High-Low Agreements in Cases Involving Minors

Missouri attorneys should request court approval of high-low agreements for cases involving minors.

"[I]n any proceeding involving minors, they are to be considered 'wards of the court and their rights are to be jealously guarded as provided by statute.'"[3]

Courts manage lawsuits involving minors differently than those involving only adults. The legal system commonly understands minors to lack the maturity and good judgment to handle legal matters on their own.[4] Under Missouri law, individuals who have not reached the age of 18 cannot personally prosecute or defend lawsuits or enter into binding contracts or settlement agreements.[5] By statute, a minor's appointed guardian or next friend can enter into settlement contracts on the minor's behalf, but only after judicial approval of the agreement.[6]

These requirements raise complex questions when a guardian or next friend wishes to enter into a high-low agreement with the minor's adversary on the minor's behalf. In a high-low agreement, a defendant agrees to pay a specified minimum amount (the "low") even if the jury's verdict falls below that amount. In exchange, the plaintiff promises not to collect any amount above a specified amount (the "high"), even if the jury's verdict exceeds that amount.[8]

When parties contemplate entering into a "high-low" agreement in a case involving a minor, they should consider several questions. Is a high-low agreement a "settlement" or "partial settlement" that requires judicial approval? Does such an agreement become effective upon mutual assent of the minor's guardian and the adverse party? Should the parties inform the court of the agreement? Must the court approve such an agreement?

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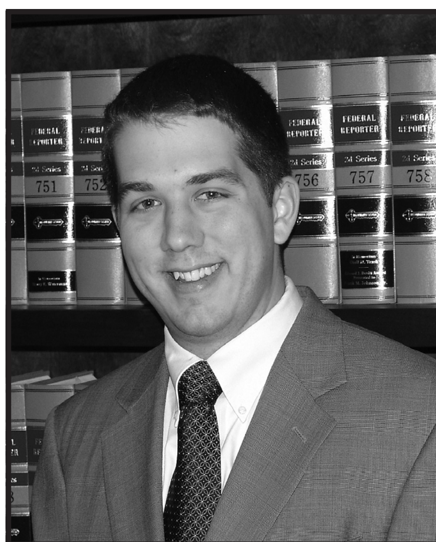

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A high-low agreement is effectively a partial settlement or compromise. Because judicial approval is required for settlement of a minor's claims under Missouri law, prudent Missouri attorneys should seek court approval of high-low agreements to protect the interests of their client, to ensure the agreement is binding, and to make certain the court is fully informed about the agreement prior to beginning trial.

I. Statutory Requirements

A minor can only initiate a lawsuit through an appointed guardian, conservator, or next friend. When a minor is sued, the suit cannot proceed until the court appoints a guardian ad litem on the minor's behalf.[10] A minor defendant can bring a counterclaim through her guardian ad litem.[11] A parent or other natural guardian cannot prosecute an action on behalf of a minor unless "duly appointed" by a court.[12]

Section 507.184(2), RSMo, authorizes the appointed next friend, guardian ad litem, guardian, or conservator to settle a minor's claim. The subsection states that this representative:

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3 *Y.W. ex rel. Smith v. National Super Markets, Inc.*, 876 S.W.2d 785, 787 (Mo. App. E.D. 1994) (citing *Morgan v. Morgan*, 289 S.W.2d 151, 153 (Mo. App. S. D. 1956)).
4 *Cox v. Wrinkle*, 267 S.W.2d 648, 651 (Mo. 1954).
5 Sections 507.110-507.115, 507.190, RSMo 2006.
6 Section 507.184(2), RSMo 2006.
7 *Fiegener v. Freeman-Oak Hill Health Sys.*, 996 S.W.2d 767, 770 (Mo. App. S.D. 1999); *Kress v. Lederle Labs.*, 901 S.W.2d 206, 208 (Mo. App. E.D. 1995).
8 *Id.*
9 Section 507.110, RSMo 2006.
10 Section 507.190, RSMo 2000; Rule 52.02(e).
11 Section 507.110, RSMo 2006.
12 *Id.*; *Y.W.*, 876 S.W.2d at 788.

[S]hall have the power and authority to contract on behalf of the minor for a settlement of the minor's claim, action or judgment, provided that such contract and settlement shall not be effective until approved by the court. The next friend, guardian ad litem and guardian or conservator shall also have the power and authority to execute and sign a release or satisfaction and discharge of a judgment which shall be binding upon the minor, provided the court orders the execution of such release or satisfaction and discharge of judgment.

Subsection (3) authorizes the court to hear evidence and either approve or disapprove any proposed settlement agreement or execution of a release or satisfaction of judgment.[13] This subsection states:

The court shall have the power and authority to hear evidence on and either approve or disapprove a proposed contract to settle an action or claim of a minor, to authorize and order the next friend, guardian ad litem or guardian or conservator to execute and sign a release or satisfaction and discharge of judgment, and shall also have the power and authority to approve a fee contract between the next friend, guardian ad litem or guardian or conservator and an attorney and to order him to pay an attorney fee and to pay the expenses which have been reasonably incurred in connection with the preparation and prosecution of the action or claim and including the cost of any bonds required herein.

Several parts of this statute deserve close analysis. First, subsection (2) indicates that the requirement of judicial approval of settlements applies equally to the appointed representatives of both minor plaintiffs and minor defendants by referring to settlements, judgments and execution of a waiver or release of judgment. Second, it is important to note that any agreement regarding a minor's claim is ineffective until the court approves it.[14] Other states' courts have concluded that during the time between when an agreement is reached – and even signed – and when it is approved by the court, the minor's representative could withdraw their assent.[15]

II. Application for Approval

The pertinent statutes do not establish a process for applying for court approval to settle a minor's claim. However, a written motion from the minor's representative and a subsequent hearing is customary and appropriate. The motion should identify the minor plaintiff, as well as the representative acting on his behalf. The legal authority for the representative to act on the minor's behalf should be set forth. Next, the parties should include a synopsis of the claim along with a statement that the facts surrounding the case have been fully and thoroughly investigated. Finally, the minor's representative should affirm that he or she has negotiated a high-low agreement with the adverse party and that they understand the agreement is subject to court approval.

III. Practical Considerations

It is, of course, ideal to have the high-low agreement drafted and approved in advance of trial. Often, however, attorneys will not begin discussing a high-low until trial, or even when the jury is deliberating. Within the uncertain time frame provided by jury deliberations, attorneys might be tempted to informally draft such an agreement on a legal pad. This is a risky proposition. Presenting a typed agreement, motion and proposed order in advance of trial demonstrates to the court that the parties have adequately contemplated the consequences of their agreement for the affected minor.

A proposed order should accompany the motion requesting authority to settle the minor's claim. The proposed order should generally track the wording of the motion. The attorneys should also provide a copy of the actual agreement to the court along with the motion and proposed order.

The parties should also plan ahead to arrange for the court clerk to seal the motion and order. With the advent of the Missouri Courts' Case.Net website, court records and docket entries are readily available to anyone with an internet connection. By filing the motion under seal, the existence of a high-low agreement is secreted from potential jurors, members of the press, and others.

IV. The Hearing

Section 507.184(3), RSMo, authorizes the court to hear evidence and decide whether to approve a settlement agreement or authorize the execution of a release or satisfaction and discharge of judgment. Because a high-low is a partial settlement, the legal representative of a minor should request a hearing on the record to establish mutual assent to the high-low agreement.

The hearing should be structured to demonstrate to the court that the parties affected understand the risks and benefits associated with a high-low. Counsel should ask the minor's representative questions, the answers to which will demonstrate the representative's understanding that the jury verdict could exceed, fall below, or fall within the range set by the high-low agreement. The objective of the hearing is to ensure that the minor's representative and the opposing parties have a complete understanding of the legal effect of a high-low agreement, and to demonstrate to the court that the agreement is in the best interest of the minor.

By statute, a court may only appoint one representative.[16] However, when two natural guardians share custody of a minor and one is appointed by the court,

13 Section 507.184(3), RSMo 2006.

14 Section 507.184(2), RSMo 2006.

15 See *Scruton v. Korean Air Lines Co.*, 46 Cal. Rptr. 2d 638, 643 (Cal. Ct. App. 1995) (holding that "a contract is voidable at the election of the minor through his guardian ad litem unless and until the court's imprimatur has been placed on it." (citing *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978))).

16 Section 507.110, RSMo 2006.

both parents should testify as witnesses. Even though one guardian alone may be the court-appointed guardian, both natural guardians have a strong interest in the outcome of the case.

In cases involving minors, it is particularly important to demonstrate to the court that the high-low agreement is reasonable considering the damages suffered by the injured party.[17] Evidence of previous verdicts in similar cases could be helpful in this regard. Photographs and medical records of the injured party might also be persuasive.[18] By law, the court acts as the guardian of the minor's interests.[19] Accordingly, the court will want to be sure that any settlement is made in the best interest of the minor.[20]

The hearing should be held on the record with a court reporter present. A copy of the transcript should be retained by counsel in case the validity of the agreement is later challenged.[21]

V. Drafting the Agreement

A high-low agreement should be in writing and thoughtfully constructed by the parties. It should identify the parties to the high-low agreement and the case style. The agreement should note that the minor is acting through his or her court-appointed representative. As a contract, the document should demonstrate the parties' mutual assent to be legally bound by the terms of the high-low.

The agreement should clearly state the "high" and "low" amounts that will be paid and collected regardless of the verdict, and indicate that a verdict rendered between the two amounts is collectable as awarded by the jury. The document should also note which party is to bear court costs.

An often overlooked aspect of a high-low is the effect of the agreement on the parties' right to appeal. It is suggested that both parties retain their right to appeal a judgment or verdict based on errors committed at trial. The agreement should, however, prohibit an appeal by either party on the size of the jury verdict alone as well as any motion for remittitur or additur. The high-low should reflect the understanding that the agreement operates as a waiver of any appeal on the basis of the size of the jury verdict.

Other important clauses include interest on the judgment in the event of an appeal, a timeline for satisfaction of the judgment, how joint and several liability is implicated, indemnification, that the partial settlement is not an admission of liability, that judicial approval is required, that the high-low is entered into with the understanding and advice of counsel, and whether the high-low applies to punitive damages. The parties should also be sure to include clauses regarding choice of laws and forum selection.

VI. Risks

An attorney who enters a high-low agreement in a case involving a minor absent court approval does so at great peril. Although some might argue that a high-low is not a "settlement" under § 507.184, RSMo, persuasive authority indicates that it should be treated as such.[22] Missouri law provides no authority for a natural guardian to contractually waive a minor's claim without court approval. As one court explained, "just as a minor lacks capacity to enter into a contract, the guardian ad litem lacks contractual capacity to settle litigation without endorsement of the court."[23]

An unapproved high-low is a recipe for an unpleasant surprise to at least one of the parties. A court might throw out the agreement entirely in favor of a higher award.[24] The minor might disaffirm the settlement agreement after reaching majority and bring a new action.

An attorney might mistakenly view a high-low agreement as a separate private contract that simply determines how the parties will satisfy a judgment of the court. However, a minor's representative can only execute a release or satisfaction of judgment by order of the court.[25] The statute treats satisfaction of a judgment for or against a minor as a matter that the court must supervise. An unapproved release or satisfaction and discharge of judgment might allow the minor, upon reaching majority, to demand payment of the full jury verdict. The bottom line is that neither party is protected by an unapproved high-low agreement.

VII. Conclusion

High-low agreements are a helpful tool to ameliorate the financial risks inherent in a jury trial. When the rights of a minor are involved, however, Missouri law requires a court to approve any settlement. Because a high-low agreement is effectively a partial settlement of a minor's claim, Missouri attorneys should always seek approval of a high-low in a case involving minors.

17 Mo. Litigation Settlements, § 6.7 (MoBar 2d ed. 2001).

18 *Id.*

19 *Y.W. ex rel. Smith v. Nat'l Super Markets, Inc.*, 876 S.W.2d 785, 787 (Mo. App. E.D. 1994).

20 *Fiegener v. Freeman-Oak Hill Health Sys.*, 996 S.W.2d 767, 774 (Mo. App. S.D. 1999).

21 The hearing transcript should be retained for 10 years after the minor reaches majority. See Rule 4-1.15.

22 *Krzaczek v. Cooler*, 2003 WL 24011559 (Pa. Com. Pl. 2003); *Power v. Tomarchio*, 701 A.2d 1371 (Pa. Super. Ct. 1997). Courts frequently refer to high-lows as "settlements" or "compromises" of claims. *See, e.g., Malick v. Seaview Lincoln Mercury*, 940 A.2d 1221, 1225 (N.J. Super. Ct. App. Div. 2008); *Baylor Coll. of Med. v. Camberg*, 247 S.W.3d 342, 344 n.1 (Tex. App. 2008); *Garley v. Columbia LaGrange Hosp.*, 881 N.E.2d 370, 372 (Ill. App. Ct. 2007).

23 *Scruton v. Korean Air Lines Co.*, 46 Cal. Rptr.2d 638, 643 (Cal. Ct. App. 1995).

24 *Power*, 701 A.2d at 1375.

25 Section 507.184(2), RSMo 2006.