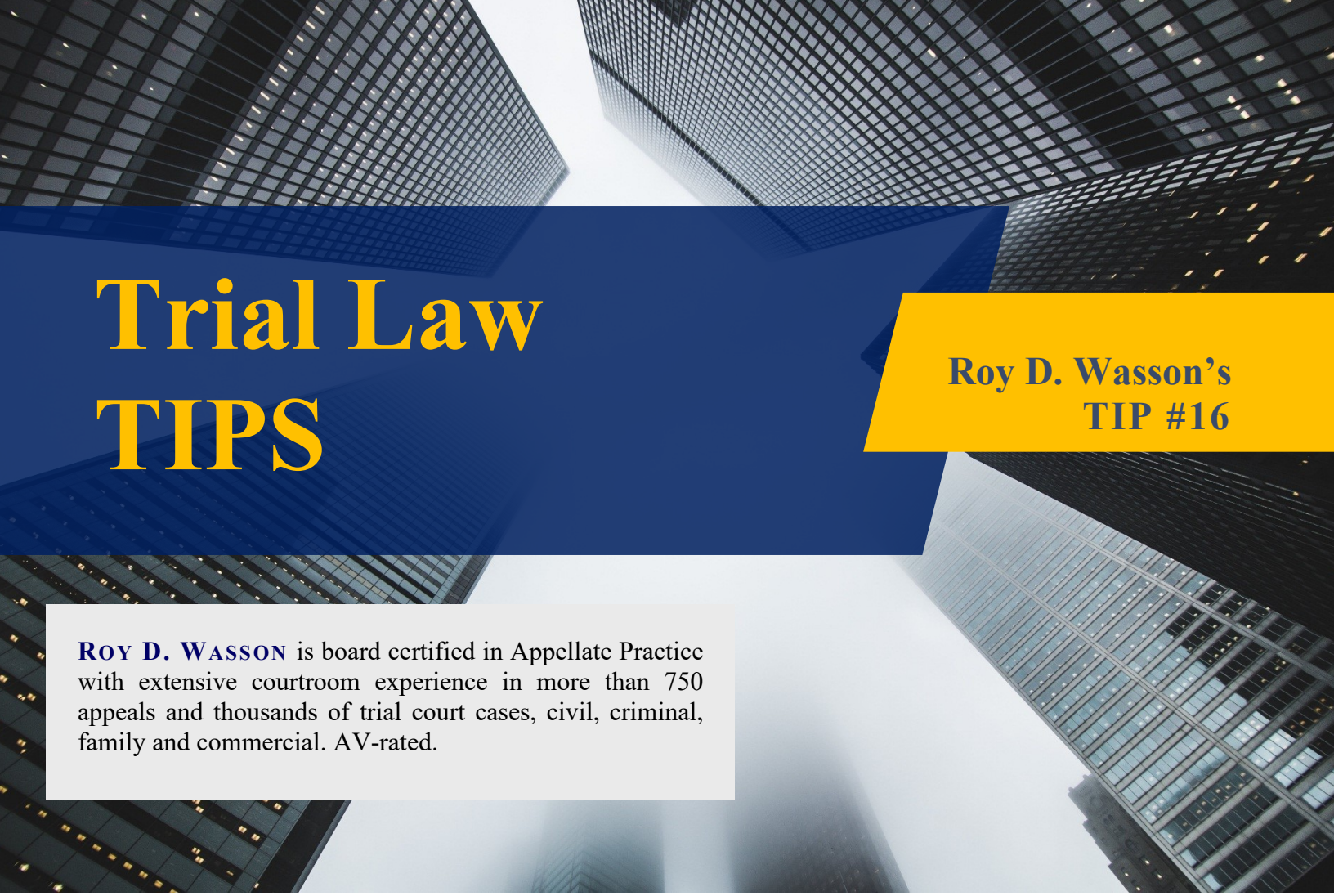

Trial Law TIPS

Roy D. Wasson's TIP #16

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"High-Low" Settlement Agreements— Nothing "Smellie" About Them

Introduction

A very useful but underutilized settlement technique is a "High-Low" agreement, which guarantees that the plaintiff will recover decent money, even if the jury returns a goose egg for a verdict, and which provides the defendant with a strong incentive to agree to pay that amount. Most often agreed to during or shortly before the start of trial, a "High-Low" settlement involves two numbers: 1) a bottom number that is the minimum the defendant will have to pay, even if the verdict is for less; 2) a top number which is the maximum the defendant is exposed to pay, even if the verdict is for more. If the verdict is between those two numbers, the plaintiff collects the actual verdict amount.

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"High-Low" settlements are legal in Florida and permissible in any kind of case. Although possible in single-defendant cases, such settlements are more useful in multi-defendant cases, like malpractice trials, where the respective fault percentages and financial responsibility levels of two defendants are unequal. The settling defendant has the incentive of bringing certainty to the question of his or her exposure and your client will have a sure recovery of something significant, even if the jury does the wrong thing.

Your author has had luck negotiating such settlements. In one case, my co-counsel and I agreed to a "High-Low" with a radiologist in a case where the damages range could very likely have exceeded that defendant's $1million limits, but we felt that another defendant (the neurologist) was much more at fault. In that case, the high end of our agreement with the radiologist was $500,000 and the low end was $200,000. We collected that "Low" amount even though the jury zipped us as to the radiologist. The verdict was for $850,000, with 90% apportioned to the neurologist, and 10% on a *Fabre* defendant doctor, and zero liability on the radiologist, so we collected $765,000 from the neurologist and $200,000 from the exonerated radiologist, for more than the total verdict.

Validity of High-Low Settlement Agreements

Non-settling defendants during the heat of trial try to snow the judge with the argument that a "High-Low" is barred by the Supreme Court's ban on *Mary Carter* agreements announced in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993), or that the "High-Low" agreement can be disclosed to the jury. Plaintiffs' lawyers know what two things the defense is up to in putting the settlement before the jury: 1.) implying that the settling defendant must be more culpable than the remaining defendant (or why didn't the remaining defendant settle?) to reduce the percentage of fault against the non-settling defendant; 2) poisoning the well with evidence that plaintiff will receive money from the settlement, to reduce the verdict amount. This TIP provides you with the legal arguments and authorities to enforce the "High-Low" settlement without the jury ever knowing about it.

The grandmother of all cases on this issue is *Smellie*. That is not to say that the decision stinks; to the contrary, it is a sweet one. In *27th Avenue Gulf Service Ctr. v. Smellie*, 510 So. 2d 996 (Fla. 3d DCA 1987), the Third District reversed Judge Smith's ruling allowing the jury to hear about a "High-Low" between the plaintiff and one of the defendants, during the trial against the other defendants, holding as follows:

> Appellees [the non-settling defendants] call the Gibson-Gulf settlement a *Mary Carter* Agreement which is admissible as evidence to be commented upon. . . . Appellant Gibson [the plaintiff] disagrees. . . that the Gibson-Gulf settlement is a *Mary Carter* agreement. He contends the agreement is an ordinary settlement which was not admissible as evidence.
>
> A true *Mary Carter* Agreement is "basically a contract by which one codefendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other codefendants," *Ward v. Ochoa*, 284 So.2d 385, 387 (Fla. 1973), and is admissible as evidence. ***We have examined the agreement in question and find that it is totally devoid of that liability shifting feature essential to a Mary Carter Agreement.*** An agreement where the defendant and plaintiff agree to a minimum and maximum amount of a judgment notwithstanding the jury verdict is a common form of settlement. It does not diminish the liability of one party by proportionately increasing the liability of another party.
>
> Admission of the agreement into evidence was therefore prejudicial error.

Id. at 998(emphasis added).

The argument that a "High-Low" settlement was a *Mary Carter* agreement was rejected by the Third District in a post *Dosdourian* case called *Cardona v. Metro Dade Transit Agency*,

680 So. 2d 1098 (Fla. 3d DCA 1996). The court in that case followed *Smellie* and held:

> We cannot agree that the high-low stipulation was an unenforceable *Mary Carter* Agreement. A *Mary Carter* Agreement is "a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co- defendants." *Dosdourian v. Carsten*, 624 So. 2d 241, 243 (Fla. 1993). . . The hallmark of a *Mary Carter* Agreement is the pitting of one defendant against the remaining defendants at trial. *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973). In contrast, the agreement in this case is "totally devoid of that liability shifting feature essential to a Mary Carter Agreement." *27th Avenue Gulf Serv. Ctr. v. Smellie*, 510 So. 2d 996, 998 (Fla. 3d DCA 1987).

Id. at 1099.

Note that the *Cardona* case involves a trial judge refusing the enforce a "High-Low" agreed to between the plaintiff and all of the defendants: "Here, all of the defendants agreed to the settlement, shared the benefits of the liability cap, and liability was not shifted." Thus, you may hear an argument from the defense in your case that a "High-Low" settlement with only one of the defendants is different than the situation in *Cardona* and is more like a *Mary Carter* agreement. Argue in response that the *Cardona* court reaffirmed *Smellie*, which was a "High-Low" with fewer than all defendants.

The Fifth District muddied the *Smellie* waters somewhat in *Garrett v. Mohammed*, 686 So. 2d 629 (Fla. 5th DCA 1996). First on the enforceability issue, the court made the following confusing (but generally favorable) pronouncement:

> It is unclear whether the supreme court in *Dosdourian* intended to outlaw high-low agreements in addition to "*Mary Carter* Agreements." This uncertainty is in part due to the court's failure to

> discuss *27th Avenue Gulf Service Center v. Smellie*, 510 So. 2d 996 (Fla. 3d DCA 1987), wherein the third district upheld the use of high-low agreements. Specifically, the Third District concluded that a "high-low agreement" is distinguishable from a "*Mary Carter* Agreement" in that a high-low agreement does "not diminish the liability of one party by proportionately increasing the liability of another party." *Id*. at 998.
>
> Perhaps the question of whether high-low agreements are covered by *Dosdourian* should turn on a case by case analysis of whether such agreements are in fact true settlements. ***In deciding whether the agreements are true settlements, the trial court should consider whether the agreement requires the co-defendant to participate in the trial.*** In other words, is the high range of the agreement contingent on participation in the trial. The trial court should also consider the amount in controversy as a result of the agreement. The greater the window between the "high" and the "low" limits of the agreement, the more incentive a co-defendant has in genuinely and aggressively litigating the dispute. If the trial court concludes that the "high-low agreement" is not a settlement and the codefendant still has a genuine incentive to defend, then in our view the agreement would not be prohibited by *Dosdourian*.

686 So. 2d at 630. (Emphasis added).

Admissibility of High-Low Settlements

The value of a High-Low settlement agreement may be reduced if the trial court allows the jury to hear evidence of the settlement. Therefore, some thought and research need to go into the terms of the settlement to prevent it from being made known to the jury. A line of dictum elsewhere in the Garrett opinion is not helpful on the issue of the admissibility of the "High-Low" agreement by a non-settling defendant. In deciding that the

agreement in that case was not a Mary Carter agreement, the court stated:

> Under the agreement, Pierce was not required to remain in the litigation. She was free to either participate in the litigation or to walk away. ***The agreement was at all times subject to discovery by the appellant and could have been admitted into evidence.*** The trial court heard argument from the parties on the appellant's motion for mistrial and concluded that Pierce had in good faith defended the case and that the appellant was not prejudiced by the agreement. Therefore, the proscription set out in *Dosdourian* does not apply to the instant case and the trial court acted within its discretion in denying the motion for mistrial.

686 So. 2d at 630 (emphasis added).

However, the most recent and most exhaustive exposition on the issue of the admissibility of a High-Low agreement establishes that such agreements are inadmissible where structured properly. The Fourth District addressed the issue as follows:

> The next, and perhaps more contentious, question is whether trial courts should permit nonsettling defendants to disclose high-low agreements to juries. The answer, however, is not perfectly clear, and a study of the admissibility of high-low agreements in other states demonstrates that there is no consensus on the issue. *Compare Reynolds v. Amchem Prods., Inc.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216, 2006 NY Slip Op 6953, 1 (N.Y. App. Div. 2006) ("Absent evidence of collusion between the co-defendant and plaintiffs to the detriment of the company, the failure to disclose the high-low agreement did not mandate reversal."), *Monti v. Wenkert*, 2006 Conn. Super. LEXIS 3849, 45-6 (Conn. Super. Ct. 2006) (In upholding use of high-low agreement without disclosure to nonsettling defendant: "If the true alignment of the codefendants is apparent to the parties, the court and the jury,

introduction of the agreement to the jury is unnecessary because there is no prejudice to be avoided."), and *Zeigler v. Wendel Poultry Servs., Inc.*, 67 Ohio St. 3d 10, 17, 615 N.E.2d 1022 (Ohio 1993) (holding high-low settlement agreement between estate and company was not a *Mary Carter* agreement and it was not erroneous to have allowed the company to participate in the trial or by failing to disclose the agreement to the jury), with *Hashem v. Les Stanford Oldsmobile, Inc*., 266 Mich. App. 61, 84-85, 697 N.W.2d 558 (Mich. Ct. App. 2005)(requiring disclosure of high-low agreement to prevent distortion of the adversarial process and preserve integrity of the judicial system), *Gen. Motors Corp. v. Lahocki*, 286 Md. 714, 410 A.2d 1039 (Md. 1980) (stating that disclosure was required to allow jury to judge the credibility of witnesses), and *Mustang Equip., Inc. v. Welch*, 115 Ariz. 206, 210, 564 P.2d 895 (Ariz. 1977) ("[T]he disclosure of [pretrial] agreements is or should be required to avoid the inherent tendency to work a fraud on the court and to avoid "collusion" between the plaintiff and some of the defendants) (*citing Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973)).

The lack of accord concerning publication of high-low agreements is perhaps due to underlying and often conflicting policy considerations. On one hand, secret agreements between plaintiffs and one or more of several defendants can mislead the jury and may "border on collusion," thereby robbing the judicial system to some extent of its truth-seeking function. *See Hashem, Lahocki and Welch, supra*; see also Ward, 284 So. 2d at 388 ("The search for the truth, in order to give justice to the litigants, is the primary duty of the courts.").

Yet, while disclosure may avoid collusion between plaintiffs and settling defendants, *see Welch*, 115 Ariz. at 210, it may also lead the jury to believe that those plaintiffs and settling defendants conspired

to prevent a fair trial. Luis F. Collins, *Admissibility of High/Low Settlements*, Fla. B.J., Jan. 1993, at 37. Disclosure may also detract from the benefits high-low agreements bestow because the knowledge that such agreements will be viewed by the jury might deter parties from entering into them to begin with. For instance, the high-low agreement enables parties to manage the risks of litigation and essentially "amounts to insurance against a catastrophic verdict, with the premium being the surrender of total victory." Stephen C. Yeazell, *The Changing Landscape of the Practice, Financing and Ethics of Civil Litigation in the Wake of the Tobacco Wars: Seventh Annual Clifford Symposium on Tort Law and Social Policy: Re-financing Civil Litigation*, 51 DePaul L. Rev. 183, 197 (2001); *see also* Steven R. Gabel, *High/Low Settlement Agreements: Method for Dispute Resolution*, 73 MI Bar Jnl. 74, 74-5 (1994) (noting that high-low agreements protect defendants from exposure exceeding policy limits and allow plaintiffs with sizable economic and non-economic damages to enjoy the certainty of a minimum payment amount; "[t]he [high-low] agreements promote finality, certainty, ease of administration and a degree of comfort for the parties to the agreement"). High-low agreements also facilitate trials:

> It is no secret that our system of civil justice has generated a pent-up demand for low-cost litigation. As a result, a procedure that lowers the cost of litigation - for example, a small-claims court - will increase the volume of litigation and the number of trials (albeit cheaper, quicker trials). The development of the high-low agreement demonstrates the existence of a parallel demand for low-risk adjudication. Any technique, public or private, that reduces the range of possible outcomes at trial could help answer that demand by making trial less scary, which might encourage more parties to take their chances and try it.

Samuel L. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. Rev. 1, 61-62 (1996) (citations omitted). To require publication of high-low agreements to juries might go some way in defeating these objectives.

Moreover, "If the true alignment of the codefendants is apparent to the parties, the court and the jury, introduction of the agreement to the jury is unnecessary because there is no prejudice to be avoided." *Monti v. Wenkert*, 2006 Conn. Super. LEXIS 3849, 45-6 (Conn. Super. Ct. 2006). This logic was mirrored in Smellie, where the third district held that, since high-low agreements were a "common form of settlement" and did not shift liability, their compulsory admission into evidence was sufficiently prejudicial to warrant a new trial on liability. *Smellie*, 510 So. 2d at 998. Similarly, in this case, Travelers was in a position adverse to Gulf regardless of the agreement because it was potentially liable for damages resulting only from the first two accidents, whereas Gulf was responsible for damages caused by the third accident. As such, Travelers would naturally attempt to shift fault to the third accident. In addition, Gulf had greater potential for liability than Travelers because it had $11,000,000 of coverage under its applicable insurance policies ($1,000,000 automobile liability policy in addition to $10,000,000 umbrella policy), as opposed to a combined $2,000,000 in coverage, $1,000,000 for each of the first two accidents, under Nair's Travelers policy. Therefore, despite the high-low agreement, the Nairs would also be inclined to argue that the third accident was the primary cause of Nair's injuries and medical expenses. Accordingly, while the agreement relieved Travelers from exposure to a "bad faith" suit,[3] it did not cause either Travelers or the Nairs to shift alignment and litigate this case for each other's benefit-the danger of a "sham of adversity" between plaintiff and settling defendant, *see Dosdourian*, 624

So. 2d at 246 (citation omitted), was not present in this case. Therefore, we conclude that introduction of the agreement into evidence would have been unnecessarily prejudicial.

Also of concern is the possibility that disclosure of high-low agreements may lead to improper publication of insurance coverage to juries. Florida courts have recognized the public policy of this state of not presenting evidence of insurance coverage to juries. In re Amendments to the Rules Regulating the Fla. Bar-Advertising, 2006 Fla. LEXIS 2594, *70 (Fla. 2006); *see also Beta Eta House Corp. v. Gregory*, 237 So. 2d 163, 165 (Fla. 1970) (stating that existence or amount of insurance coverage has no bearing on issues of liability and damages, and such evidence should not be considered by the jury), superseded by statute on other grounds, *Hazen v. Allstate Ins. Co.,* 952 So. 2d 531, 2007 Fla. App. LEXIS 347 (Fla. 2nd DCA 2007) (citing Section 627.7262, Fla. Stat. (1991)). To disclose the high-low agreement in this case would in effect reveal to the jury the amount of Nair's uninsured motorist coverage under his insurance policy with Travelers. Therefore, while *Dosdourian* encourages full disclosure to the jury, *see Dosdourian*, 624 So. 2d at 247, and an uninsured motorist carrier that is lawfully sued by a plaintiff and properly joined as a party to the lawsuit must be disclosed to the jury as a party defendant (as opposed to being identified as a co-counsel for the tortfeasor), *Medina v. Peralta*, 724 So. 2d 1188, 1189 (Fla. 1999); *see also Krawzak v. Gov't Employees Ins. Co*., 660 So. 2d 306, 310 (Fla. 4th DCA 1995), we find that disclosure in the instant case would have been unwarranted.

Gulf Inds, Inc. v. Nair, 953 So. 2d 590, 593-96 (Fla. 4th DCA 2007)(footnote omitted).

Practical Suggestions

Here is one suggestion to deal with the possibility of introduction of the agreement into evidence before the jury: Depending on the amounts involved, think about including a provision in the agreement that the deal is off if the court allows the jury to hear about it. And here's a practical idea: Think about the issue of taxable costs and negotiate something for the situation where you get a verdict in the range between the "High" and the "Low." Either make those amounts high enough to cover your costs too or add a term into the agreement that taxable costs will be paid to if you beat the "Low" amount.

Remember, if at first you don't succeed, just . . .

Keep Tryin!

Roy

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