

The Last Word on High-Low Agreements

BY LAZAR EMANUEL

Since the decision of the Court of appeals on June 27 in *Matter of Eighth Judicial District Asbestos Litigation* (“*Asbestos*”), dealing with high-low agreements, an unusual number of commentators have written articles to discuss it. One commentator called it “a very important case.” (NYLJ, 7/16/07, Thomas F. Gleason.) Others speculated that the decision “may signal the death-knell of pre-trial high-low agreements in multiple defendant jury cases, except when conditioned on the freedom of the plaintiff to have such agreement deemed void if the trial court at the outset of the trial rules that the jury may be told of it...” (NYLJ, 08/09/07), Roy L. Reardon and Mary Elizabeth McGarry.)

The facts of *Asbestos* are simple. Plaintiff Donald Reynolds brought a products liability/negligence action against a number of manufacturers and distributors of asbestos products. He alleged that their products had been used in the refinery where he had worked for 45 years and had caused him to contract mesothelioma, a particularly virulent form of cancer which attacks the lungs, the abdominal cavity and the heart.

At trial, the roster of defendants had been reduced to two – Garlock Sealing Technologies LLC (“Garlock”), a manufacturer of gaskets and packaging, and Niagara Insulations, Inc. (“Niagara”), a distributor and installer of pipe covering insulation. The jury found for the plaintiff Reynolds, but he died after the entry of judgment, leaving his wife to pursue the appeal in the Court of appeals, “both individually and as the executrix of his estate.”

How High-Low Works

Two weeks before trial, plaintiff Reynolds and defendant Niagara entered into a high-low agreement without disclosing the agreement to Garlock. In a high-low agreement, the parties agree on two limits – a lower limit representing the plaintiff’s minimum recovery, and a higher limit setting the defendant’s maximum liability. If the jury awards less than the minimum, the plaintiff recovers the minimum nevertheless; if the jury awards more than the maximum, the defendant pays no more than the maximum nevertheless. If the jury awards a sum between the minimum and the maximum, the plaintiff recovers, and the defendant pays, that sum. The agreement between Reynolds and Niagara provided for a low of \$155,000 and a high of \$185,000, a spread of only \$30,000.

The trial was conducted before Niagara County Supreme Court Judge James H. Kane, who earned the praise of the Court of appeals for negotiating and “brokering” many pre-trial settlements of claims by Reynolds against other defendants; the action had originally involved 19 separate defendants. Judge Kane was “cognizant” of the high-low agreement between Reynolds and Niagara, but he did not know its terms. Neither the jury nor Garlock was ever advised of the existence of the agreement.

After trial, the jury found for Reynolds and surprised everyone by awarding him \$3,750,000 in damages. At the same time, it apportioned the award 60% to Garlock and 40% to Niagara. The consequence was

that Garlock was expected to pay \$2,250,000, while Niagara was required to pay only \$185,000, the maximum stipulated in the Reynolds/Niagara agreement.

A few days after the trial, Garlock learned of the high-low agreement and was understandably perturbed. In the absence of the high-low agreement, Niagara would have paid 40% of \$3,750,000, or \$1,500,000, instead of \$185,000. Garlock moved to set aside the verdict and for a new trial, but Judge Kane denied the motion and entered judgment against the defendants as prescribed by the jury. Garlock appealed and the appellate Division confirmed, with one dissent.

The Court of appeals granted leave. Garlock argued before the Court that Niagara's continued participation in the trial was inherently unfair and prejudicial to Garlock, and that the failure of Judge Kane to disclose the existence of the high-low agreement constituted reversible error. The Court agreed and reversed. The Court's opinion was written by Justice Eugene F. Pigott. All concurred.

The Court's Reasoning

In his opinion, Judge Pigott said:

Here, Garlock was deprived of its right to a fair trial by Supreme Court's failure to disclose the existence of the high-low agreement. The agreement furnished plaintiffs with an incentive to maximize Garlock's liability while minimizing Niagara's, because the potential amount of damages plaintiffs could recover from Niagara was capped at \$185,000. While it is not uncommon for a plaintiff to have a financial incentive to maximize the liability of one particular defendant in a multi-defendant action, Garlock was entitled to disclosure of the existence of the high-low agreement so it knew the true posture of the case. Had the agreement been disclosed, Garlock could have adjusted its trial strategy accordingly and evaluated the risks of going to trial with the knowledge that plaintiffs had an added incentive of making Garlock the target defendant.

The opinion listed some of the ways in which Garlock was prejudiced: It might have altered its approach to jury selection; argued that it should not share its peremptory challenges with Niagara; and moved *in limine* with respect to admissibility of the high-low agreement and the cross-examination of witnesses to its contents and its history. "Instead, Garlock was compelled to proceed blindly to trial without any meaningful opportunity to defend itself from the deleterious effects that the secret agreement may have had on Garlock's defense."

The Court distinguished between a high-low agreement in a single-defendant trial, and a high-low agreement between plaintiff and one of the defendants, or between plaintiff and some (but fewer than all) of the defendants in a multi-defendant trial. When some of the defendants are excluded from the agreement and have no knowledge of it, "[the agreement] has the potential of prejudicing the rights of the non-agreeing defendant[s] at trial." Further a non-disclosed high-low agreement is the same as any other secretive agreement between some of the parties, and "...courts and commentators alike have acknowledged that secretive agreements may result in prejudice to the non-agreeing defendant at trial, distort the true adversarial nature of the litigation process, and cast a cloud over the judicial system." [Citing a string of cases and articles, 2007 WL 18269237 (NY).]

The opinion concluded:

To ensure that all parties to a litigation are treated fairly, we hold that whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the non-agreeing defendant(s). This result strikes a proper balance between this State's public policy of encouraging the expeditious settlement of claims, and the need to ensure that all parties to litigation are apprised of the true posture of the litigation so they may tailor their strategy accordingly. Disclosure provides a non-agreeing defendant a meaningful opportunity to place on the record how it intends to use the agreement at trial, if at all, and affords the trial court an opportunity to weigh the interests of all the parties in considering the extent to which an agreement may be utilized in that forum. Of course, the determinations as to what effect, if any, the existence of the agreement will have at trial, including whether such an agreement should be disclosed to the jury, are matters that lie within the sound discretion of the trial court.

Impact of Decision

One consequence of the Court's decision to require disclosure of high-low agreements to the court and to all parties is to increase the difficulty and tension of pre-trial settlement negotiation. If the plaintiff and one of the defendants reach a high-low agreement and disclose its terms to the other defendants, the other defendants are likely to insist on getting the same, or better, terms. The result is to make the original agreement conditional upon negotiation of subsequent agreements, in effect creating a multi-party and, therefore, more difficult settlement process.

Because the Court did not require disclosure of the High-Low agreement to the jury but left that issue to the trial court, we need to consider the consequences when a court decides to disclose. How is a jury likely to respond when the parties have limited its discretion? Will it say, "If the parties are satisfied, then we're satisfied?" Or is it more likely to say, "A devil on the defendants. Let's determine the real value of plaintiff's claims so everyone will know how bad this bargain was for the plaintiff." Or will they turn to the judge and say, "Why are we here anyway? This is a big waste of time."

Ultimately, will the consequence be to discourage parties from negotiating high-low agreements in the first place? Or, even, to cause the courts to review the entire issue again and reach a different decision from the one reached by the *Asbestos* Court?

One other consequence of the decision is its lack of guidance to the trial court in determining whether to disclose the existence of the high-low agreement to the jury. Again, Judge Pigott's opinion says only, "Of course, the determinations as to what effect, if any, the existence of the agreement will have at trial, including whether such an agreement should be disclosed to the jury, are matters that lie within the sound discretion of the trial court."

It seems to me that the trial court should not be given such unlimited latitude. Instead, it should be instructed to disclose the existence of the agreement only if one of the non-agreeing defendants insists on disclosure. If all the parties have knowledge of a high-low agreement and do not insist on disclosure, then disclosure should not be permitted. The jury should not be influenced by the parties' conception of a claim's value any more than it is when there is no agreement. It's important to lawyers' evaluation of the utility and benefits of High-Low agreements if they continue to be compared with jury awards, as in the Reynolds case.

Editor's Note

The full text of cases and ethics opinions quoted in these articles may be found at:

City Bar Opinion 2007-3— <http://www.nycbar.org/Ethics/eth2007.htm>

Arbor Hill II— <http://www.ca2.uscourts.gov/opinions.htm>

Asbestos Litigation— <http://www.nycourts.gov/ctapps/latdec.htm>