

LITIGATION TIPS & TRAPS: "Southren" style

By Jane Southren, *Lerners LLP*

The reason I love doing this column so much is because I learn something new every time. I must confess that while I had heard the terms Mary Carter Agreement and Pierringer Agreement, I hadn't a clue, until now, of what they were. Now I do, and my clients will benefit from that. Yours will too. Our authors this month are Reena Goyal and Daniel Schwartz.

MULTI-PARTY SETTLEMENT AGREEMENTS: MARY CARTER AGREEMENTS AND PIERRINGER AGREEMENTS

By Reena Goyal, *Fraser Milner Casgrain LLP* & Daniel Schwartz, *Lax O'Sullivan Scott LLP*

With the increasing costs and delays associated with civil litigation, the early settlement of disputes has become a desirable result for some parties; however, settlement is not always easily achieved, especially in the context of a multi-party dispute. The age-old saying "two's a party, three's a crowd" embodies the difficulty in achieving a settlement in a multi-party dispute.

An often overlooked tool that can be used to simplify multi-party disputes is the partial settlement agreement. This type of agreement allows a plaintiff to settle its claims against one defendant, while the claims against another defendant are continued. The plaintiff receives the benefit of a guaranteed minimum recovery, while at the same time exerting pressure on the non-settling defendant to also consider settlement. The following is a synopsis of two types of such partial settlement agreements: Mary Carter Agreements and Pierringer Agreements.

Mary Carter Agreements

The Mary Carter Agreement originated from the 1967 Florida Court of Appeals decision of *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (1967, Fla. App.). It causes a defendant to settle a claim, but to remain a named party in the action and to help the plaintiff recover a maximum amount of damages from the non-settling defendant in exchange for a proportionate reduction of the settlement payment made by the settling defendant. The plaintiff receives the benefit of a guaranteed minimum recovery, and the settling defendant receives the benefit of having its damages capped with the possibility of a further reduction in liability.

Mary Carter Agreements have the effect of modifying the positions of the plaintiff and the settling defendant. For example, the settling defendant no longer challenges the proposition that the plaintiff has suffered damages or asserts that the plaintiff was contributorily negligent in that regard. Indeed, Mary Carter Agreements have the effect of creating an interest in the settling defendant to help the plaintiff obtain maximum damages against the non-settling defendant. Hence, Ontario courts have held that the existence and terms (excluding dollar amounts) of any Mary Carter Agreement between the parties must be immediately disclosed, and will modify any terms therein so as to ensure a fair and equitable process for all the parties.

(Continued on page 8)



Reena Goyal



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Continued on page 9...

(Continued from page 7)

Example: P commences an action against D1 and D2 for \$400,000. D1 is willing to settle with P, but D2 is not. P and D1 enter into a Mary Carter Agreement whereby D1 agrees to pay a maximum of \$200,000 to settle P's claim against D1. The trial proceeds with D1 assisting P to obtain a maximum recovery out of D2. P succeeds at trial, and is awarded a \$400,000 judgment with liability apportioned equally between D1 and D2. P obtains a net settlement of \$300,000 -- \$200,000 from D2 and \$100,000 from D1 -- because the \$200,000 that D1 agreed to pay P is reduced by 50%.

Pierringer Agreements

Pierringer Agreements (or what are sometimes referred to as Pierringer Releases) are named after the 1963 Supreme Court of Wisconsin decision of *Pierringer v. Hoger*, 21 Wis. 2d 182 (1963 Sup. Ct.). In such agreements, a plaintiff agrees to settle a claim in consideration for the payment of a specified amount of money by the settling defendant. The plaintiff also agrees to indemnify the settling defendant for any claims of contribution awarded to the non-settling defendant. The chief distinctions between a Mary Carter Agreement and a Pierringer Agreement are that the latter results in a specified minimum amount of monetary recovery to the plaintiff and the removal of the settling defendant as a named party in the action.

Example: P commences an action against D1 and D2 for \$400,000. D1 is willing to settle with P, but D2 is not. P and D1 enter into a Pierringer Agreement whereby D1 agrees to pay \$100,000 to settle P's claim against D1. P and D2 proceed to trial. P succeeds at trial, and is awarded a \$300,000 judgment with liability apportioned equally between D1 and D2. P only seeks to collect \$150,000 from D2 instead of the full \$300,000, because D2's payment of any amount over \$150,000 may be claimed as contribution from D1.

Whether the parties choose to enter into a Mary Carter Agreement or a Pierringer Agreement may depend on the nature and strength of the evidence of the non-settling defendant. That is, the more the plaintiff requires the evidence of the settling defendant to successfully litigate its claims against the non-settling defendant, then the stronger a bargaining position the settling defendant has. The settling defendant will thus likely opt for a Pierringer agreement whereby its exact monetary exposure is specified prior to trial, it is formally removed as a named party to the litigation and any claims for contribution made by the non-settling defendant are indemnified by the plaintiff. The evidence of the settling defendant may then be introduced at trial by way of witness testimony.

If, however, the plaintiff does not require the evidence of the settling defendant in order to successfully litigate its claims against the non-settling defendant, then it may have a stronger bargaining position over the settling defendant. The plaintiff will thus likely opt for a Mary Carter Agreement, causing the settling defendant to remain a named party in the action and to actively assist the plaintiff in obtaining increased damages from the non-settling defendant, e.g. cross-examination in court by the settling defendant against the non-settling defendant.

In any event, the maximum monetary exposure of the settling defendant to the plaintiff will tend to be the overriding concern of that defendant in most cases, and will likely dictate the remaining terms of any partial settlement agreement. ■

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