

Feature Article

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Enforceable High/Low Settlement Agreements

What are they?

A high/low settlement agreement is a form of a settlement agreement, with some added aspects. The theory behind the agreement is that the plaintiff and the defendant want to insure themselves against an excessive verdict in favor of the other. The plaintiff and the defendant agree that the outcome of the case will be no less than “x” dollars (the low) and no more than “y” dollars (the high). If the verdict is in favor of the plaintiff, and exceeds “y” dollars, the plaintiff gets “y” dollars. If the verdict is in favor of the defendant, lower than “x” dollars, the plaintiff gets “x” dollars.

Ideally, consideration is made by counsel for the plaintiff and the defendant regarding a high/low agreement as an alternative to settlement of the case prior to trial. Nonetheless, these agreements certainly can be and often are entered into during trial, while the jury is out. With some limitations, high/low agreements are legal and enforceable.

The case law in Illinois on the enforceability of these agreements is scant. In order for these agreements to be enforceable, the parties must be aware of and cover the pitfalls in the agreement. One of the principal reasons high/low settlement agreements often create more problems than intended is that they are typically invoked in the middle of trial or even when the jury is out. As a consequence, they often are negotiated when the parties are under the gun and on the fly, memorialized verbally on the record and without a signed agreement. Because these agreements often are negotiated on the fly, parties fail to consider all the issues that can arise.

It’s a Contract – Put It in Writing

Like every agreement, a high/low settlement agreement should be in writing and set out what happens in every contingency. High/low settlement agreements are almost universally viewed by courts as contracts and are interpreted and enforced pursuant to the principles of contract law. Courts usually endeavor to ascertain whether there is an ambiguity in the agreement and, if so, what the extrinsic evidence reveals about the intent of the parties. *Miller v. Ginsberg*, 2005 PA Super. 136, 874 A.2d 93, 99 (2005). Thus, where the parties to a high/low settlement agreement fall into a dispute over an issue that is not clearly addressed, courts may invoke the rules of contract construction to resolve the dispute.

Ambiguous terms will be construed against the drafter of the disputed provision of the contract. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 265, 777 N.E.2d 499 (1st Dist. 2002). Contract terms are ambiguous if they can

be reasonably interpreted in more than one way due to lack of clarity or double meanings. *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334, 830 N.E.2d 760 (1st Dist. 2005). Just because the parties may disagree on a term does not make it ambiguous. The court must look to the contract as a whole and give words their ordinary and usual meaning. Whether a contract is ambiguous is a question of law. *Blair*, 358 Ill. App. 3d at 334.

Courts interpreting Illinois law have routinely held that ambiguity of material terms or lack of non-essential details will not render a contract unenforceable, so long as there is some basis for fashioning a remedy. *Quinlan v. Stouffe*, 335 Ill. App. 3d 830, 838, 823 N.E.2d 597 (4th Dist. 2005).

When an ambiguity exists, courts may consider extrinsic evidence to determine the parties' intent, including the purposes and surrounding circumstances of the contract's execution and performance. *Fleet Business Credit, LLC v. Enterasys Networks, Inc.*, 352 Ill. App. 3d 456, 469, 816 N.E.2d 619 (1st Dist. 2004).

If the parties wish to avoid the introduction of extrinsic evidence, it is advisable to include an integration clause in the written high/low settlement agreement, *i.e.* language specifying that the agreement represents the entire agreement between the parties. High/low settlement agreements, like other contracts, may be set aside where one of the parties commits a material breach of the agreement. Similarly, like other contracts, a party wishing to avoid a high/low settlement agreement likely will have to establish that it was the product of fraud, misrepresentation, or mutual mistake.

Judicial Approval Necessary?

While Illinois has not spelled out the issue with any certainty, judicial approval, or at least advising the court of the high/low settlement agreement is highly recommended. In certain circumstances, judicial approval will be required. Cases involving a minor will require the appointment of a guardian *ad litem* (GAL) and approval by the GAL of the high/low settlement agreement. In wrongful death cases, the administrator or executor of the estate, as well as those otherwise affected, will need to be provided with notice of the agreement and consent. This can be difficult if the high/low settlement agreement is being negotiated while the jury is out.

If all family members are not accessible, the best course of action is to ensure that the court's acknowledgement, if not approval, of the high/low agreement is on the record, if not in writing.

Aside from having the agreement reduced to writing, the parties, in a cleared courtroom, should set forth on the record their understanding and agreement. This should involve not only the lawyers but their respective clients. Under some circumstances (cases involving a minor or a wrongful death claim), testimony should be taken from the parties on the record.

While on the record, each lawyer should inform his or her client about all the terms of the agreement and have each party to the agreement testify, on the record, that they understand each of the terms and their effect. As testimony is being taken from the parties on the record about the terms of the proposed agreement, it is suggested that the attorneys and the trial judge provide a few examples to the parties to determine whether they understand that "Z" will happen if "W" verdict is reached. The court should also explain to the parties that once they enter into this agreement, they will not be able to change it later. Involving the court in this manner will help in enforcing high/low settlement agreements should enforceability present itself as a problem down the road.

For example, a high/low settlement agreement entered into in connection with an action brought by a minor, by his parents, to recover for injuries inflicted upon him by dogs constituted a compromise or settlement of the minor's claim within the meaning of the rules of civil procedure for the Commonwealth of Pennsylvania. As a result, such an agreement was subject to court approval as a settlement. The fact that the agreement did not incorporate the terms "settlement" or "compromise" did not alter its effect, which was to conclusively agree upon a floor and ceiling of a potential recovery. *Power v. Tomarchio*, 701 A.2d 1371, 1374 (Pa. Super. Ct. 1997); 33 Am. Jur. Trials 195, § 25 (Apr. 2008).

In Illinois, a minor involved in litigation is a ward of the court, and the court is vested with the duty and discretion to protect the minor's interests. *First Nat'l Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 203, 872 N.E.2d 447 (1st Dist. 2007), citing *Wreglesworth v. Arctco, Inc.*, 316 Ill. App. 3d 1023, 1026, 738 N.E.2d 964 (1st Dist. 2000).

Consistent with that duty, the trial court is statutorily required to approve or reject any settlement agreed to on the minor's behalf. 755 ILCS 5/19-8. Under both the case and statutory law, the duty of the court is to approve or reject any settlement proposed on the minor's behalf. The trial court has the authority to approve such a settlement when the evidence shows that the compromise is in the best interest of the minor. *Lowrey*, 375 Ill. App. 3d at 204, citing *Ott v. Little Co. of Mary Hosp.*, 273 Ill. App. 563, 570, 652 N.E.2d 1051 (1st Dist. 1995). In making this determination, "the court is permitted to review the parties' positions, analyze their potential strengths and weaknesses, and estimate probabilities of liability and damage award." *Ott*, 273 Ill. App. 3d at 573. The court may also consider any statistics regarding the probabilities of jury verdicts in favor of plaintiffs and the average dollar amount of these verdicts. *Id.* at 574. Finally, the court may consider the wishes of the minor's parents and the recommendations of any guardian *ad litem*. *Lowrey*, 375 Ill. App. 3d at 204.

The lesson here is that the high/low settlement agreement often requires not only court approval, but also clear understanding of its ramifications by all those who will be affected.

What Constitutes a Verdict?

Because the parties may be anxious to enter into a high/low settlement agreement, all the issues may not be properly considered. For example, one issue concerns the possibility of a mistrial. A high/low settlement agreement requires a verdict to determine the amount of compensation. What constitutes a "verdict"? For example, is a deadlocked jury a "verdict"? Is a deadlock jury considered a "no cause" verdict for purposes of the agreement? The parties should anticipate this possibility and reach an understanding as to how a deadlock will be handled. This understanding should be incorporated into the written document and on the record.

Similarly, if the plaintiff's counsel seeks a mistrial by intentionally violating the courts' *in limine* order or otherwise, does this constitute a "verdict" or is it a "no cause"? This contingency should also be addressed.

Special Interrogatories

Although not commonly used in cases where liability is fairly well established, in close cases, defendants often resort to special interrogatories to force the jury to deal with the issue of liability honestly and put aside sympathy. As a general proposition, the purpose of special interrogatories is to provide a check on the jury's deliberations by testing the general verdict against the jury's determination of one or more issues of material fact. See, e.g., *Simmons v. Garces*, 198 Ill. 2d 541, 555, 763 N.E.2d 720 (2002). What happens in the event a jury returns a general verdict in favor of the plaintiff and answers to special interrogatory in a manner inconsistent with the general verdict? The law in Illinois is that the answer to a special interrogatory controls the general verdict. See *Powell v. State Farm Fire and Cas. Co.*, 243 Ill. App. 3d 577, 581, 612 N.E.2d 85 (1st Dist. 1993). The court must invalidate a general verdict for the plaintiff and enter judgment for the defendant. Failure to deal with the special interrogatory issue in the high/low settlement agreement may provide a potential for a dispute in enforcement of the high/low settlement agreement down the road.

Multiple Tortfeasors

Where there are multiple tortfeasors, this raises the issue of "release" or "set-off." For a set-off, a tortfeasor must show that the plaintiff and another tortfeasor "settled" or agreed upon a "covenant not to execute." If the verdict, as very often is the case, comes in between the high and the low number, this result may not be considered a "settlement" for purposes of the rights of other tortfeasors. The reason is that the

high/low agreement was superceded by the actual jury verdict, and the plaintiff will get exactly what the jury awarded. The agreement should make clear that a verdict within the range is considered to be a “settlement.”

Illinois prohibits joint tortfeasors from pursuing contribution from settling defendants and vice versa, assuming the high/low settlement agreement is viewed as a “settlement.” In such circumstances, there is no right to contribution. See Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01 (West 2008).

In the typical high/low settlement agreement, the liability of the agreeing defendant is not tied in any way to the liability of the non-agreeing defendants. Should you disclose the high/low settlement agreement to the non-participating defendants? The answer appears to be “maybe.” Courts have taken different positions on whether disclosure of the existence in terms of the high/low agreement to non-settling parties is required.

One court has held that failure to disclose the high/low settlement agreement to the other defendants did not mandate a reversal of the judgment. In *In Re Eighth Judicial District Asbestos Litigation*, 32 A.D.3d 1268, 822 N.Y.S.2d 216 (4th Dep’t 2006), the court held that absent evidence of collusion between the insulation manufacturer, worker and the worker’s wife, to the detriment of the manufacture of material used to create gaskets, the failure to disclose the insulation manufacturer’s high/low settlement agreement with worker and his wife did not mandate reversal of a judgment in the amount of \$748,851 against the material manufacturer in a personal injury action. In that matter, the plaintiff had alleged that he developed an incurable disease as a result of his exposure to asbestos-containing products and materials. The court found that in the agreement, the insulation manufacturer retained the incentive to minimize its own culpability and to magnify the culpability of the worker and the material manufacturer, such that the high/low agreement did not realign loyalties so as to prejudice the material manufacturer. *In re Eighth Judicial Dist. Asbestos Litig.*, 32 A.D.3d at 1270; 4 Am. Jur. Trials 289, § 56 (Apr. 2008).

The courts will look to see if there is any evidence that the parties were less than zealous in the representation of their respective clients. However, the burden for the complaining, non-settling tortfeasor is high. Courts generally want to encourage settlement and quasi settlement agreements. That desire appears to outweigh the argument or contention that there was collusion on the part of the settling parties in most instances.

Comparative Fault and Other Defenses

While contributory fault is not a common defense in medical negligence claims, high/low settlement agreements can create rather than solve problems when the parties fail to take this issue into consideration. An example of that happened in *Batista v. Elite Ambulance Service, Inc.*, 281 A.D.2d 196, 721 N.Y.S.2d 355 (1st Dep’t 2001). In *Batista*, the plaintiff and defendant entered into a high/low settlement agreement. The jury awarded damages within the high/low range, but assigned the plaintiff a 75% share of contributory fault. Reduction of the jury award for comparative fault reduced the amount to below the floor of the high/low settlement agreement. The plaintiff sought the unreduced amount of the verdict. The terms of the high/low agreement were silent as to how the issue of comparative fault was to be treated. The appellate court rejected the plaintiff’s argument, holding that the agreement contained no language whereby the defendant waived the defense of comparative fault. *Batista*, 281 A.D.2d at 196. The New York court found that the plaintiff was only entitled to the amount of the verdict, even though it was below the floor of the high/low settlement agreement.

Avoid the Appearance of Collusion

The timing of the negotiations on a high/low settlement agreement can affect any claim by a non-settling defendant that there was collusion on the part of the settling defendant and the plaintiff. If the high/low settlement agreement is reached after closing arguments, nearly all collusion claims by the non-settling defendant will evaporate.

If, however, the agreement is reached prior to trial or during trial, you can expect that the non-settling defendant will raise the argument that there was collusion. The non-settling defendant may seek, in a post-trial motion, the right to engage in discovery as to the timing and negotiations leading up to the high/low settlement agreement.

A collusion claim and the request to engage in discovery regarding the negotiations leading up to the high/low settlement agreement were raised in *Wingo v. Rockford Memorial Hospital*, 292 Ill. App. 3d 896, 686 N.E.2d 722 (2d Dist. 1997).

In *Wingo*, the plaintiffs filed a medical malpractice action against defendant Rockford Memorial Hospital (Hospital) and defendant Dr. Edward W. Klink to recover for damages related to the severe brain damage allegedly suffered by their baby, Brittany Lynn Wingo, as a result of the defendants' negligence in releasing the mother from the Hospital when she was leaking amniotic fluid.

Following closing arguments in the case, but prior to the jury's verdict, the plaintiffs and Dr. Klink entered into a high/low settlement agreement. Pursuant to the terms of that agreement, Dr. Klink agreed to pay the plaintiffs \$1,000,000 if the Hospital was found negligent, and \$3,000,000 if the Hospital was not found negligent. Following its deliberations, the jury returned a verdict against the defendants for \$10,232,523, and the trial court subsequently entered judgment in accordance with the verdict. The Hospital appealed. On appeal, the Hospital argued that the trial court erred in refusing to allow it to conduct discovery with respect to the timing, terms, and conditions of the plaintiffs' settlement with Dr. Klink.

The Hospital maintained that the high/low settlement agreement was an "end run around" the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.* (1996). The Hospital argued that the plaintiffs put on a "weak attack" of Dr. Klink's negligence because they knew they would settle with Dr. Klink and that in return, Dr. Klink would put the blame on the Hospital, thereby reducing his exposure from \$3,000,000 to \$1,000,000. The Hospital further argued that Dr. Klink and the plaintiffs manipulated the settlement to deprive the Hospital of its right to a set-off. The Hospital also argued it should have been allowed to engage in discovery to explore the timing of the settlement, because the facts might indicate that Dr. Klink and the plaintiffs had already reached an agreement before closing argument but failed to inform the Hospital or the court.

The Second District of the Appellate Court found that since the Hospital had not filed a contribution action while the original action was pending, it was not entitled to contribution from the settling defendant. *Wingo*, 292 Ill. App. 3d at 912. Similarly, the Hospital's set-off rights were not negatively affected, according to the appellate court. *Id.* at 911.

Secondly, the appellate court found that there was no indication in the record that an agreement was reached or even negotiated until after closing argument so that the adversarial process was not distorted by the settling defendant's having a stake in the outcome.

Finally, granting wide discretion to the trial court on the issue, the appellate court determined that the Hospital was not entitled to engage in any discovery as to the timing of the settlement, because the trial court had found no reason to allow the Hospital to do so.

The inference from the *Wingo* case is that if the high/low settlement agreement is negotiated prior to the end of closing arguments, a non-settling defendant might have the right to engage in discovery as to the timing in order to establish whether there was collusion on the part of the plaintiff and the settling defendant.

In *McDermott v. Metropolitan Sanitary District*, 240 Ill. App. 3d 1, 607 N.E.2d 1271 (1st Dist. 1992), a bicyclist paralyzed as a result of falling into a concealed, unmarked drainage ditch, sued the Village of Palatine (Village), Salt Creek Rural Park District and the Metropolitan Sanitary District (MSD). A judgment was entered against the Village and it appealed. As part of the appeal, the Village complained that the settlement between the plaintiff and the MSD was not in good faith.

After the cause was set for trial, but before the commencement of trial, the MSD extended an irrevocable offer that guaranteed the plaintiff a minimum of \$100,000 on the condition that the plaintiff agreed not to execute in excess of \$1,000,000 on any judgment he might obtain against the MSD. Thereafter, during jury deliberations, the plaintiff advised the court that he had settled with the MSD. Specifically, the plaintiff's

counsel informed the court that the MSD's agreement amounted to "\$1 million [which] would be \$500,000 plus a \$500,000 loan agreement." *McDermott*, 240 Ill. App. 3d at 43. The court reserved ruling on whether this settlement agreement was in good faith. Plaintiff also informed the court that he had accepted the Park District's offer to settle for \$1,650,000. That settlement was not challenged by the Village on appeal.

Following the return of the jury's verdict and the MSD's filing of a motion for judgment notwithstanding the verdict, because of the settlement agreement between the MSD and the plaintiff, the court permitted the Village to undertake discovery of the circumstances surrounding the MSD's settlement agreement.

In response to written interrogatories, both the MSD and the plaintiff represented that the MSD's \$500,000 loan to the plaintiff was to be repaid upon the plaintiff's recovery of that sum from the Village, if any such recovery from the Village were forthcoming. The plaintiff and the MSD also stated in their responses to written interrogatories that the previous "high/low" covenant not to execute above \$1,000,000, which the MSD had extended shortly after the trial had begun, had been tendered for consideration of \$100,000. The MSD and the plaintiff represented that this first "high/low" agreement had been superceded by the eventual settlement between the plaintiff and the MSD reached during jury deliberations.

The Village later contended that the MSD's settlement agreement with the plaintiff should be set aside because the MSD was not candid in its representations to the trial court regarding the \$500,000 loan extended by the MSD to the plaintiff. The Village argued that the MSD's motion for judgment notwithstanding the verdict failed to make any reference to the \$500,000 loan agreement and that this loan agreement was only revealed in response to written interrogatories submitted by the Village in its discovery of the circumstances surrounding the settlement negotiations between the MSD and the plaintiff. The Village also contended that the agreement should be held invalid because the amount agreed to was only a small fraction of the amount that was both reasonably expected and actually awarded by the jury.

The appellate court rejected this argument, indicating that public policy favors the compromise of claims in good faith and acknowledges that it is "the essence of the settlement negotiations that a party either compromises in return for the certainty of a fixed result or gambles that he will obtain a more favorable result by submitting the case to a jury." *McDermott*, 240 Ill. App. 3d at 45. The Court declined to utilize "proportionality" or "reasonable range" tests in order to determine whether the MSD's settlement with the plaintiff, when compared to the jury's subsequent verdict, was made in good faith.

As to the claim by the Village that there was collusion on the part of the plaintiff and the MSD, the Village argued that the collusion activity began with the first settlement, which had been reached prior to opening statements, and culminated in the second settlement reached during jury deliberations. The Village argued that the true objective of the settlement negotiations was to retain the MSD as a "sham" defendant and to improperly shunt to the Village in excess of the amount of the jury's eventual verdict. The Appellate Court disagreed and found that the MSD had participated fully in the trial through its review of the trial record.

The lesson of *McDermott* is that the issues that can be raised by a co-defendant include a claim that the fact that a high/low settlement agreement has been negotiated might have to be shared with the non-settling defendant; that the amount may be considered by the court in its determination of whether the settlement is in good faith; and that a settlement entered into before final arguments, by its very nature, can have the appearance of collusiveness.

Costs and Interest Waived?

The high/low settlement agreement must be clear that taxed costs, interest, and other sanctions are waived. That deductions are to be made for costs and attorneys' fees must be spelled out clearly. Similarly, defendants must recognize that they will not be able to recover costs of suit, collateral source deductions, or caps for non-economic loss, unless otherwise agreed in writing.

Post-Trial Motions

What happens when a post-trial motion is filed? How is the settlement agreement affected by a JNOV or the granting of a new trial? From a defendant's perspective, it would appear that if a JNOV or new trial is granted, the high/low settlement agreement becomes unenforceable. However, it is best to deal with this contingency in writing in the body of the agreement.

Do Local Rules Apply?

A good example of a high/low agreement that became difficult to enforce is *Cunha v. Shapiro*, 42 A.D.3d 95, 837 N.Y.S.2d 160 (2d Dept. 2007). In that case, after jury selection, the parties entered into a high/low settlement agreement (\$75,000 low / \$325,000 high) and placed it on the record. The jury verdict exceeded the high and, therefore, triggered the damages ceiling. Some weeks later, the defendant sought a release from the plaintiff. The plaintiff failed to provide one, believing it was not called for in the agreement. Because the defendant failed to tender payment within thirty (30) days of the verdict, as required in the high/low settlement agreement, the plaintiff filed for a judgment which was executed by the clerk of the court in the amount of \$325,000, plus an additional \$48,060 in costs and interests.

The defendant moved to vacate the judgment, arguing that the parties had settled and, pursuant to local rules, the plaintiff failed to tender a general release. Under the local rule, the deadline for payment is determined from the time of tender of a release. Rejecting the plaintiff's characterization of the arrangement as a "mere stipulated modification of the jury's verdict," the appellate division found that the parties had, in fact, entered into a settlement agreement that implicated the local rule requiring a general release. The parties could have opted out of this requirement, but failed to do so expressly and the judgment filed by the plaintiff was properly vacated. See also *Lavergne v. Quality Fabricators of Eunice, Inc.*, 888 So. 2d 1147 (La. Ct. App. 2004) (high/low settlement agreement was a valid compromise of the plaintiff's claim and, because settlement was not approved by the workers' compensation carrier as required by local rule, the carrier was entitled to recover full value of its lien).

The lesson from these cases is that any local rules that apply to settlements of these cases should be considered when a high/low settlement agreement is being negotiated. If the parties do not want those rules to apply, the agreement should incorporate language opting out of the local rule.

Appeals

Should the high/low settlement agreement preclude the right to an appeal? High/low settlement agreements are intended to bring finality to the case upon the rendering of a verdict. However, there is a potentially significant downside to relinquishing the right to appeal. Once done, the parties likely have given up any right to challenge any error or impropriety in the proceedings, including errors in rulings by the court.

In *Manke v. Physicians Insurance Co. of Wisconsin, Inc.*, 289 Wis. 2d 750, 712 N.W.2d 40 (Wis. App. 2006), a patient brought a medical malpractice action against a medical center, a physician, and the State Patient Compensation Fund. During jury deliberations, the parties entered into a high/low settlement agreement with the floor at \$100,000 and the ceiling at \$800,000. The jury returned a verdict for the plaintiff in excess of the ceiling. Three weeks after the verdict, the defendant doctor filed a motion for a new trial on the grounds that inappropriate materials had been introduced into the deliberations by one of the jurors. The defendant alleged that a juror brought a dictionary definition of negligence into the jury room that allegedly swayed some jurors toward the plaintiff. The plaintiff objected and argued that the high/low agreement precluded the post-trial motion. Because the parties had not contemplated this issue, one that was clearly out of the control of the parties and the court, the trial court found that the high/low agreement did not preclude the post-trial motion.

In *Maslow v. Vanguri*, 168 Md. App. 298, 896 A.2d 408 (2006), the defendant doctor was entitled to rescind the high/low settlement agreement with the plaintiff in a medical malpractice action when the plaintiff appealed a verdict in favor of the defendant. The high/low settlement agreement stated that no appeals could be taken from the jury's verdict and that the plaintiff would receive at least \$250,000, regardless of the jury's verdict and that the doctor would not be liable for any amounts over \$1,000,000. When the patient filed an appeal after the jury returned a verdict in favor of the defendant, the defendant was not required to pay the patient the agreed \$250,000. The "no appeals" provision of the agreement was not merely a subsidiary term, but rather was a central element of the agreement. The plaintiff's appeal constituted a material substantial breach of that agreement. *Maslow*, 168 Md. App. 298 at 324; 16 Am. Jur. Trials 471, §71 (Apr. 2008).

A significant problem with a broad no appeals/no post-trial motion provision is the fact that it removes the ability of the parties to the high/low settlement agreement to raise post-trial challenges to errors made during trial. Parties may be tempted to take unfair advantage of a no appeals provision to sway the jury by introducing improper evidence or prejudicial statements. If the trial court in that event refuses a motion for mistrial, and the jury returns a verdict arguably influenced by the improper conduct, the victim of this conduct might be without recourse.

In light of this pitfall, it makes sense to preserve some right to appeal. Many high/low settlement agreements do reserve the right to appeal the jury's verdict. However, if the parties desire to waive some portion of their right to an appeal in order to reach some finality in the proceedings, a possible solution to this problem is to provide in the agreement that the right of appeal is preserved in the event a party publishes evidence to the jury that violates a rule, a motion *in limine*, or that was never produced in discovery. The agreement also should provide for a right to appeal where a party makes improper arguments in the presence of the jury. Without the threat of appeal, there is often little incentive for all sides to play by the rules.

Another approach is to preserve all rights to an appeal, except for those related to the damage award. You can include in the agreement that neither party will seek an additur or remittitur.

One author has proposed the following language:

Upon completion of the trial, any party retains the right to appeal any judgment or verdict based upon any errors committed at trial; however, neither party may simply appeal the judgment as being too excessive or too small except to the extent necessary to appeal any other trial error. Neither party shall seek a remittitur or additur.

Morry S.Cole, *High-Low Agreements in Cases Involving Minors*, Journal of the Missouri Bar, Sept.-Oct. 2008, at 228. With this language, each side likely will remain on their best behavior for trial. Post-trial motion practice will remain unchanged, with the exception that there will be no claim for remittitur or additur.

In *Garley v. Columbia LaGrange Hospital*, 377 Ill. App. 3d 678, 881 N.E.2d 370 (1st Dist. 2007), before the verdict was read, the plaintiff and the two defendant physicians, Dr. Scott Multack and Dr. Carla Mitchell, reached a settlement agreement. The defendant hospital was not part of the high/low settlement agreement. As to Dr. Multack's high/low agreement, the range was \$950,000 as the low and \$1,000,000 as the high. Dr. Mitchell's high was \$1,000,000 and her low was \$100,000. The high/low settlement agreement also contained a priority of execution agreement, in which the plaintiff agreed to collect any judgment, up to \$10,000,000, against the hospital before collecting anything from either doctor. The settlement agreement also contained a provision that if an appeal was pursued by the plaintiff or the hospital from a verdict for or against the hospital, and a new trial was granted, the settlement agreement would be void and a new trial would include the defendant physicians.

The jury returned its verdict, finding Dr. Multack and the hospital, but not Dr. Mitchell, liable for the decedent's death. The jury found that the damages were \$2,800,000. The hospital filed a motion for judgment N.O.V., which the circuit court denied.

The plaintiff appealed the judgment in favor of Dr. Mitchell and from the judgment against the hospital and Dr. Multack seeking a new trial on the issue of damages on the ground that the jury's verdict was

inadequate. Dr. Multack and Dr. Mitchell filed motions to dismiss the plaintiff's appeal on the grounds that the terms of the high/low settlement agreement included an agreement that prevented the filing of an appeal. They argued that if a new trial on the issue of damages were granted, the settlement terms would have to be vacated. The appellate court dismissed the plaintiff's appeal against the physicians. The court subsequently granted the plaintiff's motion to voluntarily dismiss his appeal against the hospital. The hospital, however, had appealed also, arguing that the circuit court erred in denying its motion for judgment N.O.V. because the plaintiff's experts, who were physicians, were not competent to testify as to the applicable nursing standard of care.

One of the issues in *Garley* was whether the doctors could be forced to retry the case in light of the hospital's appeal. The following question was presented to the appellate court in *Garley*:

Where only LaGrange pursued an appeal from a judgment on a jury verdict – in favor of plaintiff and against LaGrange and Dr. Multak [*sic*] and against plaintiff and in favor of Dr. Mitchell – does the original judgment against Dr. Multak [*sic*] and in favor of Dr. Mitchell remain final and binding on all parties, thus barring Drs. Mitchell and Multak [*sic*] from being parties in the retrial, where:

(b) There was a high-low agreement between plaintiff, Drs. Mitchell and Multak, [*sic*] but not LaGrange, which stated that if LaGrange obtained a new trial, the high-low agreement was void and the doctors would be parties in the retrial?

Garley, 377 Ill. App. 3d at 681. The First District found that in the settlement agreement, the parties specifically agreed that a retrial would include Drs. Multack and Mitchell: "This court's reversal placed plaintiff, the Hospital, and Drs. Multack and Mitchell back in the same position prior to the jury's verdict." *Id.* at 682. The high/low settlement agreement became voidable by the court, as the parties to it had arguably intended.

Watching Out for the Pitfalls

While the pitfalls to a high/low settlement agreement are many, a review of the checklist below and pre-prepared high/low agreement language in written form will help avoid 99% of the problems.

Drafting Checklist

Below is a list of several factors counsel should consider when entering into a high/low settlement agreement:

- Put the agreement in writing;
- Explain to the client the terms and the effect of the agreement;
- Adopt a range in the agreement that is considered an acceptable range for purposes of contract enforcement, factoring in a reasonable amount of compensatory damages;
- Factor into the range attorneys' fees, costs, interest, etc.;
- Decide whether a deadlocked jury constitutes a "verdict";
- Decide whether a mistrial constitutes a "verdict";
- Decide whether the agreement will contain a "covenant not to collect" in excess of the verdict;
- Decide whether the agreement will contain a stipulation to seal the court file;
- Decide whether the agreement will deal with confidentiality and non-disparagement;
- Decide whether the agreement will accept or exclude local rules;
- Decide whether the agreement will contain an integration clause;
- Decide whether the agreement will provide that the plaintiff is to satisfy all liens and hold the settling defendant harmless from those liens;
- Provide a date before which payment must be made;

- Take into consideration special interrogatories and post-trial motions and their effect on the agreement;
- Preserve the right of the parties to appeal in whole or at least in part;
- Contemplate a contributory fault finding by the jury and its affect on the terms of the agreement;
- Advise all parties of and obtain the necessary consented for the high/low settlement agreement, *i.e.* guardian *ad litem*, representatives of the estate, etc.;
- If there are multiple parties to the litigation, advise them of the agreement;
- If there are multiple parties to the litigation, memorialize the release and set-off risk;
- Advise the judge;
- Consider whether the agreement needs judicial approval;
- Memorialize the agreement on the record in an empty courtroom with the judge;
- On the record in open court, have all the attorneys to the agreement clearly spell out all of the terms of the agreement;
- Have the attorneys and judge provide examples to the parties so they understand the affect of the agreement, given any particular jury verdict.

Conclusion

The benefit of high/low settlement agreements is that they promote finality, certainty, ease of administration when prepared properly and a degree of comfort for the parties to the agreement. However, all the terms must be completely negotiated before being agreed upon, the parties must be fully informed and the agreement must be placed on the record, including testimony from the parties themselves. There are numerous pitfalls.

These agreements are contracts and will be interpreted by the courts under the laws of contract. When approached properly and carefully, these agreements are enforceable.

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