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Tyler White

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A “Minor” Problem with Oil and Gas Company Settlement Agreements

INTRODUCTION

Imagine being eight years old and sitting alongside your dad at your first Louisiana State University football game. The night in Tiger Stadium is off to a great start: the crowd is rambunctious, the weather is great, and the Tigers are winning. Suddenly, the night takes a turn for the worse. After another LSU touchdown, one of the players runs into the goalpost, causing it to collapse backwards into the section of seats behind the end zone. One of the beams comes crashing down onto you and your dad, causing major injuries to your legs.

Following a lengthy lawsuit, your parents enter into a settlement agreement on your behalf. While the settlement provides enough money to cover your medical expenses and necessary care going forward, the settlement benefits come with a hefty price. The agreement also includes a confidentiality agreement—one that bars you and your family from discussing any aspect of LSU football for the rest of your lives.

Football is entrenched in the culture of Southern Louisiana. It is not merely a sport for residents—it is a way of life. Imagine growing up and not being able to discuss what others talk about every day; something that you and your family have grown to love and accept as a major part of life.

In May of 2011, a similar situation occurred with two children, Nathan and Alyson Hallowich. Nathan and Alyson were nine and five years of age respectively when their parents, Chris and Stephanie Hallowich, filed a lawsuit against oil companies for damages resulting from hydraulic fracturing¹ (fracking) conducted near their property.² Upon agreement to settle, the Hallowich parents signed a settlement agreement containing a non-disclosure agreement that prohibited the Hallowich family, including Nathan and Alyson, from discussing any of the facts, elements, or contents of the case for the rest of their lives.³ Essentially, the agreement served to

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1. EPA, *Natural Gas Extraction–Hydraulic Fracturing* (Oct. 6, 2015), water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm [<https://perma.cc/ZRW7-J8GE>] (providing a general background on hydraulic fracturing).

2. *Hallowich v. Range Resources Corp.*, No. 2010-3954, 2012 WL 7992901 (Pa. Ct. Com. Pl. Apr. 2, 2012).

3. *Id.* at *2; *see also* Transcript of In-Chambers Proceeding Before the Honorable Paul Pozonsky at 4, 15, *Hallowich v. Range Res. Corp.*, 2012 WL 7992901 (Pa. Ct. Com. Pl. Apr. 2, 2012) (No. 2010-3954), [ae3b703522cf9ac6c40a-32964bea949fe02d45161cf7095bfea9.r89.cf2.rackcdn.com/2013/211/626/pg-settlement-hearing-transcript.pdf](https://perma.cc/ae3b703522cf9ac6c40a-32964bea949fe02d45161cf7095bfea9.r89.cf2.rackcdn.com/2013/211/626/pg-settlement-hearing-transcript.pdf) [<https://perma.cc/5K6X-UX34>] [hereinafter, Settlement Hearing Transcript].

prevent not only Chris and Stephanie, but also their children, from discussing fracking ever again.⁴

To put into perspective how dramatic this can be for someone in the Hallowich family's position, it is helpful to think about the area of the country in which the suit took place. Before execution of the settlement, the Hallowich family lived on a farm located on the Marcellus Shale in Mount Pleasant, Pennsylvania.⁵ The Marcellus Shale is one of the most significant fracking regions in the United States. Further, fracking plays a large role in the area's economy and living environment.⁶ Similar to football in Southern Louisiana, fracking is an important fixture in the society and culture of the Mount Pleasant, Pennsylvania region. As a result of the settlement, Nathan and Alyson have to live the remainder of their lives unable to discuss a major part of their childhood. The many encounters with fracking these children experienced as a result of living in an environment dominated by the oil industry and the resulting lawsuit cannot be spoken of or shared with anyone.

This type of agreement—one where parents settle away their children's ability to speak of a lawsuit in which they had no control—has created quite the controversy. The *Hallowich* case grabbed national attention and left many wondering how parents could be allowed to contract away their children's right to freedom of speech. Many scholars suggest that the settlement is illegal,⁷ yet they are unsure as to what exactly makes it so. Further, while still approving the settlement, the court recognized the issue; addressing the counsel for the Hallowich family it stated: "Nor does the Court have an answer for you, and I would agree with counsel that I don't know. That's a law school question, I guess."⁸

An agreement similar to that described above is unprecedented, and there is no express violation of any particular law serving as grounds to invalidate it. Nevertheless, an agreement to bargain a child's constitutional right is illegal. This Article will prove this assertion by analyzing the precepts from contract and constitutional law, along with those from public policy. Additionally, this Article will provide a solution to prevent the issues exemplified in *Hallowich* by tailoring court procedures to serve

4. *Id.*

5. Suzanne Goldenberg, *Children Given Lifelong Ban on Talking About Fracking*, THE GUARDIAN, Aug. 5, 2013, theguardian.com/environment/2013/aug/05/children-ban-talking-about-fracking?CMP=share_btn_link.

6. Alex Chamberlain, *Why the Marcellus Shale is Important for US Oil and Gas*, YAHOO FINANCE (Dec. 22, 2014), finance.yahoo.com/news/why-marcellus-shale-important-us-152716407.html [<https://perma.cc/6MZK-KU9Q>].

7. See Caitlyn Dickson, *Can You Silence a Child? Inside the Hallowich Case* (Sept. 1, 2013, 3:45 AM), thedailybeast.com/articles/2013/09/01/can-you-silence-a-child-inside-the-hallowich-case.html [<https://perma.cc/8LFF-7J3S>].

8. Settlement Hearing Transcript, *supra* note 3, at 12.

the interests of minors in settlement agreements with oil and gas companies. This Article will also advance the interests of oil and gas companies, as the proposed solution will likewise provide greater security for oil and gas companies in settlement agreements involving minors.

Part I of this Article will briefly discuss fracking operations and settlement agreements. It will then analyze *Hallowich*, which illustrates the dilemma that this Article addresses—the constitutionality of an agreement executed by parents to waive their children’s fundamental rights. Part II will discuss both public policy and statutory law as they relate to parental authority to contractually bind minor children. Part III will review three state action cases that serve as the prelude to this Article’s proposed solution concerning confidentiality clauses in settlement agreements, particularly those in fracking cases which bind minor children. Part IV will propose a solution to the issue presented by suggesting that the state and local trial courts have more authority in the enforcement process of settlement agreements between private parties and oil and gas companies to further the interests of minors involved in such agreements.

The *Hallowich* family is not the only one bound to a confidentiality agreement after agreeing to settle a civil suit with an oil and gas company.⁹ Rather, there have been cases from Pennsylvania and Wyoming, as well as from many other regions of the country where the oil industry is prevalent.¹⁰

I. THE DILEMMA

The agreement reached in the *Hallowich* suit presents a dilemma regarding whether a child’s constitutional rights be contracted away. Before addressing this dilemma, a brief background into the importance of confidentiality agreements in the oil and gas arena will be given, followed by an analysis concerning the controversial agreement involving the *Hallowich* children.

A. *Oil and Gas Settlements and the Need for Confidentiality Agreements*

Marc Bern, a prominent New York attorney, stated that in “virtually all” of the settlements he has handled where the oil and gas company paid money to the plaintiff, the company has demanded a confidentiality

9. Jim Efstathiou, Jr. & Mark Drajem, *Drillers Silence Fracking Claims with Sealed Settlements*, BLOOMBERG, June 5, 2013, bloomberg.com/news/articles/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements [<https://perma.cc/U9LS-TC38>].

10. *Id.*

agreement.¹¹ Bern believes that oil and gas companies settle because they do not want information regarding procedures and chemicals used by the fracking companies to be released to the public. Thus, these companies' willingness to settle is contingent upon the plaintiff's promise not to disclose any information about the case or the company.¹²

The majority of tort cases involving oil and gas companies result in settlements.¹³ These settlements are usually reached outside of court,¹⁴ and typically contain confidentiality clauses that prohibit the parties from discussing the contents of the settlement or details of the case.¹⁵ Plaintiffs who sign these agreements often promise to never disclose information about their injuries, the settlement provisions, or the fracking industry.¹⁶ These confidentiality clauses are private contractual agreements, and courts generally allow private parties to agree to whatever terms they wish.¹⁷ Thus, it is permissible for oil and gas companies to add confidentiality clauses into their settlement agreements if the other party so agrees.¹⁸ In fact, oil and gas companies consider the addition of a confidentiality clause to be an essential right, and often settle without having an extensive confidentiality agreement signed by the plaintiff.¹⁹ The plaintiff's promise not to disclose information is very important to oil and gas companies because most of the companies claim the chemicals used in fracking operations to be trade secrets. Therefore, they do not want that information disclosed to the public.²⁰

B. *The Hallowich Suit*

On May 27, 2011, Christopher and Stephanie Hallowich entered into a settlement agreement with Range Resources, Williams Gas/Laurel

11. *Id.* Marc Bern is an attorney with Mark J. Bern & Partners LLP in New York and has negotiated numerous fracking settlements for homeowners; *see also* MARK J. BERN & PARTNERS LLP, <http://www.bernripka.com> [<https://perma.cc/2TH4-EV8X>] (last visited Sept. 14, 2016).

12. Efstathiou, Jr., *supra* note 9.

13. *Id.* The Ruggieros and residents of Dimock Township agreed to settlement agreements with oil and gas companies. *See also* Brief of Amici Curiae Philadelphia Physicians for Social Responsibility, et al. at 23, *Hallowich v. Range Res. Corp.*, 64 A.3d 13 (Pa. Super. Ct. 2012) (Nos. 234 WDA 2012, 235 WDA 2012), earthjustice.org/sites/default/files/Hallowich_Brief.pdf [<https://perma.cc/CGD9-9JMG>].

14. Efstathiou, Jr., *supra* note 8.

15. *Id.*

16. Kellie Fisher, *Communities in the Dark: The Use of State Sunshine Laws to Shed Light on the Fracking Industry*, 42 B.C. ENVTL. AFF. L. REV. 99, 116–20 (2015).

17. *Id.*

18. *Id.*

19. *Id.* at 119.

20. *Id.* at 100.

Mountain Midstream, and MarkWest Energy Group.²¹ The settlement arose subsequent to the Hallowich family filing suit against the oil companies for injury-related damages resulting from the companies' hydraulic fracturing operations conducted on the property adjacent to the family's farm land.²² The Hallowich family alleged that the oil and gas companies destroyed their farmland located on the Marcellus Shale. Further, they alleged that the fracking chemicals contaminated their water supply which caused burning eyes, headaches, and sore throats.²³ Additionally, they averred that the companies threatened the long-term health of their two children.²⁴

Similar to the resolution of most tort cases involving oil and gas companies, the parties agreed to settle for \$750,000. Further, the settlement contained a confidentiality agreement prohibiting the parties from discussing the contents of the case. It explicitly prohibited the Hallowich family from speaking to anyone about the Marcellus Shale or hydraulic fracturing activities for the rest of their lives.²⁵ This confidentiality agreement also bound the Hallowich's minor children, who were ages five and nine at the time of the settlement.²⁶ The Hallowiches explained to the court that they agreed to the confidentiality agreement because they wanted to move away from the gas fields and live in a safer environment for their two children.²⁷

It is rather unusual for a confidentiality agreement to apply to children like it did in the Hallowich settlement. Settlement agreements are contracts and thus, minors have the right to invalidate contracts to which they are parties.²⁸ Furthermore, it is important to note that a confidentiality clause can never be legal consideration²⁹ for an agreement to settle a minor's claim. This is because the settlement of a minor's claim requires court

21. Hallowich v. Range Res. Corp., No. 2010-3954, 2012 WL 7992901 (Pa. Ct. Com. Pl. Apr. 2, 2012).

22. *Id.*

23. Goldenberg, *supra* note 5.

24. *Id.*

25. Brief of Amici Curiae Philadelphia Physicians for Social Responsibility, et al. at 23, Hallowich v. Range Res. Corp., 64 A.3d 13 (Pa. Super. Ct. 2012) (Nos. 234 WDA 2012, 235 WDA 2012), earthjustice.org/sites/default/files/Hallowich_Brief.pdf [<https://perma.cc/77SC-R4NM>].

26. *Id.* at 5.

27. Goldenberg, *supra*, note 5.

28. Aditi Mukherji, *Does Fracking Settlement's Gag Order Apply to Kids?*, FINDLAW (Aug. 2, 2013, 9:32 AM), blogs.findlaw.com/legally_weird/2013/08/does-fracking-settlements-gag-order-apply-to-kids.html [<https://perma.cc/VB75-HAPO1>].

29. Consideration is the essential reason for a party entering into a contract, and must be a benefit bargained for by both parties to the agreement. *Consideration* defined, Black's Law Dictionary (10th ed. 2014).

approval³⁰ and court proceedings are a matter of public record.³¹ As such, the Hallowich settlement should have been held invalid.

II. CONTRACTUAL AGREEMENTS—PARENTS' RIGHT TO CONTRACT FOR THEIR MINOR CHILDREN

A settlement is a contract, therefore, the principles of contract law apply. Like any other contract, a settlement must be supported by consideration.³² Consideration refers to “a bargained-for exchange of promises or performances and may consist of a promise, an act, or a forbearance.”³³

The common law of contracts suggests that the mere agreement to settle a dispute is enough to constitute consideration for the purpose of making a settlement agreement enforceable.³⁴ However, practitioners must be attentive to the statutes governing consideration in the jurisdiction in which the contract is being executed, as some jurisdictions require specific elements of consideration to be met in order to make a contract enforceable while others do not.³⁵ Furthermore, the contract must be entered into in good faith.³⁶ Good faith bargaining is a chief concern with consideration. It is an element courts examine when a party to the settlement agreement raises the issue of lack of consideration.³⁷

A. *Limits on Parents Binding Minors—During Minority*

Generally, minors (children) can enter into contracts.³⁸ However, due to their incapacity,³⁹ the law protects children in contracts by making the

30. See discussion *infra* Part II.

31. Storms ex rel. Storms v. O'Malley, 779 A.2d 548, 568 (Pa. Super. Ct. 2001).

32. RICHARD A. ROSEN ET AL., SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES § 5.06 (2016).

33. *Id.* (quoting Federico v. Freedomroads RV, Inc., No. 09-CV-2027, 2010 WL 4740181, at *9 (N.D. Ill. Nov. 10, 2010) (internal quotations marks omitted)); see also RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

34. RESTATEMENT (SECOND) OF CONTRACTS § 71.

35. *Id.*

36. *Id.*

37. *Id.*

38. RESTATEMENT (SECOND) OF CONTRACTS § 14.

39. The inability for a minor to bind themselves to a contract due to their lack of competence. See McCrary v. City of Odessa, 482 S.W.2d 151, 154 (Tex.1972).

agreements voidable⁴⁰ until the child reaches majority.⁴¹ Contract law and public policy indicates that parents do not have the right to contract on behalf of their child based merely on the parental relationship.⁴² Rather, the basis for doing so must be authorized by statute, and most states’ statutes that regulate settlements concerning minors mandate that the settlement be approved by a court in the jurisdiction where the contract was executed.⁴³ This rule was designed to serve as a check on the authority of parents and attorneys when making decisions involving a minor’s legal interest. Here, the court acts as the final decision-maker to secure the child’s best interest.⁴⁴ While in many states a parent cannot agree to a settlement and waive his or her child’s cause of action without prior court approval,⁴⁵ there are other states that do not require any court approval to enforce contracts concerning minors.⁴⁶

Generally, courts have held that parents cannot bind a child to an agreement or waive their rights unless authorized to do so by statute.⁴⁷ The common law maintains that parents cannot release a child’s cause of action before or after an injury occurs, nor can they bind their child to an agreement to arbitrate their child’s potential causes of action.⁴⁸ From these common law standards, it is clear that parents cannot bind their child to a contract or waive their child’s rights absent judicial approval. For this reason, the *Hallowiches* and the defendant oil companies were required to obtain the Pennsylvania trial court’s approval of the settlement.⁴⁹

The law, however, does maintain an exception to the rule requiring court approval for the medical care of the minor—parents do have the right to contract for their children when it comes to the health of the child.⁵⁰ A Florida appellate court in *Shea v. Global Travel Marketing, Inc.* referred

40. RESTATEMENT (SECOND) OF CONTRACTS § 7 (defining voidable contract as a contract “where one or more parties have the power . . . to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.”).

41. ROSEN ET AL., *supra* note 30, at § 6.07; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 14 (stating that “[u]nless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

42. ROSEN ET AL., *supra* note 30, at § 6.07.

43. *Id.*

44. *Id.*

45. *Id.* *See also* LA. CODE CIV. PROC. ANN. art. 4265 (2016); 231 PA. CODE § 2039 (2016).

46. *Infra*, Part II(D)(ii).

47. *E.g.*, *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1233 (Colo. 2002); *Shea v. Global Travel Mktg., Inc.*, 870 So. 2d 20, 23 (Fla. Dist. Ct. App. 2003).

48. *Cooper*, 48 P. 3d 1229, 1233; *Shea*, 870 So. 3d 20, 23–25.

49. 231 PA. CODE § 2039 (2016)

50. *Shea*, 870 So. 2d at 24.

to this as the “common sense” exception.⁵¹ The court opined that no one would possibly know and understand a child’s health needs better than a parent of that child.⁵² Therefore, other than to provide for the medical care of the child, the general rule is that parents have no right to contract or waive their child’s rights without obtaining prior court approval.⁵³

B. Limits on Parents Binding Minors Into Majority

Ordinarily, contracts with minors are voidable once they reach majority.⁵⁴ Thus, the child can invalidate a contract within a reasonable time after reaching the requisite age to be considered an adult.⁵⁵ However, once the appropriate court has approved the settlement contract, the contract with the minor becomes binding.⁵⁶ The child thus cannot invalidate the agreement once he or she becomes an adult, unless the hearing held to review the agreement was deemed inadequate to support the interest of the minor.⁵⁷ In other words, if the court that reviews the agreement deems it to be in the best interest of the child and approves it, the minor cannot subsequently invalidate the settlement.⁵⁸ Yet, if there is no court approval, the minor or his or her guardian has the right to renounce the agreement.⁵⁹ Therefore, had the Hallowich settlement not been approved by the appropriate court, the Hallowich children could have simply invalidated the agreement upon reaching majority. Obtaining court approval is an important part of the settlement process, and attorneys representing oil and gas companies not aware of this procedure can potentially cause clients to lose out on settlement agreements due to the risk that the involved minors may later invalidate these agreements.

This concept is illustrated in *Sullivan v. Department of Transportation*, a 1992 Florida District Court case where a woman’s husband and her children brought suit for damages resulting from the woman’s death in a car accident.⁶⁰ The case settled without going to trial, and the settlement arrangement provided for monthly installments to be

51. *Id.*

52. *Id.*

53. ROSEN ET AL., *supra* note 30, at § 6.07.

54. Halbman v. Lemke, 298 N.W.2d 562, 564 (1980).

55. LEGAL RIGHTS OF CHILDREN § 10:1 (Thomas R. Young ed., 3d ed. 2015).

56. Childs By and Through Harvey v. Williams, 757 P.2d 302, 303 (Kan. 1988).

57. White v. Allied Mut. Ins. Co., 31 P.3d 328 (Kan. App. 2d. 2001).

58. *Id.*

59. Y.G. v. Riverside Unified Sch.. Dist., No. EDCV 10-1002, 2012 WL 2153957, at *3 (C.D. Cal. June 11, 2012); *see also* Pearson v. Superior Ct. of San Luis Obispo Cnty., 202 Cal. App. 4th 1333, 136 Cal. Rptr. 3d 455 (2012).

60. Tom Barber, *Settling Claims Involving Minors*, 69 FLA. B. J. 10, 10–19 (1995).

paid to the husband with a separate amount to be paid to the children.⁶¹ Because the agreement was not approved by a court of competent jurisdiction, the court held that the family was able to bring a subsequent wrongful death action against the defendant.⁶² Because the defendant’s legal counsel did not raise the issue of court approval, the defendant was susceptible to being sued and at risk of paying a much higher damage award to the family. Thus, the interests of both the minors and the opposing party are better served when the attorneys for both sides seek court approval at the outset during settlement discussions.⁶³

C. The Civil Law Perspective

In Louisiana—a state governed by the civil law of obligations—a settlement is referred to as a compromise.⁶⁴ A compromise is “a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship.”⁶⁵

While the law concerning settlements with minors in the civil law is similar to the common law, one minor difference exists. The civil law dictates that with any settlement agreement made on behalf of a minor, the court must both approve the compromise involving a minor and determine whether the terms of the proposed compromise are in the minor’s best interests.⁶⁶

This procedural rule is designed to protect the interests of minors while affording protection to those who contract with minors. This principle is relatively consistent with most common law jurisdictions. Additionally, Louisiana jurisprudence and the Louisiana Code of Civil Procedure provide that any agreement to waive a minor’s rights, or any contract entered into on a minor’s behalf without court approval, is null and without any legal effect.⁶⁷

61. *Id.*

62. *Id.*

63. *Id.* at 18.

64. *Trask v. Lewis*, 258 So.2d 603, 605 (La. App. 1 Cir. 1/31/72).

65. LA. CIV. CODE ANN. art. 3071 (2016). There is no major difference between a common law settlement and a civil law compromise, as the two are used interchangeably and the Louisiana Civil Code equates one with the other. *See Trask*, 258 So.2d at 605 (stating that “[s]ettlement must be equated with compromise”).

66. *Carter v. Fenner*, 136 F.3d 1000, 1009 (5th Cir. 1998); LA. CODE CIV. PROC. ANN. art. 4265; *see also* discussion *infra* Part III.

67. LA. CODE CIV. PROC. ANN. art. 4265; *see also* *Chambers v. Chambers*, 6 So. 659 (La. 1889). Additionally, Louisiana has a special exception to its court approval requirement. LA. REV. STAT. § 9:196 allows for the parent of a minor to settle a claim or relinquish a minor’s rights without judicial approval as long as the claim is valued at less than \$10,000. If the claim is valued at more than \$10,000, then the settlement must be approved by the appropriate and competent court. *See also*, *Bowen v. Smith*, 885 So. 2d 1, 3–4 (La. App. 4 Cir. 9/8/04).

Another difference between civil and common law regarding court approval is illustrated by the effect on the settlement once it has been nullified for lack of compliance with the Louisiana Code of Civil Procedure.⁶⁸ In the common law, when the appropriate court has not approved the settlement, the minor can invalidate the agreement as to himself.⁶⁹ While the agreement will no longer have any legal effect on the minor, other parties to the agreement may still be bound. In the civil law, however, when a contract is declared null by the court, it is deemed to have never existed.⁷⁰ All of the parties to the agreement will be restored to their positions prior to the existence of the contract.⁷¹ If complete restoration is not possible, the parties can be made whole through an award of damages.⁷²

D. Public Policy Standards on Contracts with Minors

The term *public policy* is not easily defined.⁷³ To some, it denotes the common sense ideologies or principles that are applied to public state matters such as the health, safety, and welfare of the citizens of the state.⁷⁴ To others, it is the system that governs a multitude of legal issues, including those involving contracts.⁷⁵ As public policy targeting contracts varies among states, examination of these different policy standards provide insight into why legislation that regulates contracts involving minors exist.

The goal among the states concerning settlements involving minors is to protect the overall interests of the minor. However, differences exist among the states in regard to the regulatory procedure governing these settlements. One of the primary inconsistencies is the question of who is allowed to represent the minor at the approval hearing. The policy on this issue varies among states, with each state handling the issue in one of three ways: 1) allow the parent or legal guardian of the minor to represent the child; 2) allow for the minor's attorney to stand in as the representative; or 3) have the court appoint the representative itself. These policies can be analyzed on a spectrum, with states favoring the appointment of representatives for the minor on one end, and states favoring the allowance of the parents or legal guardians to represent the minor on the other. Lying

68. LA. CODE CIV. PROC. ANN. art. 4265.

69. Storms ex rel. Storms v. O'Malley, 779 A.2d 548, 555–56 (Pa. Super. Ct. 2001).

70. LA. CIV. CODE ANN. art. 2033 (2016); *see also* Bowen, 885 So. 2d at 5.

71. LA. CIV. CODE ANN. art. 2033.

72. *Id.*

73. Harris v. Gonzalez, 789 So. 2d 405, 409 (Fla. 4th Dist. Ct. App. 2001).

74. *Id.*

75. *Id.*

in the middle are the states that want to preserve some parental authority while allowing the judiciary to oversee the settlement process.

1. *Missouri, Michigan, and Alabama*

Missouri, Michigan, and Alabama are three of several states that represent the extreme “protective” view on the policy spectrum and favor the appointment of representatives for minors in settlement hearings.

In Missouri, courts typically require that parents be judicially appointed to represent their own child at the settlement approval hearings.⁷⁶ The Missouri Supreme Court held in *Broughton v. Esurance Insurance Company* that “even though a parent generally has the interests of his child at heart, ‘this does not mean a parent in all cases is qualified to represent his child in litigation.’”⁷⁷ The reasoning behind the Missouri Supreme Court’s assertion is not entirely illogical. Missouri’s sole concern is protecting the interests of children involved in these settlements.⁷⁸ This gives the court authority to determine whether the parent is qualified to represent his or her child in the matter.⁷⁹ Thus, this policy prevents conflicts of interest and provides for a knowledgeable and capable representative to ensure an outcome that is in the best interest of the child.⁸⁰

Similarly, in Michigan and Alabama, a parent has no authority, merely due to their status as the parent, to waive, release, or compromise claims on behalf of his or her child.⁸¹ The policy in both of these states requires a parent to first obtain court approval in order to bind a minor to a settlement agreement.⁸² The goal of this judicial approval requirement is to ensure that the minor’s interests are being properly attended to in the settlement proceedings.⁸³

2. *New York*

New York is an example of a state on the opposite end of the spectrum. States like New York favor policies that allow parents or guardians to

76. *Broughton v. Esurance Ins. Co.*, 466 S.W.3d 1, 13 (Mo. Ct. App. W.D. 2015), *reh’g denied* (Apr. 28, 2015).

77. *Id.* at 12.

78. *Id.* at 13.

79. *Id.*

80. *Id.*

81. *Woodman v. Kera, LLC*, 760 N.W.2d 641, 652 (Mich. App. 2008); *see also* *J.T. ex rel. Thode v. Monster Mountain, LLC*, 754 F. Supp. 2d 1323, 1326 (M.D. Ala. 2010).

82. *Thode*, 754 F. Supp. 2d at 1326.

83. *Id.*

represent their minor children at settlement hearings without court approval.⁸⁴ Further, New York courts cannot amend the terms of a settlement agreement consented to by a minor's parent or guardian on behalf of their child.⁸⁵ The only jurisdictional requirement is that some basis exist to show that the settlement is in the best interest of the child.⁸⁶ This relaxed standard does not indicate that New York lacks concern for the interests of children; rather, it demonstrates that the New York courts place greater confidence in the parents' knowledge of what is best for their child.

3. Colorado, Florida, and Other States in the Middle of the Spectrum

In the middle of the policy spectrum are states that neither seek to bolster nor to limit a parent's right to represent their children in settlement proceedings. Instead, these states—such as Colorado, Florida, and several others—are content with allowing parents, guardians, or the minor's attorney to represent the child in the proceedings.⁸⁷ However, these states also prefer that the courts have enough authority to oversee the entire process and to ensure that the minor's welfare and legal interests are being protected throughout the process.

In Colorado, public policy protects minors from being bound to agreements that waive their cause of action for injury-related claims.⁸⁸ It is the policy of each state to impose a duty upon its courts to “exercise a watchful and protecting care over a minor's interests, and not permit his rights to be waived, prejudiced or surrendered either by his own acts, or by the admissions or pleadings of those who act for him.”⁸⁹

Like Colorado, Florida's policy seeks to further the best interests of minors by requiring judicial approval to validate settlements involving minors.⁹⁰ Florida also imposes a monetary requirement in addition to its judicial approval requirement,⁹¹ prohibiting a minor child's parents from binding the minor to a settlement with a value exceeding \$15,000 without prior court approval.⁹² While Florida policy recognizes that parents have broad authority over their children, it also asserts that the State has greater

84. Glenn ex rel. Fraser v. Jones, 796 N.Y.S. 2d 230, 231 (N.Y. Sup. Ct. 2005).

85. *Id.*

86. *Id.*

87. Cooper v. Aspen Skiing Co., 48 P.3d. 1229, 1231 (Colo. 2002).

88. *Id.*

89. *Id.* at 1234–35.

90. Shea v. Global Travel Mktg., 870 So.2d. 20, 24 (Fla. Dist. Ct. App. 2003).

91. *Id.*

92. *Id.*

authority as the "*parens patriae*"⁹³ and thus can deem any contract or settlement unenforceable if it runs contrary to public policy.⁹⁴

The U.S. Supreme Court recognized the *parens patriae* power in *Prince v. Massachusetts*⁹⁵ when it held that, although there exists a fundamental right of parents to make decisions pertaining to the care, custody, and control of their minor children, the state, as *parens patriae*, may intervene and require, mandate or regulate whatever is deemed necessary to protect the interest of the minor.⁹⁶ In *Cooper v. Aspen Skiing Co.*,⁹⁷ the Colorado Supreme Court concluded that a parental release of a child's cause of action is "not of the same character and quality as those rights recognized as implicating parents' fundamental liberty interest in the 'care, custody and control' of their children."⁹⁸ Significantly, the court in *Cooper* specified that this conclusion was not inconsistent with the due process right of parental decision-making recognized in *Prince*.⁹⁹

4. Where Louisiana Falls on the Spectrum

Louisiana's policy on settlements involving minors falls directly in the middle of the spectrum. Similar to most common law states, public policy in Louisiana recognizes that a minor should be protected in his or her contractual relationships. This notion is expressly stated in Louisiana's Code of Civil Procedure article 4265.¹⁰⁰ Article 4265 mandates that a competent court approve all settlement agreements concerning minor children.¹⁰¹ Like Colorado and Florida, Louisiana's standard does not promote nor limit the rights of parents. Rather, it simply uses the court as a check on the parent's authority.¹⁰²

93. *Parens Patriae* is the Latin translation for "parent of the nation." This doctrine allows a state to intervene in any action that violates the health, safety, or welfare of its citizenry. Richard P. Ieyoub & Theodore Eisenberg, *Class Actions in the Gulf South Symposium: State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863 (2000).

94. *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 399 (Fla. 2005).

95. 321 U.S. 158 (1944).

96. *Shea*, 908 So. 2d at 399; see also *Troxel v. Granville*, 530 U.S. 2054 (2000).

97. 48 P.3d 1229 (Colo.2002).

98. *Id.* at 1235 n.11.

99. *Id.* at 400.

100. *Wilkinson v. Wilkinson*, 323 So. 2d 120, 125 (La. 1975); LA. CODE CIV. PROC. ANN. art. 4265.

101. LA. CODE CIV. PROC. ANN. art. 4265. As was mentioned in the previous section, Louisiana requires settlements entered into on behalf of a minor to be approved by a competent court in the appropriate jurisdiction if the value of the settlement is in excess of the allotted amount set forth in the LA. REV. STAT. ANN. § 9:196.

102. *Wilkinson*, 323 So.2d at 125.

Common and civil law jurisdictions indicate a consensus that the overarching goal of any settlement agreement involving a minor is to obtain what is in his or her best interests. This assertion strongly suggests that the *Hallowich* agreement is in violation of public policy. Although the settlement was approved in accordance with Pennsylvania law, the court failed its duty to make sure the agreement was in the best legal interests of the children.

III. THE CONSTITUTIONAL RIGHTS IMPLICATIONS OF SETTLEMENTS INVOLVING MINORS

Now that the contract law analysis has been explored, it is important to address the potential constitutional rights issues involved in the *Hallowich* settlement. Due to the settlement prohibiting the *Hallowich* children from speaking about fracking, the analysis will focus primarily on the right to freedom of speech.

A. State Action Analysis

Constitutional provisions generally do not apply to the actions of private parties.¹⁰³ Therefore, in order to raise a constitutional rights violation—such as a violation of the First Amendment right to Freedom of Speech—there must be some state action involved.¹⁰⁴ Accordingly, in order to perform a proper constitutional rights violation analysis, a state action analysis should first be made to determine whether some state action exists.¹⁰⁵

Three paramount cases on the issue of state action are *Shelley v. Kraemer*,¹⁰⁶ *Edmonson v. Leesville Concrete Company*,¹⁰⁷ and *Cohen v. Cowles Media Company*.¹⁰⁸ Each of these cases is important to a state action analysis as they demonstrate different vehicles by which a plaintiff can show that state action exists for the purpose of raising a constitutional rights violation. Thus, each of these cases will be addressed, analyzed, and compared to the facts of the *Hallowich* case in order to determine if state action exists in the enforcement of the *Hallowich* settlement.

1. *Shelley v. Kraemer*

Kraemer involved a suit brought by Louis Kraemer and his wife against J.D. Shelley and his wife to enforce restrictive covenants against the

103. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

104. *Id.*

105. *Id.* at 620.

106. 334 U.S. 1 (1948).

107. *Edmonson*, 500 U.S. at 619.

108. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

occupancy or ownership of property by African Americans.¹⁰⁹ Shelley, an African American, argued that the covenant violated his Fourteenth Amendment rights.¹¹⁰ The Supreme Court then had to determine whether a state action existed in order to address Shelley’s claim.¹¹¹ The Supreme Court opined that a State may act through different agencies—through its legislative, executive or judicial authority—and that any action by the State under one of their branches constitutes an action of the State.¹¹² The Court concluded that the enforcement of property interests by the judiciary would amount to state action; thus, this power must be exercised within the boundaries defined by the Fourteenth Amendment.¹¹³

Whether *Kraemer* applies to the *Hallowich* situation is uncertain. *Kraemer* holds that the enforcement of property interests by the judiciary constitutes state action.¹¹⁴ In order to fit the facts of the *Hallowich* case under *Kraemer*, the argument is that because the settlement agreement called for the transfer of the *Hallowich* property, and a Pennsylvania trial court enforced the settlement, that there was an enforcement of property interests by the judicial system. With that said, the transfer of the home was not what the court was enforcing. Rather, it enforced the confidentiality agreement that was in need of approval due to the concern for the minor children. Both of these arguments are not without merit, but, it is wise to consider other state action precedent before drawing the conclusion whether state action exists in this case under the *Kraemer* standard.

2. *Edmonson v. Leesville Concrete Company*

Edmonson v. Leesville Concrete Company,¹¹⁵ also decided by the Supreme Court, provides another useful state action analysis. In *Edmonson*, a black construction worker was injured in a job-site accident.¹¹⁶ He subsequently sued the concrete company for negligence.¹¹⁷ During *voir dire*,¹¹⁸ the defendant used two of three peremptory challenges to remove African Americans from the prospective jury.¹¹⁹ The issue before the Court

109. *Shelley*, 334 U.S. at 6.

110. *Id.* at 7.

111. *Id.* at 13.

112. *Id.* at 14.

113. *Id.* at 20.

114. *Id.*

115. 500 U.S. 614, 619 (1991).

116. *Id.* at 616.

117. *Id.*

118. The *voir dire* stage of trial is used as “a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury.” BLACK’S LAW DICTIONARY (10th ed. 2014).

119. *Edmonson*, 500 U.S. at 616.

was whether the defendant's actions during *voir dire* amounted to that of a state action, which would have allowed for Edmonson to raise an equal protection claim.¹²⁰ The Supreme Court held that the defendant's use of peremptory challenges in district court was state action.¹²¹ In its reasoning, the Court determined that because peremptory challenges are useless outside of a courtroom, are regulated by state statute, and are administered by judges, their use clearly constitutes state action.¹²²

On one hand, because the Supreme Court's reasoning and holding in *Edmonson* is much broader than it was in *Kraemer*, it is easier to apply *Edmonson*'s state action analysis to *Hallowich*. In *Hallowich*, a judge approved the settlement agreement between the Hallowich family and the defendant oil companies. The judicial act of approval in *Hallowich* is the same state action that the Court in *Edmonson* sought to include in its holding. Although they may intended it, the Supreme Court did not specifically state any intent to limit their ruling to peremptory challenges. Rather, the Court's reasoning was founded on the fact that a government official, in this instance a judge, was involved in the administering of the procedure.¹²³ Therefore, due to the presence of a government official administering his approval of the Hallowich settlement under the authority of the judicial system of the state, *Edmonson* applies and the presence of a state action exists.

To further the argument for the existence of state action under *Edmonson*, not only do the judges and courts play a role in approving settlements concerning minors, state statutes are what authorize them to do so. The state statute, the court, and the judge are all involved in the process, quite similar to what was seen in *Edmonson*.

The Hallowich settlement ended up in court so that the parties would be in compliance with Pennsylvania Rule of Civil Procedure 2039. This article is similar to Louisiana's Code of Civil Procedure requirement,¹²⁴ and requires all settlements involving minors in the state of Pennsylvania to be approved in court.¹²⁵ This rule's primary purpose is to "prevent settlements which are unfair to minors, and to ensure that the minor receives the benefit of the money awarded."¹²⁶ The enforcement of the settlement agreements in accordance with these statutes would clearly fall under *Edmonson* and state action would exist in the Hallowich settlement.

120. *Id.* at 620.

121. *Id.* at 628.

122. *Id.* at 622.

123. *Id.*

124. *See* LA. CODE CIV. PROC. art. 4265 (2016).

125. 231 PA. CODE § 2039.

126. *Storms v. O'Malley*, 779 A.2d 548, 556 (Pa. Super. Ct. 2001).

3. Cohen v. Cowles Media Company

A final state action case that is beneficial to examine is *Cohen v. Cowles Media Company*.¹²⁷ In this Supreme Court case, the plaintiff had provided certain information to the defendant’s newspaper company after receiving promises of confidentiality from the defendant’s reporters.¹²⁸ The defendant then revealed the plaintiff as the informant, breaching confidentiality.¹²⁹ The plaintiff subsequently brought an action against the newspaper company for fraudulent misrepresentation and breach of contract.¹³⁰ The Supreme Court held that the enforcement of the promises made to the plaintiff would violate the defendant’s First Amendment right to freedom of speech, since compelling the confidentiality agreement would place a limitation on their right of speech.¹³¹ The Court determined that this was enough to establish state action for the purposes of the First Amendment.¹³²

Cohen provides a strong argument that state action existed in the *Hallowich* case. In both the *Hallowich* settlement and *Cohen*, the courts were asked to enforce a settlement agreement, which contained confidentiality clauses. Because confidentiality clauses restrict speech, they often raise First Amendment considerations. The constitutional “violation” at issue in the *Hallowich* settlement is that the *Hallowich* parents essentially waived their children’s First Amendment right of Freedom of Speech in the confidentiality agreement. By applying the Supreme Court’s decision in *Cohen*, state action is present and analysis for a violation of the *Hallowich* children’s First Amendment rights should commence.

B. Waivers of Constitutional Rights in Settlement Agreements

The law on waivers clearly provides that individuals can decide to waive their own constitutional rights, so long as the required factors for an enforceable waiver are met.¹³³ The *Hallowich* parents agreed to waive their rights to freedom of speech when they signed the confidentiality clause. The problem is that the *Hallowich* parents also waived their minor children’s rights. This issue raises the inquiry of whether a person can waive the constitutional rights of another person—particularly a minor.

127. 501 U.S. 663 (1991).

128. *Id.* at 665.

129. *Id.* at 666.

130. *Id.*

131. *Id.*

132. *Id.* at 667.

133. *Perricone v. Perricone*, 972 A.2d 666, 680 (Conn. 2009).

A waiver is an intentional relinquishment or abandonment of a known right or privilege.¹³⁴ The waiver must be made with the full knowledge of the right, along with the awareness of the circumstances and consequences of waiving that right.¹³⁵ Federal law controls the inquiry into whether a party has waived a federal provided-for constitutional right.¹³⁶

In *Perricone v. Perricone*, a woman agreed to waive her First Amendment right of freedom of speech when she signed a confidentiality agreement and promised not to disclose information about her divorce from her estranged husband.¹³⁷ The Connecticut Supreme Court held that a promise to keep information confidential constitutes a valid waiver of one's First Amendment rights.¹³⁸ Furthermore, *Perricone* discussed the effect of such waivers on public policy. The Court stated that even when a waiver of rights is made knowingly, voluntarily, and intelligently, public policy must also be considered as an additional factor as to whether the waiver should be given full effect.¹³⁹ A waiver may be deemed unenforceable if the interests in its enforcement are outweighed by the harm done to public policy from the enforcement of the agreement.¹⁴⁰

Generally, situations similar to *Perricone*—where an individual agrees to remain silent and waive his or her First Amendment rights—are quite common. This is particularly true in settlement agreements involving oil and gas companies.¹⁴¹ The dilemma in *Hallowich*, however, is unprecedented as the parents agreed to waive their children's rights rather than just their own. Despite the absence of law to provide an answer to the *Hallowich* dilemma, a solution can be drawn from analogies to public policy and from the laws on waivers.

Since waivers are required to be made knowingly, intelligently, and voluntarily, it is highly doubtful that a child could validly waive his or her right to free speech. It is unlikely that the *Hallowich* children, or any child in general, would understand what their rights are, much less understand the concept of constitutional rights. Even if they did, it is even less likely that they would understand the full consequences resulting from such a waiver. Stephanie *Hallowich*, the children's mother, stated that even she did not completely understand the extent to which her children's rights had been surrendered.¹⁴² If the children's mother did not understand the full

134. *Id.*

135. *Id.*

136. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

137. *Perricone*, 972 A.2d at 671.

138. *Id.* at 681–83.

139. *Id.* at 687 (citing *Erie Telecommunications, Inc. v. Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988)).

140. *Id.*

141. Fisher, *supra* note 15, at 117–20.

142. Goldenberg, *supra*, note 4.

extent of the consequences, then it easily follows that the children did not understand themselves.

Moreover, the law on waivers includes public policy as a factor to ensure the appropriateness of any waiver agreement.¹⁴³ As discussed previously, the public policy of most states weighs strongly in support of the best interests of the children¹⁴⁴ by preventing a guardian or parent from waiving a minor's fundamental rights without prior court approval.¹⁴⁵ When the public policy factor favoring the minor's best interest is figured into the waiver enforceability calculation, the scale leans heavily on the side of unenforceability. The interests in enforcing the Hallowich settlement do not outweigh the harm done to the public policy that exists to protect minors from agreements like these. Therefore, if parents cannot enter into an agreement to waive a child's fundamental rights, then parents have no authority in the law to waive a child's constitutional right to freedom of speech, because it is a true and fundamental right.

IV. PROPOSED SOLUTION

Public policy standards and contract law dictate that the interests of minors are of the utmost importance. Therefore, those interests should be protected to the full extent of the law. To protect children from being harmed in contracts with oil and gas companies, states have required that any settlement agreement in which a minor is involved be approved in court.¹⁴⁶ This alone, however, is not enough to protect the interests of the parties on both sides. This judicial requirement was not enough to prevent the Hallowich agreement from being enforced, and the Hallowich children's rights were waived as a result. More protection is necessary to prevent agreements like the Hallowich settlement from harming minors in the future. Also, for oil and gas companies, the issue with these current protections afforded to minors is that they limit the amount of protection that the drilling companies have in settlements involving minor children.

Rather than provide the courts with the authority to only approve the settlements, courts should be given the authority to determine whether a settlement is beneficial to the minor prior to giving its approval. This will better serve the interests of the child, while also ensuring that the settlement cannot be later invalidated because it was not beneficial to the child. This solution will serve both sides equally by protecting the interests of both the oil companies and minors.

143. Fisher, *supra* note 15, at 117–20; *see also* Perricone v. Perricone, 972 A.2d 666, 680 (Conn. 2009).

144. *See supra* Part II.D.

145. Romish v. Albo, 291 So. 2d 24 (Fla. 3d D.C.A. 1974).

146. *See* LA. CODE CIV. PROC. ANN. art. 4265; 231 PA. CODE § 2039.

This solution can be accomplished by providing trial courts with a procedural test to follow before approving any settlement agreement involving a minor. The Hallowich Test, an appropriate name for this proposal, contains three prongs that must be met in order for the court to approve the settlement. The first prong for the court to consider is whether the agreement violates the enforcing state's public policy. If the agreement does not violate the state's policy concerning settlements with minors, then the court will proceed to the next analytical prong. The second prong places a duty upon the court to examine the enforceability of the settlement's term.¹⁴⁷ If the term of the agreement is not enforceable, then the analysis stops and the court will not approve the settlement. If the term is enforceable, however, the court will proceed to the third and final prong of its analysis. This last prong serves as a balancing test to determine the proportionality between the rights the minor relinquished and the benefit received. Only if the court determines that the damage award is beneficial to the minor and is proportionate to what the minor is giving up in the agreement, may the court proceed to validate the settlement.

A. The First Prong: Compliance with Public Policy

The first prong of the Hallowich Test requires consideration of whether the agreement violates the public policy of the state in which the agreement is being enforced. In order to define what that state's public policy may be, the court should look to the state's code of civil procedure and the state's statutes concerning contracts with minors. Once the court has defined the relevant state's policy regarding settlements with minors, it must then determine whether the settlement is in compliance with that policy. A court does not proceed to the next prong of the analysis if the settlement fails this first prong.

B. The Second Prong: Enforceability of the Settlement's Term

The second prong will require the court to decide whether the essential term of the settlement is actually enforceable. The court must conclude that it is reasonable to expect someone to adhere to the term and that the term is legally enforceable. For example, attempting to bind a minor to an agreement to never speak about fracking for the rest of his or her life is not reasonable, as settlements of a minor's claim requires court approval and court proceedings are a matter of public record.¹⁴⁸ Courts should not

147. Referring to a provision in a contract that gives rise to a contractual obligation, the breach of which can give rise to litigation.

148. *Storms v. O'Malley*, 779 A.2d 548, 552 (Pa. Super. Ct. 2001).

approve these types of agreements. If the enforceability requirement is satisfied, then the court will proceed to the third and final prong of the analysis.

C. The Third Prong: A Balancing Test

If the prior two prongs have been met, the court will next have to determine whether the value of what the minor is surrendering in the agreement is proportional to the benefit that the minor is receiving in return. This can be achieved by performing a balancing test. If, like in *Hallowich* the minor is relinquishing a fundamental right only in exchange for a small sum of money, the court should not approve the settlement. If, however, the court determines that the damage award is beneficial to the minor and proportionate to what the minor is giving up, then the court can proceed to approve the settlement between the parties. The settlement will be binding against both parties and cannot be invalidated.

Critics of this proposal could argue in support of the free market society and suggest that this three-prong test gives courts too much authority. This argument will likely be that individuals should have the right to agree to whatever they want to in a contract, and not have courts disapprove of that right. However, this proposal does not hinder the free market society for contracts; rather, it promotes this notion. Giving courts more authority in the enforcement of these settlements will provide greater security for both sides, and as a result, will provide incentive for both sides to come to an agreement with one another, rather than go to trial.

All parties win with this proposed change in the judicial approval requirement, as minors will no longer have their constitutional rights waived illegally by their guardians. Further, minor's overall welfare in these agreements will be better protected. As for oil and gas companies, they will receive the benefit of having greater security in knowing that their settlement agreements will be enforced and not invalidated.

CONCLUSION

Parents have the right to do many things on their child's behalf, however, agreeing to waive one of their child's fundamental rights is not among them. While the issue presented in *Hallowich* has remained unsolved for several years, this "law school question" has now been answered. An analysis of contract law, public policy, and constitutional law provides the overwhelming consensus that the interests of minors are of the utmost importance, especially in contractual relationships. Thus, an agreement not in the best interest of the minor child will not be enforced in any court. Hence, one may rest assured in knowing that his or her first

amendment right to talk about LSU football cannot be waived by his or her parents.

*Tyler S. White**

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