WHAT IS A MARY CARTER AGREEMENT AND WHEN TO USE IT?

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Although as advocates, we often hear the term “Mary Carter Agreement”, it is difficult to know if a Mary Carter Agreement would be an effective tool in one’s current litigation. The reason for this is because there seems to be a mystery surrounding Mary Carter Agreements and its applicability. When properly used, a Mary Carter Agreement can narrow the issues in a multi party action, and reduce the expense of litigation.

A settlement agreement between some, but not all parties to a law suit, changes the adversarial orientation of the landscape of the action.

What is a Mary Carter Agreement?

When there are several parties involved, especially in complex litigation, there are usually differing opinions on liability and damages. These differing views will make the likelihood of a timely settlement difficult. One way to achieve some form of resolution, which is often overlooked, is through the use of partial settlement agreements. These agreements allow some of the participants of multi-party litigation to settle their claims, while maintaining the claims against the non settling participants. The Plaintiff achieves partial success and some certainty. In addition to that, the partial settlement agreement usually brings additional pressure upon the remaining parties, thereby facilitating a complete settlement of all the claims.

The Origins of Mary Carter Agreements

Partial settlement agreements are based on the 1967 United States’ decision of *Booth v. Mary Carter Paint Co*. and are often referred to as “Mary Carter” agreements. The essential features of a true Mary Carter Agreement are where the Plaintiff enters into a settlement agreement with one of more defendants (the "settling defendants") whereby:

- the Plaintiff receives a specific amount of money, regardless of the outcome of the trial
- the Plaintiff places a cap on the liability of the settling defendants at this amount
- the settling defendants remain in the lawsuit
- the Plaintiff agrees not to pursue the non settling defendants for any amount beyond their several liabilities in order to protect the settling defendant from any potential crossclaims for contribution and indemnity from the non settling defendants
- the Plaintiff will agree to decrease the amount to be paid by the settling defendants in direct proportion to any increase in the liability of the non-settling defendants

The beauty of Mary Carter Agreements is that the settling defendants will never be liable to the plaintiff for more than the agreed upon amount and the plaintiff is guaranteed recovery of a predetermined amount, regardless of the finding of liability by the trier of fact. It eliminates, in some ways, the uncertainties of trial.

It also places pressure on the non settling defendants to reach settlement, as their liability then becomes increased.

Disclosure of the settlement agreement

The case law in *Pettey v. Avis Car Inc.*(1993), 13 O.R. (3d) 725 ("*Pettey*") stipulates that non-settling defendants have to be made aware of the Mary Carter Agreement, although *the actual dollar amounts do not have to be disclosed*.

In commentary 1, under Rule 5.1-2 of the *Rules of Professional Conduct*, it requires:

> In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed

> recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

In *Pettey*, the Court stated that the existence of a Mary Carter-like Agreement must be disclosed to the parties and the court as soon as such an agreement is made. The Court laid out the reasons for the disclosure the type of disclosure required:

In particular, the Court stated:

> 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 contacting Defendants. Most importantly, the Court must be informed immediately, so that it can properly fulfil its role in controlling its process in interests of fairness and justice to all parties.

At para. 34, Ferrier J. held:

> 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.

At para. 35, he went on to state:

> The disclosure of the dollar amounts is patently in the discretion of the court. In the case at bar, as above noted, a copy of the full text of the Agreement, including the dollar amounts, was sealed and made an exhibit in the trial, so that full disclosure was entirely within the court's control.

The decision of the Ontario Court of Appeal in *Laudon v. Roberts,* a 2009 decision of the Ontario Court of Appeal cited the decision in *Pettey* and confirmed that the existence of a Mary Carter Agreement is to be disclosed to the Court and to the other parties to the litigation as soon as it is

concluded because the existence of such an Agreement significantly alters the relationship among the parties to the litigation.

Laudon is cited in the Ontario Court of Appeal decision of *Aecon Buildings, a Division of Aecon Construction Group Inc. v. Brampton (City)*, a 2010 decision of the Ontario Court of Appeal. The disclosure of the existence of such agreements is necessary and obvious. Such agreements change entirely the landscape of the litigation. The obligation is that of the parties who enter into such agreements to immediately disclose the fact.

No Double Recovery

Mary Carter agreements can be effective, when properly drafted and understood. However, the Court of Appeal in *Laudon* found that based on the principle that plaintiffs are not entitled to double recovery, the plaintiff did have to deduct his settlement amount from the damage award. In *Laudon,* the non settling defendant therefore did not owe any monies to the plaintiff. Furthermore, the plaintiff was directed to pay the non-settling defendant's costs.

Query whether or not the Court of Appeal would have made the same decision if the Mary Carter agreement in *Laudon* would have resulted in the plaintiff paying back the settling defendant a portion of the settlement? Would there have been any finding of double recovery then?

Penalties for Non-Disclosure of a Mary Carter Agreement

In *Aecon Buildings v. Brampton (City)*, a 2010 decision of the Ontario Court of Appeal, the failure to disclose the Mary Carter type agreement was a failure of justice and an abuse of the Court's process. Therefore, the Court stayed the City of Brampton's claims against the remaining Defendants.

> Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit the litigation to proceed without disclosure of agreements such as the one in issue renders the process a sham and amounts to a failure of justice.

Drafting a Mary Carter Agreement

The wording of a Mary Carter Agreement is most important and several drafts are exchanged between the settling parties and the Plaintiff before it is agreed upon. Depending on the wording of a particular agreement, a settling defendant may escape all contribution should the Plaintiff be successful against the remaining non-settling defendants. This is referred to as a "sliding scale" contribution, in which the settling defendant's contribution varies according to the contribution received from the non-settling defendants upon judgment.

As has been indicated by many judges and commentators, where a plaintiff and one defendant enter into a Mary Carter agreement there is a serious risk of distorting the judicial process. Former adversaries now become allies in asserting those propositions to the detriment of another defendant.

Conclusion

Although the particulars of the settlement agreement must be disclosed, whether the settlement quantum needs to be disclosed remains a live issue. In a case where I was representing one of the settling parties, the Court did not require us to disclose the quantum. If the quantum is ordered to be disclosed, does that undermine the settlement agreement altogether?