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DRAFTING AN EFFECTIVE, ENFORCEABLE "HIGH LOW" AGREEMENT

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There are few "certainties" in litigation, particularly if a case includes an open-ended claim involving "pain and suffering" or fiduciary breaches. If the claim makes it to the jury, an award may depend on factors over which the client and counsel have limited control, such as third party witnesses, a plaintiff's medical history or a "smoking gun" produced in discovery. While recognizing that anything can happen in litigation, both plaintiff and defense lawyers can estimate a reasonable range of recovery. But, instead of making settlement decisions based on the estimated range, clients sometime consider the "best" or "worst" case scenario. Fear of a runaway jury can motivate a defendant to pay more than the estimated range, while concern over a motion to strike can convince a plaintiff to accept less than the range. High-low agreements give the parties their day in court without risking the extremes. But an effective high-low involves planning. Litigation is unlikely to end with a jury verdict if the parties enter into a high-low simply by picking a couple of numbers at the last minute while waiting for the jury to return.

A high-low, like any other settlement agreement, is a contract. Just as a lawyer would not dream of throwing together a contract without careful consideration of the essential terms necessary for enforcement and the various contingencies that could alter the outcome, an attorney should not enter into a high-low without thinking through the terms and contingencies. While parties can enter into last minute high-low agreements, they should plan ahead, either by having a proposed agreement prepared for signature or at least having an understanding of the essential terms so that a satisfactory, enforceable agreement can be drafted at the last minute.

The Virginia Supreme Court has considered only one case in which it was asked to construe the terms of a high-low agreement. In *Smith v. Settle*, 254 Va. 348 (1997), the plaintiff's vehicle was struck by an ambulance driven by the defendant. Although it is not clear when the agreement was negotiated, defense counsel stated on the record that the parties and the insurer had arrived at a high-low agreement. The low was $350,000, which the plaintiff would get if there was a defense verdict. *Id.* at 350.

After deliberation, the jury returned a defense verdict. However, the plaintiff refused the $350,000 tender from the insurer. Instead, the plaintiff moved to set aside the verdict and for a new trial alleging improper jury instructions. The defendant filed a motion to enforce the high-low agreement, even though the jury verdict had been in his favor. The court denied defendant's motion to enforce, and instead granted the plaintiff's motion for a new trial. But the jury in the new trial could not agree on the verdict. *Id.* at 350-51.

There was a *third* trial in which the jury again returned a defense verdict. This time, the court denied the plaintiff's motion to set aside the verdict, and instead sustained the plaintiff's alternative motion to enforce the high-low agreement which had been entered in the first trial, ordering the insurer to pay $350,000 "as agreed by the parties." *Id.* As discussed below, this case illustrates the importance of including in a high-low agreement terms designed to address any contingency.

A. Authority

To be enforceable, the parties must agree to the high-low. While an attorney can certainly act on behalf of the client, the attorney can do so only after securing the client's approval. An attorney who agrees to a high-low "subject to" client approval has agreed to nothing. What is more, the parties run the risk that the jury will return a verdict while one party attempts to secure client approval. The terms of any high-low should provide that the agreement

becomes binding only when both parties communicate final approval or is terminated when the jury returns a verdict, whichever occurs first.

To the extent that insurers are involved, the parties must make certain that all are on board before the high-low becomes final. It is important to secure the insurer's approval not just with regard to the amount of the high-low, but with regard to other terms as well. For example, insurance policies only cover certain liabilities or damages. The parties are better served if the high-low agreement covers any and all liability, and the insurer agrees to pay the liability (up to the policy limits) regardless of the nature of the claim or the characterization of the damages. Otherwise, counsel may face an ethical dilemma if asked to consider a high-low tied to claims or damages only some of which are covered by insurance.

Of course, if there are multiple plaintiffs and/or defendants, it is important to include in the terms of the high-low to whom it applies, and how the verdict is to be determined in the event of joint and several liability. Virginia Code Section 8.01-35.1 addresses the effect of a release or covenant not to sue given "to one of two or more persons liable in tort for the same injury." Va. Code § 8.01-35.1(A). The Code specifically provides that such covenants include high-low agreements. Under the statute, the high-low does not discharge other tortfeasors, but any amount awarded against other tortfeasors will be reduced by the consideration given for the agreement. Thus, parties cannot include in a high-low agreement any limitation on the amount of offset to other tortfeasors as to do so would deprive them of rights under the statute.

Since high-low agreements represent a compromise or settlement, they may need to be blessed by the court. The Code specifically makes covenants, including high-low agreements, subject to the provisions of Sections 8.01-55 and 8.01-424, both of which require court participation in settlements. Section 8.01-55 authorizes a personal representative to compromise wrongful death claims "with the approval of the court in which the action was brought."

Moreover, the statute specifically provides that approval is secured through a petition process, and that the petition process requires "the convening of the parties in interest… ." Va. Code § 8.01-55. While it may be in everyone's best interest to enter into a high-low agreement, no one wants to be in the position of having to convince a court after the verdict that a high-low is in a plaintiff's best interest, particularly if there is a considerable disparity between the verdict and the high-low.

Similarly, Section 8.01-424 gives courts the power to approve and confirm a compromise on behalf of a person under a disability if it is "deemed to be in the interest of the parties." Va. Code § 8.01-424(A). Again, while a court very well may approve the high-low after the fact, the parties should secure prior approval if at all possible. As a practical matter, these issues only arise when the jury verdict exceeds the high, and the court is asked to approve a compromise which reduces the amount the jury intended to award in either a wrongful death action or to a person under a disability. No court would refuse to enforce a high-low agreement as contrary to the interest of the parties if the low is more than the jury award.

B. Add-Ons

Virtually all judgments include an interest element and some involve other "add-ons" to the award. Even if the verdict is more than the designated high, a plaintiff may argue that interest should be added, and should be calculated based on the high. What if the jury verdict is within the high-low? Is interest added to increase the verdict? If authorized by statute, are attorney's fees added? As an example, under Virginia's Business Conspiracy Act, courts sometimes conduct a post-verdict hearing to determine the cost of suit, including reasonable attorney's fees, to be awarded to a prevailing plaintiff. The Act also authorizes the court to treble certain damages. If the parties do not consider and address these add-ons in the high-low agreement, then the defendant may argue that the high-low contemplates the jury verdict, and

nothing more, while the plaintiff will argue that the high-low includes any recoverable damages, including costs and attorney's fees available even if not included in the verdict. To avoid confusion, the high-low should state specifically that the amount awarded will be either the high, the low or the verdict amount *without* add-ons, or state specifically which add-ons will be included and whether the add-ons can push the amount to be awarded above the high. Regardless of who has the prevailing argument, absent a term addressing add-ons, the dispute may lead to additional litigation to determine the intent of the parties.

C. The Verdict

Most high-low agreements are entered to eliminate the risk of an extreme verdict, and to end the litigation. In light of these goals, parties are well served to include a provision that resolves litigation in the event that there is no verdict. This can result from a mistrial, a nonsuit or a hung jury. Of course, the parties can provide that, if there is no verdict, there is no high-low agreement. Indeed, if the parties do not address the issue, it is implied as a high-low is impossible to enforce without a verdict absent a specific provision providing for resolution in the event of a hung jury or mistrial.

Some parties enter into high-lows because they are convinced that they will reap the better of the bargain. But if the case "turns south," either during trial or as evidenced by the verdict, can a party take steps to avoid the high-low? Can a plaintiff nonsuit? Can either party move for a mistrial or for a new trial? Can a party intentionally "draw the foul" to cause a mistrial? As all but the last of these legal maneuvers are perfectly legitimate, is there anything to prohibit a party from taking advantage of them? The answer likely depends on whether there is a jury verdict.

1. Avoiding the Verdict

If the plaintiff takes a nonsuit or a mistrial is granted before the verdict, the court is unlikely to enforce the high-low agreement unless it includes terms outlining a resolution in the event of a nonsuit, mistrial or hung jury.

If the parties are intent on ending litigation in the event of a hung jury, a resolution is relatively straightforward. The parties typically pick a compromise number to be awarded if the jury cannot agree on a verdict.

Virginia Code Section 8.01-380 gives a plaintiff the right to nonsuit a case at any time before it is submitted to the jury. The only reason a plaintiff would nonsuit with a high-low agreement in place is to avoid the possibility that the plaintiff will end up with the low. In essence, it is an attempt to avoid the agreement. For this reason, plaintiffs should not be allowed to escape the agreement by nonsuiting the case. However, Virginia courts are loathe to deny a plaintiff the statutory right to a nonsuit, and courts may interpret the statute as giving a plaintiff the absolute right regardless of whether a high-low is in place. To make certain that the litigation ends in the event of a nonsuit, the terms of the high-low should specifically state that, should the plaintiff move for a nonsuit, the low will be awarded. Nothing in the Code suggests that such an agreement would not be enforced.

Including terms in a high-low that ends litigation in the event of a mistrial (other than a hung jury) is much more difficult. Unlike a hung jury or nonsuit, mistrials occur when something goes wrong, and the judge suspects that the verdict will be tainted. Moreover, mistrials may occur through no fault of the litigants, i.e., the result of improper third party witness testimony or juror misconduct. Accordingly, to the extent that the parties decide to address the issue in the high-low, the terms usually provide that the agreement has no effect in the event of a mistrial.

2. Challenging the Verdict

Jury verdicts can be affected by errors which occurred during trial such as the introduction of inadmissible evidence, improper argument or erroneous jury instructions. If a party enters into a high-low and yet believes that the jury verdict is the result of error, is there any way to avoid the agreement? In all likelihood, not without including specific terms in the high-low agreement addressing such errors. The trial court in *Smith v. Settle* granted the plaintiff's motion to set aside the verdict because the judge was convinced that the jury was not properly instructed. However, when the case finally made its way to the Supreme Court, the resulting opinion suggests that, once the jury renders a verdict, the high-low is binding and enforceable unless the parties included in the agreement terms allowing relief from the verdict.

On appeal in *Smith v. Settle* was the trial judge's enforcement of the high-low in the third trial. The defendant insisted that he was no longer bound by the high-low because the plaintiff repudiated the agreement by refusing the tender of $350,000 following the jury verdict in the first trial. The Supreme Court agreed with the defendant that the original high-low agreement was no longer in place, reversed the trial judge's enforcement of the high-low, and entered judgment for the defendant. 254 Va. at 352.

Implicit in the ruling is the Court's conclusion that the defendant had the right to enforce the high-low agreement in the first trial and that the plaintiff repudiated the agreement by moving for a new trial. To reach this result, the Court had to conclude that the plaintiff did not have a right to repudiate the high-low agreement in light of erroneous jury instructions:

> Recognizing that there is no explicit provision in the agreement requiring the jury to be "properly instructed on the law," plaintiffs assert that it "was an implicit term of the agreement [and]… there was no agreement not to seek post verdict relief in the trial court."

254 Va. at 354. The Court, however, found "nothing in counsel's statement implying that a 'properly instructed' jury was part of the agreement or that either party could seek post-verdict

relief in the trial court." The Court refused to "rewrite the agreement to impose provisions that are neither stated nor implied therein. The plaintiff's unjustified refusal of the tender prevented performance of the agreement and gave [the defendant] the right to regard it as terminated." *Id.* (citations omitted).

Does this decision mean that there is nothing a party can do to protect itself against errors that may affect the jury verdict? The Court answers the question in its refusal to "rewrite the agreement to impose provisions" that are not stated or implied. If the parties would like to preserve the right to challenge errors, they can do so by including provisions in the high-low agreement preserving the right, either through post-trial motions, an appeal or both. But if the goal of a high-low agreement is to end litigation, then the parties may be better served to accept whatever jury verdict is rendered, relying on the judge to prevent or correct any errors that occur during trial.

The Court's decision in *Smith v. Settle* suggests that the plaintiff had no right to appeal the jury verdict had the trial judge denied the motion for a new trial. It would not make sense for the Supreme Court to allow an appeal to address errors which could not be corrected pursuant to a motion for a new trial. Nevertheless, in order to put an end to the litigation once the jury renders a verdict, it is important to include in a high-low agreement the waiver of any right to appeal.

D. Enforcing the Agreement

When the jury verdict is rendered, the parties should advise the court of the high-low agreement and request that judgment not be entered. Both the Virginia Code and case law suggests that a high-low agreement is a settlement. *See* Va. Code § 8.01-35.1; *Smith v. Settle*, 254 Va. at 351 (characterizing a high-low as an "agreement" that would not be rewritten by the court); *see also Cunha v. Shapiro*, ___ N.Y.S.2d ___, 2007 WL 1295844 (App. Div. May 1,

2007) (unanimous panel of appellate division holds that a high-low is a settlement and subject to a statutorily required general release). If the parties settle a case, no judgment is entered. Indeed, many defendants count the absence of a recorded judgment as one of the many benefits of settlement. To avoid any dispute, if it is important that no judgment be entered, the high-low should say so.

It is up to the parties to comply with the high-low. Any refusal to honor the agreement will be treated the same as any other breach. To the extent that the agreement is written, it will be interpreted the same as any other written contract. To the extent that the agreement is unwritten, there may be a hearing to determine its terms. To avoid post-trial litigation to enforce a high-low, the parties should reduce the agreement to writing and include as many terms as possible including payment terms to help avoid further litigation costs. Again, it is important to make sure that any insurers involved in the litigation agree to the payment terms included in the high-low so that the insurers will not be heard to complain if the payment terms differ from the standard procedures for paying settlements.

The *Smith v. Settle* case demonstrates the importance of complying with the terms of the high-low agreement. The plaintiff clearly saw the high-low as a "fall back" and moved for a new trial after both the first and second defense verdicts. However, the plaintiff tried to keep the high-low agreement as a "fall back" option. While moving for a new trial after the second defense verdict, the plaintiff alternatively moved to enforce the high-low agreement. The Supreme Court made clear that the plaintiff's refusal to acknowledge the high-low after the first jury verdict eliminated the defendant's obligation. 254 Va. at 354. No doubt the Court's conclusion was motivated by the fact that a defendant who entered into a high-low in an attempt to end litigation was forced to try the case not once, not twice, but three times. Would the case have been any different had the trial judge *denied* the motion for new trial after the first defense

verdict, a ruling the plaintiff likely would have appealed? While no reported cases address the issue, another jurisdiction was faced with a similar situation.

In April of 2006, the Maryland Court of Special Appeals in *Maslow v. Vanguri*, concluded that a plaintiff's appeal after an adverse judgment forfeited the defendant's obligation to pay pursuant to a high-low agreement. The court reached this result because the high-low agreement specifically provided that, with a jury verdict, the parties would waive any right of appeal. The plaintiff argued, among other things, that the jury instructions were in error. When the appeal failed, the plaintiff attempted to enforce the high-low agreement. The defendant argued that the appeal was a material breach, permitting rescission of the agreement. While the plaintiff conceded that appealing was a breach, she argued that it justified damages only, and not total rescission. The court disagreed, holding that after the jury rendered its verdict, the plaintiff was bound by its obligation not to appeal, and repudiation of the obligation left the defendant free to pursue rescission. *See Maslow v. Vanguri*, 896 A.2d 408 (Md. Ct. Spec. App.), cert. denied, 903 A.2d 416 (Md. 2006).

The Supreme Court's decision in *Smith v. Settle* and the Maryland Court of Special Appeals' decision in *Maslow v. Vanguri* reflect a consistent judicial attitude toward high-low agreements. They are contractual obligations, and will be enforced pursuant to their terms. Courts do not, and should not, scrutinize jury verdicts for error or prejudice when a high-low is in place. Litigation is fraught with risk, including the risk of an extreme result. The high-low agreement removes the risk of an extreme result and in its place imposes a range acceptable to both parties. Once a case is submitted to the jury and a verdict is rendered, the court should leave the parties with the benefit and burden of their bargain.

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