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Attorney (Looks Like A Party)

When a settlement agreement contains confidentiality provisions that purport to bind the parties and their attorneys, and the attorneys sign the agreement under the recital “APPROVED AS TO FORM AND CONTENT,” have the attorneys consented to be bound by the confidentiality provisions? The answer is “No,” according to *Monster Energy Co. v. Schechter* (2018) 26 Cal.App.5th 54.)

The underlying case was a wrongful death action filed by the parents of a 14-year-old girl who drank two Monster Energy drinks, suffered cardiac arrest, and died. The parents and Monster signed a settlement agreement with confidentiality provisions including, “Plaintiffs and their counsel agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement.” “The parties and their attorneys” also agreed not to make any statement about the action in the media.

Plaintiffs’ attorneys signed the agreement in the signature block under the words “APPROVED AS TO FORM AND CONTENT” as “Attorneys for Plaintiff[s].” Five weeks later, Bruce Schechter, one of Plaintiffs’ attorneys, was interviewed by a reporter for a legal news website. Schechter revealed that Monster’s product caused the death of the 14-year-old girl, and that the matter was resolved for “substantial dollars for the family.”

Monster sued Schechter for breach of contract and other claims. Schechter filed a special motion to strike the complaint and argued that Monster could not prevail because the attorneys were not parties to the settlement agreement. Schechter asserted that merely approving it as to form and content did not make him a party. The trial court disagreed and found that “[T]he settlement clearly contemplated counsel as being subject to the agreement.”

The court of appeal reversed. The attorneys were not defined or identified as “Parties” in the agreement. No matter how plainly the contract provided that the attorneys were bound, they could not actually be bound without manifesting their consent. Even an express representation by the plaintiffs that they were authorized to execute the settlement agreement on behalf of the attorneys would not bind the attorneys. There was no evidence of implied authority to obviate the general rule that the principal cannot contractually bind the agent (the attorneys).

The wording “Approved as to form and content” meant that counsel “were signing solely in the capacity of attorneys who had reviewed the settlement agreement and had given their clients their professional approval to sign it,” which is customary in the legal community.

The Court's Dictum:

1. Draft a settlement agreement that explicitly makes the attorneys parties (even if only to the confidentiality provision) and explicitly requires them to sign as such.
2. Monster may have a cause of action against the Plaintiffs. Arguably, it could state a cause of action as a third-party beneficiary of the attorney-client contract between the Plaintiffs and their attorneys.
3. An attorney who discloses confidential settlement provisions faces practical and ethical risks, aside from the possibility of getting sued by the other party. (Schechter testified that, while he had no contractual duty to Monster, he did have a duty to his clients “not to cause or create any potential litigation for them”).

Status of Appeal:

On May 7, 2019 the case was argued before the California Supreme Court and submitted for decision. Holding that an attorney who signs to approve the form and content is bound to every provision in the agreement would come as a shock to the legal community. Alternatively, holding that Monster's only remedy is to sue the parents of a 14-year-old girl who died would be a result that the parties never intended. Stay tuned for this decision which will affect many attorneys and settlements in the state.