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High-low deals: In vogue or in trouble?

Not along ago, settling a case was pretty simple. The parties would agree on a value and the case would settle. There were very few lien problems. Not much back stabbing. The case would settle and the parties and attorneys would typically walk away from the table satisfied. Times have changed. Today, many problems begin after a “settlement” has been reached.

Picture this scenario. You represent one of two defendants in a personal injury action. Up until trial, the relationship with your co-defendant and his lawyer has been good. Everyone seems to get along. The defense is “united” in attempts to establish the plaintiff’s comparative negligence and to demonstrate that the damage claims are overstated.

On the date of trial, co-defendant’s counsel seems distant. They do not cooperate in scheduling. You see him whispering with plaintiff’s counsel. Worst of all, no return phone calls. You later learn that opposing counsel has been seduced by Mary Carter.

Mary Carter. Those words strike fear in the hearts of many defense attorneys. To embrace Mary Carter is to achieve comfort and protection with the promise of benefits to come. To be scorned by Mary Carter is to face a lower chance of resolving a dispute and increased exposure for damages. Who wins? It all depends which party is courting Mary Carter.

Mary Carter agreements have been valid in Illinois since 1973 with the Illinois Supreme Court decision of *Reese v. Norfolk and Western Railroad Company*, 77 Ill. 2d 434 (1979); *Kerns v. Engelke*, 76 Ill. 2d 154 (1979). The purpose of the disclosure requirements are to “level the playing field” between the “scorned” party and the participants of the Mary Carter agreement. According to one court, the disclosure is required:

[T]o counterbalance the undermining effect of such agreements on the adversarial nature of the proceedings, the non-loaning [parties] must be allowed to establish the potential bias of witnesses connected with the loaning defendant by cross-examining them about their knowledge of the agreement’s existence and by introducing the agreement, subject to an appropriate limiting instruction. *Norton v. Wilbur Waggner Equipment Rental*, 82 Ill. App. 3d 727, 732(5th Dist. 1980).

There are several variations and offsprings of the Mary Carter agreement. The purpose of this article is not to discuss the pros and cons of Mary Carter agreements. Conversely, this article will address the in vogue area of high-low deals. Like it or not, they are becoming increasingly more common in jury trials and binding arbitration. Some parties may find high-low agreements as reliable as a safety net. Be careful, your safety net may have a hole in it. Unfortunately, “the just is still out” on high-low agreements. The purpose of this article is to explore some of the case law on high-low deals and also to discuss some of the strengths and weaknesses of such deals.

I. Courts have refused to enforce High-low agreements

There is not an abundance of case law on the use of high-low agreements. Although the parties may have agreed on a high-low agreement, there have been cases in which courts have failed to enforce them. In *Tekin v. Whiddin*, 1998 WL 394790 (Ga. App. 1998), a plaintiff and an insurance company tired to negotiate a settlement limiting the amount of the plaintiff’s highest and lowest possible recoveries in a jury trial. The insurance company represented to the plaintiff’s attorney that the maximum amount of coverage available was \$2,000,000. The plaintiff’s lawyer repeatedly insisted that an essential condition of any settlement was certification that \$2,000,000 was the full limit of coverage for the defendant. The parties eventually agreed to a high limit of \$1,600,000 and a low limit if \$600,000. A lawyer for the insurance company wrote the following notes about the settlement:

All claim, all defendant; [defendant] out; confidential; no post-trial motions; payment 30 days; no less than \$600,000; no more than \$1,600,000; no interest due on unliquidated; interest out.

Interestingly enough, the note was not signed by the parties. The jury then rendered a verdict for the plaintiffs in the amount of \$5,650,000. As it turned out, there was an additional \$1,000,000 in coverage. Therefore, instead of the \$2,000,000 which was represented to be the applicable coverage there was \$3,000,000 in total coverage for the defendant. Defendant sought to enforce the settlement while the plaintiff declared the “settlement” null and void due to misrepresentations and omissions regarding the limits of applicable insurance coverage.

The Georgia Court of Appeals reviewed the agreement and noted that no meeting of the minds took place on the certification of available insurance coverage. Thus, no valid contract was formed. The appellate court affirmed the trial court and refused to enforce the “purported” settlement agreement. The judgment of \$5,650,000 was affirmed.

The lesson to be learned from the *Tekin* case is that total honesty and integrity is part of every high-low agreement. If someone is misrepresenting an issue, such as applicable insurance coverage, the high-low agreement may be unenforceable. How far does that extend? Could one argue that a party misrepresented what a witness would say

at trial, thus, the “enforceable” settlement was off? This case creates problems for attorneys entering into such an agreement.

In *Smith v. Settle*, 492 S.E. 2d 427 (Va. 1997), the parties entered into a high-low agreement where plaintiff’s could receive \$350,000 even if the verdict was less than \$350,000. If the verdict exceeded \$1,000,000, the maximum liability of the insured, the plaintiffs would recover \$1,000,000. The plaintiff would be paid any amount awarded between \$350,000 and \$1,000,000. Both parties agreed to waive the right to an appeal. On its face, a “typical” high-low agreement.

After the jury returned a verdict, the plaintiffs refused the tender of the \$350,000. The defendants filed a motion to enforce the high-low agreement which the trial court denied. The trial court sustained the plaintiff’s motion to set aside the verdict and to awarded a new trial because the jury had been erroneously instructed to an issue of law. Therefore, the case was retired.

The second trial resulted in a hung jury. A jury returned a verdict for the defense in the third trial. Overruling the plaintiff’s motion to set aside the verdicts, the court sustained their alternative motions to enforce the high-low agreement and ordered the defendant to pay the plaintiffs \$350,000.

On appeal, defendant contended that there was no explicit provision in the agreement requiring the jury to be “properly instructed on the law.” Plaintiff asserted that it was an implicit term of the agreement and that there was “no agreement” not to seek post-verdict relief in the trial court.

The appellate court reviewed the agreement and noted that there was nothing implying a “properly instructed jury” was part of the agreement and that either party could seek *post-verdict relief in the trial court*. The court noted:

[W]e will not rewrite the agreement to impose provisions that are neither stated nor implied therein... the plaintiff’s unjustified refusal of the tender prevented performance of the agreement and gave [a party] the right to regard it as terminated. Therefore, we conclude that the court erred in enforcing the high-low agreement. *Smith*, 492 S.E. 2d at 429.

What do we learn from the *Smith* decision? When drafting the high-low agreement, it must address *every* critical point! For example, in *Smith*, they agreed to “no appeal.” The court stated that the agreement did not address post-trial motions. If you do enter into a high-low agreement, you should make a distinction between post-trial motions and/or an appeal. Otherwise, potential problems are likely.

At least one court was reluctant to enforce a high-low agreement involving a minor. In *Power v. Tomarchio*, 701 A.2d 1371 (Pa. 1997), the parties entered into a high-low agreement prior to binding arbitration. The agreement indicated that the minor

plaintiff was assured a recovery of no less than \$7,500 but no more than \$20,000. Neither the judge nor the arbitrators were aware of this high-low agreement.

The arbitrators heard the evidence and entered an award of \$35,000. No appeal was filed. The plaintiff's lawyer petitioned the court for permission to accept an amount equal to the high end of the high-low agreement, i.e. \$20,000, in full and complete settlement of the minor's claim. The judge denied the petition and refused to approve a settlement for less than the arbitration award. The appeal followed.

On appeal, the defense lawyer contended that the high-low agreement was not a "settlement" under the rules of the Pennsylvania Supreme Court. Defendant argued this point to circumvent judicial approval of the settlement. Conversely, defendant contended that the high-low agreement was merely a trial strategy designed to assure that the minor obtained appropriate relief. The Pennsylvania Supreme Court disagree and noted:

Clearly, the parties' high-low agreement satisfies the above definitions, and the mere fact that the agreement did not incorporate the word "settlement" or "compromise" does not alter its effect, which was to conclusively agree to the floor and ceiling of the minor's potential recovery.

Power, 701 A. 2d 1371 at 1374. *See also Yackobovitz v. Transportation Authority*, 590 A.2d 40 (1991). (Refers to high-low agreement as a settlement agreement.)

The Superior Court of Pennsylvania was faced with two alternatives:

1. Give effect to the parties' agreement thereby giving the minor a lesser award than an independent panel found that the claim was worth;
2. Enter judgment for the arbitration award which would become final by the expiration of the appeal.

The court found that it was in the minor's best interest to enter judgment on the arbitration panel's award. The trial court noted that its main concern was to protect the minor litigant. Therefore, the court refused to set aside the arbitration award denied the appellant the opportunity to appeal.

Attorneys should be careful when entering into a high-low agreement with a minor or disabled person. If Illinois courts followed the rationale of the Pennsylvania courts, a high-low agreement may not be proper for a minor litigant or disabled party. It may be beneficial for the parties to inform the court of the agreement to arbitration or trial.

II. Other state courts have found that high-low agreements do not violate public policy

In *Cardona v. Metro Dade Transit Agency*, 680 So. 2d 1098 (Fla. Dist. Ct. App. 1996), the plaintiff and all defendants entered into a “high-low agreement.” Regardless of the verdict, the maximum recovery would be \$100,000 while the minimum recovery would be \$15,000. For the purposes of the agreement, defendants were willing to concede 1% liability. After a jury verdict in defendants’ favor, the court refused to enforce the agreement and entered an order disapproving the high-low stipulation. The court noted that the high-low agreement essentially violated public policy and offended the integrity of the court and the jury system. The court then entered final judgment for the defendants.

The appellate court reversed the lower court and distinguished the high-low agreement from a Mary Carter agreement. The court noted that all of the defendants agreed to the settlement, shared the benefits of the liability cap and liability was not shifted. Therefore, the final judgment was reversed and the cause was remanded with instructions to enter judgment in the amount of \$15,000.

In *Shafer v. Cronk*, 532 A. 2d 1131 (N.J. 1987), the court held that a high-low agreement constituted a settlement between the passenger and the driver and hence, the passenger was precluded from recovering damages from another motorist above the percentage share set by the jury. There, plaintiffs and defendant, Smith, entered into a high-low agreement on the record in which defendant Smith agreed to pay the plaintiff \$40,000 but be limited to \$100,000 regardless of the jury verdict above or below those verdicts. They further agreed to accept any jury verdict rendered where the sum awarded against Smith was between those figures.

The jury returned a verdict finding defendant Smith liable to the extent of 97% and defendant Cronk to the extent of 3% and awarded plaintiff \$500,000 for his injuries. Plaintiff asserted that defendant Cronk was liable for the full extent of the \$500,000 verdict citing a New Jersey statute which permitted recovery of the full amount against any party against whom such recovery is not barred. Defendant disagreed and claimed his liability was limited to 3% of the verdict, or \$15,000. Defendant further asserted that the effect of the high-low agreement was a settlement by plaintiff with defendant Smith. Thus, the settlement barred any contribution defendant Cronk could seek from defendant Smith. Plaintiff contended that the high-low agreement was not a settlement. The appellate court determined that the high-low agreement constituted a settlement and its effect was to bar further recovery from defendant Cronk. Therefore, defendant Cronk was not compelled to pay any more than his percentage share of liability. Judgment was entered for the plaintiff and against defendant Cronk in the amount of \$15,000.

III. What do we call these agreements?

**What’s in a name? That which we call a rose. By any other name
would smell as sweet. William Shakespeare,
Romeo and Juliet, Act 2, Scene ii.**

Several courts throughout the United States have determined that a high-low agreement is a settlement. It is a contract between the parties resolving matters in dispute.

The basic principals of contract law do apply to high-low agreements. The consideration given by the plaintiff is the expectation of a larger verdict for a guarantee of a sum certain. When a defendant agrees to pay a sum certain so as not to be exposed to a larger verdict, this arrangement constitutes a valid and enforceable contract. Therefore, issues such as set-offs and cross-claims should be addressed when entering into a high-law agreement.

IV. What are the strengths and weaknesses of high-low agreements?

What are the strengths and weaknesses of a high-low agreement? Obviously, a high-low agreement allows a party to take a case to trial while guaranteeing the plaintiff a payment and capping a defendant's potential loss. That is the biggest advantage to a high-low agreement. There are disadvantages.

* High-low agreements will ease the pressure to settle and will encourage more trials. Once you enter into a high-low agreement, the plaintiff's attorney loses any possible leverage in a bad faith action. Therefore, there is no pressure on the carrier to settle the case.

* It is a waste of the court's time. You are disregarding the decision of the 12 people who heard the evidence in the case. With all of the faith we put in our justice system, a high-low agreement, some argue, could rebut that faith.

* There is no safeguard on a party injecting error into a trial.

Win, lose or draw, high-low agreements have their advantages and disadvantages. The high-low deal is akin to an insurance policy for both sides. If they are to be used, they are best employed in uncertain cases in which liability is tenuous but damages are potentially large.

One of the fears of the high-low agreement in Illinois is the lack of case law or precedent on this issue. Two Illinois courts have peripherally addressed high-low agreements and have alluded to their acceptance. *See, e.g., Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896 (2d 1997); *McDermott v. Metropolitan Sanitary District*, 240 Ill. App. 3d 1 (1st 1993). Other than that, high-low agreements have not been addressed in Illinois.

V. Conclusion

There are unanswered questions for high-low agreements. If, for example, the parties agree to no appeal, would that preclude a post-trial motion? What precludes a party from injecting error into the case if it was not going well? If a party knows that it will not be appealed, why not allude to the defendant's insurance? Why not refer to the plaintiff's prior back injury that you could not connect up? These are some of the fears with the high-low agreement. The agreement should contain safeguards. Some of the

fears of high-low agreements have been discussed. The high-low agreement is not a back stop for all parties and should be used with caution and only under extraordinary circumstances.