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PRACTICAL STRATEGIES FOR WINNING AUTO CASES

MARY CARTER & PIERRINGER AGREEMENTS

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Mary Carter and Pierringer Agreements: Powerful and Strategic Settlement Tools

I Introduction

Mary Carter and Pierringer Agreements are powerful and extraordinary tools to achieve settlement. In recent years, with complex multi-party litigation becoming increasingly common, these agreements have performed an indispensable role in the pursuit of justice for injured victims by guaranteeing a minimum result, reducing the expense of litigation and shifting the burden to the non-contracting defendants. This paper and the accompanying materials are intended to assist in the drafting and implementation of Mary Carter and Pierringer Agreements.

II Mary Carter Agreements

The potential for the use of a Mary Carter Agreement arises when a plaintiff has sued at least two parties as joint and several tortfeasors and where at least one of the defendants wants to settle with the plaintiff and the other does not.

Mary Carter Agreements are limited only by counsel's imagination and the exigencies of the case. Mary Carter Agreements owe their genesis to the Florida case of *Booth v Mary Carter Paint Co.*[1] In the United States, a typical Mary Carter Agreement has these features:

1. The Plaintiff is guaranteed a minimum recovery and the Defendant's exposure is capped at the agreed-upon amount of settlement;
2. The contracting Defendant remains in the litigation;
3. The settling Defendant's liability decreases in direct proportion to any increase in the non-settling Defendant's liability; and
4. The terms of the Agreement are to be kept secret from the non-settling parties.[2]

In *Pettey v. Avis Car Inc*., the first Canadian case to consider Mary Carter agreements, Mr. Justice Ferrier ruled that blanket approval for all Mary Carter-type agreements should not be given, but that each particular agreement should be assessed with consideration of the rights of parties to contract and settle lawsuits, with which rights the Court will not interfere lightly. Justice Ferrier also decided that with the exception of dollar amounts and gratuitous and self-serving language, the agreement must be disclosed to all parties, and to the Court, **as soon as it is made**. Immediate disclosure is necessary as a matter of procedural fairness and in order to allow the Court to properly control the judicial process. Mr. Justice Ferrier also concluded that the Mary

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[1] 202 So. 2d 8 (Fla. 1967).

[2] *see Pettey v. Avis Car Inc*. (1993), 13 O.R. (3d) 725. - (p. 7 of the Quicklaw version included in the materials)

Carter Agreement in question did not constitute champerty or maintenance.[3]

By the terms of a Mary Carter Agreement, the settling defendant will never be liable to the plaintiff for more than the agreed-upon amount and in exchange, the plaintiff is **guaranteed recovery of a predetermined amount regardless of the finding of liability by the trier of fact**. The guarantee of a fixed amount is the most important hallmark of the Mary Carter Agreement, for it substantially reduces the risks associated with trial. The momentum shifts to the plaintiff and the non-contracting defendant faces being isolated by his co-defendant. The pressure of the trial then rests mainly on the shoulders of the non-contracting defendant.[4]

Strategy and focus shift once a Mary Carter Agreement has been confirmed. The plaintiff's focus shifts from maximizing the liability of all defendants to maximizing the liability of the non-settling defendant. The settling defendant's focus shifts from limiting its own liability to maximizing the plaintiff's damages and the non-settling defendant's liability.[5]

a) When must the Mary Carter Agreement be disclosed?

A Mary Carter Agreement must be disclosed to the parties and to the Court as soon as it is made. This is because the Mary Carter Agreement may have an impact on strategy, the evidence to be led and the form and type of questions used in cross-examination. Immediate disclosure is required for procedural fairness and to allow the Court to control its own process.

b) What must be disclosed?

With the exception of the dollar amounts of the agreement, all terms of the agreement must be disclosed. Additionally, gratuitous and self-serving language may also be omitted. The disclosure of the dollar amounts of the agreement is at the discretion of the Court. Generally, the complete agreement, with all components, is sealed, marked as an Exhibit, made available to the Court and placed within its control.[6]

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[3] *Ibid.*at p. 13

[4] *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725; *Walker Estate v. York Finch General Hospital*, [1998] O.J. No. 2271; *Beresford-Last (Litigation Guardian of) v. Dworak*, [2000] O.J. No. 5506; *Noramerica Inc. v 1406716 Ontario Inc.* (2002), 58 O.R. (3d) 464.

[5] *Ibid.*

[6] *Ibid.*

There are however, instances where the amounts of settlement have been required to be disclosed. In *Leadbetter v. Penncorp Life Insurance Co.*[7], an agreement was made to settle future disability payments. The agreement was to settle the amount to be paid for future disability benefits only. The contracting defendant advised the other defendants of the terms of the agreement and the plaintiff withdrew from the settlement agreement, claiming that because the two causes of action were unrelated, there was no need for the contracting defendant to communicate the details of the settlement. On motion brought by the defendant insurer to enforce the settlement, the Court concluded that to ensure procedural fairness to the non-contracting defendants, the settlement and amounts to be paid were to be disclosed.[8] The Court also concluded that it was open to the non-contracting defendants to compel the disclosure of the settlement in any event. As the plaintiff's claims against the non-contracting defendants were limited only to past due payments and the settlement related to future payments, there was no prejudice to the plaintiff in the disclosure of the settlement and the amounts to be paid.[9]

c) Procedural Concerns

A number of procedural issues arise during trial where a Mary Carter Agreement has been executed. For example, in *Evans v. Jenkins*[10], the Court considered the use of a surveillance videotape undertaken by the contracting defendant. The non-contracting defendant wanted to use this videotape during cross-examination of the plaintiff. The Court concluded that the non-contracting defendant would suffer prejudice if not allowed to introduce the surveillance evidence and the jury would be deprived of material information and evidence. Without ascribing any improper purpose or intent to the contracting parties, the Court was concerned that it would be perceived as approving or permitting an arrangement where relevant evidence is kept from the trier of fact by two parties with the goal of advancing their own interests against a third party. As such, use of the videotape by the non-contracting defendant was allowed. Additionally, it was held that the investigator was a compellable witness to describe what he had observed.[11]

III Pierringer Agreements

The Pierringer Agreement differs from the Mary Carter Agreement in its purpose and obvious effect: to completely remove the settling party from the litigation. With this type of Agreement, the settling party pays the plaintiff a set amount in full satisfaction of the plaintiff's claim against it and the plaintiff discontinues the action against the settling defendant. The

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[7] [1999] O.J. No. 496.

[8] *Ibid* (p.3 of the Quicklaw decision)

[9] *Ibid, supra,* note 4.

[10] [2003] O.J. No. 5796.

[11] *Ibid*, paras. 25-27.

plaintiff then continues the action against the non-settling defendant(s) but promises the settling defendant that it will not pursue the remaining defendants for any portion of liability which a court assesses against the settling defendant.

Similar to the Mary Carter Agreement, the Pierringer Agreement has its roots in the United States. The Pierringer Agreement was first considered in a Wisconsin case, styled *Pierringer v. Hoger*.[12] A number of Canadian cases, including *M.(J.) v. B.(W.)*[13] and *Amoco Canada Petroleum Co. v. Propak Systems Ltd.,*[14] have outlined the development of the use of settlement agreements, including Pierringer Agreements, in Canada. These cases underscore the fact that settlement agreements are no longer solely used for the final resolution of all outstanding issues between parties to a lawsuit. These new types of settlement agreements rather than trying to resolve all outstanding issues attempt to proactively manage the risks associated with litigation, namely the uncertainty and expense of a trial and possibly an undesirable outcome. These settlement agreements attempt to settle issues of liability between some but not all of the parties, reducing the number of issues in dispute and simplifying the lawsuit.

The Court in *Amoco* described a Pierringer Agreement as follows:

> "Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a "proportionate share settlement agreement"[15] *(underlining mine)*

A number of complications arise with Pierringer Agreements; however, a number of these obstacles can be overcome with the inclusion of specific clauses in the agreement itself. Settling defendants are usually subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the settling defendant. This obstacle can be overcome by including an indemnity clause in the Pierringer Agreement where the plaintiff covenants to indemnify the settling defendants for any portion of the damages

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[12] 124 N.W.2d 106, (Wis. 1963).

[13](2004), 71 O.R. (3d) 171.

[14](2001), 200 D.L.R. (4th) 667 [hereinafter referred to as *Amoco*].

[15]*Ibid*, at p. 671.

that the Court may determine to be **attributable to them** and for which the non-settling defendants would otherwise be liable for due to the principle of joint and several liability. Another option is for the plaintiff to agree not to pursue the non-settling defendants for the portion of liability that the Court may determine as attributable to the non-settling defendants.[16]

Terms of a carefully drafted Pierringer Agreement will also include clauses relating to amendments to be made to the Statement of Claim that will be undertaken to ensure that the non-settling defendants will be accountable for their several liability only and that the Court will have full authority to adjudicate upon the apportionment of liability. With these concessions there is no risk of a "gap" in liability.[17]

Courts will limit the use of Pierringer Agreements if their terms result in unfairness to the non-settling defendants. In *Lau v. Bayview Landmark Inc.*[18], the agreement arose in the context where cross-claims, third party claims or claims for contribution and indemnity were being barred. The Court concluded that the effect of the agreement that was in place would not only effect the procedural, but also the substantive rights of the non-settling defendants. In this case, with the settling defendants absent from trial, the non-settling defendants would be deprived of the benefits that would come from full discovery and evidence of those defendants. The Court ultimately concluded that the non-settling defendants could not be procedurally or substantively restored to the position they would have been in if there were no settlement without the opportunity to amend pleadings and cross-claim, neither of which were permitted in the agreement. As such, the agreement as it stood was not approved.[19]

IV Conclusion

As evidenced by their complicated nature, the negotiation and drafting of Mary Carter Agreements and Pierringer Agreements requires time, creativity and thought. It is also important that those involved in their drafting and implementation understand the principles, implications

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[16] *Ibid, supra,* notes 7 and 8.

[17] *Ibid*.

[18] [2006] O.J. No. 600.

[19] *Ibid*.

and ramifications of these agreements. Mary Carter Agreements and Pierringer Agreements are generally entered into prior to trial; however, there is no impediment to counsel entering into a Mary Carter Agreement during the trial. It has been said that, in some ways, an agreement made once trial has commenced has an even greater impact on the trier of fact than an agreement entered into before trial has begun.

The increasing use of Mary Carter Agreements and Pierringer Agreements is a very important development in civil litigation, as their use and implementation guarantee a minimum result for the plaintiff, reducing the great expense and risk of litigation and shifts the risk of litigation to the non-contracting defendant. Mary Carter Agreements and Pierringer Agreements are powerful tools for settlement which, by their nature, achieve one of the paramount objectives of the administration of justice - the settlement of disputes.

Mary Carter Agreements and Pierringer Agreements: A Comparison	
Mary Carter Agreements	**Pierringer Agreements**
• Liability remains joint and several	• Liability becomes several only (Commonly known as a "proportionate share settlement agreement")
• Contracting defendant is still part of the litigation	• Contracting defendant is out of the litigation
• Immediate disclosure required	• Immediate disclosure required
• Amendment to pleading not required	• Amendment to pleading required (Please see *M.(J.) v. B.(W.)*
• Contracting defendant usually assists plaintiff on liability and damages by either not cross-examining the plaintiff on damages and/or trying to shift liability to the non-contracting defendant	• Contracting defendant is removed from the litigation. Its presence is generally to defend a cross-claim in the unlikely situation it is still being asserted