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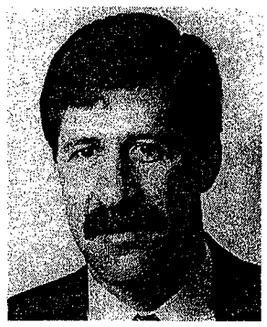
Risk Reduction Strategies In Personal Injury Litigation



While personal injury litigation has always been fraught with uncertainty, the past several years has seen a dramatic escalation in sustainable value[1] with a simultaneous reduction in the percentage of plaintiff's verdicts.[2] The result is that litigants are increasingly being placed in untenable all or nothing situations. While litigators have been known to relish the challenge of a good battle, litigants are often better served by strategies calculated to reduce risk, limit uncertainty, and provide some economic protection. Settlement, of course, is one such strategy. While settlement provides the ultimate measure of certainty, it terminates the ability of a party to take advantage of what it may perceive to be a particularly strong or meritorious position. In an effort to find some middle ground between relinquishing what is felt to be strong claim or defense and acceptance of the substantial risks attendant trial of a high exposure case, some novel approaches have been developed. One frequently utilized strategy is settlement with less than all tortfeasors resulting in at least two of the litigants having at least one issue left unresolved. Another strategy involves attempts to limit the effect of the jury's ultimate determination. It is these attempts to limit the effect of the jury's determination that form the basis for this article.

Foremost in the armament of strategies, which reduce uncertainty while preserving the adversarial posture of the litigants, is the high/low agreement. A high/low is an arrangement whereby a plaintiff and a defendant agree, typically in writing or on the record, on the boundaries of a prospective jury award, leaving a range within which the jury determination would stand. For example a $500,000 to $1,000,000 high/low

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agreement would provide that in the event of a defense verdict or verdict of up to $500,000, a settlement payment of $500,000 would be made, while in the event of a verdict of $1 million or more a settlement payment of $1 million would be made. A verdict in the range of between $500,000 and $1,000,000 would remain undisturbed. This approach has features that are attractive to both sides, particularly in high exposure, questionable liability cases in which a defendant is seeking to limit its exposure and/or eliminate bad faith scenarios, and in which a plaintiff is interested in ensuring some level of recovery to recoup costs or guaranty the plaintiff some minimum level of compensation.

Where fewer than all of the defendants in a multi-defendant case participate with the plaintiff in a high/low pact, some very interesting issues arise. Because of the interplay with GOL §15-108, questions may arise as to whether the non-settling tort teasor is limited by the high end of a high low or may obtain a set off based on the actual jury award.[4] Perhaps the most interesting issue that arises in this context is the right of a non-settling defendant to have the high/low agreement voided as a "Mary Carter" agreement[5] or alternatively disclosed to the jury. A "Mary Carter" agreement is an agreement between the plaintiff and a defendant, which may incorporate any variety of terms, but are generally characterized by three basic provisions.[6] First, the settling defendant guarantees the plaintiff a minimum payment, regardless of the Court's judgment. Second, the plaintiff agrees not to enforce the Court's judgment against the settling defendant. Third, the settling defendant remains a party in the trial, but his exposure is reduced in proportion to any increase in the liability of his codefendant's over an agreed upon amount. Some "Mary Carter" agreements include a fourth element: that the agreement be kept secret between the settling parties.

Such an agreement is considered improper in New York and failure to disclose it may require a new trial,[7] the theory being that the collusive nature of the agreement creates a danger of perjury and is calculated to mislead the jury as to who the true adversaries are. The non-disclosure prevents the jury from scrutinizing the evidence in light of the true self interest and inter relationships of the parties.[8] In New York courts seem to have placed a high priority on the integrity of the litigation process and fundamental fairness at the expense of a policy of encouraging settlements. Other states have not necessarily agreed.[9]

In certain scenarios, a high/low arrangement with less than all defendants begins to assume many of the classic features of a "Mary Carter" agreement. Similar to a "Mary Carter" agreement, one consequence of a high/low agreement with less than all of the defendants participating, is that the limit on recovery may create a tacit incentive for the plaintiff to more vigorously pursue the non-settling defendant. The similarity does not end there. The potential savings between the guaranteed minimum payment and the potential maximum payment may create some incentive on the part of the settling defendant to vigorously pursue a position adversarial in nature to the non-settling defendant. The question arises as to whether this alteration of the relationships between the parties is merely incidental to a settlement, which the courts seek to encourage, or whether the settling defendant remaining in the case as a nominal adversary is so prejudicial that disclosure of the agreement to the jury is warranted.

Perhaps, the only element missing from the classic "Mary Carter" scenario in a high/low arrangement is an agreement that the settling defendant's exposure is to be reduced in proportion to any increase in the liability of the non-settling defendant over an agreed amount. In other words the settling defendant does not have a financial stake in plaintiff's recovery or a reduction in its own payment directly tied to an increase in the award against the non-settling defendant. The amount paid by the non-settling defendant has no direct impact on the amount paid by the settling defendant and theoretically the settling defendant still has an incentive to keep the verdict down. Nonetheless, an incentive for a settling defendant to assume an adversarial posture in relation to a non-settling defendant in an effort to obtain potential reduction in its own proportionate share, may be the de facto result of the realignment of interests once a high/low is agreed upon.

Assume, for example, a high/low agreement were entered into in which the target defendant in a case with $5 million exposure, limited its exposure to a minimum of $1,000,000 and a maximum of $1,500,000. This agreement would appear to create an incentive for the plaintiff to target the non-settling defendant in an effort to maximize his overall recovery and at the same time create an incentive for the settling defendant to assume an adversarial posture against the non-settling defendant in an effort to reduce its own proportionate share, even though it would still have some incentive to minimize the overall award as well. Would a court in this situation be justified in keeping secret this alliance that might serve to alter the presentation of evidence and affect the relationships of the parties?

In *Lambert Houses Redevelopment v. HRH Equity*, 117 A.D. 227, 502 NYS2d 433 (1st Dept. 1986) the first department held that a defendant/third party plain-

tiff's concession of liability and liquidation of damages did not prejudice the non-settling third party defendant, whose contribution rights are preserved under GOL is 15-108. However, the Lambert settlement involved a sum certain rather than a high/low agreement and the agreement in *Lambert* was disclosed to the jury.

In *Meleo v. Rochester Gas and Electric*, 72 AD2d 83, 423 NYS2d 343 (4th Dept. 1979) the trial court permitted three of four defendants who agreed to settle a claim for a total of $450,000 which would be reduced to the extent the nonsettling defendant was found responsible. The settling defendants also agreed to remain in the case and retain their contribution rights against the non-settling defendant over the non-settling defendant's objection. The agreement was not disclosed to the jury. The only issue to be litigated was the relative proportionate shares of liability of the settling and non-settling defendant, with the amount of settlement to be reduced to the extent that a jury apportioned damages to the non-settling defendant. While not having all of the classic features of a "Mary Carter" agreement the arrangement did guaranty a minimum payment (of $450,000) and did require the plaintiff not to enforce the court's judgment against the settling defendants. It also permitted a reduction in the exposure of the settling defendants based on an increase in the liability of the nonsettling defendants over an agreed upon amount (zero in this case). The Appellate Division found the existing incentives strong enough to warrant invalidating the agreement and ordered a new trial.

It appears that the arrangement in the *Meleo* case essentially was a "Mary Carter" agreement. One wonders whether the same prejudice would be found if the arrangement were replaced by a high/low agreement of $100,000 to $450,000 without reference a reduction in the settling defendants' share, based on the award rendered against the non-settling defendant.[10] A similar incentive for the plaintiff to target the non-settling defendant would remain. The incentive for the settling defendants to join forces with plaintiff against the non settling defendant would still exist as to maximizing the nonsettling defendant's share of liability, but would not exist with respect to increasing the size of the award.

It would appear that for a non-settling defendant faced with a situation in which a codefendant has entered into a high/low agreement with the plaintiff, it would be incumbent upon him to examine the extent to which the settlement creates any incentives on the part of the plaintiff and the settling defendant that are detrimental to his position and should consider asking the court to determine whether the arrangement constitutes a "Mary Carter" agreement which should be nullified or disclosed. Some of the factors relevant to such an evaluation would include:

1. Whether the settling defendant's exposure is reduced by agreement or de facto in proportion to an increase in the liability of the co-defendant.

2. Whether any minimum recovery is guaranteed to plaintiff. The absence of any minimum guaranteed recovery removes some of the incentive for plaintiff to exclusively target the non-settling defendant.

3. Whether the high and low settlement figures reasonably represent that defendant's liability and exposure.[11] An unusually low maximum figure suggests additional consideration in the form of an alliance between the settling defendant and the plaintiff.

4. Whether the range between the high and low is sufficient to create a real controversy so as to maintain an adversarial posture between the plaintiff and the settling defendant and permit the settling defendant to remain in the litigation without disclosure.

5. The stage of the trial at which the agreement is entered into, as an agreement entered after presentation of the evidence is less subject to abuse by perversion of the trial process.

The remedies available to the non-settling defendant would include rendering the agreement nugatory or in the alternative, disclosure of the agreement to the jury alone or in conjunction with reallocation of peremptory challenges, alteration of the order of closing arguments and various other limitations and modifications in the presentation of evidence.[12]

Defendants' Agreements

Occasionally cases arise in which liability is a foregone conclusion, but the percentage split as well as the extent of damages remain viable areas of dispute and may, in fact, constitute the paramount issues to be resolved.[13] In this scenario cross claims and in fighting amongst defendants are often the rule, and the plaintiff has a strong interest in ensuring the defendants' posture remains adversarial to each other. Suppose, however, that the defendants agree prior to trial to share liability in a 50 percent to 50 percent proportion regardless of the jury verdict and to indemnify each other up to 50 percent regardless of how plaintiff enforces judgment. This would enable the defendants to concede liability where they otherwise might be reluctant to do so for fear of creating vulnerability in relation to the co-defendant. It would also permit them to assume a more aggressive and credible posture as to causation and extent of damages, without risking being assigned a disproportionate percentage of liability. Can a plaintiff in this situation be heard to

raise the specter of "Mary Carter" and argue that non-disclosure[14] of this indemnity sharing agreement is misleading to the jury since it prevents the jury from scrutinizing the evidence in light of the self-interest of the parties. Would the plaintiff or for that matter a third defendant not participating in the indemnity sharing arrangement, have the basis for an objection on the ground that the jury would expect the defendants, absent some undisclosed agreement, to be "natural" adversaries? Does a plaintiff have a right to expect each defendant to adduce proof against the other? While the answers are not clear, it would appear the *Meleo* rationale certainly would not apply in this situation.

While each co-defendant is entitled to a GOL §15-108 set off, these contribution rights were not fashioned for the benefit of the plaintiff. The plaintiff is entitled as a result of joint and several liability to pursue either defendant to the full extent of his claim. His claim is severally against either of the defendants and thus, would not appear to be prejudiced by an agreement to reapportion between the co-defendants. The only prejudice plaintiff might suffer is the loss of the spectacle of two co-defendants pointing fingers at each other in a desperate attempt to exculpate themselves, and as a consequence, increase the amount of damages. This is not the type of prejudice that the Mary Carter case or the *Meleo* case envisioned. Plaintiff, in this situation has a fair opportunity to introduce proof on damages as he see fit.

Because there is no alteration of the basic rights and obligations of the plaintiff in relation to each and defendant, disclosure of indemnity sharing agreements would not appear to be required. If the co-defendants have cross or third party claims these would probably have to be discontinued so as not to permit the defendants to portray the existence of an ostensible adversarial relationship before the jury, where none truly exists.

While the contents of GOL §15-108 is something of which the jury will to some extent become aware as a result of the charge and verdict sheet, these contribution rights belong to and are for the benefit of the defendants and consequently the failure of the defendants to pursue them does not alter the relationship between the plaintiff and the defendant. While it may alter the relationship between the defendants, if both defendants agree to that modification, it would seem that there would be no reason why they could not by agreement waive these rights.

Conclusion

As long as litigants and their counsel endeavor to maximize the strengths and minimize the risks and weakness of their positions, we can anticipate novel approaches, including various strategic alliances designed to secure advantage, being developed. It behooves the practitioner to explore these possibilities, but to also be aware of their pitfalls.

(1) Recently, *Abellard v. New York City Health and Hospitals Corp.*, 694 N.Y.S.2d 163 (2nd Dep't. 1999) raised the second department ceiling in cases involving neurological impairment to $14.2 million.

(2) For example the Mar. 1, 1999 New York Jury Verdict Reporter reported an increase in defendants verdicts in motor vehicle cases from 26 percent in 1995 to 48 percent in 1998. Similarly the Feb. 22, 1999 edition reported an increase in defendants verdicts in police cases from 38 percent in 1995 to 59 percent in 1998. This may in part be due to the expanded jury pool that includes a greater number of professionals.

(3) One issue that arises on the context of high/low agreements is whether appellate rights are preserved. While one objective of a high/low agreement is to terminate the litigation at the end of the trial, elimination of appellate rights may serve to introduce a free for all atmosphere since, with the exception of a mistrial, there is little fear of reappraisal for impermissible or improper conduct.

(4) See *Williams v. Niske*, 81 N.Y. 437, 599 NYS2d 519 (1993) in which the trial court compounded this problem by failing to submit for determination by the jury the liability and percentage contribution of certain tort teasors who settled for fixed amounts before trial, resulting in multiple approaches to calculating recovery being advanced.

(5) The name is taken from the seminal case, *Booth v. Mary Carter Paint Co.*, (Fla. App. 1967), 202 So.2d 8.

(6) See, It's a Mistake to Tolerate the Mary Carter Agreement (1987), 87 Colum. L. Rev. 368, 369-370.

(7) *Stile v. Bataria Atomic Horseshoes. Inc.*, 174, AD2d 287, 579 NYS2d 790 (4th Dept. 1992), rev'd on other grounds, 81 NY2D 950, 957, NYS2d 666 (1993)

(8) *Meleo v. Rochester Gas & Elec. Corp.*, 72 AD2d 83, 423 NYS2d 343 (4th Dept. 1979)

(9) See, e.g. *City of Tuscan v. Gallagher*, 108 Ariz. 140, 493 P. 2d 1197 (Sup. Ct., Ariz. 1972) and *Hackman v. Dandamudi*, 733 S.W. 452 (Mo. 1986) The majority view permits such agreements, but requires disclosure to the jury and court supervision and modification of procedure to ensure the integrity of the trial. The minority view is that such prophylactic measures are unsatisfactory and that these agreements are null and void as against public policy. See, *Elabor v. Smith*, 845 S.W. 240 (Tex. 1992); *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (Nev. 1971).

(10) While the issue has not been addressed in New York, in *Newman v. Ford Motor Co.*, 975 S.W. 147 (Mo. 1988), the Court found that in the absence of a minimum recovery being guaranteed to plaintiff and in the absence of a de jure relationship between the settling defendant's exposure and a reduction in liability of the codefendant, the agreement did not constitute a "Mary Carter" and disclosure to the jury was not required.

(11) At least once court has held that as long as the high low agreement is not illusory and there remains some incentive for the settling defendant to minimize his own exposure, any incentive to increase the exposure of the co-defendant is incidental. The court reviewed the trial record to ensure that the proceedings involving the settling defendant and the plaintiff remained adversarial, *Ziegler v. Wendell Poultry Services, Inc.*, 67 Ohio St. 3d10, 615 N.E.2d 1022 (1993).

(12) Some courts have permitted use of the agreement during cross examination of the settling defendant, not to prove the contents of the agreement, but rather to establish bias of the witness.

(13) In the medical malpractice are these types of cases would include retained surgical instruments and sponges, while in the construction context it might involve scaffolding accidents and the like under Labor Law §240 and 241(6).

(14) In general, terms of a settlement are discoverable and may even be usable for impeachment at trial, *In re Data Entry Worker Prod. Liability*, 222 A.D.2d 381, 635 NYS2d 641 (1st Dep't. 1993).