

California Court Holds that Attorney is Not Bound by Confidentiality Provision

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On August 13, 2018, the California Fourth District of Appeal held in *Monster Energy Company v. Schechter* that an attorney who signed his client's settlement agreement under the phrase "approved as to form and content" was entitled to the granting of an anti-SLAPP motion in a case against him for breaching the confidentiality provision of the settlement, finding that he was not a party to that agreement.

Richard Fournier and Wendy Crossland (the Fourniers) filed an action (the Fournier case) against Monster Energy Company (Monster) and a related defendant when their 14-year-old daughter went into cardiac arrest in 2011 after consuming two Monster brand energy drinks and died. The attorney in the case, Bruce Schechter, and his firm, the R. Rex Parris Law Firm represented the Fourniers in their lawsuit.

In 2015, Schechter negotiated a settlement for the clients, which included a confidentiality provision purporting to bind him and his firm. Schechter later gave an interview to the website Lawyersandsettlements.com, in which he mentioned that a recent case he had handled against Monster, involving a 14-year-old girl, had settled for "substantial dollars for the family." Lawyersandsettlements.com then published an online article that included Schechter's statements.

Monster then sued Schechter and his firm, alleging in part that they had breached the terms of the settlement agreement, asserting causes of action for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; and (4) promissory estoppel.

Schechter and his firm then filed a special motion to strike under Code of Civil Procedure § 425.16 (SLAPP motion) arguing, among other things, that Monster could not show a probability of prevailing on its breach of contract claim because Schechter and his firm were not parties to the settlement agreement. In opposition, Monster argued: (1) Schechter's statements were commercial speech and therefore unprotected; and (2) Schechter and his firm were "[c]learly" bound by the settlement agreement.

The trial court denied the motion with respect to the breach of contract cause of action but granted it with respect to the other causes of action. Schechter and his firm appealed.

On appeal, the Court of Appeals held that - when a settlement agreement provides that a plaintiff and his or her counsel agree to keep the terms of the agreement confidential - and the plaintiff's counsel signs the agreement under the words "approved as to form and content," the Court of Appeals held the plaintiff's counsel could not be liable to defendant for breach of the confidentiality provision. The Court noted: "The only reasonable construction of this wording is that they 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. In our experience, this is the wording that the legal community customarily uses for this purpose."

Recognizing that confidentiality is often a material term of a settlement agreement, the Court noted that a way to avoid this issue is "to draft a settlement agreement that explicitly makes the attorneys parties to the agreement (even if only to the confidentiality provision) and explicitly requires them to sign as such.

In sum, although a settlement agreement may bind one or more parties to its confidentiality provision, an attorney's signature under the words "approved as to form and content" does not impose any specific obligation



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on the attorney to maintain the confidentiality of the settlement. In light of this holding, employers who wish to bind opposing counsel to the confidentiality provision of a settlement agreement should specifically draft the confidentiality provision to encompass opposing counsel as well as the party represented by the opposing counsel. Moreover, the settlement agreement should include an express statement signed by opposing counsel agreeing to be bound by the settlement agreement's confidentiality provision.

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