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The Minefield of Liability for Minors: Running Afoul of Corporate Risk Management in Florida*

JORDAN A. DRESNICK†

I. AN INTRODUCTION

The world is laden with risks.¹ The average person has a one in 10,000 risk of dying in a bathtub, a one in 4,800 gamble of being killed by a falling object, a greater chance of being attacked by a cow than a shark, and is more likely to be killed by a champagne cork than a bite from a poisonous spider.² Over time, capitalism and the American legal system have proposed a solution—the liability waiver, a mechanism under which one party agrees not to hold the other party responsible for resulting damages.³ In the face of an ancient African proverb that teaches, “it takes a village to raise a child,”⁴ the Florida Supreme Court

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1. François Ewald, *Risk in Contemporary Society*, 6 CONN. INS. L.J. 365, 365–66 (Jean-Marc Dautrey & Claire F. Stifler trans.) (2000). According to Ewald,

Risk has become ubiquitous and a kind of conceptual umbrella used to cover all sorts of events, be they individual or collective, minor or catastrophic. Risk presents itself as the modern approach to an event and the way in which, in our societies, we reflect upon issues that concern us. Risk is the single point upon which contemporary societies question themselves, analyze themselves, seek their values and, perhaps, recognize their limits.

Id. at 366.

2. Robert S. Nelson, Comment, *The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive Their Children's Tort Liability Claims*, 36 U.S.F. L. REV. 535, 535 (2002).

3. See generally Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111 (1983) (discussing consumer waivers of product-liability rights); Andrew Manno, Note, *A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools From Liability for Injuries to Athletes with High Medical Risks*, 79 KY. L.J. 867 (1991) (discussing student-athlete waivers).

4. See, e.g., HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996).

recently echoed that it also takes a court to protect the property rights of children after parents sign preinjury waivers on behalf of minors.⁵ This article examines the new shift of jurisprudence toward increased accountability and its implications on corporate risk management.

In *Kirton v. Fields*, the Florida Supreme Court confronted the issue of whether a parent may bind a minor's estate by a preinjury release.⁶ The case hinged on the competing rights of a parent or guardian to raise her child free of the state's reign and the interest of the state in providing for the safety and well-being of minors. The court held that a preinjury release executed by a parent on behalf of a minor was unenforceable against the minor's estate for torts resulting from the child's participation in a commercial activity.⁷ The opinion raises more questions than answers, namely as to the limits of the holding. For example, in the wake of *Kirton*, are liability waivers valid for school-sponsored activities?⁸ Are such waivers enforceable for community-related activities? What does the future minefield for liability for minors hold for corporate risk management?

This article discusses the facts and procedures leading to the opinion in *Kirton*, a survey of related precedent of courts throughout the state and nation, the movement afoot by businesses across Florida currently lobbying the state legislature to overturn the case, and the gapping questions left unanswered by the Florida Supreme Court, such as the validity of waivers that release volunteers from liability in the volunteer and school setting. The article proceeds as follows: Part II introduces corporate risk management; Part III sets the backdrop of the emergence of tort liability in American jurisprudence; Part IV describes the facts of *Kirton v. Fields* and the opinions rendered by the Florida Supreme Court, Florida District Court of Appeal, and trial court; Part V traces the rich conflict and harmony among the cases on preinjury waiver of liability to minors and arbitration-setting clauses; Part VI and VII analyze the implications of the decision on corporate risk management both in Florida and across the nation; and Part VIII provides some concluding remarks.

5. See *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

6. *Id.* at 350.

7. *Id.* at 358.

8. See *id.* at 350 n.2. The Florida Supreme Court specifically noted,

We answer the certified question as to pre-injury releases in commercial activities because that is what this case involves. Our decision in this case should not be read as limiting our reasoning only to pre-injury releases involving commercial activity; however, any discussion on pre-injury releases in noncommercial activities would be dicta and it is for that reason we do not discuss the broader question posed by the Fifth District.

Id.

II. THE MODERN STATE OF CORPORATE RISK MANAGEMENT

“[R]isk management is the practice of assessing and identifying the [myriad] risks facing a person, an institution, or society because of its activities and environment, determining the likelihood of losses and other consequences from those risks, and taking appropriate actions,” which include monitoring the risks and reducing the potential damage and related consequences.⁹ Although risk management is most frequently applied to investments,¹⁰ recent scholarship¹¹ and federal legislation¹² have highlighted the role of risk in corporate governance. Enterprise risk management is the procedure by which a corporation’s officers and directors define the firm’s strategies and objectives so as to arrive at an optimal balance between growth, return, and risk management.¹³ Risk can take several forms for companies, including accounting

9. James Fanto, *Anticipating the Unthinkable: The Adequacy of Risk Management in Finance and Environmental Studies*, 44 WAKE FOREST L. REV. 731, 731 (2009).

10. See generally Joe Nocera, *Risk Mismanagement: Were the Measures Used to Evaluate Wall Street Trades Flawed?*, N.Y. TIMES MAG., Jan. 4, 2009, at 24 (discussing the “Value at Risk” model for measuring the risk in investment portfolios).

11. See, e.g., Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009); Susan Schmidt Bies, Member, Bd. Of Governors of the Fed. Reserve Sys., Keynote Address at the International Symposium on Risk Management and Derivatives (Oct. 8, 2002), in 8 FORDHAM J. CORP. & FIN. L. 81, 82 (2003) (discussing the role that “risk management can play in strengthening corporate governance”); Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571, 591 (2008) (“Our system of corporate governance is flawed. It is now apparent that CEOs may exploit excessive autonomy to impose excessive long term risks on their firms in the name of greater profits and compensation today.”).

12. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.); see also Brent J. Horton, *How Corporate Lawyers Escaped Sarbanes-Oxley: Disparate Treatment in the Legislative Process*, 60 S.C. L. REV. 149, 202 (2008). According to Horton,

Like the lawyers of the 1920s, the lawyers of today enabled—indeed cooked up—the legal structures that resulted in the fall of Enron; now, like in 1934, There is little to suggest that the Bar has yet recognized that it must bear some burden of responsibility for these evils. Instead, corporate officers and accountants—both of whom made easier legislative targets—shouldered the burden of Sarbanes-Oxley.

Id. at 202 (internal quotation marks and footnote omitted).

13. COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, ENTERPRISE RISK MANAGEMENT—INTEGRATED FRAMEWORK 1 (2004), http://www.coso.org/Publications/ERM/COSO_ERM_ExecutiveSummary.pdf.

fraud,¹⁴ labor relations,¹⁵ securities fraud,¹⁶ lack of internal

14. One of the largest accounting frauds in history came to light in 2001, with the unexpected collapse of Enron. Enron's President Jeffrey Skilling and Chief Executive Officer Kenneth Lay focused on increasing the company's stock price to maximize their bonuses and compensation. In an attempt to keep the market's attention on the company, Lay and Skilling created new ventures and businesses, many of which were largely unsuccessful. The company maintained a complex set of offshore partnerships and accounts that were specifically kept off the accounting statements of the corporation to mask losses, artificially increase earnings, and avoid taxes. These entities made Enron appear more profitable than it was in reality and created a perilous helix in which executives would have to perform a greater number of twisted financial deceptions each passing quarter to maintain the façade of billions in profits while the company was actually quickly diminishing in value. This process drove the stock price to record levels. Although many insiders and executives at Enron were all too familiar with the offshore accounts and fraudulent accounting practices, the stunning neglect for corporate risk management kept the practices concealed from investors. The ultimate collapse of Enron was notable not only due to the sheer volume and scale of the accounting fraud, but also because many of the company's former directors had to settle suits by personally paying large sums and because Enron's demise led to the dissolution of the company's independent auditors, Arthur Anderson. *See generally* Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787 (2002); Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in a Global Economy*, 37 IND. L. REV. 141 (2003); George J. Benston, *The Regulation of Accountants and Public Accounting Before and After Enron*, 52 EMORY L.J. 1325 (2003); John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403 (2002); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002); David Millon, *Who "Caused" the Enron Debacle?*, 60 WASH. & LEE L. REV. 309 (2003); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, 8 STAN. J.L. BUS. & FIN. 9 (2002).

15. *See, e.g.*, Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 108–09 (2000).

The most notorious example of such a casualty is Texaco Oil Company, and the unfortunate Texaco shareholders during the time that the racism within Texaco came to light. Texaco's nightmare began in 1994, when African-American employees filed a class action lawsuit alleging pervasive racial discrimination. The extent of Texaco's discriminatory misconduct came to light in late 1996, when a senior executive released highly controversial tapes that appeared to contain racial slurs emblematic of a racially hostile environment. Once allegations of Texaco's misconduct surfaced, its shareholders suffered stunning losses, as its market capitalization plunged by \$1 billion. Subsequent reports demonstrated that the tapes were not isolated circumstances of racial bigotry, but that instead such attitudes appeared to have permeated Texaco's business culture. Ultimately Texaco paid \$176 million, the largest amount ever paid in a racial discrimination suit, to settle the class action claims of over 1,400 African-American employees. Texaco also suffered from a serious bout of negative publicity that caused investors to flee the company and consumers to threaten boycotts.

Id. at 108–09 (footnotes omitted).

16. For example, the Securities and Exchange Commission charged Qwest Communications International Inc., one of the largest telecommunications companies in the United States, with securities fraud and other violations of the federal securities laws for fraudulently recognizing over \$3.8 billion in revenue and excluding \$231 million in expenses as part of a "fraudulent scheme to meet optimistic and unsupportable revenue and earnings projections. Without admitting or denying the allegations in the complaint, Qwest consented to entry of a judgment enjoining it from violating the antifraud, reporting, books and records, internal control, proxy, and securities registration provisions of the federal securities laws." Press Release, Sec. & Exch. Comm'n, SEC

controls,¹⁷ and weak corporate governance.¹⁸ However, one of the most significant risks faced by a company is the potential for bet-the-company litigation.¹⁹

Many businesses today could easily be bankrupted not only by a single bet-the-company suit,²⁰ but by a series of smaller claims whose aggregate value is worth more than the assets of the company. Consider, for example, several lawsuits brought against the Walt Disney World Company. Disney is not only one of the largest and most successful companies in the world,²¹ but it also caters largely to children.²² One of Disney's main attractions, the Walt Disney World theme park, is located

Charges Qwest Communications International Inc. with Multi-Faceted Accounting and Financial Reporting Fraud (Oct. 21, 2004), <http://www.sec.gov/news/press/2004-148.htm>.

17. See, e.g., Simkins & Ramirez, *supra* note 11, at 575 (describing how a rogue trader at Barings Bank acted both as a trader and manager, essentially supervising himself, and in the absence of proper oversight was able to disguise \$1.3 billion in trading losses into the branch's error account).

18. In 2002, telecommunications giant WorldCom admitted that an internal audit revealed improper accounting of over \$3.9 billion in expenses. WorldCom said that accounting irregularities involving expenses and capital expenditures inflated its cash flow and that otherwise it would have reported a net loss for 2001 and the first quarter of 2002. In the aftermath of the ensuing investigations, many cited WorldCom's corporate governance for failing to investigate multi-billion dollar transfers between internal accounts, none of which conformed to GAAP (Generally Accepted Accounting Principles). See, e.g., Marianne M. Jennings, *Restoring Ethical Gumption in the Corporation: A Federalist Paper on Corporate Governance—Restoration of Active Virtue in the Corporate Structure to Curb the "YeeHaw Culture" in Organizations*, 3 WYO. L. REV. 387, 410–29 (2003).

19. See, e.g., *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987). In January 1984, the Board of Directors of Getty Oil Company and several related companies approved an oral agreement in principle to sell Getty to Pennzoil. Simkins & Ramirez, *supra* note 11, at 573. Texaco subsequently interfered with this agreement, and a jury awarded \$11 billion to Pennzoil against Texaco, which was the largest civil judgment at the time. *Id.* Texaco then had to declare bankruptcy and ultimately settled for three billion dollars. *Id.* The case highlighted the risks faced by the Board of Directors of Texaco of interfering in the sale of Getty: becoming involved in significant litigation, declaring bankruptcy, and then facing the consequences of a \$3 billion settlement.

20. See, e.g., *Texaco, Inc.*, 729 S.W.2d 768.

21. See The Walt Disney Company and Affiliated Companies – Careers, <http://corporate.disney.go.com/careers/index.html> (last visited Jan. 1, 2010). According to Disney's website,

Fortune magazine annually surveys more than 15,000 top executives, directors and members of the financial community to generate its Most Admired Companies list. This year, for the first time, Fortune combined the America's Most Admired Companies and World's Most Admired Companies survey results into one. After taking the top spot in all nine industry categories, ranging from people management, use of corporate assets and management quality to innovation, Disney was named No. 1 Most Admired Entertainment Company in the world! In addition, Disney ranked No. 13 on Fortune's overall list of the World's Most Admired Companies.

Id.

22. See Carmine Gallo, *How Disney Works to Win Repeat Customers*, BUS. WK., Dec. 1, 2009, http://www.businessweek.com/smallbiz/content/nov2009/sb20091130_866423.htm.

in Orlando and is therefore particularly applicable when considering the implications of *Kirton v. Fields* on Florida-based corporations.

Since Walt Disney World was first developed in the late 1960s, “Disney has grown to include four theme parks, more than twenty on-site hotels which encompass more than 20,000 rooms, three water parks, five 18-hole championship golf courses, a speedway, and numerous other world class amenities.”²³ The robust success of Disney “spurred the growth of nearby Orlando, from a small city into a huge metropolis, [boasting] one of the busiest airports in the country.”²⁴ Disney has a huge economic impact on Florida by attracting more than forty million visitors to the state, paying hundreds of millions of dollars in taxes each year, and gaining the role as one of the state’s largest employers.²⁵

Along with the millions of visitors to the amusement parks each year, Walt Disney World must also contend with thousands of actual and potential lawsuits. For a company as large and diversified as Disney, matters may be brought involving adult guests,²⁶ minor guests,²⁷

23. Kent Wetherell, *Florida Law Because of and According to Mickey: The “Top 5” Florida Cases and Statutes Involving Walt Disney World*, 4 FLA. COASTAL L.J. 1, 1 (2002) (footnotes omitted).

24. *Id.* at 2 (“When people think of Florida, they think of beaches and Disney World . . .”).

25. *Id.*

26. *See, e.g.*, *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987). A commentator describes the case as follows:

In November 1971 (only a month after Disney opened), [park guest] Aloysia Wood was injured after her fiancé rear-ended the vehicle she was driving on the grand prix raceway (now known as Tomorrowland Indy Speedway) in the Magic Kingdom. Ms. Wood sued Disney and its insurer, and after a jury trial, she was awarded damages of \$75,000. The jury found Ms. Wood to be fourteen percent at fault, her fiancé to be eighty-five percent at fault, and Disney to be only one percent at fault. Notwithstanding its nominal level of fault, judgment was entered against Disney for eighty-six percent of the damages, since at that time [of the decision], Florida law imposed joint and several liability on joint tortfeasors. Disney appealed to Florida’s Fourth District Court of Appeal, which affirmed the judgment. The Fourth District certified a question of great public importance to the Florida Supreme Court, which was whether joint and several liability should be abolished.

The Florida Supreme Court, in a four to three decision, answered the certified question in the negative and affirmed the Fourth District’s decision. The majority “recogniz[ed] the logic in Disney’s position” that it should not be required to pay eighty-six percent of the damages when it was only one percent at fault; the court still refused to abolish joint and several liability and left the viability of the doctrine to the legislature.

Wetherell, *supra* note 23, at 11–12 (footnotes omitted) (quoting *Wood*, 515 So. 2d at 202).

27. *See, e.g.*, *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. Dist. Ct. App. 1994) (involving a ten-year-old whose thumb was amputated); *Walt Disney World Co. v. Goode*, 501 So. 2d 622 (Fla. Dist. Ct. App. 1986) (involving a four-year-old who drowned at Magic Kingdom). For further discussion of *Blalock* and *Goode*, see Wetherell, *supra* note 23, at 13–15, 19–20.

employees,²⁸ and even access to the corporation's records.²⁹ The volume and factual complexity of these select cases speak not only to the resources required to defend such cases, but also illustrate that many cases can spur through litigation for a decade or longer.³⁰ These disputes also provide anecdotal evidence of the myriad facets springing litigation to American corporations.³¹ Without a doubt, a lack of proper risk management can lead to the entity's rapid demise.³²

As companies target the bottom line of their accounting statements to augment profits, there has been a pronounced shift toward anticipating and hedging against potential litigation.³³ A popular vehicle to meet

28. See, e.g., *Bardy v. Walt Disney World Co.*, 643 So. 2d 46 (Fla. Dist. Ct. App. 1994).

[Michael] Bardy, a Disney employee, claims he became voluntarily intoxicated while attending an employee party sponsored by Disney and held on Disney's premises. Before the party ended, Bardy went to his car in the parking lot to lie down. A security guard employed by Disney discovered Bardy sleeping in the car. Despite Bardy's protestations that he was too intoxicated to drive, Bardy claims the guard ordered him to move the car and leave the premises. The guard also threatened that if Bardy was not gone when he returned, the guard would have Bardy arrested. Some time later, Bardy attempted to drive the car off the premises, but after driving only about 500 feet, his car struck a light pole and Bardy was injured. He sued Disney to recover damages for his injuries.

Id. at 47. Although the trial court granted summary judgment in favor of Walt Disney World, the appellate court reversed, finding that Disney could theoretically be held liable if a jury determined that the security guard's actions caused Bardy's injuries:

If there is no duty to come to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse. When we cross the line into the field of "misfeasance," liability is far easier to find There may be no duty to take care of a man who is ill or intoxicated, and unable to look out for himself; but it is another thing entirely to eject him into the danger of a railroad yard; and if he is injured there will be liability.

Id. at 47-48 (alteration in original) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56, at 343 (4th ed. 1971)).

29. See, e.g., *Sipkema v. Reedy Creek Improvement Dist.*, 697 So. 2d 880 (Fla. Dist. Ct. App. 1997) (per curiam). The "case arose when the Sipkemas attempted to use the Public Records Act to obtain copies of the security manual, traffic citations, and accident reports maintained by Disney" following a fatal accident that claimed the life of their son during a high-speed chase by Disney security. Wetherell, *supra* note 23, at 21 & n.121.

30. See, e.g., *Walt Disney World Co. v. Goode*, 501 So. 2d 622 (Fla. Dist. Ct. App. 1986), *review dismissed*, 520 So. 2d 270 (Fla. 1988). The incident giving rise to this case occurred in 1977, *id.* at 623, more than ten years before the final disposition of the case.

31. See Simkins & Ramirez, *supra* note 11, at 571 ("[T]he modern corporation may well face a myriad of risks from disparate fields of business ranging from complex financial risk to quality control regarding material manufactured in China." (footnote omitted)).

32. See generally Joseph A. Smith, Jr., *The Role of Outside Counsel in the Creation of Economic Value*, 2 N.C. BANKING INST. 113 (1998) (discussing a regional bank holding company's relationships with its outside counsel and how the relationships relate to the firm's primary mission of creating economic value).

33. In fact, corporations often cause injury to parties who do not participate in the enterprise as owners, employees, or customers, thus giving rise to "enterprise liability." Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 612 (1998). "[U]nless the business was negligent, it is

this goal has come in the guise of risk management, which is still a young and evolving discipline.³⁴ Proper risk management involves determining which of a corporation's activities creates a potential for loss or exposure to liability and then calculating the expected loss.³⁵ Although the liability waiver emerged decades ago as an attempt to shield corporate coffers against the piercing arrows of plaintiffs' counsel, the jurisprudence in the area has been suffocated with significant clout.³⁶ This article addresses the manner in which the Florida Supreme Court's opinion in *Kirton v. Fields*³⁷ changes the lush landscape of deflecting liability toward the consumer.

III. BACKGROUND: THE RISE AND ATTEMPTED DEMISE OF TORT LIABILITY

A. *The Threat of Tort Liability*

Tort law is premised on the notion that the fear of liability for falling below a required standard of care is an effective incentive, which leads to an increase in the quality of goods and services.³⁸ That level is generally defined as negligence, which is characterized as "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."³⁹ The compensation rationale for tort liability can be traced to the *Restatement (Second) of Torts*, which states that "the purposes for which actions of tort are maintainable . . . are: (a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help."⁴⁰ However, this raises particular concern for charitable organizations because of the potentially stiffening effect on discouraging

ordinarily not liable for the injuries of someone with whom it did not have a contractual relationship." *Id.* For further discussion of "enterprise liability," see Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157 (1992), and Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

34. Bainbridge, *supra* note 11, at 982.

35. Brent E. Dyer, *Risk Management and its Application to Air Carrier Safety*, 62 J. AIR L. & COM. 491, 494 (1996). However, "[t]he potential amount is not simply the total amount the entity stands to lose. Rather, it is the total potential loss multiplied by the percentage chance that the loss will occur." *Id.*

36. See, e.g., Note, *supra* note 3, at 1114–15.

37. 997 So. 2d 349 (Fla. 2008).

38. Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing the Vulnerable*, 35 HARV. J. ON LEGIS. 123, 134 (1998).

39. BLACK'S LAW DICTIONARY 1133 (9th ed. 2009).

40. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

volunteerism.⁴¹

B. *The Impact of Tort Law on Volunteerism*

Volunteerism has been historically labeled by many commentators as the “Third Sector”⁴² of the American economy and includes services rendered in schools, churches, temples, libraries, and little league teams.⁴³ Hundreds of thousands of Americans work for nonprofit entities, and millions more volunteer or contribute to the charitable causes each year.⁴⁴ The U.S. Supreme Court has defined the charitable sector with a broad brush, “A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man.”⁴⁵ Although the charitable sector is expansive, diverse, and expanding, it is not well defined.⁴⁶

The Internal Revenue Service provides helpful guidance for characterizing the philanthropic sector by defining “charitable” in “its generally accepted legal sense.”⁴⁷ To qualify for tax exemption, an organization must have a charitable purpose,⁴⁸ function “in harmony

41. See Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969, 971–72 (1979).

42. See, e.g., James Cook, *Businessmen with Halos*, FORBES, Nov. 26, 1990, at 100 (finding that nonprofit institutions generate annual revenues exceeding \$750 billion—roughly 15% of the nation's GNP).

43. David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 U. BRIDGEPORT L. REV. 63, 72–73 (1989); see also *Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1581 (1992) (finding nonprofit corporations encompass recognizable entities like the American Red Cross and the Salvation Army, as well as less-known organizations, such as soup kitchens, political associations, business leagues, social clubs, sports leagues, schools and hospitals, and even law reviews, the Federalist Society, and the Star Trek Fan Club).

44. See *Developments in the Law—Nonprofit Corporations*, *supra* note 43.

45. *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303, 311 (1877) (“Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense, —given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.” (internal quotation marks omitted)).

46. Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 406 (1991).

47. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1998).

48. I.R.C. § 501(c)(3) (2006).

with the public interest,"⁴⁹ serve a sufficiently broad public,⁵⁰ and "not allow its resources to 'inure to the benefit' of any private person."⁵¹ Although this guidance from the federal tax code provides insight to the parameters that separate charitable organizations from for-profit corporations, the operative issue in the wake of *Kirton v. Fields* is whether applying that same standard to volunteers will adversely affect the interest to become involved in community-enriching endeavors.

C. A Carve Out for Tort Liability

Throughout history, charities have traditionally been treated differently than for-profit entities when it comes to the rules of preinjury waiver.⁵² This concept was first articulated in the 1876 decision of *McDonald v. Massachusetts General Hospital*⁵³ and later became known as the doctrine of charitable immunity. There, the court granted immunity to a hospital because of its charitable status.⁵⁴ By the middle of the twentieth century, jurists began to critically challenge the charitable-immunity doctrine.⁵⁵ These challenges came to bear particularly potent light with a series of high-profile cases that refocused attention on the dire need to provide special consideration for charitable organizations.⁵⁶

49. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.

Id. at 591–92 (footnotes omitted).

50. *See* Rev. Rul. 56-403, 1956-2 C.B. 307, 1956 IRB LEXIS 101.

51. Tremper, *supra* note 46, at 407 (citing Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980)).

52. *See* Melinda Smith, Note, *Tort Immunity for Volunteers in Ohio: Zivich v. Mentor Soccer Club, Inc.*, 32 AKRON L. REV. 699, 699–702 (1999).

53. 120 Mass. 432 (1876).

54. *Id.* at 435–36.

55. Smith, *supra* note 52, at 700–01 (noting that proponents of charitable immunity have proposed four theories to support their argument: (1) the trust fund theory, which focuses on the intent of donors and therefore prohibits the use of funds donated for charitable purposes to satisfy tort awards; (2) the inapplicability of the doctrine of respondeat superior to charitable organizations; (3) the implied waiver theory that participants in charitable events have waived suit against the charity; and (4) underlying public policy grounds against allowing scarce charitable resources to be claimed by individuals benefiting from charities).

56. *See, e.g.*, Tremper, *supra* note 46, at 402 (citing Damond Benningfield, *Who's Minding the Nonprofits?*, TEX. INSUROR, Jan./Feb. 1987; Kristen A. Goss, *Boy Scouts of America Win*

At the same time, Congress, while limited in passing tort legislation,⁵⁷ began proposing solutions to reform suits against nonprofits.⁵⁸ As the literature increasingly turned to examine these pressing issues,⁵⁹ more ideas flowed to cool the fires slowly bursting on the scene.

D. *The Emergence of the Liability Waiver*

A person generally becomes liable in tort when his conduct falls below that required of a reasonable person under the circumstances.⁶⁰ In light of the significance of tort liability, the waiver emerged as a means by which one party agrees to carry risk that would have otherwise been shouldered by the other party.⁶¹ Courts have recognized both a release and an indemnity agreement. The release surrenders legal rights or obligations between the parties to an agreement,⁶² thus extinguishing a potential claim or cause of action in the same manner as a prior judgment between the parties.⁶³ A release is an absolute bar to any right of action on the released matter⁶⁴ and may also be raised as an affirmative defense in some states.⁶⁵

An indemnity agreement, on the other hand, is “[a] collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by

Victory in Sex Abuse Case; Jury Fails to Find Negligence by National Organization, CHRON. PHILANTHROPY, Jan. 24, 1989, at 15; Thomas Heath, *\$ 45,000 Award to Molested Va. Youth Hailed as Victory by Scouts*, WASH. POST, Jan. 12, 1989, at D1; Lisa Green Markoff, *A Volunteer's Thankless Task*, NAT'L L.J., Sept. 19, 1988, at 1; David Rohn, *YMCA, Pool Victim Settle: 5-Year-Old to Get \$4,000 a Month Initially*, WASH. POST, May 17, 1978, at A4; Gary Taylor, *Goodwill Must Pay \$5M in Murder by Parolee-Employee*, NAT'L L.J., June 8, 1987, at 22).

57. Congress is limited in its ability to enact tort-related legislation, as Amendment X and Article I, § 8 of the U.S. Constitution confine federal authority in the absence of interstate commerce.

58. See Volunteer Protection Act of 1989, H.R. 911, 101st Cong. (1989).

59. See, e.g., Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990).

60. See RESTATEMENT (SECOND) OF TORTS § 281 (1965) (noting that a party will be liable if he negligently causes injury to another, whose own conduct did not unreasonably contribute to that injury).

61. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The court defined a release as:

A contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility . . . [An] [a]greement or contract in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved.

Id. (alterations in original) (citing BLACK'S LAW DICTIONARY 658 (5th ed. 1979)).

62. *Cox v. Robison*, 150 S.W. 1149, 1155 (Tex. 1912).

63. *Hart v. Traders & Gen. Ins. Co.*, 189 S.W.2d 493, 494 (Tex. 1945).

64. *Id.*

65. See, e.g., TEX. R. CIV. P. 94.

the legal consequences of an act or forbearance on the part of one of the parties or of some third person."⁶⁶ An indemnity agreement is a promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability.⁶⁷ Although indemnity agreements, releases, waivers, and exculpatory agreements all operate to transfer risk,⁶⁸ the focus of this article is on liability waivers signed by parents releasing third parties from potential claims by children who are later injured by the third party.

The waiver yields significant power in the shifting of tort liability.⁶⁹ Even if clearly at fault, a business or corporate entity will not be held liable for a customer's injury if the customer signed a valid waiver.⁷⁰ In many regards, the tort waiver appears contrary to the general consensus that tort law promotes socially desirable behavior.⁷¹ At the same time, many scholars take the opposite approach, contending that tort is simply a method of inefficient deterrence.⁷² Some argue that people behave like mice "in psychologist's maze of electrical shocks," in which they "are directed away from conduct that brings the sting of tort liability and toward those channels of activity where the sting is avoided."⁷³ However, such assumptions are based on models of rational behavior and symmetric information. In reality, many consumers are neither well informed about a company's previous negligent actions, nor are they fully rational actors.⁷⁴ In turn, this economic truism brings us full circle to the origin: namely the judicial inquiry to determine whether parents should be endowed with the power to waive the rights of their children against potential liability.

66. *Dresser Indus.*, 853 S.W.2d at 508 (citing BLACK'S LAW DICTIONARY 692 (5th ed. 1979)).

67. See *Russell v. Lemons*, 205 S.W.2d 629, 631 (Tex. Civ. App. 1947).

68. *Dresser Indus.*, 853 S.W.2d at 508.

69. See, e.g., Jeff Kessler, Note, *Dollar Signs on the Muscle. . . and the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes*, 3 VA. J. SPORTS & L. 80, 83-86 (2001) (discussing the import of liability waivers on student athletes and universities).

70. See RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1981) ("[A] party to a contract can ordinarily exempt himself from liability for harm caused by his failure to observe the standard of reasonable care imposed by the law of negligence. ").

71. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 559 (1985).

72. *Id.* at 561 n.12 (citing DONALD HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 328 (1984) ("Deterrence of carelessness operates in a random way . . . "); TERENCE G. ISON, THE FORENSIC LOTTERY 89 (1967) ("[T]he value of tort liability as a deterrent . . . is thought on the whole to be negligible."); John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1198 (1984) ("[O]ne must be skeptical about the effectiveness of tort law in promoting accident prevention").

73. *Id.* at 561.

74. See Ralph Nader & Joseph A. Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645, 647-48 (1967).

IV. WALKING THE MINEFIELD OF LIABILITY FOR MINORS

A. *Factual and Procedural Background of Kirton v. Fields*

In *Fields v. Kirton*, the Fourth District Court of Appeal reversed summary judgment and certified the following question to the Florida Supreme Court as one of great public importance: “whether a parent may bind a minor’s estate by the pre-injury execution of a release.”⁷⁵ The facts pivot on the rights of a parent to decide those activities appropriate for her minor children against the state’s interest in intermeddling on behalf of a minor child, as *parens patriae*.⁷⁶

Bobby Jones was the primary residential parent for his fourteen-year-old son Christopher.⁷⁷ In May 2003, Jones took his son to a sports motor park to drive an all-terrain vehicle (“ATV”).⁷⁸ To gain entry into the park and ride the ATV, Jones signed several documents of legal import, including a release, a waiver of liability, assumption of risk, and an indemnity agreement.⁷⁹ While operating the ATV, the minor lost control on a particular jump and was ejected, hitting the ground, whereupon the vehicle landed on top of him, taking the minor’s life.⁸⁰

Jordan Fields, the minor’s personal representative, brought a wrongful death claim against the owners, operators, and manager of the park.⁸¹ The trial court granted the defendants’ motion for summary judgment, noting the lack of genuine issue of material fact because Jones had “willfully and with full understanding” executed the preinjury release on behalf of his son.⁸² Further, Jones filed an affidavit stating that it was his intention to waive the right to sue for the death of his child and that the release served to forever discharge the defendants of any and all loss or damage and any claim or demands due to the injury of the minor or his property.⁸³ The trial court specifically relied on the enforceability of the preinjury release and waiver signed by Jones, as the natural guardian, on behalf of the deceased child in dismissing the case.⁸⁴

Reviewing the trial court’s ruling *de novo*, the Fourth District affirmed that the material facts were not in dispute but reversed the lower court’s enforcement of the release, thus enabling the plaintiff to

75. *Fields v. Kirton*, 961 So. 2d 1127, 1130 (Fla. Dist. Ct. App. 2007), *aff’d*, 997 So. 2d 349 (Fla. 2008).

76. *Id.*

77. *Id.* at 1128.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Kirton v. Fields*, 997 So. 2d 349, 351 (Fla. 2008).

82. *Id.* at 351 & n.3.

83. *Id.* at 351 n.3.

84. *See id.* at 351.

litigate the wrongful death claim.⁸⁵ Although the lower court's ruling did not comport with the Florida Constitution, which grants parents the right to make decisions affecting their children without governmental interference,⁸⁶ the Fourth District differentiated between this constitutional right and the release of any form of negligence.⁸⁷ In effect, the release forfeited the minor's property rights to seek legal redress against the commercial activity provider—here, the ATV park.⁸⁸ Relying on Florida statutes⁸⁹ and common law,⁹⁰ the appellate court cited a controlling statutory provision on preinjury releases signed by a parent for her child.⁹¹ The Florida legislature has given clear guidance regarding when the state, as *parens patriae*, must act on behalf of minors, such as in the case of juvenile delinquency and dependency.⁹² "It is not the function of the courts to usurp the constitutional role of the legislature and judicially

85. *Fields*, 961 So. 2d at 1130.

86. See *id.* at 1129 (noting that the government should only interfere where there is a threat of significant harm to the child (citing *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998))).

87. *Id.*

The decision to absolve the provider of an activity from liability for any form of negligence (regardless of the inherent risk or danger in the activity) goes beyond the scope of determining which activity a person feels is appropriate for their [sic] child. The decision to allow a minor to participate in an activity is properly left to the parents or natural guardian.

Id.

88. *Id.* at 1129–30.

89. *Id.* at 1130 (citing FLA. STAT. § 744.301 (2008)).

Section 744.301, Florida Statutes, provides a statutory scheme wherein natural guardians are granted limited rights to settle claims on behalf of minors. That statute provides that parents are authorized to settle any claims or causes of action for damages on behalf of their minor child without the necessity of court approval when the amount does not exceed \$15,000. Any settlement greater than [sic] \$15,000 but less than \$25,000 may involve a guardian ad litem, if the court chooses to appoint one, while a settlement in excess of \$25,000 requires a court-appointed guardian as well as a specific determination by the court that the settlement is in the best interest of the minor. There is no comparable statutory scheme governing the issue of pre-injury releases signed by a parent on behalf of a minor child.

If the legislature wished to grant a parent the authority to bind a minor's estate by signing a pre-injury release, they could have said so. The legislature has decided when the state, as *parens patriae*, should intervene on behalf of a minor. There is a significant statutory framework in place relating to dependency and juvenile delinquency, which evidences the legislature's exercise of the *parens patriae* authority. That statutory scheme does not authorize one parent to release property rights of the child except as specified.

Id. (citations omitted).

90. *Id.* ("There is no basis in common law for a parent to enter into a compromise or settlement of a child's claim, or to waive substantive rights of the child without court approval." (citing *Romish v. Albo*, 291 So. 2d 24, 25 (Fla. Dist. Ct. App. 1974), *vacated on other grounds*, *Venus Labs. v. Katz*, 573 So. 2d 993 (Fla. Dist. Ct. App. 1991), and 59 AM. JUR. 2D *Parent and Child* §§ 40, 183 (1962))).

91. *Id.*

92. *Id.*

legislate that which necessarily must originate, if it is to be law, with the legislature.”⁹³ The appellate court ultimately decided against finding the preinjury release enforceable and reversed the lower court’s grant of summary judgment.

B. *The Florida Supreme Court’s Treatment of Preinjury
Waivers Prior to Kirton*

The Florida Supreme Court answered the question of “whether a parent may bind a minor’s estate by the pre-injury execution of a release” in the negative.⁹⁴ The court considered the public policy concerns and the potential chilling effect on the willingness of individuals to volunteer amidst a potential minefield of personal liability, in the absence of waivers. From the outset of the opinion’s second footnote, the court expressly stated that its decision in *Kirton v. Fields* should not be read as limited solely to preinjury releases signed in the context of for-profit commercial activities.⁹⁵ The enforceability of preinjury releases is a question of law to be reviewed de novo.⁹⁶ Such releases contrast the rights of parents to raise their children against those of the state to protect minors.

The Fourteenth Amendment and the Florida Constitution make clear that parents have a constitutionally protected authority to make decisions concerning the care, custody, and control of their children.⁹⁷ A presumption exists that “fit” parents act in the best interests of their children. That presumption, however, is not absolute. On the contrary, it is precisely within this realm of limits that the court found sufficient reason for the state as *parens patriae*⁹⁸ to trump parental authority in the context of a preinjury release.

First, the court discounted the defendants’ assertion that a parent’s right to execute a preinjury release on behalf of a minor falls within the ambit of section 744.301(2) of the Florida Statutes.⁹⁹ The defendants argued that when the father signed the release, Christopher’s “claim”

93. *Id.*

94. *Kirton v. Fields*, 997 So. 2d 349, 350 (Fla. 2008).

95. *Id.* at 350 n.2 (“[A]ny discussion on pre-injury releases in noncommercial activities would be dicta and it is for that reason we do not discuss the broader question posed by the Fifth District.”).

96. *Id.* at 352 (citing *D’Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003)).

97. *Id.* (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) and *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996)).

98. *Parens patriae* is defined as the state acting as the “provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

99. This statutory provision allows a parent, acting as the natural guardian of a minor child, to settle the child’s claim for amounts up to \$15,000. FLA. STAT. § 744.301(2) (2009).

was less than \$15,000, and was therefore valid under the statute.¹⁰⁰ The court disagreed, finding the statute applied only to instances in which the child *already* had a valid claim against another party.¹⁰¹ This was clearly not the case here, as the minor had not even mounted the ATV when the father signed the release. The court also noted the absence of guidance from the Florida legislature regarding preinjury releases as evidence that there has been no legislative ban on releases executed by parents for their children.¹⁰² However, in the absence of a relevant statutory basis, the court concluded that public policy concerns override the statutory void with respect to parental preinjury releases, and therefore parents cannot legally shift the property interests of their children through preinjury releases.¹⁰³

Florida courts have previously, though not consistently, opined on the enforceability of preinjury releases. The Fourth District confronted an arbitration setting provision in *Shea v. Global Travel Marketing, Inc.*¹⁰⁴ There, a mother signed an agreement covering herself and her minor child, which included a release of liability and an arbitration provision.¹⁰⁵ The father brought a wrongful death suit against the safari operator after his son was mauled to death by hyenas during the trip.¹⁰⁶ The trial court granted the safari operator's motion to stay proceedings and compel arbitration of the claim based on the language of the waiver.¹⁰⁷ The Fourth District reversed, finding the arbitration agreement unenforceable as to the child on public policy grounds.¹⁰⁸ The appellate court distinguished this case from instances in which a parent may be entitled to waive a minor's litigation rights when necessary for the child to undertake an activity beneficial to her health, such as obtaining insurance or medical care, and participating in community-oriented or school-supported activities.¹⁰⁹

100. *Kirton*, 997 So. 2d at 353.

101. *Id.* at 353–54.

102. *Id.* at 354 (citing *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 400 (Fla. 2005)).

103. *Id.*

104. 870 So. 2d 20, 22 (Fla. Dist. Ct. App. 2003), *quashed*, 908 So. 2d 392 (Fla. 2005). See generally Douglas P. Gerber, Note, *The Validity of Binding Arbitration Agreements and Children's Personal Injury Claims in Florida After Shea v. Global Travel Marketing, Inc.*, 28 NOVA L. REV. 167 (2003).

105. See *Global Travel Mktg.*, 908 So. 2d at 395.

106. *Id.* at 395 & n.1.

107. *Id.*

108. *Id.* at 396.

109. *Shea*, 870 So. 2d at 25.

V. SETTING THE STAGE: THE LAW OF ARBITRATION AND
PREINJURY WAIVERS

There has been significant scholarship of the import of *Shea* in arbitration setting clauses. In *Accomazzo v. CEDU Educational Services, Inc.*,¹¹⁰ the minor's parents enrolled him in three programs for juveniles with emotional, behavioral, and academic problems. Upon entering each program, the minor's father signed a participant contract, which contained an arbitration provision that required all disputes arising from the agreement to be submitted to binding arbitration.¹¹¹ The minor was later injured in a physical confrontation with a counselor from the program. As a result, the minor's parents filed claims of battery, negligence, and violation of state laws protecting children.¹¹² The school moved to stay litigation as a result of the contracts that bound the parties to arbitration.¹¹³ That motion was denied by the district court as to the minor's claims against the defendants. Affirming the district court's ruling, the Supreme Court of Idaho ruled that the arbitration clause was not binding on the minor as a result of the language used in the contract.¹¹⁴

In *Troshak v. Terminix International Co.*,¹¹⁵ the homeowner's minor child was rendered unconscious as a result of the toxic fumes produced by a pesticide treatment performed by Terminix in the family home. Prior to performance of Terminix's services, the minor's father signed the "Termite Service Plan," containing the terms and conditions under which Terminix was to provide the termite-control services.¹¹⁶ Despite the terms requiring arbitration, the minor's parents filed a civil action against Terminix seeking damages for personal injury and property damage. The company removed the case to federal court based on diversity and moved to stay litigation pending arbitration due to the fact that the minor's father had agreed to arbitrate any controversies arising under the company's service agreement.¹¹⁷ The district court determined that the minor's parents were bound by the arbitration agreement; however the question remained whether the agreement was binding on the minor.¹¹⁸

Due to the void of Pennsylvania precedent, the federal district court needed to determine how the Supreme Court of Pennsylvania would rule

110. 15 P.3d 1153 (Idaho 2000).

111. *Id.* at 1155.

112. *Id.*

113. *Id.*

114. *Id.* at 1156.

115. No. CIV.A.98-1727, 1998 WL 401693 (E.D. Pa. July 2, 1998).

116. *Id.* at *2.

117. *Id.* at *1.

118. *Id.* at *3-4.

on such a matter if brought before it.¹¹⁹ As such, the court turned to applicable federal cases that held parents could not waive the legal claims of their children simply because of the parental relationship. Thus, the court found that a child could not be bound by his parents' agreement to arbitrate.¹²⁰ The court stated,

If a parent cannot prospectively release the potential claims of a minor child, then a parent does not have authority to bind a minor child to an arbitration provision that requires the minor to waive their right to have potential claims for personal injury filed in a court of law.¹²¹

In *Fleetwood Enterprises v. Gaskamp*,¹²² the parents of a sick child filed suit against Fleetwood Enterprises on behalf of themselves and their children alleging personal injury resulting from exposure to formaldehyde in the family's mobile home. The district court compelled arbitration, and, on appeal, the Gaskamps argued that the arbitration provision was procedurally unconscionable.¹²³ The court of appeals did not agree and held that the parties were required to arbitrate.¹²⁴ However, because the children were not signatories or third-party beneficiaries of the contract, the minor children could not be forced to arbitrate.¹²⁵

In *Lantz v. Iron Horse Saloon*,¹²⁶ the Fifth District Court of Appeal of Florida upheld the lower court's issuance of a motion to dismiss where a minor's guardian had waived liability so the child could ride a bike on the Iron Horse premises. The decision was not based on whether the guardian had the authority to execute the preinjury release on behalf of the minor, but instead on the language used in the release to clearly and unequivocally relieve Iron Horse from liability.¹²⁷

In *Gonzalez v. City of Coral Gables*,¹²⁸ the Third District Court of Appeal upheld the entry of summary judgment against a mother who signed a release for her minor child to participate in the Coral Gables Fire Rescue Explorer Program. The court found the "explorer program falls within the category of commonplace child oriented community or school supported activities for which a parent or guardian may waive his

119. *Id.* at *4.

120. *Id.* at *5.

121. *Id.*

122. 280 F.3d 1069 (5th Cir.), *modified*, 303 F.3d 570 (5th Cir. 2002).

123. *Id.* at 1070–71.

124. *See id.* at 1077.

125. *Id.*

126. 717 So. 2d 590 (Fla. Dist. Ct. App. 1998), *abrogated by* *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

127. *See id.* at 591–92.

128. 871 So. 2d 1067 (Fla. Dist. Ct. App. 2004).

or her child's litigation rights in authorizing the child's participation."¹²⁹ The Third District has also held releases for school-supported activities to be enforceable, where a parent waived liability on behalf of a minor participating on a high school cheerleading squad.¹³⁰

Examining a preinjury release in a commercial context, the Fifth District Court of Appeal concluded in *Applegate v. Cable Water Ski*¹³¹ that a parent's execution of a preinjury release did not prevent a child from suing after becoming injured while wakeboarding at a camp. The appellate court expressly limited its decision to commercial enterprises because for-profit companies have the financial resources to insure against the risk of loss and include the price of insurance in the cost associated with participating in the activity giving rise to the injury.¹³²

The courts have shown similar distaste for honoring preinjury parental waivers as they have in evaluating an adult's ability to bring suit after signing a release. For example, the Second District Court of Appeal considered the enforceability of an exculpatory clause within a preinjury release in *Murphy v. YMCA of Lake Wales*.¹³³ When Elizabeth Murphy became a member of the YMCA, she signed a waiver that included the following language:

I am an adult over 18 years of age and wish to participate in Lake Wales Family YMCA activities. In addition . . . I understand that even when every reasonable precaution is taken, accidents can sometimes still happen. . . . I understand that this release includes any claims based on negligence, action or inaction of the Lake Wales Family YMCA¹³⁴

After becoming injured while using the exercise equipment at the YMCA, Murphy brought suit alleging negligent failure to maintain, inspect, and repair the exercise equipment.¹³⁵

The trial court entered summary judgment in favor of YMCA, stating that "[w]ith some concern, the Court finds the Waiver is clear and unequivocal."¹³⁶ Noting that "[e]xculpatory clauses are disfavored and

129. *Id.* at 1067 (citing *Shea v. Global Travel Mktg., Inc.*, 870 So. 2d 20, 25 (Fla. Dist. Ct. App. 2003), *quashed*, 908 So. 2d 392 (Fla. 2005)).

130. *See Krathen v. Sch. Bd. of Monroe County*, 972 So. 2d 887, 889–90 (Fla. Dist. Ct. App. 2007).

131. 974 So. 2d 1112, 1113–14 (Fla. Dist. Ct. App. 2008).

132. *Id.* at 1115.

133. 974 So. 2d 565 (Fla. Dist. Ct. App. 2008).

134. *Id.* at 566.

135. *Id.* at 566–67.

136. *Id.* at 567(alteration in original) (internal quotation marks omitted) ("The trial court expressed some concern over the 'reasonable precaution' language in the waiver: 'I kind of think it is a little misleading when it reads: 'I understand that even when every reasonable precaution is taken, accidents can sometimes [still] happen.''" (alteration in original)).

will be strictly construed against the party claiming to be relieved of liability,"¹³⁷ the court reversed the lower court's grant of summary judgment and held that the "reasonable reader might be led to believe that the waiver of liability extends only to claims for injuries that were unavoidable 'even when every reasonable precaution' had been taken by the YMCA."¹³⁸ It follows that the court's aversion for exculpatory agreements equally applies in the context of preinjury waivers signed on behalf of children.

Federal courts in Florida have also opined on the issue. In *In re Complaint of Royal Caribbean Cruises Ltd.*, the District Court for the Southern District of Florida held a preinjury release unenforceable where it was signed by a father for his minor child, and the minor was later injured on a jet ski at Royal Caribbean's private island in the Bahamas.¹³⁹ Relying upon *Shea*, the court held the release unenforceable as it was "signed on behalf of a minor child for an activity run by a for-profit business, outside of a school or community setting."¹⁴⁰ On the same fact pattern, a different federal district judge relied upon *Gonzalez* and cases from Massachusetts,¹⁴¹ California,¹⁴² and Ohio¹⁴³ to reach a distinction between parental preinjury releases involving activities relating to a school, community, or volunteer-run event and those relating to private, for-profit activities.¹⁴⁴ "Generally, parental pre-injury releases are upheld when they involve activities related to school, volunteer, or community events but are invalidated when they involve activities related to private for-profit activities."¹⁴⁵

Despite recent opinions that have not bound minors to arbitration, other courts require the minor to seek redress before an arbitral panel to ensure redress of inequitable outcomes. There is a clear distinction between parents waving the rights of minors in the arbitration context and parents waiving the rights of minors to seek redress in a court of law. By providing a spectrum of everything in between the two

137. *Id.* at 567–68 (citing *Theis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. Dist. Ct. App. 1990) and *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. Dist. Ct. App. 1991)).

138. *Id.* at 568; *see also* *Goyings v. Jack & Ruth Eckerd Found.*, 403 So. 2d 1144, 1145–46 (Fla. Dist. Ct. App. 1981) (noting that genuine issues of fact existed where the language of the exculpatory agreement "did not explicitly state that the [defendant] would be absolved from liability for injuries resulting from its negligence").

139. 403 F. Supp. 2d 1168, 1173 (S.D. Fla. 2005).

140. *Id.*

141. *Sharon v. City of Newton*, 769 N.E.2d 738 (Mass. 2002).

142. *Hohe v. San Diego Unified Sch. Dist.*, 224 Cal. App. 3d 1559 (Ct. App. 1990).

143. *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998).

144. *See In re Complaint of Royal Caribbean Cruises Ltd.*, 459 F. Supp. 2d 1275, 1279–80 (S.D. Fla. 2006).

145. *Id.* at 1279.

extremes, the courts provide a means for everyone to find a happy medium. Today there remains a clear split within some judicial circuits as to the enforceability of parents' preinjury agreement to submit claims of arbitration before seeking judicial redress.¹⁴⁶

VI. THE IMPLICATIONS OF *KIRTON* IN FLORIDA AND ACROSS THE COUNTRY

The Florida Supreme Court's opinion in *Kirton* reveals a subtle suspicion of deference to parental discretion in light of public policy. However, as the court reiterated seventy years ago, "[p]ublic policy is the cornerstone—the foundation—of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them."¹⁴⁷ After all, the primary purpose of public policy is justice.¹⁴⁸ Courts across the country have underscored the injustice that can result to children who are victimized twice: first by the actions of a tortfeasor, and second by their inability to recover damages because their parents, without the informed advice of the child, have waived the child's day in court.¹⁴⁹ Based on the very nature of the American tort system,¹⁵⁰ a parent's absolute waiver of a potential suit against a commercial entity, or any party for that matter, greatly diminishes the potential risk to the enterprise.¹⁵¹

State courts across the nation have examined the validity of preinjury releases executed by parents and guardians on behalf of minors. They have found a clear distinction between releases covering school-run, community-sponsored activities and releases covering for-profit activities. For example, in *Sharon v. City of Newton*, a sixteen-year-old was injured while participating in cheerleading practice at a public high school.¹⁵² Three months before the injury, her father had signed a release waiving the school's liability for any damages relating

146. See, e.g., *Costanza v. Allstate Ins. Co.*, No. CIV.A.02-1492, 2002 WL 31528447 (E.D. La. Nov. 12, 2002). In *Costanza*, parents brought negligence claims against various businesses allegedly as a result of injuries their children sustained when water leaked into their home. Of the many parties against whom the Costanzas filed suit, two of the defendants moved to compel arbitration because of an arbitration agreement that the parents had voluntarily signed. The parents relied on *Fleetwood Enterprises v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002), arguing that their children should not be bound by the signed arbitration clause because they were not third-party beneficiaries or signatories. *Costanza*, 2002 WL 31528447, at *6.

147. *City of Leesburg v. Ware*, 153 So. 87, 89–90 (Fla. 1934).

148. *Id.* at 89.

149. See, e.g., *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1234–36 (Colo. 2002) (en banc), superseded by statute, COLO. REV. STAT. § 13-22-107 (2003).

150. See *supra* Part III.A.

151. See *supra* Part II.

152. *Sharon v. City of Newton*, 769 N.E.2d 738, 741 (Mass. 2002).

to the daughter's participation in the school's athletic programs.¹⁵³ Upon reaching the age of majority, the cheerleader filed suit against the city for negligence and negligent hiring and retention of the cheerleading coach.¹⁵⁴ The trial court granted the city's motion for summary judgment, noting that "[a] contrary ruling would detrimentally chill a school's ability to offer voluntary athletic and other extracurricular programs."¹⁵⁵

The Supreme Judicial Court of Massachusetts first noted that "[a] party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence."¹⁵⁶ Second, while most contracts signed with a minor are voidable at the age of majority, the father here

made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts.¹⁵⁷

Finally, the court held that requiring releases as a condition of voluntary participation in extracurricular sports activities is consistent with the public policy of encouraging athletic programs for the state's youth.¹⁵⁸ Further, holding such releases unenforceable might lead to financial costs and risks that could reduce extracurricular activities.¹⁵⁹

In *Hohe v. San Diego Unified School District*, fifteen-year-old Sara Hohe was injured during a hypnotism show sponsored by the Parent, Teacher and Student Association ("PTSA") of the local, public high school.¹⁶⁰ Prior to participating in the show, Hohe and her father both signed two waivers, releasing the PTSA, high school, school district, and hypnotist from any liability.¹⁶¹ The trial court held that the releases barred the action. The appellate court began by addressing the policy concerns, finding that "[n]o public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other

153. *See id.*

154. *Id.*

155. *Id.* at 741-42 (alteration in original) (internal quotation marks omitted).

156. *Id.* at 744.

157. *Id.* at 746-47.

158. *Id.* at 747-48.

159. *See id.* at 747.

160. *Hohe v. San Diego Unified Sch. Dist.*, 224 Cal. App. 3d 1559, 1562 (Ct. App. 1990).

161. *Id.* at 1563.

party.”¹⁶² The court then noted the thousands of recreational activities in which volunteers are asked to give up their right to bring suit so that groups like the Boy and Girl Scouts, Little League, and parent-teacher associations can operate without the risks and overwhelming costs of litigation. Ultimately, the appellate court reversed the lower court’s grant of summary judgment because the scope of the release was ambiguous and failed to alert the parent that the child would be barred from recovery based on bodily injury.¹⁶³ This is the same result as predicated in cases involving exculpatory agreements.

In *Zivich v. Mentor Soccer Club*, a mother signed a release covering her seven-year-old’s participation in a nonprofit organization that provided children with the opportunity to learn and play soccer.¹⁶⁴ Basing its decision on the fact that “invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations,” the court recognized the benefits received by the public from such releases for school-sponsored and volunteer activities.¹⁶⁵ The court held against “disturb[ing]” the mother’s judgment to sign the release because she wanted her son to play soccer and made an important family decision to assume the risk of the cost of physical injury inflicted upon her son.¹⁶⁶

In *Kirton v. Fields*, the Florida Supreme Court acknowledged that while parents have a fundamental right to make decisions about the care and upbringing of their children, there are wider public policy concerns involved in governing a parent’s ability to wholly waive her minor’s property interest in obtaining damages for resulting torts.¹⁶⁷ The court held against assuming that a parent who voluntarily waives risks on behalf of a minor child’s physical well-being has acted in the child’s best interest:

When a parent executes such a release and a child is injured, the provider of the activity escapes liability while the parent is left to deal with the financial burden of an injured child. If the parent cannot afford to bear that burden, the parties who suffer are the child, other family members, and the people of the State who will be called on to bear that financial burden.¹⁶⁸

Therefore, upholding exculpatory agreements does not ensure the wel-

162. *Id.* (internal quotation marks omitted).

163. *Id.* at 1567–68.

164. *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 202–03 (Ohio 1998).

165. *Id.* at 205.

166. *Id.* at 207.

167. *See Kirton v. Fields*, 997 So. 2d 349, 352–54 (Fla. 2008).

168. *Id.* at 357.

fare of the child, but instead protects the interests of the activity provider.

The Utah Supreme Court faced a scenario factually similar to *Kirton v. Fields* in 2001. In July 1997, eleven-year-old Jessica Hawkins went to Duck Creek, Utah, for a family reunion.¹⁶⁹ During the reunion, members of the family arranged for Navajo Trails (defendant Peart) to provide horses and guides for a trail ride.¹⁷⁰ Prior to the ride, Navajo Trails required Jessica's mother to sign a "Release Form" that provided in relevant part:

Riding and handling horses can be DANGEROUS. This form must be completed and signed before you can ride By signing this form, you agree to ASSUME THE RISK of any injury, death, or loss, or damage which you or your child . . . may suffer In consideration for the rendering of trail riding . . . service by Navajo Trails . . . [t]he undersigned on behalf of himself or for any person for whom he or she is a parent or legal guardian, does hereby indemnify (reimburse), release, and forever hold harmless, Navajo Trails . . . [for] any claims, demands, and actions or causes of action on account of death or injury or loss or damage which may occur from any cause, without regard to negligence, other than the gross negligence or willful misconduct of Navajo Trails If the undersigned is a parent or guardian, he or she further agrees to indemnify (reimburse) Navajo Trails or such persons for any damages paid by or assessed against Navajo Trails . . . as a result of injury to or death of a child¹⁷¹

The mother read the contract and signed the form.¹⁷² While on trail ride, Hawkins's horse became spooked and threw her off its back, causing Hawkins to become injured.¹⁷³ She brought suit against Navajo Trails claiming that the company failed to provide a sufficient number of guides, that the guides were not properly trained, and that the guides on duty did not fulfill their duties.¹⁷⁴ The company denied the negligence claims and cited the "Release Form" as a bar to Hawkins's suit.¹⁷⁵ There would be far less of an incentive for businesses to protect the safety of minor children if preinjury releases were legally recognized for commercial activity providers. The court thereby concluded that parental preinjury waivers must be held unenforceable against for-profit business entities.¹⁷⁶

169. *Hawkins v. Peart*, 37 P.3d 1062, 1063 (Utah 2001).

170. *Id.*

171. *Id.* (alterations in original).

172. *Id.*

173. *Id.*

174. *Id.* at 1063–64.

175. *Id.* at 1064.

176. *Id.* at 1066.

In sum, the tenuous split in the emerging jurisprudence hinges on a careful balancing of *parens patriae* with the inherent rights owed to parents. Weighing carefully on this equilibrium is the future of risk management to corporations engaged in business operations that cater to young children. While a parent's unique relationship with her child must be recognized as it relates to the ability to gauge the perils awaiting her child,¹⁷⁷ parents may not fully understand the consequences of signing exculpatory contracts or agreeing to arbitrate a potential dispute.¹⁷⁸ A parent's signature on such a contract is at odds with the paternal protections owed to the child.¹⁷⁹ The state's role as *parens patriae* is not only a means to shield children from a potentially misguided or poorly informed parents, but also serves as a lasting reminder of the enormous potential that enterprise risk management invokes on a corporation's ability to continue in existence.

VII. THE FALLACY OF PREINJURY WAIVERS IN THE WAKE OF *KIRTON V. FIELDS*

Following *Kirton v. Fields*, are preinjury releases still enforceable under Florida law? The court has left the door to this question wide open to await further inquiry.¹⁸⁰ A waiver is enforceable if its language is clear and comports with public policy, or if the participant knowingly and voluntarily surrenders her right against suit.¹⁸¹ Courts have considered the enforceability of waivers covering sports players on many occasions, particularly in high-risk situations.¹⁸² Courts have generally been reluctant to enforce contracts intended to exculpate a party from liability for his or her own negligence.¹⁸³ Such contracts are closely scrutinized

177. See *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1234 (Colo. 2002) (en banc), *superseded by statute*, COLO. REV. STAT. § 13-22-107 (2003).

178. Gerber, *supra* note 104, at 183.

179. *Cooper*, 48 P.3d at 1237.

180. See *Kirton v. Fields*, 997 So. 2d at 361–62 (Pariente, J., concurring).

Finally, I write to emphasize that this Court limits its decision to activities provided by commercial establishments because those were the facts presented by this case. However, I do not agree with the reasoning of those cases cited by the majority that have found that all releases from liability for noncommercial activities are automatically valid. To me there is an important distinction between a release to allow a child to participate in school activities, such as cheerleading or football, which could be considered inherently dangerous, and a blanket release that absolves the sponsor of liability from all negligent acts. As with commercial activities, when a parent allows his or her child to participate in an inherently dangerous noncommercial activity, his or her acceptance does not contemplate that the activity provider will act negligently.

Id.

181. See *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813, 822 (Ct. App. 1996).

182. See, e.g., *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 11 (Wash. 1992) (en banc).

183. *Turnbough v. Ladner*, 754 So. 2d 467, 469 (Miss. 1999).

and are rarely upheld except in rare instances where the intention of the parties is clearly and unambiguously expressed in the language of the waiver.¹⁸⁴ To determine the intent of the parties, courts look to the four corners of the instrument.¹⁸⁵ Oddly, however, it is not necessary that the party actually have read the waiver prior to signing it.¹⁸⁶

Although courts are relatively likely to enforce waivers signed by adults that relinquish the individual's ability to bring suit, jurists are much more hesitant to honor waivers signed by parents on behalf of their minor children.¹⁸⁷ In the latter instance, courts are split on the outcome.¹⁸⁸ For example, in *Simmons v. Parkette National Gymnastic Training Center*, a mother signed a preinjury waiver waiving any claims that she or her minor daughter could make against a gym.¹⁸⁹ The District Court for the Eastern District of Pennsylvania held that the mother's cause of action was barred by the exculpatory agreement but simultaneously found the contract voidable as against the minor.¹⁹⁰ Similarly, in *Apicella v. Valley Forge Military Academy and Junior College*, the court held that an agreement signed by parents releasing a military school "from all claims and damages arising from or related to or in any way connected with their son Jerry's hemophilic condition"¹⁹¹ only released the defendant school for liability against potential claims that the parents might assert but did not bar suit by the minor son.¹⁹² Finally, as noted above, in *Kirton*, the Florida Supreme Court clearly held unenforceable preinjury releases signed by a parent on behalf of a minor in the for-profit commercial setting.¹⁹³

If preinjury releases are unenforceable, will we continue to see, and be forced to sign, such waivers? In the path of *Kirton v. Fields*, the act of a parent signing a preinjury waiver on behalf of a child no longer serves a clear purpose. The question thus becomes more focused as to whether there are exceptions when a preinjury waiver signed by a parent on

184. *Id.*

185. *United States v. Seckinger*, 397 U.S. 203, 210-11 (1970).

186. *See Dixon v. Manier*, 545 S.W.2d 948, 949 (Tenn. Ct. App. 1976) (upholding exculpatory contract where patron failed to review waiver prior to signing because she did not have her reading glasses when she signed the waiver).

187. *See, e.g., Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F. Supp. 140 (E.D. Pa. 1987).

188. *See id.*; *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 10 (Wash. 1992) (en banc).

189. *Simmons*, 670 F. Supp. at 141.

190. *Id.* at 142 ("Where a minor executes a contract, however, the agreement is not void, but rather, voidable." (citing RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981) (internal quotation marks omitted))).

191. *Apicella v. Valley Forge Military Acad. & Junior Coll.*, 630 F. Supp. 20, 22 (E.D. Pa. 1985).

192. *Id.* at 24.

193. *Kirton v. Fields*, 997 So. 2d 349, 358 (Fla. 2008).

behalf of a minor is enforceable. In *Kirton*, the court began its opinion with the second footnote stating, "Our decision in this case should not be read as limiting our reasoning only to pre-injury releases involving commercial activity; however, any discussion on pre-injury releases in non-commercial activities would be dicta" ¹⁹⁴ At the same time, the court forecasted the adverse effects if the opinion were applied to non-commercial settings. ¹⁹⁵ Throughout the ten-page majority opinion, the court referred to the terms *business* or *commercial* entities twenty-three times, while not once suggesting that the outcome be applied to community-oriented or school-sponsored activities. ¹⁹⁶ The looming query remains how this opinion will adversely impact community organizations, volunteers, and charities. ¹⁹⁷

Professor Joseph H. King, Jr. notes, "The United States is burdened by an unimaginable debt. It is unthinkable that we could afford to pay for the services currently provided by volunteers. More than 85 million Americans engage in volunteer activities." ¹⁹⁸ They spend an average of five hours per week, collectively, 16.5 total billion hours annually, valued at \$110 billion per year. ¹⁹⁹ When considering that nonprofit entities generally have little to no assets, the relatively deeper pockets lie with the volunteers. If *Kirton* is extended to school-related or community-sponsored activities, America risks losing this indispensable outlet for services that the country would not otherwise be able to afford.

Since the recent shift in Florida law, where parents are no longer able to sign preinjury waivers allowing their minor children to participate in commercial activities, businesses across the state have become weary of exposure to total liability. Even businesses whose customer

194. *Id.* at 350 n.2.

195. *See id.* at 357 ("If pre-injury releases were invalidated, these volunteers would be faced with the threat of lawsuits and the potential for substantial damage awards, which could lead volunteers to decide that the risk is not worth the effort.").

196. *See, e.g., id.* at 358 ("Business owners owe their patrons a duty of reasonable care and to maintain a safe environment for the activity they provide.").

197. *See id.* at 363 (Wells, J., dissenting).

Bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances will not know whether they are a commercial activity because of the fees and ticket sales. How can these groups carry on their activities that are so needed by youth if the groups face exposure to large damage claims either by paying defense costs or damages? Insuring against such claims is not a realistic answer for many activity providers because insurance costs deplete already very scarce resources. The majority's decision seems just as likely to force small-scale activity providers out of business as it is to encourage such providers to obtain insurance coverage.

Id.

198. Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf®" Tiddlywinks*, 53 OHIO ST. L.J. 683, 686 (1992) (footnotes omitted).

199. *Id.* at 686 & n.4.

base is comprised mostly of adults have wheezed at the potential legal implications affecting their patrons. These companies also cater to the children in accompanying their parents. According to a March 2009 *Orlando Sentinel* article, central Florida theme parks, activity providers, the Florida Restaurant and Lodging Association—including SeaWorld, Disney World, and Gatorland—have joined the bandwagon to urge state lawmakers to overturn *Kirton v. Fields* and are supporting two bills currently before the Florida legislature.²⁰⁰ House Bill 363 and Senate Bill 886 seek to revise Section 744.301 of the Florida Statutes to allow natural guardians or parents to waive and release, in advance, any claim or cause of action that would accrue to minor children to the same extent as any adult. However, the state's trial lawyers argue that the measure is overbroad and could lead to protecting truly negligent recreational businesses that threaten the safety of children across the State of Florida.²⁰¹

Florida's economy relies heavily on tourism and related industry. Businesses throughout the state, including companies that offer water-scooter rentals, snorkeling tours, and sky diving tours through the Everglades, all depend on the availability of preinjury waivers to absolve litigation brought by patrons. These releases have far-reaching implications, as they may ultimately dovetail Florida's tourism-driven economy. For example, in 2004 alone, Florida received over 76.8 million visitors amounting to \$57 billion in revenue.²⁰² Companies that cater to tourism in Florida claim that they can only roll out the welcome mat to the state's doorstep if the Florida legislature were to overturn the Florida Supreme Court's decision. As this article goes to print, the Florida legislature is currently debating a measure that would enable businesses to shield against liability by using preinjury waivers.²⁰³ Not surprisingly, the state senator who introduced the bill represents a district that is in close physical and economic proximity to Central Florida's tourism haven.²⁰⁴

If left unaltered by the Florida legislature, *Kirton* will have several long-lasting impacts on the manner in which corporations, both in and out of the state, anticipate risks that were previously immunized by exculpatory agreements. First, corporate risk management offices must

200. Jason Garcia, *Parks: Let Parents Say What's Safe*, ORLANDO SENTINEL, Mar. 18, 2009, at A1; Traci T. McKee, *When a Clear and Unambiguous Pre-injury Release is Nonetheless Unenforceable: The Effect and Implications of the Florida Supreme Court's Decision in Kirton v. Fields*, 28 No. 2 TRIAL ADVOC. Q. 6, 10 (2009).

201. Garcia, *supra* note 200.

202. State of Florida.com, Florida Quick Facts, <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95> (last visited Feb. 16, 2010).

203. See S. 2440, 112th Leg., Reg. Sess. (Fla. 2010).

204. See The Florida Senate, <http://www.flsenate.gov/Legislators/> (follow "Michael S. 'Mike' Bennett" hyperlink) (last visited Mar. 28, 2010).

undertake a careful analysis of the consequences exposed by the invalidation of parental waivers.²⁰⁵ Second, corporations will likely need to carry additional insurance to cover lawsuits by minors, which are now unleashed by the blanket voidance of certain preinjury waivers.²⁰⁶ This in turn will lead to the eventual rise in prices charged to customers, as businesses receive the bills from the insurance contracts. In the end, the consumer will face a higher cost to engage in certain activities as a result of the delicate balancing between the state's role as *parens patriae* and the parent's right to assess the perils awaiting her child.

VIII. CONCLUDING REMARKS

The Florida Supreme Court's opinion in *Kirton v. Fields* dramatically overhauls the enforceability of preinjury waivers signed by parents on behalf of their minor children. This case departs from existing statutory law by holding commercial entities legally responsible for child patrons, even in the presence of preinjury waivers signed by the minor's parent. Indeed, *Kirton* places responsibilities on businesses across Florida, noting they are best apt to gauge potential hazards, liabilities, and insulate risk by obtaining adequate insurance coverage to cover resulting litigation and damages.

Despite an overt attempt against limiting *Kirton* to for-profit commercial entities, the language, albeit in dicta, of the majority's ruling appears to render exculpatory contracts unenforceable against community-sponsored and school-related volunteers. The court recognized that the true victims of enforceable preinjury waivers are the children themselves, the state, and family members, all of whom are generally left financially vulnerable to provide for the injured minor. While settling the legality involved in preinjury waivers, the opinion raises more questions than answers. Indeed, *Kirton* has rattled the skeletons fast asleep in the closets of community-sponsored and school-related activity providers. We are still left staring at the 500-pound elephant in the middle of the room, namely the potential for suit by volunteers even after the parents of the minors signed preinjury waivers.

The future is still uncertain as parties join the intense battle to

205. See Dyer, *supra* note 35, at 494.

First, the entity seeking to manage its risk must determine which of its activities create a potential for loss or exposure to liability. Once the entity determines which activities create potential losses, it must calculate the potential amount of loss. The potential amount is not simply the total amount the entity stands to lose. Rather, it is the total potential loss multiplied by the percentage chance that the loss will occur.

Id. (footnotes omitted).

206. See generally Marc R. Stanley, *When Bad Companies Happen to Good People*, 56 *DRAKE L. REV.* 517 (2008).

change *Kirton*. When the final spike is served across the net, the Florida Supreme Court may yet to have the last word on a parent's ability to weigh and relinquish the property rights of her children. In 1533, Martin Luther warned of the import of good corporate citizenship: "Everyone should conduct his trade, craft and business in such a way that he overcharges no one, cheats no one with false wares, is satisfied with a fair profit, and gives people something worthwhile for their penny."²⁰⁷ Nearly 500 years later, the penny paid for another's trade will likely go toward insurance against future litigation.

207. *Id.* at 517–18 (internal quotation marks omitted).