

## HIGH/LOW AGREEMENTS: AN EFFECTIVE SETTLEMENT VEHICLE AND A POTENTIAL TRAP FOR THE UNWARY

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A high/low agreement is “a settlement in which a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff’s agreement to accept a maximum amount regardless of the outcome of the trial.” *Black’s Law Dictionary*, 8<sup>th</sup> ed. (2004). High/low agreements are commonly used in all manner of litigation. They are favored by courts, counsel, and litigants because they “assure plaintiffs of minimally-acceptable recoveries while protecting defendants against exorbitant verdicts.” *Thompson v. T.J. Whipple Construction Co.*, 2009 WL 807467, \*8 (Pa. Super. March 30, 2009). Parties to a high/low agreement are free to craft its terms in a manner that is mutually agreeable. However, a recent decision of the Pennsylvania Superior Court highlights the potential pitfalls that might arise if all contingencies are not clearly spelled out in the agreement itself.

### ***Thompson v. T.J. Whipple Construction Co.*, 2009 WL 807467 (Pa. Super. March 30, 2009)**

Plaintiff, Douglas Thompson, alleged that he sustained personal injuries as a result of the negligence of employees of Defendant, T.J. Whipple Construction Co. Before trial, the parties entered into a high/low agreement with parameters of \$1 million and \$250,000. If the jury were to award more than \$1 million Thompson would receive \$1 million. If the jury awarded less than \$250,000, or returned a defense verdict, Thompson would receive \$250,000. 2009 WL 807467, \*1. After an August 2007 trial a jury awarded Thompson a little more than \$1.07 million in damages. The court reduced the verdict to \$1 million based on the high/low agreement. Thompson then filed a petition for delay damages pursuant to Pa. R.C.P. 238. The trial court denied the petition, and Thompson appealed. *Id.*

Rule 238 allows for “delay damages” or prejudgment interest to be added to the amount of compensatory damages awarded at trial. The purpose of the rule is to encourage pre-trial settlement by compensating “the

plaintiff for inability to utilize funds rightfully due him.” *Id.* at \*3 (quoting *Laudenberger v. Port Authority of Allegheny Cty.*, 426 A.2d 147, 154 (Pa. 1981)). Defendants are “given an opportunity to protect themselves from exposure to prejudgment interest by making a reasonable offer of settlement in good faith and in a timely fashion.” *Id.* (quoting *Berry v. Anderson*, 502 A.2d 717, 720 (Pa. Super. 1986)).

### **The Court’s Reasoning**

Pennsylvania courts have recognized high/low agreements as both contractual agreements and as a type of settlement, and therefore they should be interpreted under general rules of contractual interpretation. The fundamental rule in construing a contract “is to ascertain and give effect to the intention of the parties.” *Friia v. Friia*, 780 A.2d 664, 668 (Pa. Super. 2001). In so doing, courts “will adopt an interpretation which, under all circumstances, ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished.” *Id.* Courts will “not ignore otherwise clear language merely because one of the parties did not anticipate related complications prior to performance.” *Id.*

Although parties are free to craft high/low agreements in a manner that is mutually acceptable, the Court held that “to engraft the addition of delay damages onto the ceiling of a high/low agreement that is silent to their applicability renders a high/low agreement useless for litigation purposes. The ceiling in such an agreement would be a nullity.” 2009 WL 807467, \*8.

Finding no Pennsylvania cases directly on point, the Court examined several cases from other jurisdictions, including New Jersey, New York, and Louisiana. The Court found the application of high/low agreements as explained in *Benz v. Pires*, 267 N.J. Super. 575, 580 (App. Div. 1994) particularly persuasive:

If there is a no-cause verdict, the agreed floor controls, and plaintiff takes the amount. There is nothing to calculate

interest on. There is only the agreed minimum recovery.

If there is a damage verdict below the agreed floor, interest is calculated on the verdict and plaintiff receives the total, up to the agreed ceiling; if the total does not exceed the floor, plaintiff receives the floor.

If there is a damage verdict of the floor or more, but less than the ceiling, interest is calculated on the verdict. Plaintiff receives the whole amount up to the ceiling.

If there is a damage verdict of the ceiling or more, plaintiff receives the amount of the ceiling.

Applying principles of contract interpretation, and the analysis of courts from other states, the Superior Court affirmed the trial court's refusal to grant delay damages to Thompson.

## Conclusion

*Thompson* appears to be properly decided under its facts, and reaffirms the principal that a high/low agreement means just that—that a plaintiff can recover no more than the high amount nor receive no less than the low amount. Left unstated, however, is whether delay damages might be awarded in situations where the jury verdict was less than the previously agreed upon ceiling. For example, if the jury verdict was below the floor, but the addition of delay damages increased the award to something between the high and low parameters, would the plaintiff be entitled to the award plus delay damages? Alternatively, if the jury verdict was between the high and low parameters, and the addition of delay damages was still less than the ceiling, would the plaintiff be entitled to the award plus delay damages? Finally, suppose the jury verdict was between the high and low parameters, but the addition of delay damages increased the award to an amount that exceeded the ceiling. In that case, would the plaintiff be entitled to the ceiling? In view of the fact that *Thompson* does not foreclose the applicability of delay damages to high/low agreements, and that it cites with approval the reasoning of *Benz v. Pires*, the answer to all three questions is most likely yes.

*Thompson* serves, however, as a cautionary tale for litigants who may be tempted to enter into high/low

agreements in the future. To avoid any doubt about how a court may interpret their agreements, they would be well-advised to spell out all terms, including the applicability of delay damages, with specificity.

White and Williams LLP has extensive experience in drafting all manner of high/low agreements tailored to the specific needs of its clients, and in ultimately trying cases to verdict where such agreements are being used.

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