Partial Settlement Agreements: Practical Realities
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The benefits of a negotiated settlement often outweigh the financial risks and expense of litigation. The realities of a "loser pays" system of costs, which see the loser pay and the winner receive only 66% - 80% of costs incurred, make civil trials an expensive exercise, even for the winners.

Such economies have given rise to the evolution of partial settlement agreements, the form and structure of which are now limited only by the creativity of the parties and players. This paper purports to discuss the most common forms of partial settlement agreements ("PSA's"), the state of the law with respect to disclosing such agreements to non-settling parties, as well as an analysis of the procedural rights of, and recommended safeguards for, non-settling defendants thereafter.

Pierringer & Mary Carter Agreements: Defining Characteristics & Procedural Issues

The most common forms of partial settlement agreements are *Pierringer* and *Mary Carter* agreements. Both look to cap or fix the exposure of the settling defendant but achieve this end differently.

Mary Carter Agreements

A *Mary Carter* agreement typically keeps the settling defendant in the litigation. The upside to a *Mary Carter* agreement is that often the plaintiff will agree to share with the settling defendant any award achieved against the non-settling defendant at trial to the extent that the amount awarded is greater than the amount paid to the plaintiff by the settling party. The settling parties share the spoils of war.

In a *Mary Carter* agreement, the settlement amount is capped and the plaintiff provides indemnification to the settling defendant for claims at the hands of the non-settling defendant. The settling defendant may, however, given their continued participation in the litigation, continue with their crossclaim against the non-settling defendant with the protection of this indemnification.

Pierringer Agreements

The settling defendant is removed entirely from the litigation in a *Pierringer* agreement, while the settlement amount is fixed (not capped). The plaintiff protects the settling defendant from the non-settling defendant by limiting claims against the non-settling defendant to several (as opposed to joint and several) liability.

Although not a rule of law, it is inherent to a *Pierringer* agreement that the plaintiff agrees to this limiting of liability. To do otherwise would seemingly undo the benefits of the agreement from the perspective of the settling defendant. If a settling party is left exposed thereafter to claims for contribution and indemnity at the hands of the non-settling defendant, the benefits of the settlement, including a defined exposure and an end to the litigation, are not realized.

Where a *Pierringer* agreement includes such a term, the non-settling defendant should ensure the plaintiff amends the statement of claim to clearly and unambiguously limit the relief sought against the non-settling party to their several liability only, before consenting to a dismissal of any crossclaim.

Disclosure Requirements in PSA's

Although settlement agreements are prima facie privileged,[1] procedural fairness requires that at least the existence of a partial settlement agreement be immediately disclosed to any non-settling party and to the court[2] (whenever the court process is otherwise engaged).

Furthermore, the Divisional Court in *Stamatopolous v. Harris*[3] has confirmed (in the context of a *Mary Carter* agreement) that it is not merely the existence of the agreement that is required to be disclosed by the settling parties, but also any terms which reflect *a change in the litigation landscape.*

Practically speaking, the settling parties' altered approach to the litigation may have a significant impact on any apportionment of fault against the non-settling defendants at trial. It will certainly impact the presentation of evidence, the strategies of counsel, and the potential order and nature of examinations and cross examinations. Suffice it to say that in a court room when foe becomes friend, the litigation landscape changes.

Where there is a *Mary Carter* agreement, and the settling defendant remains in the litigation, that party may change their approach to examinations for discovery, will look to assist the plaintiff from a liability perspective in an effort to maximize any finding of fault on the non-settling defendants and may even agree not to cross-examine the plaintiff on damages at trial (given the now cooperative nature of their relationship).

In requiring immediate disclosure, the courts have recognized the prejudice that might be caused to the non-settling defendants by this potential shift in the relationship of the settling parties from adversaries to allies; so much so that failure to disclose the

[1] *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37
[2] *Moore v. Bertuzzi,* 2012 ONSC 3248 at para. 99
[3] *Stamatopoulos et al. v. Harris et al,* 2013 ONSC 4143

agreement by the settling parties may attract the harsh penalty of the action being stayed.[4]

That being said, the settling parties are, generally speaking, only obliged to disclose as much of the agreement as is necessary to explain that change in the litigation landscape. Therefore, in the context of a partial settlement agreement, privilege arguably attaches to those terms which are not relevant in explaining that change and may fall short of obliging the settling parties to divulge the quantum of settlement (at least before a verdict at trial). This approach was enshrined and explained by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*[5]*("Sable")* and seeks to protect the public policy of encouraging settlement.

In *Sable*, all of the terms of the subject *Pierringer* agreement had been disclosed to the non-settling defendants with the exception of the quantum. The Court held that the non-settling defendants were not entitled to disclosure of the amount of the settlements as they were *otherwise* (and that is seemingly a big otherwise) fully aware of the case they had to answer to at trial. Essentially, it was sufficient that the non-settling defendants knew the plaintiff received monies and so the landscape had changed. The settlement quantum was only relevant to the issue of damages and it was held that could be dealt with after any assessment of damages by way of a deduction, if necessary.

Disclosure of Quantum: The Circumstances

The Court further held that the policy of encouraging settlement may be overridden, however, where a competing public interest is proven to outweigh the public interest in settlement and might include where there are countervailing interests like allegations of fraud, misrepresentation, undue influence and/or preventing a plaintiff from being

[4] *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898 (Ont. C.A.), leave to appeal to SCC refd. [2011] S.C.C.A. No. 84 (S.C.C.) at para. 16
[5] *Supra,* fn.1

overcompensated.[6] In any event, it appears now well settled that, the onus rests on the non-settling party to establish the basis for an exemption from the application of the privilege.[7]

Over-Compensating the Plaintiff

In the context of partial settlement agreements, the most common factor or argument in favour of the exemption is the risk of a plaintiff being overcompensated. There is a delicate balance to be struck between the public policy of encouraging settlement expounded in *Sable* with the principles against double recovery in *Ratych v. Bloomer*[8]. Accordingly, the Supreme Court has recognized that quantum of settlement may be disclosed where same is relevant and necessary in the circumstances of the case in order to avoid the possibility of double, or over, recovery to the plaintiff.[9]

Timing aside, the Ontario Court of Appeal confirmed in *Laudon v. Roberts*[10] *("Laudon")* that any settlement monies received by the plaintiff "on account of the same damage for which the plaintiff continued his proceeding against…the non-contracting defendant"[11] will be deducted from any award of damages at trial.

Prior to *Laudon,* there existed some debate regarding whether a plaintiff could secure a potential windfall if they entered into a partial settlement agreement and secured a favourable verdict at trial. The effect of the Court of Appeal ending this debate in *Laudon* saw the plaintiff, who was held to be fully compensated by the settling defendant, paying costs to the non-settling defendant, despite receiving a favourable verdict at trial.

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[6] *Supra,* fn.1 at para 19
[7] *R. v. Nestle Canada Inc.,* 2015 ONSC 810 at para. 43 citing *A. (L.L.) v. B. (A.),* [1995] 4 S.C.R. 536 (S.C.C.) at para. 39
[8] *Ratych v. Bloomer,* [1990] 1 S.C.R. 940
[9] *Supra,* fn. 1 at para. 19 citing *Dos Santos v. Sun Life Assurance Co. of Canada,* 2005 BCCA 4
[10] *Laudon v. Roberts,* 2009 ONCA 383
[11] *Ibid* at para. 55

In that case, the plaintiff's total damages were assessed by a jury at $312,000.00, which was less than the amount he received from the settling defendant pursuant to a *Mary Carter* agreement ($365,000.00 exclusive of fees and disbursements). The result was such that the plaintiff had been paid more than all of the damages awarded by the jury by the settling defendant, with the net result of the non-settling defendant (despite having been found 39% liable) not being ordered to pay damages as the plaintiff had already been made whole from a damages perspective, at least according to the jury.

Strategies & Safeguards for Non-Settling Defendants

Formal court approval of a settlement agreement is not required in every instance.[12] However, where the unfairness of an agreement is impugned by a non-settling defendant, the court is obliged to consider the fairness of that agreement to ensure public confidence in the administration of justice.[13]

The non-settling defendant must demonstrate, however, a just and substantial cause, for example, unfairness and/or prejudice to the non-settling party, before the court will interfere with the settlement.[14]

Procedural Issues: Apportioning Fault Against a Non-Party

Given that a settling defendant to a *Mary Carter* agreement remains in the litigation, greater chance for prejudice is most likely to be shown in the context of a *Pierringer* agreement. The effect of such an agreement can be far-reaching in terms of a non-settling defendant's ability to marshal the case through both the pre-trial and trial stages of the litigation in the absence of the settling defendant.

[12] *Rains v. Molea,* 2012 ONSC 4906
[13] *Ibid* at para. 13
[14] *Ibid* at para. 14

Such defendants will therefore be reassured by the power afforded to the court by virtue of section 1 of the *Negligence Act*[15]. In *Taylor v. Canada (Health)*[16], the Ontario Court of Appeal held that, in an appropriate case, the court has jurisdiction under section 1 of the *Negligence Act* to apportion fault against a person who was not a party to the action, including where a party does not participate in the trial because the action was dismissed against it pursuant to a *Pierringer* agreement. Laskin J.A. opined that interpreting the *Negligence Act* in such a way "makes good sense" and "promotes the streamlining of litigation…and…the settlement of parts of the litigation"[17].

Procedural Issues: Productions & Discovery of Settling Defendant

Next, and although not settled in law, there is an argument that non-settling defendants are entitled to documentary and oral discovery of the settling defendants. This, of course, is not a concern where there is a *Mary Carter* agreement and the settling defendant remains a participant in the litigation. In determining, however, whether a *Pierringer* agreement would prejudice a non-settling defendant, the courts consider whether discoveries have been completed.

Where discoveries have not been completed, it has been recognized that a *Pierringer* agreement has more potential to prejudice the rights of non-settling defendants, as they would be deprived of the benefit of having full oral and documentary discovery of the settling defendant.

In *Hollinger Inc. (Re)*[18], the prejudicial outcome to the non-settling defendants of a pre-discovery *Pierringer* agreement resulted in a court-managed discovery process involving

[15] Negligence Act, RSO 1990, c.N.1
[16] *Taylor v. Canada (Health)*, 2009 ONCA 487
[17] *Ibid* at para. 28
[18] *Hollinger Inc. (Re)*, 2012 ONSC 5107

the settling defendants, effectively keeping them in the litigation, albeit to a limited extent, despite their agreement with the plaintiff.

The court may be less inclined to interfere with a *Pierringer* agreement, however, where the non-settling defendant has had the advantage of oral examinations and documentary disclosure prior to the agreement being entered into.

In rare occasions, the court may take the further step of allowing the non-settling defendant to maintain a third party action for declaratory relief against the settling party in a *Pierringer* agreement. This has the effect of preserving the non-settling defendant's rights of discovery, as well as the settling party's' evidence and participation at trial as a party.

The decision of the British Columbia Court of Appeal in *British Columbia Ferry Corp. v. T & N*[19] involved a *Pierringer* agreement between the plaintiff and a third party defendant. The non-settling defendants were allowed to maintain a claim for a declaration to determine the degree to which the plaintiff's damages were attributable to the settling defendants, keeping the settling defendants in the litigation for the purely procedural purpose of allowing the non-settling parties access to pre-trial procedural rights, such as document production and oral discovery. In upholding the decision of the lower court, the Court of Appeal recognized that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full pre-trial procedural rights against the settling parties.[20] In Ontario, this relief may be granted in such cases where the complexity of the claims calls for same, by virtue of the nature, number and age of the claims advanced by the plaintiffs against the defendants.[21]

[19] *British Columbia Ferry Corp. v. T & N,* 1995 Can LII 1810 (BC CA)
[20] *Ibid* at para. 31
[21] *Holthaus v. Bank of Montreal,* [1999] O.J. No. 2240

Failing any discovery rights being afforded to a non-settling party by virtue of a *Pierringer* agreement, court ordered or otherwise, a non-settling party should look to the *Rules of Civil Procedure* which may allow orders for non-party productions[22] and non-party examinations for discovery[23], where appropriate, as well as providing for summonsing a non-party as a witness at trial[24].

Summary and Concluding Remarks

Partial settlement agreements offer favourable solutions to parties involved in multi-party litigation, allowing for creative terms of settlement within the confines of the law. Challenging the fairness of such an agreement may be a costly exercise for all concerned. As such, due care should be taken to avoid intervention by the court by ensuring the agreement does not infringe upon the procedural rights of any non-settling party.

The non-settling defendant will want to guarantee that a fair trial can still be held and should look to ensure that discovery rights (both documentary and, potentially, oral) are maintained and that the Court is aware of, and can control for, the change in the litigation landscape at trial. When such safeguards are not provided by agreement, then a motion, though costly, may be the appropriate avenue.

Further, where there is a realistic prospect that the plaintiff may be over compensated by virtue of the settlement and the award at trial, then the quantum of the settlement ought to be disclosed prior to trial so as to ensure all are fairly working from the same knowledge base and so that a full trial is not required only to find out the plaintiff has already been fully compensated.

[22] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 30.10
[23] *Ibid,* Rule 31.10
[24] I*bid,* Rule 53.04

In a system where proportionality and access to justice are presently at the fore, it appears incongruent to force litigants through a trial to find out that which they likely ought to have known when the settlement was reached. One wonders if *Sable*[25] would be decided differently post-*Hryniak*[26]. In the authors' opinion, it would, or should be, and that the circumstances where "the competing public interest" requiring disclosure of the quantum of the settlement pre-trial be broadly interpreted. Full disclosure and fairness to <u>all</u> parties, in the authors' opinion, requires no less.

[25] *Supra,* fn.1
[26] *Hryniak v. Maudlin*, 2014 SCC 7