

## LexisNexis® Emerging Issues Analysis

Kyle C. Bisceglie on  
**High-Low Agreements**

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**High-Low Agreements Must Be Disclosed to Court and Non-Agreeing Parties.** In *the Matter of Eighth Judicial District Asbestos Litigation*, [8 N.Y.3d 717](#), 872 N.E.2d 232, 840 N.Y.S.2d 546 (2007), a unanimous Court of Appeals ruled that a high-low agreement between plaintiff and defendant, who remain in a multi-defendant lawsuit, must be disclosed to the trial court and to non-settling defendants. The Court also expressly ruled that disclosure of the agreement to the jury lay in the "sound discretion" of the trial court. This case is significant for at least three reasons. First, it provides bright line instruction on disclosure where previous practice standards varied. Second, the decision reaffirms the discretion held by the trial court to permit a jury to hear evidence about the agreement. Third, it raises the question whether disclosure will affect other partial settlements in multi-defendant cases including so-called Mary Carter agreements.

**Elements of a High-Low Agreement.** A high-low agreement is commonly used in a case going to trial to guarantee the plaintiff a minimum recovery while capping a defendant's potential maximum exposure. It is commonly asserted that high-low agreements allow the parties to re-allocate the risk of going to trial. In the context of a multi-defendant litigation where not all remaining defendants are parties to the high-low agreement, a defendant not a party to the agreement may be prejudiced if it is not informed of the agreement until after trial.

In *the Matter of Eighth Judicial District*, the plaintiff and the settling defendant entered into an agreement wherein settling defendant's liability would fall within a pre-determined range. If the jury awarded damages against settling defendant of \$155,000 or less, settling defendant would pay \$155,000; \$185,000 or more, settling defendant would pay \$185,000; and only in the range of \$155,000 and \$185,000 would settling defendant be obligated to pay the actual amount awarded. The Court was made aware of the existence of this high-low agreement but the agreement was not disclosed to the non-settling party or the jury. After trial, the jury returned a verdict for plaintiff in the amount of \$3,750,000 and apportioned 60%, or \$2,250,000, to the non-settling party. After various post-trial motions, the trial court ultimately granted judgment against the non-settling defendant for \$1.55 million.

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**Prejudice of a Secret High-Low Agreement.** In *Matter of Eighth Judicial District*, the Court of Appeals found that the agreement "furnished plaintiff with an incentive to maximize" the non-settling defendant's liability. While it is "not uncommon" for the plaintiff to maximize the liability of one defendant, the non-settling defendant was entitled to know "the true posture of the case." Such disclosure would have permitted the non-settling defendant the opportunity to adjust trial strategy and re-evaluate its decision to proceed to trial as "the target defendant." The Court noted a litany of procedural and evidentiary strategies denied to the non-settling party: conducting jury selection differently, arguing that it is entitled to its own peremptory challenges rather than sharing them with the settling co-defendant, filing *in limine* motions on the admissibility of the agreement and cross-examining witnesses differently.

The Court of Appeals ruled that disclosure of the existence of the agreement to the trial court and to the non-settling defendant strikes "the proper balance between [New York's] public policy of encouraging the expeditious settlement of claims, and the need to ensure that all parties to a litigation are apprised of the true posture of the litigation so they may tailor their strategy accordingly." Additionally, disclosure of the agreement allows the non-settling party the opportunity to make a record of how it believes the high-low agreement affects its rights, and allows the trial court to consider the interests of all the parties before determining the high-low agreement's role, if any, at trial. The Court of Appeals left all determinations about the evidentiary treatment of the high-low agreement to the "sound discretion of the trial court."

Prior to *Matter of Eighth Judicial District*, whether or not such agreements were disclosed to the non-settling parties or the court was a matter of varying practice without any significant limitation beyond guidance imported from other jurisdictions and equity. For example, *Matter of Eighth Judicial District* involves an appeal from *Reynolds v. Anchem Products*, [32 A.D.3d 1268](#), 822 N.Y.S.2d 216 (4<sup>th</sup> Dep't 2006). Therein, in a three-to-one decision with one justice abstaining, the Appellate Division based solely on authority cited from other states, upheld a non-disclosed high-low agreement because it found no "evidence of collusion" to "realign the loyalties" of the parties. *Id.*, [32 A.D.3d at 1270](#), 822 N.Y.S.2d at 218 (citations omitted).

The Court of Appeals cited a singular concern with "lack of disclosure." Read broadly, the decision raises questions under New York practice about the role of disclosure, the trial court and jury in all partial settlements.

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**Open Questions in New York.** *Matter of Eighth Judicial District* raises the issue whether other types of partial settlement agreements must be disclosed in New York. Examples include: settlement agreements involving sums certain, (see, e.g., *Wausau Bus. Ins. Co. v. Turner Constr. Co.*, [2001 U.S. Dist. LEXIS 7294](#) (S.D.N.Y. June 5, 2001)); agreements calling for testimony at trial of witnesses of the settling defendant, (see, e.g., *Minpeco, S.A. v. Hunt*, [127 F.R.D. 460](#) (S.D.N.Y. 1989)); or agreements between the plaintiff and defendant to forego summation against one another (see, e.g., *Leon v. J & M Peppe Realty Corp.*, [190 A.D.2d 400](#), 596 N.Y.S.2d 380 (1<sup>st</sup> Dep't 1993)).

**Effect of Decision on Status of Mary Carter Agreements in New York.** *Matter of Eighth Judicial District* raises the question of whether Mary Carter agreements, which are generally viewed as impermissible by New York courts, will now be per se permissible as long as disclosure of the agreement is made to the court and to the non-settling defendants. Both high-low and Mary Carter agreements raise similar policy concerns. To wit, they are often secret and realign the interests of supposedly adverse and aligned parties alike. The term "Mary Carter Agreement" arises from *Booth v. Mary Carter Paint Co.*, [202 So. 2d 8](#) (Fla. Dist Ct. App. 1967) and usually describes confidential agreements that require the settling defendant's continued participation as a party to the litigation with reduced exposure in proportion to an increase in the non-settling defendants' liability over a specific amount. Some courts define the key characteristic as realignment of the parties: "most importantly, .. the settling parties structure the settlement in such a way as to give the settling defendant a financial incentive to assist the plaintiff in increasing the liability of the non-settling defendant." *Wausau Bus. Ins. Co.*, [2001 U.S. Dist. LEXIS 7294](#), \*2 (the agreement in *Wausau* was disclosed to the Court but not the non-settling party). Other courts emphasize its secrecy, and, nearly, use a "secret" partial settlement as a synonym for Mary Carter agreement. E.g., *Minpeco*, [127 F.R.D. at 463](#) ; *Sierra Rutile Ltd. v. Katz*, [1994 U.S. Dist. LEXIS 14921](#), \*9-10 (S.D.N.Y. October 19, 1994) ("[S]ecrecy is part of the essence of a Mary Carter agreement," and disclosure "avoids prejudice to the non-settling defendants.").

Either way, federal courts consistently have observed that New York law precludes Mary Carter agreements. See, e.g., *Wausau*, [2001 U.S. Dist. LEXIS 7294](#), at \*3 ("Most jurisdictions, including New York, hold that such agreements are void as against public policy, because they secretly realign the parties, may confuse juries if not disclosed, and may affect the settling defendant's presentation of evidence in a way that prejudices the non-settling defendants.")(Citations omitted); *Minpeco*, [127 F.R.D. at 463-464](#) (finding agreement not "unlawful" because agreement was not a Mary Carter agreement);

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*Sierra Rutile Limited*, [1994 U.S. Dist. LEXIS 14921, at \\*9-10](#) (agreement "not a Mary Carter agreement and is thus not void against public policy").

At least two First Department cases note, in passing, the impermissible collusive nature of Mary Carter agreements. See *Considar, Inc. v. Equipment & Parts Export, Inc.*, [271 A.D.2d 288](#), 706 N.Y.S.2d 633 (1<sup>st</sup> Dep't 2000)(litigation agreement between two parties in multi-defendant case "did not amount to an impermissible collusive *Mary Carter* agreement since [co-defendant] did not agree to feign a defense so as to minimize liability.."); *Herbst v. 40 Worth Associates*, [276 A.D.2d 320, 321](#), 714 N.Y.S.2d 211, 212 (1<sup>st</sup> Dep't 2000)(agreement to apportion liability "not an improper Mary Carter agreement").

Treatise authority goes so far to state that New York *prohibits* Mary Carter agreements. [1-10 Weinstein, Korn & Miller CPLR Manual § 10.05](#) (2007). While this may be a valid observation about New York *practice*, there are no New York State cases that so hold. The only New York state authority relied upon in federal cases is *Stiles v. Batavia Atomic Horseshoes, Inc.*, [174 A.D.2d 287](#), 579 N.Y.S.2d 790 (4<sup>th</sup> Dep't 1992), reversed on other grounds, *Stiles v. Batavia Atomic Horseshoes, Inc.*, [81 N.Y.2d 950](#), 613 N.E.2d 572, 597 N.Y.S.2d 666 (1993). In *Stiles*, the Appellate Division stated that a Mary Carter agreement *may* be invalid in some circumstances, found that the agreement before it was not a Mary Carter agreement and, in any event, was ultimately reversed.

The combined weight of prior authority and *Matter of Eighth Judicial District* suggests that, provided full disclosure to the court and non-settling defendants, New York law would permit parties to enter partial settlements that provide greater realignment than called for in a high-low agreements including but not limited to the type of realignment typically associated with Mary Carter agreements.

**Disclosure to the Jury.** *Matter of Eighth Judicial District* reminds practitioners that the trial court has discretion to reveal high-low agreements to the jury. Many practitioners rely on CPLR 4533-b (takes proof of settlement "out of the hearing of a jury" to show "mitigation of damages") or [Federal Rule of Evidence 408](#) to argue that the jury should not be made aware of settlement as the prejudice outweighs probative value. *Matter of Eighth Judicial District* emphasizes the discretion trial courts possess to disclose the high-low agreement to the jury for purposes other than proving liability, mitigation or amount of the claim in dispute, which adds a dimension of risk that settling parties likely previously underestimated or ignored, *viz.*, will they have to disclose to the jury part or all of the elements of their high-low agreement? Disclosure of settlement to the jury in a multi-defendant case has precedent in New York. See, *e.g.*, *Lambert Houses Redevelopment Co. v. HRH Equity Corp.*, [117](#)

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[A.D.2d 227, 234](#), 502 N.Y.S.2d 433, 437 (1<sup>st</sup> Dep't 1986)(plaintiff and settling defendant annexed copies of the settlement agreement to proposed amended pleadings "thereby assuring that the jury in this case will be fully informed of the [settlement] agreement and of the relationship" between plaintiff and settling defendant); *Meleo v. Rochester Gas & Elec. Corp.*, [72 A.D.2d 83, 98](#), 423 N.Y.S.2d 343, 353 (4<sup>th</sup> Dept. 1979)(failure to disclose secret agreement between plaintiff and four settling defendants denied the jury the opportunity to "scrutinize the evidence in the light of the true self-interests and interrelationships of the parties.") In light of *Matter of Eighth Judicial District*, parties interested in entering high-low agreements and other partial settlement agreements in multi-defendant cases ignore potential disclosure to the jury at their own risk.

**Cross-References.** [1-5 LexisNexis AnswerGuide New York Negligence § 5.51](#) (2006); [1-10 LexisNexis AnswerGuide New York Civil Litigation § 10.10](#) (discussing offering proof of payment by joint tortfeasor in mitigation of damages); John E. Benedict, It's a Mistake to Tolerate the Mary Carter Agreement, [87 Colum. L. Rev. 368](#) (1987)(outlining problems created by Mary Carter agreements); [1-3 New York Practice Guide: Negligence § 3.08\(3\)\(d\)](#) (note on Mary Carter Agreements); Lisa Bernstein & Daniel Klerman, An Economic Analysis of Mary Carter Settlement Agreements, [83 Geo. L.J. 2215](#), 2222-23 (1995)(more on Mary Carter Agreements); [9-45 New York Civil Practice: CPLR P 4533-b.01](#) (2007)(notes that CPLR § 4533-b provision was designed to avoid drawing of prejudicial inference by jury); 2-408 Weinstein's Federal Evidence 408 (2007) ([1-7 Weinstein's Evidence Manual § 7.05](#) discussing admissibility of evidence of settlement and consequences of admitting evidence of a settlement).

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