

# OREGON LAW UPDATE

## Side Deals with Plaintiff - Sideways with Co-Defendant; Off-sides or Just Good Defense?

case in point...

**From the desk of Jeff Eberhard:** In this case the defendant entered into a settlement agreement that set a low number of \$1.5 million — meaning that even if the plaintiff obtained a jury award for less, that sum was guaranteed. The maximum was \$2 million — meaning that even if the plaintiff obtained a jury award for more, the defendant did not have to pay more. The wrinkle in this case is that the settling defendant had indemnity claims against another defendant. Does that mean the agreement ends the adversarial process, and is therefore void?

**Claims Pointer:** Here, the court concluded that adversity remained between the plaintiff and the defendant even after entering into the agreement because for every dollar above an agreed upon amount that the jury awarded to plaintiff against this particular defendant (up to a maximum amount), equaled an additional dollar that the defendant had to pay plaintiff. The mere possibility that the defendant would later prevail on its indemnity claim and fully recover all of that additional money from its co-defendant did not extinguish the adversity between the plaintiff and the agreeing defendant that remained at the time of trial. Therefore, even though the plaintiff entered into a partial settlement agreement with one of the defendants, that defendant could not be dismissed from the case as a result of the agreement.

Rains v. Stayton Builders Mart, Inc., 264 Or App 636, --- P3d --- (2014).

Plaintiffs, Kevin Rains and his wife Mitzi, sued several parties seeking damages for injuries Kevin sustained while working as a subcontractor on a construction project. While on a job, a wood board Kevin was standing on broke, causing him to fall 16 feet to the ground. Kevin's injuries rendered him a paraplegic. Kevin brought claims against a number of parties for negligence and strict products liability. Among the defendants were Stayton Builders Mart ("Stayton") who supplied the board to the job site; and Weyerhaeuser Company ("Weyerhaeuser"), who provided lumber to Stayton.

Prior to trial, Kevin and Mitzi entered into a partial settlement agreement with Stayton. The settlement agreement provided, in part, that if the parties did not mutually resolve their claims against Weyerhaeuser and proceeded to trial: (1) if the jury returned a verdict for Kevin against Stayton for less than \$1.5 million, Stayton would still have to pay Kevin \$1.5 million and Stayton could seek contribution or indemnification from Weyerhaeuser; and (2) if the verdict is for Kevin against Stayton in excess of \$1.5 million then Stayton must pay the amount of the verdict up to a maximum of \$2 million, and further, any excess amount over \$2 million recovered from Stayton on its indemnity or contribution claim against Weyerhaeuser also must be paid to Kevin.

This partial settlement agreement, the court

concluded, was a hybrid between what is called a Mary Carter agreement and a high-low agreement. When a plaintiff sues multiple defendants for his or her injuries, as is the case here, the plaintiff can enter into a Mary Carter settlement agreement with some (but not all) of the defendants in the lawsuit. The parties to the agreement place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the non-agreeing defendant or defendants. See Grillo v. Burke's Paint Co., 275 Or 421, 425 n.1, 551 P2d 449 (1976). On the other hand, a high-low agreement is where the defendant agrees to pay the plaintiff a minimum amount in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome of the trial.

After Kevin and Stayton entered into the agreement, Weyerhaeuser moved to dismiss Stayton from the action as a defendant, arguing that there no longer was any adversity between Kevin and Stayton as a result of the agreement. The trial court did not agree with Weyerhaeuser and denied its motion to dismiss Stayton. Weyerhaeuser appealed.

There must be a justiciable controversy between parties before the court can hear a case, i.e., the court cannot decide abstract, hypothetical, or contingent questions. Whether a controversy exists in this respect depends on whether, (1) the interests of the parties to the action are adverse and (2) the court's decision in the matter will have



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some practical effect on the rights of the parties to the controversy. On appeal, Weyerhaeuser argued that there no longer was any controversy between Stayton and Kevin after the parties entered into the agreement because Stayton's sole interest was in the jury finding both Weyerhaeuser and it to be liable, which would position Stayton to recover all its damages in indemnity from Weyerhaeuser.

By contrast, Kevin argued that the agreement was only a partial settlement and that it did not extinguish all adversity between the plaintiffs and Stayton. Specifically, Kevin argued that the agreement established a potential range of liability for Stayton between \$1.5 million and \$2 million, which they argued made their interests adverse enough to survive Weyerhaeuser's challenge.

It has been argued before that agreements such as the one in this case have the potential to distort the relationship between plaintiffs and defendants, resulting in a non-adversary and possibly collusive proceeding between the plaintiff and one defendant which may adversely affect the non-settling defendant's right to a fair trial. Nevertheless, the Oregon Supreme Court has joined the majority of jurisdictions and found Mary Carter agreements to be valid, and that the problems with these types of agreements can be addressed by instituting safeguards such as disclosing the agreement to the parties, the court, and the factfinder, such that the factfinder could evaluate the agreement's effect on the adversarial process.

Here, the court concluded that the agreement between Kevin and Stayton did not extinguish all adversity between the two. Instead, the agreement set up a range of liability for Stayton that, at least on some level, maintained an adversarial position between the parties. The remaining adversity was that every dollar above \$1.5 million that the jury awarded to Kevin against Stayton, up to a maximum of \$2 million, equaled an additional dollar that Stayton had to pay to Kevin. The mere possibility that Stayton would later prevail on its indemnity claim and fully recover all of the additional money from Weyerhaeuser did not extinguish the adversity that remained at the time of trial.



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