



RISK MANAGEMENT SETTLEMENT AGREEMENTS IN ALBERTA

Measuring the Certainty of Settlement Against the Expense and Uncertainty of Trial.

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By Donald J. McGarvey¹

I. Introduction

In recent years, large loss, multi-party lawsuits have been frequently punctuated by the use of what have been described as “cautiously adopted risk management settlement agreements”. These agreements have largely been embraced by our courts, subject to certain criteria being met, for reasons grounded in the public policy rationale that settlements are to be encouraged.

The public policy rationale seems to derive from the desire that by either removing some of the parties from a lawsuit, or at least capping their exposure, the litigation is streamlined and therefore less complex and less expensive. In turn, it is thought that this saves not only court time and resources, but furthers the likelihood that the remaining parties will reach a resolution prior to trial.

This paper will explore two of the most common species of risk management settlement agreements, being Pierringer Agreements and Mary Carter Agreements.

II. Pierringer Agreements

Pierringer Agreements Defined

Pierringer Agreements are essentially a risk management tool used by counsel on behalf of their clients in actions where more than one defendant is potentially jointly and severally liable for the plaintiff’s alleged losses.

It has become common practice, especially in cases of catastrophic loss, for the plaintiff to sue everyone who may have had their proverbial fingerprints on the subject of the loss. Many settling defendants, even where they likely don’t possess any true liability, may prefer the certainty of settlement to the uncertainty of an expensive trial and the possibility of an undesirable outcome. This is where a Pierringer Agreement can be effective.

Pierringer Agreements are typically characterized by a settlement agreement between the plaintiff and one or more defendants (the “settling defendants”) which allows for the exit of those settling defendants from the lawsuit while leaving the plaintiff to continue to litigate against the remaining

¹ Partner, McLennan Ross LLP. The author gratefully acknowledges and appreciates the input and assistance of Amanda Bartley, a student-at-law with McLennan Ross LLP, in the preparation of this paper.

defendants (the “non-settling defendants”). Pierringer Agreements also typically allow for the extinguishment of any claims issued by the non-settling defendant against the settling defendant.

Pierringer Agreements originated from the U.S. case of *Pierringer v. Hoger et al*² in 1963 and found their way to Canada in the case of *British Columbia Ferry Corp. v. T&N plc*³. Although not specifically referred to as a Pierringer Agreement, the agreement at issue in *British Columbia Ferry Corp.* bore a number of the hallmarks of a Pierringer Agreement, namely, the segregation of the settling party claims and the application to remove the settling parties from the lawsuit.

That said, the approach of the British Columbia Court of Appeal in *British Columbia Ferry Corp.* appears somewhat different than the approach that has been taken by our Alberta courts to these types of agreements. For reasons that will follow, the approach taken in the *British Columbia Ferry* case has not been adopted in Alberta and therefore one ought to be cautious in attempting to rely on it in Alberta.

In Alberta, the settling defendants are permitted to exit the lawsuit by settling their claims with the plaintiff for some measure of consideration. This is not to say that there has to be an admission of liability on the part of the non-settling defendant to the plaintiff. “There is nothing objectionable in a party negotiating an exit from an action where it takes no share of the liability”.⁴

The leading Alberta case on Pierringer Agreements is the Alberta Court of Appeal decision in *Amoco Canada Petroleum Co. v. Propak Systems Ltd*⁵. In that case, the Court defined a Pierringer Agreement as permitting:

[3] ...some parties to withdraw from the litigation leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As non-settling defendants are responsible only for the proportionate share of the loss, the Pierringer Agreement can probably be characterized as a “Proportionate Share Settlement Agreement”.

The basic elements of the Pierringer Agreement are:

- A. The plaintiff receives a payment, or otherwise some measure of consideration from the settling defendants, in full satisfaction of the plaintiff’s claim against the settling defendants;
- B. The plaintiff agrees to discontinue the action against the settling defendants, removing them from the action;
- C. Formal amendments to the pleadings remove the settling defendants from the action;

² (1963), 21 Wis. 2d 182 (U.S. Wis. S.C.)

³ [1995] B.C.J. No. 2116

⁴ *Canadian Truck Stops Ltd. v. Imperial Oil et al*, [2006] A.J. No. 314 at p. 8

⁵ [2001] A.J. No. 600

- D. The plaintiff then continues the action against the non-settling defendants, who are then responsible only for their several liability, being the loss they actually cause.

It ought to be recognized that in the case of joint tort-feasors, practitioners have to be careful in drafting their Pierringer Agreements so as not to suggest that one of the joint tort-feasors is being released as there is authority to suggest that the release of one joint tort-feasor operates as a release of all joint tort-feasors.

The Pierringer Agreement ought to speak in terms of a covenant not to sue, rather than a release of the settling defendants as it helps to preserve the claim against the non-settling defendants. Further, it ensures that the settling defendant will not be subject to further litigation to recover any amount that the court might ultimately find as being the proportionate share of the settling defendant's liability. This maximizes the benefit of the Pierringer Agreement and effectively eradicates transaction costs attributable to the recovery of funds at the end of the litigation.

The Effect on Rule 77 – Notices to Co-Defendants

Since the purpose of a Pierringer Agreement is to avoid further litigation including cross-claims between defendants, the agreement itself must contain clauses addressing those claims to ensure that the settling defendant can fully escape the litigation (subject to any challenge to the validity of the Pierringer Agreement). Parties contemplating the exit of the settling defendant must be mindful of the effect of the *Contributory Negligence Act*⁶ and the *Tort-Feasors Act*⁷.

The Court in *Amoco* stated that before the settling defendant can successfully negotiate its way out of a lawsuit it has to deal with any cross-claims against it:

[16] This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability.

Having only an indemnity in the Pierringer Agreement is not generally sufficient or prudent. For one thing, there is only value in an indemnity from the plaintiff if the plaintiff is solvent when it comes time to call on the indemnity.

Further, one must be aware that contribution among tort-feasors is not limited to joint tort-feasors and covers several tort-feasors as well. As such, the preferred method of avoiding cross-claims for contribution by non-settling defendants is to include a covenant in the Pierringer Agreement whereby the plaintiff will not seek to recover any amounts attributable to the settling defendant over and above the amounts specified in the agreement. In *Amoco*, the Court describes this in the following terms:

⁶ R.S.A. 2000 c. C-27

⁷ R.S.A. 2000 c. T-5

[16]...alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants...

Therefore, the Pierringer Agreement can provide for the settling defendant to escape a Rule 77 Notice to co-defendant by ensuring that the Pierringer Agreement contains clauses which specify that:

1. The plaintiff will forego any recovery for amounts attributable to the settling defendant which are over and above a specified amount;
2. The plaintiff will limit its claim against the non-settling defendants to only the non-settling defendants' several liability;
3. An indemnity in favour of the settling defendants for any amounts awarded through cross-claims over and above the amount specified in the agreement.

The Effect on Third Party Notices

The Court in *Amoco* also dealt with the prospect of claims for contribution or indemnity by way of third party notice. The Court found that:

[44] Proportionate share settlement agreements are relatively straightforward when all defendants are potentially liable to the plaintiff. The settlement is proper so long as the non-settling defendant's liability is strictly limited to the loss it actually caused. The situation is more complicated when the non-settling defendant has issued a third party notice claiming an independent duty that is owed to it, but not to the plaintiff. A settlement cannot extinguish the non-settling defendant's entitlement to indemnification from the third party unless it also extinguishes the non-settling defendant's liability to the plaintiff in respect of claims for which it is seeking indemnification from the third party.

While the Court was not provided with submissions in *Amoco* that allowed it to apply these principles to the facts of that case, it appears that the Court is suggesting that where a plaintiff sues a number of defendants, and one or more of those defendants then issues a third party notice based on an independent duty, whether in tort or contract, against a third party, a Pierringer Agreement cannot be used to extinguish the non-settling defendant's third party action unless the Pierringer Agreement also extinguishes the plaintiff's right of action against the non-settling defendant.

Therefore, unless the third party notice is issued against a party who is also a defendant and founded on a basis other than a duty already owed by the third party to the plaintiff, a Pierringer Agreement would not be effective between the plaintiff and a third party to cause a discontinuance of the third party notice.

The recent case of *Canadian Truck Stops Ltd. v. Imperial Oil et al*⁸ is somewhat instructive on this discreet point. Canadian Truck Stops Ltd ("CTS") leased lands from Imperial Oil and under the terms

⁸ *supra*, at note 4

of the lease, Imperial Oil agreed to develop the land so that CTS could operate a truck stop. Imperial Oil retained CTM Design Services Ltd. (“CTM”) to design the layout of the truck stop. It turned out that the design was flawed and as a result, CTS lost the benefit of several parking stalls of which it otherwise would have had the benefit.

CTS sued Imperial Oil in negligence and breach of contract and also sued CTM in negligence. Imperial Oil issued a third party notice against CTM seeking contribution and indemnity on the basis of both negligence and breach of contract.

Imperial settled with CTS. As part of the settlement, Imperial assigned its third party action to CTS. CTM argued that, among other things, the action was no more streamlined than it was before the settlement and the Pierringer Agreement was invalid as CTM still had to defend the negligence claim brought against it as a defendant, as well as the third party action in negligence and contract, even though the defendant who issued that third party claim was out of the lawsuit.

The Court upheld the validity of a Pierringer Agreement. The Court found that:

[29] CTM has lost nothing. Now and before the settlement agreement came into being, CTM would be liable for its proportionate share of the liability but not to exceed the amount Imperial is liable to CTS.

The Issue of Potential Prejudice

One issue that is commonly raised by non-settling defendants when faced with the fact that a Pierringer Agreement has been entered into by other parties to the action is that of prejudice. In essence, the argument is that the removal of one or more other parties creates prejudice for the non-settling parties because they lose the benefit of discovery of that non-settling party or the ability to cross-examine that settling party at trial.

As alluded to at the outset of this paper, the *British Columbia Ferry* case was one such instance where the Court was sympathetic to the circumstances that the non-settling defendants found themselves after the removal of other defendants from the lawsuit. In *British Columbia Ferry*, the Court considered the interests of settlement against the potential prejudice that a partial settlement may have on the non-settling defendant. In the result, the Court agreed that there was a measure of prejudice to the non-settling defendants and imposed certain procedural restrictions on the lawsuit going forward that considerably weakened the intended effect of the settlement agreement.

This balancing of interests was canvassed by the Court in *Amoco* and the approach taken in *British Columbia Ferry Corp.* was largely rejected by the Alberta Court of Appeal:

[29] Alberta courts have grappled with the *B.C. Ferry* approach, attempting to balance the certain benefit of settlement against the potential problem of prejudice. Faced with the difficulty of predicting future prejudice, they have looked to the past, assessing such things as the age and complexity of the action; the number of parties involved; how long the present structure of defendants and third parties has been in place; at what stage in the proceedings the application was; whether discoveries have taken place; documents been produced and expert reports exchanged; whether a trial date has been

set; delays and reasons for them; whether the non-settling parties diligently exercised discovery rights.

The Alberta Court of Appeal in *Amoco* expressly rejected the need to balance the certainty of settlement against the potential for prejudice, finding that such an approach was not only superficial, but also favoured settlement in the later stages of litigation as opposed to the earlier stages and created uncertainty for judges and litigants since the courts are looking for potential, but no actual prejudice:

[34] A test which institutionalizes this degree of uncertainty is no test at all. By properly drafting a proportionate share settlement agreement, settling parties can ensure that a non-settling defendant is responsible only for its proportionate share of the loss. But a non-settling defendant can always assert some form of potential prejudice which settling parties cannot avoid by contractual means. Litigants will no doubt be reluctant to spend time evaluating their legal position and displaying their hand in settlement negotiations if there is little ability to predict whether a proportionate share settlement agreement will be given effect by the court.

The Court in *Amoco* went on to say that, unlike other jurisdictions where forms of discovery of non-parties are available, Alberta Courts cannot remedy potential prejudice due to the lack of legislative provisions which would otherwise give Alberta judges the same flexibility as judges in other jurisdictions:

[37]...Because [Alberta judges] can do little to remedy potential prejudice, the so-called balance they are supposed to achieve is no balance at all: to uphold a settlement agreement, a judge must conclude that there is little or no potential for prejudice, but in reality, curtailing pre-trial disclosure rights will almost always result in possible procedural disadvantage to the non-settling defendants. In most cases the disadvantage does not stem from the fact of settlement, but from the pre-trial disclosure regimen which exists in this province. It is therefore more productive to focus on the cause, rather than the potential for prejudice.

[39] Alberta's current pre-trial disclosure regimen severely restricts third party discovery rights. This limitation, which affects all litigants equally, should not be equated to prejudice. Nor should it be used to justify jettisoning proportionate share settlement agreements in this province. A better solution is to introduce some form of third party discovery in Alberta to address the type of procedural complaints levied in this case. The fact that non-settling defendants are confined to a statutory disclosure regimen constrained by the *Alberta Rules of Court* is not a proper basis for refusing to give the effect to proportionate share settlement agreements.

Despite this rather strong statement from the Court of Appeal and the fact that legislative amendments allowing third party discovery have not come into being, non-settling defendants continue to raise prejudice as a reason why Pierringer Agreements should not be upheld. And some Courts appear open to considering actual or potential prejudice arguments.

Recently, in *Canadian Truck Stops Ltd. v. Imperial Oil et al*⁹, Justice Kent upheld the Pierringer Agreement but gave the non-settling defendants the opportunity to have the same type of pre-trial discovery that they would have had if the settling defendant would have remained in the action:

⁹ *supra*, at note 4

[30] In the result the agreement is approved. That, however, does not end the application. CTM says that the agreement needs to be amended to ensure that CTM will continue to have the same kind and quality of pre-trial discovery as it would have if Imperial remained an active participant in the action. I agree that CTM is entitled to that protection. This action is being case managed by me. CTM may apply to seek whatever direction it says are appropriate to ensure that protection.

The same argument about ensuring procedural fairness was made in another recent case, *Sun Gro Horticulture Canada Ltd. v. Abe's Door Service Ltd.*¹⁰ In the *Sun Gro* case, Justice Macklin was asked to approve a proportionate share settlement agreement and strike certain cross-claims issued by the non-settling defendants against the settling defendants.

The non-settling defendants in *Sun Gro* argued that the proportionate share settlement agreement at issue had the effect of removing Mr. Snihur, a settling defendant, and putting Mr. Snihur out of the reach of the non-settling defendants for the purpose of cross-examination at trial.

The Court in *Sun Gro* recognized that if the plaintiff did not call Mr. Snihur, the non-settling defendants could seek to have an adverse inference drawn against the plaintiff. In addition, it was open for the non-settling defendants to call Mr. Snihur as their witness and if Mr. Snihur presented himself as a hostile witness, an application could be made to have Mr. Snihur declared a hostile witness and cross-examined.

Justice Macklin rejected the suggestion of the non-settling defendants that the Court should compel Mr. Snihur to testify. Justifiably, the Court found no provision in the *Rules of Court* or elsewhere to allow itself to appoint and direct an ordinary witness to testify in a civil proceeding. Nevertheless, Justice Macklin left the door open, albeit slightly, concluding that while the proportionate share settlement agreement at issue was granted on the basis of the public policy rationale that settlement is to be encouraged, he said "...the facts peculiar to each case must be examined to determine whether and what steps need to be taken to ensure a fair trial for all parties".¹¹

Therefore, in evaluating proportionate share settlement agreements, the Court will evaluate the propriety of the Pierringer Agreement on the following basis:

1. A court must keep in mind the strong public policy reason which encourages settlement;
2. The fact that a non-settling defendant has restricted rights of third party disclosure under the *Alberta Rules of Court* does not justify refusing to give effect to a proportionate share settlement agreement;
3. The court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling defendant would otherwise have;

¹⁰ [2006] A.J. No. 1180

¹¹ *supra*, at note 6

4. A proportionate share settlement agreement should be disclosed to the non-settling party to further reduce potential prejudice. The terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed at court.¹²

Disclosure of the Agreement

With respect to the last point, one should be aware that disclosure of the settlement terms, although not necessarily the amount, is also touched upon by the *Code of Professional Conduct*. In particular, Chapter 10, Rule 13 provides as follows:

[Rule 13] A lawyer must not misrepresent to the Court the identity of the lawyer's client or witness, the client's position in the litigation or the issues to be determined in the litigation.

The commentary to the Rule specifically contemplates Mary Carter Agreements but appears to apply equally to Pierringer Agreements. For this reason, notice ought to be given to the court with respect to the proportionate share settlement agreement. This is normally done at the time of the application to amend the Statement of Claim to remove the settling defendants from the action.

Further, under Chapter 11, Rule 1:

[Rule 1] A lawyer must not lie to you or mislead an opposing party.

The commentary to the Rule reads as follows:

[c.1] ...a lawyer who reaches an agreement with some, but not all, of the opposing parties in negotiation must disclose the agreement to the remaining parties if the lawyer's client intends to continue as a party in the matter. An example is of a Mary Carter Agreement...to conceal such an agreement would be to mislead the other parties since, by continuing in the matter, the parties who have reached an agreement are representing that their positions are unchanged. In fact, the agreement has altered their respective positions or interest of the parties and the appropriate negotiating strategy will be different as a result. Any agreement having this effect, whether in a litigation context or otherwise, must be disclosed to all parties.

In summary, proportionate share settlement agreements are to be encouraged in the appropriate circumstances and are an effective and efficient tool in minimizing litigation risk within the parameters set forth above. They ought to be considered, even early on in the process.

III. Mary Carter Agreements

Mary Carter Agreements, also known as Guaranteed Verdict Agreements, first emerged in the case of *Booth v. Mary Carter Paint Company*.¹³ The facts behind the case developed out of a college prank. Two college students were dropped off in the middle of the highway blindfolded, as part of a college

¹² *Amoco, supra.*, at note 5 at para. 41

¹³ 202 So. 2d 8 (1967)

fraternity initiation. Two tractor trailer units driven by employees of the Mary Carter Paint Company were traveling southbound on the highway and when the lead tractor trailer saw the college students on the highway, the driver brought the vehicle to a stop, thinking that an accident had occurred. The driver of the second tractor trailer unit parked approximately 40 feet behind the lead vehicle with all of its wheels on the pavement. Both vehicles effectively blocked the entire southbound lane.

Another tractor trailer unit, driven by Willoughby, subsequently came upon the scene and blocked another lane. Shortly thereafter, a Volkswagen drove into the back of the Willoughby vehicle, and the driver of the Volkswagen was killed instantly.

The case went to trial but only on appeal did it become evident to the Court that prior to judgment, an agreement had been reached between Willoughby and the plaintiff that limited Willoughby's exposure to \$12,500. The agreement provided that in the event that judgment was assessed jointly against Mary Carter Paint Company and Willoughby in an amount that exceeded \$37,500, no contribution would be sought from Willoughby.

Further, in the event that Mary Carter Paint Company was either not liable or liable for damages of less than \$37,500, Willoughby would contribute in an amount between Mary Carter Paint Company's actual liability and \$37,500, up to a maximum of \$12,500. Willoughby continued to participate in the litigation after the agreement was reached and the agreement was to remain confidential unless disclosure was ordered by the court.

The Court found that the agreement was not a release but rather operated as an instrument to limit Willoughby's liability. Subsequently, American courts have treated Mary Carter Agreements with varying degrees of acceptance.

Mary Carter Agreements did not emerge on the Canadian litigation landscape until approximately 1981 when the case of *J. & M. Chartrand Realty Ltd. v. Martin*¹⁴ was decided. In that case, the agreement was kept confidential until well after judgment had been rendered. The Court canvassed the prevailing elements of a Mary Carter Agreement in American jurisprudence as follows:

[8] A typical 'Mary Carter Agreement' according to an Article "The Expected Demise of 'Mary Carter': She Never was Well." by Warren Freedman I.L.J. October 1975 would appear to embody four features: (1) secrecy; (2) the contracting defendants agree to remain as party defendants in the action and become active proponents of the plaintiff's case; (3) the contracting defendants guarantee the plaintiff a specific sum of money if the plaintiff loses or recovers less than that amount; (4) the contracting defendants partake of an interest in the outcome of the litigation (for example the plaintiff agrees to refund the payment previously received if the verdict against the others exceeds the amount or if the Judge finds the contracting defendant free from all liability).

Since the validity of the Mary Carter Agreement was not at issue in that case, the Court declined to comment on it.

¹⁴ (1981), 22 C.P.C. 186

Subsequent cases contained references to Mary Carter Agreements,¹⁵ but no definitive direction with respect to the validity of such agreements was given until the Ontario decision in *Petty v. Avis Car Inc.*¹⁶ In *Petty*, the Court affirmed the use of a Mary Carter Agreement and concluded that it did not amount to an abuse of process because the disclosure of the agreement ensured court control over the proceedings. The Court instructed that Mary Carter Agreements generally do not prevent the non-settling defendant from defending itself, and instructed that where necessary, prejudice can be avoided by court mandated procedural safeguards.¹⁷

The agreement here has not been kept secret. Accordingly, the court is able to control its process with full knowledge of all relevant circumstances

The contracting defendants remain in the lawsuit. They remain for the specific purpose of establishing their claims for contribution and indemnity against their co-defendants. Such claims would have been vigorously pursued even in the absence of the agreement. The agreement did not bring these cross-claims into existence, nor did it prejudice the non-contracting defendants' position in defending the cross-claims. I see no reason why the agreement should prohibit the pursuit of those cross-claims.

The additional feature similar to a Mary Carter agreement is that the contracting defendants' exposure is decreased in direct proportion to the increase in the non-contracting defendants' exposure. This is so to a degree in the case at bar. With such an agreement, it is in the interests of the contracting defendants to pursue the non-contracting defendants on the issues of liability; but this would be so as well in the absence of an agreement. However, it is also in the interests of the contracting defendants, once having made the agreement, to have the plaintiffs' damages assessed as high as possible in the circumstances. The higher the assessment, the greater the return to the contracting defendants.

...

Without some procedural safeguards to prevent the kind of distortions which occurred in *Elbaor*, there would be a legitimate concern that the agreement resulted in an abuse of process.

Accordingly, I directed, when dismissing the motion for a stay, that the contracting defendants would not be permitted to cross-examine on issues related to the quantum of damages, except with leave of the court.

The use of Mary Carter Agreements are now entrenched in Canadian law. In *Resch v. Canadian Tire Corp.*¹⁸ the court comments that:

¹⁵ For instance, see *Madgett v. Dawley* (1986), 170 A.R. 351 at para. 5, *Syncrude Canada Ltd. v. Canadian Bechtel Ltd.* (1990), 76 Alta. L.R. (2d) 327 at para. 3

¹⁶ (1993) 13 O.R. (3d) 725

¹⁷ *Petty v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 at paras. 36-41

¹⁸ 2006 CarswellOnt 4382

[117] As I said in my opening remarks to the jury, there is nothing improper about a Mary Carter Agreement, so long as it is promptly and properly disclosed to the court as it was in this case. These types of settlements have been found to be legal and ethical by the courts.

A Mary Carter Agreement is a settlement agreement made between parties adverse in interest.¹⁹ The settling defendant admits liability, but caps its portion of damages at an agreed amount. The parties agree that the plaintiff will recover the specified amount of damages regardless of the outcome of the trial. At a minimum, the plaintiff is guaranteed recovery from the settling defendant. In the event that the settling party is assessed as having liability greater than the amount agreed upon in the Mary Carter Agreement, the plaintiff agrees to abandon the portion of its claim greater than the capped amount in order to protect the settling party from cross-claims for contribution.

The parties further agree that the settling defendant's liability will be reduced in direct proportion to the increase in liability of the non-settling party. This creates an incentive for the settling party to maximize the liability of the non-settling party. Thus the agreement involves a shift in interest on the part of the settling defendant; instead of denying liability, the settling party will attempt to maximize the non-settling party's exposure to liability in order to reduce the amount of money he or she must pay out pursuant to the agreement.

At a bare minimum, a Mary Carter Agreement includes the following features:

1. liability of the settling defendant is capped and the plaintiff agrees to abandon any portion of the judgment attributable to the settling party greater than the capped amount;
2. the settling party continues to participate in the lawsuit in order to maximize the non-settling party's liability;
3. the settling party's liability is reduced in direct proportion to the increase in the non-settling party's liability; and
4. the agreement must be immediately disclosed.

The benefit of the Mary Carter Agreement is that it is a useful tool for controlling risk. It is beneficial for the plaintiff because the plaintiff is guaranteed a settlement regardless of the outcome of the trial. Further it elicits assistance from a previously adverse party; the settling defendant. This may also encourage settlement from the non-settling party because the loss of the settling defendant may mean that the non-settling party must bear the full costs of the defense. Often where there is more than one defendant, parties can share resources.

A Mary Carter Agreement benefits the settling defendant because the settling defendant is able to limit its liability regardless of the outcome of the trial. Further, by cooperating with the plaintiff, the settling defendant is able to reduce the amount it must pay out in direct proportion to the increase in the non-settling defendant's liability.

¹⁹ *Greep v. Josephson* (2001), 285 A.R. 326 at para. 7

Timing and the Use of Evidence

Mary Carter Agreements may be entered into at any stage of the proceedings up to and including trial. This can be problematic where a Mary Carter Agreement has been entered into while discoveries are ongoing.

In *Syncrude Canada v. Canadian Bechtel Ltd.*²⁰, the non-settling defendant sought to introduce the settling defendant's discovery transcripts against the plaintiff at trial. These transcripts had been generated through discoveries that occurred between the settling defendant and the plaintiff before the signing of the Mary Carter Agreement. Although the Mary Carter Agreement aligned the settling defendant and the plaintiff's interests, the Court ruled that the evidence obtained by the settling defendant through its discovery of the plaintiff could not be used against the plaintiff:

[10] In sum therefore, it is unfair to put into evidence against a person an admission by a different person, whether or not the two now have similar interests, friendship, and cooperation.

This reasoning was subsequently followed in *Edmonton (City) v. Lovat Tunnel Equipment Inc.*²¹

Relevant evidence cannot be suppressed using a Mary Carter Agreement. In *Evans v. Jenkins*²², the settling defendant had in its possession a videotape that it had intended to use to impeach the plaintiff's testimony with respect to the extent of the plaintiff's injuries. Pursuant to the Mary Carter Agreement, the settling defendant agreed not to use a videotape to impeach the plaintiff. The non-settling defendant sought to use the tape. The Court directed that the video be available for use, and instructed that a Mary Carter Agreement cannot be used to deprive the decision maker of relevant and material evidence:

[25] It seems to me, based upon the peculiar terms of the *Mary Carter Agreement* in the present case, that there is a risk that its implementation will have the result of depriving the jury of material information and evidence in the form of this videotape. Without ascribing any improper purpose or intent to anyone, the Court must be concerned to avoid any suggestion that it has approved or permitted an arrangement whereby two parties to a proceeding agree to keep relevant evidence under wraps in order to advance their joint interests as against a third party. A civil trial is, after all, a truth-seeking exercise. Any arrangement that raises an impediment to that objective must be carefully scrutinized.

[26] In view of the real dynamics of this trial that exist in the wake of the *Mary Carter Agreement*, and pursuant to the Court's jurisdiction to control its own process, justice dictates that the videotape be made available for use during [the plaintiff's] cross-examination and I so order.

²⁰ (1994), 149 A.R. 54

²¹ 2000 ABQB 882 at paras. 57, 65

²² (2003), 29 C.P.C. (5th) 299

Disclosure of the Agreement

In *Petty*, *supra*, the Court directed that in order to ensure fairness, the agreement should be disclosed as soon as it is made :

[32] ... The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfill its role in controlling its process in the interests of fairness and justice to all parties.

The complete terms of the agreement should be disclosed. However, disclosure of actual dollar amount is within the discretion of the court:

[34] Excepting the dollar amounts, it is rather obvious that all of the terms of the agreement must be disclosed, especially for the purpose of enabling the court to control its own process...

[35] The disclosure of the dollar amounts is patently in the discretion of the court.

Practically, the actual dollar amounts are rarely disclosed, or requested by the courts.²³

However, in *Newell v. McIvor*²⁴ the Court suggested that where portions of the agreement are not relevant to the changed positions of the parties, the Court needs only to receive an unedited copy of the agreement. The relevant portions of the agreement may be edited and provided to the non-settling parties and the onus is then on the non-settling parties wishing to obtain full disclosure to make a court application:

[18]... The better practice would seem to be, that at the time of disclosure, the contracting parties provide the Court with an unedited copy of the agreement, and if they feel there are portions of the agreement that should not be disclosed to the other parties, and such portions are not relevant to the changed relationships, they should provide the other parties with an edited copy of the agreement (as was done in *Petty v. Avis Car Inc.*, *supra*). The other parties can then determine if they wish to apply to the Court for disclosure of the edited portions. The Court may then determine what, if any, additional disclosure is required.

One is also reminded of the *Code of Professional Conduct* and its provisions with respect to disclosure of agreements of this nature as discussed in the previous section on Pierringer Agreements.

²³ For example, see *Anguish v. Daviault*, 2006 Carswell Ont 4193

²⁴ (1998), 164 Sask. R. 258

Margetts v. Timmer Agreements

A variation on a Mary Carter Agreement which still has many of the same elements was at issue in the Alberta case of *Margetts v. Timmer*.²⁵ While not a true “Mary Carter Agreement”, *Margetts v. Timmer* Agreements are characterized by:

1. The settling defendant paying the plaintiff a set sum of money;
2. The plaintiff’s claims are then assigned to the defendant;
3. The settling defendant can also pursue its own claims for contribution against the non-settling defendant;
4. The Plaintiff holds the settling defendant harmless against any claims for contribution by the non-settling defendant;
5. The plaintiff’s legal costs are paid by the settling defendant;
6. The settling defendant holds the plaintiff harmless for any costs awarded against the plaintiff.

In effect, the settling defendant buys out the plaintiff’s lawsuit. The Court in *Margetts* determined that such a settlement was “in the nature of” a Mary Carter Agreement and assessed it on that basis, approving it accordingly. Some have suggested that such arrangements are void due to champerty and maintenance. It is generally accepted, however, that an assignment of an action between parties already interested in the litigation does not constitute champerty and maintenance.²⁶

Further, one must again be aware, as is the case with Pierringer Agreements, that at common law, a release of one joint tort-feasor releases all joint tort-feasors so Mary Carter Agreements or agreements in the nature of Mary Carter Agreements must be structured as a covenant not to sue rather than a release.

IV. Conclusion

Both Pierringer Agreements and Mary Carter Agreements each have their own unique features but they are both effective tools for minimizing litigation risk. The certainty that such agreements can offer is often valuable to parties who are seeking to engage in activities other than speculating on their chances of success in complex, multi-party litigation. To fail to consider the benefits of these tools is to expose clients to increased expense and the uncertainty of trial.

²⁵ 1999 ABCA 268

²⁶ See also *Sun Gro Horticulture*, *supra* at note 10



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