

MAY 4, 2010

LAW ALERT

Section 744.301, Florida Statutes

The Enforceability of Pre-Injury Releases Executed by Parents on Behalf of Minors.

If you have questions or would like additional information on the material covered in this Law Alert, please contact the Managing Partner.

Daniel J. Santaniello
Managing Partner
954.847.2911
DJS@LS-LAW.COM

Doreen E. Lasch
Associate
954.761.9900
DLASCH@LS-LAW.COM

LAW ALERT
Section 744.301,
Florida Statutes
MAY 4, 2010
LS-LAW.COM

The Florida legislature enacted a substantial amendment to Section 744.301, Florida Statutes on April 24, 2010. This new legislation reverses the *Kirton* decision which held that parents and guardians cannot execute enforceable pre-injury releases on behalf of minors in commercial activities. The new law now allows parents and natural guardians to effectively execute pre-injury releases for their minor children, but only for those dangers inherent in the activity. The decision does not apply retroactively. The statute does not shield commercial owners and operators from injury caused by **their own negligence**. Underwriting may advise insureds of the new law so that their release language complies with the new Act.

As you may recall, in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008), the Supreme Court held that a pre-injury release executed by a parent on behalf of a minor child is unenforceable against the minor or the minor's estate in a tort action arising from injuries resulting from participation in a commercial activity. In *Kirton*, the minor child was killed in an accident while operating his ATV at a motor sports park. The Court also held that a parent's authority to execute a pre-injury release on behalf of a minor child does not fall within the purview of Florida Statute 744.301(2). The *Kirton* court stated that Section 744.301 applies to situations where a minor child already has a cause of action against another party whereas a pre-injury release is executed before any cause of action accrues and extinguishes any possible cause of action.

Assistance or Inquiries:

CLIENT RELATIONS

T: 954.847.2959

E: MDONNELLY@LS-LAW.COM

PRACTICE AREAS

Appellate Practice

General Liability

Vehicular Liability

Trucking Liability

Premises Liability

Negligent Security

Wrongful Death

Construction Litigation

Roadway Design and Traffic Control

Chinese Drywall and Mass Tort Defense

Product Liability

Boating Liability & Maritime

Insurance Law & Coverage

Labor & Employment Law

Collection & Creditor's Rights

Federal practice

Professional Liability

Environmental Law, Mold and Toxic Tort

Commercial Litigation

Workers' Compensation

Medicare Set-Aside Services & MSP Section III Reporting

The new law amends Florida Statute 744.301 by creating a new subsection (3) which authorizes natural guardians on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a **commercial activity provider**, which would accrue to the minor child for personal injury, including death, resulting from an **inherent risk** in the activity.

“Inherent risk” is defined in the statute as “those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are not eliminated even if the activity provider acts with due care in a reasonably prudent manner. The term includes failure by the activity provider to warn of an inherent risk, and the risk that the minor child or another participant in the activity may act in a negligent or intentional manner and contribute to the injury or death of the minor child. **A participant does not include the activity provider or its owners, affiliates, employees, or agents.** Thus, the statute does not authorize a natural guardian to execute a pre-injury release on behalf of a minor that will release the activity provider from injury caused by its own negligence.

The statute states that to be enforceable, a waiver or release under this subsection must include the following statement in “uppercase type that is at least 5 points larger than, and clearly distinguishable from” the rest of the text of the waiver or release.¹ It must be noted that the statute mandates that the size and type of the printing as well as the language set forth in the statute are minimum requirements for the waiver or release to be enforceable. However, if the notice in the waiver or release does conform to the requirements and if it waives no more than allowed under the subsection, there is a rebuttable presumption that the waiver or release is valid **and** that any injury or damage to the minor child **arose from the inherent risk involved in the activity.**

The statute goes on to state that to rebut the presumption of a valid waiver or release, a claimant must demonstrate **by a preponderance of the evidence** that the waiver release does not comply with this subsection. Moreover, to rebut the presumption that the injury to the minor child arose from a risk inherent in the activity, a claimant must demonstrate **by clear and convincing evidence** that the conduct, condition, or other cause resulting in the injury or damage was not an inherent risk of the activity.

If you have questions or would like additional information on the material covered in this Law Alert, please contact the Managing Partner.

Daniel J. Santaniello
Managing Partner
954.847.2911
DJS@LS-LAW.COM

Doreen E. Lasch
Associate
954.761.9900
DLASCH@LS-LAW.COM

LAW ALERT
Section 744.301,
Florida Statutes
MAY 4, 2010
LS-LAW.COM

1 NOTICE TO THE MINOR CHILD'S NATURAL GUARDIAN

READ THIS FORM COMPLETELY AND CAREFULLY. YOU ARE AGREEING TO LET YOUR MINOR CHILD ENGAGE IN A POTENTIALLY DANGEROUS ACTIVITY. YOU ARE AGREEING THAT, EVEN IF (name of released party or parties) USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED OR KILLED BY PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR RIGHT TO RECOVER FROM (name of released party or parties) IN A LAWSUIT FOR ANY PERSONAL INJURY, INCLUDING DEATH, TO YOUR CHILD OR ANY PROPERTY DAMAGE THAT RESULTS FROM THE RISKS THAT ARE A NATURAL PART OF THE ACTIVITY. YOU HAVE THE RIGHT TO REFUSE TO SIGN THIS FORM, AND (name of released party or parties) HAS THE RIGHT TO REFUSE TO LET YOUR CHILD PARTICIPATE IF YOU DO NOT SIGN THIS FORM.

This Law Alert is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

"AV® Preeminent™ and BV® Distinguished™ are certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies."

LS LUKS, SANTANIELLO PEREZ, PETRILLO, GOLD & JONES

Assistance or Inquiries:

CLIENT RELATIONS

T: 954.847.2959

E: MDONNELLY@LS-LAW.COM

PRACTICE AREAS

Appellate Practice

General Liability

Vehicular Liability

Trucking Liability

Premises Liability

Negligent Security

Wrongful Death

Construction Litigation

Roadway Design and Traffic Control

Chinese Drywall and Mass Tort Defense

Product Liability

Boating Liability & Maritime

Insurance Law & Coverage

Labor and Employment Law

Collection and Creditor's Rights

Federal practice

Professional Liability

Environmental Law, Mold and Toxic Tort

Commercial Litigation

Workers' Compensation

Medicare Set-Aside Services & MSP Section III Reporting

About Luks, Santaniello, Perez, Petrillo, Gold & Jones

Luks, Santaniello is a Florida AV® Preeminent™ Rated, Corporate & Insurance Defense Litigation firm handling Liability (most lines- A/GL, A&E, BAP, CGL, D&O, E&O, E&S, P&C, PL, PLL, JUA, XS and EC) and Workers' Compensation matters. The firm was ranked a Top 50 Florida firm by the Daily Business Review and named a "Go-To Law Firm" (09/08) for Fortune 500 Companies Litigation matters by Incisive Media. The Daily Business Review selected Luks, Santaniello as finalists for the Most Effective Lawyers in 2007. Partner Shareholders average **20 years** of trial litigation experience. The firm has a diversified team of 40 Insurance Defense Litigation attorneys with offices in Fort Lauderdale, Palm Beach, Orlando, Tampa, Jacksonville and Tallahassee.

About The Authors



T: 954.847.2911
E: DJS@LS-LAW.COM

DANIEL J. SANTANIELLO

Dan is a Founding Partner and Managing Partner of the firm with 21 years of trial litigation experience. He is rated AV® Preeminent™ by Martindale-Hubbell and **Board Certified** in Civil Trial by The Florida Bar. Daniel is a **summa cum laude** graduate of Nova Southeastern University (Ranked 3rd, 1990). More recently, he was selected as finalist for **Most Effective Lawyer** by the Florida Daily Business Review in 2007 and appointed on the Board of Directors to the Florida Defense Lawyers Association. Daniel heads up the firm's complex and high exposure trial team. He has handled highly publicized cases in all of the firm's practice areas.



T: 954.761.9900
E: DLASCH@LS-LAW.COM

DOREEN E. LASCH, ESQ.

Doreen Lasch, Associate has 19 years of trial litigation experience and works out of the Fort Lauderdale office. She dedicates her practice to appellate, general liability, vehicular, premises, negligence, wrongful death and insurance law & coverage. Doreen is a **magna cum laude** graduate of Nova Southeastern University. She is admitted to the U.S. District Court, Southern District of Florida (1991) and the U.S. Court of Appeals, Eleventh Circuit (1991).