KIRKLAND ALERT

August 20, 2018

California Court of Appeal Holds that Settlement Terms "Approved as to Form and Content" Are Not Enforceable Against Counsel

A recent California court decision makes clear that an attorney's approval "as to form and substance" does not actually create any obligations on the attorney under a settlement agreement.

Settlement agreements often contain terms requiring the parties to keep the terms of the agreement confidential. These terms have little value if they do not also apply to the parties' lawyers. One might expect, then, that a confidentiality clause applicable to "the parties and their attorneys" would bind an opposing counsel who signs off on the agreement as "approved as to form and content." But a recent decision from the Fourth District, division one of California Court of Appeal in Riverside holds otherwise.

In *Monster Energy Company v. Schechter*[1], the parties settled a products liability case. The settlement agreement included various provisions that purported to bind "the parties and their attorneys," including agreements that the settlement would remain confidential and that no comments would be given to the press.[2] The agreement was signed by the parties. In a separate signature block under the words "approved as to form and content," it was also signed by the parties' lawyers as "attorneys for" their clients.[3]

A few months later, the plaintiffs' lawyer proceeded to give an-on-the record comment to an internet publication called *Lawyersandsettlements.com* — perhaps not coincidentally, an attorney advertising/lawyer referral service that shared at least one employee with the plaintiffs' lawyers' law firm.[4] The defendants sued the attorney for breaching the settlement agreement. The attorney responded by filing an anti-SLAPP motion, which requires the non-moving party to make an early proof of the validity of its claim. The trial court denied the motion, finding that the attorneys were bound to the face of the settlement agreement and thus that the claim had merit.[5]

But the Court of Appeal reversed. It first held that the clients could not bind the attorneys to the agreement simply by virtue of their relationship. "[A] party cannot bind another to a contract simply by so reciting in a piece of paper. It is rudimentary contract law that the party to be bound must first *accept* the obligation."[6] And although an agent can bind its principal to agreements under some circumstances, "this does not work in reverse — the client cannot bind the attorney."[7] So unless the attorneys actually gave their assent, they were not bound to the agreement, notwithstanding its various provisions that purported to bind the "parties and their attorneys."

Moving on to whether the attorneys had actually agreed to be bound, the court held they had not. It is a relatively common practice for attorneys to sign on to

their clients' settlement agreements as "approved to form and content." The rationale for doing so is less than clear. Arguably, by showing that the contents of an agreement have been approved by the other party's counsel, one could potentially head off defenses to enforcement like duress or procedural unconscionability. Or perhaps it could avoid a *contra preferedum* argument that the agreement should be interpreted against a party who did not participate in the drafting.

But after reviewing the sparse authority addressed to the meaning of signing "approved as to form and content,"[8] the Court of Appeal concluded that signature "means only that the document has the attorney's professional thumbs-up."[9] "[T]he attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties[.]"[10] The signature, however, "does not objectively manifest the attorney's intent to be bound," even when the terms of the agreement itself purport to bind the parties attorneys.[11]

The court concluded by suggesting that the settling parties could potentially sue *each other* for their attorneys' breaches, based on an agency theory. And the court explained, in any event, that "[i]t seems easy enough . . . to 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."[12]

When drafting settlement agreements in California, attorneys should take that advice. If you intend to bind the other side's lawyers to a confidentiality provision, or any other term, you need to make sure the attorney agrees to be bound, not just to sign off "on form and content."

---

1 --- Cal. App. 5th ---, 2018 WL 3829255, No. E066267 (Aug. 13, 2018).

2 *Id.* at **1–2

3 *Id. a*t *2.

4 *Id.* at *3.

5 *Id.*

6 *Id.* at *6 (emphasis original, quoting *Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.* 72 Cal. App. 4th 208, 212 (1999).

7 *Id.*

8 *Id.* at **7–9 (discussing *Freedman v. Brutzkus,* 182 Cal. App. 4th 1065 (2010) and *RSUI Indem. Co. v. Bacon*, 282 Neb. 436 (2011).

9 *Id.* at *9.

10 *Id.* at *8 (quoting *Freedman*, 182 Cal. App. 4th at 1070).

11 *Id. at *9.*

12 *Id.*

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Michael J. Shipley
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
www.kirkland.com/mshipley
+1 213 680 8222

David I. Horowitz, P.C.
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
www.kirkland.com/dhorowitz
+1 213 680 8374

Jay Bhimani
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
www.kirkland.com/jbhimani
+1 213 680 8285