**Hastings Law Journal**

Volume 56 | Issue 6 Article 5

1-2005

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## INTRODUCTION

During litigation, settlement contracts can create duties running between attorneys and adverse parties. In general, attorneys have a duty to deal honestly and fairly with adverse parties and counsel.[1] Sometimes, however, contractual or fiduciary duties can run between attorneys and adverse parties. When a settlement agreement fails through no or negligible fault of the opposing party, the opposing party may be able to seek remedy through civil liability against the attorney.

There are several causes of action that the adverse party in the underlying suit can seek against the opposing attorney. The attorney may be liable for breach of contract or tortious interference with contract. If the contract or tortious interference with contract claims fail, the attorney may be liable under escrow or restitution for any property received. Lastly, the opposing party can seek equitable relief under a theory of constructive trust or equitable lien.

The majority of the adverse party's causes of actions will fail. The contract and tortious interference with contract claims will generally fail for lack of privity or through absolution of liability by agency. Any theory of escrow or restitution will generally be limited to a specific factual scenario. Equitable remedies will generally fail because of an adequate legal remedy.

There are, however, limited situations in which a California court may impose civil liability against an attorney. Such situations create

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1. Wasmann v. Seidenberg, 248 Cal. Rptr. 744, 746 (Cal. Ct. App. 1988); Bernath v. Wilson, 309 P.2d 87, 90 (Cal. Ct. App. 1957).

unfortunate implications for California's legal system. An imposition of duty on an attorney to an adverse party during litigation harms the adversarial system. In addition, attorney-client privilege may require an attorney to withhold exculpatory evidence in her favor. This Note suggests a virtual per se rule against the imposition of civil liability on the attorney to the adverse party when a settlement agreement is breached. Exceptions to the virtual per se rule would be made for specific factual scenarios where the attorney has wrongfully retained property or when the attorney acts outside the scope of her agency.

Part I of this Note provides an overview of the general duty that attorneys owe to third parties. Part II examines various causes of action available to plaintiffs. Next, various factors influencing liability are detailed in Part III. Lastly, Part IV details the proposed virtual per se rule against liability.

## I. GENERAL DUTY OF ATTORNEYS TO THIRD PARTIES

Over 125 years ago, the U.S. Supreme Court held that an attorney could not be held liable to a third party for professional malpractice without a showing of fraud, collusion, or privity of contract.[2] Nearly eighty years later, the California Supreme Court departed from strict contractual privity in duty to third parties.[3] In *Biakanja v. Irving*, the court adopted a balancing factors test.[4] The test is "closely related to the analysis and policy reasons used to justify permitting a third-party beneficiary to recover in a contract action."[5] The *Biakanja* court listed six factors for determining whether an attorney owes a duty to third parties: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of connection between the attorney's conduct and the injury, (5) the moral blame attached to the attorney's conduct, and (6) the policy of preventing future harm.[6]

The *Biakanja* factors were later refined by the California Supreme Court in *Lucas v. Hamm*.[7] In *Lucas*, an attorney prepared a will for his client, who later died.[8] Due to a drafting error, the plaintiffs received a smaller share of the estate than the testator had intended.[9] Despite the

2. Sav. Bank v. Ward, 100 U.S. 195, 206 (1879).

3. Biakanja v. Irving, 320 P.2d 16, 18–19 (Cal. 1958).

4. *Id.*

5. Wilson-Cunningham v. Meyer, 820 P.2d 725, 728 (Kan. Ct. App. 1991) (quoting Pizel v. Zuspann, 795 P.2d 42, 49 (Kan. 1990)).

6. *Biakanja*, 320 P.2d at 19.

7. 364 P.2d 685, 688 (Cal. 1961).

8. *Id.* at 686.

9. *Id.* at 686–87.

lack of privity between the attorney and the plaintiffs, the court held that the plaintiffs were third-party beneficiaries to the contractual relationship between the attorney and the decedent.[10] The *Lucas* court replaced *Biakanja*'s moral blame element with an inquiry into whether expansion of liability to the third party would place an undue burden on the legal profession.[11] In *Lucas*, expanding liability to the attorney did not create such a burden.[12] Since *Biakanja* and *Lucas*, California courts have extended an attorney's liability to third parties on a number of occasions.[13] After considering a number of third-party liability cases, one justice commented that imposition of liability on an attorney involves "'a judicial weighing of the policy considerations for and against [such] imposition . . . .'"[14] This Note starts with an overview of the available causes of action against attorneys by adverse parties and then discusses the policy implications for such liability.

## II. CAUSES OF ACTION AVAILABLE TO PLAINTIFFS

There are several causes of action available to plaintiffs seeking remedy against an adverse attorney for breach of a settlement agreement. This Note first details the legal causes of action of breach of contract, tortious interference with contract, and escrow. Then, the equitable causes of action of restitution, constructive trust, and equitable lien are examined.

### A. BREACH OF CONTRACT

In general, a breach of contract cause of action requires that the parties be in privity with one another.[15] During representation, an

10. *Id.* at 687.

11. *Id.* at 688.

12. *Id.*

13. *See, e.g.*, Bily v. Arthur Young & Co., 834 P.2d 745, 772–73 (Cal. 1992) (extending doctrine to provide for auditor's liability); Goodman v. Kennedy, 556 P.2d 737, 742 (Cal. 1976) (applying balancing test in a securities setting); Johnson v. Superior Court, 45 Cal. Rptr. 2d 312, 317 (Cal. Ct. App. 1995) (finding attorney's duty to extend to all partners within a limited partnership); Assurance Co. of Am. v. Haven, 38 Cal. Rptr. 2d 25, 34 (Cal. Ct. App. 1995) (insurance context); Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices, 255 Cal. Rptr. 483, 486–87 (Cal. Ct. App. 1989) (holding an attorney liable for false representations regarding his client in a "to whom it may concern" letter upon which a lender relied); Courtney v. Waring, 237 Cal. Rptr. 233, 239 (Cal. Ct. App. 1987) (holding an attorney liable for negligently preparing a prospectus knowing parties other than his client would rely on it in purchasing franchises); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 905–06 (Cal. Ct. App. 1976) (holding attorney's misrepresentations in letter regarding status of partnership to be adequate basis for cause of action by lender who foreseeably relied on attorney's letter); Donald v. Garry, 97 Cal. Rptr. 191, 191–92 (Cal. Ct. App. 1971) (holding collection agency's attorney owed a duty to a creditor who relied on agency to collect debt). *But see* Fox v. Pollack, 226 Cal. Rptr. 532, 535–36 (Cal. Ct. App. 1986) (holding that attorney's duty does not extend to unrepresented adverse party in real estate exchange).

14. Skarbrevik v. Cohen, England & Whitfeld, 282 Cal. Rptr. 627, 632 (Cal. Ct. App. 1991) (quoting *Goodman*, 556 P.2d at 742).

15. RESTATEMENT (SECOND) OF CONTRACTS ch. 10, introductory cmt. (2003).

attorney acts as an agent for his or her client.[16] Since clients are known by the adverse party during settlement negotiations, clients are fully disclosed principals.[17] When an agent acts with either actual or apparent authority within the scope of agency, or the agent's actions are ratified by the principal, then the principal is liable for breach of the agreement.[18] The agent is relieved of any liability to the third party.[19]

California law requires that "'an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.'"[20] Therefore, California law requires that an attorney have actual authority to enter into a valid compromise.[21] In a situation where there is actual authority, the agent is not bound by the settlement contract.[22] Therefore, attorneys with authority to enter into a settlement on behalf of their clients generally will not be in direct privity with adverse parties. Even if privity can be found, agency will relieve the attorney of any liability.[23] Attorneys generally will not be held civilly liable to opposing parties for breach of a settlement agreement under a theory of contract breach.

### B. Liability in Tort for Interference with Contract

An attorney may be liable for tortious interference with a settlement contract. In general, when an attorney is asked for advice, he or she may "give it in good faith" even though the end result may be to interfere

16. Restatement (Second) of Agency § 1, cmt. e (1958).

17. *Id.* § 146.

18. 12 Williston on Contracts § 35:34 (4th ed. 1999); Oelricks v. Ford, 64 U.S. 49, 64–65, (23 How. 49, 64–65) (1859).

19. 12 Williston on Contracts, *supra* note 18, § 35:34.

20. Blanton v. Womancare, Inc., 696 P.2d 645, 650 (Cal. 1985) (quoting Whittier Union High Sch. Dist. v. Superior Court, 136 Cal. Rptr. 86, 89 (Cal. Ct. App. 1977)); *see also* Linsk v. Linsk, 449 P.2d 760, 762 (Cal. 1969) (stating that an attorney is not authorized, merely by virtue of his retention in litigation, to "impair the client's substantial rights or the cause of action itself").

21. Levy v. Superior Court, 896 P.2d 171 (Cal. 1995) ("[S]ettlement of a lawsuit is not incidental to the management of the lawsuit; it ends the lawsuit. Accordingly, settlement is such a serious step that it requires the client's knowledge and express consent."); *Blanton*, 696 P.2d at 650; *Linsk*, 449 P.2d at 762.

22. 12 Williston on Contracts, *supra* note 18, § 35:34. The Court in *Oelricks* concluded as follows:

> In the present case, the broker's note, and which is approved by the defendants, affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. . . . The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performance upon him, and exonerates the agent.

64 U.S. at 65; *see also* Marks v. Jos. H. Rucker & Co., 200 P. 655 (Cal. Ct. App. 1921). This Note is limited to valid settlement agreements.

23. *Oelricks*, 64 U.S. at 65; *Marks*, 200 P. at 655–57; 12 Williston on Contracts, *supra* note 18, § 35:34.

with another person's business.[24] However, if the advice concerns a contract to which the client is party, and the advice causes the client to breach the contract, third parties may seek to hold the attorney liable.[25] Courts, however, have been reluctant to hold attorneys liable for the breach of their clients' contracts.[26] Some courts have held that an attorney's liability could be relieved under the same theory of agency as described above.[27]

California courts require that the plaintiff prove that the attorney intended to cause the breach.[28] In *Costello v. Wells Fargo Bank*, an attorney represented the executor of an estate in a sale of real property belonging to the estate.[29] The plaintiffs, real estate brokers for the transaction, alleged that the attorney's negligence caused the plaintiffs to lose $5,650.30 in brokerage commissions under a contractual theory.[30] The court held that mere negligence cannot result in liability for interference with the contract.[31] Subjective intent to interfere with the contract is required.[32] In *Schick v. Bach*, an attorney represented a psychologist who had been treating the plaintiff.[33] The attorney advised the psychologist that he could disclose confidential documents in a legal proceeding.[34] The plaintiff filed suit against the attorney for interference with the contract between the psychologist and the plaintiff.[35] The court held that the attorney was not liable as a matter of law because the complaint merely averred that the attorney "knew or should have known" of the harm to the patient.[36] The plaintiff did not allege actual intent.[37] Therefore, unless an attorney subjectively intended to interfere with the contract, he or she cannot be held liable under tortious interference with contract.[38] Even then, agency principles may relieve the attorney of liability.[39]

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24. 45 AM. JUR. 2d *Interference* § 32 (2004); Randy R. Koenders, Annotation, *Attorney's Liability in Tort for Interference with Contract to Which Client Was Party*, 85 A.L.R. 4th 846, 849–50 (2003).
25. *See* Koenders, *supra* note 24, at 850.
26. *Id.*
27. *Id.* at 859–61.
28. *Id.* at 853–54.
29. 65 Cal. Rptr. 612, 614 (Cal. Ct. App. 1968).
30. *Id.* at 613.
31. *Id.* at 615.
32. *Id.*
33. 238 Cal. Rptr. 902, 904 (Cal. Ct. App. 1987).
34. *Id.*
35. *Id.* at 905.
36. *Id.* at 907.
37. *Id.*
38. *Id.* at 908; *Costello*, 65 Cal. Rptr. at 614–15.
39. Koenders, *supra* note 24, at 859.

C. ESCROW

An attorney may be liable to an adverse party under a theory of escrow. When an attorney holds property of the opposing party until his or her client turns something over to the opposing party, the attorney may be an escrow holder of that property.[40] If the attorney violates an explicit escrow instruction, she may be liable for breach of contract.[41] If the attorney is negligent in her duties as an escrow holder, she may be liable in tort for breach of escrow.[42]

In *Wasmann v. Seidenberg*, the court imposed "a duty to safeguard property entrusted to [an attorney] during settlement negotiations by an adverse party."[43] In *Wasmann*, an attorney represented the wife in a dissolution proceeding.[44] The husband agreed to convey his full interest in community property to the wife in exchange for $70,000 or a promissory note.[45] The husband gave the deed to the attorney and, in writing, stated that the attorney was "authorized to record [the deed] only upon obtaining" the $70,000 in cash or the promissory note.[46] The attorney delivered the deed to the wife and the husband received neither the cash nor the promissory note.[47] The husband subsequently sued the wife's attorney for legal malpractice and constructive fraud.[48] The court held that the attorney's acceptance of the deed gave rise to a duty of care based on escrow.[49] *Wasmann*'s precedence is limited by its procedural status. The trial court had sustained a demurrer without leave to amend.[50] The *Wasmann* court limited its decision to whether the plaintiff's pleadings sufficiently plead a cause of action for escrow.[51] As such, the court did not enter into a discussion of whether an escrow should be imposed, only that it is legally possible.[52]

D. RESTITUTION

An attorney may be liable under a theory of restitution. Recovery in restitution is allowed when a person has been unjustly enriched at the expense of the plaintiff.[53] "A person is enriched if he receives a benefit at

40. Wasmann v. Seidenberg, 248 Cal. Rptr. 744, 746 (Cal. Ct. App. 1988).
41. *Id.* at 747; Claussen v. First Am. Title Guar. Co., 230 Cal. Rptr. 749, 752 (Cal. Ct. App. 1986).
42. *Wasmann*, 248 Cal. Rptr. at 747; *Claussen*, 230 Cal. Rptr. at 752.
43. *Wasmann*, 248 Cal. Rptr. at 746.
44. *Id.* at 745.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 746.
50. *Id.* at 745.
51. *Id.* at 746.
52. *Id.*
53. Ghirardo v. Antonioli, 924 P.2d 996, 1003 (Cal. 1996); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (Tentative Draft, 2000).

another's expense."[54] Retention of the benefit must be inequitable.[55] For an attorney to be held liable under restitution, the attorney must unjustly retain the benefit caused by the breach of the settlement agreement. In the context of settlement agreements, attorney liability would be limited to situations in which the client turned property over to his or her attorney to pass to the opposing party. Only when the attorney failed to pass the property to the opposing party will the attorney be civilly liable to the opposing party. Both the escrow and restitution causes of action, therefore, are limited to particular factual scenarios.

### E. Constructive Trust

An attorney may be liable to an adverse party under a theory of constructive trust. Constructive trusts are statutorily defined in California.[56] The code states that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."[57] A constructive trust may only be imposed when three conditions are satisfied: (1) the existence of some interest in property, (2) the right of the complaining party to the property, and (3) some wrongful acquisition or detention of the property by another who is not entitled to it.[58] The existence of some interest may be based in an equitable lien.[59] Despite their statutory nature, constructive trusts are "creatures of equity."[60] As such, courts are free to take into account equitable factors in determining whether a particular transaction creates a constructive trust.[61]

In *Guzzetta v. State Bar*, a review of State Bar proceedings, the California Supreme Court imposed a constructive trust on an attorney for the benefit of the opposing party.[62] In *Guzzetta*, an attorney represented the husband in a dissolution proceeding.[63] A restaurant owned by the couple was sold and the proceeds were divided.[64] Of the proceeds, $3,000 was given to the husband, $3,000 to the wife, and the balance was to be held in the attorney's trust account subject to stipulation of the parties.[65] The court held that the attorney was a

54. *Ghirardo*, 924 P.2d at 1003.

55. *Id.*; 66 Am. Jur. 2d *Restitution and Implied Contracts* § 13 (2004).

56. Cal. Civ. Code § 2223 (West 2004).

57. *Id.*

58. Burlesci v. Petersen, 80 Cal. Rptr. 2d 704, 708 (Cal. Ct. App. 1998); *see also* Farmers Ins. Exch. v. Zerin, 61 Cal. Rptr. 2d 707, 713 (Cal. Ct. App. 1997) (holding that a constructive trust cannot exist until an ownership interest exists in the purported beneficiary).

59. *Zerin*, 61 Cal. Rptr. 2d at 713.

60. Edwards-Town, Inc. v. Dimin, 87 Cal. Rptr. 726, 730 (Cal. Ct. App. 1970).

61. David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 344–45 (Cal. Ct. App. 1988); *Edwards-Town, Inc.*, 87 Cal. Rptr. at 730–731.

62. 741 P.2d 172, 181 (Cal. 1987).

63. *Id.* at 177.

64. *Id.*

65. *Id.*

constructive trustee for the wife with respect to the trust funds despite her status as opposing party.[66] As such, the attorney "owe[d] a duty as a constructive trustee to his constructive beneficiary that is fiduciary in nature."[67] Reviews of State Bar proceedings are based on a different set of laws and statutes than civil proceedings.[68] As such, the precedential value of *Guzzetta* is limited. Furthermore, the *Guzzetta* court provided bare legal conclusions, unsupported by legal analysis. In determining whether a constructive trust is an appropriate equitable remedy, courts must weigh equitable factors.[69] *Guzzetta* provided no analysis of equitable factors. Therefore, *Guzzetta* merely stands for the proposition that it is possible to impose a constructive trust on an attorney for the benefit of the opposing party.[70] *Guzzetta* is not helpful, however, in determining whether such a remedy is appropriate. As an equitable remedy, the *Guzzetta* court should have examined equitable factors in determining whether a constructive trust existed.[71] The set of factors described in *Biakanja* (as modified by *Lucas*) could serve as the basis for such an examination.[72]

### F. EQUITABLE LIEN

An attorney may be liable under a theory of equitable lien. An equitable lien requires a promise to pay the adverse party combined with either detrimental reliance by the adverse party or unjust enrichment of the attorney.[73] In general, "[o]ne who wrongfully withholds personal property from another who is entitled to it under a security agreement may be liable for conversion."[74] An equitable lien is a right to property not in the lienor's possession as security for payment of a debt.[75] It may arise from a contract with an intent to secure particular property for a debt or "out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings."[76]

> The basis of equitable liens is variously placed on the doctrines of estoppel, or unjust enrichment, or on the principle that a person having obtained an estate of another ought not in conscience to keep it as between them; and frequently it is based on the equitable maxim that

66. *Id.* at 181–82.

67. *Id.*

68. *See, e.g.*, Most v. State Bar, 432 P.2d 953, 956 n.5 (Cal. 1967).

69. David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 344–45 (Cal. Ct. App. 1988); Edwards-Town, Inc. v. Dimin, 87 Cal. Rptr. 726, 730–31 (Cal. Ct. App. 1970).

70. *Guzzetta*, 741 P.2d at 181.

71. *David Welch Co.*, 250 Cal. Rptr. at 344–45; *Edwards-Town, Inc.*, 87 Cal. Rptr. at 730–31.

72. Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961).

73. Farmers Ins. Exch. v. Smith, 83 Cal. Rptr. 2d 911, 914 (Cal. Ct. App. 1999).

74. Messerall v. Fulwider, 245 Cal. Rptr. 548, 550 (Cal. Ct. App. 1988).

75. 42 CAL. JUR. 3d *Liens* § 10 (2003).

76. 1 LEONARD A. JONES, A TREATISE ON THE LAW OF LIENS: COMMON LAW, STATUTORY, EQUITABLE, AND MARITIME § 27 (3d ed. 1914).

> equity will deem as done that which ought to be done, or that he who seeks the aid of equity must himself do equity.[77]

An equitable lien may form the basis of the ownership interest required for a constructive trust.[78]

For an equitable lien to exist, the plaintiff must prove: (1) some debt, duty, or obligation from one person to another, (2) an object to which that obligation fastens that can be identified or described with reasonable certainty, and (3) an intent that the property serve as security for payment of the debt or obligation.[79] An attorney who has notice of a third party's contractual right to funds received on behalf of his or her client may be liable under a theory of equitable lien if those funds are distributed.[80] An equitable lien, as an equitable remedy, requires an inadequate remedy at law to be present.[81] "[W]hether an equitable lien should be 'created' or 'recognized to exist' is a highly fact-specific sort of question because each context has its own equitable considerations."[82] In California, the three cases of *Kaiser Foundation Health Plan v. Aguiluz*[83] ("*Kaiser*"), *Farmers Insurance Exchange v. Zerin*[84] ("*Zerin*"), and *Farmers Insurance Exchange v. Smith*[85] ("*Smith*"), analyze an attorney's civil liability to third parties during settlement. Although none of the cases directly address civil liability to an adverse party, the analysis in each of these cases can be analogized to an adverse party.

In *Kaiser*, an attorney represented a man in a personal injury suit resulting from a motorcycle accident.[86] Kaiser, the client's insurance company, had paid $23,070.26 towards the client's medical expenses.[87] The client had signed a contract stating, "I hereby authorize and direct my attorney, if any, to reimburse Kaiser . . . by disbursing the money I receive from such a settlement or judgment directly to Kaiser."[88] The action for personal injury was settled, but Kaiser was never paid any of the $23,070.26 it was owed.[89] Kaiser filed suit against the client and obtained a judgment for the full $23,070.26.[90] Despite being awarded full

77. 53 C.J.S. *Liens* § 5 (2003).
78. Farmers Ins. Exch. v. Zerin, 61 Cal. Rptr. 2d 707, 713 (Cal. Ct. App. 1997).
79. 51 AM. JUR. 2d *Liens* § 34 (2003).
80. Kaiser Found. Health Plan v. Aguiluz, 54 Cal. Rptr. 2d 665, 666 (Cal. Ct. App. 1996); Miller v. Rau, 30 Cal. Rptr. 612, 616–17 (Cal. Ct. App. 1963).
81. Farmers Ins. Exch. v. Smith, 83 Cal. Rptr. 2d 911, 918 (Cal. Ct. App. 1999).
82. *Id.* at 914 n.3.
83. *Kaiser*, 54 Cal. Rptr. 2d at 665.
84. Farmers Ins. Exch. v. Zerin, 61 Cal. Rptr. 2d 707, 707 (Cal. Ct. App. 1997).
85. *Smith*, 83 Cal. Rptr. 2d at 911.
86. *Kaiser*, 54 Cal. Rptr. 2d at 666.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

compensation, Kaiser then filed suit against the attorney.[91] The court, relying heavily on *Miller v. Rau*,[92] determined that since the attorney was aware of the lien, he was liable for disbursing the full amount to his client.[93]

In *Zerin*, an attorney represented three individuals insured by Farmers Insurance in a personal injury action.[94] Two of the three clients had medical bills paid by Farmers.[95] Farmers informed the attorney of policy provisions that required reimbursement upon recovery from the third-party tortfeasors.[96] The attorney received payments from the third parties and disbursed them to himself and his clients.[97] Farmers then sued the attorney for multiple causes of action, including equitable lien.[98] The court held that the case did not involve detrimental reliance or unjust enrichment.[99] As such, no equitable lien attached to the settlement funds.[100]

*Kaiser* and *Zerin* are factually similar, but have opposite holdings. This fact was well examined in *Smith*.[101] The facts of *Smith* are nearly identical to *Kaiser* and *Zerin*.[102] In *Smith*, an attorney had represented eighteen different plaintiffs in personal injury suits.[103] Farmers had paid out a total of $47,057.45 to the plaintiffs.[104] Farmers had notified the attorney that the insurance policy required reimbursement from any recovery from third parties.[105] The attorney paid the recovery directly to his clients and Farmers subsequently sued the attorney.[106] The court held that "a mere promise to pay is not enough to create an equitable lien on a fund, at least when there are no considerations of either detrimental reliance or unjust enrichment."[107] The *Smith* court chose to follow *Zerin* rather than *Kaiser* because *Kaiser* "never addressed the question of *whether* an equitable lien should be impressed on the proceeds."[108] *Kaiser*

91. *Id.*
92. Miller v. Rau, 30 Cal. Rptr. 612, 617 (Cal. Ct. App. 1963).
93. *Kaiser*, 54 Cal. Rptr. 2d at 668.
94. Farmers Ins. Exch. v. Zerin, 61 Cal. Rptr. 2d 707, 709 (Cal. Ct. App. 1997).
95. *Id.* at 708.
96. *Id.* at 709.
97. *Id.*
98. *Id.*
99. *Id.* at 712.
100. *Id.* at 713.
101. Farmers Ins. Exch. v. Smith, 83 Cal. Rptr. 2d 911, 912 (Cal. Ct. App. 1999). Strangely enough, Associate Justice Sheila Prell Sonenshine of Division Three, Fourth Appellate District was on both of the panels deciding *Kaiser* and *Smith*. This is striking considering *Smith*'s scathing treatment of *Kaiser*.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 912–13.
106. *Id.* at 913.
107. *Id.* at 914.
108. *Id.*

presupposed the existence of the equitable lien and, thus, is questionable precedent.[109] The *Smith* court then looked into an examination of equitable considerations to determine that the attorney should not be civilly liable.[110]

## III. Considerations Against Holding an Attorney Liable

The *Biakanja* factors (as modified by *Lucas*) require an examination of various equitable factors in determining whether to hold an attorney liable to a third party.[111] This Note examines both policy and other factors to aid in the determination that the *Biakanja* test does not favor holding attorneys liable for their client's breach of settlement agreements.

### A. Policy Considerations Against Holding an Attorney Liable

An imposition of liability to an attorney would be predicated on a duty running from the attorney to the adverse party. In determining whether a duty is owed to a foreseeable third party, courts are to look to policy considerations on a "case-by-case basis."[112]

> Duty is a shorthand statement of a conclusion, rather than an aid to analysis in itself. But it should be recognized that duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.[113]

Two policy considerations in particular favor not holding attorneys liable for their clients' breaches of settlement agreements: potential conflicts of interests and attorney-client privilege.

#### *1. Liability Would Create a Conflict of Interests*

If an attorney is to be held civilly liable to an adverse party, that liability is predicated on a duty owed to the adverse party (in contract, tort, or equity). Imposing a duty on an attorney to an adverse party would create a conflict with the attorney's duty to his client.[114] Such a conflict would denigrate the client's right to effective counsel and his right to "free access to the courts."[115]

In *Norton v. Hines*, an attorney represented his client in a breach of contract action against Norton.[116] The claim was dismissed with the

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109. *Id.* at 914–16.

110. *Id.* at 917–19.

111. Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961).

112. Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).

113. Weaver v. Superior Court, 156 Cal. Rptr. 745, 751 (Cal. Ct. App. 1979); *see also* Commercial Standard Ins. Co. v. Bank of Am., 129 Cal. Rptr. 91, 95 (Cal. Ct. App. 1976); McGarvey v. Pac. Gas & Elec. Co., 95 Cal. Rptr. 894, 898–99 (Cal. Ct. App. 1971).

114. *Weaver*, 156 Cal. Rptr. at 751.

115. *Id.* at 751–52.

116. Norton v. Hines, 123 Cal. Rptr. 237, 238 (Cal. Ct. App. 1975).

attorney conceding that the claim had been pursued "merely in the hope that some common basis for the action would develop or turn up."[117] Norton subsequently sued the attorney for malicious prosecution and negligent advice to the attorney's client.[118] The court stated that an attorney owes a duty to his client to "vigorously" pursue the client's case to the fullest extent of the law and professional ethics.[119] If liability was to be imposed, it would make attorneys second guess filing actions.[120] The long-term implications of such a rule would deny some clients their day in court.[121]

In *Goodman v. Kennedy*, an attorney represented the principal officers of a corporation issuing stock.[122] The attorney advised his clients in the sale of stock to the plaintiffs.[123] He advised that the shares could be issued as dividends and sold to the plaintiffs without jeopardizing the Securities Act of 1933 registration exemption.[124] The plaintiffs alleged that the Securities and Exchange Commission eventually suspended the exemption, causing the stock to lose value, damaging the plaintiffs.[125] The court sustained a demurrer on the issue of negligence.[126] To allow such a cause of action "would inject undesirable self-protective reservations into the attorney's counselling role."[127] The court was concerned that attorneys would be tempted to look after their own interests, to the detriment of their clients.[128] Although the *Goodman* court was concerned with negligence, the same logic can be equally applied to breach of settlement or equitable causes of action.

2. *The Attorney-Client Privilege and Duties of Confidentiality Would Place the Attorney at an Evidentiary Disadvantage*

Another troubling aspect of imposing civil liability on attorneys involves the attorney-client privilege. Any conversations between the attorney and her client would fall under the attorney-client privilege and, thus, be prevented from being presented.[129] The existence of attorney-

117. *Id.*
118. *Id.*
119. *Id.* at 240; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. c (2000) ("A lawyer representing a party in litigation has no duty of care to the opposing party.... Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent.").
120. *See Norton*, 123 Cal. Rptr. at 241.
121. *Id.*
122. Goodman v. Kennedy, 556 P.2d 737, 740 (Cal. 1976).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 747.
127. *Id.* at 743.
128. *Id.*
129. CAL. EVID. CODE § 954 (West 2003).

client privilege is as vital to the public as it is to clients.[130] Only the holder of the privilege may waive it.[131] Thus, a client can prevent the attorney from introducing evidence under the attorney-client privilege.[132]

If there exists any exculpatory evidence from privileged conversations, the attorney may be prevented from presenting it. Even after the termination of the attorney-client relationship, the attorney is still under an affirmative duty to protect the confidentiality of his or her client.[133] Courts cannot create an exception to force waiver of the client's privilege.[134] Courts do not have the ability to "elaborate upon the statutory scheme."[135] The strict construction of the statutory code leaves no room for courts to create exceptions.[136] In addition, courts cannot interpret the statutory exceptions to include situations not literally exempt.[137] Therefore, courts cannot exempt the attorney from liability to the client for a breach of attorney-client confidentiality.

If confidential conversations occurred which included evidence that could relieve the attorney of potential liability, courts would not be aware of it. Business & Professions Code section 6068(e) explicitly requires attorneys to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[138] The danger of such a requirement can be demonstrated by way of example. Suppose that after agreeing to the settlement, the client changed his or her mind. The client told the attorney that he or she

130. *See generally* Sacramento Newspaper Guild v. Sacramento County, 62 Cal. Rptr. 819 (Cal. Ct. App. 1968).

131. CAL. EVID. CODE § 912 (West 2003); *see also* Rittenhouse v. Superior Court, 1 Cal. Rptr. 2d 595, 597 (Cal. Ct. App. 1991) (holding that "[o]nly a holder may waive the [attorney-client] privilege"); State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 805 (Cal. Ct. App. 1999) (holding that courts must examine the subjective intent of the holder of the privilege when determining if inadvertent disclosure of privileged information constitutes a waiver).

132. CAL. EVID. CODE § 954 (West 2003).

133. *Cf.* Mavroudis v. Superior Court, 162 Cal. Rptr. 724, 731 (Cal. Ct. App. 1980) (holding that a therapist has no power to waive a client's privilege and is under an affirmative duty to assert such privilege). While *Mavroudis* applied to therapists, the same reasoning can apply to attorneys.

134. *See* CAL. EVID. CODE § 911 law revision commission comment (West 2003).

135. *Id.*

136. Wells Fargo Bank v. Superior Court, 990 P.2d 591, 596 (Cal. 2000); Dickerson v. Superior Court, 185 Cal. Rptr. 97, 100 (Cal. Ct. App. 1982) ("[C]ourts of this state . . . are not free to create new privileges as a matter of judicial policy and must apply only those which have been created by statute.").

137. People v. Resendez, 15 Cal. Rptr. 2d 575, 581 (Cal. Ct. App. 1993).

138. CAL. BUS. & PROF. CODE § 6068(e) (West 2005). In contrast to section 6068(e), the ABA Model Rules of Professional Conduct allow an attorney to protect herself in such a situation. Comment 10 to Rule 1.6 allows an attorney to "respond to the extent the lawyer reasonably believes necessary to establish a defense" to any "civil, criminal, disciplinary or other proceeding . . . based on . . . a wrong alleged by a third person." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 10 (2005). California has no such provision. The only exception under the California Code is "to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." CAL. BUS. & PROF. CODE § 6068(e)(2).

would purposefully breach the settlement agreement. The attorney would have performed no wrong, yet he or she would be unable to present the conversation to clear himself or herself of liability.

Courts would not know whether such a conversation occurred. The nature of attorney confidentiality prevents such knowledge. It is precisely this lack of knowledge that creates a problem. Parties should be allowed to present evidence in their favor. When privilege or confidentiality prevents them from doing so, they are put at a distinct disadvantage. As such, the existence of attorney-client privilege and confidentiality disfavors holding an attorney civilly liable for the breach of a settlement agreement.

### B. Other Considerations Against Holding an Attorney Liable

In addition to policy considerations, there are other considerations that influence the *Biakanja* factors. In particular, the existence of an adequate remedy at law and the ability to perfect settlement agreements in California influence whether liability should be imposed.

#### 1. *An Adequate Remedy at Law Exists*

In general, an equitable remedy is only available when there is no adequate legal remedy.[139] This long-standing rule remains law in California.[140] If an adequate legal remedy exists, then courts have no jurisdiction to enforce an equitable one.[141] An exception exists for constructive trusts. "An action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy."[142] The rationale behind the exception is that the court is merely requiring the constructive trustee to fulfill his fiduciary obligation to the beneficiary.[143] In the breach of settlement agreements, an adequate remedy at law generally will exist: sue the client. The existence of an adequate remedy will foreclose any restitution or equitable lien claims.

#### 2. *Parties Can Perfect Settlement Agreements Without Liability*

California law allows for the perfection of settlement agreements through Code of Civil Procedure section 664.6.[144] This provision allows the parties, through motion, to "enter judgment pursuant to the terms of the settlement."[145] In a section 664.6 motion, the parties can request that the court "retain jurisdiction over the parties to enforce the settlement

139. Parker v. Winnipiseogee Lake Cotton & Woollen Co., 67 U.S. 545, 551 (1862).

140. *See* Wilkison v. Wiederkehr, 124 Cal. Rptr. 2d 631, 637 (Cal. Ct. App. 2002).

141. *Id.*

142. 76 Am. Jur. 2d *Trusts* § 668 (2003); *see also* Heckmann v. Ahmanson, 214 Cal. Rptr. 177, 187 (Cal. Ct. App. 1985).

143. *See* 76 Am. Jur. 2d *Trusts* § 668 (2003).

144. Cal. Code Civ. Proc. § 664.6 (West 2000).

145. *Id.*

until performance in full of the terms of the settlement."[146]

Parties are not required to use section 664.6 to perfect settlement agreements.[147] Use of section 664.6 is not exclusive.[148] It is merely an expeditious, valid alternative.[149] Settlement agreements may also be enforced by motion for summary judgment, by a separate suit in equity, or by amendment of the pleadings to raise the settlement as an affirmative defense.[150] While it may not be exclusive, the legislature enacted section 664.6 to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.[151] The existence of section 664.6 reduces the need to use liability as a deterrent for settlement breaches. If such deterrence is required, the parties can use section 664.6.

## IV. PROPOSAL

The courts should adopt a virtual per se rule against holding an attorney civilly liable to adverse parties for breach of a settlement agreement. Instead, the adverse party should be directed to sue the client for damages or enforcement of the agreement. Any need to create an incentive to enforce settlement agreements should be relieved by the ability to perfect settlement agreements through Code of Civil Procedure section 664.6 and through the possibility of liability to the client. An attorney should only be liable when two conditions are met: (1) the attorney intentionally induced the breach and (2) the breach was not in the best interests of his or her client.

### A. *BIAKANJA* FACTORS WEIGH AGAINST ATTORNEY LIABILITY

A virtual per se rule against liability to adverse parties for breach of a settlement agreement would satisfy the *Biakanja* factors (as modified by *Lucas*) in determining whether an attorney owes a duty to third parties. Those factors are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of connection between the attorney's conduct and the injury, (5) whether expansion of liability to the third party would place an undue burden on the legal profession, and (6) the policy of preventing future harm.[152] Each factor will be examined individually.

146. *Id.*

147. Robertson v. Chen, 52 Cal. Rptr. 2d 264 (Cal. Ct. App. 1996) (holding that California Code of Civil Procedure § 664.6 is not the exclusive means of enforcing a settlement agreement); *see also* Nicholson v. Barab, 285 Cal. Rtpr. 441 (Cal. Ct. App. 1991).

148. *Robertson*, 52 Cal. Rptr. 2d at 266.

149. *Id.*

150. *Id.*

151. Weddington Prods., Inc. v. Flick, 71 Cal. Rptr. 2d 265, 276 (Cal. Ct. App. 1998).

152. Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961).

*1. Extent to Which the Transaction was Intended to Affect the Plaintiff*

Settlement agreements are intended to affect the rights of the parties. The agreement is a contract between the parties. Generally, one side gives up the right to pursue legal action while the other side agrees to pay compensation or refrain from or take certain action. Without both sides being affected, the contract is without consideration. Therefore, the creation of the settlement agreement is directly intended to affect the plaintiff.

Creation of the settlement agreement, however, is not the transaction that led to the lawsuit initiated by the plaintiff. The transaction that caused the suit against the attorney was the breach of the settlement. The individual with legal obligations is the client. The client's intent is relevant to the matter of breach. The intent of the attorney's client during the breach is a factual matter, but it is irrelevant to the issue of liability for the attorney. The intent of the client should not control the liability of the attorney. A person should not be held liable for the intent of another. Only when the attorney has taken some independent action, outside the scope of the agency, to induce his or her client to breach will the attorney's intent be relevant to the transaction. This is the one exception to the virtual per se rule. Since the attorney's intent is irrelevant (except in the above mentioned exception) this factor cannot justify liability.

*2. The Foreseeability of Harm to the Plaintiff*

The foreseeability of harm to the plaintiff is directly related to the foreseeability that the attorney's client will breach the settlement agreement. Breaches of settlement agreements are the exception, not the norm. It is not foreseeable that the average settlement agreement will be breached. There may be situations in which it is foreseeable to the attorney that his or her client will breach. This is purely a factual determination for the trier of fact.

Once the decision has been made to breach the settlement agreement, the plaintiff will almost certainly be harmed. The breach of the settlement deprives the plaintiff of the benefit of his or her bargain. Therefore, if the breach is foreseeable, then so too is the harm.

*3. The Degree of Certainty that the Plaintiff Suffered Injury*

In most breaches of settlement agreements, this will not be a contended issue. The plaintiff has lost his or her benefit of the settlement agreement. That which he or she bargained for has been deprived. Therefore, this factor weighs neither in favor of, nor against, liability.

*4. The Closeness of Connection between the Attorney's Conduct and the Injury*

The client's breach of the settlement is the cause of the plaintiff's

harm. The settlement is breached by the client, not the attorney. Actions taken by the client's attorney are at the behest of the client, since the attorney is the client's agent. Unless the attorney is acting outside of the scope of his or her employment as the client's agent, then the attorney should not be held liable to the adverse party for his or her own conduct.

When the attorney is acting on his or her own volition, without the authority of the client, there may be a closeness of the attorney's conduct and the harm. It is difficult, however, to imagine a situation in which the attorney's conduct would fall under this scenario. The only action the attorney could take to encourage the breach would be to advise the client to breach or to make the completion of the client's obligations infeasible. Advising the client, however, is clearly within the authority of the attorney. Giving legal advice to a client is the heart of an attorney's responsibility.

An attorney making the completion of the client's obligations infeasible may be acting outside the scope of his or her authority. An attorney has an obligation to act in his or her client's best interests. It is possible to imagine situations where breaching a settlement may be in the client's best interests, as when the breach is efficient. Only when the attorney has breached his or her duty to the client by acting contrary to the client's best interests may this factor weigh in favor of civil liability to the adverse party.

5. *Whether Expansion of Liability Would Place an Undue Burden on the Legal Profession*

The expansion of attorney liability to adverse parties would almost certainly place an undue burden on the legal profession. The imposition would create a conflict of interests between the attorney's duty to his or her client and potential liability to adverse parties. Liability would also place an undue burden on attorneys to produce exculpatory evidence because of their clients' privilege.

Imposing liability on an attorney to adverse parties would create a conflict of interest for the attorney. The attorney has an obligation to act in the best interests of his or her client. Any finding of liability would be predicated on a duty that the attorney owed to the adverse party. Imposition of liability, therefore, would create concurrent duties: one to the attorney's client and another to the adverse party. Ethically, the attorney would be in a Catch-22. Either the attorney will breach his or her de jure duty to the adverse party or violate the Business & Professional Code by acting contrary to the client's best interests. This is a great burden to place on the legal profession.

Expanding attorneys' liability to adverse parties would harm attorneys by prohibiting the introduction of potentially exculpatory evidence. The attorney-client privilege and the attorney's duties of

confidentiality prevent any communications between the attorney and his or her client from being presented. The attorney is under a positive obligation to assert the client's privilege, even to the attorney's detriment. The client may waive privilege, but, if the client's misconduct caused the breach, it is unlikely that the client will do so. Expanding attorneys' liability to adverse parties would put attorneys at a distinct evidentiary disadvantage. The combination of the conflict of interests and effect of the attorney-client privilege ensures that this factor weighs heavily against an imposition of liability.

*6. The Policy of Preventing Future Harm*

While imposition of liability may inhibit some breaches of settlement contracts, there exist procedural safeguards that are more effective. Use of Code of Civil Procedure section 664.6, for example, is a more effective means to ensure that settlement agreements are not breached. Through section 664.6, attorneys can request that the court retain jurisdiction over the case. The judge presiding over the settlement can take measures to prevent breach and quickly remedy any breaches that do occur.

Imposition of liability to attorneys, on the other hand, provides little actual protection from future breaches. In a regime where attorneys can be held liable for their clients' breaches, attorneys will more vigilantly enforce their clients' obligations. However, an attorney has little power to prevent his or her client's actions. As an advisor, an attorney is powerless to prevent the breach from occurring. A judge, with jurisdiction over the case retained via section 664.6, has far more power to prevent breaches than a powerless attorney. Therefore, imposition of attorney liability does little to prevent future harm.

B. LEGAL OPTIONS AVAILABLE TO THE ADVERSE PARTY

The six *Biakanja* factors (as modified by *Lucas*) dictate that, in general, attorneys should not be held civilly liable to adverse parties for the breach of a settlement agreement. The adverse party is left with a simple alternative: sue the client. The attorney's client is in contractual privity with the adverse party. This Note already assumes the existence of a valid settlement contract. Consequently, establishing a prima facie case should be relatively easy. If the client has already retained a benefit from the agreement, proving equitable remedy such as trust or lien should not be overly burdensome to the adverse party.

Many adverse parties would rather sue the attorney, however, out of a fear that the client will not be solvent. If the attorney was in some way at fault, the client will be able to seek contribution or perhaps even indemnification from the attorney. If the attorney was not at fault, the adverse party may suffer. An attorney, however, is not the insurer of his or her client. It is inequitable that the attorney should bear the client's financial burden. The loss is more justly borne by the adverse party.

## CONCLUSION

An attorney faces potential liability to adverse parties when a settlement agreement is breached in California. Under the *Biakanja* test (as modified by *Lucas*), however, an attorney should not be liable unless he or she intentionally induced the breach while acting contrary to the client's best interests. Otherwise, the attorney will be faced with a conflict of interest and be placed at an evidentiary disadvantage due to the attorney-client privilege. Therefore, California courts should adopt a virtual per se rule against attorney liability to adverse parties for breach of a settlement agreement.

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