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Mary Carter and Pierringer Agreements: What Are They and How Do They Work?

Settling claims involving multi-party litigation can be a frustrating and prolonged experience. In addition to there being substantive disagreements between the parties as to apportionment of damages, quantum and liability; there are also various personalities, settlement policies, and litigation practices that complicate matters. Whereas some insurers prefer to settle claims quickly for a fair resolution, others prefer to take a more "hard-line" principled approach. The same can be said for individual adjusters and lawyers. This often leads to situations in which one defendant is prepared to settle a case while the co-defendant is not. One party may feel that they have minimal liability and is prepared to pay its fair share to resolve a case while as the target defendant may feel otherwise. Indeed, it is often the case in multi-party litigation that the Plaintiff is not the impediment to a resolution; but it is the ongoing dispute between the defendants.

An underused and underappreciated tactic to break this logjam is by way of a Mary Carter or Pierringer agreement. Both of these "partial settlement" mechanisms allows one (or some) defendant(s) to settle with the Plaintiff without having to negotiate a global resolution. The common feature between these two forms of partial settlements is that the claim vis-à-vis the Plaintiff is resolved and the "settling" defendant is protected as against any cross-claims by any "non-settling" defendants. The Plaintiff receives a minimum guaranteed settlement amount and lives to fight another day for the balance of the money allegedly owed. Depending on the nature of the agreement, the settling defendant is now either out of the action altogether or their role is very much diminished. Either way, it is certainly an effective mechanism to take control of a case and not be beholden by the actions of a co-defendant.

The Mary Carter Agreement

A Mary Carter Agreement is a settlement between the plaintiff and one or more defendants wherein the settling defendant guarantees to the Plaintiff a minimal financial recovery. In return, the Plaintiff agrees to limit the exposure to the settling defendant including to indemnify for any crossclaims. One of the hallmarks of a Mary Carter agreement is that the settling defendant remains in the lawsuit. Traditionally, in a Mary Carter agreement the settling defendant's payment to the Plaintiff is tied to a determination of liability. The more the liability found against the non-settling defendant the less the settling defendant has to pay. While the settling defendant has agreed to pay to the claimant a value to the claim, that value has the potential to decrease, depending on the net result at trial. As such, the settling defendant has a stake in the outcome of the trial.

As part of the Mary Carter agreement, the plaintiff and the settling defendant will normally agree to a limited role to which the settling defendant will play at trial. It is agreed that the settling defendant will not take any position regarding damages, but will actively try and impart liability on the non-settling defendant. The more

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the claimant is awarded at trial for damages and the greater the proportion of liability found against the non-settling defendant, the less the settling defendant has to pay. This can lead to the somewhat absurd result that the settling defendant wants the plaintiff to be successful at trial in proving damages.

The unique and tricky aspect of the Mary Carter agreement is the ability to try and predict what will happen at trial. At the same time the settling party has the ability to help shape the outcome as it relates to liability as opposed to being a mere spectator.

A Mary Carter agreement still requires a settling defendant to attend and participate at trial; which has an obvious legal expense to the insurer. However, the settling defendant will not be taking any position on damages and need not prepare for same. It is only when liability becomes a live issue that the settling defendant lawyer will need to take action.

There are certainly risks involved by continuing to participate in the lawsuit at trial. Although a settling defendant has capped his payment exposure, he is still subject to the mercy of the Court with respect to costs. In particular, if the non-settling party does well at trial this may result in an adverse cost award against the settling party.

For cases in which there is a large amount of money at stake, and the defendant thinks it may be able to get a "refund", then a Mary Carter agreement is a viable option.

Pierringer Agreements

Pierringer Agreements on the other hand are somewhat more straightforward and user-friendly. In a Pierringer agreement the settling defendant pays compensation to the Plaintiff and the Plaintiff agrees to release this defendant from the lawsuit and indemnify for any crossclaims. The settling defendant is thereby extricated from the action and no longer has a stake in the matter.

Unlike a Mary Carter agreement, the settling defendant does not participate in the trial. The settling defendant does not get a refund if there were to be a beneficial result and their stake in the lawsuit comes to an end. The Pierringer agreements lacks the creativity of a Mary Carter but at the same time increases the level of certainty.

A Pierringer agreement is more user friendly as it can be utilized in more circumstances then that of a Mary Carter Agreement. Since the cost of a trial is expensive, the goal of many insurers is to avoid them if possible. While as in a Mary Carter Agreement the insurer's damages exposure is capped (and a refund possible), it still is obligated to attend at trial. There is little to no value in settling a case by way of a Mary Carter Agreement for $5,000.00 if the legal cost of attending trial will be $50,000.00. In a Pierringer agreement though, the settling defendant can resolve a case for $5,000.00 or $500,000.00 and be extricated from the action. For this reason a Pierringer can be used effectively in virtually every type of case.

No Double Recovery

One of the prior benefits of a Mary Carter and Pierringer agreement from a Plaintiff standpoint was that there was the potential for double recovery. If the Plaintiff did well at trial and worked out a beneficial settlement agreement, there was the potential that he would secure a windfall. The Court of Appeal decision of *Louden v. Roberts* (2009) brought this practice to a halt. The Court of Appeal found that the amount of a settlement is deducted after trial from the verdict. The Court of Appeal found that the principles of double recovery prevent the claimant from recovering twice. As stated by the Court: "The right solution nowadays is for any sum paid by one wrongdoer under the settlement to be taken into account when assessing damages against the other wrongdoer".

This is an essential need to know if you find yourself as being the non-settling defendant at a trial. Remember, you are entitled to deduct whatever agreement was worked out between the settling parties.

Disclosure Of A Settlement Agreement Must Be Immediate

The effect of a settlement agreement has an immediate and significant impact on the remainder of the litigation. In a Mary Carter Agreement the settlement defendant is no longer involved in the litigation of damages and in a Pierringer the settling defendant is no longer interested in the lawsuit at all. This obviously alters the dynamics between the remaining parties. In order for the parties to properly understand the new change in the litigation the disclosure of the agreement must be made immediately.

In *Aecon Buildings v. Stephenson Engineering* (2010) the Court of Appeal dismissed a third and fourth party action on account of the failure to immediately disclose the settlement agreement. The particulars of this agreement were only disclosed after consistent requests by the non-settling defendants after they came aware that something had happened. Interestingly, the action was dismissed despite the fact that the Court found that there was no prejudice to the parties. The dismissal appears to be more of a procedural reprimand as opposed to any substantive rationale.

Although there is no determination as to what is meant by immediate, and the exact manner in which the agreement must be

disclosed, the right way to proceed is to act right away. Once the executed agreement is received, the particulars of the agreement should be disclosed to the Court and to the non-settling defendants.

Disclosing The Quantum Of The Settlement

While as the particulars of a settlement agreement must be disclosed, there is a live question as to whether the quantum of the settlement must be disclosed before the verdict. There is no question that the amount of the settlement must be disclosed to the Court and the parties after the verdict. Interestingly, there is a dearth of case law on this subject in Ontario.

In *Noonan v. Alpha-Vico* (2010) the non-settling defendant commenced a motion for disclosure of the settlement amount. A Master concluded that the quantum of the settlement amount must be disclosed to the non-settling defendant immediately. He reasoned that "a defendant is entitled to know what the actual amounts in dispute are so that informed decisions may be made about whether to defend or offer to settle and what procedures may or may not be justified". It would help further the cause of a final settlement of the case if the non-settling defendant knew how much the settling defendant paid. Indeed, the Plaintiff knows this information so the non-settling defendant is put in a disadvantaged position. This is a Master's decision which was not appealed to a Judge.

Representing the other side of the argument is the decision by the Court in Nova Scotia in *Sable Offshore Energy Inc. v. Ameron International* (2010). In that case, the Judge conducted a thorough analysis of the case law across the country (included the *Noonan* decision above) and found that the "public interest in settlements is better furthered by protecting the settlement made by the settling defendants with the plaintiffs". The Court found that settlement privilege trumps any public interest benefit for full disclosure. More particularly, it was reasoned that "it would be unfair to have one party have the benefit of knowing the other's settlement details before deciding to try to settle. That would be a discouragement to settlement and contrary to the policy in favour of settlement". This would result in an unfair advantage to the non-settling defendant.

It is unclear how a Judge would rule in Ontario regarding this issue as there is certainly merit to both arguments. If you are a defendant who has entered into a settlement agreement, it would be wise to insist that the disclosure of the amount would only be with the consent of the plaintiff or by order of the court. To voluntarily disclose the amount of the settlement amount otherwise would be a risky proposition in light of the unsettled case law; and perhaps jeopardize the settlement.

Conclusion

Mary Carter and Pierringer Agreements are an effective tool of limiting a defendant's exposure and resolving cases expeditiously. For a Plaintiff they result in a guaranteed sum of money now and limit the number of defendants attacking your case. While a Mary Carter Agreement gives the settling defendant the opportunity for a "refund" the Pierringer Agreement allows a settling defendant to close its file. Moreover, the simple threat of entering into one of these agreements may prompt a defendant who is reluctant to settle a case to come to the bargaining table. Caution ought to be taken to follow the procedural requirements of entering into these agreements or you may find the settlement rendered null and void. Despite the intricacies of these partial settlement agreements, one should not be scared away from brokering a deal. If your co-defendant has become an impediment to settling your file, these partial settlement agreements are a means of re-asserting control over one's own destiny.

Notes:

- Understanding Mary Carter Agreements and Pierringer Agreements: Andrew Spurgeon December 10, 2009
- Mary Carter & Pierringer Agreements: Richard Bogoroch and Melinda Baxter January 19, 2007
- Partial Settlement Agreements Must Be Immediately Disclosed: Robin Squires 2010
- Disclosure of Litigation Agreements Must Be "Immediate" John Aikins, March, 2011
- *Aecon Buildings v. Stephenson Engineering Ltd* (2010) ONCA 898
- *Laudon v. Roberts* (2009) ONCA 383
- *Sable Offshore Energy Inc. v. Ameron International* (2010) Nova Scotia
- *Noonan v. Alpha-Vico* (2010) ONSC 2720 (CanLii)

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