

By Kevin G. Faley and Andrea M. Alonso
*High-Low Agreements:
Misunderstood Litigation Technique*

AN OFTEN underutilized and misunderstood litigation technique is the use of "high-low" agreements during the trial of tort cases. From a plaintiff's perspective, a high-low agreement guarantees that a minimum monetary amount will be received regardless of the verdict. In most cases, this will result in the attorney's out-of-pocket expenses being covered even in the event of a defendant's verdict.

To a defendant insurance company, it will prevent a "run-away jury verdict" and also protect the carrier from bad faith claims if the jury verdict exceeds a limited policy of insurance.

A high-low agreement places a ceiling and a floor on the amount of money awarded at trial.

A \$50,000/\$250,000 high-low agreement means \$250,000 will be the maximum award and \$50,000 will be the minimum award, regardless of the jury's actual verdict. A high-low agreement must not be confused with a "Mary Carter" agreement which is a variant of the normal release or covenant not to sue.¹ That term is used to describe any agreement between the plaintiff and some, but not necessarily all defendants, in which the parties secretly place limitations on the financial responsibility of the settling defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to obtain against the non-settling defendant or defendants.

The parties to a Mary Carter agreement usually do not disclose their agreement as opposed to a high-low agreement which is either written or placed on the record in open court.

Here is how a \$50,000/\$250,000 high-low agreement works: If a jury returns a defendant's verdict or a plaintiff's verdict up to and including \$50,000 then the plaintiff

receives \$50,000. If a jury returns a verdict of \$50,000 up to and including \$250,000, then the actual verdict amount is paid to the plaintiff. (Thus, if the verdict is \$150,000, the plaintiff receives \$150,000.) If a jury returns a verdict exceeding \$250,000, then the plaintiff is entitled only to the \$250,000 "high" of the agreement.

A high-low agreement reduces the inherent risk to a plaintiff of an "all or nothing" verdict in a jury trial and additionally provides a moderate degree of control over the jury's determination. In the above example, a carrier with a liability insurance limit of \$300,000 will be assured that no bad faith claim will be made if the jury verdict

exceeds \$300,000. Additionally, a defendant is protected from exposure exceeding the policy limits.



A plaintiff avoids risking everything and possibly being left without compensation or inadequate compensation.



A plaintiff is certain of a minimum amount to offset his economic and non-economic damages and the plaintiff's

attorney is able to "cover" his expenses at

trial with the possibility of recovering a large, albeit not a blockbuster, award.

The agreement described above is the most commonly used type. However, parties also negotiate "hybrid" agreements that employ the same basic "risk-reduction" with a bit of a twist.

In the multi-defendant case of *Williams v. Niske*,² defendant Union Underwear Company entered into a "hybrid" high-low agreement, wherein Union agreed to pay the plaintiffs a base amount of \$100,000 and up to \$400,000 more to assure that the plaintiffs recovered at least \$500,000 at trial.

The jury returned a verdict of \$2.5 million for which more than \$400,000 was recoverable against another defendant. Union, therefore, was only required to pay \$100,000. Had the jury come back with a verdict of, say, \$200,000, Union would then have been required to pay the plaintiff the difference up to \$500,000 as the "hybrid" high-low agreement assured plaintiffs that they would recover at least \$500,000.

A high-low agreement can be made at any stage during the litigation. In theory, it can be entered into prior to jury selection, during the trial or even during jury deliberations. As the agreement is in effect a settlement, it must either be in writing, or signed by the parties, or it must be made in open court or placed on the record.³

In *Baca v. HRH Construction Corp.*,⁴ one question raised was whether a high-low agreement constituted a "release" within the meaning of General Obligations Law §15-108, the statute governing releases or covenants not to sue.

In *Baca*, the plaintiff and the defendant/third party plaintiff entered into a high-low agreement in which the defendant agreed to pay the plaintiff a minimum payment of \$400,000 in exchange for a promise not to enforce any judgment in excess of

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\$800,000 against the defendant/third party plaintiff obtained after trial. It was the intent of the plaintiff to try the case and to obtain a larger verdict against the third-party defendant.

The first Department affirmed the trial court's decision and held that the high-low agreement negotiated in this case was a "release" under General Obligations Law §15-108 and barred the third party claim of the defendant against the third party defendant employer. The court held that as the agreement was a settlement it barred a contribution claim even though it did not contain an express statement of release.

Accordingly, in cases that go to trial where there are some parties that are not participating in the high-low agreement, the effect of §15-108 on contribution and third-party claims must be carefully analyzed as a court will not hesitate to consider the entire case "settled" and dismiss cross-claims or third-party claims.

The high-low agreement is also widely used outside of the courtroom. When a case is settled through arbitration or mediation and high-low agreement is used, both sides reap the benefits of limiting their risks. Again, the plaintiff is guaranteed a minimum recovery and the insurance carrier a certain amount.

In the case of *New York Central Mutual Fire Ins. Co. v. Farm Family Mutual Ins. Co.*,⁵ Farm Family, one of three insurance companies representing three defendants in the underlying negligence action, entered into a high-low agreement with the plaintiff with the amount of recovery to be determined by a high-low arbitration with a maximum of \$60,000. This arbitration resulted in an award of \$60,000 and Farm Family secured a general release from the victim in favor of all the defendants in the underlying action.

Farm Family then sought to arbitrate liability among the three insurance companies, which were all signatories to a special arbitration agreement which provided that any signatory insurer could settle a claim without the consent of the other signatory insurers and the apportionment of liability of each respective insurer would be subject to a special arbitration.

Farm Family was claiming that the high-low agreement to arbitrate was in effect a settlement and, therefore, the other two insurance carriers were required to submit to

arbitration on the issue of apportionment of liability. The two insurance carriers took the position that there was no settlement and that the agreement to employ the initial high-low arbitration did not satisfy the condition precedent within the special arbitration agreement that the underlying claim be settled.

The court held that the high-low agreement was "the functional equivalent of a settlement" within the meaning of the agreement between the insurance companies, thus allowing settlement by one insurer, Farm Family, without the consent of the other insurers. The court then required arbitration on apportionment of liability among the insurers. The "mere fact that amount of the settlement between Farm Family and [the plaintiff] was set by an arbitrator" rather than Farm Family was irrelevant.

In the case of *Dion v. Green*,⁶ a high-low agreement of \$25,000/\$2,500 was negotiated and a private firm was retained for arbitration. The arbitrator found for the defendant. Although the plaintiff, on behalf of her infant daughter, was then entitled to receive a \$2,500 payment from the insurer, a problem arose because this controversy involved an infant and had not been submitted to arbitration pursuant to a court order as required by CPLR 1209.⁷

The court reserved decision for other reasons, but did state that it could find that the arbitration proceeding, which essentially resulted in a \$2,500 settlement, was void ab initio.

Although it was not stated by the court, as a high-low agreement has been found to be a settlement, it would follow that it is necessary to obtain court approval before not only submitting an infant's case to arbitration but also to obtaining court approval to the figures of the high-low.

Many insurance carriers and plaintiffs' attorneys utilize high-low agreements for the above reasons. According to the Larry Perrone, claims manager of United States Fidelity & Guaranty's Purchase, New York office, USF&G will use a high-low agreement not only where the trial is unified and the jury will be determining damages, but also in cases which are bifurcated and only liability is being tried.

For example, a high-low of \$50,000/\$250,000 might be entered into in a case of questionable liability, but with a serious injury or in an unfavorable venue for a

defendant. If there is a verdict for the defendant, then the plaintiff receives \$50,000. If there is a verdict for the plaintiff, then the plaintiff receives \$250,000.

This eliminates the "middle" of any verdict between \$50,000 and \$250,000 and removes the issue of damages from the jury. It also allows both parties to save money on expenses for medical experts. Finally, it can cut the length of a trial in half.

Rod Curran, assistant vice president of claims for Government Employees Insurance Company, Woodbury, N.Y. said his firm not only uses high-low agreements when there is questionable liability with a serious injury but also in cases where:

- There is a question as to whether a plaintiff has a serious injury under the no-fault threshold status;
- There is a threshold question due to soft tissue injuries with minimal or no damage to the vehicles, and
- There are serious injuries but the injuries may not be causally related to the accident.

Finally, Christopher McGrath, a partner in Sullivan & Liapakis offers the plaintiff's perspective: "A high-low agreement is not called for in every case because sometimes the parties simply cannot agree on the value range of a particular claim. But may cases cry out for a high-low and we're very comfortable using them and are open to them. As a plaintiff, I like it because the worry of our clients getting shut out is gone, yet a reasonably large verdict is still possible."

High-low agreements are now being used more often at trial and are viewed favorably by all sides. It appears that the continued use of high-low agreements will provide some certainty in the uncertain world of litigation and will also provide a margin of comfort to all involved.

(1) The name "Mary Carter" is derived from the case *Booth v. Mary Carter Paint*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967).

(2) *Williams v. Niske*, 81 NY2d 437, 599 NYS2d 519 (1993).

(3) *New York Central Mutual Fire Insurance Company v. Farm Family Mutual Insurance Company*, 231 A.D.2d 722, 647 NYS2d 555 (2nd Dept. 1996). See also, *Dion v. Green*, 161 Misc.2d 341, 613 NYS2d 570 (Sup. Ct. Saratoga County 1994).

(4) *Baca v. HRH Construction Corp.*, 200 A.D.2d 538, 607 NYS2d 21 (1st Dept. 1994).

(5) *New York Central Mutual Fire Ins. Co. v. Farm Family Mutual Ins. Co.*, supra.

(6) *Dion v. Green*, supra.

(7) CPLR §1209 limits the right to arbitrate the claims of infants only upon court order.