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Contingent Fee Contract Between Attorney and Client—Legal Effect of Provision Prohibiting Client from Compromising Without Attorney's Consent

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RECENT CASE COMMENTS

CONTINGENT FEE CONTRACT BETWEEN ATTORNEY AND CLIENT — LEGAL EFFECT OF PROVISION PROHIBITING CLIENT FROM COMPROMISING WITHOUT ATTORNEY’S CONSENT. — P’s brought a partition suit against D’s for the purpose of partitioning real estate. From an adverse decree P’s appeal to the supreme court, the record before that body presenting this question: what is the legal effect of a stipulation in a contract between an attorney and client providing for a contingent fee on a percentage basis, expressly prohibiting the client from compromising without the attorney’s consent? Held, one judge dissenting, that although such a stipulation in a contingent fee contract is void as against public policy, its inclusion in the contract, otherwise valid, will not destroy the legal effect of the remaining provisions. Butler v. Young.¹

The question presented is novel to this jurisdiction, but has arisen many times in other states. A survey of the cases discloses three lines of authority.

A majority of courts have held not only that such a stipulation is void, but also that its inclusion in a contingent fee contract destroys the validity of the entire agreement.² These decisions proceed to this result primarily on the basis of public policy. It has always been the policy of the courts to discourage litigation. Thus, they favor the compromise of disputes either before or after suit has been instituted. This is universally recognized as sound policy. Consequently, any condition which might act as an obstacle to, or which would in any way restrain, peaceful settlement of disputes and compromise of litigation meets the court’s displeasure and will be removed as far as possible. Courts supporting the majority view look upon the provision in question as being such an obstacle, and its inclusion in a contingent fee contract makes it invalid in its entirety. This clause is not severable from the remaining provisions that would otherwise be valid. It is also pointed out in these decisions that such provisions would give the attorney in his position of trust an unusual power of control over another’s property. The cause of action is still the client’s prop-

¹ 2 S. E. (2d) 250 (W. Va. 1939).
² Re Snyder, 190 N. Y. 66, 22 N. E. 742, 14 L. R. A. (N. S.) 1101 (1907); Kansas City Elevated Ry. v. Service, 77 Kan. 316, 94 Pac. 262, 14 L. R. A. (N. S.) 1105 (1908); North Chicago St. R. R. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177 (1898); Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196 (1899); Jackson v. Steam, 48 Ore. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390 (1906).
erty after the attorney is engaged, although the latter is given a lien on it. An unethical attorney could easily abuse this power and by prolonging litigation extract exorbitant sums from his clients. One court, in particular, goes so far as to say that it would be difficult to estimate the monstrously unjust consequences that might result to parties willing to settle, if it lay in the power of the attorney to impede or control such settlement. Although this majority rule regards such contracts void, if the attorney acted in good faith he may recover for services rendered on a quantum meruit basis.

On the other hand, it has been held by courts supporting the general rule that if the suit, brought under such an agreement between the attorney and client, is settled by the parties collusively with intent to defeat the attorney's lien or claim, the compromise will be disregarded.

The West Virginia court, in reaching the present decision, recognized the general rule as given above — that the inclusion of such a stipulation invalidated the entire contract — but refused to follow it. A majority of the court fell in line with a second group of decisions which hold that the provision restraining compromise is void within itself, but its invalidity does not destroy the other provisions of the contract, provided they are otherwise valid.

Under this second doctrine the same reasons are given for declaring the provision alone void and inoperative as are given under the general rule for declaring the entire contract invalid; namely, that such a stipulation is opposed to public policy, and so obnoxious that it is a nullity. But the inclusion of such a clause in the agreement is not regarded as indicating bad faith on the part of the attorney, nor does it merit censure. A principle of contract law is applied, which provides that the obnoxious features of a contract may be removed and the remaining provisions enforced when it can be done without impairing the general meaning and purpose of the agreement. Hence, the attorney recovers as his fee the percentage of the recovery provided by the contract.


5 Potter v. Ajax Mining Co., 22 Utah 273, 61 Pac. 999 (1900); Louisville, etc. Ry. v. Burke, 149 Ky. 437, 149 S. W. 865 (1912); Howard v. Ward, 31 S. D. 114, 139 N. W. 771 (1913); Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760 (1912).
Under the present decision the client cannot collude with the other party litigant for the purpose of defeating the attorney's rights. An earlier West Virginia case also points this out as an exception to the general rule that the client has absolute control over the settlement of the dispute.⁶ There it is said, in effect, that the contract does not amount to an assignment of an interest in the chose itself, but gives the attorney such an inchoate right therein, after the suit is brought, as cannot be defeated by collusion and fraud between the parties.

In Missouri the doctrine is established that such agreements may or may not be a violation of public policy, depending on the circumstances of each case.⁷ These decisions assert the protection such contracts afford by preventing the perpretation of fraud on attorneys, and by serving as obstructions to imposition on needy and ignorant clients by shrewd adversaries. However, where there is indication of bad faith on the part of the attorney, the Missouri court intimates that the agreement would be against public policy.⁸

The dissenting opinion in the present case convincingly points out the likely result of the rule as adopted by the majority. Merely declaring the restraint on compromise inoperative without voiding the other provisions of the contract assesses no penalty on those who engage in a practice condemned by public policy. Attorneys may still use this obnoxious device without incurring any risk. At least, they have nothing to lose by its insertion in the agreement, since the remaining provisions may be enforced. Can it not, then, be said that a practice, admittedly against public policy, is permitted? It is the opinion of the dissent that such provisions should destroy the entire contract, and the attorney be allowed to recover for services rendered only on a quantum meruit basis.

V. K. K.

**Duress by Third Party — Economic Compulsion Applied by Beneficiary of Duress — Avoidance of Release Therefor.** — Decedent, infant daughter of P, was mortally injured by an automobile driven by D, insured. T, an undertaker, refused to release the body for burial until payment had been made or secured. Shortly thereafter a settlement was negotiated between decedent's indigent parents and X, an insurance adjuster, and a written re-

⁸ Wright v. Kansas City, *et al.* By., Beages v. Robertson, both *supra* n. 7.