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Lawyers should be watching high court Monster Energy case

By Misasha S. Graham and Jennifer Hagan

For years, it has been standard practice for lawyers to give the "thumbs up" on settlement agreements by signing "Approved as to Form and Content." Since the inception of the *Monster Energy v. Schechter* case, attorneys have been watching — and waiting — to see the implications of any final ruling. *Monster Energy Company v. Schechter*, 26 Cal. App. 5th 54 (Aug. 18, 2018) (reversed and remanded).

The *Monster Energy* case is on appeal in front of the California Supreme Court which agreed to resolve questions around the scope of enforcement of a confidentiality provision in a settlement agreement and whether lawyers could be bound to that provision based on approving the agreement as to "form and content."

The *Monster Energy* case arises out of the tragic death of a 14-yearold girl who went to the shopping mall with her friends and drank two 25 ounce Monster Energy drinks, then went into cardiac arrest and died.

The parents of the girl sued Monster Energy Company for wrongful death. The company eventually agreed to a confidential settlement. (The argument for wrongful death was that none of the ingredients in the energy drink by themselves was harmful, but mixed together, those ingredients "synergistically" became a harmful tonic that induced cardiac arrest in young hearts. There have been at least four cases where young people died after drinking Monster Energy drinks.) The confidentiality provision in the settlement agreement prohibited disclosure of the terms of the agreement by any *party* to the agreement.

After the settlement, one of the parents' lawyers, Bruce Schechter was contacted by a reporter and asked about the terms of the settlement. Schechter informed the reporter that the settlement was confidential and he could not talk about it. However, he did state that is was settled for "substantial dollars." This was published online.

Monster Energy Company then sued Schechter personally for violation of the settlement agreement because he had signed it "APPROVED AS TO FORM AND CONTENT." Monster argued that Schechter's signature as to "Form and Content" bound him to the confidentiality provision as a party to the agreement, and that Schechter breached this clause by speaking to the reporter in general terms about the existence of the agreement.

Schechter defended himself by filing an anti-SLAPP motion under CCP Section 425.16, challenging Monster Energy's premise that he, as an attorney, was bound in any way by the settlement agreement through approving only its form and content. Schechter further argued that Monster Energy's only reason for making such a claim was to chill Schechter's First Amendment rights in speaking to any member of the media.

The trial court granted Schechter's motion to strike as to all causes of action except the breach of contract claim, concluding that Monster Energy had met its statutory burden to show a probability of prevailing on the claimed contract cause of action.

The Court of Appeal sided with Schechter holding that, while attorneys do have an ethical and professional obligation to maintain the confidentiality of the terms of their clients' settlements, simply signing "approved as to form and content" does not render an attorney a party to an agreement, and therefore, they cannot be charged with breaching that same agreement.

Monster Energy appealed to the California Supreme Court on two grounds: (1) when a settlement agreement contains confidentiality provisions that are explicitly binding on the parties and their attorneys, and the attorneys sign the agreement under the legend "approved as to form and content," have the attorneys consented to be bound by the confidentiality provision; and (2) when evaluating the plaintiff's probability of prevailing on its claim under Code of Civil Procedure Section 425.16, subdivision (b), may a court ignore extrinsic evidence that supports the plaintiff's claim, or accept the defendant's interpretation of an undisputed but ambiguous fact over that of the plaintiff.

The implications of Monster Energy's position — that simply signing 'approved as to form and content' manifests consent and an intent to be bound by the terms of the contract on the part of the attorney signing it — are far reaching beyond the scope of this current case.

The case is currently in the briefing stages and pending. In Schechter's opening brief, he maintains that an attorney's approval as to "form and content" does not constitute the attorney's consent to be contractually bound to the other party, and that Monster Energy has presented no evidence that his affirmative consent to be bound by the settlement agreement that was communicated to Monster Energy. Further, the plain language of the agreement meant that the attorneys were not parties to the settlement agreement.

The implications of Monster Energy's position — that simply signing "approved as to form and content" manifests consent and an intent to be bound by the terms of the contract on the part of the attorney signing it — are far reaching beyond the scope of this current case. Indeed, based on Monster's theory, there are many situations in which nonparties to an agreement could inadvertently or unintentionally be bound without intending to do so.

For example, spouses of members in a closely held company are often required to sign various agreements, simply in their role as a spouse, whereby they acknowledge that they have read and understood the agreement. Attorneys who are familiar with these types of spousal consent forms know that these signatures later can become important in divorce or dissolution proceedings, or even in probate court. Under the theory advanced by *Monster Energy*, this signature may actually bind the spouse to the terms of the agreement as a party without providing them any benefit as a result.

For lawyers, a frightening scenario exists. Thousands of settlement agreements are entered into each year in California, and attorneys often approve them as to form and content. If Monster prevails before the Supreme Court, every lawyer having previously signed such a settlement agreement as to form and content may be suddenly and inadvertently be made a target for breach of that agreement.

The *Monster Energy* case could have calamitous implications for the legal community. Until it is decided by the Supreme Court, which hopefully will clarify that lawyers are not party to client settlement agreements, the best practice for attorneys approving settlement agreements would be to clearly and unambiguously state that they do not intend to be a party to the agreement and that they do not consent to be bound to the terms of the agreement.

While it should be manifestly obvious that only the named parties to an agreement should be legally bound by the terms of that agreement, California lawyers should take precautions to protect themselves until the *Monster Energy* case is decided.

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