They can offer protection and predictability if you're ever faced with the prospect of a huge jury award.

HOW High-Low Agreements WORK IN A Malpractice Case

Peter G. Teichman, MD, MPA

The most massive medical liability case of 2005 resulted in a jury award of $606 million.[1] But only $1 million of the award was ever paid, even though a jury set the award, the judge did not reduce it, and the defense filed no appeal. How did $605 million disappear?

The answer: It never existed, nor would it need to be funded. In this trial, and many like it, a little known stratagem was used to protect the defendant from an unaffordable jury verdict and guarantee the plaintiff a minimally acceptable payment. The legal maneuver is called a high-low agreement. This article describes how high-low agreements work and when they might be appropriate to consider.

Beyond the jury's control

High-low agreements blend jury decisions with aspects of out-of-court settlements. They set upper and lower settlement amounts, which are contingent on the jury's decision. At the same time, they take the decision of whether a payment will be made out of the jury's control.

For example, while a jury is deliberating, attorneys from both sides agree on a settlement that would pay $1 million to the plaintiff if the verdict favors the plaintiff and $200,000 if the verdict favors the defendant. Some middle amount would be negotiated for hung juries. If the jury found for the plaintiff, the maximum award would be the lesser of the jury's award or $1 million. A finding for the defendant would still result in a $200,000 settlement payment to the plaintiff.

Although the odds of prevailing at trial strongly favor defendant doctors,[2] the costs of losing may be so high as to drive defendants toward high-low agreements. Certain situations set the stage for their use.

In cases where a doctor's liability is low (e.g., there is little or no demonstrable variance from the standard of care) but the damages are likely to be high (e.g., the case involves catastrophic injury in a young patient), high-low agreements become a more acceptable option to the defendant physician than a potentially staggering jury verdict.

Similarly, when a doctor's liability is less certain and pretrial settlement attempts have failed, when the case for the defense is strong but the jury is likely to find the defendant unsympathetic relative to the plaintiff, when the damages are hard to quantify or when the plaintiff's counsel unearths information highly prejudicial to the defendant, a high-low agreement will neutralize a runaway verdict. ➤

By entering a high-low agreement, both sides essentially insure each other against their worst-case scenario.

If a malpractice suit goes to trial, a high-low agreement might be considered by the plaintiff and the defendant doctor.

High-low agreements set upper and lower settlement amounts, contingent on the jury's verdict.

If the verdict favors the plaintiff, he or she receives at most the upper amount set by the high-low agreement. If it favors the defendant, the doctor pays the lower amount.

High-low agreements can also appeal to the plaintiff who is losing hope of some remedy for his or her injuries. If the case involves only one defendant who is not an apparent agent of a more deeply insured entity (see "Apparent agency: the quest for a deep pocket" on page 45), or if a defendant has aggressively alienated assets to the point that the plaintiff is unlikely to recover the bulk of a jury award (see "Alienated assets: foiling recoverability" below), a high-low agreement promises quick access to financial remuneration for the plaintiff and payment for his or her attorney.

Finally, when a large verdict is sure to trigger an exhausting and costly series of appeals, a high-low agreement locks in a settlement and eliminates the possibility of the original verdict being overturned – a scenario that would leave the plaintiff with nothing and would deeply deplete a contingency attorney's financial reserves.

Who wins?

High-low agreements appear to create no winners and allow no exoneration in a medical liability case. The size of the plaintiff's "win" is usually drastically reduced, while a "winning" defendant physician suffers the career-long consequences of disclosure to the National Practitioner Data Bank.

However, the agreements still occur because they offer mutual benefits. Juries are notoriously unpredictable. When they file out of the courtroom to begin deliberations, neither side can confidently predict the verdict or accurately estimate the award amounts the jury will determine. By entering a high-low agreement, both sides essentially insure each other against their worst-case scenario: no payment for the plaintiff and personal liability for awards beyond policy coverage for the physician.

High-low agreements also introduce a degree of predictability to the process. They define the worst-case scenario, usually cap the physician's exposure at his or her policy limit, and cover at least the patient's current and future medical expenses and the litigating attorney's investment. By prohibiting appeals and post-verdict motions, high-low settlements confer finality. Both sides leave the courtroom knowing the case is finally closed. Most important, high-low agreements

ALIENATED ASSETS: FOILING RECOVERABILITY

In our adversarial medical liability system, neither side can dependably rely upon the largesse of the opponent to craft a financial settlement that preserves the professional reputation and personal assets of the doctor while affording the injured patient the opportunity to comfortably rebuild his or her life. Distrust and discord have led some doctors to engage in various schemes to deter attorneys from pursuing settlements or awards beyond their medical liability insurance coverage limits. One such scheme is to alienate assets, that is, to purposely place financial resources beyond the immediate control of an individual in order to shield them from creditors.

There are a number of methods and tools for alienating assets. These range from transfers to spouses to sophisticated offshore trusts. Some methods are less scrupulous than others. All carry their own costs. Doctors who use these tools should be wary of running afoul of fraudulent conveyances laws and becoming ensnared in illegal tax sheltering schemes. Lastly, with physician divorce rates outpacing the risk of a primary care doctor being named in a malpractice suit, it behooves physicians to be mindful of where and how they stash savings.[3,4]

APPARENT AGENCY: THE QUEST FOR A DEEP POCKET

An early goal for plaintiff attorneys is learning the insurance coverage limits of the defendant physician. The policy limit represents the likely maximum award that a plaintiff could achieve.

To expand this amount, plaintiff attorneys may attempt to exploit relationships between the defendant physician and an entity with a larger insurance policy limit. The classic target is a hospital where the alleged malpractice occurred. Under *apparent* or *ostensible agency*, a hospital may be held liable for proven damages if the patient looked to the institution rather than the individual physician for care and the hospital's actions led the patient to the reasonable belief that the physician was one of its employees.[5] Most often, apparent agency applies to emergency department physicians, but primary care physicians whose offices are on hospital property, who appear in hospital promotional materials or who are listed in public rosters in a manner that could imply an employer-employee relationship could also be defined as apparent agents of the hospital.

Defendants may benefit or be harmed by the hospital's inclusion in a medical liability suit. Juries may be more disposed to find against a hospital than a physician, and the co-defendant physician could be swept along in the adverse verdict. Conversely, being more sympathetic to individuals than institutions, the jury could shift all or most of the blame and responsibility for payment from the physician to the hospital.

One concerning trend that inhibits a physician's ability to individually cover the future cost of a malpractice claim (and argues for being identified as an ostensible agent of a more deeply insured entity) is the lack of inflation indexing in medical liability policies. In other words, doctors are paying higher premiums today, but their policy limits have not generally increased from the customary $1 million per incident/$3 million aggregate policy. As awards and settlements crest these maximums, the risk of personal exposure increases. Meanwhile, the deep pocket of your policy becomes shallower every year.

introduce an element of restraint to awards and fairness to the "all or nothing" system.

High-low agreements may be formed at any time from the beginning of a trial to minutes before the jury delivers its verdict. Their existence is usually not revealed to juries or judges, and often is not a matter of public record. Keeping the agreement secret until after the verdict is announced is not subversive. Rather, it preserves the purity of the process and the integrity of the agreement.

Beyond high-low agreements

Although high-low agreements are an 11th-hour solution to disproportionate findings, they may not be the last chance to settle a case at or near the defendant's insurance policy limits. A 13th-hour, or post-verdict, settlement that reduces the jury's award while assuring rapid payment to the plaintiff is one last alternative to further litigation.

In either case, family physicians should rest assured that exorbitant jury awards are not always the final outcome. FPM

Send comments to **fpmedit@aafp.org.**

About the Author

Dr. Teichman is medical director of the Victoria Healthcare My My International Clinic in Ho Chi Minh City, Vietnam. Author disclosure: nothing to disclose.

1. White N. Overdose of chemotherapy meds leads to $606 million verdict. *Lawyers USA*. Jan. 16, 2006. Available at: http://www.lawyersweeklyusa.com/usa/2topten2005.cfm. Accessed April 23, 2007.

2. Studdert DM, Mello MM, Gawande AA, et al. Claims, errors, and compensation payments in medical malpractice litigation. *N Engl J Med*. 2006;354:2024-2033.

3. Rollman BL, Mead LA, Wang NY, Klag MJ. Medical specialty and the incidence of divorce. *N Engl J Med*. 1997;336:800-803.

4. Hickson GB, Federspiel CF, Pichert JW, Miller CS, Gauld-Jaeger J, Bost P. Patient complaints and malpractice risk. *JAMA*. 2002;287:2951-2957.

5. University of Pennsylvania Health System Office of Legal Affairs. *A Guide to Legal Issues in Health Care*. Pittsburgh: Trustees of the University of Pennsylvania; 1998. Available at: http://www.uphs.upenn.edu/legal. Accessed Jan. 17, 2007.

- High-low agreements take the amount of the verdict out of the jury's control.
- There appears to be no clear winner when a high-low agreement is made, though it offers benefits to both sides.
- High-low agreements can be made at any point during a trial before the jury delivers its verdict, and they are often kept secret from the judge and the jury.