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LOOKING OUT FOR MARY CARTER: COLLUSIVE SETTLEMENT AGREEMENTS IN WASHINGTON TORT LITIGATION

J. Michael Philips

Abstract: Courts and commentators disagree as to the propriety of Mary Carter agreements, pseudo-settlement devices used in multiparty litigation that unite the interests of a plaintiff and a cooperating defendant, and maintain that defendant's presence at trial. Most courts tolerate these arrangements provided that they are disclosed, while a distinct minority render them void. Washington courts have not espoused a definite position, although recent decisions suggest a tolerant stance. This Comment argues that the use of Mary Carters is inconsistent with Washington tort law, and that Washington courts should therefore prohibit them entirely. This may be accomplished by treating all Mary Carters as final settlements of a plaintiff's claim against an agreeing defendant and requiring dismissal of that defendant, an approach suggested by the nature of the agreements themselves.

Driving home from work one day, Alice was unfortunately caught in the path of Bill, an individual who drove with the slightest of care, and worse, the slightest of insurance coverage. Alice was severely injured when the slightly intoxicated Bill lost control of his speeding auto, crossed the center line, and collided with Alice. Aware that Bill's insurance coverage would fail to fully compensate her, Alice chose to sue both Bill and the city, claiming negligence in the construction of the road due to the city's failure to build a solid median structure. To hedge her bets, and to increase the chances of a judgment against the city, Alice entered an agreement with Bill, in which Bill guaranteed Alice recovery to the extent of his insurance coverage regardless of the outcome at trial. In return, Alice promised not to collect from Bill in the event that she was able to recover an amount in excess of Bill's coverage from the city. Moreover, under the agreement Bill was required to remain a defendant in the action.

Alice was thus able to buy an ally at trial, as both she and Bill would benefit from a large judgment against the city. Bill viewed the agreement as an opportunity to escape as much blame and consequent liability as possible, and enthusiastically developed a story to the effect that it was faulty highway design that caused him to lose control of his car. The result was that the two exploited the trial process, improperly influenced the jury, and secured an enhanced finding of fault against the "deep-pocket" city. And the device making it all possible was the Mary

Carter agreement,[1] a controversial pseudo-settlement tool that in many cases has become a powerful plaintiff's weapon.[2]

Debate has raged for years over the validity of such agreements. The potential variations on the basic agreement are infinite,[3] and jurisdictions have adopted individual approaches in response to various forms. The important features, however, embodied in most Mary Carters are: 1) that the settling defendant retains a financial stake in the plaintiff's recovery, and 2) that the settling defendant remains a nominal defendant at trial.[4]

Because of their tendency to alter traditional aspects of the trial process, Mary Carter agreements have received mixed reviews from courts and commentators. Much of the debate focuses on whether adopting procedures to prevent them from remaining secret is sufficient to ensure trial fairness. The majority of courts argue that while these agreements might threaten trial fairness, they are tolerable if completely disclosed to the court and non-agreeing parties.[5]

Although Washington courts have yet to definitively establish a position, the recent case of *McCluskey v. Handorff-Sherman*[6] suggests that they lean toward the majority view. If Washington courts fully adopt this position in the future, the implications will be critical, particularly for deep-pocket defendants who often become targets of

1. The name comes from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). The agreements are occasionally known by different names. *See* June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions,* 38 U. Fla. L. Rev. 521, 522 n.1 (1986).

2. This hypothetical is based loosely on the case of McCluskey v. Handorff-Sherman, 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted,* 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993). In *McCluskey,* the existence of an agreement was never established. Nevertheless, the case presented an ideal opportunity for the use of a Mary Carter agreement. *McCluskey* was different in that the defendant was insolvent and lacked insurance altogether. In such a situation, the Mary Carter agreement would be equally effective. While it would not guarantee any amount from Bill (*B*) to Alice (*A*), *A* and *B* would still contract to work together at trial to foist maximum liability on the city (*C*). The incentives for *A*, as in the hypothetical, are obvious. *B*, although insolvent, might still be encouraged to cooperate if *A* promises to place all blame upon *C* and not to enforce judgment; thus, *B* has a chance to escape much, if not all, responsibility for the accident.

3. Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds,* 284 So. 2d 389 (Fla. 1973).

4. Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992). As discussed, Mary Carters may vary. This Comment discusses only those agreements containing these two major elements.

5. *See* Entman, *supra* note 1, at 530.

6. 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted,* 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993). Washington courts have previously confronted agreements that may be classified under the general definition of Mary Carter agreements. *See infra* note 47 and accompanying text.

personal injury litigation.[7] Because Mary Carter agreements can influence determinations of proportionate fault,[8] their use in Washington courts—which determine liability on a "pure" comparative basis[9]—could inflate the liability of non-agreeing defendants. As a result, Mary Carters conflict with Tort Reform laws enacted in Washington that were designed at least in part to protect deep-pocket defendants from bearing more than their fair share of liability.

Part I of this Comment examines Mary Carter agreements in depth, analyzing the split in authority concerning their validity, and their status under existing Washington tort law. Part II develops the implications of such an agreement in a typical litigation setting under Washington tort law. Part III concludes that Washington courts should render Mary Carters void by treating them as final settlements of the plaintiff's claim against the agreeing defendant and dismissing that defendant from trial. This approach properly serves the legislative goals underlying the Washington Tort Reform Act and comports with basic legal principles requiring a justiciable issue among adversarial parties.

I. OVERVIEW OF MARY CARTER AGREEMENTS

A. Details of a Mary Carter Agreement

The key elements of a Mary Carter agreement are a limitation of the settling defendant's liability, a requirement that that defendant remain in the trial, and a guarantee of a certain sum of money to the plaintiff.[10] A typical Mary Carter agreement might contain several additional provisions. For example, the plaintiff might be prohibited from settling with non-agreeing defendants for an amount less than the guaranteed amount without the agreeing defendant's consent.[11] The agreement

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7. *See* Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability,* 62 Wash. L. Rev. 233, 238 (1987) [hereinafter Peck, *Rejection and Modification*].

8. *See, e.g.,* John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement,* 87 Colum. L. Rev. 368, 374–75 (1987); Entman, *supra* note 1, at 574.

9. *See infra* note 73 and accompanying text. A "pure" comparative negligence system is one in which a plaintiff's contributory negligence serves to reduce his or her damages in proportion to his or her fault; all defendants are liable to the plaintiff for their respective shares of the loss, even though they may be less negligent than the plaintiff. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 67, at 471–72 (5th ed. 1984); *see* Wash. Rev. Code § 4.22.070 (1993).

10. Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992).

11. *See* Entman, *supra* note 1, at 524–25.

might even explicitly urge a verdict exceeding the guaranteed amount.[12] Further, it might require that the parties conceal the agreement not only from the jury, but also from the court and other parties.[13] This secrecy has been a focus of controversy, with most, if not all, courts requiring disclosure of the agreement.[14]

Specific provisions regarding the guaranteed payment might also vary. For example, rather than guarantee a payment, the defendant might loan the funds to the plaintiff under a variation known as a "loan receipt" agreement.[15] While the terminology differs, the essential premise is the same: the settling defendant guarantees recovery to the plaintiff of a specified amount. Whether funds actually change hands prior to trial and judgment or whether the transfer is purely on paper makes little difference.[16]

Such an arrangement has significant effects on the parties' conduct at trial. In its recent decision to ban Mary Carters, the Texas Supreme Court remarked that these agreements create a substantial interest for the defendant in a sizable plaintiff's recovery, and therefore encourage that defendant to assist the plaintiff at trial in any manner possible.[17] Settling defendants are thus pressured to cooperate with the plaintiff in discovery, peremptory challenges, trial tactics, witness examination, and influencing the jury.[18]

B. *Judicial Treatment of Mary Carters: Generally*

While debate continues over whether trial processes will be unfairly distorted, most authorities accept that Mary Carters skew the parties' interests. A key problem acknowledged by courts and commentators on both sides of the issue is how to overcome secrecy.[19] Even those courts

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12. *See, e.g.*, Lum v. Stinnet, 488 P.2d 347, 348 (Nev. 1971).

13. *See, e.g.*, Booth v. Mary Carter Paint Co., 202 So. 2d 8, 10 (Fla. Dist. Ct. App. 1967).

14. *See* Benedict, *supra* note 8, at 370.

15. *See, e.g.*, Meriwether D. Williams, Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 Gonz. L. Rev. 266, 268 (1977). A "loan receipt" agreement provides for payment prior to judgment, with reimbursement made later, rather than a mere guarantee of payment with later reduction.

16. However, whether there is actual payment might be important to a court attempting to determine the true nature of the agreement. See *infra* note 123.

17. Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992).

18. *Id.* at 249 (citing Benedict, *supra* note 8, at 372–73).

19. "The chief problem associated with a Mary Carter agreement is that a hidden alteration of the relationship of some of the parties will give the jury a misleading and incomplete basis for evaluating the evidence." *Id.* at 254 (Doggett, J., dissenting).

that tolerate Mary Carters recognize the potential for trial misconduct when the agreeing parties assist each other to the complete bewilderment of the court, other defendants, and the jury. This problem may or may not be controllable through various disclosure and instructional devices, and the sufficiency of such measures is a major issue dividing those courts that tolerate Mary Carters from those that prohibit them.

1. *The Majority View*

The vast majority of states allow Mary Carter agreements if trial courts implement procedural safeguards to overcome secrecy.[20] As long as a Mary Carter is disclosed to the court and opposing parties prior to trial, these courts are satisfied that the nonsettling parties will not be surprised or unfairly disadvantaged. Additionally, when the court is aware of the agreement, it may consult the parties on how best to instruct the jury concerning the arrangement and the true interests of the parties. Once instructed, the jury is said to be able to properly judge the credibility of witnesses.[21]

Some courts have developed specific procedures to eliminate bias that may result from collusive or abnormal conduct of the agreeing defendants. In *Elbaor v. Smith,*[22] for example, the trial court gave the non-agreeing defendant the same number of peremptory challenges as the plaintiff and settling defendants combined, denied the settling parties the customary right of an opponent to lead opposing witnesses, and changed the order of presentation to guarantee that the non-agreeing defendant always had the final opportunity to present evidence and examine witnesses. By balancing procedural advantages, these courts hope to overcome the shifting alliances created by a Mary Carter agreement that might unfairly skew the trial process.[23]

20. *Id.* at 256 (Doggett, J., dissenting).

21. *See, e.g.,* General Motors Corp. v. Lahocki, 410 A.2d 1039, 1046 (Md. 1980).

22. *Elbaor,* 845 S.W.2d at 255 (Doggett, J., dissenting).

23. *Id.* at 254–55 (Doggett, J., dissenting). The maintenance of Mary Carters in the face of various challenges is attributable to what some courts refer to as the "salutary effects" of these agreements. *See* Reese v. Chicago, B. & Q. R.R., 303 N.E.2d 382, 386 (Ill. 1973) (holding that a loan receipt agreement was beneficial in that it meant funds would be more readily available to an injured plaintiff, and that private settlement would be facilitated). While the justification of encouraging settlement has been adopted by several courts, this line of reasoning has recently been attacked as short-sighted because these agreements encourage only partial settlements. *See infra* note 27.

2. *Minority Position*

A clear minority of jurisdictions have elected to ban Mary Carter agreements or to render them entirely ineffective.[24] In a major recent case, the Texas Supreme Court determined that these arrangements skew the trial process, mislead the jury, promote unethical collusion between nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full amount of any judgment.[25] The court concluded that the agreements and their effects are therefore inimical to the adversary system.[26] The court further noted that such agreements do not promote settlement, but rather provide only partial settlement, ensuring that the plaintiff will go to trial against the remaining defendant to obtain high damages.[27]

Based on these concerns, the Texas court denounced Mary Carters as completely incompatible with a system of fair trials, despite measures designed to mitigate harmful effects.[28] The court found such remedial measures insufficient to overcome the harm caused by collusion between the settling parties when the defendant retained a substantial financial interest in the plaintiff's recovery.[29] The court reasoned that its policy of

24. Only Texas, Nevada, Oklahoma, and Wisconsin have banned the use of Mary Carter agreements. *See Elbaor,* 845 S.W.2d at 250 n.21. Some argue that Wisconsin, in Trampe v. Wisconsin Tel. Co., 252 N.W. 675 (Wis. 1934), banned only *secret* Mary Carter agreements. *See Elbaor,* 845 S.W.2d at 256 (Doggett, J., dissenting).

25. *Elbaor,* 845 S.W.2d at 250.

26. *Id.* at 248 (citing Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 8 (Tex. 1986) (Spears, J., concurring)).

27. *Id.* at 248–49. The existence of a settlement "veto" power in the hands of the settling defendant makes settlement with the remaining defendant even less likely, as the settling defendant is unlikely to approve of any settlement which defeats reimbursement of the guaranteed amount.

28. The trial judge, aware of the potential bias against the non-settling doctor, undertook various remedial measures to mitigate any harmful effects. *See supra* note 22 and accompanying text. Despite these provisions, the court noted an extremely abnormal effect on the parties' conduct. *Elbaor,* 845 S.W.2d at 246–47. The court discussed the ways in which a settling defendant might assist the plaintiff, including cooperating in discovery, peremptory challenges, trial tactics, supportive witness examination, and influencing the jury. *Id.* at 249 (citing Benedict, *supra* note 8, at 372–73 (detailing the tactical and procedural advantages that cooperating parties enjoy)).

29. *Elboar,* 845 S.W.2d at 250. Earlier, in Scurlock Oil v. Smithwick, 724 S.W.2d 1 (Tex. 1986) (Spears, J., concurring), Justice Spears argued that disclosure provisions are insufficient to overcome unfairness, because it would be difficult for jurors, already unfamiliar with trial procedure and practice, to fully grasp the implications of the relationship between the settling parties created by the Mary Carter agreement. *Id.* at 11. To illustrate the problem, Spears referred to a companion case arising from the same accident as *Scurlock Oil* and containing identical facts, Missouri Pacific v. Huebner, 704 S.W.2d 353 (Tex. Ct. App. 1985). The outcome in *Missouri Pacific* was virtually opposite from the jury findings in *Scurlock Oil. Scurlock Oil,* 724 S.W.2d at 11. In *Scurlock Oil,* the jury found the Mary Carter defendant (Mo-Pac) not negligent and the non-settling defendant

favoring fair trials far outweighed any policy favoring partial settlements.[30]

Texas is not alone in its rejection of Mary Carters. In a much earlier decision, the Nevada Supreme Court, in *Lum v. Stinnett,*[31] declared Mary Carter agreements void as against public policy. The court determined that remedial measures such as disclosure to the jury are not only inadequate, but might present additional problems such as unwarranted jury bias.[32] While it confessed to being unsure of the effects such an agreement might actually have on the jury, the court argued that defendants have the right to litigate without the risk that a Mary Carter might affect a jury's verdict.[33]

As an alternative to outright banning, Oklahoma adopted a somewhat novel approach to Mary Carter agreements. In *Cox v. Kelsey-Hayes Co.,*[34] the Oklahoma Supreme Court recognized that Mary Carters deprive a trial of its adversarial nature, and that the more culpable defendant usually avoids liability through them.[35] The court therefore required trial courts to adopt one of two alternative approaches: either dismiss the agreeing defendant prior to trial or prohibit the portion of the agreement granting the defendant an interest in a large plaintiff's recovery.[36] The court reasoned that if the settling defendant is dismissed and subsequently appears as a witness, cross-examination regarding the defendant's interests and credibility will sufficiently protect the non-settling defendant's interests.[37] Alternatively, allowing the settling defendant to remain in the suit but voiding the reimbursement provision

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(Scurlock) 100 percent negligent; in *Huebner,* where Mo-Pac did not enter a settlement agreement, it was found 90 percent negligent and Scurlock only 10 percent negligent. *Id.* The concurring justice reasoned that "[o]nly the Mary Carter agreement can account for these variations in the juries' findings." *Id.*

30. *Elbaor,* 845 S.W.2d at 250.

31. Lum v. Stinnett, 488 P.2d 347 (Nev. 1971) (banning Mary Carters because they violate policies against champerty and maintenance, violate rules of professional ethics, and are "inimical to true adversary process," thus preventing fair trial). For a detailed examination of this case, see Entman, *supra* note 1, at 531–40.

32. *Lum,* 488 P.2d at 352–53.

33. *Id.*

34. 594 P.2d 354 (Okla. 1978).

35. *Id.* at 359.

36. *Id.* ("In no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant.").

37. *Id.*

will preserve the adversarial nature of the proceedings and make the agreement irrelevant.[38]

Although the *Cox* court required the defendant's dismissal, it did not elect to view Mary Carters in general as settlements. In fact, the court commented that Mary Carter-type agreements cannot be classified as settlements because the controversy is only contingently settled.[39] The agreeing defendant remains a party, and the jury still determines the extent of his or her liability.[40]

In contrast to Oklahoma's conclusion that Mary Carters are not settlements, the Maryland Supreme Court, in *General Motors Corp. v. Lahocki,*[41] did view a Mary Carter-type arrangement as a settlement. Citing nineteenth century precedent, the court stressed that the very essence of compromise involves the waiver of preexisting claims in favor of a right or claim fixed by a new agreement.[42] The court reasoned that because the defendant limits the extent of its liability and guarantees a sum to the plaintiff through a Mary Carter, such arrangements are essentially settlements.[43] The court therefore determined that disclosure to the trial court was necessary.[44] It did not, however, consider the propriety of dismissing the defendant, apparently because the non-agreeing defendant in the case had not requested dismissal.[45] This treatment suggests that the court considered Mary Carters acceptable if disclosed, indicating compliance with the majority view.

C. *Mary Carters Under Washington Law*

1. *Judicial Treatment of Mary Carters*

Consideration of Mary Carter arrangements by Washington courts has been extremely limited. A few cases, while not specifically referring to "Mary Carters," have dealt with similar arrangements. Only two cases have actually used the term "Mary Carter," and only one of these was decided since 1986, when the legislature amended laws governing

38. *Id.* at 359–60.

39. *Id.* at 358.

40. *Id.*

41. 410 A.2d 1039 (Md. 1980).

42. *Id.* at 1044 (citing St. John's College v. Purnell, 23 Md. 629, 640–41 (1865)).

43. *See id.*

44. The court held that disclosure was necessary because "in judging the credibility of a witness, the jury is entitled to know of his interest in the outcome" of the trial. *Id.* at 1046.

45. *See id.*

determinations of fault.[46] Indications are that Washington courts lean toward allowing these arrangements if fully disclosed.

In *Monjay v. Evergreen School District*,[47] an appellate court confronted a Mary Carter-like arrangement that it called a "loan agreement." The contract guaranteed a recovery amount to the plaintiff, who agreed to reimburse the settling defendant in the event of judgment against the non-settling party.[48] The settling party did not, however, remain at trial as a defendant; instead, the plaintiff agreed not to sue that party.[49] Troubled primarily by the guarantee clause of the arrangement, the court declared only that portion void. It held that such a provision was repugnant to the principle of pro tanto reduction attendant to the covenant not to sue,[50] and was potentially coercive because it forced the non-settling defendant, whose responsibility for injury might be questionable or unclear, to either litigate or settle, thereby compelling contribution from that defendant.[51]

Ten years later, the same court overruled this holding in *Jensen v. Beaird*.[52] Attacking the reasoning in *Monjay*, the court joined the majority of states by lending its approval to Mary Carter-type settlements.[53] The court specifically rejected the lower court's reliance

46. These cases are McCluskey v. Handorff-Sherman, 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted*, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993), and Giambattista v. National Bank of Commerce, 21 Wash. App. 723, 586 P.2d 1180 (1978). The *Giambattista* court referred to Mary Carters only in passing, holding that the agreement in question did not fall within such a category. *Id.* at 735 n.5, 586 P.2d at 1187 n.5; *see supra* note 9.

47. 13 Wash. App. 654, 537 P.2d 825 (1975), *review denied*, 85 Wash. 2d 1017 (1975).

48. *Id.* at 658.

49. *Id.* at 655. *See* Williams, *supra* note 15, at 273–74.

50. Pro tanto reduction, whereby the plaintiff's total recovery against remaining defendants is reduced by the amount of settlement, was in use in Washington at the time of *Monjay*. The 1986 Tort Reform Act has rejected this principle in favor of a comparative reduction system in the case of joint tortfeasors. *See infra* notes 74–80 and accompanying text.

51. *Monjay*, 13 Wash. App. at 660–61, 537 P.2d at 829. The court also expressed concern that the agreement was champertous. *Id.* at 661, 537 P.2d at 830. *Cf.* Lum v. Stinnet, 488 P.2d 347 (Nev. 1971). Champerty is a disfavored practice in which a stranger to a suit agrees with a party to carry on the litigation at his or her own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. *Black's Law Dictionary* 231 (6th ed. 1990).

52. 40 Wash. App. 1, 696 P.2d 612 (1985), *review denied*, 103 Wash. 2d 1038 (1985). The agreement at issue in *Jensen* consisted of a covenant by the plaintiff not to execute any judgment against the settling defendant in exchange for $110,000. Note a critical difference from *Monjay*—the agreeing defendant in *Jensen* remained a party at trial.

53. *Id.* at 10, 696 P.2d at 618.

on *Monjay*,[54] concluding that loan agreements violate neither the pro tanto reduction principle nor any other public policy.[55]

The *Jensen* court concluded that a loan agreement did not involve an actual payment in settlement of the plaintiff's claim.[56] While a loan might deprive the remaining tortfeasor of a reduction in any judgment against it, this would not violate pro tanto reduction principles. The court suggested that *Monjay* confused the pro tanto principle with prohibitions against contribution.[57] In any event, it held that rules barring contribution were not violated, even though the settling defendant might therefore obtain indemnification to which it otherwise would not be entitled. The court reasoned that the principle objection behind the no-contribution doctrine—that the courts should not be used for the relief of wrongdoers—was absent in this case because the agreement was indirect, private, and "out of court."[58]

The *Jensen* court also noted certain salutory effects of a loan agreement, including that such agreements encourage private settlement, make funds immediately available to injured persons, and simplify complex multiparty litigation.[59] The court further dismissed the *Monjay* arguments that loan agreements were coercive, reasoning that disclosure and limiting instructions can alleviate any collusive or abnormal effects.[60] In rejecting any argument that such agreements undermine the adversarial nature of trial or produce coercive effects, the court rather summarily cited "the great weight of authority." It relied on the notion that the law does not require that codefendants be friendly.[61]

However, while *Jensen* thus dismissed *Monjay* and suggested that Mary Carters might be acceptable in Washington, it was decided prior to tort reform. While its analysis indicates how Washington courts may act,

54. The trial court found that the agreement violated pro tanto reduction in that it resulted in indemnity or contribution for the settling defendant to which it otherwise would not have been entitled. *Id.* at 6–7, 696 P.2d at 616.

55. *Id.* at 7, 696 P.2d at 617.

56. *Id.* at 9, 696 P.2d at 618.

57. *Id.* at 10, 696 P.2d at 618.

58. *Id.* (citing Reese v. Chicago, B.& Q. R.R., 303 N.E.2d 382, 386 (Ill. 1973)).

59. *Id.* citing *Reese*, 303 N.E.2d at 386.

60. *Id.* at 11–12, 696 P.2d at 619. This dismissal of the *Monjay* argument appears to have missed the point. In *Monjay*, the agreeing defendant clearly was not required to remain at trial. The *Monjay* court discussed the coercive potential of the agreement as forcing a non-agreeing defendant to either litigate or settle; it did not deal with the collusive effects of a plaintiff and cooperative defendant aligned at trial. *See Monjay*, 13 Wash. App. at 661, 537 P.2d at 829.

61. *Jensen*, 40 Wash. App. at 12, 696 P.2d at 619.

the changes wrought by tort reform call its continuing validity into question.

In the one case discussing Mary Carters after tort reform, *McCluskey v. Handorff-Sherman,* the Washington Court of Appeals did not reach the issue of the validity of Mary Carters, due to a lack of evidence that such an agreement actually existed.[62] In dictum, however, the court cited cases from other states for the proposition that secret agreements might prejudice a trier of fact and that pretrial disclosure is therefore necessary.[63] Those cases suggest that through disclosure, the jury will be able to sufficiently consider the parties' relationships in evaluating evidence and the credibility of witnesses.[64] The implication is therefore that Washington courts might uphold disclosed Mary Carter agreements even under modern tort law.

On the other hand, Washington courts have given no indication as to whether Mary Carter agreements will be viewed as settlements. However, they have concluded that a similar device—a straight "covenant not to execute"[65]—will be. In *Shelby v. Keck,* the Washington Supreme Court held that such a covenant made dismissal of the agreeing defendant appropriate.[66] The arrangement set the upper limit of the defendant's liability. The court reasoned that once the plaintiff accepted the funds, the plaintiff was protected in the event that the jury held against that defendant for a lower amount.[67] The court held that the covenant was a settlement because it left no justiciable issue between the parties; dismissal was proper despite the plaintiff's objection that the agreement did not call for it.[68]

62. 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted,* 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993).

63. *Id.* at 103–04, 841 P.2d at 1304–05.

64. *Id.* (citing Daniel v. Penrod, 393 F. Supp. 1056 (E.D. La. 1975); Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973); Maule v. Rountree, 284 So. 2d 389 (Fla. 1973); Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985)).

65 "In a covenant not to execute, the defendant's liability is limited to an agreed sum regardless of the judgment amount." Sara Connelly, Note, *Loan Agreements as Settlement Devices,* 25 DePaul L. Rev. 792, 795 (1976).

66. 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975).

67. *Id.*

68. *Id.*

2. *Background on 1986 Tort Reform*

Washington began moving away from traditional common law principles of fault determination in its 1973 legislation adopting a system of "pure" comparative negligence, with the purpose of facilitating recovery by injured persons and thereby serving the compensatory function of tort law.[69] The Washington Supreme Court later rejected pleas to abandon joint and several liability, holding that comparative negligence did not necessitate such an action, and that abandoning joint and several liability would only frustrate the goal of compensation.[70] Fairness among tortfeasors was deemed subordinate to the goal of fairness to the injured party.[71] In 1981, the legislature established contribution among joint or concurrent tortfeasors to mitigate any "unfairness" to defendants who may have been compelled to pay more than their proportionate share of damages.[72]

In 1986, the Washington Legislature modified the state's tort system and, in particular, substantively changed rules regulating joint and several liability. The legislature adopted a general rule of several liability based on proportionate fault, with joint and several liability restricted to a few specific situations. An example is when a plaintiff is free from fault.[73]

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69. See Peck, *Rejection and Modification, supra* note 7, at 235–39, for a detailed history of the common law principles and their modification in Washington.

70. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 236, 588 P.2d 1308, 1313 (1978); *see also* Peck, *Rejection and Modification, supra* note 7, at 237.

71. *Id.*

72. *See* Cornelius J. Peck, *Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault,* 15 U. Puget Sound L. Rev. 335, 337 (1992) [hereinafter Peck, *Tea Leaves*].

73. The Washington statute provides, in pertinent part:

> (1) In all actions involving fault of more than one entity, [the trier of fact shall determine the fault of each entity, with judgment entered against each defendant except those released by the claimant,] in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:
>
> ...
>
> (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.
>
> (2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW [§§] 4.22.040, 4.22.050, and 4.22.060.

Wash. Rev. Code § 4.22.070 (1993).

The 1986 law requires a trier of fact to allocate liability comparatively among all entities causing damage, including the plaintiff,[74] based on each party's share of fault. The liability of each is to be several only, except when the plaintiff is free of fault; in that case, the defendants are jointly and severally liable for the sum of the shares of all parties against whom judgment is entered.[75] Thus, when a faultless plaintiff settles with one defendant prior to judgment, the amount of joint and several liability is reduced by whatever amount of fault the trier of fact later allocates to that settling defendant.[76] One effect of this provision is to require faultless plaintiffs to exercise extreme caution in entering into any pre-judgment settlement agreement.[77]

In cases in which a faultless plaintiff enters into a post-judgment settlement with one of the joint tortfeasors, the effects of that settlement are governed by section 4.22.060.[78] That provision specifically lists any release, covenant not to sue, covenant not to enforce judgment, or similar agreement as a settlement within its scope.[79] On the other hand, when liability is several only, settlement appears to have no effect on the liabilities of remaining tortfeasors.[80]

II. ANALYZING MARY CARTER AGREEMENTS IN WASHINGTON

Much of the impact of Mary Carter agreements in a given jurisdiction depends on how the jurisdiction in question handles contribution, joint and several liability, and determinations of fault. A brief examination of how a Mary Carter agreement might affect a typical personal injury suit in Washington provides a better understanding of these agreements and why they are incompatible with the purposes behind tort reform.

Note that joint and several liability is traditionally reserved for cases involving hazardous wastes, tortious interference with contracts or business relations, and generic products. *See, e.g.*, Peck, *Tea Leaves*, *supra* note 72, at 341 n.24.

74. Wash. Rev. Code § 4.22.070(1).

75. Note that joint and several liability is also available in the separate context of concurrent tortfeasors. *See supra* note 73.

76. For a detailed discussion of the intricacies of this system and criticism of its effects on negotiation and claim settlement, see generally Peck, *Rejection and Modification*, *supra* note 7; Peck, *Tea Leaves*, *supra* note 72.

77. *See* Peck, *Tea Leaves*, *supra* note 72, at 351.

78. Wash. Rev. Code § 4.22.070(2).

79. Wash. Rev. Code § 4.22.060.

80. *See* Peck, *Tea Leaves*, *supra* note 72, at 340 n.21.

A. *Application of a Mary Carter Agreement*

The use of Mary Carter agreements in Washington will have a distinctly negative impact on deep-pocket defendants. This is demonstrated by the simple automobile collision suit discussed at the beginning of this Comment.[81]

Where the plaintiff (*A*) is faultless, its advantages from a Mary Carter agreement are clear. Washington law holds the defendants against whom judgment is entered jointly and severally liable for the sum of their proportionate shares of the claimant's total damages.[82] Because the settling defendant (*B*) is financially limited to its insurance coverage, any judgment against *B* will be limited for purposes of actual recovery. By making the city (*C*)—a typical "deep-pocket defendant"—a defendant, and by agreeing with *B* to encourage the jury to allocate fault to the city, *A* greatly increases chances for recovery of full damages,[83] with *C* jointly and severally liable for all damages.

In fact, *A*'s and *B*'s job of convincing the jury is made relatively easy, because the city technically need be only 1 percent at fault to be responsible for the entire amount of damages. Thus, an imaginative plaintiff might concoct a multitude of arguments as to how a city negligently constructed a road. A defendant in *B*'s position will likely be extremely willing to adopt a common argument, finding that his recollection of the accident coincides quite closely with *A*'s theory against the city. While the story might otherwise fail, its chances for success are greatly enhanced when the settling defendant cooperates. Potentially huge liability in a myriad of injury situations is therefore foisted onto states, municipalities, and other deep pockets by the operation of a simple Mary Carter contract.

Nor does the defendant's right of contribution[84] offer any consolation to a deep-pocket defendant on the short end of an agreement. The distortive effects of supposedly opposing parties' cooperative conduct on a jury's fault determinations are well-chronicled.[85] A jury might allocate

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81. *See supra* note 1 and accompanying text.

82. Wash. Rev. Code § 4.22.070(1)(b); *see supra* note 76 and accompanying text.

83. *See* Wash. Rev. Code § 4.22.070(1)(b).

84. *See* Wash. Rev. Code § 4.22.070(2) (indicating that right to contribution is to be determined according to sections 4.22.040–.060).

85. *See supra* note 25 and accompanying text. One commentator notes that the very nature of a Mary Carter is deceit and fraud practiced by the contracting parties against the outside defendant. Warren Freedman, *The Expected Demise of "Mary Carter": She Never Was Well*, 633 Ins. L.J. 602,

substantial fault to a city that is charged, for example, with negligence in failing to construct a median barrier.[86] The agreeing defendant's liability will thus likely be lower, which means that contribution to the extent of that liability will be substantially lower than in the absence of such an agreement.[87] Further, because the state bears the risk that other tortfeasors will be unable to pay damages, it lacks recourse when the agreeing defendant is insolvent.[88]

The potential for abuse of the trial process is substantial even when the plaintiff is partially at fault, and the defendants' liabilities are therefore several only. As discussed, the impact on the jury of cooperative conduct between the settling parties may increase a non-settling party's liability far beyond what it might have been absent the agreement. *A* and *B* will work to decrease *B*'s fault while attempting to increase both the total damages and the outside defendant's responsibility for them.[89] All defendants, deep-pocket or otherwise, are thus exposed to unjustifiably high fault determinations when the plaintiff and settling defendant coordinate their efforts against them. As

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604 (1975). The *Scurlock* concurrence describes the anomalous results reached in companion cases based on the same accident and identical facts. *See supra* note 29.

86. In fact, the jury in *McCluskey* allocated 50 percent of the fault to the state and 50 percent of the fault to the defendant driver who had been smoking marijuana and speeding at the time of the accident. On appeal, the state noted indications of improper collaboration in the allegedly agreeing parties' trial conduct, including the agreeing defendant's (*D1*) failure to object to plaintiff's motions in limine or to her damages, *D1*'s agreement with plaintiff's jury challenges and selection, *D1*'s targeting of the State as the responsible party, plaintiff's and *D1*'s buttressing of each other's cases through cross-examination of witnesses, and various other measures taken by the plaintiff to reduce the liability of *D1*. The court nevertheless held that such behavior was not sufficiently indicative of a possible collaborative agreement to warrant further discovery. McCluskey v. Handorff-Sherman, 68 Wash. App. 96, 102–05, 841 P.2d 1300, 1304–05 (1992), *review granted,* 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993).

87. *See* Benedict, *supra* note 8, at 375 (arguing that as the focus of the parties is to try to increase the non-settling defendant's liability, while decreasing that of the settling defendant, the non-settling defendant is naturally likely to pay more than if there is no Mary Carter arrangement).

88. *See* Peck, *Rejection and Modification, supra* note 7, at 239. Another possibility might be that the settling parties, nearing conclusion of the trial and confident of a high negligence finding against the deep pocket, agree to drop the settling party from the suit. This will cost the plaintiff the chance of joint and several liability, but will save the settling defendant any risk of contribution. When the settling party's negligence is found to be low anyway, this may be a viable part of a creative agreement. *See generally* Entman, *supra* note 1, at 545–46.

89. For a discussion of the attractiveness of Mary Carters in comparative contribution jurisdictions, *see* Benedict, *supra* note 8, at 375–76 ("[T]he settling defendant's negligence only reduces the plaintiff's recovery by the percentage of fault attributable to him. The settling parties attempt to decrease the settling defendant's percentage of liability, while increasing both the total judgment and the nonsettling defendant's percentage of fault.").

contribution is not allowed when liability is several only,[90] the agreeing parties need not concern themselves with the possibility of the outside defendant seeking reimbursement from *B*.

B. *Mary Carter Agreements Frustrate the Purposes Behind 1986 Tort Reform*

Because Mary Carter agreements have the potential to unduly influence the jury and thereby to thrust excessive liability onto a deep-pocket defendant, such agreements frustrate the purposes of the Washington Legislature's modification of joint and several liability under the 1986 Tort Reform Act.[91] The preamble to the 1986 modification states that the reforms were enacted to create a more equitable distribution of the cost and risk of injury and to increase the availability and affordability of insurance.[92] The aim is to reduce costs associated with the tort system while providing "adequate and appropriate" compensation to injured parties.[93] Because of their capacity to greatly inflate or even create the non-settling defendant's share of responsibility for injury, Mary Carter agreements defeat these purposes.

The possibility of inflated allocations of fault based on the cooperative and manipulative conduct of the agreeing parties, rather than on the true facts of the case, frustrates the legislative goal of an equitable allocation of the cost and risk of injury. Whether liability is joint or several, deep-pocket defendants face drastically increased liability. Allocations of fault in these cases are not "equitable," because they are the products of jury influencing and strategic gamesmanship rather than legitimate fact-finding.[94] Recovery from the deep-pocket defendant is therefore not an appropriate compensation, because it is not based on the true facts of the case and does not accurately reflect the actual responsibilities for injury.

90. *See supra* note 73.

91. *See id.*

92. 1986 Wash. Laws 1354–55.

93. *Id.*

94. *See* Entman, *supra* note 1, at 574–75.

III. TREATING MARY CARTER AGREEMENTS AS SETTLEMENTS AND REQUIRING DISMISSAL OF THE DEFENDANT IS A SOLUTION TO THE PROBLEM

The use of Mary Carter agreements is inconsistent with modern Washington tort law. While the position of Washington courts is unclear, the *Jensen* and *McCluskey* holdings have suggested that Mary Carters are acceptable when tempered by prophylactic measures.[95] A better rule, however, would be to eliminate Mary Carters entirely.

First, the *Jensen* view is outdated and incorrect. Not only is its reasoning inconsistent with the legislature's subsequent effort to curb inflated deep-pocket liability, but the court also appears to have relied on the reasoning of the majority of other jurisdictions without a thorough, independent assessment of the true effects of a Mary Carter-type agreement under Washington law. The court merely commented that the majority of states' courts reject arguments that these arrangements undermine the adversarial process or produce collusion, apparently because there is no requirement that codefendants be friendly.[96] The evidence of the impact of cooperative conduct,[97] however, demonstrates that the problem goes beyond unfriendly codefendants. Washington courts should therefore abandon *Jensen's* short-sighted approach.

A sounder and more logical approach to Mary Carter agreements is to treat them as outright settlements between the agreeing parties, and to require dismissal of the agreeing defendant. This alternative is appropriate because the Mary Carter actually resolves the plaintiff's claim against the defendant and eliminates all justiciable issues between them. Further, this approach is consistent with the language and intent of the 1986 Tort Reform Act. Finally, treating the agreements as settlements best serves the principles of the adversarial process.

A. *Mary Carter Agreements Resolve the Plaintiff's Claim*

The logistics of the parties' new relationship under a Mary Carter agreement demonstrate that the agreements resolve the plaintiff's claim against the agreeing defendant; therefore, courts should view the agreements as settlements and dismiss the agreeing defendant. This

95. *See supra* notes 52–64 and accompanying text.

96. Jensen v. Beaird, 40 Wash. App. 1, 12, 696 P.2d 612, 619 (1985), *review denied*, 103 Wash. 2d 1038 (1985).

97. *See supra* note 25.

conclusion is supported by the Washington Supreme Court's reasoning in *Shelby v. Keck*. There, the court dismissed the agreeing defendant in a covenant not to execute, due to the absence of a justiciable issue.[98] A covenant not to execute is virtually identical to a Mary Carter agreement.[99] Under a Mary Carter agreement, the plaintiff and defendant have also resolved the plaintiff's claim, completely replacing it with a separate contractual relationship in which the defendant pays the agreed sum and the plaintiff reimburses the defendant to the extent warranted by the final judgment.[100] The trial serves only as the engine for the contract's execution.

The Mary Carter agreement thereby eliminates any justiciable issue between the plaintiff and the agreeing defendant. Although the agreeing defendant retains an interest in the outcome of the litigation, this interest is now tied to the jury's allocation of fault to the non-agreeing party; this interest has no relationship to the plaintiff's original claim against the agreeing defendant. Most importantly, the proceedings between the plaintiff and settling defendant are no longer adversarial. Having settled their differences, they are now working together to achieve a maximum verdict against the non-agreeing party. There is a complete lack of dispute over a now non-existent claim, between parties who are nevertheless nominally opposed and treated as adversaries in the formal trial structure.[101]

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98. *See supra* note 66 and accompanying text.

99. The only real differences between *Shelby*'s covenant not to execute and a Mary Carter are the contractual ramifications for final payment or reimbursement amounts. Under a Mary Carter, agreeing defendants effectively limit their liability to the agreed upon sum, just as in a covenant not to execute. Mary Carters only differ to the extent that the defendant may or may not recover some or all of its commitment, depending on the non-settling party's allocation of fault; the plaintiff receives the same security as in a covenant not to execute. More importantly, the defendant is effectively receiving an unspoken covenant not to execute, because any judgment against it will be deemed ineffective due to its contractual right. *See generally* Connelly, *supra* note 65, at 792; Benedict, *supra* note 8, at 371 n.12 (labeling all Mary Carters covenants not to execute, as the plaintiff promises not to enforce a court's judgment against the settling defendant). Note that many Mary Carters contain an explicit covenant not to execute. *See, e.g.*, Williams, *supra* note 15, at 268.

100. *See* General Motors Corp. v. Lahocki, 410 A.2d 1039, 1043–44 (Md. 1980); *see also supra* note 1.

101. *Cf.* Gatto v. Walgreen Drug Co., 337 N.E.2d 23, 29 (Ill. 1975), *cert. denied*, 425 U.S. 936 (1976) ("No 'justiciable matter' exists where two former adversary parties have settled their differences as to all the issues they are *purportedly* litigating before the trial court." (emphasis added)). *See also* Connelly, *supra* note 65, at 798–99 (arguing that the *Gatto* holding "indicates that once a loan agreement is executed, the signing defendant must be dismissed from the action"); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779, 800 (1978) ("Since no justiciable issue exists between the parties entering the Mary Carter agreement, dismissing the settling defendant is appropriate."); Entman, *supra* note 1, at 563, 564 n.241 (arguing that if a Mary Carter is treated as valid and given full effect, there are no issues left to be tried on the

Allowing the settling party to remain a defendant therefore presents the court with a sham controversy.[102] The settling defendant effectively circumvents Washington law forbidding contribution from remaining defendants,[103] under the guise of adversity and within the auspices of a formal trial designed to resolve adversarial disputes. Allowing a defendant to remain nominally opposed to the plaintiff, while its only interest concerns the non-settling defendant and the "contribution" it may effectively receive from that defendant, is therefore utterly incompatible with the traditional trial system.[104]

B. *Construing Mary Carter Agreements as Settlements Is Consistent with the Language and Intent of the 1986 Tort Reform Act*

1. *The Language of the Statute Indicates That Mary Carter-type Agreements Constitute Settlements*

The language of the 1986 Tort Reform Act and its interrelationship with the "effects of settlement" statute[105] suggest that the legislature intended Mary Carter-type agreements to be treated as settlements.

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claim against the agreeing defendant, thus "demonstrat[ing] the absurdity of upholding the validity of a Mary Carter agreement while still allowing the settling defendant to remain as a party defendant").

102. *Cf. Gatto*, 337 N.E.2d at 29 ("While [the Illinois Constitution] provides that 'Circuit Courts shall have original jurisdiction of all justiciable matters' . . . it does not confer jurisdiction to decide sham controversies.").

103. A right to contribution among defendants is available only to defendants against whom judgment has been entered. *See supra* note 77. Here, however, the settling defendant is clearly seeking contribution towards its payment (or promise to pay) of the guaranteed amount. The *Jensen* court remarked that it was not concerned with the potential for contribution between parties despite prohibition of such a result, as the real objection to contribution—"use of the courts for relief of wrongdoers"—was absent from what it called an "indirect, private out-of-court arrangement." Jensen v. Beaird, 40 Wash. App. 1, 10, 696 P.2d 612, 618 (1985). In the hypothetical at hand, however, where the only interest of the settling defendant involves what it will in fact receive from the non-settling defendant as contribution, the court is being used for the relief of wrongdoers, and in an underhanded manner at that. This result weighs in favor of banning Mary Carters, at least insofar as they maintain the settling defendant's presence at trial. For a discussion of how Mary Carters violate no contribution rules, see Entman, *supra* note 1, at 540–49.

104. Compare the *Shelby* court's reasoning for approving the lower court's dismissal of the agreeing defendant: The plaintiff hoped to use certain pre-trial statements of the settling defendant, and could do so only under the hearsay exception for party admissions. This was apparently the sole purpose of maintaining the defendant's presence, and the lower court was deemed to be acting within its discretion in dismissing the defendant "to avoid a possible misuse of the evidence by the jury." Shelby v. Keck, 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975).

105. Wash. Rev. Code § 4.22.070, .060; *see supra* notes 74–81 and accompanying text.

Section 4.22.060, the effects of settlement statute, specifically identifies releases, covenants not to sue, covenants not to enforce judgment, or similar agreements as settlements.[106] While this section is intended only to come into effect in the case of joint and several liability,[107] which itself only applies when there is judgment against the defendants,[108] it appears by inference that the legislature also intended that when one of the listed types of settlements is entered into before judgment, that settlement would prevent judgment against the settling party, and thereby exclude that party's damages from the amount of joint liability. A Mary Carter agreement, effectively a pre-judgment covenant not to execute or enforce judgment, should therefore be viewed as a settlement within this general statutory definition of settlements. This will foil schemes designed to achieve joint and several liability by keeping the settling parties in the lawsuit.[109]

In cases when liability is several only, the effects of settlement statute[110] does not apply; the language of the general fault determination statute[111] nevertheless indicates the same legislative intent to treat Mary Carter-type agreements as settlements. The statute specifically directs that judgment shall be entered against all parties, except those released by the claimant, or immune from liability, or prevailing on any other defense.[112] While this section does not specifically list the types of settlements considered releases, it can be inferred that a release is intended to include those arrangements listed in the effects of settlement statute.[113] Further, at least one commentator argues that the fact that the fault determination statute was amended in 1987 gives rise to an inference that the two statutes cover the same general types of agreements.[114] This suggests that a Mary Carter-type agreement would

106. *See supra* note 79 and accompanying text.

107. *See, e.g.*, Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 840 P.2d 860 (1992) (when there is no joint and several liability, § 4.22.070(2) does not apply, and thus does not direct that .040, .050, or .060 is to be applied).

108. *See supra* note 75 and accompanying text. *See also* Peck, *Tea Leaves*, *supra* note 72, at 340.

109. *See* Peck, *Tea Leaves*, *supra* note 72, at 343–44.

110. Wash. Rev. Code § 4.22.060; *see supra* notes 73–80 and accompanying text.

111. Wash. Rev. Code § 4.22.070; *see supra* notes 73–80 and accompanying text.

112. Wash. Rev. Code § 4.22.070(1).

113. *See* Peck, *Tea Leaves*, *supra* note 72, at 344 (section .060 refers to "a release, covenant not to sue, covenant not to enforce judgment, or similar agreement" as being "interchangeable" for the purpose of determining the effect of settlement).

114. *Id.*

be considered by the legislature to be a release; the released defendant should therefore be dismissed.

2. *Treating Mary Carters as Settlements Comports with Legislative Intent*

In limiting the application of joint and several liability to situations in which there is an actual judgment against the defendants,[115] the legislature sought to hold an entity responsible only for its proportionate share of fault.[116] Joint and several liability is clearly the exception, not the rule. Further, in excluding the fault of settling parties from the amount considered joint, the legislature was apparently putting the burden of inadequate settlement on the plaintiff, rather than on the remaining parties against whom judgment is entered.[117]

A Mary Carter agreement, however, circumvents these intentions. It provides the plaintiff with the security of a settlement while maintaining the defendant's presence until judgment is reached. If that judgment results in joint and several liability, the non-settling defendant must shoulder the burden of any shortcomings in the amount of the settlement. That the agreeing defendant's fault may later be determined to be in excess of that contemplated in the agreement will be irrelevant, because the plaintiff may recover the full amount from the non-settling defendant.

C. *Dealing with Mary Carter Agreements Purporting Not To Be Settlements*

Recitals within a Mary Carter that it is not to be construed as a settlement, that the defendant is not to be released, or that it is not

115. *See supra* note 76 and accompanying text; Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 293–96, 840 P.2d 860, 885–89 (1992). When parties were acting in concert or when a person was acting as an agent or servant of the other party, there is no judgment requirement. Wash. Rev. Code § 4.22.070(1)(a).

116. *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886.

117. *Id.* at 299, 840 P.2d at 888–89. The Washington Supreme Court has argued that the plaintiff bears the risk of an adverse settlement when liability is several only because of uncertainty about the ultimate recovery following trial. The uncertainty built into the general rule of several liability, combined with the fact that the plaintiff often will not know whether it will be at fault until the end of the trial, indicated to the court that the legislature did not intend to burden non-settling parties with the effects of a plaintiff's settlement. *Id.* (citing Thomas Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 Gonz. L. Rev. 67, 82 (1986-87)).

intended as a covenant not to execute should not prevent a court from identifying the agreement for what it is: a settlement of the plaintiff's claim. Washington courts, in similarly attempting to distinguish between releases and covenants not to sue, have consistently held that the court will look to the true nature of the agreement rather than to the language of the contract itself.[118] Courts should similarly treat a Mary Carter agreement as a settlement or release despite any recitals within the agreement to the contrary.[119]

Finally, courts should treat Mary Carter agreements as settlements whether or not money has actually changed hands between the plaintiff and settling defendant. The issue arises under an agreement such as a loan receipt,[120] in which the defendant turns money over to the plaintiff prior to judgment instead of merely guaranteeing the sum.[121] The defendant will receive reimbursement in the event of sufficient recovery against the non-settling defendant. The crucial point is that, whether or not money has actually changed hands, the settling defendant has made an unconditional promise to provide the sum, and the plaintiff is guaranteed at least that amount regardless of the outcome of trial.[122] While the fact that money has changed hands may provide direct evidence that the agreement is in fact unconditional, [23] a true Mary Carter will always involve the unconditional promise. Courts in Washington should therefore not hesitate to identify them as settlements, whether or not the plaintiff has received funds prior to trial.

D. *Benefits of Treating Mary Carter Agreement as Settlement and Dismissing the Agreeing Defendant*

The benefits of dismissing the defendant are many. The plaintiff may no longer obtain the underhanded assistance at trial that it initially sought to purchase through the Mary Carter agreement. This eliminates the

118. *See* Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941); Hargreaves v. American Flyers Airline Corp., 6 Wash. App. 508, 511, 494 P.2d 229, 231 (1972) ("Appellate courts have ignored the stated intent of the parties . . . if it is clear from the surrounding circumstances that the actual intent was other than as stated.").

119. Peck, *Tea Leaves, supra* note 72, at 344.

120. *See, e.g.*, Jensen v. Beaird, 40 Wash. App. 1, 696 P.2d 612 (1985).

121. *See* Entman, *supra* note 1, at 522–23.

122. *Id.* at 544–45.

123. *See* Cullen v. Atchison, Topeka & Santa Fe Ry., 507 P.2d 353 (Kan. 1973) (where parties had entered a loan receipt-type agreement, court held the agreement to be a conventional, unconditional settlement; money paid was treated as a credit to subsequent judgment against non-settling defendant). *See also* Entman, *supra* note 1, at 544.

potential for skewing the adversarial process. While most courts recognize this problem, the majority have attempted to deal with it by providing limiting instructions, balancing procedural advantages, and disclosing the agreement.[124] The success of such measures is debatable, as argued by some courts and commentators.[125] Removing the defendant achieves the purpose of ensuring trial fairness[126] while avoiding debates as to the propriety of disclosing the agreement and sufficiency of balancing measures. While the *Cox* court adopted this measure based primarily on public policy grounds,[127] Washington courts may effectively do so by viewing Mary Carters as final settlements.[128]

Once the agreeing defendant is removed, the trial may produce a judgment free from collusive influence. The settling defendant's fault will still be determined by the trier of fact, but without the bias of that party's tainted input. Because the settling defendant's real interest is against the interest of the non-settling party, some courts have apparently allowed the agreeing defendant to remain at trial as a plaintiff.[129] This approach should be precluded in Washington, however, as a settling defendant is not permitted to maintain an action against other tortfeasors for contribution or indemnity.[130] Taking the next logical step, courts should similarly hold void that element of the agreement guaranteeing reimbursement to the settling defendant.

To best serve future litigants, Washington courts should unequivocally assert that all Mary Carter agreements requiring the settling defendant to remain at trial will be void. A firm policy will prevent piecemeal assessment of each agreement as it might become relevant at trial,

124. *See supra* notes 21–23 and accompanying text.

125. *See* Elboar v. Smith, 845 S.W.2d 240, 249 (Tex. 1992); Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 9–11 (Tex. 1986); *supra* note 28; *see also* Entman, *supra* note 1, at 563 ("The disclosure and admission approach to controlling Mary Carter agreements has been criticized as being insufficient to cure the prejudice to the nonsettling defendant.").

126. Entman argues that dismissing the settling defendant eliminates trial prejudice by removing an attorney from trial who may use jury selection, examination of witnesses and jury arguments to the plaintiff's advantage. Entman, *supra* note 1, at 564; *see also* Miller, *supra* note 101, at 800 ("dismissing the settling defendant will frustrate the collusive intentions of the agreeing parties").

127. *See supra* note 38 and accompanying text.

128. Dismissing the defendant under such conditions involves reasoning similar to that used in the *Shelby* case, in which the court held that dismissal of the settling defendant, who no longer was party to a justiciable issue, was proper to avoid a misuse of evidence by the jury. *See supra* note 104.

129. *See* Entman, *supra* note 1, at 563 n.235.

130. *See supra* note 76 and accompanying text.

thereby avoiding wasted time and energy. Ideally, parties will abandon this particular device in favor of traditional, acceptable settlements.[131]

IV. CONCLUSION

Mary Carter agreements distort the traditional aspects of litigation to such an extent that they are simply incompatible with the adversarial process. Practices for limiting their impact are insufficient; eliminating them completely is a more practical approach, and comports with the current state of Washington tort law. Treating Mary Carters as outright settlements and dismissing the agreeing defendant from trial is a logical method to achieve this result.

131. There is a clear potential for collusion in litigation that may escape the court's eye. It is conceivable that Mary Carter-type agreements may be made tacitly, with nothing more than oral confirmation. Such a possibility suggests that the current provision for joint and several liability should be reworked, perhaps by requiring that a defendant be at least 30 to 40 percent at fault before joint and several liability will apply.