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September 22, 2010

Barbara Ann Johnson

President

South Jersey Claims Association

Ramblewood Country Club

Mount Laurel, NJ 08054

Dear Ms. Johnson, Members and Guests:

On August 5, 2010, the New Jersey Supreme Court decided the case of *Stelluti v. Casapenn Enterprises, LLC*, __ N.J. __ (2010), and held that a liability waiver signed by a parton of a gym was enforceable and barred her negligence claim. This case is significant because the Court recognized, seemingly for the first time, that a private, profit-making facility that invites members of the public onto its premises can impose a limited waiver of liability as a condition of entry.

In *Stelluti*, the plaintiff was injured while participating in a spinning class at the Powerhouse Gym, when the handlebars on the bike came dislodged, causing her to fall forwards. She had joined the gym earlier that day, and was participating in her first class when she was injured. When she was filling out paperwork, and as a condition of enrollment, she signed a waiver and release form that provided as follows:

Because physical exercise can be strenuous and subject to risk of serious injury, the club urges you to obtain a physical examination from a doctor before using any exercise equipment or participating in any exercise activity. You (each member, guest, and all participating family members) agree that if you engage in any physical exercise or activity, or use any club amenity on the premises or off premises including any sponsored club event, you do so entirely at your own risk. Any recommendation for changes in diet including the use of food supplements, weight reduction and or body building enhancement products are entirely your

responsibility and you should consult a physician prior to undergoing any dietary or food supplement changes. You agree that you are voluntarily participating in these activities and use of these facilities and premises and assume all risks of injury, illness, or death. We are also not responsible for any loss of your personal property.

This waiver and release of liability includes, without limitation, all injuries which may occur as a result of, (a) your use of all amenities and equipment in the facility and your participation in any activity, class, program, personal training or instruction, (b) the sudden and unforeseen malfunctioning of any equipment, (c) our instruction, training, supervision, or dietary recommendations, and (d) your slipping and/or falling while in the club, or on the club premises, including adjacent sidewalks and parking areas.

You acknowledge that you have carefully read this “waiver and release” and fully understand that it is a release of liability. You expressly agree to release and discharge the health club, and all affiliates, employees, agents, representatives, successors, or assigns, from any and all claims or causes of action and you agree to voluntarily give up or waive any right that you may otherwise have to bring a legal action against the club for personal injury or property damage.

To the extent that statute or case law does not prohibit releases for negligence, this release is also for negligence on the part of the Club, its agents, and employees.

Naturally, plaintiff sued to recover for her injuries in spite of the waiver, and when confronted with the gym’s summary judgment motion, she argued that the waiver was ambiguous, and that such an exculpatory agreement was unenforceable due to public policy reasons. The trial court granted summary judgment, and the Appellate Division affirmed. However, the appellate court held that the waiver applied only to injuries sustained while using gym equipment or from instruction or participation in gym activities, and it further held that claims arising out of grossly negligent or reckless conduct were not exculpated. The Supreme Court granted plaintiff’s petition for certification.

In considering the case, the Court determined that the primary question was whether such an exculpatory agreement, presented on a take-it-or-leave-it basis, offended public policy requiring all commercial landowners to provide a

reasonably safe place to do business within the scope of the invitation. The Court determined that it did not, due to the positive social value gyms provide to the population as a whole. The Court wrote:

Although there is public interest in holding a health club to its general common law duty to business invitees-to maintain its premises in a condition safe from defects that the business is charged with knowing or discovering-it need not ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries. Any requirement to so guarantee a patron's safety from all risk in using equipment, which understandably is passed from patron to patron, could chill the establishment of health clubs. Health clubs perform a salutary purpose by offering activities and equipment so that patrons can enjoy challenging physical exercise. There has been recognized a "positive social value" in allowing gyms to limit their liability in respect of patrons who wish to assume the risk of participation in activities that could cause an injury. And, further, it is not unreasonable to encourage patrons of a fitness center to take proper steps to prepare, such as identifying their own physical limitations and learning about the activity, before engaging in a foreign activity for the first time.

Essentially, the Court's decision was based on the recognition that the scope of the invitation extended by a gym – to engage in vigorous physical activity – as well as the positive effect on society, justified enforcing the gym's waiver so that the gym could control the costs associated with membership. Keep that in mind the next time you exercise, and be safe.

Very truly yours,

SWEENEY & SHEEHAN

By: _____

Neal A. Thakkar

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