied on by Bally, as discussed below.

Under Marshall, as the owner of the club premises and as operator of club, Bally had a duty of reasonable care to its club member, Gary Fowler, to act reasonably for his protection and to protect him against unreasonable risk of physical harm and to render reasonable emergency care if he were injured. Like the Plaintiff in Marshall, Fowler alleges facts from which an inference of duty and breach can be drawn:

- First and foremost, Bally **recognized and accepted the duty** when, in 2002, it decided to deploy AEDs in its clubs, but at the same time decided not to complete the deployment until 2006. By November, 2005, it had, however, deployed AEDs even in states where not required by law to do so (Complaint ¶¶50-51, 65);
- AEDs were inexpensive, easy-to-use and foolproof (Complaint ¶¶16, 49);
- Bally knew that exercise, of the kind it encouraged in its members, increased the risk of cardiac arrest by a factor of 20 (Complaint ¶13);
- For purposes of a study, Bally documented in 1997 and 1998 that at least 71 of its members had died of cardiac events (Complaint ¶40);

- Bally recognized the likelihood of member cardiac arrest, proclaimed its commitment to member safety, and announced in 2003 that all its clubs had employees trained in CPR who were required to use it to assist members (Complaint ¶¶6, 54);
- Bally knew that by 2001 (five years before Gary Fowler's death), other health clubs, including other large chains, routinely used AEDs to save member lives, and that by 2004, many health club chains had adopted them (Complaint ¶¶22-24, 79(c));
- Bally knew that casinos, including those it previously owned and operated, had begun saving people with AEDs in the mid-1990s; and that the Las Vegas Bally's casino had been one of the first casinos to do so (Complaint ¶¶28, 79(d));
- Bally publicly pledged to embrace all the applicable published safety standards but ignored those standards (from the American Heart Association, American College of Sports Medicine, YMCA, etc.), which had strongly recommended AEDs in health clubs as early as 1986 and no later than 2002 (Complaint ¶¶39, 79(e));
- Bally publicly pledged to stay abreast of industry developments and timely respond to medical emergencies, but it never actually even tried to do so when the lives of its members were at stake, as in the case of cardiac arrest and AEDs (Complaint ¶¶37, 79(f));
- Bally knew of the widespread media coverage of AEDs in the mid and late 1990s, that AEDs were required in similar environments like schools and airplanes, and that by 2001 federal and state (including Maryland) legislation had been enacted to promote AED use through Good Samaritan immunities and similar laws (Complaint ¶¶25-26, 28, 79(g));
- Bally knew AEDs were required by law in health clubs in many states by 2004, including states where Bally did business and was required to install them (Complaint ¶¶59, 64, 66-68, 79(h));
- Throughout the late 1990s and early 2000s, Bally publicized its own Medical Advisory Board as providing it with cutting edge fitness-related medical knowledge for the benefit of members. By 2002, two members of this Board publicly advocated for AEDs in health clubs. At about the same time, Bally disbanded its Medical Advisory Board (Complaint ¶¶45-46, 48, 79(i));
- Acquisition and training for AEDs would have cost Bally about $2,000,000 in the early and mid-2000s. Its advertising budget regularly exceeded $15,000,000 per quarter during the same period (Complaint ¶¶73, 79(j));
- Despite its extensive knowledge of AEDs' benefits, beginning several years before Gary Fowler's death, Bally lobbied vigorously against proposed legislation to require AEDs in health clubs (Complaint ¶¶60-64, 66-69, 79(k));
- Following the wide publicity and criticism in Montgomery County resulting from Gary Fowler's death, Bally installed AEDs at all of its Montgomery County clubs four days later (Complaint ¶¶72, 79(m)).

From these alleged facts, the Court may infer that Bally's failure to install an AED with trained staff in its Gaithersburg club was a breach of its duty to Fowler to take reasonable

precautions against foreseeable risks of harm. Fowler states a good claim for negligence.

Conventional Duty Analysis Imposes a Duty on Bally

Application of Restatement (Second) of Torts §314A as interpreted in Marshall yields an outcome that is fully consistent with conventional duty analysis under Illinois law. In deciding whether the defendant owes the plaintiff a duty, "the court considers whether the parties stood in such a relation to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff." Hammond v. SBC Communications, Inc., 365 Ill. App. 3d 879, 885 (1st Dist.), app. denied 221 Ill.2d 635 (2006); Marshall, 222 Ill.2d at 436. Fowler alleges facts sufficient to give rise to a duty on Bally's part to act reasonably for the protection of its club member.

To determine whether a duty exists in a particular case, the court must weigh (1) the reasonable foreseeability of the injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden of guarding against it; and (4) the consequences of placing that burden on the defendant. Hammond, 365 Ill.App.3d at 885, citing Gouge v. Central Illinois Public Service Co., 144 Ill.2d 535, 542 (1991); Marshall, 222 Ill.2d at 436. Again, Maryland law is virtually identical. Patton v. USA Rugby, 851 A.2d at 571. See, Dalmo Sales of Wheaton, Inc. v. Steinberg, 43 Md. App. 659 (1979)(upholding negligence verdict against business owner in favor of pedestrian struck by car in parking lot which did not have barrier protection).

As an initial matter, by enacting legislation in August, 2004 requiring AEDs in health clubs by July, 2006 at the latest, the Illinois legislature had already determined that the risk of club member cardiac arrest fatalities outweighed the burdens on health clubs in supplying AEDs and trained staff. 210 ILCS 74/1 et seq. (Colleen O'Sullivan law). Under the alleged facts, summarized above, Bally determined that at least 35 club members died per year of cardiac arrest. These numbers were actually foreseen by Bally years before Fowler's death.

The likelihood of injury equates to the likelihood of death or brain damage from cardiac arrest in the absence of an AED. As for any particular cardiac event, with each minute passing after an arrest, without defibrillation, the odds of survival drop 10%. A typical AED program provides for a shock to be delivered within three minutes or so, which generally ensures survival. The Bally practice of relying on 911 calls very rarely got defibrillation to a cardiac arrest victim in time to save them. The majority of cardiac arrest victims would be saved with AEDs; the majority die if AEDs are not installed in the club. Consequently, the likelihood of injury, in the

absence of AEDs, is death for the majority of cardiac arrest victims.

The magnitude of the burden is not high compared to the lives saved. Bally is already required in many states (including Illinois) to have AEDs in its clubs, and had been required to do so before Fowler died. Bally's cost to acquire AEDs for all its clubs in the United States and train its employees nationwide would have been approximately $2 million. By comparison, in a typical fiscal three-month quarter, Bally has spent at least $15 million on advertising. (Complaint ¶¶73, 79(j)). For the same reasons, the consequences of imposing a duty are mostly moot and in any event not significant.

Under conventional duty analysis, Fowler alleges sufficient facts to support an inference of duty on Bally's part to have an AED at the Fowler's club.

After *Marshall*, *Salte* is No Longer Good Law

Bally relies primarily on Salte v. YMCA, 351 Ill.App.3d 524 (2d Dist. 2004), in which a health club member suffered a cardiac arrest while exercising on a treadmill and suffered permanent brain injury. Plaintiffs sued the health club claiming, among other things, that the defendant had a duty to equip its club with an AED. The trial court granted defendant's motion to dismiss. The Second District upheld that ruling, over a vigorous dissent, on the basis of lack of duty, concluding that Restatement (Second) of Torts 314A only compelled the defendant to render whatever first aid that it was capable of providing under the circumstances, and that CPR coupled with a call to 9-1-1 was enough in that case.

The Supreme Court's recent Marshall decision overrules, in effect, the analysis and result in Salte. In Marshall, the Court specifically criticized "fact-specific" pronouncements as to duty, where a general duty of reasonable care exists, and at issue are protections and precautions against a given risk. 222 Ill.2d at 443. This was the mistake of the Salte majority, as the dissent in that case eloquently pointed out. Salte, 351 Ill.App.3d at 532.[1]

[1] Salte was a 2-1 decision of the Second District, with Justices Hutchinson and McLaren in the majority. The Second District later repudiated the Salte analysis in its own Marshall decision, concluding that facts in support of duty had been alleged, with breach remaining as an issue for the jury. Marshall v. Burger King, 355 Ill. App. 3d 685 (2d Dist. 2005). The Salte dissent's analysis was adopted in the subsequent Second District Marshall case. Interestingly, Justice McLaren dissented in the Marshall decision. 355 Ill.App.3d at 689-90. Justice McLaren's dissent in Marshall and his rationale in Salte were soundly dismissed by the Supreme Court in its Marshall decision. Both cases involved customers suing premises owners in negligence for failure to take precautions against a foreseeable danger. In Salte, the risk was cardiac arrest and the precaution was an AED. In Marshall, the risk was vehicles penetrating the restaurant and the precaution was preventative design.

Restatement (Second) of Torts §314A was cited in Salte and other cases cited by the defense. The section imposes, on specified classes of relationships, a duty to provide medical care or assistance to someone stricken. Quoting directly from §314A, the Supreme Court in Marshall imposed on business owners and inviters a general duty to protect invitees from unreasonable risks of physical harm. Marshall, 222 Ill.2d at 438. The Salte court mistakenly ignored this central provision. Thus, Marshall overrules Salte's narrow reading of the same section. Bally owed such a duty to Fowler here, and, as in Marshall, the allegations of the complaint establish this duty and the issue of breach should be left to the jury.[2]

Moreover, Salte is factually distinguishable because the allegations here establish a far more compelling factual predicate in support of duty and breach. This is partly due to the undeveloped factual record in Salte, the passage of time between the Salte incident (April 2003) and Fowler's (November 2005), and the corresponding developments in the industry (including at Bally) and in state legislatures around the country. The Salte court does not cite any allegations against the defendant in that case that are comparable to the allegations against Bally here, as summarized herein at pp.4-5 and in Exhibit A. Ironically, the Salte court was not made aware that the national YMCA had recommended AEDs to its member centers by 1997, 6 years prior to the incident at issue in that case (Complaint ¶22). In short, this is a different, later, and better-documented case against a health club defendant.

The Salte court stated "[T]he use of a defibrillator requires specific training and we believe that its use is far beyond the type of 'first aid' contemplated by Restatement section 314A." 351 Ill.App.3d at 530. Unlike in Salte, Fowler alleges here that AEDs were an "integral" part of first aid as of 2005. (Complaint ¶27). In 1986, the American Heart Association and Journal of the American Medical Association identified "health club personnel" as capable first responders and users of AEDs. In 1994, the AHA recommended that any industry expecting its employees to perform CPR should also install and implement an AED program. (See, Complaint, ¶17, 20). In March, 2002, the AHA and the ACSM jointly "strongly recommended" health clubs deploy AEDs. (Complaint ¶ 29).

[2] Section 314A's limited view of necessary emergency aid should not apply to AEDs for two additional reasons. First, the section was drafted in 1965, and does not represent current legal standards. Courts have increasingly recognized duties, especially of businesses to customers, to provide preventative equipment (like sprinklers or air bags) that are designed to protect people from known dangers, including dangers not of the defendant's making. Second, at the time of drafting, technologies like AEDs were not even imagined; even basic responses like CPR had not been developed.

For these reasons, Salte is no longer good law and is, in any event, distinguishable.[3] The issue of Bally's breach must wait for a jury.

The Release Does Not Bar Plaintiff's Claims

The relevant release and waiver language of the Bally membership contract signed by Gary Fowler on December 31, 2003 ("Release") is attached hereto as Exhibit B. The Release, by its terms, is governed by the law of the place of its execution, which was Maryland. Maryland supplies the rule of law for interpretation of the Release and probably on the question of whether the release is void as against public policy. In any event, Illinois and Maryland law are similar in evaluating the kinds of public interest factors that would support invalidation of contractual provisions.

As an initial matter, the Release language is explicitly aimed at negligence only. Other than negligence, the scope of the Release – no matter how broadly read – does not encompass Fowler's other claims (warranty, consumer fraud, gross negligence, willful and reckless conduct). The Release does not bar Fowler's negligence claim for several reasons: (1) an emergency response or AED claim would not reasonably be expected to fall within the scope of the Release; and (2) it is void against public policy to the extent it purports to bar cardiac emergency response claims, even if based on negligence.

Negligence Based on Bally's Failure to Adequately Respond to a Medical Emergency It Foresaw Is Not Within the Scope of the Release

The Release language begins with a release of negligence claims, then recites the member's assumption of risk (a negligence defense in some jurisdictions) and examples of (1) locations in the club where injuries could typically occur, (2) activities in which injuries could occur, and (3) the examples of negligence as would typically occur in a health club, relating to equipment, instruction, slipping and falling, etc.

Customary contract interpretation principles generally require an interpretation of a broad general statement, followed by a list of examples, to be restricted to the sense provided by the

[3] In addition to Salte, Bally cites other, older out-of-jurisdiction cases finding a lack of duty to have a defibrillator, some of which the Salte majority cited. These cases do not represent any sort of national trend. Rather, because the decisions disposed of plaintiff's claims, either a decision issued or appeal was made, generating a published opinion. Since 2002, the undersigned counsel has defeated (or helped defeat) summary judgment for plaintiff on the duty and breach issues in several cases based on lack of an AED against health clubs, usually overcoming citations to Salte. These cases have produced unpublished decisions in the District of Massachusetts federal court, in Texas, in California, in New York, in Massachusetts, and in two Florida cases. Counsel is aware of others as well, and would be willing to supply an affidavit to this effect should the court deem it helpful.

examples. See, Clendenin Bros., Inc. v. United States Fire Ins. Co., 390 Md. 449, 461-62; 889 A.2d 387, 395 (2006)(listed examples of "pollutants" in contract of insurance limited meaning of phrase to "irritants or contaminants;" otherwise phrase would be "virtually limitless"). This rule is especially apt in the case of a release, which is construed against the drafter. See, e.g., Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 262 (1996); Macek v. Schooner's, Inc., 224 Ill.App.3d 103, 105 (1st Dist. 1991).

Properly, Bally has chosen not to rely on a single statement of release. The language of the Bally release is obviously drafted with the above principles in mind: the general statement coupled with a list of example claim categories. Through its examples of barred claims, the Bally release language necessarily excludes some types of negligence claims, not listed or suggested, which would not be within the reasonable contemplation of a club member reading the list – such as Fowler's claims based on cardiac arrest response and lack of an AED.

Maryland and Illinois have consistently held that vague general statements in releases do not release claims, where the general statement does not provide specific guidance on the types of claims that would be barred. In the Illinois case cited by Bally, Garrison v. Combined Fitness Centre, Ltd., 201 Ill.App.3d 581 (1st Dist. 1990), plaintiff sustained a weight-lifting injury using a bench press apparatus without a safety bar. The rule for releases was stated to be:

> An exculpatory clause, to be valid and enforceable, should contain clear, explicit, and unequivocal language referencing the types of activities, circumstances or situations that it encompasses and for which plaintiff agrees to relieve the defendant from a duty of care.
>
> ***
>
> It should only appear that the injury falls within the scope of possible dangers ordinarily accompanying the activity and, thus, reasonably contemplated by the parties.

Garrison, 201 Ill.App.3d at 585; see, Wolf v. Ford, 335 Md. 525, 537 (1994)(harm "within the contemplation of the parties when they entered the agreement"). Because the plaintiff's injury clearly fell within the scope of dangers ordinarily accompanying the activity of weight lifting, his claim was barred.[4] Risks not within the intentions of the contracting parties are not barred by

[4] In Calarco v. YMCA of Greater Metropolitan Chicago, 149 Ill.App. 3d 1037 (2d Dist. 1986), general language releasing "any and all rights and claims for damages" in connection with "participation" in YMCA "activities" did not release a claim for an injury sustained when weights from an exercise machine fell and injured plaintiff's hand. Calarco was found to be "directly on point" in the First District's Macek v. Schooner's, Inc., 224 Ill.App.3d 103 (1st Dist. 1991), where general release language waiving all "right and claim for damages" was held not to release a negligence claim for a broken arm sustained from an arm wrestling machine used in a bar.

general release language in Illinois. Larsen v. Vic Tanney, International, 130 Ill.App.3d 574, 577 (1st Dist. 1984)(noxious fumes in health club not risk intended to be excused in health club); Simpson v. Byron Dragway, 210 Ill.App.3d 639, 647 (2d Dist. 1999)(crash into deer at dragway not forseeable).

Maryland follows the same general approach. In Adloo, Maryland's highest court noted that other jurisdictions, including Illinois, employed Maryland's analysis of releases, "a stringent and exacting one, under which the clause must not simply be unambiguous but also understandable." 344 Md. at 264. Because the exculpatory clause in Adloo did not

> clearly, unequivocally, specifically, and unmistakably express the parties' intention to exculpate the respondent from liability resulting from its own negligence, the clause is insufficient for that purpose.

Id at 267; see, Calarco v.YMCA of Greater Metropolitan Chicago, 149 Ill.App.3d 1037 (2d Dist. 1986). Adloo was discussed and distinguished in Seigneur v. National Fitness Institute, 752 A.2d 631, 132 Md.App. 271 (2000), a case from Maryland's intermediate level court. In Seigneur, too much weight was put on a weight machine for plaintiff to lift, and she injured her shoulder trying to lift it. The Seigneur court cited and discussed Calarco, supra, at length, but concluded that the general language in the release before it expressly released negligence claims. 752 A.2d at 635-636.

Seigneur is distinguishable for two main reasons. First, the injury in that case was a typical health club exercising injury, as would be reasonably understood to be barred by the general release, which specifically mentioned exercise:

> all exercises shall be undertaken by me at my sole risk and that [Defendant] shall not be liable to me for any claims… arising out of… the use or services of the facilities…. Further, I do expressly hereby forever release and discharge [Defendant] from any and all claims… and from all acts of active or passive negligence....

752 A.2d at 634. The barring of the routine exercising negligence claim was found consistent with Adloo's requirement that the language be specific, unmistakable, unambiguous and understandable. Here, neither the general language of the Bally release, nor the list of examples of claims, would convey to a reasonable reader that Bally would not render appropriate emergency aid, or that a claim based on deficient emergency medical response would be barred. Such a reading would fail Adloo's test. 344 Md. at 266-267; 686 A.2d at 304.

Second, the Seigneur release did not contain a limiting list of examples of the types of

injuries covered by the release, but rather contained only general language. The list of claims in the Bally release here, as compared to its general language, creates an ambiguity between a construction in keeping with the restricted scope of the list of claims, or the nearly limitless scope of the general language. See, Clendenin Bros., 889 A.2d at 394 (ambiguity as to whether manganese fumes were "pollutant" because, partly in light of examples listed, reasonable readings were possible with either interpretation).

Accordingly, under Adloo and Clendenin Bros., the Bally release must be construed against Bally, and the scope of the release must be restricted to the scope of the examples. These are typical health club injuries, and none of the listed types of claims come close to suggesting that a claim for deficient emergency cardiac arrest response is within the scope of the release. Nor does the general release language suggest this result.

For these reasons, under Illinois law (Calarco and Macek) and Maryland law (Adloo), the Bally release does not encompass Fowler's negligence claims.

Bally Has Adopted Fowler's Interpretation of the Release

Bally has adopted this interpretation. Fowler alleges in ¶81 of the Complaint:

> 81. In August, 2003, a California intermediate appellate court ruled that the BALLY's waiver and release language (similar to that in Gary Fowler's contract) did not release BALLY from a failure to assist a member who was a victim of a cardiac emergency because such action was not in the reasonable contemplation of the parties. Rather than change its policies on emergency responses, BALLY changed its waiver language, to try to release it specifically from liability for the failure to administer emergency assistance. This change was made after Gary Fowler joined BALLY.

The decision alleged is from the Court of Appeal in California, Second Appellate District, Brown v. Bally Total Fitness Corp., 2003 Cal. App. Unpub. LEXIS 8245, a copy of which is included in the appendix of out-of-state materials which accompanies the courtesy copy of this brief. In that case, based on a 2000 cardiac arrest and death, the plaintiff sued Bally for failing to have an AED and for failing to respond adequately to club member cardiac arrest. Bally raised its release in defense, but the Court found that the release did not bar such claims, because these were not claims a reasonable member would understand to be barred from the release language. The Court's analysis parallels Maryland and Illinois law, discussed above.

The release language in the Brown case was identical to the release signed by Gary Fowler here. (Compare, Brown at *3-*4, and Exhibit B hereto). Following the Brown decision, Bally changed its release form to include a specific reference to emergency medical response. A copy

of the revised Bally release, which Fowler was never asked to sign, is attached as Exhibit C.

By this conduct, Bally demonstrated its adoption of the Brown court's interpretation – that AED claims were not, in fact, barred by the original language, which did not include any reference to emergency medical response. Under applicable Maryland law, a party's own conduct is evidence of the meaning of an ambiguous term. Stern v. Stern, 58 Md. App. 280, 291 (1984)(parties' understanding of contract was illustrated in correspondence); Pantazes v. Pantazes, 77 Md. App. 712, 720-721 (1989)(court may consider "the parties' own construction of the contract and the conduct of the parties"). Bally's conduct confirms that its release does not bar Fowler's claims.

At a minimum, fact issues remain which cannot be resolved at this stage by a Section 2-619 motion. Illinois Graphics Co. v. Nickum, 159 Ill.2d 469, 494 (1994).

The Bally Release is Void as to Fowler's Claims on Public Policy Grounds

Unambiguous contract terms will be enforced if not contrary to public policy. Two recognized grounds in Maryland which will invalidate a contractual release on these grounds are gross negligence and public interest. Winterstein v. Wilcom, 16 Md. App. 130, 135-36 (1972). Bally's gross negligence is alleged in Count IV and discussed below at pp. 16-17. Bally does not even address this release exception in its motion.

Three relatively recent Maryland cases involve consumer releases and discuss the public interest exception to enforcement of releases are: Winterstein, supra, Wolf, supra, and Seigneur, supra. Winterstein held that a drag race strip release was unambiguous and enforceable, for claims arising from injuries from a crash, allegedly caused by debris on the drag strip. The Winterstein court reviewed the Tunkl factors (from the seminal 1963 California case Tunkl v. Regents of the University of California, 60 Cal.2d 92): (1) a business generally thought suitable for regulation; (2) service of great importance to the public; (3) service mandated to be open to all of the public; (4) decisive bargaining power as a result of an "essential service;" (5) a contract of adhesion; and (6) customers puts their safety under the control of the defendant. 16 Md.App. at 137. The drag strip in Winterstein was found to have none of the Tunkl factors. Id. at 138. But the Winterstein court did recognize that private individuals could not waive the protections afforded by safety statutes enacted for the benefit of the public. Id. at 137.

The Court in Wolf rejected strict adherence to the Tunkl factors as "too rigid," announcing instead that

> [t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations. (emphasis supplied).

Wolf, 335 Md. at 535. Wolf is a Court of Appeals case (the highest court); Winterstein and Seigneur are not. To the extent it may apply, Illinois law makes similar provision for the invalidation of contract terms as against public policy. See, Masciola v. Chicago Metropolitan Ski Council, 257 Ill.App.3d 313, 317 (1st Dist. 1993).

Seigneur addresses an exculpatory clause found in a fitness club's contract. The court concluded fitness clubs did not provide a service of great importance to the community as a whole, and were not as "socially important" as innkeepers, public utilities, common carriers or schools. 752 A.2d at 638-39. Fowler does not dispute that Seigneur is good law, to the extent it holds generally that health club services are not essential, such that a release of garden-variety health club negligence claims (as in the Seigneur case) would not be void on public policy grounds. The instant case is not a routine health club negligence case, as discussed above at pp.4-9, and Seigneur does not apply.

The Bally release is void as against public policy, under the authority of the Maryland public interest exception, to the extent it bars a claim based on Bally's failure to have an AED and trained staff in November 2005 in Gaithersburg. Under Wolf, the public interest exception encompasses all the relevant circumstances. As discussed below in the section addressing Count V (pp. 17-19), to permit Bally to rely on a release of AED claims by a cardiac arrest victim is to sanction Bally's failure to revive, at relatively slight cost, at least 35 arrest victims per year – victims that instead died.

The following additional factors, alleged by Fowler, demonstrate the public interest in support of denying Bally's effort to avoid liability for its lack of an AED:

- Montgomery County, Maryland enacted an ordinance requiring AEDs in health clubs before Fowler's death; only a home rule provision may have prevented the ordinance from applying to the Gaithersburg club, as opposed to the other Bally clubs located in Montgomery County at the time of Fowler's death (Complaint ¶¶68-70); Montgomery County clubs were required to have AEDs before July, 2005;
- Bally's home state of Illinois (which supplies the rule of law for Bally's tortious conduct in this case) enacted the Colleen O'Sullivan law, 210 ILCS 74/1 et seq., before Fowler's death, mandating AEDs in health clubs. Illinois clubs were to have AEDs "on or before" July, 2006 at the latest (Complaint ¶64);
- Cardiac arrest kills about 300,000 every year, and is recognized as one of the country's

paramount health concerns (Complaint ¶30);

- AED Good Samaritan legislation was passed in all 50 states before Fowler's death. Under these statutes, typically, non-professional use of AEDs was subject to civil immunities and protections, to encourage AED use by non-professional responders (Complaint ¶25);
- The federal AED Good Samaritan statute was enacted in 2002, several years before Fowler's death, to supply a national minimum protection from civil liability for users of AEDs (Complaint ¶26);
- By the time of Fowler's death, many of the states and jurisdictions where Bally operated required AEDs in health clubs. Some had done so for many years (Complaint ¶¶59, 64, 66-68, 79(h));
- By the late 1990s, other industries had adopted AEDs, including the airline and casino industries, an adoption that was widely publicized and known to Bally, which at one time had a famous casino of its own (Complaint ¶¶21, 28, 79(d));
- The American Heart Association, the nationally recognized leader in the field of cardiac arrest response and AEDs, "strongly recommended" in 2002 that AEDs be placed in health clubs, in a joint statement with the American College of Sports Medicine, the national leader in exercise physiology (Complaint ¶29);
- An industry standard developed in health clubs to have AEDs, and clubs were saving lives with AEDs beginning in the mid-1990s (Complaint ¶34).

For these reasons, emergency response and AED-based claims stand on a different public interest footing than garden-variety health club negligence claims. Public policy dictates that Bally should not be permitted or encouraged to extract contractual immunity for these claims in take-it-or-leave-it membership application boilerplate. Fowler's Bally contract may be partially voided to effectuate this outcome. The Bally contract signed by Gary Fowler also includes this provision:

> 17. MISCELLANEOUS. The provisions of this contract are severable and if any provision is determined to be illegal or unenforceable the remaining provisions and any partially enforceable provisions shall nevertheless be enforceable unless otherwise prohibited by state law.

This provision is lawful and consistent with Maryland law. Maryland law authorizes this kind of partial invalidation. As an initial matter, Maryland recognizes the power of the court to refuse to enforce or "blue-pencil" a term of a contract that violates public policy. E.g., Nationwide Mutual v. Hart, 73 Md. App. 406, 413 (1988), citing Tawney v. Mutual System of Maryland, 186 Md. 508, 521 (1946); see also, Holloway v. Faw, Casson & Co., 319 Md. 324, 353 (1990)(discussing "partial enforcement" of restrictive covenant).

Under Maryland law, the proper analysis is: for any provision sought to be nullified, the first

step is to determine which terms or parts of terms are void as against public policy; the second step is to determine whether it is severable, and if so, to decline to enforce it; if the offending term is not severable, then resort must be made to "partial enforcement," by which the offending partial term is not enforced.

The language of the Bally release is "You… agree to release and discharge us… from any and all claims or causes of action arising out of our negligence." This is void and against public policy, on public interest grounds, to the extent it encompasses and therefore bars claims based on Bally's failure to have an AED and trained staff in November, 2005 at the Gaithersburg, Maryland club.

For these reasons, the Release relied upon by Bally does not bar Fowler's claims.

Fowler States a Claim for Willful and Wanton Conduct under Illinois Law and Gross Negligence under Maryland Law, Neither of Which Can be Waived

By Count IV, Fowler states a claim for willful and wanton misconduct, which is recognized as a separate cause of action in tort under Illinois law. O'Brien v. Township High School Dist., 83 Ill.2d 462, 468-69 (1980); see, Morrow v. L.A. Goldschmidt Associates, Inc., 126 Ill.App.3d 1089, 1094 (1st Dist. 1984), rev'd on other grounds, 112 Ill.2d 87 (1986). Willful and wanton conduct has been defined as "conscious and deliberate disregard for the rights and safety of others." Morrow, 126 Ill. App. 3d at 1095.

Gross negligence under Maryland law is

> [a]n intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them.

Taylor v. Hartford County Department of Social Services, 384 Md. 213, 228 (2004), quoting Romanesk v. Rose, 248 Md. 420, 423 (1968); see also, Boucher v. Riner, 68 Md. App. 539, 548 (1986)(as for gross negligence as an asserted basis to nullify a release, there was "no evidence of a premeditated decision, deliberately arrived at, by an indifferent jumpmaster [the case involved a parachuting fatality] that should have indicated almost certain harm to others."). Claims for gross negligence cannot be waived. Wolf, 335 Md. at 531. Neither can claims for willful and wanton misconduct be waived prospectively in Illinois. Davis v. Commonwealth Edison Co., 61 Ill.2d 494, 500-501 (1975); Third Swansea Properties, Inc. v. Ockerlund Construction Co., 41 Ill.App.3d 894, 896 (1st Dist. 1976).

For the reasons set forth above, Fowler contends that Illinois law applies to supply the tort standard to measure Bally's conduct. Under either Illinois or Maryland law, Fowler states a claim for willful and wanton conduct and gross negligence, respectively.

As Bally knew for at least seven or eight years before Mr. Fowler's death in November 2005, cardiac arrest killed three or more of its members per month. As has been the case for the past nine or ten years, most of these fatalities could be easily avoided through use of AEDs with minimally trained staff in the Bally clubs. Bally knew this. It deliberated on this precise question in 2002, and decided against AEDs and saving lives. Bally's deliberate decision not to try to stop this ongoing death toll at a relatively minor cost was, by itself, reckless and grossly negligent. Moreover, Bally sought to hide behind its release when members died – as Bally knew they would – to avoid any responsibility.

Bally knew the lives of its patrons were at stake, but chose to let them come to harm, when – like some large club chains (Complaint ¶34) – it could have saved dozens of customer lives. Bally was indifferent to circumstances which indicated "almost certain" harm to others. There should be no difference in the analysis between failing to acquire lifesaving measures for a condition not of Bally's making (cardiac arrest) as opposed to Bally's having created the dangerous condition itself. The conduct is the same and the outcome is the same: knowing of preventable harm and doing nothing.

Fowler States a Claim for Consumer Fraud

As discussed in more detail above, the Bally release does not bar Fowler's claims. In addition to those grounds, by Count V, Fowler seeks to set aside the Bally release signed by Fowler on the grounds that Bally's long-standing practice, of shielding itself from liability for at least 35 avoidable deaths per year, is abhorrent and a violation of consumer fraud laws. By Count VI, Fowler brings a consumer fraud count for damages based on the breach of warranty counts (addressed separately below). Bally attacks both counts by arguing that the Illinois consumer fraud statute does not apply to conduct in another state, and as to Count VI, that the release is valid and enforceable under Illinois and Maryland law and therefore not in violation of consumer protection laws (Bally Brief at pp. 10-19).

Fowler's release claim (Count V) states a claim for conduct that is "unfair" under the Illinois Consumer Fraud and Deceptive Practices Act ("CFA"), which looks to three factors: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or

unscrupulous; and (3) whether it causes substantial injury to consumers. Robinson v. Toyota Motor Credit Corp., 201 Ill.2d 403, 417 (2002). The reckless nature of Bally's conduct, in consistently making no effective response to fatal club member cardiac emergencies, is described above at pp.4-5 and 14-17, in the discussion of Fowler's gross negligence/willful and wanton claim. Fowler incorporates that discussion here.

Obviously, to some degree, use of releases, even by a health club, may not offend public policy (although in some states, like New York and Massachusetts, they are illegal). However, claims based on a slip and fall in the shower, or a torn muscle from a poorly adjusted weight machine, bear no resemblance to avoidable death on the large scale practiced by Bally. Bally's use of releases in cardiac arrest cases is immoral and causes substantial injury to consumers. Bally's conduct is "unfair" under the Illinois CFA.

Equitable relief is available to private individuals under the Illinois CFA. 815 ILCS 505/10a(c). Injunction is appropriate to enjoin Bally's unfair practice in this case, i.e., the operation of Bally's release. Fowler is among those potentially harmed by the Bally practice, in being denied legal redress for legitimate claims.

There is no absolute rule, as Bally suggests, that out-of-state conduct can never form the basis of a CFA claim. Instead, the court in Avery v. State Farm Mutual Automobile Ins. Co., 216 Ill.2d 100 (2005) required that the conduct at issue take place "primarily and substantially" in Illinois. 216 Ill.2d at 187. The court stated that the location where a company drafts a document at issue is a relevant factor, and that the place of deception or injury need not control. Id. at 187.

Here, the release used by Bally (in Maryland and elsewhere) was drafted in Chicago, Illinois at Bally headquarters. The injury occurs in whichever state – not just in Maryland – Bally imposes its release by way of its membership contract and raises it in defense of cardiac emergency claims in litigation. Fowler's basic claim is that Bally's release practice is a national practice, and not restricted to Maryland. Consequently, the only state with a direct connection to Bally's practice in every case is Illinois.

In any event, even if the Illinois CFA were not to apply, under the Maryland Consumer Protection Act, Bally's conduct is "unfair" so as to justify nullification of the Fowler release. Legg v. Castruccio, 100 Md. App. 748, 771-73 (1994)(discussing and applying "unfair" standard under Maryland Consumer Protection Act).

For these reasons, Count V states a claim and should not be dismissed.

Fowler's Express Warranty Count States a Claim

As for Count I (express warranty), Bally presents a series of factual assertions that cannot be resolved on a motion to dismiss: (1) the warranties alleged were not made in the boilerplate contract it attaches to its motion; (2) the warranties were made in a "trade publication;" (3) the warranties were not part of the basis for the bargain.

Fowler's allegations are as follows:

> 77. Before, during and after the time Gary Fowler became a BALLY club member, BALLY pledged, agreed and warranted to its members that it would:
>
> a. "Systematically upgrade our professional knowledge and keep abreast of new developments in our field;"
>
> b. "…design our facilities and programs with the members' safety in mind…;"
>
> c. "…respond in a timely manner to any reasonably foreseeable emergency event that threatens the health and safety of the club users. Toward this end, the club must have an appropriate emergency plan that can be executed by qualified personnel in a timely manner;" and
>
> d. "conform to all relevant laws, regulations, and published standards."
>
> 78. In conjunction with its Medical Advisory Board, BALLY also pledged, agreed and warranted that it would support and abide by guidelines and recommendations of the American College of Sports Medicine. One such guideline was the joint AHA/ACSM statement in March 2002, "strongly recommending" AEDs in health clubs.
>
> 79. In failing to respond appropriately to Gary Fowler's cardiac arrest on November 7, 2005, including by its failure to have an emergency response plan, and in failing to have and use an AED at the club, BALLY breached these agreements, pledges and warranties.

(Complaint ¶¶77-79).

Bally's own employment manual states that Bally aspires to the "highest possible level of safety." (Complaint ¶57). In addition, a Bally spokesperson, Sarah Matheu, told a newspaper in August, 2003 that "we currently have CPR trained personnel in each of our 420 clubs as the safety and security of our members is of the utmost importance. Should a law be passed mandating that defibrillators must be in health club facilities, we will certainly comply." (Complaint ¶54).

These representations are alleged to have been made to members, including Fowler, before, during and after Fowler's joining Bally. It is premature for this court, on a motion to dismiss, to

conduct a factual inquiry as to the place, timing and substance of the allegations alleged.[5]

CONCLUSION

For all of the foregoing reasons, Bally's Motion to Dismiss should be denied in its entirety.

PLAINTIFF, LOIS M. FOWLER,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF GARY FOWLER,
DECEASED

By: _____

Paul S. Weinberg, BBO No. 519550
Weinberg & Garber, P.C.
71 King Street
Northampton, MA 01060
(413) 582-6886
fax (413) 582-6881

and

_____

Robert B. Patterson, Esq.
Law Offices of Robert B. Patterson
221 North LaSalle Street, Suite 1050
Chicago, IL 60601
(312) 236 0995 (telephone)
(312) 984 5791 (fax)

[5] Fowler does not oppose dismissal of the implied warranty count (Count II).

EXHIBIT A

ALLEGATIONS OF THE COMPLAINT

A summary of the allegations of the Complaint is as follows:

1. Plaintiff, LOIS M. FOWLER is a resident of Bethesda, Maryland. She is the mother of the decedent, Gary Fowler. Lois M. Fowler is the personal representative of Gary Fowler's estate. Gary Fowler's only surviving dependents, heirs and next of kin are his parents, James Fowler, Jr., and Lois Fowler, residents of Bethesda, Maryland, and his adult sister, Cynthia Parker, a resident of Houston, Texas.

2. Defendant, Bally is a Delaware corporation with a principal place of business in Chicago, Cook County, Illinois. Bally directly owned the fitness center in Montgomery County, Maryland, where plaintiff's decedent suffered sudden cardiac arrest (SCA) on November 7, 2005, and made all policy decisions and directions regarding provision of defibrillation equipment at and from its corporate headquarters in Chicago, Cook County, Illinois.

3. On November 7, 2005, Gary Fowler suffered sudden cardiac arrest while exercising at a fitness club owned and operated by Bally and located in Gaithersburg, Montgomery County, Maryland. He was 46 years old and a professional land surveyor.

4. Once EMS personnel arrived at Mr. Fowler's side, the monitor on their defibrillator showed that his heart was in a shockable rhythm called ventricular tachycardia. Approximately 8 minutes after the 911 alarm, EMS personnel applied the first electric shock with a defibrillator to Gary Fowler. Because of the passage of time between his collapse and the first defibrillation shock, the efforts by EMS to resuscitate Mr. Fowler were unsuccessful, and Mr. Fowler died on November 7, 2005.

5. SCA kills over 300,000 people in the United States every year. It often strikes at places where groups of people combine with excitement or exertion, such as casinos, stadiums, airplanes, airline terminals and exercise facilities. Studies have shown that the risk of SCA is nearly 20 times higher during or immediately following vigorous exercise.

6. The only significant determinant of survival for victims of SCA is the brevity of the time from collapse to administration of a shock (defibrillation) to try to restore normal cardiac function, including the flow of oxygenated blood to the brain and other vital organs.

7. Automated External Defibrillators ("AEDs") are lightweight, portable defibrillators which are able to analyze a cardiac rhythm and determine whether or not a shock is necessary.

By the mid-1990s, AEDs were available which were designed to be used even by laypersons, with little or no training. Targeted users included lifeguards, fitness trainers, security guards, flight attendants, fire and police department employees, and other persons who are likely to be early on the scene where a person has experienced SCA. These persons are called "first responders."

8. In October, 1999, the International Health Racquet and Sportsclub Association ("IHRSA"), the major trade and lobbying association of for-profit fitness clubs, polled some of its member clubs concerning AED use. Over 40% of the clubs which responded reported they either had AEDs or planned on acquiring them in the near future.

9. By November of 2000, all 50 states had enacted Good Samaritan laws providing immunity for lay users of AEDs. The federal Cardiac Arrest Survival Act, passed in November, 2000, provided broad immunity to any class of lay AED responders not otherwise covered by a specific state's Good Samaritan statute.

10. In March, 2002, the American College of Sports Medicine ("ACSM"), a pre-eminent authority in exercise physiology, and the American Heart Association ("AHA"), a pre-eminent authority in cardiovascular issues, issued a joint recommendation concerning AED placement in health clubs. The two groups "strongly recommended" that AEDs be placed in any club that had 2,500 members, was more than five minutes from an EMS response, or which catered to older or deconditioned members.

11. By 1994, the AHA had published standards which included AED use as part of Basic Life Support and stated as a principle that any person who is expected to respond to a victim of SCA must be trained in the use of and equipped with an AED.

12. By 2001, the American Red Cross stated that instruction in the use of AEDs was an "integral" component of first aid training, much like CPR.

13. As of November, 2005, most, if not all, Bally clubs had more than 2,500 members. As of November, 2005, the average EMS response time for arrival at curb-side to most Bally clubs was more than 5 minutes. As of November, 2005, more than 25% of Bally members were 45 years of age or older.

14. In the years before Gary Fowler's death, many large health club chains had either acquired AEDs or were in the process of doing so. These included Gold's Gym International, Wellbridge, Fitcorp, Club Corp USA, Tennis Corporation of America, Sport and Health Clubs,

and The Sports Club Company.

15. As of 2004, Bally claimed to be the largest commercial operator of fitness centers in North America, with approximately 4 million members and more than 420 facilities located in 29 states, Canada, Asia and the Caribbean. On information and belief, Bally operated 11 clubs in Maryland in 2004. In November, 2005, at the time of Gary Fowler's death, Bally operated at least 30 clubs in its home state, Illinois.

16. Since at least 2001, Bally has been a member of IHRSA. As a member of IHRSA, and as a subscriber to the standards of the ACSM, Bally pledged and agreed to:

> "Systematically upgrade our professional knowledge and keep abreast of new developments in our field;"
>
> "…design our facilities and programs with the members' safety in mind…;"
>
> "…respond in a timely manner to any reasonably foreseeable emergency event that threatens the health and safety of the club users. Toward this end, the club must have an appropriate emergency plan that can be executed by qualified personnel in a timely manner;" and
>
> "conform to all relevant laws, regulations, and published standards."

17. By 2000 at the latest, Bally knew that moderate to vigorous physical exercise can precipitate fatal cardiovascular events. In 2000, several Bally executives, including its Risk Manager, Judie Lasch, co-authored an abstract for presentation to the American Heart Association. They presented a retrospective review (for the years 1997 and 1998) of member death records and their respective exercise histories. That review disclosed that at least 71 fatal cardiovascular events had occurred during the period studied. During this period, nearly 3 million members or guests worked out at Bally centers. According to the Bally study, the number of deaths amounted to approximately one death per 100,000 members per year from a cardiovascular event.

18. Bally's advertised mission of its Sports Fitness Medicine Advisory Board is "to increase the value to the existing and prospective member, to increase the fitness level of our membership base, and enhance the image of Bally Total Fitness within the communities where our centers are located by supporting the guidelines and recommendations of the Surgeon General's Report on Physical Activity and Health and the American College of Sports Medicine." One such guideline was the March 2002 ACSM joint recommendation with the AHA which "strongly

recommended" AEDs in health clubs.

19. By 2002, at least two of the members of the Bally Sports Fitness Medicine Advisory Board, Barry Franklin and Cecil Bryant, were public advocates for placement of AEDs in health clubs. On information and belief, Bally actually disbanded its Sports Fitness Medicine Advisory Board in 2002, though Bally continues to advertise it on its website.

20. In late 2002 or early 2003, BALLY decided to begin deploying AEDs in its clubs. BALLY planned to install AEDs at first only in states, counties or municipalities where the devices were, or were about to be, required by law.

21. BALLY planned not to complete the process in the rest of its clubs, in locales where AEDs were not required by law, until some time in 2006.

22. In August, 2003, a BALLY spokesperson, Sarah Matheu, told a newspaper in Washington state that "we currently have CPR trained personnel in each of our 420 clubs as the safety and security of our members is of the utmost importance. Should a law be passed mandating that defibrillators must be in health club facilities, we will certainly comply."

23. In June, 2004, BALLY began training certain key employees who were slated to train other BALLY employees in the use of AEDs as the AED implementation program began.

24. By November 7, 2005, at least 7 states, 2 counties, and several municipalities had passed ordinances or laws to require health clubs to have AEDs in place and available, along with staff trained to use them. Bally was subject to many of these laws. Bally and IHRSA consistently sought to oppose, delay or undermine such legislative efforts.

25. If Bally had chosen to acquire AEDs for all its clubs in the United States and train its employees nationwide, the cost would have been approximately $2 million, or a one-time equivalent charge of fifty cents per member. In a typical fiscal three-month quarter, Bally spends at least $15 million on advertising.

26. If Bally had chosen to acquire AEDs for all its clubs in the United States and train its employees nation-wide in the same timeframe, this could have been accomplished in less than three months from the purchase of the first AED.

If an AED had been present and readily accessible at the Gaithersburg club, Gary Fowler would have been resuscitated successfully.

EXHIBIT B

In relevant part, the Bally release language is as follows:

You (buyer, member, parent, spouse or guest, as applicable) agree that if you engage in any physical exercise or activity or any facility on a club's premises, you do so at your own risk. This includes, without limitation, your use of the equipment, locker room, showers, pool, whirlpool, sauna, steam room, parking area, or sidewalk and your participation in any activity, class, program, personal training or other instruction now or in the future made available. You agree that you are voluntarily participating in these activities and using the equipment and facilities and assuming all risk of injury or your contraction of any illness or medical condition that might result therefrom or any damages, loss or theft of any personal property. You discharge us… from any and all claims or causes of action arising out of our negligence. This Waiver and Release of all liability includes (a) your use of any facility or its improper maintenance, (b) your use of any exercise equipment which may malfunction of break, (c) our improper maintenance of any of any exercise equipment, (d) our negligent instruction or supervision, (e) our negligent hiring or negligent retention of any employees, (f) loss of consortium or (g) your slipping and falling while in any club or on the surrounding premises. YOU ACKNOWLEDGE THAT YOU HAVE CAREFULLY READ THIS WAIVER AND RELEASE AND FULLY UNDERSTAND THAT IT IS A RELEASE OF ALL LIABILITY. IN ADDITION, YOU DO HEREBY WAIVE ANY RIGHT YOU MAY HAVE … TO BRING A LEGAL CLAIM OR ASSERT A CLAIM FOR INJURY …