[Florida Law Review](https://scholarship.law.ufl.edu/flr)

Volume 38 | Issue 4 Article 1

September 1986

Mary Carter Agreements: An Assesment of Attempted Solutions

June F. Entman

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

Part of the Law Commons

Recommended Citation
June F. Entman, *Mary Carter Agreements: An Assesment of Attempted Solutions*, 38 Fla. L. Rev. 521 (1986).
Available at: https://scholarship.law.ufl.edu/flr/vol38/iss4/1

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

University of Florida Law Review

VOLUME XXXVIII FALL 1986 NUMBER 4

MARY CARTER AGREEMENTS: AN ASSESSMENT OF ATTEMPTED SOLUTIONS

JUNE F. ENTMAN*

I. INTRODUCTION 522

II. ELIMINATING MARY CARTER AGREEMENTS 530
  A. *Banning the Use of Mary Carter Agreements: Champerty, Ethics and Trial Fairness* 531
    1. Champerty 531
    2. Ethics 537
    3. Trial Fairness 539
  B. *Applying Credit Rules to Mary Carter Agreements to Prevent Contribution and Indemnity for a Settling Tortfeasor* 540
  C. *Deterring Mary Carter Agreements by Allowing Contribution for the Nonsettling Party* 549
  D. *Mary Carter Agreements in a Tort System Without Joint and Several Liability and Contribution* 557

III. TOLERATING MARY CARTER AGREEMENTS 558
  A. *Admissibility of the Mary Carter Agreement* 558
  B. *Disclosure of the Agreement* 561
  C. *Separate Trials, Severance and Dismissal of the Settling Defendant* 563
  D. *Conflicts Between Mary Carter Agreements and the Real Party in Interest Rule* 566
  E. *Preserving the Nonsettling Defendants' Right to Remove the Case to Federal Court* 571

IV. SHOULD MARY CARTER AGREEMENTS BE TOLERATED? 574

V. CONCLUSION 579

* Assistant Professor of Law, Memphis State University; B.A., 1967, Smith College; M.A.T., 1969, University of Chicago; J.D., 1981, Memphis State University School of Law. I am grateful for the assistance of Memphis State University School of Law Visiting Herff Chair Professors John W. Wade and Robert T. Mann, who willingly read the final draft of this article and suggested valuable improvements. Throughout the project, my colleague, Robert Banks, provided relentless encouragement and thoughtful criticism, both of which I very much appreciate. I also thank my student research assistants, Debra Davis and Randall Crossing, for their patient and careful work.

Published by UF Law Scholarship Repository, 1986

I. Introduction

For almost twenty years, a type of settlement agreement known as a "Mary Carter agreement"[1] has been a growing, but not widely recognized, problem in civil litigation in the United States. Under a Mary Carter agreement, one or more of the potentially liable obligors or tortfeasors[2] guarantees the plaintiff a specified recovery. The portion of the guaranteed amount ultimately paid by the agreeing tortfeasor, however, depends upon the amount, if any, the plaintiff recovers from other tortfeasors.[3] In some Mary Carter agreements, the guarantee is merely expressed in an agreement between the parties, and no money is paid until after the nonagreeing tortfeasor's liability is determined.[4] In others, the settling tortfeasor gives the guaranteed amount to the plaintiff at the time of the agreement as a loan without interest to be repaid only to the extent of the plaintiff's recovery from other tortfeasors. This latter variation is frequently

---

1. The name derives from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d D.C.A. 1967). California regulates Mary Carter agreements by statute and calls them "sliding scale recovery" agreements. *See* CAL. CIV. PROC. CODE § 877.5 (West 1980); Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiation*, 12 PAC. L.J. 121 (1980) [hereinafter *Sliding Scale Agreements*]. In Arizona, Mary Carter agreements are called "Gallagher" agreements. *See* City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972); Note, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 ARIZ. L. REV. 863 (1977); Comment, *Gallagher Covenants, Mary Carter Agreements and Loan Receipt Agreements: Unsettling Contributions to Conflict Resolution*, 1977 ARIZ. ST. L.J. 117 [hereinafter *Unsettling Contributions*].

2. For convenience, the potentially liable obligors or tortfeasors entering into a Mary Carter agreement will be referred to as the settling or agreeing tortfeasors.

3. Mary Carter agreements have been used in cases involving obligors other than tortfeasors. *See* Corn Exch. Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596 (S.D. 1985); Record v. Insurance Co. of N. Am., 222 Tenn. 548, 438 S.W.2d 743 (1969); Comment, *Settling Multiparty Contract Disputes Through the Use of Loan Receipt Agreements*, 76 NW. U.L. REV. 271 (1981). The device appears most frequently, however, in judicial decisions involving joint tortfeasors.

Several commentators define Mary Carter agreements by delineating "elements" of such an agreement. *E.g.*, Comment, *Mary Carter Agreements: A Viable Means of Settlement?*, 14 TULSA L.J. 744, 754 & n.30 (1979). Some consider secrecy the essence of a Mary Carter agreement. *Id.*; Comment, *Is Mary Carter Alive and Well in Michigan?: Taking a Stand on Secret Settlements in Multiparty Tort Litigation*, 1985 DET. C.L. REV. 605, 607 [hereinafter *Mary Carter in Michigan*]. While secrecy certainly exacerbates the problems caused by Mary Carter agreements, disclosure of the agreement does not eliminate either the problems of litigation fairness, *see infra* § III., or the distortion of allocation of liability among tortfeasors, *see infra* § II.B.-D., created by Mary Carter agreements. Thus, secrecy is not a necessary part of a Mary Carter agreement. *See* CAL. CIV. PROC. CODE § 877.5(b) (West 1980) (quoted *infra* note 187); Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779, 784 (1978) [hereinafter *Unfair and Unnecessary*].

For the complete text of various Mary Carter agreements, see Booth v. Mary Carter Paint Co., 202 So. 2d 8, 10-11 (Fla. 2d D.C.A. 1967); Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 168-73, 355 N.E.2d 253, 254-58 (1976); General Motors Corp. v. Lahocki, 286 Md. 714, 719 n.1, 410 A.2d 1039, 1042 n.1 (1980); Lum v. Stinnett, 87 Nev. 402, 404, 488 P.2d 347, 348 (1971); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 355-56 (Okla. 1978); Grillo v. Burke's Paint Co., 275 Or. 421, 424-25, 551 P.2d 449, 451 (1976); Jensen v. Beaird, 40 Wash. App. 1, 3-4 n.2, 696 P.2d 612, 614-15 n.2 (1985); Eubanks & Cocchiarella, *In Defense of "Mary Carter,"* 26 FOR THE DEF., Feb. 1984, at 14, 26; Thornton & Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, 43 INS. COUNS. J. 226, 238-39 (1976).

4. *See, e.g.*, Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971).

denominated a "loan receipt" agreement,[5] which generates confusion because loan receipts have long been used for different purposes in the insurance subrogation context.[6]

Mary Carter agreements received a great deal of attention from courts and commentators during the 1970s, particularly in jurisdictions without contribution among joint tortfeasors.[7] Mary Carter agreements are also used, however, in

5. *See, e.g.*, Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953) ("loan receipt"); Palmer v. Avco Distrib. Corp., 82 Ill. '2d 211, 412 N.E.2d 959 (1980) ("loan agreement"); Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 355 N.E.2d 253 (1976) ("Loan Agreement and Contractual Promises of the Parties to the Loan"); Cullen v. Atchison, T. & S.F. Ry., 211 Kan. 368, 507 P.2d 353 (1973) ("loan receipt"); Grillo v. Burke's Paint Co., 275 Or. 421, 551 P.2d 449 (1976) ("Loan Receipt and Covenant Not to Execute"). The "loan" or "advance" feature is sometimes present in agreements referred to as simply "Mary Carter." *See* Shelton v. Firestone Tire & Rubber Co., 281 Ark. 100, 662 S.W.2d 473 (1983); Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801 (Tex. 1978). In California, a sliding scale recovery agreement includes "agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant." CAL. CIV. PROC. CODE § 877.5(b) (West 1980).

6. Some loan receipt agreements are not Mary Carter agreements. The term "loan receipt" originally referred to a subrogation agreement in which an insurance company lent its insured the amount of his loss. The loan was repayable to the extent of any recovery by the insured from third persons. *See* Annotation, *Insurance: Validity and Effect of Loan Receipt or Agreement Between Insured and Insurer for a Loan Repayable to Extent of Insured's Recovery from Another*, 13 A.L.R.3d 42 (1967). By contrast, the Mary Carter loan receipt involves payment by the third party obligor or tortfeasor, or its liability insurer, to the injured party. This important distinction is noted in the following decisions: Bolton v. Ziegler, 111 F. Supp. 516, 530 (N.D. Iowa 1953); Reese v. Chicago, B. & Q.R.R., 55 Ill. 2d 356, 361-62, 303 N.E.2d 382, 386 (1973); Cullen v. Atchinson, T. & S.F. Ry., 211 Kan. 368, 375-76, 507 P.2d 353, 362-63 (1973); Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 660 n.3, 537 P.2d 825, 829 n.3 (1975). *See generally* Lageson, *Guarantee and Loan Receipt Agreements in Multi-party Litigation*, 42 J. AIR L. & COMMERCE 85 (1976); McKay, *Loan Agreement: A Settlement Device that Deserves Close Scurtiny*, 10 VAL. U.L. REV. 231 (1976); Scoby, *Loan Receipts and Guaranty Agreements*, 10 FORUM 1300 (1975); Thornton & Wick, *supra* note 3; Annotation, *Validity and Effect of "Loan Receipt" Agreement Between Injured Party and One Tortfeasor, for Loan Repayable to Extent of Injured Party's Recovery from a Cotortfeasor*, 62 A.L.R.3d 1111 (1975).

Unfortunately, courts sometimes fail to recognize a Mary Carter agreement and its unique problems when the agreement is denominated with the more respectable name, "loan receipt." *See* Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 176-81, 250 N.E.2d 378, 390-93 (1969) (discussed in McKay, *supra*, at 258 n.98); Record v. Insurance Co. of N. Am., 222 Tenn. 548, 438 S.W.2d 743 (1969) (discussed *infra* text accompanying notes 61-77); Freedman, *The Expected Demise of "Mary Carter": She Never Was Well!*, 1975 INS. L.J. 602, 611-613.

More recently, a Minnesota court mistakenly treated a subrogation loan receipt as if it were a Mary Carter agreement. In Riewe v. Arnesen, 381 N.W.2d 448 (Minn. Ct. App. 1986), the agreement at issue was between some of the defendant physicians and *their* insurer. The plaintiff's claim was completely satisfied before trial and the case proceeded solely on the settling defendant's crossclaim for contribution and indemnity against a codefendant physician. Thus, the trial did not involve any agreement between a claimant and a codefendant or a codefendant's insurer. Nevertheless, in holding that the loan receipt agreement should have been admitted on cross-examination of the settling defendants — crossclaimants, the court relied upon Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977), a case involving a true Mary Carter agreement between plaintiffs and two defendants. *Riewe*, 381 N.W.2d at 453-54.

7. *See, e.g.*, Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971); Monjay v. Evergreen School Dist. No. 114, 14 Wash. App. 654, 660 n.3, 537 P.2d 825, 829 n.3 (1975); Michael, *"Mary*

jurisdictions that do provide for contribution among joint tortfeasors.[8] In all jurisdictions, Mary Carter agreements create significant problems of unfairness to the nonsettling defendants. The following example illustrates the use and effects of a Mary Carter agreement.

On a bright sunny day in Memphis, Tennessee, George pulled away from a stop sign at a four-way-stop intersection without bringing his automobile to a complete stop. George was struck broadside by Martha's automobile, which had entered the intersection from the cross street, also without first coming to a stop. George and Martha were the only witnesses. Immediately after the accident, a shaken Martha told George that she could not imagine how she had failed to see the stop sign. Later, however, Martha took the position that she tried to stop, but was unable to do so because her brakes had not responded properly. The reason for this, according to Martha, was the negligence of Shade Tree Mechanics, Inc. in failing to repair her brakes when she had taken her car to Shade Tree in West Memphis, Arkansas, for brake work the week before the accident.

George, a Tennessee citizen, brought suit in a Tennessee state court against Martha, also a Tennessee citizen, and against Shade Tree Mechanics, Inc., an Arkansas corporation. George sought $200,000 for his personal injuries incurred in the accident.

Prior to trial, George entered into a Mary Carter agreement with Martha and Martha's liability insurance carrier, which covered Martha for a limit of $150,000 per accident. The agreement provided: (1) Martha would pay George $50,000 and George would release Martha, but not Shade Tree, from all claims and liability to George.[9] (2) If George obtained a settlement or judgment against Shade Tree for more than $50,000, Martha would not pay any amount to George, but if George obtained a judgment against Shade Tree in an amount less than $50,000, Martha would pay George only the difference between the judgment against Shade Tree and $50,000. (3) George would not settle with

---

Carter" Agreements in Illinois, 64 ILL. B.J. 514 (1976); Note, *supra* note 1; Note, *Settlement Devices with Joint Tortfeasors*, 25 U. FLA. L. REV. 762 (1973); Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988 (1974). Arizona, Florida, Illinois, and Nevada, early sources of much Mary Carter litigation, have now adopted contribution acts. ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509 (Supp. 1985); FLA. STAT. ANN. § 768.31 (West Supp. 1986); ILL. ANN. STAT. ch. 70, § 302 (Smith-Hurd Supp. 1986); NEV. REV. STAT. §§ 17.225-.305 (1986).

8. *See infra* § II.C.

9. Sometimes the release is in the form of a covenant not to sue or a covenant not to execute. *See, e.g.*, Grillo v. Burke's Paint Co., 275 Or. 421, 551 P.2d 449 (1976). At one time, the distinction among these devices was that a release given to one joint obligor or tortfeasor released all. A covenant not to sue or to execute, however, released only the party to whom it was given. Most jurisdictions have changed this common law rule to provide that none of these devices releases other tortfeasors or obligors unless the parties intend to do so. *See* 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 10.1, at 32-39 (2d ed. 1986); W. PROSSER & W. KEETON, THE LAW OF TORTS § 49 (5th ed. 1984); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 4, 12 U.L.A. 98 (1975); *see, e.g.*, TENN. CODE ANN. § 24-7-106 (1980) (contract actions), § 29-11-105(a)(1) (1980) (tort actions).

Shade Tree for less than $50,000 without Martha's consent.[10] (4) George would proceed with the suit against Shade Tree, and Martha would remain a defendant in that lawsuit.[11] (5) The agreement between George and Martha would be kept secret.[12]

The Mary Carter agreement eliminated any actual controversy between George and Martha and aligned their interests in favor of George obtaining a judgment against Shade Tree of at least $50,000. Nevertheless, to the rest of the world, the lawsuit appeared to be George v. Martha and Shade Tree. Shade Tree, moreover, was unable to remove the case to federal court because of the lack of diversity of citizenship between George and Martha.[13]

Another effect of the Mary Carter agreement was that settlement overtures Shade Tree might ordinarily make were useless. Martha, of course, was unwilling to contribute to any settlement fund. George would not consider any offer from Shade Tree less than $50,000 and viewed the result of turning down an offer of, for instance, $80,000 as placing only $30,000 at risk. Since, as far as Shade Tree knew, George could have accepted $80,000 and still proceeded against Martha, George's rejection of such an offer was baffling to Shade Tree.[14]

---

10. The Mary Carter agreements in the following cases contained provisions penalizing the plaintiffs if they settled with the nonagreeing defendant for less than a certain amount or without the agreeing defendant's approval: Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154, 1156 (5th Cir. 1985); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 511 (9th Cir. 1974); Thompson v. Continental Emsco Co., 629 F. Supp. 1160, 1161 (S.D. Tex. 1986); Florow v. Louisville & N.R.R. (*In re* Waverly Accident of February 22-24, 1978), 502 F. Supp. 1, 2 (M.D. Tenn. 1979); Abbott Ford, Inc. v. Superior Court, 181 Cal. App. 3d 1205, ____, 228 Cal. Rptr. 250, 253 (Ct. App.), *review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); Lum v. Stinnett, 87 Nev. 402, 404, 488 P.2d 347, 348 (1971); Wright v. Commercial Union Ins. Co., 63 N.C. App. 465, 467, 305 S.E.2d 190, 191 (1983); General Motors Corp. v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977) (overruled on other grounds by Duncan v. Cessna Aircraft Co., 665 S.W.2d 214 (Tex. 1984)); Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 660, 537 P.2d 825, 826 (1975).

11. The Mary Carter agreements in the following cases contained such provisions: Maule Indus., Inc. v. Rountree, 284 So. 2d 389, 390 (Fla. 1973) (agreeing defendants would "continue in active defense of the litigation"); Grillo v. Burke's Paint Co., 275 Or. 421, 424, 551 P.2d 449, 451 (1976); Jensen v. Beaird, 40 Wash. App. 1, 3-4, 696 P.2d 612, 615 (1985).

12. *See supra* note 3.

13. *See infra* § III.E.

14. *See* General Motors v. Lahocki, 286 Md. 714, 726, 410 A.2d 1039, 1045 (1980), in which the court observed that the nonagreeing defendant could not bargain on the same basis as it might have bargained had it known of the Mary Carter settlement. The court found that the plaintiffs had an incentive not to settle with the nonagreeing defendant, because settlement would reduce the amount they would receive from the agreeing defendant. In Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301, 1304 (5th Cir. 1986), the court granted relief to Marathon, the nonsettling defendant. Marathon had shown that, as a result of a Mary Carter agreement, it could not settle the claim against it for less than $85,000, even though the plaintiff was willing to accept a net payment of $55,000 from Marathon. In Thompson v. Continental Emsco Co., 629 F. Supp. 1160, 1162 (S.D. Tex. 1986), the plaintiff refused to accept a settlement offer of $1,200,000 from the nonagreeing defendant because another defendant, who was a party to a $900,000 Mary Carter agreement with the plaintiff, refused to reduce its "lien" on the plaintiff's recovery. *See also* Bass v. Phoenix Seadrill/78, Ltd., 562 F. Supp. 790, 798-99 (E.D. Tex. 1983) (plaintiff received only a small part of the value of his claim from the settling defendant, thus he was likely to demand a larger settlement from the other defendants), *rev'd*, 749 F.2d 1154 (5th Cir. 1985); Mustang

At trial, Shade Tree was the primary target of George's offense. Opening and closing arguments by George's attorney focused on Shade Tree's negligence and de-emphasized Martha's contribution in causing George's injuries.[15] In his testimony, George did not mention Martha's statement to him about failing to see the stop sign.[16] Martha's testimony and the behavior of her attorney were equally surprising. After George's attorney exhausted his peremptory challenges, Martha's attorney used her peremptory challenges to exclude potential jurors that Shade Tree's attorney accepted and considered good for the defense.[17] Further, Martha did not plead George's contributory negligence as a defense and she testified at trial that George came to a full stop before he entered the intersection.[18] Generally, Martha's testimony bolstered George's case by em-

---

Equip., Inc. v. Welch, 115 Ariz. 376, 380, 565 P.2d 882, 886 (Ct. App. 1976) ("it is impossible to say that settlement negotiations . . . might not have been different" if the Mary Carter agreement had been disclosed), *aff'd in part, rev'd in part*, 115 Ariz. 206, 210, 564 P.2d 895, 900 (1977) (en banc); McKay, *supra* note 6, at 252 ("The non-agreeing codefendant is barred from settling out of court by the very nature and contractual provisions of the loan receipt device."); Scoby, *supra* note 6, at 1313 (plaintiff is "unable to consider an offer of additional sums by the remaining defendants without regard for the 'debt' incurred to the lending defendant"); *Unfair and Unnecessary, supra* note 3, at 786. *But see* Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154, 1164 n.18 (5th Cir. 1985) ("We are not altogether convinced that the possibility of settlement with [nonagreeing defendants] is rendered less likely, because of the veto provision, than it would have been if [agreeing defendant] lacked the ability to reject settlements.").

15. *See* Lum v. Stinnett, 87 Nev. 402, 405-07, 488 P.2d 347, 348-49 (1971) (while a settling defendant seemed the prime target of the complaint, plaintiff's counsel focused on the nonsettling defendant in his opening statement, displaying sympathy toward the settling defendants).

16. *See* Ratterree v. Bartlett, 238 Kan. 11, 28, 707 P.2d 1063, 1075 (1985). In *Ratterree*, plaintiff alleged in the petition and pretrial order that the settling defendant was negligent. Her counsel, however, did not mention that defendant's negligence in opening argument. Plaintiff testified that the settling defendant "was not in the least bit negligent" and she did not object to the settling defendant's motion for directed verdict. *Id.*

17. *See* Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907, 920-22 (Tex. Ct. App. 1979) (allocation of challenges not materially unfair despite Mary Carter agreements); Greiner v. Zinker, 573 S.W.2d 884, 885-86 (Tex. Ct. App. 1978) (error to grant settling defendants and plaintiff six strikes each; neither crossed on any of the eighteen strikes); *see, e.g.*, TENN. CODE ANN. § 22-3-105 (1980). This statute allocates four peremptory challenges each to a sole plaintiff and sole defendant and adds four additional challenges, up to eight, to each side having more than one party. The trial court in its discretion divides the eight challenges among the parties on the same side.

18. *See* Corn Exch. Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596, 599 (S.D. 1985) (testimony of owner of settling defendant, called by plaintiff as an "adverse" witness, did not contradict plaintiff's position). An additional element of prejudice may arise if the nonagreeing defendant (Shade Tree) is not permitted to treat the agreeing defendant (Martha) as an adverse witness, thereby enabling the agreeing defendant to testify without cross-examination by the only truly adverse party, the nonagreeing defendant. *See* Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 448 (4th D.C.A. 1972) (trial judge did not permit nonagreeing defendant who called agreeing defendant as a witness to impeach the witness on the basis of a prior inconsistent statement), *rev'd*, 284 So. 2d 389 (Fla. 1973); Lum v. Stinnett, 87 Nev. 402, 405, 488 P.2d 347, 349 (1971). In *Lum*, plaintiff's counsel called agreeing defendants as adverse parties and examined one with leading questions. Plaintiff's counsel then opposed full cross-examination by nonagreeing defendant's counsel on the ground his own interrogation was cross-examination. The court noted that the plaintiff thus had the benefit of the settling defendant's testimony without being bound by it. *Id.*; *cf.* Lubbock

phasizing the seriousness of the accident and of George's injuries.[19]

The cross-examination of George and George's witnesses by Martha's attorney was unenthusiastic at best[20] and even seemed to enhance George's case with regard to the extent of George's injuries.[21] In closing argument, Martha's attorney vigorously denied Martha's negligence but virtually admitted that George was terribly injured.[22] The jury returned a verdict in favor of Martha and against Shade Tree in the amount of $200,000.

Mfg. Co. v. Perez, 591 S.W.2d 907, 920 (Tex. Ct. App. 1979). In *Lubbock*, the trial judge ruled that after Mary Carter agreements were disclosed during trial, the nonagreeing defendant was entitled to recall for examination and impeachment any witnesses previously examined by agreeing defendant. *Id.*

19. *See* Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 514, 639 S.W.2d 726, 728 (1982) (testimony of the settling defendants was critical to the plaintiff's case against the defendant manufacturer of a tire rim to establish that the wheel introduced in evidence caused the plaintiff's injuries); General Motors v. Lahocki, 286 Md. 714, 724, 410 A.2d 1039, 1044 (1980). In *Lahocki*, the settling defendant bolstered plaintiff's case by filling in areas not covered and reiterating testimony harmful to nonsettling defendant. "In short, Contee did all in its power to see that the plaintiffs obtained a verdict against GM." *Id.*; *see also* Hegarty v. Campbell Soup Co., 214 Neb. 716, 724, 335 N.W.2d 758, 764 (1983) (employees of settling defendant testified about seniority, employees' salaries, and employees' benefits, matters relevant to the amount of damages the plaintiff had suffered). In Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973), the court discussed the benefit to the settling defendant in "painting a gruesome testimonial picture of the other defendant's misconduct." *But cf.* City of Tucson v. Gallagher, 108 Ariz. 140, 142-43, 493 P.2d 1197, 1200 (1972) (en banc) (Mary Carter agreement did not affect settling defendant's testimony). Even absent a Mary Carter agreement, an alleged joint tortfeasor, hoping for a favorable verdict against the plaintiff, or at least contribution, will wish to place blame on another alleged joint tortfeasor. Never, however, absent a Mary Carter agreement will the alleged joint tortfeasor wish to strengthen the plaintiff's case with regard to the extent of damages or plaintiff's lack of fault. *See Unfair and Unnecessary*, *supra* note 3, at 783-84.

20. *Cf.* City of Tucson v. Gallagher, 108 Ariz. 140, 143, 493 P.2d 1197, 1200 (1972) (en banc). In *Gallagher*, the nonagreeing defendant complained that the agreeing defendant's counsel asked only one question during the trial and did not cross-examine the plaintiff, or her doctor, or her dentist. The court responded, "We know of no rule of law requiring cross-examination . . . . [C]ross-examination frequently is harmful to the cross-examiner's case." *Accord* Bill Currie Ford, Inc. v. Cash, 252 So. 2d 407 (2d D.C.A. 1971), *cert. denied*, 256 So. 2d 513 (Fla. 1972); Ratterree v. Bartlett, 238 Kan. 11, 707 P.2d 1063 (1985).

21. In General Motors Corp. v. Lahocki, 286 Md. 714, 724-26, 410 A.2d 1039, 1044-45 (1980), the court found that the settling defendant had cross-examined witnesses who, because of the Mary Carter agreement, were not truly adverse. *See also* Lum v. Stinnett, 87 Nev. 402, 405-06, 488 P.2d 347, 349 (1971) ("When [plaintiff's] counsel omitted to ask plaintiff's former employer if [plaintiff] had received 'tips' as well as wages, [the settling defendant's] counsel went into this item of special damage on cross-examination, in notable departure from his usual nonchalance."); *Unfair and Unnecessary*, *supra* note 3, at 794 (discussing General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977), in which counsel for the settling defendants promoted plaintiff's cause on cross-examination of plaintiff and the nonsettling defendant's expert witness); *cf.* Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907, 920 (Tex. Ct. App. 1979) (trial judge ruled that after Mary Carter agreements were disclosed during trial, agreeing defendant could not cross-examine plaintiff's witnesses).

22. Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 448 (4th D.C.A. 1972) (counsel for agreeing defendants in closing argument "candidly admitted that his clients were partly responsible for the plaintiffs' damages and then devoted the major portion of his summation to showing that appellants [nonagreeing defendants] were likewise partly responsible."), *rev'd*, 284 So. 2d 389 (Fla.

After the verdict, Shade Tree learned about the Mary Carter agreement. Shade Tree moved for a new trial on the ground that George had failed to supplement an interrogatory, propounded to George by Shade Tree, asking whether George had been compensated in any way by others for the injuries sustained in the accident. Shade Tree argued that if it had known of the Mary Carter agreement, it would have used the agreement to impeach both George and Martha.[23] George argued that the Mary Carter agreement was not "compensation" and was not discoverable,[24] and that the trial was unaffected by the nondisclosure because settlement agreements are not admissible for any purpose. The trial judge reasoned that because Tennessee Code Annotated § 29-11-105(b) provides, "No evidence of a release . . . received by another tortfeasor . . . may be introduced by a defendant at the trial of an action by a claimant for injury . . . ,"[25] Shade Tree could not have introduced the agreement and, therefore, was not prejudiced by the nondisclosure.

Shade Tree then moved for a reduction of the verdict by $50,000[26] — the value of the settlement between George and Martha. Because George never actually received that amount from Martha, and would not receive any money from Martha under the Mary Carter agreement, the trial court denied the motion. Shade Tree also was not able to seek contribution from Martha because the verdict in Martha's favor against George effectively barred such a claim.[27]

1973); Corn Exch. Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596, 599 (S.D. 1985) (settling defendant's counsel conceded in closing argument that plaintiff had made its case against both his client and the nonsettling defendant); Degen v. Bayman, 86 S.D. 598, 607-08, 200 N.W.2d 134, 139 (1972). *See* Ratterree v. Bartlett, 238 Kan. 11, 28, 707 P.2d 1063, 1076 (1985). In *Ratterree*, the agreeing defendant's counsel did not comment in opening statement about the validity of plaintiff's damage claims, even though he was being sued for 3/4 million dollars; he did not cross-examine one of plaintiff's damage witnesses and performed only limited cross-examination of another; and in closing, he urged the jury to adequately compensate both himself and the plaintiff and even commented on the extensiveness of the plaintiff's damages. *Id.* In the frequently-cited Ponderosa Timber & Clearing Co. v. Emrich, 86 Nev. 625, 631-32, 472 P.2d 358, 362-63 (1970), counsel for the settling defendant stated in closing argument, "Now I am not going to stand here and make a fool of myself by telling you people that there is any merit in the defense of contributory negligence. There isn't . . . . This is the kind of a case when a lawyer . . . has to remind himself of the oath that he took when he was admitted to practice . . . to see that justice is done." *Cf.* Johnson v. Moberg, 334 N.W.2d 411, 415 (Minn. 1983) ("The trial court, in the best position to monitor the trial, was of the opinion that the final arguments would have been the same with or without the settlement agreement and that the non-disclosure was not prejudicial.").

23. *See infra* § III.A.

24. *See infra* § III.B.

25. TENN. CODE ANN. § 29-11-105(b) (1980) is a part of the "Uniform Contribution Among Tort-Feasors Act" adopted in Tennessee in 1968. TENN. CODE ANN. § 29-11-101 (1980). Subsection 105(b), however, is not part of the Uniform Act. *See* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 4, 12 U.L.A. 98-100 (1975). For similar statutes in other states, see *infra* note 217.

26. TENN. CODE ANN. § 29-11-105(a)(1) (1980) and UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 4(a), 12 U.L.A. 98 (1975) provide that a release given in good faith to one joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . ." For further discussion of this doctrine and its application in Mary Carter cases, see *infra* § II.B.

27. TENN. CODE ANN. § 29-11-104(f) (1980) provides:

The judgment of a court in determining the liability of the several defendants to a

As illustrated by the above example, there are various benefits of a Mary Carter agreement for the agreeing parties. The plaintiff is guaranteed a minimum recovery regardless of the outcome of trial or settlement negotiations. The plaintiff also may realize a recovery far in excess of the guaranteed amount if there is a large enough verdict against the nonsettling defendant. In addition, the likelihood of such a verdict is enhanced by the cooperation at trial between the plaintiff and the settling defendant.

The benefit of the agreement to the settling defendant is that his liability to the plaintiff is set at a maximum amount, which may be reduced to zero if a sufficiently large verdict against the nonsettling defendant is recovered. In a jurisdiction that does not provide for contribution among tortfeasors, the settling defendant's total liability is established by the Mary Carter agreement. Even in a jurisdiction that provides for contribution, the settling defendant may be able to avoid liability above the amount guaranteed in the agreement. If, through the agreeing parties' cooperation at trial, there is a verdict in favor of the settling defendant, he then is not liable for contribution. Even if there is a verdict against both defendants, the settling defendant is able to avoid contribution if, as discussed below,[28] the court construes the Mary Carter agreement to be the type of settlement that bars contribution against the settling defendant.

There are two distinct problems caused by Mary Carter agreements. The most easily recognized problem is the presence at trial of a defendant who has an identity of interest with the plaintiff. As in the example above, the opportunity for collusion between the plaintiff and a codefendant may lead not only to a substantial verdict for the plaintiff, but also to exoneration for the settling defendant. Thus, as the result of an unfair trial, the nonsettling defendant loses both the case brought by the plaintiff and the possibility of contribution from the settling tortfeasor.

The second problem is the effect a Mary Carter agreement has on the apportionment of responsibility among joint tortfeasors. For instance, if the jury in the example above had found Martha and Shade Tree jointly and severally liable for George's injuries, Shade Tree would be entitled in most jurisdictions to seek contribution from Martha.[29] Martha may then contend that she had settled with George and, therefore, is not liable for contribution. Under the Uniform Contribution Among Tortfeasors Act, Martha's success in resisting contribution depends upon whether the court finds that the settlement between George and Martha was in good faith.[30] Thus, Martha may be able to escape

---

claimant for an injury or wrongful death after trial on the merits, shall be binding among such defendants in determining their right to contribution or indemnity, except where a claimant commenced an action for injury or wrongful death prior to April 3, 1968.

See also UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 3(f), 12 U.L.A. 89 (1975).

28. *See infra* notes 29-31 and accompanying text and § II.C.

29. *See* TENN. CODE. ANN. § 29-11-102(a) (1980); *infra* § II.C.

30. *See* TENN. CODE ANN. § 29-11-105(a)(2) (1980); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, § 4, 12 U.L.A. 98 (1975) (a release given in good faith "discharges the tort-feasor to whom

contribution, either because she was exonerated at trial of liability to George or because she has settled with George. If she is not liable for contribution, and if there is no reduction in George's judgment against Shade Tree because of the settlement with Martha, the result is that the entire burden of compensating the plaintiff falls upon one of two jointly liable tortfeasors.[31]

Judicial responses to Mary Carter agreements vary widely. Some courts have taken steps to eliminate the use of Mary Carter agreements, either because of their distortion of the adversary process or because of their effect on the allocation of liability among defendants. The steps taken include outright prohibition of these agreements, refusal to enforce the agreement between the parties, and frustrating the agreement's purpose by either reducing the plaintiff's judgment on the basis of the agreement or refusing to permit the agreement to bar the nonsettling defendant's right to contribution.[32]

Other courts have rejected both the notion that Mary Carter agreements are hopelessly irreconcilable with fair trials and that the liability shifting caused by a Mary Carter agreement should be prevented. These courts permit the use of Mary Carter agreements, but acknowledge that the agreements may adversely affect the fairness of a trial against the nonsettling defendant. Even courts that allow Mary Carter agreements, therefore, do not permit the agreement to be kept secret and often allow the nonsettling defendant to inform the trier of fact of the parties' true positions.[33]

The purpose of this article is to suggest what should be done about Mary Carter agreements. First, section II examines various reasons and methods adopted by courts to eliminate Mary Carter agreements or to frustrate their essential purpose. Turning then to juridictions that view Mary Carter agreements as essentially legitimate, section III discusses the steps taken by courts to protect the nonsettling defendant's right to a fair trial. Section IV analyzes the arguments favoring a permissive approach to Mary Carter agreements and evaluates the means employed to eliminate trial prejudice to the nonsettling defendant. This article concludes there are no adequate solutions to the problems of trial unfairness and inequitable distribution of liability created by Mary Carter agreements, and there are no good reasons for courts and legislatures to continue accommodating use of these agreements.

II. ELIMINATING MARY CARTER AGREEMENTS

In the frequently cited case of *Lum v. Stinnett*,[34] the Nevada Supreme Court took the most direct approach to eliminating Mary Carter agreements. The *Lum* court declared Mary Carter agreements void. The court reversed a plain-

---

it is given from all liability for contribution to any other tort-feasor"). For further discussion, see *infra* § II.C.

31. *See infra* §§ II.B.-D.
32. *See infra* § II.
33. *See infra* §§ III.A.-B.
34. 87 Nev. 402, 488 P.2d 347 (1971).

tiff's verdict and ordered a new trial because of a Mary Carter agreement between the plaintiff and two codefendants.[35] The court based its holding on principles of public policy — champerty, ethics, and trial fairness — that will be examined in detail below.[36]

A less direct approach taken by some courts is to reduce the verdict against the nonsettling defendant on the basis of the Mary Carter agreement. This approach, as a practical matter, strongly discourages Mary Carter agreements by treating them as unconditional settlements between the plaintiff and the settling defendant. Courts taking this second approach to eliminating Mary Carter agreements rely primarily upon principles of contribution among joint tortfeasors. These courts perceive that the effect of a successful Mary Carter agreement is to force the nonsettling defendant to indemnify fully the settling defendant. Depending upon the jurisdiction's policies regarding contribution, courts have held that such a result is contrary either to doctrines prohibiting contribution among joint tortfeasors[37] or to doctrines providing for contribution, but not indemnity, among joint tortfeasors.[38]

A. *Banning the Use of Mary Carter Agreements: Champerty, Ethics and Trial Fairness*

1. Champerty

In *Lum*, the Nevada Supreme Court concluded that a Mary Carter agreement constituted maintenance and champerty and violated the canons of ethics.[39] *Lum* was a medical malpractice action in which the Mary Carter agreement was between the plaintiff and the insurance carriers of two defendants — the emergency room physician and the plaintiff's family doctor. The nonsettling defendant was another physician, who allegedly failed to read the plaintiff's x-rays properly.[40] Only the nonsettling defendant was found liable at trial.[41] Noting that "irregularities"[42] in the conduct of the trial had "so warped presentation

---

35. *Id.* at 412-13, 488 P.2d at 353.

36. *See infra* § II.A. The court in *Lum* also mentioned a real party in interest problem. 87 Nev. at 408, 488 P.2d at 350-51; *see infra* § III.D.

37. *See infra* notes 121-33 and accompanying text.

38. *See infra* notes 143-51, 167-77 and accompanying text.

39. 87 Nev. at 407-08, 411, 488 P.2d at 347, 352.

40. *Id.* at 404, 488 P.2d at 348.

41. The parties entered into the Mary Carter agreement on the day jury selection began. The nonagreeing defendant's counsel was told at that time that there was some agreement between the parties. He did not see a copy of the agreement, however, or become aware of all its terms until the agreeing defendants were dismissed upon their motion, without objection by the plaintiff, at the close of the plaintiff's case. Counsel for the nonagreeing defendant then moved for a mistrial and the court ordered that copies of the agreement be given to the court and counsel. The motion for mistrial was denied. *Id.* at 406, 488 P.2d at 348-49.

42. *Id.* at 412, 488 P.2d at 353. The "irregularities" included: plaintiff's opening statement focused on the nonagreeing defendant's fault and asserted the agreeing defendants' reliance on his expertise; the agreeing defendants made no opening statements; plaintiff's counsel treated the agreeing defendants as adverse witnesses. *Id.* at 405, 488 P.2d at 348-49.

of the case as to deny a fair trial,"[43] the supreme court held the agreement void and ordered a new trial.[44]

The court in *Lum* defined maintenance as follows: " 'Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.' "[45] Champerty was defined as " 'maintenance with the additional feature of an agreement for the payment of compensation or personal profit from the subject matter of the suit.' "[46] With regard to maintenance, the Nevada court reasoned that the insurance carriers for the agreeing defendants were strangers to the action between the plaintiff and the nonagreeing defendant. The promise of these strangers to pay the plaintiff, if he prosecuted his claim against the nonsettling defendants, constituted maintenance. The agreement constituted champerty because the insurance carriers would profit from any recovery against the nonsettling defendant.[47]

Lum's finding of maintenance and champerty focused on only the agreeing defendants' insurers as "strangers" to the litigation.[48] The court made no mention of the agreeing defendants' lack of an interest in the plaintiff's claim. It is uncertain, therefore, whether the Nevada court would have reached the same conclusion if the defendants themselves, rather than their insurers, were the contracting parties deemed to have acquired an interest in the plaintiff's claim.[49]

Other courts have rejected the argument that a Mary Carter agreement is champertous both when the agreement is between the plaintiff and an alleged tortfeasor and when the tortfeasor's insurer is the agreeing party. In *Lahocki v.*

---

43. *Id.* at 412, 488 P.2d at 353. One author argued that a Mary Carter agreement constitutes "an unconstitutional denial of *due process of law, unequal treatment before the law,* and a deprivation of the *'right to a fair trial . . . .'* " Freedman, *supra* note 6, at 619-20 (emphasis in original); *see also* Mark C. Bloome Co. v. Superior Court, ___Cal. App. ___, *cert. denied,* 107 S. Ct. 189 (1986); City of Los Angeles v. Superior Court, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (Ct. App. 1986) (rejecting due process and equal protection challenges to California's statutory version of Mary Carter agreements).

44. 87 Nev. at 412-13, 488 P.2d at 353.

45. *Id.* at 408, 488 P.2d at 350 (quoting 14 C.J.S. *Champerty and Maintenance* § 1(b) (1939)).

46. *Id.* (quoting 14 C.J.S. *Champerty and Maintenance* § 2 (1939)).

47. *Id.* The authors of one article argued that a Mary Carter agreement is not champertous because the settling defendant does not derive "compensation or personal profit" from the agreement. Eubanks & Cocchiarella, *supra* note 3, at 20. Using the Mary Carter agreement in Hegarty v. Campbell Soup Co., 214 Neb. 716, 335 N.W.2d 758 (1983) as a prototype, the authors assert that "Union Pacific [settling defendant] would derive no compensation or profit from the agreement, but could only reduce the amount of its debt to Hegarty [plaintiff]." The authors do not explain their distinction, which is contrary to the *Hegarty* court's conclusion that the Mary Carter agreement "created an interest on the part of the Union Pacific in the amount of damages recovered by the plaintiff in this litigation." 214 Neb. at 724-25, 335 N.W.2d at 764.

48. 214 Neb. at 724-25, 335 N.W.2d at 764.

49. *See* Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 661, 537 P.2d 825, 830 (1975), in which the court found the conditional repayment clause in a Mary Carter agreement between plaintiff and alleged tortfeasors (not their insurers) void and stated, "It is our opinion that this agreement contains strong overtones of champerty which we cannot sanction."

Contee Sand & Gravel Co.,[50] the court stated that the agreeing defendant was not " 'without interest' in this case."[51] In *Wright v. Commercial Union Insurance Co.*,[52] the court stated that the alleged tortfeasor's insurer "had a real interest in settling the claims against its insureds by the [plaintiffs]."[53]

The analysis used by these courts, however, in rejecting the argument that a Mary Carter agreement constitutes maintenance and champerty, is superficial. The question should not be whether the agreeing party, absent the Mary Carter agreement, had some generalized "interest" in the lawsuit as a whole. Rather, the question is whether the agreeing party had any legitimate beneficial interest in the plaintiff's claim.[54] At least one court has so delineated the issue. In *Bass v. Phoenix Seadrill/78, Ltd.*,[55] an admiralty action, the district court applying federal common law found the Mary Carter agreement champertous because "Phoenix [the agreeing defendant] did not . . . have an 'interest' in the lawsuit as the term relates to champerty. Although not a stranger to the lawsuit, Phoenix had no interest in the relief demanded by Bass [the plaintiff]."[56]

---

50. 41 Md. App. 579, 398 A.2d 490 (Ct. Spec. App. 1979), *rev'd sub nom.* General Motors Corp. v. Lahocki, 286 Md. 714, 410 A.2d 1039 (1980).

51. *Id.* at 608, 398 A.2d at 507 (referring to "without interest" as an element of the doctrines of maintenance and champerty). The court of special appeals in *Lahocki* found no prejudicial error in the trial court's refusal to admit evidence of the Mary Carter agreement. The Maryland Court of Appeals reversed, but not on grounds of champerty or maintenance. General Motors Corp. v. Lahocki, 286 Md. 714, 727, 410 A.2d 1039, 1045-46 (1980) ("We do not believe the agreement here amounts to champerty, one of the factors that led the court in *Lum v. Stinnett* to declare the agreement void.").

52. 63 N.C. App. 465, 305 S.E.2d 190 (1983).

53. *Id.* at 469, 305 S.E.2d at 193; *see also* Cullen v. Atchison, T. & S.F. Ry., 211 Kan. 368, 374, 507 P.2d 353, 360 (1973), in which the court stated that State Farm (insurer of alleged tortfeasor) had "at least a possible interest in any wrongful death action brought by the guardian [plaintiff]."

In most of the Mary Carter cases discussed herein in which the issue of champerty has arisen, it has been raised by the nonagreeing defendant in the proceedings on the tort victim's original claim. In *Wright*, the issue arose in a subsequent suit brought by the nonagreeing defendant and his insurer seeking damages on grounds of champerty and maintenance from Commercial, the insurer of the agreeing defendant. Commercial had been the contracting party in the Mary Carter agreement with the original tort plaintiffs. The court affirmed summary judgment for Commercial. 63 N.C. App. at 465-68, 305 S.E.2d at 190-92.

54. *See* McKay, *supra* note 6, at 254 n.88 ("In the plaintiff-codefendant context, the device [loan receipt] is champertous not only because of a division of proceeds between plaintiff and a stranger *to the plaintiff's interest* but also because the device limits the non-agreeing defendant's right to compromise with the plaintiff.") (emphasis added).

55. 562 F. Supp. 790 (E.D. Tex.), *aff'd*, 573 F. Supp. 866 (1983), *rev'd in part*, 749 F.2d 1154 (1985).

56. *Id.* at 798; *accord* Note, *supra* note 1, at 880 (1977) ("[T]he interest of the defendant entering the agreement is solely in the outcome of the litigation, and not in the cause of action itself . . . . A Gallagher covenant would thus seem to constitute champerty [under Arizona law]."). In *Bass*, the Fifth Circuit reversed the district court's finding on champerty. 749 F.2d 1154, 1158 n.7 (5th Cir. 1985). The Fifth Circuit declined to ban Mary Carter settlements on any grounds. The court stated, "Despite the potential for abuse, we think that properly disclosed Mary Carter agreements serve a legitimate function of providing litigants with capital with which to continue

The effect of the doctrines of champerty and maintenance on Mary Carter agreements depends upon the extent to which these common law doctrines are still viable and, if so, the remedies available to a party who claims to be injured by such an agreement. The court in *Lum*, having determined that the Mary Carter agreement was champertous and therefore void, ordered a new trial in which "the action shall stand reinstated against Greene and Romeo [settling defendants], as well as appellant."[57] Even if champertous agreements are illegal, however, it does not necessarily follow that a verdict in a case involving a Mary Carter agreement will be overturned on this basis.

First, some jurisdictions have held it is not maintenance or champerty to advance money to finance an action by a poor person.[58] Of course, not all plaintiffs who enter into Mary Carter agreements are poor. Nevertheless, Mary Carter agreements have been defended because they provide the plaintiff with funds necessary to permit the plaintiff to pursue his claims.[59] Second, there is authority for the propositions that only a party to a champertous contract may raise the defense of champerty and that a plaintiff's champertous agreement is not a ground for dismissal of the plaintiff's claim.[60]

This latter doctrine was applied by the Tennessee Supreme Court in a case involving a Mary Carter agreement. In *Record v. Insurance Company of North America*,[61] the plaintiff originally sued two insurance companies alleging that one or both of the companies had issued to the plaintiff an insurance contract that was in effect at the time of his loss. Both companies had denied coverage.[62]

---

prosecution of their claims. Abuse of the device, we think, is more properly dealt with on a case-by-case basis." *Id.* at 1159.

57. 87 Nev. at 412-13, 488 P.2d at 353.

58. RESTATEMENT (FIRST) OF CONTRACTS § 541 (1932); 6A A. CORBIN, CORBIN ON CONTRACTS § 1423 (1962); McKay, *supra* note 6, at 254 n.88.

59. *See supra* note 56; *see also* Abbott Ford, Inc. v. Superior Court, 181 Cal. App. 3d 1205, ——, 228 Cal. Rptr. 250, 256 (plaintiffs benefit from ability to maintain themselves while matter is being resolved) (Ct. App.), *review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); Webb v. Dessert Seed Co., 718 P.2d 1057, 1060 (Colo. 1986) (Mary Carter agreement recited that plaintiffs agreed to its terms because they needed money to operate their farms and to pursue their claims); Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 178-79, 250 N.E.2d 378, 392 (1969) (one policy reason supporting loan receipt agreements is economic need of injured plaintiff); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 557 (Minn. 1977) (loan receipt agreements allow plaintiff to receive some compensation without waiting until lengthy trial concludes); Grillo v. Burke's Paint Co., 275 Or. 421, 427, 551 P.2d 449, 452 (1976) (Mary Carter agreements provide fast economic relief to injured plaintiff); Mullins & Morrison, *Who Is Mary Carter and Why Is She Saying All Those Nasty Things About Pre-Trial Settlements?*, 23 FOR THE DEF., Dec. 1981, at 14, 17 (plaintiff gains the resources to finance "full scale discovery and trial preparations"); *Unsettling Contributions*, *supra* note 1, at 152 (Mary Carter agreements "compensate quickly those who can least accommodate both personal and litigation expenses because of personal injury incapacitation"); Case Note, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 ARK. L. REV. 570, 584-85 (1983) ("needy and legitimate plaintiff may be aided in seeking recovery by the advancement of funds under a secret agreement").

60. *See* RESTATEMENT (FIRST) OF CONTRACTS § 544 (1932); McKay, *supra* note 6, at 254 n.88.

61. 222 Tenn. 548, 438 S.W.2d 743 (1969).

62. *Id.* at 550-51, 438 S.W.2d at 744-45. Plaintiff was in the trucking business and the loss resulted from the burning of a load of cotton being hauled by the plaintiff. *Id.* at 550, 438 S.W.2d

The plaintiff and one insurer, Selective, entered into a Mary Carter agreement[63] pursuant to which the plaintiff dismissed the first suit and refiled solely against the other insurer, INA.[64] INA alleged that the agreement between the plaintiff and Selective was champertous. The chancellor dismissed the plaintiff's bill on grounds of champerty.[65]

The Tennessee Supreme Court reversed the chancellor's dismissal.[66] First, accepting the plaintiff's characterization of the agreement as a loan receipt, the court discussed two cases in which courts had approved subrogation-type loan receipt agreements.[67] Nevertheless, the court concluded that the issue of the validity of a loan receipt agreement was not determinative and would not be decided.[68]

The court then turned directly to champerty, which it defined as " '[a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject matter sought to be recovered.' "[69] The court did not decide whether the agreement at bar was champertous. Rather, after reviewing Tennessee cases on the champerty doctrine, the court noted, " 'It is the rule in this state that a suit will not be dismissed for champerty because complainants and an attorney or layman entered into a champertous contract relating to its prosecution.' "[70] The court, therefore, concluded that the chancellor erred in dismissing the plaintiff's bill on grounds of champerty.[71]

The holding in *Record* is in clear opposition to the *Lum* court's refusal, on grounds of champerty, to permit a trial to proceed when a plaintiff had entered

at 744. One insurer, Selective, argued that it had cancelled the policy prior to the loss. The other insurer, INA, contended that Selective's notice of cancellation was ineffective and that INA, therefore, was not liable under the policy it had subsequently issued. *Id.* at 550-51, 438 S.W.2d at 745.

63. The agreement provided that Selective would lend plaintiff the amount of the loss if he would dismiss the first suit against it, release all claims under its policy and sue INA for the loss. Selective would pay all costs of the suit and provide attorneys. Plaintiff would repay the loan only to the extent of any recovery from INA. *Id.* at 550-51, 438 S.W.2d at 745.

64. *Id.* at 551, 438 S.W.2d at 745.

65. *Id.* at 552, 438 S.W.2d at 745.

66. *Id.* at 557-58, 438 S.W.2d at 748.

67. In arguing that the agreement was valid as a loan receipt, the plaintiff relied upon an A.L.R. annotation dealing with the subrogation loan receipt agreement. 222 Tenn. at 553, 438 S.W.2d at 745. The subrogation loan receipt cases discussed by the court were Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S.W. 317 (1890) and the frequently-cited opinion of Justice Brandeis in Luckenbach v. W.J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918). 222 Tenn. at 553-54, 438 S.W.2d at 746.

68. 222 Tenn. at 555, 438 S.W.2d at 746.

69. *Id.* at 555, 438 S.W.2d at 746-47 (quoting BLACK'S LAW DICTIONARY (4th ed. 1968)).

70. *Id.* at 557, 438 S.W.2d at 747 (quoting Walsh v. Rose, 29 Tenn. App. 78, 88, 193 S.W.2d 118, 122 (1945)).

71. *Id.*, 438 S.W.2d at 747. The court also rejected INA's argument that the plaintiff and Selective should be denied relief because they came into court with unclean hands. *Id.*, 438 S.W.2d at 747.

into a Mary Carter agreement.[72] The court in *Record*, however, stated that champertous agreements are "illegal between the parties,"[73] which implies that the doctrine of champerty may still affect Mary Carter agreements in Tennessee.[74] That the court declined to decide if the agreement was champertous is not particularly significant in light of its failure to appreciate that the agreement was not a typical subrogation-type loan receipt between an insured and his insurer in the context of a suit by the insured against a third party.[75]

In addition, *Record* was decided at the pleading stage of the litigation. The *Record* court stated, "It is our opinion defendant has not been prejudiced in any manner by the action of those parties in entering into the agreement or their actions pursuant to the agreement."[76] Since much of the prejudice caused by Mary Carter agreements occurs during trial, the *Record* court did not have before it, as the *Lum* court did, a case in which the champertous agreement tainted the fairness of the trial.[77]

In light of the original purpose of the champerty doctrine to discourage unnecessary and oppressive litigation,[78] Mary Carter agreements are champertous. The agreeing defendant acquires an interest in the plaintiff's claim, through the agreement, which in turn creates a barrier to settlement with the nonagreeing defendant.[79] The doctrines of champerty and maintenance, however,

---

72. *See supra* text accompanying notes 39-49.

73. 222 Tenn. at 556, 438 S.W.2d at 747. For this proposition, the court quoted Staub v. Sewanee Coal, Coke & Land Co., 140 Tenn. 505, 509, 205 S.W. 320, 322 (1917). In a 1983 article on the subject of champerty, however, Dean Cox reviewed the history of Tennessee common law and various statutory enactments and repeals dealing with champerty and maintenance. While the article primarily concerns champerty as a prohibition on the buying of pretensed titles to real property, Dean Cox concluded that it is unclear whether Tennessee has abandoned the prohibition of champerty and maintenance with regard to sharing the proceeds of lawsuits. Cox, *Champerty As We Know It*, 13 MEM. ST. U.L. REV. 139, 198, 201 (1983).

74. If the agreement is "illegal," a court may refuse to enforce it between the parties, which will discourage parties from entering into such an agreement because the success of the arrangement will depend upon the parties' willingness to abide by its terms. In addition, the attorneys who participate in a Mary Carter agreement may be subject to discipline for their involvement in an illegal arrangement. *See infra* text accompanying note 86.

75. Selective, the agreeing defendant, had denied coverage and was originally a defendant to the plaintiff's claim. 222 Tenn. at 550-51, 438 S.W.2d at 744-45. By entering into the agreement, Selective was not seeking to assure its subrogation rights against a third-party tortfeasor or obligor. Rather, Selective was attempting to avoid coverage altogether by guaranteeing that the plaintiff would seek full recovery from the nonagreeing defendant. For further discussion of the distinction between subrogation loan receipts and Mary Carter loan receipts, see *supra* note 6.

76. 222 Tenn. at 557, 438 S.W.2d at 747. *But see supra* note 14 (prejudice to the nonsettling defendant in attempting to negotiate settlement with the plaintiff).

77. *See infra* text accompanying notes 95-96.

78. The background of champerty includes a medieval and Christian condemnation of litigiousness and a prohibition against a feudal practice by which powerful persons enhanced their estates through purchasing and prosecuting doubtful claims to land in exchange for a share of the proceeds. 6A A. CORBIN, *supra* note 58, § 1422; Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 68 (1935).

79. *See supra* note 14 and *infra* notes 304-11 and accompanying text.

have been eroded in recent years.[80] Thus, although the *Lum* court and other courts have found Mary Carter agreements prohibited by champerty,[81] it is unlikely champerty will provide a solution to the problems of Mary Carter agreements in many jurisdictions. In any case, it is more satisfactory for courts to address directly the problems of unfairness to nonsettling defendants that are created by Mary Carter agreements, than to respond to these agreements solely within the limited confines of the champerty doctrine.

2. Ethics

Ethical considerations, relied upon by the *Lum* court,[82] provide a second set of reasons for eliminating Mary Carter agreements. In addressing those considerations, it is necessary to distinguish between Mary Carter agreements that are kept secret and those that are not.

All courts that have ruled upon the use of Mary Carter agreements have held that such an agreement must be disclosed by the agreeing parties either without request or, in some cases, in response to an inquiry by another party to the action.[83] These courts have recognized a trial that proceeds with a Mary Carter agreement in effect may be unfair to the nonsettling defendant and present to the court, jury and public a spurious impression of the real interests of the parties. Only by requiring disclosure can courts act to eliminate these problems.[84]

In jurisdictions where courts have ruled in favor of automatic disclosure, it would be an indisputable breach of legal ethics for an attorney to keep a Mary Carter agreement secret.[85] In jurisdictions where there are no judicial decisions

80. Corbin asserts that in many states, the doctrines of champerty and maintenance were never well established, and in others, the law "has very largely lapsed, except as it may in part be embodied in new statutes." 6A A. CORBIN, *supra* note 58, §§ 1422, 1424. Champerty and maintenance were treated in the RESTATEMENT (FIRST) OF CONTRACTS §§ 540-546 (1932), but are not included in the second Restatement because "legislation has replaced the common law of maintenance and champerty in many states." RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Ch. 8 (1981); *see also supra* note 73. The attorney's contingent fee contract has been a primary concern of champerty as it has developed and been regulated in this country. 6A A. CORBIN, *supra* note 58, §§ 1424-1426; Cox, *supra* note 73, at 197 n.88. The decline of the doctrine, therefore, may be due at least in part to the general acceptance of the contingent fee arrangement, as well as the rise of public interest litigation. *See generally* Cox, *supra* note 73; Radin, *supra* note 78, at 69-78 (defending attorney contingent fee contracts); Case Comment, *Constitutional Law — Tennessee Barratry Statute Conflicts with the First Amendment*, 11 MEM. ST. U.L. REV. 424 (1981).

81. *See supra* notes 39-57 and accompanying text.

82. 87 Nev. at 408, 488 P.2d at 351-52. The court cited a 1970 opinion of the Arizona State Bar Committee on Rules of Professional Conduct, Op. No. 70-18, for the proposition that defense counsel with an actual interest in furthering plaintiff's cause may not participate in litigation. *Id.* at 410, 488 P.2d at 351-52. The opinion prohibited a secret nonconditional settlement in which the settling defendants would participate actively in the trial. The Arizona Supreme Court, however, has approved non-secret Mary Carter agreements (known as Gallagher covenants) if no actual collusion or perjury occurs that prejudices the nonagreeing defendant. *See* City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972); Note, *supra* note 1.

83. *See infra* § III.B.

84. *See infra* § III.

85. Disciplinary Rule 7-102(A) of the Model Code of Professional Responsibility (1981) pro-

requiring automatic disclosure, it is probably still a violation of legal ethics for an attorney to participate in a secret Mary Carter agreement. Ethical Consideration 8-5 provides in part: "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers."[86] A trial in which a plaintiff and a defendant have secretly settled their dispute is fraudulent and deceptive. It permits the settling parties to subvert the rules on distribution of peremptory challenges and examination of friendly and adverse witnesses.[87] It deliberately misleads the fact finder in evaluating the credibility of witnesses and the candor of the attorneys' arguments.[88] Secret Mary Carter agreements simply should not be tolerated.[89] Until a jurisdiction specifically requires disclosure, codefendants may be able to protect themselves by using discovery to request information about settlements between the plaintiff and other parties and then relying upon the duties of counsel in responding to discovery to insure disclosure.[90]

Even when Mary Carter agreements are disclosed, ethical problems remain.[91] The Mary Carter agreement is unique among settlement devices because it not

---

vides: "In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal." Disciplinary Rule 7-106(A) provides: "A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal . . . , but he may take appropriate steps in good faith to test the validity of such rule or ruling." Model Rules of Professional Conduct Rule 3.4 (1983) provides: "A lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

86. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-5 (1981). Model Rules of Professional Conduct Rule 3.3 (1983) provides: "(a) lawyer shall not knowlingly: . . . (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983) (lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation).

87. *See supra* notes 17-21.

88. *See supra* note 22.

89. *See* Daniel v. Penrod Drilling Co., 393 F. Supp. 1056, 1061 (D. La. 1975) ("But even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a facade."); Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 215, 252 N.W. 675, 676-77 (1934) (plaintiff's claim dismissed because secret settlement with one defendant created "fundamental defect in the pleadings").

90. *See, e.g.*, FED. R. CIV. P. 26(e) & (g); TENN. R. CIV. P. 26.05 & .07.

91. Two other ethical objections to Mary Carter agreements, *see* Note, *supra* note 1, at 881-87, certainly apply to their secrecy, but do not present problems as serious if the agreement is disclosed. First, Canon 7 of the Model Code of Professional Responsibility provides that attorneys have a duty to the adversary system of justice to provide "competent, adverse presentation of evidence and issues." EC 7-20. The attorneys for the plaintiff and the agreeing defendant in a Mary Carter situation certainly will not provide adverse presentations. Nevertheless, both of these attorneys will be making presentations adverse to the nonagreeing defendant. So long as the true positions of the parties are fully disclosed to judge and jury, the trial will remain an adversary proceeding, albeit with one more party on plaintiff's side and one less on the nonagreeing defendant's. Second, Canon 9 is entitled, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety" and provides: "A lawyer should promote public confidence in our system and in the legal profession." EC 9-1. The practice of using secret Mary Carter agreements and conducting trials with sham defendants will certainly reinforce notions of attorneys as deceptive and conniving manipulators and of the legal system as a minefield of injustice for the unwary.

only removes the settling defendant's desire to defeat the plaintiff's claim, but also creates a motive for the settling defendant to assist the plaintiff in obtaining the largest possible recovery against the nonsettling defendant. By creating this motivation, the agreement may encourage perjury. Ethical Consideration 7-28 provides, "Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness."[92] Of course, any person who has a stake in the outcome of litigation has an incentive to be untruthful as to those facts unfavorable to his position. That is unavoidable without resorting to the generally discredited practice of disqualifying witnesses for interest.[93] In a case in which the settling tortfeasor is also a witness, however, the Mary Carter agreement often provides a financial inducement for the witness to testify differently than he would if his motivations were not rearranged by the agreement.[94] Although the ability of the nonsettling defendant to impeach the tortfeasor-witness may ameliorate the resulting harm, it is nevertheless ethically questionable for attorneys to play a role in creating such an inducement to perjury.

3. Trial Fairness

The court in *Lum* pointed out in some detail the ways in which the Mary Carter agreement had affected the fairness of the trial. In the opening statement, plaintiff's counsel displayed feigned candor regarding the lack of culpability of the settling defendants. Plaintiff's counsel called the settling defendants as adverse parties, examining one with leading questions, and successfully opposed full cross-examination by the nonsettling defendant's counsel. Plaintiff's counsel did not oppose the granting of motions to dismiss the settling defendants at the close of plaintiff's case.[95] The court concluded that through these "irregularities proceeding from the agreement, the trial was deprived of its proper adversary character."[96]

The *Lum* court also suggested that a fair trial would not have occurred even if the jury had been made aware of the agreement. The court noted that the agreement, written by plaintiff's counsel, contained several self-serving recitals

---

Note, *supra* note 1, at 888, also discusses conflict of interest problems that arise when an attorney represents a defendant and his liability insurer and the Mary Carter agreement is between the liability insurer and the plaintiff. In such a case, the insurer's interest may be in a large plaintiff's verdict while the insured defendant may be interested in being exonerated for any amounts above his insurance coverage.

92. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-28 (1981). Model Rules of Professional Conduct Rule 3.4 (1983) provides: "A lawyer shall not . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

93. *See* MCCORMICK, EVIDENCE § 65 (3d ed. 1984).

94. *See* McKay, *supra* note 6, at 246-51.

95. 87 Nev. at 405-06, 488 P.2d at 348-49.

96. *Id.* at 412, 488 P.2d at 353; *cf. In re* MGM Grand Hotel Fire Litigation, 570 F. Supp. 913, 932 (D. Nev. 1983) (distinguishing *Lum* because the settling defendant would not appear at trial and several other Mary Carter elements were absent).

about the plaintiff's damages, the nonsettling defendant's liability, his insurance and his insurance carrier's "irresponsible position."[97] Thus, presentation of the entire agreement to the jury would have exposed the jury to otherwise incompetent and inadmissible declarations that would have been highly prejudicial and unfair to the nonsettling defendant. The court also stated that it did not know how the jury might react if informed of only the bare terms of the agreement.[98] The court then concluded, "we only know that appellant had the right to litigate his case without hazarding the prospect that such considerations might affect the jury's verdict."[99]

Trial fairness may be the strongest rationale in *Lum* for eliminating Mary Carter agreements because this rationale does not depend upon the somewhat obscure doctrine of champerty and because ethical doctrines do not clearly prohibit non-secret Mary Carter agreements. Nevertheless, the *Lum* direct approach has not been widely followed.[100] As discussed in section III, most courts, apparently believing there is some reason to permit Mary Carter agreements, have adopted various requirements for a trial involving a Mary Carter agreement in an attempt to reconcile these agreements with a fair trial for the nonsettling defendant. The inadequacy of these requirements in assuring a fair trial, and consequently the wisdom of the *Lum* court's conclusion, are addressed further in sections III and IV below.

B. *Applying Credit Rules to Mary Carter Agreements to Prevent Contribution and Indemnity for a Settling Tortfeasor*

Mary Carter agreements interfere with judicial and legislative policies prohibiting or providing for contribution and indemnity among joint tortfeasors.[101] As illustrated by the hypothetical case in the introduction to this article, a Mary Carter agreement is an agreement through which the plaintiff and one defendant hope to place upon the nonsettling defendant alone the duty of compensating the plaintiff for his injuries.[102]

The common law approach to the distribution of liability among joint tort-

---

97. 87 Nev. at 411, 488 P.2d at 352.

98. *Id.* at 412, 488 P.2d at 352-53.

99. *Id.* at 412, 488 P.2d at 353. In response to the argument of plaintiff's counsel that everything they did was "open and aboveboard," the court responded, "It is no answer to say appellant was not stabbed in the back. If his hands were tied, it matters little that he could see the blow coming." *Id.* at 411, 488 P.2d at 352. The court also added, "Thus, we think, the sum of [plaintiff's] counsel's argument is that nimbler opposing counsel and an alert trial judge might have defeated his plan." *Id.*, 488 P.2d at 352.

100. Both jurists and law review writers have agreed, however, for varying reasons, that the result in *Lum* should be followed. Florow v. Louisville & N.R.R. (*In re* Waverly Accident of Feb. 22-24, 1978), 502 F. Supp. 1 (M.D. Tenn. 1979) (discussed *infra* notes 167-77); *see* Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973) (Ervin, J., concurring); Scurlock Oil Co. v. Smithwick, No. C-4838, slip op. at 3 (Tex. Nov. 26, 1986) (LEXIS, States library, Tex file) (Spears, J., concurring) (discussed *infra* notes 318-22); Freedman, *supra* note 6; McKay, *supra* note 6, at 257; *Unfair and Unnecessary*, *supra* note 3, at 801.

101. 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.2, at 57.

102. *See supra* § I.

feasors did not require joinder of all potential defendants[103] and did not permit contribution[104] or indemnity[105] among joint tortfeasors. The plaintiff was presumed to know how best to assert his rights[106] and the courts refused to grant relief, in the form of contribution or indemnity, in favor of a wrongdoer.[107] If the plaintiff settled with one tortfeasor in partial satisfaction of his claim, however, a credit was allowed to diminish the amount of the claim recoverable against other tortfeasors in order to prevent the plaintiff from receiving a double recovery.[108]

A Mary Carter agreement undermines this common law approach. First, the settling tortfeasor obtains the prohibited contribution or indemnity from the nonsettling tortfeasor when the result of the Mary Carter agreement is a judgment of sufficient amount for the plaintiff against the nonsettling tortfeasor. Indemnity is accomplished when the amount of the judgment exceeds the guarantee in the agreement so that the settling tortfeasor ultimately pays nothing to the plaintiff, while the nonsettling tortfeasor must satisfy the entire judgment. Contribution, rather than full indemnity, is achieved when the judgment against the nonsettling defendant is not large enough to permit the settling tortfeasor to avoid all payment to the plaintiff, but is large enough to partially satisfy the settling tortfeasor's obligation to the plaintiff under the agreement.[109]

Second, a Mary Carter agreement induces the plaintiff to select his defendant because of the agreement, rather than because of his assessment of the relative culpability of the tortfeasors.[110] Also, because the plaintiff does not receive a double recovery if the settling tortfeasor ends up paying nothing to the plaintiff, the settlement does not provide a credit reducing the plaintiff's judgment against the nonsettling tortfeasor.[111] Thus, the nonsettling tortfeasor becomes the sole target of the plaintiff's litigation efforts with no corresponding benefit of a setoff against the plaintiff's judgment.

In jurisdictions that permit contribution among joint tortfeasors,[112] the goal

---

103. W. PROSSER & W. KEETON, *supra* note 9, § 47, at 327.

104. *Id.* § 50, at 337.

105. Under very limited circumstances, one joint tortfeasor may be entitled to indemnity from another. *See* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.2, at 57-63; W. PROSSER & W. KEETON, *supra* note 9, § 51; V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.9 (1974 & Supp. 1981); Note, *Tennessee Survey of the Law — Indemnity in Tort*, 7 MEM. ST. U.L. REV. 307 (1977).

106. Reese v. Chicago, B. & Q.R.R., 55 Ill.2d 356, 367, 303 N.E.2d 382, 388 (1973) (Schaefer, J., dissenting).

107. W. PROSSER & W. KEETON, *supra* note 9, § 50.

108. *Id.* § 49, at 335-36.

109. For example, in the hypothetical case in the introduction to this article, assume a judgment against both defendants, or against the nonsettling defendant alone, for $25,000. Under the terms of the Mary Carter agreement, the plaintiff will collect $25,000 from the nonsettling defendant and $25,000 from the settling defendant.

110. In Reese v. Chicago, B. & Q.R.R., 55 Ill. 2d 356, 367, 303 N.E.2d 382, 388 (1973), Justice Schaefer, dissenting, argued that while many factors may legitimately influence the plaintiff's free choice of defendants, "the law should not permit that choice to be influenced by a payment received from one defendant which is designed to operate as an inducement to the plaintiff to join in a pursuit of the other defendants, to the advantage of both of the pursuing parties."

111. *See infra* notes 137-41 and accompanying text. *But see infra* notes 121-32.

112. Today, "[n]early every jurisdiction, with the notable exception of South Carolina, has

of the law is to promote equitable sharing of liability among the tortfeasors.[113] Contribution, not indemnity, is provided for joint tortfeasors who satisfy more than their equitable share of the plaintiff's claim.[114] In these jurisdictions, a tortfeasor who settles with the plaintiff without obtaining the plaintiff's release of the other tortfeasors is not permitted to seek contribution from the other tortfeasors[115] and, as in the common law approach, the plaintiff's claim against the other tortfeasors is reduced on the basis of the partial settlement of the claim.[116] In this way, the settling tortfeasor pays his equitable share to the plaintiff in settlement and the nonsettling defendant is not liable for that share.[117]

---

provided some method for shifting the burden for joint and several liability." *Negotiation and Settlement: Partial Settlement*, 51 Civil Trial Manual (BNA) 801, 804 (1985); UNIF. COMPARATIVE FAULT ACT, Prefatory Note, 12 U.L.A. 38 (Supp. 1986) ("[A] substantial majority of the states now have contribution in some form and the Restatement (Second) of Torts § 886A, now provides for it.") *But see infra* § II.D. *See generally* F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.2, at 40-54.

113. The Commissioner's Prefatory Note to the 1955 Revision of the Uniform Contribution Among Tortfeasors Act states, "This act would distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1985) Commissioner's prefatory note, 12 U.L.A. 59 (1975).

114. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939) § 2(2), 12 U.L.A. 57 (1975); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 1(b), 12 U.L.A. 63 (1975); UNIF. COMPARATIVE FAULT ACT, § 4(a), 12 U.L.A. 44 (Supp. 1986). The original Uniform Contribution Among Tortfeasors Act, adopted in 1939, appears in the latest (1975) edition of Uniform Laws Annotated in the Historical Note to the 1955 Revised Act. For clarity, citations to the 1939 and 1955 Acts will indicate the year after the title.

115. Section 1(d) of the 1955 Act provides:

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955), 12 U.L.A. 63 (1955); *see also* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939) § 2(3), 12 U.L.A. 57 (joint tortfeasor who settles is not entitled to contribution from non-settling joint tortfeasor); UNIF. COMPARATIVE FAULT ACT § 4(b), 12 U.L.A. 44 (Supp. 1986) (settling party entitled to contribution if liability was extinguished and only to extent settlement amount was reasonable).

116. Various credit schemes have been devised. The most common rules provide for either a pro rata credit for the shares of the settling tortfeasors or a pro tanto credit for the amount paid in settlement. These credit rules were judicially created at common law, *see supra* note 108 and accompanying text, and have been incorporated into statutory systems allowing for contribution among tortfeasors. *See* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939) § 5, 12 U.L.A. 58 (1975) (pro rata); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 4, 12 U.L.A. 98 (1975) (pro tanto). Under the UNIF. COMPARATIVE FAULT ACT, § 6, 12 U.L.A. 45-46, (Supp. 1986), the plaintiff's claim is reduced by the percentage of the settling defendant's causal fault. *See* Diggs v. Hood, 772 F.2d 190 (5th Cir. 1985) (construing Unif. Comparative Fault Act as partially adopted in Louisiana); *see also* V. SCHWARTZ, *supra* note 105, § 16.5 (discussion of comparative negligence of tortfeasors not joined as defendants); *infra* note 161 (discussion of § 6 of UNIF. COMPARATIVE FAULT ACT). *But see* Mayhew v. Berrian County Rd. Comm'n, 414 Mich. 399, 326 N.W.2d 366 (1982) (pro tanto reduction under Michigan's comparative fault system). For an excellent discussion of these rules and other variations, see Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZAGA L. REV. 69, 77-105 (1985).

117. The Commissioner's Comment to § 1(d) states:

A successful Mary Carter agreement subverts the equitable sharing contemplated by systems of contribution among joint tortfeasors. In a Mary Carter agreement, the settling tortfeasor makes only a contingent payment to the plaintiff and, in effect, obtains contribution toward that payment from the nonsettling tortfeasor if the plaintiff obtains a sufficiently large judgment against the nonsettling tortfeasor. The settling tortfeasor thus may avoid paying his equitable share, or any share at all, through the interest he acquires in the plaintiff's claim. If the plaintiff's judgment against the nonsettling tortfeasor is not reduced on account of the settlement, and if, for reasons discussed in section II.C., the settling tortfeasor is able to avoid contribution to the nonsettling tortfeasor, the effect is that the nonsettling tortfeasor bears the entire burden of satisfying the plaintiff's claim.

The effect of a Mary Carter agreement in facilitating otherwise prohibited contribution or indemnity has led some courts to balk at giving these agreements their intended effect.[118] One way to eliminate this effect of a Mary Carter agreement is to follow *Lum* — void the agreement altogether and order that the proceedings begin anew.[119] Another approach reasons that because the Mary Carter agreement contains a release of the settling defendant, it is a settlement for the guaranteed amount. The settlement then triggers a reduction of any verdict the plaintiff recovers against other tortfeasors which, in effect, is a credit for the nonsettling tortfeasors.[120] The credit eliminates that part of the nonsettling defendant's liability that by design in a Mary Carter agreement ultimately benefits the settling defendant.

This approach is illustrated by *Cullen v. Atchison, Topeka & Santa Fe Railway*.[121] The *Cullen* court ruled that the nonsettling defendant would be entitled to a $29,600 credit toward any judgment the plaintiff obtained against the nonsettling defendant. The credit represented an amount the plaintiff received from the settling defendant pursuant to a Mary Carter loan receipt.[122] The court reasoned that the substance of the loan receipt agreement was an attempt by one tortfeasor to obtain indemnity, or at least contribution, from another tortfeasor. Under Kansas law, neither contribution nor indemnity was allowed in the circumstances of the case.[123] The court concluded, therefore, that the agreement must be "held

---

> The policy of the Act is to encourage rather than discourage settlements. The tortfeasor who settles removes himself entirely from the case so far as contribution is concerned if he is able and chooses to buy his peace for less than the entire liability. If he discharges the entire obligation it is only fair to give him contribution from those whose liability he has discharged. Since the settlement must be reasonable it follows that the question of total liability to the injured party may be litigated in the contribution action.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(d) comment, 12 U.L.A. 65 (1975). *See generally* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.2, at 54-57.

118. *See infra* text accompanying notes 121-25 & 143-51.

119. 87 Nev. 402, 488 P.2d 347; *see supra* notes 39-57 and accompanying text.

120. *See supra* notes 108 & 116 and accompanying text.

121. 211 Kan. 368, 507 P.2d 353 (1973).

122. *Id.* at 377-78, 507 P.2d at 361-62.

123. *Id.* at 375, 507 P.2d at 361.

ineffective" to confer these benefits on the settling defendant.[124] The court's solution to the problem, however, was to give the agreement effect, not as it was written, but as if it were a conventional, unconditional partial settlement in which the plaintiff received the money with no obligation to repay and the amount received operated as a credit to the subsequent judgment against the nonsettling defendant.[125]

In *Cullen* and other cases holding that the nonsettling defendant is entitled to a credit on account of the Mary Carter agreement,[126] the Mary Carter agreement was in the form of a loan receipt. The guaranteed amount was actually advanced to the plaintiff prior to the resolution of the litigation.[127] The *Cullen* court treated the fact that the money had been received by the plaintiff as significant in its resolution of the problem. It stated, "The policy of our law where efforts have been made to thwart the rules respecting either contribution or indemnity has been to leave the parties where it finds them."[128] Because the plaintiff already had the money and the repayment clause was unenforceable, the court could conclude that the plaintiff would retain the money and the nonsettling defendant would be entitled to the credit.

If the *Cullen* court's treatment of the Mary Carter agreement turned upon the fact that the plaintiff had actually received the payment, the possibility remains that a credit for the nonsettling defendant would not be appropriate in the case of a Mary Carter agreement in which the settling tortfeasor will make no actual payment to the plaintiff until the litigation against the nonsettling defendant is resolved.[129] Assuming, however, that a court is willing to

---

124. *Id.*, 507 P.2d at 361. The result in *Cullen* was also reached in Bolton v. Ziegler, 111 F. Supp. 516, 531 (N.D. Iowa 1953), in which the court stated, "The basis of the Iowa rule of *pro tanto* reduction is the prevention of unjust recoveries. There is no reason for assuming that the Iowa Supreme Court is concerned only with the prevention of unjust recoveries by claimants and has no concern as to unjust recoveries by joint tortfeasors."

125. 211 Kan. at 377, 507 P.2d at 362. In Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 660, 537 P.2d 825, 829 (1975), the court followed Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa) in holding that a Mary Carter agreement's repayment clause was void because it violated the state's prohibition against contribution among tortfeasors. The court did not, however, treat the agreement as an unconditional settlement. The court gave the plaintiff an option. She could either affirm the agreement as final and accept a reduction of her judgment against the nonsettling tortfeasor, or she could rescind the agreement and the court would order a new trial. *Id.* at 662, 537 P.2d at 830; *see also* Tober v. Hampton, 178 Neb. 858, 876, 136 N.W.2d 194, 205 (1965) (Mary Carter loan receipt thwarted Nebraska law prohibiting indemnification and contribution among tortfeasors; plaintiffs' claim dismissed because they were no longer real parties in interest) (overruled by Royal Indem. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975) to the extent that *Tober* held negligent joint tortfeasors not entitled to contribution); Thornton & Wick, *supra* note 3, at 238 (advocating pro tanto credit for Mary Carter agreements). *Contra* Jensen v. Beaird, 40 Wash. App. 1, 7, 696 P.2d 612, 618 (1985) (rejecting *Monjay*).

126. *See supra* notes 124-25 and *infra* notes 130, 141 & 151.

127. *See generally supra* note 6.

128. 211 Kan. at 377, 507 P.2d at 362.

129. *See, e.g., supra* text accompanying notes 9-12. This reasoning was applied by the court in Hemet Dodge v. Gryder, 23 Ariz. App. 523, 530, 534 P.2d 454, 461 (1975), in which the

take the approach of rewriting the parties' agreement, as the *Cullen* court did,[130] the fact of advance payment should not be significant. In the case of a Mary Carter agreement that is not a loan receipt, the court could hold that the promise to pay the guaranteed amount is unconditional and, consequently, entitles the nonsettling defendant to the appropriate pro tanto or pro rata credit.[131]

Mary Carter agreements become much less attractive when courts adopt a rule that provides a credit for the nonsettling defendant on the basis of such an agreement. Under this circumstance, it is impossible for the plaintiff to achieve full satisfaction from the nonsettling defendant because any judgment is reduced, either by the amount of the Mary Carter agreement guarantee (pro tanto) or by the settling defendant's pro rata share of the judgment.[132] Either the plaintiff is unable to achieve a complete recovery because the agreement does not require the settling defendant to pay if there is a verdict for the guaranteed amount or more against the nonsettling defendant, or the settling defendant pays the guaranteed amount, as in *Cullen*, in spite of a verdict for all the damages against the nonsettling defendant. In either case, the nonsettling defendant is not required to contribute the entire portion of liability that the parties to the Mary Carter agreement contemplated he would be forced to contribute.

The credit approach to Mary Carter agreements, however, does not entirely eliminate their use. A settling defendant will still be willing to enter into a

---

court's entire response to nonsettling defendant's motion for credit was that "no money was actually paid to the plaintiff under the covenant prior to judgment. Since no money was paid, the rule pertaining to credit . . . does not apply."

130. The approach of converting a Mary Carter agreement into a final settlement was criticized by the court in Bass v. Phoenix Seadrill/78 Ltd., 749 F.2d 1154 (5th Cir. 1985). The district court in *Bass* found that the Mary Carter agreement was unfair to the plaintiff, a seaman, and that it acted as a deterrent to settlement with the remaining defendants. In entering judgment, therefore, the court enforced the agreement as if it were a straight settlement. *Id.* at 1158. The Court of Appeals reversed, not because it necessarily approved of Mary Carter agreements, *id.* at 1158 nn.6 & 7, but because it disagreed with the district court's finding that the plaintiff and nonsettling defendants had been adversely prejudiced by the agreement. *Id.* at 1160-65. Moreover, the court stated, "We have grave doubts whether a district court faced with an unenforceable settlement provision can simply write the offensive provision out of the agreement and effectively bind the parties to a deal they never contemplated." *Id.* at 1165 n.19. *See generally* Note, *Mary Carter Agreements in Maritime Personal Injury Suits*, 22 S. TEX. L.J. 545 (1982).

131. This result appears to have occurred in the recent case of Schick v. Rodenburg, 397 N.W.2d 464 (S.D. 1986), in which the court held that the nonsettling defendants were entitled to a credit of $200,000 on the basis of a Mary Carter agreement that provided for an $85,000 loan and an additional $115,000 guarantee if the plaintiff recovered less than $200,000 from the nonsettling defendants.

132. In the case of proportionate credit in a comparative fault system, *see supra* note 116, Mary Carter agreements are less deterred. The settling parties may succeed at trial in assuring that only a small percentage of fault, if any, is attributed to the settling defendant. Thus, the nonsettling defendant's liability to the plaintiff would be reduced only minimally, if at all. *See Unfair and Unnecessary*, *supra* note 3, at 800; Case Note, *supra* note 59, at 588; *infra* note 161. *But see Mary Carter in Michigan*, *supra* note 3, at 640 (reducing a plaintiff's recovery against nonsettling defendants by the settling defendant's comparative fault will make Mary Carter agreements less attractive to more culpable defendants unable to avoid a large percentage allocation of fault).

Mary Carter agreement if the opportunity exists to limit or escape liability. A plaintiff may be willing to accept something less than full recovery from the nonsettling defendant in exchange for the guarantee of some recovery from the settling defendant and the settling defendant's assistance at trial in maximizing the verdict against the nonsettling defendant.[133]

The credit rule also fails to address the problem of trial unfairness caused by these agreements. In *Ward v. Ochoa*,[134] the Florida Fourth District Court of Appeal ordered the plaintiff to produce a previously undisclosed Mary Carter agreement and permitted the nonsettling defendants to apply to the trial court for a pro tanto credit toward the judgment against them.[135] The Supreme Court of Florida, however, concluding that a "set-off in favor of the petitioners would be insufficient in correcting possible injustice," ordered a new trial at which the Mary Carter agreement would be admissible in evidence.[136]

Courts in some jurisdictions have rejected the argument that the credit rule should be applied to Mary Carter agreements because they are inimical to the policy against contribution. The classic statement of this position is found in *Reese v. Chicago, Burlington & Quincy Railroad*,[137] in which the Supreme Court of Illinois reversed a trial judge's decision that had converted a Mary Carter loan agreement into an unconditional covenant not to sue and reduced the plaintiff's verdict by the "loan" amount.[138] The supreme court framed the issue as, "whether our policy of denying contribution between joint tortfeasors outweighs the considerations favoring private settlement of lawsuits."[139] The court acknowledged that a Mary Carter agreement permits a joint tortfeasor to do indirectly what he may not do directly. The court reasoned, however, that "the principal objection to contribution — use of the courts for relief of wrongdoers

133. For instance, a plaintiff may value his claim at $600, but believe that his chances of winning at trial are small if both defendants defend vigorously. He enters into a Mary Carter agreement with one defendant that guarantees recovery of $200. If the verdict against the nonsettling defendant is less than $200, the settling defendant will pay the plaintiff the difference between the verdict and $200. If the verdict exceeds $200, the settling defendant pays nothing. The verdict is for the full claim — $600. Under a pro tanto credit rule, the plaintiff's judgment against the nonsettling defendant, and ultimate recovery, will be $400; under a pro rata rule, it will be $300. In *Unfair and Unnecessary*, *supra* note 3, at 799, the writer concludes that even pro rata reduction on the basis of a Mary Carter agreement will not eliminate their use because the plaintiff may believe that enlisting the support at trial of one defendant will produce the maximum possible recovery, notwithstanding the reduction. With regard to a comparative fault system, see *infra* note 161.

134. 271 So. 2d 173, 174 (4th D.C.A.), *modified*, 284 So. 2d 385 (Fla. 1973).

135. *Id.*

136. Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973). The court also specifically rejected the views expressed in Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d D.C.A. 1967). 284 So. 2d at 388.

137. 55 Ill. 2d 356, 303 N.E.2d 382 (1973).

138. *Id.* at 358-59, 303 N.E.2d at 385; *accord* Hemet Dodge v. Gryder, 23 Ariz. App. 523, 530, 534 P.2d 454, 461 (1975); Jensen v. Beaird, 40 Wash. App. 1, 7, 696 P.2d 612, 618 (1985). The plaintiff in *Reese* received $57,500 repayable from any judgment collected against the nonsettling defendant. The judgment obtained was $149,000. Under the trial judge's holding, the plaintiff was not obligated to repay the loan. 55 Ill. 2d at 358-59, 303 N.E.2d at 383-84.

139. 55 Ill. 2d at 363, 303 N.E.2d at 386.

— is absent from this private, out-of-court arrangement."[140] The court next asserted that Mary Carter agreements have "salutory effects" including that "funds under this arrangement will be more readily offered to injured plaintiffs" and that these agreements "may tend to simplify complex multiparty litigation, and are desirable from the standpoint of facilitating private resolution of litigation."[141] Thus, because there was no reduction in the plaintiff's verdict against the nonsettling defendant and because Illinois law did not provide contribution among tortfeasors, the settling defendant in *Reese* was able to use a Mary Carter agreement successfully to shift all liability to the nonsettling defendant.[142]

Jurisdictions that permit contribution among joint tortfeasors retain pro rata, pro tanto, or proportionate reduction rules[143] and provide that a defendant who settles with the plaintiff is not permitted to obtain contribution from other tortfeasors whose liability has not been extinguished by the settlement.[144] The benefit to the settling defendant is that he is released from liability to the plaintiff and possibly from liability to other tortfeasors for contribution.[145] In *Alder v. Garcia*,[146] the court refused to enforce a Mary Carter agreement because it had the effect of providing contribution to a settling defendant in contravention of New Mexico's Contribution Among Joint Tort Feasors Act.[147] The issue arose in *Alder* in a somewhat unusual fashion. The plaintiff's suit against the first tortfeasor was settled through a Mary Carter agreement that gave the plaintiff $40,000 in exchange for a release of liability and an assignment to the settling tortfeasor of half of any recovery against the nonsettling tortfeasor not to exceed $80,000. During the subsequent trial, the nonsettling tortfeasor learned of the

---

140. *Id.* at 363-64, 303 N.E.2d at 386. Arguably because the plaintiff's success will benefit the settling defendant, the court is being used to benefit a "wrongdoer."

141. *Id.*, 303 N.E.2d at 386. Dissenting in *Reese*, Justice Schaefer, joined by two others, argued that the Mary Carter agreement increases, rather than diminishes, litigation and unjustly gives the settling defendant a chance to avoid any financial loss. *Id.* at 365-68, 303 N.E.2d at 387-88.

In Popovich v. Ram Pipe & Supply Co., 82 Ill. 2d 203, 412 N.E.2d 518 (1980) and Palmer v. Avco. Distrib. Corp., 82 Ill. 2d 211, 412 N.E.2d 959 (1980), the Illinois Supreme Court held that loans not repayable under a Mary Carter agreement must be set off. In *Palmer*, the plaintiff would retain the $266,000 loan because the judgment against the nonsettling defendant was $492,000 and the agreement required repayment only if the verdict exceeded $500,000. The supreme court required a credit to prevent double recovery for the plaintiff. 82 Ill. 2d at 223-26, 412 N.E.2d at 965-67. A new trial on damages only was granted, however, so that the jury might be informed of the effect of the agreement. *Id.* at 227, 412 N.E.2d at 967. The jury thus will be able to increase the damages to an amount that will provide the *Reese* result — a repayment of the loan to the settling defendant and full recovery for the plaintiff from the nonsettling defendant. Justice Ryan dissented from this handling of loan agreements because settling defendants may still use these agreements to escape liability. *Id.* at 233-34, 412 N.E.2d at 970 ("I view this case as a fulfillment of the prophesy [sic] of Mr. Justice Schaefer in the dissent in *Reese*.").

142. 55 Ill. 2d at 363, 303 N.E.2d at 386.

143. *See supra* note 116.

144. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939) § 2(3), 12 U.L.A. 57 (1975); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955), § 1(d), 12 U.L.A. 63 (1975); UNIF. COMPARATIVE FAULT ACT § 4(b), 12 U.L.A. 44 (Supp. 1986).

145. *See infra* notes 158-61 and accompanying text.

146. 324 F.2d 483 (10th Cir. 1963).

147. *Id.* at 485.

assignment. It then settled with the plaintiff by paying him $40,000 and promising to indemnify him in any suit by the settling tortfeasor to enforce the assignment. The original settling tortfeasor then brought suit to enforce the assignment against both the plaintiff and the tortfeasor who had settled at trial.[148]

The court of appeals pointed out that the Uniform Joint Tort Feasors Act of New Mexico provided that a release from the plaintiff did not relieve a settling tortfeasor of liability for contribution unless the release provided for a pro rata reduction of the plaintiff's damages against all other tortfeasors and, further, that a settling tortfeasor in such a case was not entitled to contribution from other tortfeasors.[149] The court denied enforcement because the agreement benefitted the settling defendant in a manner contrary to the public policy of New Mexico.[150] The *Alder* holding gave a Mary Carter agreement the effect of a final partial settlement in which the settling defendant was released from liability to the plaintiff, but received no contribution from the remaining defendant.[151]

---

148. *Id.* at 483-84.

149. *Id.* at 485.

150. *Id.*; *see also* Atlantic Ambulance & Convalescent Serv., Inc. v. Asbury, 330 So. 2d 477 (Fla. 4th D.C.A. 1975) (where plaintiff and codefendant had agreement limiting liability, amount of verdict rendered against other defendants entitled to reduction by amount of codefendant's agreement). *Contra* Slaughter v. Pennsylvania X-ray Corp., 638 F.2d 639, 644 (3d Cir. 1981).

In Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301 (5th Cir. 1986), similar to an attempt to avoid a prohibition against contribution, an obligor sought to use a Mary Carter agreement to avoid a waiver of subrogation clause. As in *Alder*, the nonsettling defendant, upon learning of the agreement, settled with the original plaintiff and directly confronted the settling defendant's attempt to shift liability. The original plaintiff, Tye, a seaman, had sued three defendants for injuries he sustained at an oil platform. The defendant boat lessor had obtained an insurance policy from British Underwriters, which also covered defendant Marathon, the lessee, as an additional assured. The policy also waived subrogation rights against Marathon. Underwriters, however, settled with Tye for $60,000, with a "side letter" in which Tye agreed to pay Underwriters the first $30,000 he recovered in his suit against Marathon. When Marathon learned of the settlement agreement, it paid Tye $85,000 and sued Underwriters to recover all or part of the $30,000 that Tye was required to pay Underwriters under the agreement. *Id.* at 1303. The court agreed with Marathon that Underwriters was barred by the waiver of subrogation clause from recovering any of its $60,000 settlement with Tye from Marathon. It then stated, "What British Underwriters could not do directly by suit in their own name, they cannot do indirectly, by using Tye as their cat's paw." *Id.* at 1304. The court then found that the Mary Carter agreement had damaged Marathon because Tye would not settle with Marathon for less that $85,000, even though he would have accepted $55,000 from Marathon if he had been able to keep all of Underwriter's $60,000 settlement. The court awarded Marathon $27,500 against Underwriters. *Id.*

151. *But see* Palmer v. Avco Distrib. Corp., 82 Ill. 2d 211, 224, 412 N.E.2d 959, 966 (1980), in which the court noted that Illinois' contribution statute, adopted in 1979, evidences a policy of protecting the financial interest of nonsettling parties in a settlement. Nevertheless, the court held that amounts paid to a plaintiff under a Mary Carter loan agreement, which the plaintiff would return to the settling defendant from recovery against the nonsettling defendant, would not be credited against the judgment. *Id.* at 227, 412 N.E.2d at 967; *see also* Webb v. Dessert Seed Co., 718 P.2d 1057 (Colo. 1986), in which the trial court, pursuant to the Unif. Contribution Among Tortfeasors Act, reduced the plaintiffs' verdict by the $200,000 they received under a Mary Carter loan receipt. *Id.* at 1061 n.5. The Colorado Supreme Court reversed this reduction, reasoning simply that the plaintiffs would not receive double recovery because the agreement required them

A different approach to Mary Carter agreements consistent with permitting contribution among tortfeasors is to hold that a Mary Carter agreement is not a settlement at all for purposes of either crediting a judgment against nonsettling tortfeasors or relieving the settling defendant of liability for contribution.[152] Mary Carter agreements can successfully subvert systems of contribution among tortfeasors only if the parties to the agreement are permitted to have it both ways — to treat the agreement as a settlement that relieves the settling defendant of liability for contribution, yet not give any credit to the nonsettling tortfeasors.

C. *Deterring Mary Carter Agreements by Allowing Contribution for the Nonsettling Party*

Several writers have suggested that where a duty of contribution among joint tortfeasors exists, Mary Carter agreements will be eliminated. They reason that a defendant has no incentive to enter into a Mary Carter agreement and to strive to achieve a large plaintiff's verdict if he may still be liable to a codefendant for contribution in the event of a judgment against them both.[153] Thus, even if a Mary Carter agreement is not foiled by allowing a credit against the nonsettling party's liability to the plaintiff,[154] it may be foiled by retaining the settling defendant's duty of contribution.

While contribution may eliminate some of the attractiveness of Mary Carter agreements, it does not completely eliminate their use.[155] One reason for this is that cooperation between the parties to a Mary Carter agreement creates the possibility of a verdict that absolves the settling defendant of liability to the plaintiff, in which case the settling defendant will not be liable for contribution.[156] In addition, some courts have held that settling defendants are not liable for contribution even without a verdict in their favor because their Mary Carter

---

to transfer $200,000 to the settling defendant. *Id.* at 1068. The court acknowledged that under the agreement, the settling obligor was not only relieved of liability, but could actually recover more than it paid the plaintiffs. Nevertheless, the arrangement was not objectionable because the plaintiffs' claims were "freely assignable" under Colorado law. *Id.* In Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 511 n.9 (9th Cir. 1974), the court expressed no opinion as to whether, for purposes of Alaska's contribution act, the plaintiff's claim would be reduced on the basis of the "loaned" funds.

152. *See infra* § II.C.

153. *See* Taylor v. DiRico, 124 Ariz. 513, 520, 606 P.2d 3, 10 (1980) (Gordon, J., concurring); Freedman, *supra* note 6, at 617-19; *Unsettling Contributions*, *supra* note 1, at 148; Note, *The Mary Carter Agreement — Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1406-07 (1974); *see also* Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973) (Deckle, Jr., concurring) (it is essential to remove the limitation imposed by the rule against the division of liability among joint tortfeasors).

154. *See supra* § II.B.

155. *Unfair and Unnecessary*, *supra* note 3, at 798-99; Case Note, *supra* note 59, at 588.

156. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 3(f), 12 U.L.A. 89 (1975) provides: "The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution." The Commissioners' Comment states:

> Subsection (f). Res Adjudicata. This seems necessary in view of the position some courts have taken that adjudication of liability to the plaintiff of several defendants is not

settlement with the plaintiff absolves them of liability for contribution.[157] If a settling defendant avoids contribution, either through a favorable verdict or because he has "settled" with the plaintiff, and at the same time avoids crediting the plaintiff's verdict on account of the settlement, the Mary Carter agreement will have accomplished a shifting of all liability to the nonsettling defendant.

This result is less likely in a jursdiction with the 1939 version of the Uniform Contribution Among Tortfeasors Act because under its provisions, a settling tortfeasor is released from contribution only if the settlement provides for a reduction of the plaintiff's claim by the settling tortfeasor's pro rata share.[158] This provision, however, deters not only Mary Carter agreements,[159] but all partial settlements.[160] For that very reason, the more widely followed 1955 re-

---

> necessarily res adjudicata of the liability for determination of contribution claims. Obviously, the defendants should be bound as among themselves by the adjudication of their liability to the claimant.

Id. at 90-91; *see also* TENN. CODE ANN. § 29-11-104(f) (1980) (judgment determining liability of several defendants shall be binding among the defendants in determining contribution or indemnity); Bible & Godwin Constr. Co. v. Faener Corp., 504 S.W.2d 370, 372 (Tenn. 1974) (judgment in favor of defendant bars codefendants' claim of contribution or indemnity). A Mary Carter agreement increases the likelihood of a verdict in favor of the settling defendant, of course, because the plaintiff has no incentive to obtain a judgment against the settling defendant and will cooperate with him. *See supra* notes 15-18 and accompanying text.

157. *See infra* notes 186-95 and accompanying text.

158. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939) § 5, 12 U.L.A. 58 (1975). Nevertheless, if the settling defendant is absolved of liability at trial, and the plaintiff obtains a verdict against the nonsettling defendant, the liability shifting could be accomplished. In Arkansas, where the 1939 uniform act is in effect, ARK. STAT. ANN. §§ 34-1001 to -1009 (1962), such a result was obtained in the second trial in Shelton v. Firestone Tire & Rubber Co., 281 Ark. 100, 662 S.W.2d 473 (1984). The judgment against the nonsettling defendant and in favor of the other defendants was reversed, however, because of the undisclosed Mary Carter agreement. Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982); *see also* Firestone Tire & Rubber Co. v. Little, 269 Ark. 636, 599 S.W.2d 756 (Ark. 1980) (first trial). On retrial, all defendants were found liable. *Shelton*, 281 Ark. at 102, 662 S.W.2d at 474.

One nonsettling defendant then sought contribution from the settling defendant, which was denied by the trial court. The Supreme Court of Arkansas reversed. The court stated, "The 'Mary Carter' agreement should not have been the basis for relieving Shelton [settling defendant] of his share of the liability determined by the jury." *Id.* at 103, 662 S.W.2d at 475. Illustrative of the lengths to which plaintiffs will go to obtain a Mary Carter guarantee, the agreement in *Shelton* combined a Mary Carter agreement with a Pierringer release. *See infra* note 160. The plaintiff in *Shelton* had agreed to hold the settling defendant and his insurance carrier harmless from claims for contribution against them. 281 Ark. at 102, 662 S.W.2d at 474. Thus, in this case, the plaintiff bore the risk of the court's unwillingness to cooperate in the liability shifting scheme.

159. *But see supra* note 133.

160. *See* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 4, Commissioners' Comment to subsection (b), 12 U.L.A. 99-100 (1975). Not surprisingly, a settlement device has developed that is designed to overcome the impediment of pro rata credit, particularly in jurisdictions that have comparative negligence. The Pierringer release is an agreement between a plaintiff and a potential tortfeasor that (1) releases the settling tortfeasor from the lawsuit and discharges that part of the plaintiff's claim attributable to the settling tortfeasor; (2) reserves the balance of the claim against the nonsettling tortfeasor; and (3) contains an agreement whereby the plaintiff indemnifies the settling tortfeasor from any claims of contribution made by the nonsettling tortfeasors and agrees to satisfy any judgment he obtains from the nonsettling tortfeasors to the extent attributable to the settling tortfeasor's causal fault. *See, e.g.*, Frey v. Snelgrove, 269 N.W.2d 918, 920-22 (Minn. 1978).

vision requires only pro tanto reduction and provides for the release of the settling defendant from contribution so long as the settlement was in good faith.[161]

The effect of a Pierringer release is that the plaintiff takes the risk of the jurisdiction's requirements for equitable sharing of liability among tortfeasors. The plaintiff accepts the risk that the amount he receives in settlement is less than either the amount of contribution other tortfeasors will be entitled to from the settling tortfeasor or the amount of the judgment attributable to the settling tortfeasor. *See also* Lavoie v. Celotex Corp., 505 A.2d 481 (Me. 1986); Frederickson v. Alton M. Johnson Co., 390 N.W.2d 786 (Minn. 1986) (Pierringer release mandated 40% reduction of verdict); Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963) (seminal case). *See generally* V. SCHWARTZ, *supra* note 105, § 16.6, at 255-56; Hirshon, *Release of Defendants in Multiparty Litigation*, 26 FOR THE DEF., Feb. 1984, at 27; Simonett, *Release of Joint Tortfeasors: Use of the* Pierringer *Release in Minnesota*, 3 WM. MITCHELL L. REV. 1, 3 (1977). If, on the other hand, it is determined at the trial against the nonsettling defendant that the settling defendant was not at fault, the plaintiff retains the settlement amount as well as any amounts recovered from the nonsettling defendant. Shantz v. Richview, Inc., 311 N.W.2d 155 (Minn. 1980). This is true because under a Pierringer arrangement, there is no credit on the basis of the settlement. The settling tortfeasor remains potentially liable for contribution, which is barred if no fault is attributed to the settling tortfeasor at trial. *See supra* note 158 and accompanying text. The Pierringer arrangement runs afoul of the 1955 Act, however, because under that Act, the nonsettling defendant is entitled to a credit based upon the settlement amount. *See infra* note 161; Schick v. Rodenburg, 397 N.W.2d 464, 469 (S.D. 1986) (holding that Pierringer agreement permits a double recovery and, therefore, contravenes South Dakota public policy).

Within the context of pro rata credit and comparative fault, Pierringer arrangements appear to be fair to nonsettling defendants because the nonsettling defendant is protected from paying amounts attributable to the fault of the settling tortfeasor. Nevertheless, the success of a Pierringer arrangement for the plaintiff depends upon a low allocation of fault to the settling defendant. Courts and juries, therefore, should be informed of the Pierringer arrangement and how it may bias the plaintiff's conduct at trial.

161. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 4, 12 U.L.A. 98 (1975) provides:

> When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release of the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

See also TENN. CODE ANN. § 29-11-105 (1980) (follows 1955 version).

The good faith requirement does not appear in the Uniform Comparative Fault Act. The settling defendant is automatically released from contribution and the plaintiff's claim is reduced by the settling defendant's proportionate share of causal fault. UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 45-46 (Supp. 1986). The Comment to § 6 acknowledges that this provision may discourage claimants from entering into partial settlements. *See generally* V. SCHWARTZ, *supra* note 105, §§ 16.7-.8. In 2 COMPARATIVE NEGLIGENCE § 13.50[2], at 13-63 (Matthew Bender & Co. 1985), Professor Little suggests that this weakness in the Comparative Fault Act can be remedied by an amendment providing that the plaintiff's claim is reduced by the amount of the released person's equitable share "or the amount of the consideration paid for the release whichever is less."

A Mary Carter agreement may work well for the agreeing parties under the Uniform Comparative Fault Act. With a Mary Carter agreement, the parties may believe that they can achieve at trial a minimal attribution of fault to the settling defendant. In that case, whether the agreement is treated as a settlement reducing the plaintiff's claim, or whether it still leaves the settling defendant

While one student of Mary Carter agreements considered it "highly unlikely that courts would find a Mary Carter agreement to be a good faith settlement due to its potential for collusion,"[162] another predicted that "the nebulous standard of 'good faith' may not be sufficient protection against collusive settlements."[163] Courts are, in fact, split on whether a Mary Carter agreement may be a good faith settlement. One Tennessee federal district court has given an emphatic "no" in response to a request to find a Mary Carter agreement in good faith.[164] Florida courts have taken an ad hoc approach[165] and California courts have generally answered "yes."[166]

In the Tennessee case, *Florow v. Louisville & Nashville Railroad (In re Waverly Accident of February 22-24, 1978)*,[167] the plaintiff and one defendant entered into a settlement agreement that included both an unconditional settlement for $33,333.33 and a Mary Carter guarantee for $66,666.67.[168] The agreement provided that the plaintiff could not settle with any other defendant for less than $33,333.33 without the settling defendant's approval. It also required the plaintiff to pursue to final judgment her claim against the nonsettling defendants.[169] The nonsettling defendant crossclaimed for contribution and the settling defendant moved for partial summary judgment dismissing the crossclaim on the grounds that it had entered into a good faith settlement with the plaintiff.[170] The federal district court, applying section 4 of the 1955 revised Uniform Contribution Among Tortfeasors Act as adopted in Tennessee,[171] gave three reasons for holding the Mary Carter agreement not in good faith and refusing to discharge the settling defendant from the duty of contribution.[172]

First, the court found that "the agreement frustrates the statutory goal of

---

liable for contribution on the basis of his proportionate fault, the loss may be small in comparison with the recovery against the nonsettling tortfeasor. *See Unfair and Unnecessary*, *supra* note 3, at 799-800.

162. Note, *supra* note 153, at 1407; *see also* Wesierski, *Mary Carter Agreements and Good Faith Settlements — Are They Both Possible in California?*, 48 INS. COUNS. J. 639, 648 (1981) (concluding that Mary Carter agreements will not be considered good faith settlements in California). *But see infra* notes 186-99 and accompanying text.

163. *Unfair and Unnecessary*, *supra* note 3, at 798. *See generally* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.2, at 56 (noting that a settlement amount may be low even when the settlement is in good faith and that the good faith requirement poses difficulties of proof).

164. *See infra* text accompanying notes 167-77.

165. *See infra* text accompanying notes 178-84.

166. *See infra* text accompanying notes 186-99.

167. 502 F. Supp. 1 (M.D. Tenn. 1979).

168. *Id.* at 2.

169. *Id.* at 5.

170. *Id.* at 2.

171. *See* TENN. CODE ANN. § 29-11-105 (1980); *supra* note 161.

172. The settling defendant surprisingly conceded that a Mary Carter agreement is in bad faith, but argued that the agreement should bar contribution because it included a substantial unconditional amount, for which the nonsettling defendants would receive a pro tanto credit. 502 F. Supp. at 3-4. The court responded that if the agreement were simply a release of the defendant in exchange for $33,333.33, it "would probably uphold the contract's validity." *Id.* at 4. *Contra* Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (Ct. App. 1984) (settlement that included $50,000 unconditional payment and $150,000 guarantee was in good faith).

encouraging settlements."[173] Second, it found that the agreement was a collusive attempt by the parties to obtain contribution for the settling defendant in contravention of the contribution statutes, which provided that a settling defendant was not entitled to contribution from defendants who were not released from liability to the plaintiff by the settlement agreement.[174] Finally, the court was "disturbed that the agreement require[d] plaintiff to continue to prosecute her action against movant even though the controversy between them is settled."[175]

The court in *Florow* not only denied the settling defendant's motion with regard to contribution, but also stated that the Mary Carter agreement was "void" and invalid "in toto."[176] The effect of those conclusions is unclear.[177] Nevertheless, because no Tennessee decisions on the validity of Mary Carter agreements existed, the court wrote on a clean slate in determining the good faith nature of such an agreement.

In other jurisdictions, the good faith issue is complicated by prior judicial or legislative approval of the use of Mary Carter agreements. In Florida, where Mary Carter agreements had long been permitted and regulated by the courts,[178] the first appellate court to consider the contribution issue, in *Frier's Inc. v. Seaboard Coastline Railroad*,[179] stated that it was "not prepared to say that all Mary Carter agreements lack the essential good faith element."[180] Because the trial court had made no determination of whether the agreement was in good faith within the meaning of the contribution act and because the record was

---

173. 502 F. Supp. at 5.

174. *Id.* (citing Alder v. Garcia, 324 F.2d 483 (10th Cir. 1963)); *see supra* text accompanying notes 146-51.

175. 502 F. Supp. at 6 (citing Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971)); *see supra* § II.A. The court noted that some jurisdictions permit this practice if the settlement agreement is revealed to the jury. It observed, however, that this might not be possible in Tennessee under TENN. CODE ANN. § 29-11-105(b) (1980) (formerly § 23-3105(c)). *Id.* at 6-7. *See infra* text accompanying note 216. The court apparently assumed that federal law would not control on this issue in federal court. If it did, FED. R. EVID. 408 would permit the agreement to be admitted to show bias or prejudice of a witness. The court concluded that it was not

> compelled to resolve this difficult question of state law, nor to determine whether or not an agreement that requires the contracting parties to present an illusory controversy to the jury would fail for that sole reason to satisfy the requirement of good faith under § 23-3105(b). The court does believe that this aspect of the instant agreement, combined with the infirmities already discussed, provide ample reason to invalidate the agreement in toto and to hold that it does not discharge movant from its obligation of contribution to respondents.

502 F. Supp. at 7.

176. *Id.*

177. Although the only motion before the court was the partial summary judgment on contribution, the court stated that it "must still determine the position of the parties with respect to the prior $33,333.33 payment." It concluded that "the best solution is to allow plaintiff to retain that sum as an advance payment on any judgment that may be rendered against L & N [settling defendant]." *Id.*

178. *See* Florida cases collected in Case Note, *supra* note 59, at 574 n.24.

179. 355 So. 2d 208 (Fla. 1st D.C.A. 1978).

180. *Id.* at 211. Florida adopted the 1955 revised version of the Uniform Contribution Among Tortfeasor's Act in 1975. FLA. STAT. ANN. § 768.31 (West Supp. 1986).

incomplete, the court remanded the case for an evidentiary hearing on the issue.[181] Subsequently, in *Diaz v. Sears, Roebuck & Co.*,[182] a Florida appellate court approved a trial judge's refusal to give good faith treatment to a Mary Carter agreement for purposes of relieving the settling defendants of a duty of contribution.[183] The *Diaz* court stated, "In the instant case, there is more than ample evidence of Sear's [sic] bad faith as demonstrated by the agreement on its face and Sear's [sic] collusion with the plaintiffs in the trying of their case."[184]

Arguably, even where Mary Carter agreements are valid between the parties to the agreement, they should not be permitted to relieve the settling defendant of his duty of contribution to the nonsettling defendant, so long as the agreement does not trigger a reduction in the plaintiff's claim against the nonsettling party. With regard to the rights of the nonsettling defendant, a Mary Carter agreement cannot be in good faith within the meaning of the Uniform Contribution Among Tortfeasors Act when its effect is to shift all liability to the nonsettling defendant.[185] Courts may permit the plaintiff or the settling defendant to exchange, respectively, a reduction in the judgment or a potential duty of contribution, for the other agreeing party's cooperation in obtaining a large verdict against the nonsettling defendant. Courts should not permit, however, the placement of *all* liability on the nonsettling defendant, which is the consequence if the Mary Carter agreement does not reduce the plaintiff's claim but relieves the settling defendant from contribution.

Shifting all liability through a Mary Carter agreement, nevertheless, is exactly what occurred in California, although California law follows the pattern of the 1955 Uniform Act, including pro tanto reduction of a plaintiff's judgment in case of settlement with a joint tortfeasor, a duty of contribution and a good faith standard for relieving settling parties from contribution.[186] The California experience is atypical because a California statute specifically addresses Mary Carter (sliding scale recovery) agreements, although the statute does not deal

181. 355 So. 2d at 211-12.

182. 475 So. 2d 932 (Fla. 3d D.C.A. 1985).

183. *Id.* at 934.

184. *Id.* The court also considered the text of the agreement in affirming the trial court's decision to advise the jury of its terms instead of admitting it into evidence. *Id.* The court found the agreement to be "self-serving and inflammatory." *Id.* at 933. The court did not explain how Sears had colluded with the plaintiffs at trial. *Id.* at 934.

185. The purpose of the contribution act is to provide for equitable sharing of liability among those jointly liable. *See supra* note 113. In River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 995-96, 103 Cal. Rptr. 498, 504 (Ct. App. 1972), the court stated that the purpose of the good faith clause of the contribution act is to aid the twin statutory objectives of equitable sharing of the burden of compensating plaintiffs and of encouraging settlements. This analysis was approved in *Florow*, 502 F. Supp. at 4. *Cf. In re* MGM Grand Hotel Fire Litigation, 570 F. Supp. 913, 931-33 (D. Nev. 1983) (settlement that included some aspects of a Mary Carter guarantee was approved as in good faith because the nonsettling defendants would receive a full pro tanto credit); Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 216-17, 252 N.W. 675, 677-78 (1934) (although Mary Carter agreement held to release nonsettling defendant, settling defendant not entitled to contribution because purpose of secret settlement to throw burden on codefendant was not in good faith).

186. CAL. CIV. PROC. CODE §§ 875-880 (West 1980).

with problems of credit or contribution for the nonsettling defendant.[187] The significance of the statute for these issues is that the California courts have been unwilling to deny good faith status to a device that has been approved, not just judicially, as in Florida, but also legislatively. In *Burlington Northern Railroad v. Superior Court*,[188] the California Court of Appeal stated:

> Given the legislative approval of sliding scale agreements, however, the trial court's finding of unfairness cannot support a conclusion that the settlement was not made in good faith. This is so even when a nonsettling tortfeasor has been required to pay the entire compensation without contribution or indemnity from the settling joint tortfeasor.[189]

Although *Burlington Northern* was widely followed in California decisions affording good faith treatment to Mary Carter agreements,[190] its holding is now

---

187. CAL. CIV. PROC. CODE § 877.5 (West 1980) provides:

Sliding scale recovery agreement; disclosure to court and jury

(a) Where an agreement or covenant is made which provides for a sliding scale recovery agreement between one or more, but not all, alleged defendant tortfeasors and the plaintiff or plaintiffs:

(1) The parties entering into any such agreement or convenant shall promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions; and

(2) If the action is tried before a jury, and a defendant party to the agreement is a witness, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The jury disclosure herein required shall be no more than necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.

(b) As used in this section, a "sliding scale recovery agreement" means an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, where the agreement limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants. This includes, but is not limited to, agreements within the scope of section 877, and agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant.

One of the unique problems in California has been whether the good faith requirement applies to sliding scale agreements at all because § 877.5 does not refer to this requirement. For an excellent discussion of the problem in California and in general, see *Sliding Scale Agreements*, *supra* note 1.

188. 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (Ct. App. 1982).

189. *Id.* at 948, 187 Cal. Rptr. at 379.

190. *See* Anderson v. International Harvester Co., 165 Cal. App. 3d 100, 211 Cal. Rptr. 253 (Ct. App. 1985); City of Los Angeles v. Superior Court, 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (Ct. App. 1984), *vacated and remanded*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (Ct. App. 1986) (following *Burlington Northern* and rejecting constitutional attack on sliding scale agreements); Imperial Spa, Inc. v. Superior Court, 158 Cal. App. 3d 1185, 205 Cal. Rptr. 337 (Ct. App. 1984) ("In denying hearing, the [California] Supreme Court ordered that the opinion be not officially published."). *But see* Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 505-10, 203 Cal. Rptr. 825, 829-33 (Ct. App. 1984) (disagreeing with *Burlington Northern*, but finding agreement in good faith where it contained a $50,000 unconditional payment as well as a $150,000 guarantee).

in some doubt. In addition to relying upon legislative approval of Mary Carter agreements, the *Burlington Northern* court also relied upon the very broad standard of good faith set out in a 1981 decision, *Dompeling v. Superior Court*.[191] The *Dompeling* rule was that "bad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share of the value of the plaintiff's case," but only by a showing of "tortious or other wrongful conduct" by the settling parties.[192] In 1985, the California Supreme Court rejected the *Dompeling* rule in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[193] a case that involved a conventional settlement, not a Mary Carter agreement. The court in *Tech-Bilt* set out a multi-factor test, which included a determination "whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries."[194] While it is too soon to know the ultimate impact of *Tech-Bilt* on Mary Carter good faith determinations,[195] *Tech-Bilt* arguably rejects the *Burlington Northern* line of cases that considered the settling defendant's avoidance of all liability to be irrelevant.

An ad hoc approach to the good faith issue in Mary Carter cases, as followed in Florida and now in California, presents several difficulties. Courts may be called upon to make the good faith determination either before or after the trial of the plaintiff's claim.[196] If the determination is made before the trial, the court will not be able to consider collusive trial conduct, as did the Florida court in *Diaz*.[197] Also, the court will not know whether the settling defendant will assume any actual liability under a Mary Carter agreement because the ultimate payment by the settling defendant is not ascertainable until the conclusion of the litigation against the nonsettling defendants. The California Supreme Court in *Tech-Bilt* recognized that in determining whether a settlement

191. *Burlington Northern*, 137 Cal. App. 3d at 946-47, 187 Cal. Rptr. at 378 (citing Dompeling v. Superior Ct., 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981)).

192. 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44.

193. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

194. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

195. Several California courts of appeal, applying *Tech-Bilt*, have found sliding scale agreements in good faith. Riverside Steel Constr. Co. v. William H. Simpson Constr. Co., 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, (Ct. App.) (suggesting, however, that sliding scale recovery agreements are not "settlements" at all), *review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); Rogers & Wells v. Superior Court, 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (Ct. App. 1985); Abbott Ford, Inc. v. Superior Court, 181 Cal. App. 3d 1205, 218 Cal. Rptr. 605 (Ct. App.), *review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); *see also* Comment, *Sliding Scale Settlements: The Need for a Minimum Contribution to Comply with the Reasonable Range Test for Good Faith*, 19 LOY. L.A.L. REV. 995 (1986) (suggesting that the *Tech-Bilt* reasonable range standard must encompass sliding scale settlement agreements).

196. The issue may arise before trial on a motion to dismiss a crossclaim for contribution. *See, e.g., Florow*, 502 F. Supp. 1; *see also supra* notes 167-77 and accompanying text (discussing *Florow*). Also, some statutory schemes provide for a pretrial hearing to determine the good faith or reasonableness of a settlement. *See, e.g.*, CAL. CIV. PROC. CODE § 877.6 (West Supp. 1987); WASH. REV. CODE ANN. § 4.22.060 (West Supp. 1987); *see also* Harris, *supra* note 116 (discussing statutory schemes).

197. *See supra* notes 179-84 and accompanying text.

amount is reasonable, courts may have to consider the information available to the parties at the time of settlement.[198] While this approach is certainly fair in ordinary cases, its application to Mary Carter agreements will mean blanket approval of all these agreements in which the guaranteed amount is within the reasonable range, regardless of whether the amount is ever paid. Evaluating the good faith of Mary Carter agreements on the basis of the guaranteed amount alone has been justly criticized because it still permits shifting all liability to the nonsettling defendant and "does not accord the equitable sharing concept the consideration it deserves in our present tort system."[199]

D. *Mary Carter Agreements in a Tort System Without Joint and Several Liability and Contribution*

In the 1970s, the trend in tort law was toward adoption of contribution among joint tortfeasors,[200] and many believed contribution would solve the problem of Mary Carter agreements.[201] Thus, it seemed that shifting total liability through a Mary Carter agreement, with no reduction in the plaintiff's judgment and no contribution for the nonsettling defendant, would not become a widespread problem. The threat of contribution, however, like the threat of reducing the plaintiff's judgment, has not entirely destroyed the attractiveness of Mary Carter agreements because courts have not consistently or uniformly applied these doctrines to protect the nonsettling defendant.[202]

Moreover, as a result of the movement to abolish joint and several liability,[203] a trend has now begun away from contribution. The latest development in tort law seems to be a system of apportioning fault among the plaintiff and each tortfeasor and holding each defendant liable for only his proportionate share regardless of the other defendants' ability to pay.[204] Under such a system, there

---

198. 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263.

199. *Sliding Scale Agreements*, *supra* note 1, at 143.

200. The UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) was adopted in North Carolina and Tennessee in 1968; Alaska in 1970; Nevada in 1973; Florida in 1975; Ohio in 1976; Colorado in 1977; Wyoming in 1978. 12 U.L.A. 61 (Supp. 1986). Illinois adopted a contribution system in 1979. ILL. REV. STAT., ch. 70, § 302(c), (d) (1979).

201. *See supra* notes 153-54 and accompanying text.

202. *See supra* § II.C.

203. *See* Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J., July 1985, at 60. During 1986, legislation eliminating or limiting the application of joint and several liability was proposed or enacted in Florida and Illinois, 2 Civil Trial Manual (BNA) 284-86 (July 16, 1986); Hawaii and New York, 2 Civil Trial Manual (BNA) 381-83 (Sept. 10, 1986); Utah and Wyoming, 2 Civil Trial Manual (BNA) 167-68 (May 7, 1986). On June 3, 1986, California voters by public referendum approved Proposition 51, which limits the application of joint and several liability. CAL. CIVIL CODE § 1431.1 (West Supp. 1987). In a few states, the adoption of comparative negligence in the 1970's was accompanied by abrogation of joint and several liability. *See* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.1, at 29.

204. *See* Granelli, *supra* note 203; Note, *An Analysis of the Proposed Abrogation of California's Joint and Several Liability Doctrine — Is Abrogation the Answer to the Insurance Industry Crisis?*, 8 WHITTIER L. REV. 263, 263 (1986). In 1974, Professor Schwartz suggested that if comparative negligence is "to fulfill its role of apportioning damages on the basis of fault, [the rule of joint and several liability] must be abolished." V. SCHWARTZ, *supra* note 105, § 16.7, at 260.

is no need for a credit rule or contribution because no defendant is required to pay another's share of the plaintiff's recovery.[205]

It is not clear at this time how far this movement will extend, but wherever it reaches it makes Mary Carter agreements more inviting. The plaintiff entering into such an agreement is, as always, guaranteed some recovery. The plaintiff also secures assistance from the settling defendant, during the trial, in placing maximum blame on the nonsettling defendant, minimum blame on the plaintiff, and a high value on the plaintiff's injuries. In return, the settling defendant limits his liability to a specific amount, or possibly eliminates all liability if there is a verdict against the nonsettling defendant of sufficient size according to the terms of the Mary Carter agreement. The absence of joint and several liability of tortfeasors, therefore, serves only to enhance the attractiveness of Mary Carter agreements.

III. TOLERATING MARY CARTER AGREEMENTS

Most jurisdictions tolerate the use of Mary Carter agreements, even though the courts acknowledge that a Mary Carter agreement threatens the fairness of the trial of the settling plaintiff's claim against the nonsettling defendant. Courts utilize various approaches in attempting to reconcile the existence of a Mary Carter agreement with the nonsettling defendant's right to a fair trial.

A. *Admissibility of the Mary Carter Agreement*

With regard to trial fairness for the nonsettling defendant, one of the most harmful effects of a Mary Carter agreement occurs when the settling defendant appears before the jury as a defendant, but testifies favorably to the plaintiff.[206] Because of the Mary Carter agreement, the settling defendant's real interest is in favor of the plaintiff's recovery of a substantial verdict. While settlement agreements generally are not admissible to prove liability, they may be admissible to prove the bias of a witness.[207] Most jurisdictions that accept Mary Carter agreements have held that the agreement is admissible to impeach the testimony of the settling defendant.[208]

California's Proposition 51, *see supra* note 203, amends the California Civil Code to add § 1431.1, which states in part that "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault." CAL. CIVIL CODE § 1431.1 (West Supp. 1987).

205. *See* Harris, *supra* note 116, at 108 n.137.

206. *See supra* notes 18-19 & 21 and accompanying text.

207. *See infra* note 217.

208. *Reese*, 55 Ill. 2d at 364, 303 N.E.2d at 387; Douglas v. GHR Energy Corp., 477 So. 2d 691, 691 (La. 1985); Johnson v. Moberg, 334 N.W.2d 411, 415 (Minn. 1983); Hegarty v. Campbell Soup Co., 214 Neb. 716, 725, 335 N.W.2d 758, 764-65 (1983) (to impeach employees of settling defendant); Bedford School Dist. v. Caron Constr. Co., 116 N.H. 800, 805, 367 A.2d 1051, 1055 (1976) (but amount guaranteed may not be disclosed); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla. 1978); *see also infra* text accompanying notes 236-37 (discussing *Cox*); General Motors Corp. v. Simmons, 558 S.W.2d 855, 858-59 (Tex. 1977); CAL. CIV. PROC. CODE § 877.5(2) (West 1980) (quoted *supra* note 187); *cf.* Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 511 (9th Cir. 1974) (when settling tortfeasor is participating in the suit as a party plaintiff, Mary Carter loan receipt inadmissible to impeach either agreeing party). *But see* Barajas v. USA Petroleum

The problem of trial unfairness, however, is not limited to the credibility of the settling defendant. The agreement also affects the way in which counsel for both the plaintiff and the nonsettling defendant present and argue their cases.[209] For this reason, admitting Mary Carter agreements only for the purpose of impeachment is not an adequate solution. In some cases, there may be no witness to impeach. For example, in *Marotta v. General Motors Corp.*,[210] the Illinois Supreme Court held there was no error in the trial court's refusal to admit a Mary Carter agreement where there was no proof that the settling defendant's testifying employee knew of the agreement.[211] A broader and preferable approach taken by some courts simply permits the trier of fact to be informed of the existence of the agreement and its terms.[212]

A related problem that arises is whether the entire agreement can or must be admitted. At first glance, it appears that it would be in the interest of the nonsettling defendant to have the jury fully informed of the facts that explain the interests and positions of all witnesses and parties to the litigation. In fact, however, full disclosure may be an unpalatable antidote for the nonsettling defendant. First, the disclosure of the amount and terms of the agreement may be seen as prejudicial to the nonsettling defendant. Also, in a far from subtle move patently aimed at barring full disclosure of the Mary Carter agreement, the settling parties often resort to inclusion of statements in the agreement condemning the nonsettling defendant or reciting the seriousness of the plaintiff's injuries.[213] To avoid having such prejudicial statements read to the jury, the nonsettling defendant may wish to introduce only parts, or only the substance

---

Corp., 184 Cal. App. 3d 974, ____, 229 Cal. Rptr. 513, 521 (Ct. App. 1986) (trial court did not abuse its discretion under CAL. CIV. PROC. CODE § 877.5(2) in determining not to disclose Mary Carter settlement to jury).

209. *See supra* notes 15-22 and accompanying text.

210. 108 Ill. 2d 168, 483 N.E.2d 503 (1985).

211. *Id.* at ____, 483 N.E.2d at 507.

212. *See, e.g.*, Sequoia Mfg. Co. v. Halec Constr. Co., 117 Ariz. 11, 24, 570 P.2d 782, 794 (Ct. App. 1977) ("[T]here are clearly circumstances in which *Gallagher* agreements should be admitted into evidence or made known to the jury by way of instruction, for limited purposes."); Imperial Elevator Co. v. Cohen, 311 So. 2d 732, 734 (3d D.C.A. 1975) ("The jury is entitled to be advised of such an agreement since it relates to the credibility and demeanor of the witnesses and their interest in the outcome of the case, as well as to conduct of counsel during the course of the trial."), *cert. denied*, 327 So. 2d 32 (Fla. 1976); General Motors Corp. v. Lahocki, 286 Md. 714, 730, 410 A.2d 1039, 1047 (1980) (jury must be informed "as to exactly what the circumstances are between the parties"); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 557 (Minn. 1977); Corn Exch. Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596, 600 (S.D. 1985). *But see* Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976) (no harmful error in refusing to admit evidence of Mary Carter agreement, but better to permit cross-examination about the agreement for impeachment).

213. *See, e.g.*, *Diaz*, 475 So. 2d at 933-344 (terms of agreement were "self-serving and inflammatory"); Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 178-79, 355 N.E.2d 253, 260-61 (1976). In *Burkett*, the court stated:

> As in the case at bar, the loan receipt agreement may be drafted with admissions and accusations so damning to the non-participating co-defendant that the co-defendant is placed in a dilemma. He must choose to suffer in silence damaging conduct at trial by the co-defendant participating in the agreement, or he must choose to explain that conduct to

of the agreement, while the plaintiff and the settling tortfeasor may insist on all or nothing.[214] Most jurisdictions address this problem by holding that the jury may be informed of only the substance of the agreement or only those parts necessary to inform them of the fact of settlement and its contingencies.[215]

While disclosure and admission into evidence is the solution to the Mary Carter problem most favored by courts that have addressed the issue, this judicial solution faces a potential barrier in some states. For example, Tennessee's version of the Uniform Contribution Among Tortfeasors Act includes a provision, not part of the Uniform Act, which seems to prohibit admission of the agreement for any purpose. Tennessee Code Annotated section 29-11-105(b) provides:

> No evidence of a release or covenant not to sue received by another tort-feasor or payment therefor may be introduced by a defendant at the trial of an action by a claimant for injury or wrongful death, but may be introduced upon motion after judgment to reduce a judgment by the amount stipulated by the release or the covenant or by the amount of the consideration paid for it, whichever is greater.[216]

The plain language of this statute, which is similar to that of statutes in other jurisdictions,[217] seems to prohibit introduction of a Mary Carter agreement even on cross-examination of a witness for the purpose of showing bias. It is probable, however, that this statute was never meant to apply to impeachment of a witness for the bias that results from his entry into a settlement agreement.[218] Moreover,

---

> the trier of fact by offering into evidence the agreement with its statements calculated to frame the offering party in the worst possible light.

Id., 355 N.E.2d at 260-61; *see also Lum*, 87 Nev. at 407, 488 P.2d at 352 ("[Plaintiff's] counsel acknowledged the agreement itself might prejudice the jury, since it contains references to [plaintiff's] damages, and to [nonsettling defendant's] liability, his insurance, and his insurance carrier's 'irresponsible position.' ").

214. *See, e.g.*, Insurance Co. of N. Am. v. Sloan, 432 So. 2d 132, 133 (Fla. 4th D.C.A. 1983); Palmer v. Avco Distrib. Corp., 75 Ill. App. 3d 598, 606, 394 N.E.2d 480, 487 (1979), *aff'd in part, rev'd in part*, 82 Ill. 2d 211, 412 N.E.2d 959 (1980) (after nonsettling defendant alluded to agreement on cross-examination of settling defendant, plaintiff was permitted to place entire agreement before the jury, subject to limiting instruction).

215. General Motors Corp. v. Lahocki, 286 Md. 714, 728, 410 A.2d 1039, 1047 (1980); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558 (Minn. 1977); Brown v. Gonzales, 653 S.W.2d 854, 863-64 (Tex. Ct. App. 1983); *see also* CAL. CIV. PROC. CODE § 877.5(2) (West 1980) (quoted *supra* note 187); cases collected in Case Note, *supra* note 59, at 576 n.30.

216. *Cf.* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 4, 12 U.L.A. 98 (1975) (quoted in full *supra* note 161).

217. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 163 (1964) ("Evidence of settlement with a release of one or more persons causing the injury shall not be admissible at a subsequent trial against the other person or persons also causing the injury."); MINN. STAT. ANN. § 604.01(4) (West Supp. 1987) ("Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action."); WIS. STAT. ANN. § 885.285(2) (West Supp. 1986) ("Any settlement or payment under sub. (1) is not admissible in any legal action unless pleaded as a defense.").

218. *Cf.* FED. R. EVID. 408, which prohibits admission of compromises and offers to compromise to prove or disprove liability, but which adds, "This rule also does not require exclusion

given the lack of widespread awareness of Mary Carter agreements, a court could reasonably conclude that the legislature did not intend the statute to apply to such an agreement, and that juries, therefore, may be informed of its existence so they can appreciate the true positions of the parties before them.

B. *Disclosure of the Agreement*

Admission of a Mary Carter agreement to preserve trial fairness cannot be accomplished, of course, if the existence of the agreement is known only to the settling parties. For this reason, and because of the ethical considerations discussed earlier,[219] courts that have addressed the problem have uniformly refused to permit such agreements to be kept secret from the court and the opposing party.

In some jurisdictions, either by statute or by judicial decision, disclosure of a Mary Carter agreement to the court and to other litigants is required whether or not a nonsettling defendant seeks disclosure of the agreement.[220] While not all courts have required such automatic disclosure, all jurisdictions addressing the question seem to concur that such agreements must be disclosed in response to a properly framed discovery request.[221]

Federal Rule of Civil Procedure 26(b), and similar rules in many jurisdictions,[222] provide that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." If a Mary Carter agreement is admissible evidence for purposes of impeachment, or if it is otherwise subject to disclosure to the trier of fact,[223]

---

when the evidence is offered for another purpose, such as proving bias or prejudice of witness a . . . ."; D. PAINE, TENNESSEE LAW OF EVIDENCE § 38 (1974) ("It should be remembered that a witness called by the defendant can be impeached for bias if his claim was settled."); *see also id.* § 209.

219. *See supra* § II.A.2.

220. *See, e.g.*, CAL. CIV. PROC. CODE § 877.5(a)(1) (West 1980); WASH. REV. CODE § 4.22.060(1) (1986); Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977); Gatto v. Walgreen Drug Co., 61 Ill. 2d 513, 520-23, 337 N.E.2d 23, 28 (1974), *cert. denied*, 425 U.S. 936 (1976); Johnson v. Moberg, 334 N.W.2d 411, 415 (Minn. 1983); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 360 (Okla. 1978); State *ex rel.* Vapor Corp. v. Narick, 320 S.E.2d 345, 348 (W.Va. 1984); *see also Guiding Principles for Cooperation in the Defense of Multi-Party Litigation*, 24 FOR THE DEF., July, 1982, at 16, 18 (conclusion of Defense Research Institute that Mary Carter agreements are acceptable only "where intransigent co-defendants refuse to consider settlement *and* where the agreement is disclosed to the court and all counsel").

221. *See, e.g.*, Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 514, 639 S.W.2d 726, 728 (1982); Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Grillo v. Burke's Paint Co., 275 Or. 421, 427, 551 P.2d 449, 453 (1976); Corn Exch. Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596, 599-600 (S.D. 1985). *See generally* Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 GONZAGA L. REV. 266, 277-78 (1977).

222. *See, e.g.*, TENN. R. CIV. P. 26.02. Rule 26 also provides, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." In the case of a Mary Carter agreement, however, it is difficult to see how the agreement, if not admissible itself, would lead to the discovery of other admissible evidence.

223. *See supra* § III.A.

Florida Law Review, Vol. 38, Iss. 4 [1986], Art. 1

it would seem to be relevant to the subject matter of the action and, therefore, within the scope of discovery.[224]

Mary Carter agreements are also relevant to the subject matter of the action because the agreement may affect the nonsettling defendant's right to a reduction of a plaintiff's judgment against him or his right to contribution from the settling defendant.[225] With regard to contribution, the Mary Carter agreement becomes relevant to the action if and when, in a jurisdiction following the 1955 Revised Uniform Contribution Among Tortfeasors Act, a settling defendant seeks to defeat a nonsettling defendant's claim for contribution on the basis that the Mary Carter agreement is a good faith settlement barring contribution.[226] This rationale for the relevance and discoverability of a Mary Carter agreement, however, may not be apparent during the early stages of the litigation, either because the nonsettling defendant has not yet asserted a claim for contribution, or because the settling defendant answered the claim for contribution with only a general denial.[227]

The agreement also may be relevant and discoverable if the nonsettling defendant seeks a reduction of a judgment against him on the basis of a Mary Carter agreement. This, however, is a less likely basis for pretrial discovery of a Mary Carter agreement. The issue of reducing a plaintiff's judgment may be seen as relevant to the action only after there is a verdict against the nonsettling defendant.[228]

If a Mary Carter agreement remains a secret from a nonsettling defendant, it is probable that a trial against him will be unfair. Without knowledge of the agreement, the nonsettling defendant is unable to challenge either testimony biased by the agreement or the settling defendant's sham posture as a defendant. Because of the importance of disclosure[229] and because the agreeing parties may create barriers or delay if the nonsettling defendant must rely upon the ordinary discovery process, disclosure of all Mary Carter agreements to the court and to other parties should be required as a matter of course as soon as the agreement is consummated.

---

224. In Tennessee, however, this proposition is in doubt because of TENN. CODE ANN. § 29-11-105(b) (1980). *See supra* text accompanying notes 216-18.

225. *See supra* §§ II.B.-C.

226. *See* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 4, 12 U.L.A. 98 (1975) (quoted in full *supra* note 161); *supra* § II.C.

227. Good faith settlement must be pleaded as an affirmative defense to a claim for contribution. Concrete Sciences, Inc. v. Bassett, 449 So. 2d 300, 300 (Fla. 4th D.C.A. 1984); *see* FED. R. CIV. P. 8(c). Liberal amendment of pleadings, however, is generally permitted. FED. R. CIV. P. 15(a). *But cf.* CAL. CIV. PROC. CODE § 877.6(d) (West 1980) ("The party asserting the lack of good faith shall have the burden of proof on that issue.").

228. TENN. CODE ANN. § 29-11-105(b) (1980) (quoted *supra* text accompanying note 209) provides that a settlement agreement may not be introduced on the primary claim, but may be introduced on motion to reduce the judgment.

229. In City of Los Angeles v. Superior Court, 176 Cal. App. 3d 856, 864-65, 222 Cal. Rptr. 562, 566-67 (Ct. App. 1986), the court held that the mandatory disclosure requirement with regard to sliding scale recovery agreements authorized by CAL. CIV. PROC. CODE § 877.5 (West 1980) prevents violations of the due process rights of the nonsettling defendant. See also *supra* notes 82-89 and accompanying text for discussion of ethical duties to disclose settlement agreements.

C. *Separate Trials, Severance and Dismissal of the Settling Defendant*

The disclosure and admission approach to controlling Mary Carter agreements has been criticized as being insufficient to cure the prejudice to the nonsettling defendant.[230] Admitting the Mary Carter agreement into evidence does not resolve several problems of unfairness in the trial process. Even if the jurisdiction permits the nonsettling defendant to inform the jury of the agreement for impeachment purposes or to disclose the parties' true positions,[231] courts permitting the settling defendant to remain a party defendant still may enable the settling defendant to enjoy the advantages of that position to the detriment of the nonsettling defendant. The settling defendant may still use peremptory challenges to aid the plaintiff in jury selection, thus allotting more challenges to the plaintiff's side of the litigation, and less to the defendant's, than the applicable law provides.[232] The settling defendant may still be permitted to use leading questions to cross-examine witnesses who are not really adverse.[233] Also, the continuing presence of the settling defendant may serve to block the nonsettling defendant from removing a case to federal court when in reality there is complete diversity of citizenship between those parties who are truly adverse.[234]

Because admissibility is an insufficient protection for the nonsettling defendant, some courts, while not banning Mary Carter agreements, refuse to permit the settling defendant to remain in the case as a party defendant.[235] For instance, in *Cox v. Kelsey-Hayes Co.*,[236] the Oklahoma Supreme Court held:

> If a pre-trial agreement has settled the suit completely between plaintiff and one defendant, then that defendant should be dismissed as being unnecessary to disposition of the case.
>
> If the agreement does not absolutely settle the conflict, but rather hinges on the amount of the verdict, the trial court should review the circumstances of the agreement and *either hold that portion of the agreement granting agreeing defendant an interest in a large plaintiff's verdict unenforceable as against public policy, or dismiss the agreeing defendant from the suit.* 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. If agreeing defendant is dismissed, cross-examination affecting his interest and credibility should protect the interest of non-agreeing defendant. If agreeing defendant remains in the suit and the agreement has been de-

---

230. *See, e.g.*, *Reese*, 55 Ill. 2d at 366-67, 303 N.E.2d at 387-88 (Schaefer, J., dissenting); *Lum*, 87 Nev. at 411-12, 488 P.2d at 351-52 (1971); Case Note, *supra* note 59, at 581; Comment, *supra* note 221, at 278-81.

231. *See supra* § III.A.

232. *See supra* note 17.

233. *See supra* note 21.

234. *See infra* § III.E.

235. Mary Carter agreements have been found unobjectionable where the settling tortfeasor has participated in the trial as a party plaintiff. Auto Village, Inc. v. Sipe, 63 Md. App. 280, 286, 492 A.2d 910, 913, *cert. denied*, 304 Md. 296, 498 A.2d 1183 (1985); Vermont Union School Dist. No. 21 v. H.P. Cummings Constr. Co., 143 Vt. 416, 430, 469 A.2d 742, 750 (1983).

236. 594 P.2d 354 (Okla. 1978).

clared void as against public policy, then the adversary nature of the proceedings has been preserved and the agreement is no longer relevant.[237]

Dismissal of the settling defendant serves to eliminate much of the trial prejudice caused by these agreements. The settling defendant no longer has an attorney participating in the trial who may use jury selection, examination of witnesses and jury arguments to the plaintiff's advantage.[238] Of course, the settling defendant may still appear as a witness, but, as the *Cox* court states, admissibility of the agreement at least permits the nonsettling defendant to expose to the jury the bias of the witness.[239] The plaintiff will then be no worse off than with any other nonparty witness who has a known incentive to lie or shade his testimony.

Similarly, some courts have suggested that separate trials or severance of the plaintiff's claim against the settling defendant should be used to eliminate the deception and prejudice that results from participation by the settling defendant.[240] In a simple Mary Carter case, however, severance should amount to dismissal of the plaintiff's case against the settling defendant. If the settlement agreement is treated as valid and all of its provisions given their intended effect, there are no issues left to be tried on the severed claim.[241] Separate, rather than severed, trials conducted without realignment of the settling defendant as a party plaintiff would not remedy the problem of the settling defendant's trial participation, because the settling defendant would remain a party at both trials.[242]

237. *Id.* at 359-60; *see also Unfair and Unnecessary, supra* note 3, at 800 (dismissing settling defendant is appropriate since no justiciable issue exists and it avoids collusion). Courts have also indicated that voluntary dismissal of the settling defendant may be a condition of the court's recognition of the agreement. Popovich v. Ram Pipe & Supply Co., 82 Ill. 2d 203, 210, 412 N.E.2d 518, 522 (1980) (giving effect to a Mary Carter loan receipt where the agreement "was disclosed to the court, the contracting defendants were dismissed, and the court was not forced to determine the liability of a sham defendant").

238. *See supra* notes 15-22 and accompanying text; *see also* Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907, 919-21 (Tex. Civ. App. 1979), in which the plaintiffs and settling defendant, contemplating Mary Carter agreements, were granted severance from the claims against the nonsettling defendant. After the agreements were consummated during trial, the settling defendant was not permitted to cross-examine the plaintiff's witnesses and the nonsettling defendant was permitted to recall and impeach any witnesses that had previously been examined by the settling defendant.

239. 594 P.2d at 359-60; *see also* Palmer v. Avco Distrib. Corp., 82 Ill. 2d 211, 215, 226, 412 N.E.2d 959, 961, 966-67 (1980) (settling defendants were dismissed before trial; proper to cross-examine settling defendant about the agreement); Bistol Myers v. Gonzales, 561 S.W.2d 801, 805 (Tex. 1978) (Mary Carter agreement admissible to impeach settling defendant even though plaintiff had non-suited claim against him before trial).

240. 284 So. 2d at 387; Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 177, 355 N.E.2d 253, 259 (Ct. App. 1976) (separate trials). *Unfair and Unnecessary, supra* note 3, at 800-01, criticizes this approach as inadequate because the nonsettling defendant, in a case in which he has brought a crossclaim for contribution, will be forced "to participate in two separate proceedings, merely because a co-defendant entered an unrighteous agreement to avoid liability."

241. This analysis, of course, demonstrates the absurdity of upholding the validity of a Mary Carter agreement while still allowing the settling defendant to remain as a party defendant.

242. Modern rules of practice differentiate between severance and separate trials. Separate trials under FED. R. CIV. P. 42(b) result in one judgment, but "severed claims under [Fed. R.

Nevertheless, in *Hemet Dodge v. Gryder,*[243] an Arizona appellate court held that the trial court did not abuse its discretion in refusing to grant a severance sought by the nonsettling defendant. The court cited *City of Tucson v. Gallagher*[244] for the proposition that a Mary Carter agreement permits a plaintiff "to be assured of some recovery, but without the disadvantage of having to try a case with an 'absent' defendant."[245] The court in *Hemet Dodge* was apparently referring to the *Gallagher* court's observation that dismissing the settling defendant gives the nonsettling defendant's attorney a chance to argue to the jury that the settling defendant is the liable party and that the plaintiff has sued the wrong party.[246]

The problem raised by the *Hemet Dodge* and *Gallagher* courts is not unique to cases involving Mary Carter agreements. The so-called "empty chair" defense is a strategy also used by nonsettling defendants in cases where the plaintiff has entered into a conventional settlement with a codefendant.[247] The problem arises when the nonsettling defendant argues not merely that the absent party's conduct was the sole cause of the plaintiff's injuries, but when he argues that the plaintiff ought to have sued the absent party, rather than him.[248]

The solution to this problem, however, is not to retain settling defendants as party defendants, but rather to permit the plaintiff to inform the jury of his settlement with the absent party when the nonsettling defendant's argument that

---

Civ. P. 21] become entirely independent actions to be tried, and judgment entered thereon, independently." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387 (1971). In separate trials, therefore, the settling defendant remains a party at the trial against the nonsettling defendant. *See* Phillips v. Unijax, Inc., 625 F.2d 54, 56 (5th Cir. 1980) (state court order of separate trials did not create diversity jurisdiction where it did not previously exist because the nondiverse party remained a party to the suit); 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.10, at 14-101 to -102 (2d ed. 1983) [hereinafter 3 MOORE'S FEDERAL PRACTICE] (in the case of an order for separate trial of a claim, prior determination of main claim is not final and appealable, absent an order under FED. R. CIV. P. 54(b), because the determination has adjudicated "fewer than all the claims or the rights and liabilities of fewer than all the parties"). The settling defendant, therefore, may have the right to participate in the separate trial of the plaintiff's claim against the nonsettling defendant. *See* 3 MOORE'S FEDERAL PRACTICE, *supra* at ¶ 14.19, at 14-99, 14-100.

Separate trials under FED. R. CIV. P. 42(b) is a device used "for convenience or to avoid prejudice"; severance under Rule 21 is generally used only to correct misjoinder of parties or claims. 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 21.05 [2], at 21-43 (2d ed. 1982) [hereinafter 3A MOORE'S FEDERAL PRACTICE]. In a Mary Carter case, therefore, the more appropriate device would be separate trials because the purpose of divorcing the claims (if any claim exists against the settling defendant) is to avoid prejudice, not to correct a misjoinder.

243. 23 Ariz. App. 523, 534 P.2d 454 (1975); *accord* Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 171-76, 250 N.E.2d 378, 388-90 (1969) (criticized in McKay, *supra* note 6, at 232-33 n.6).

244. 108 Ariz. 140, 493 P.2d 1197 (1972).

245. 23 Ariz. App. at 530, 534 P.2d at 461.

246. *See* 108 Ariz. at 142, 493 P.2d at 1199.

247. Gutman, *Advance Sheet - See No Evil,* 12 LITIGATION 43 (Summer 1986) (commenting upon Rojas v. Lindsay Mfg. Co., 108 Idaho 590, 701 P.2d 210 (1985)).

248. *Id.* In *Rojas,* the jury had been informed of the settlement and the nonsettling defendant's counsel argued to the jury that the settlement evidenced that the settling defendant had caused the injury. *Id.* at 43-44.

the absent party should be present renders the information relevant. In some jurisdictions, in fact, the jury ordinarily is informed of the plaintiff's settlement with a third party, either because the jury has the task of deducting settlement amounts from the judgment[249] or because the disclosure is deemed to minimize the prejudice that results from the jury's speculations about the role of the absent party.[250] Moreover, in Mary Carter cases, it is often the nonsettling defendant — the party who typically uses the "empty chair" strategy — who wishes to introduce the plaintiff's settlement for purposes of impeaching the parties to the agreement or informing the jury of the parties' nonadverse position.[251]

D. *Conflicts Between Mary Carter Agreements and the Real Party in Interest Rule*

Some courts and litigants have questioned whether the real party in interest rule is violated when the plaintiff who has entered into a Mary Carter agreement proceeds as the sole party plaintiff to prosecute the claim against the nonsettling defendant.[252] As described below, depending upon how a jurisdiction construes the real party in interest rule and the Mary Carter agreement, the result may be that (1) the plaintiff is not a real party in interest and may not proceed with his claim against the nonsettling defendant, (2) the plaintiff must join the settling defendant as a party plaintiff, (3) the real party in interest rule requires disclosure of the Mary Carter agreement to the jury, or (4) the real party in interest rule has no effect upon the plaintiff's right to proceed alone in his claim against the nonsettling defendant.

The real party in interest rule, as stated in Federal Rule of Civil Procedure 17(a), and similar state rules of procedure, provides that, "Every action shall be prosecuted in the name of the real party in interest."[253] A real party in interest is a party "who, by the substantive law, possesses the right sought to be enforced."[254] The plaintiff who is a party to a Mary Carter agreement,

249. When the jury deducts settlement amounts, the jury is informed, of course, of both the fact and the amount of any settlements with the plaintiff. *See* Annotation, *Manner of Crediting One Tortfeasor with Amount Paid by Another for Release or Covenant Not to Sue*, 94 A.L.R.2d 352, 360 (1964).

250. *See* Greenemeier v. Spencer, 719 P.2d 710, 714 (Colo. 1986) (en banc) (although the court and not the jury will deduct the amount of settlement from the verdict, the fact of settlement, but not the amount paid, should be brought to the jury's attention, absent special circumstances); *accord* Arhart v. Micro Switch Mfg. Co., 798 F.2d 291 (8th Cir. 1986). *But see supra* notes 216-18 and accompanying text.

251. *See supra* § III.A.

252. Bolton v. Ziegler, 111 F. Supp. 516, 531 (N.D. Iowa 1953); *Cullen*, 211 Kan. at 374, 507 P.2d at 360; General Motors Corp. v. Lahocki, 286 Md. 714, 726, 410 A.2d 1039, 1045 (1980); Tober v. Hampton, 178 Neb. 858, 879, 136 N.W.2d 194, 207 (1965); *Lum*, 87 Nev. at 408, 488 P.2d at 350-51 (1971).

253. *See, e.g.*, TENN. R. CIV. P. 17.01; *see also* 3A MOORE'S FEDERAL PRACTICE, *supra* note 242, ¶ 17.02 n.13 (listing state statutes and rules).

254. 6 C. WRIGHT & A. MILLER, *supra* note 242, § 1543, at 643-44 (1971). In a case in federal court in which state law provides the rule of decision, state law determines the substantive right of a party to enforce a claim. Federal law then governs on the question of joinder. *Id.* § 1544.

therefore, is a real party in interest in his suit against the nonsettling defendant if he continues to possess his original claim against the nonsettling defendant.

A plaintiff whose claim has been fully satisfied generally is not entitled to further enforce the claim.[255] Courts have expressed differing views with regard to whether the plaintiff who has entered into a Mary Carter agreement has been fully compensated. In *Tober v. Hampton*,[256] the Nebraska Supreme Court held that the plaintiffs had been fully compensated for their injuries by the Mary Carter loan receipt they obtained from the settling tortfeasor; thus they were no longer owners of their claims. The court affirmed the trial court's dismissal of the plaintiffs' suit on the grounds that the plaintiffs were not real parties in interest. The court reached its conclusion by first deciding that the loan receipt was not a valid loan. Rather, it was merely an attempt by the agreeing alleged joint tortfeasor to settle the plaintiffs' claims and then impose full liability on the nonagreeing defendant in contravention of Nebraska law prohibiting contribution and indemnification among joint tortfeasors.[257] Once the court determined that the plaintiffs had in effect settled and fully assigned their claims, it followed that they were no longer real parties in interest.[258]

The *Tober* court's analysis depended upon construing the Mary Carter agreement to be something that the parties never intended it to be — full compensation and assignment of the plaintiff's claim. Thus, the *Tober* opinion is not particularly instructive regarding the application of the real party in interest rule to cases where a Mary Carter agreement is given its intended effect. The Supreme Court of Kansas, in *Cullen v. Atchison, Topeka & Santa Fe Railway*,[259] took a more realistic view of Mary Carter agreements and rejected the argument

---

255. 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 9, § 10.1, at 30-32; W. PROSSER & W. KEETON, *supra* note 9, § 48, at 330.

256. 178 Neb. 858, 136 N.W.2d 194 (1965).

257. *Id.* at 879, 136 N.W.2d at 207; see *supra* § II.B. for other cases refusing to permit Mary Carter agreements for similar reasons. *Tober* was overruled in Royal Indem. Co. v. Aetna Casualty & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975), to the extent that *Tober* held negligent joint tortfeasors not entitled to contribution.

258. Justice Boslaugh, concurring in *Tober*, would have dismissed the plaintiff's claim because the settlement was full compensation and effected a release of the nonsettling defendants. 178 Neb. at 880, 136 N.W.2d at 207. Justice Smith, dissenting, argued that the loan receipt in this case should be treated no differently than loan receipts in the insurance context and, therefore, that the plaintiffs were real parties in interest. *Id.*

In Reese v. Chicago, B. & Q. R.R., 55 Ill. 2d 356, 365, 303 N.E.2d 382, 387 (1973), Justice Schaefer, dissenting, argued that enforcement of a Mary Carter loan receipt agreement

> undermines, without even mentioning it, the long-standing doctrine that prohibits the assignment of a cause of action for personal injuries or for wrongful death. By the arrangement sanctioned in this case, one of two joint tortfeasors is permitted to buy from the injured person or his administrator the cause of action as it relates to him, and then to participate in the assertion of the cause of action against his co-defendants.

This argument has been rejected. *See* Cullen v. Atchison, T. & S.F. Ry., 211 Kan. 368, 374, 507 P.2d 353, 360 (1973); Biven v. Charlie's Hobby Shop, 500 S.W.2d 597, 598-99 (Ky. 1973). The argument is of no significance where the claims at issue are assignable. *See* Webb v. Dessert Seed Co., 718 P.2d 1057, 1067-68 (Colo. 1986). For a discussion of the issues of assignment, subrogation and real party in interest in Mary Carter agreements see *Unsettling Contributions, supra* note 1, at 139-42.

259. 211 Kan. 368, 507 P.2d 353 (1973).

that a Mary Carter loan receipt rendered the plaintiffs no longer real parties in interest. The court stated, "The deciding factor is whether the amount received, whether denominated loan or payment, is full satisfaction or only partial satisfaction of the loss."[260] The court then reasoned that because the plaintiff's suit sought $36,926.61 and the loan receipt evidenced payment of only $29,600.00, the plaintiff was permitted to bring the suit.[261]

In the typical case involving a Mary Carter agreement, the damages claimed by the plaintiff exceed the guaranteed or loaned amount. The opportunity to recover more than the guaranteed amount, by obtaining the agreeing defendant's cooperation at trial, is a primary motivation for the plaintiff to enter into such an agreement. The difference between potential and guaranteed recovery also assures the agreeing defendant that the plaintiff will vigorously prosecute the action against the nonagreeing defendant and thereby minimize the agreeing defendant's actual liability. Thus, when a Mary Carter agreement is construed as it was intended by the parties, the plaintiff remains a real party in interest and may continue to prosecute his claim against the nonsettling defendant.

Even if the plaintiff who has entered into a Mary Carter agreement is considered a real party in interest, a suit against the nonsettling defendant by the plaintiff alone may be impermissible under the real party in interest rule if the rule is construed to require that all real parties in interest join as party plaintiffs and if the settling defendant is considered to be a real party in interest. Through the Mary Carter agreement, a settling defendant acquires a beneficial interest in the plaintiff's claim because his ultimate payment to the plaintiff depends entirely upon the amount of any verdict the plaintiff recovers.[262] A real party in interest, however, is not merely a person with some beneficial interest in the claim. Rather, it is a party who by the substantive law possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.[263] The settling defendant, therefore, is a real party in interest only if by virtue of the agreement he acquires a right to enforce the plaintiff's claim.

Mary Carter agreements generally do not expressly assign all or a part of the plaintiff's claim to the settling defendant or otherwise give the settling defendant a right to prosecute the plaintiff's claim.[264] Nevertheless, one may conclude that the settling defendant acquires a right to enforce the claim under the doctrine of subrogation, if one reasons that the settling defendant's guarantee or "loan" to the plaintiff discharges the nonsettling defendant's obligation.[265]

---

260. *Id.* at 374, 507 P.2d at 360.

261. *Id.*, 507 P.2d at 360.

262. The settling defendant's acquisition of a beneficial interest in the plaintiff's claim also injects the issue of champerty into the Mary Carter arena. *See supra* § II.A.1. In *Lum v. Stinnett*, where the court relied upon the doctrine of champerty in voiding Mary Carter agreements, *see supra* notes 39-49 and accompanying text, the court also noted, but did not analyze, the real party in interest issue. 87 Nev. at 408, 488 P.2d at 350-51 (1971).

263. *See supra* note 254.

264. *But see supra* note 258 and *Alder*, 324 F.2d 483 (discussed *supra* notes 146-51).

265. *See* RESTATEMENT OF RESTITUTION § 162 (1937), which provides: "Where property of one person is used in discharging an obligation owed by another . . . , under such circumstances that

It is by no means certain that the settling defendant is entitled to subrogation under these circumstances. First, if the settling defendant is considered to have made the payment or guarantee officiously, he may not be entitled to subrogation.[266] Second, subrogation may not be available if the settling defendant has only partially satisfied the plaintiff's claim.[267] Third, in a negligence case involving a Mary Carter agreement, giving subrogation rights to the agreeing tortfeasor effectively gives contribution or indemnity to a settling joint tortfeasor, a result possibly prohibited.[268] More importantly, the purpose of a Mary Carter agreement is not to discharge the nonsettling defendant's obligation. Quite to the contrary, the intent of the agreeing parties is that the nonsettling defendant remain liable to the plaintiff for the full claim. If subrogation is not applicable and if the plaintiff has not assigned his claim to the settling defendant, the settling defendant will only be a beneficially interested party, and not a real party in interest. In such a case, it is clear that the real party in interest rule will have no effect on a suit brought by a plaintiff who has entered into a Mary Carter agreement.

Assuming the settling defendant is considered to be a real party in interest, either through assignment or subrogation, it is still not clear that the real party in interest rule is violated in a suit brought by the injured party as the only party plaintiff. While some courts hold that the rule requires joinder of all real parties in interest, other courts hold that the rule requires only that a real party in interest bring the suit.

The view that the real party in interest rule requires joinder of all real parties in interest is found in the Seventh Circuit case of *Wadsworth v. United States Postal Service*.[269] In *Wadsworth*, the court stated that under Federal Rule 17(a), an insurer who has paid part of a plaintiff's loss is a real party in interest and must be joined as a plaintiff.[270] There appear to be no reported decisions requiring that under the real party in interest rule, a party who has settled with the injured party through a Mary Carter agreement must be joined as a party plaintiff when the injured party seeks to enforce his claim against the nonsettling defendant. The view that requires joinder of all real parties in interest is certainly open to criticism.[271] Nevertheless, if the settling defendant

---

the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee . . . ."; *see also* RESTATEMENT (SECOND) OF RESTITUTION § 31 (Tent. Draft No. 2 1984).

266. RESTATEMENT OF RESTITUTION § 162, comment b (1937); *see* Bolton v. Ziegler, 111 F. Supp. 516, 531 (N.D. Iowa 1953) (because insurance policy of the settling defendant is one of liability, subrogaton is not involved; settling defendant is not a real party in interest).

267. RESTATEMENT OF RESTITUTION § 162, comment c (1937).

268. RESTATEMENT OF RESTITUTION § 102 (1937); *see supra* § II.B.

269. 511 F.2d 64 (7th Cir. 1975).

270. *Id.* at 65-66 (citing United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949)); *see also* Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 358-59 (N.D. Ill. 1985) (following *Wadsworth*; joinder of plaintiff store's insurer required under Rule 17(a) where insurer had reimbursed store for less than entire loss).

271. *See* 3A MOORE'S FEDERAL PRACTICE, *supra* note 242, ¶ 17.09 [1.-1], at 17-94:

> Since the original purpose of the rule was to overcome procedural barriers disallowing suit by assignees, the rule should not now be applied to dismiss suits as of course, when

is considered a real party in interest and his joinder is required by the real party in interest rule or otherwise, the effect would be helpful in assuring a fair trial for the nonsettling defendant. The jury would be aware of the settling defendant's real posture and the settling defendant would not have the defendant's privileges with regard to jury selection, examination of witnesses and argument.[272]

An interpretation of the real party in interest rule similar to the *Wadsworth* view was suggested in the context of a Mary Carter agreement by the Court of Appeals of Maryland in *General Motors Corp. v. Lahocki.*[273] The *Lahocki* court, however, did not require joinder of the settling tortfeasor as a party plaintiff, but did require disclosure of the Mary Carter agreement to the jury. Reasoning that "the policy of this State is for the trier of fact to have knowledge of the real party in interest,"[274] the court in *Lahocki* ordered a new trial because of failure to disclose to the jury a Mary Carter agreement between the plaintiff and one defendant.[275]

The view that the real party in interest rule does not require joinder of all real parties in interest is found in the Fourth Circuit opinion in *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*[276] Construing Federal Rule 17(a), the court held that in the context of partial subrogation between an insured and its insurer, there are two real parties in interest and the insured subrogor was entitled to bring suit for the entire loss in its own name.[277] The court reasoned that the effect of nonjoinder of the other real party in interest — the insurer — should be analyzed under Federal Rule 19, not Rule 17.[278] The court did note, however, that in a case of complete subrogation where the insurer has recompensed the insured for its entire loss, the insurance company would be the only real party in interest and would be required to sue in its own name.[279]

Under this latter view of the real party in interest rule, a Mary Carter agreement construed as the parties intended has no effect on a lawsuit brought by the injured party as the sole plaintiff. Even if the settling defendant is deemed to be a real party in interest, his joinder as a plaintiff is not required because the plaintiff, who has not fully assigned his claim or been fully compensated, remains a real party in interest who may assert the entire claim, even though he may be obligated to reimburse or release the agreeing defendant in some proportion to the final award.

> brought by assignors, unless the court finds the assignee is indispensable under Rule 19 and the assignee is not joined.

Id. 6 C. Wright & A. Miller, *supra* note 242, § 1543, at 646 ("[T]he question of who should or may be joined in the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a).").

272. *See supra* § III.

273. 286 Md. 714, 410 A.2d 1039 (1980).

274. *Id.* at 727, 410 A.2d at 1045.

275. *Id.* at 726, 410 A.2d at 1047.

276. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

277. *Id.* at 84.

278. *Id.* at 85.

279. *Id.* at 83 (citing United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-81 (1949)).

In summary, the real party in interest rule should have no impact on lawsuits in which the plaintiff has entered into a Mary Carter agreement, even though joinder of the settling defendant as a party plaintiff may be helpful in reducing prejudice to the nonsettling defendant. Because a Mary Carter agreement is not intended to fully compensate the plaintiff, the plaintiff remains a real party in interest. Further, without an enforceable assignment of the plaintiff's claim to the settling defendant, the settling defendant is not a real party in interest with regard to that claim. If the settling defendant is an additional real party in interest through an assignment in the Mary Carter agreement, his joinder as a plaintiff is not required under the more widely-held view of the Fourth Circuit that the real party in interest rule does not require joinder of all real parties in interest.

E. *Preserving the Nonsettling Defendant's Right to Remove to Federal Court*

As discussed above, jurisdictions that tolerate the use of Mary Carter agreements employ various devices to ensure that the agreement does not prejudice the nonsettling defendant's right to a fair trial. Many jurisdictions rely upon disclosure and admission of the agreement and permit the settling defendant to remain a party defendant. If, however, trial fairness includes the nonsettling defendant's right to remove the case to a federal court when there is a proper basis for federal jurisdiction, then a Mary Carter agreement may unfairly deprive the nonsettling defendant of this right.

A defendant is entitled to remove a case from state to federal court if it is a case "of which the district courts of the United States have original jurisdiction."[280] Complete diversity of citizenship between the plaintiffs and the defendants in a suit creates original federal subject matter jurisdiction.[281] In a case in which there is diversity of citizenship between the plaintiff and the nonsettling defendant, but not between the plaintiff and the settling defendant, the presence of the settling defendant in the suit can be the only barrier preventing the nonsettling defendant from removing the case to federal court. An incidental effect of an undisclosed Mary Carter agreement thus may be to defeat the nonsettling defendant's right of removal. Conceivably, defeat of removal to federal court may even be a primary goal behind the structuring of Mary Carter settlements in some cases.

There are no reported decisions addressing the problem of removal in the particular context of a Mary Carter agreement, but federal courts have considerable experience with the problem of plaintiffs attempting to defeat removal

---

280. Removal jurisdiction is created by 28 U.S.C. § 1441 (1982), which provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id. When the sole basis for original jurisdiction in the federal court is diversity of citizenship, removal is available only if the defendants "properly joined and served" are not citizens of the state in which the action is brought. *Id.* § 1441(b).

281. 28 U.S.C. § 1332 (1982); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

by various devices, including joinder of nondiverse defendants against whom they have no legitimate claim.[282] As a result, there are several doctrines that may be invoked by a nonsettling defendant to accomplish removal notwithstanding the naming of a nondiverse settling defendant as a party defendant in the complaint. The applicable doctrines depend upon whether the settlement agreement is consummated prior to or subsequent to the commencement of the action.

The right to remove is initially determined by the existence of federal subject matter jurisdiction at the time the suit is commenced.[283] In determining whether diversity jurisdiction exists, federal courts "look beyond the pleadings, and arrange the parties according to their sides in the dispute."[284] A corollary to this doctrine of realignment[285] is the doctrine of fraudulent joinder, which provides that removal is not defeated by the joinder as a defendant of a nondiverse person against whom the plaintiff has no bona fide claim.[286] Thus, in the case of either a Mary Carter agreement or a conventional settlement between the plaintiff and the sole nondiverse defendant prior to commencement of the action, the suit should be considered removable at the time of its commencement because the plaintiff has settled with that defendant and no longer has a bona fide claim to assert.[287]

Another possibility in the case of a Mary Carter agreement is to analyze the situation as one of realignment of the settling defendant as a party plaintiff because the settling defendant's ultimate interest is for the plaintiff to succeed in his claim against the nonsettling defendant.[288] This analysis would be ap-

282. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 31 (4th ed. 1983).

283. When the basis for removal jurisdiction exists at the commencement of the suit, diversity of citizenship must exist at commencement and at the time of removal. 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.161 [1.-3], at 267-68 (2d ed. 1983) [hereinafter 1A MOORE'S FEDERAL PRACTICE].

284. City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 180 (1905).

285. A defendant, in his removal petition to the federal court, may seek realignment to justify the existence of diversity and removal jurisdiction. *See* Pacific Ry. v. Ketchum, 101 U.S. 289 (1879); Broidy v. State Mut. Life Assur. Co., 186 F.2d 490 (2d Cir. 1951); Thompson v. Bankers & Shippers Ins. Co., 479 F. Supp. 956 (N.D. Miss. 1979); 1A MOORE'S FEDERAL PRACTICE, *supra* note 283, at 256. Procedures for removal are specified in 28 U.S.C. § 1446 (1982). In addition to the complaint, the federal court will consider affidavits and depositions submitted in support and in opposition to the removal petition. B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981).

286. C. WRIGHT, *supra* note 282, at 173. *See generally* 1A MOORE'S FEDERAL PRACTICE, *supra* note 283, at ¶ 0.161 [2]. The question of bona fide claim will be decided with reference to state law. "[T]here can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged." Parks v. New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

287. A petition for removal ordinarily must be filed within thirty days after the defendant receives the initial pleading. 28 U.S.C. § 1446(b) (1982). If a settlement was consummated prior to commencement of the suit, but is not discovered until later, however, the defendant may then remove the action, *see id.*, and the agreement may be considered in determining the parties' original positions. *See* C. WRIGHT, *supra* note 282, at 157.

288. In determining the propriety of removal on the basis of diversity of citizenship, the characterization in the state court action of a party as a plaintiff or defendant is not controlling

propriate, however, only in cases in which the settling defendant has acquired a right to enforce the plaintiff's claim, which is probably true only if the agreement contains an enforceable assignment.[289] Whether the situation is one of fraudulent joinder or realignment, removal should be allowed whenever a plaintiff commences an action in which the only nondiverse defendant has entered into a Mary Carter agreement with the plaintiff.

If a settlement with the only nondiverse defendant is entered into after the suit has commenced, a defendant will not be able to remove the case on the basis of diversity jurisdiction existing at the time the suit commenced. Nonetheless, a voluntary dismissal of the sole nondiverse defendant renders a case removable under 28 U.S.C. § 1446(b), which provides in a pertinent part:

> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.[290]

A settlement agreement with the sole nondiverse defendant, entered into and revealed during litigation, is arguably an "other paper from which it may first be ascertained that the case is one which is or has become removable." By reason of the settlement, the plaintiff has arguably voluntarily dismissed his claim against the settling defendant.[291] If the settlement is a Mary Carter agreement giving the settling defendant an enforceable claim against the nonsettling defendant, the case is nonetheless removable because the settling defendant should now be realigned as a plaintiff.[292]

Even without formal receipt of a Mary Carter agreement or formal dismissal of the nondiverse settling defendant, the conduct of the plaintiff and the settling defendant during trial may make removal possible. An illustrative case is *Heniford v. American Motor Sales Corp.*,[293] a case that may not have involved a Mary Carter agreement, but in which the plaintiffs' counsel, in closing argument in state court, told the jury with regard to the nondiverse codefendant, "[D]on't give a verdict against Ralph. We're not actually suing Ralph because we've found out now — found out when this case came up, that Ralph was telling

because the meaning of the federal removal statute is for the federal courts to decide. 1A MOORE'S FEDERAL PRACTICE, *supra* note 283, at 256. Thus, the fact that the state court may permit the settling defendant to appear as a defendant in the suit should not be determinative.

289. *See supra* text accompanying notes 262-68.

290. 28 U.S.C. § 1446(b) (1982). A plaintiff's voluntary dismissal of the nondiverse defendant will render a case removable, but an involuntary dismissal will not. 1A MOORE'S FEDERAL PRACTICE, *supra* note 283, at 279-80.

291. *See* DiNatale v. Subaru of Am., 624 F. Supp. 340 (E.D. Mich. 1985) (removal sustained on the basis of an agreement that the plaintiff would seek no recovery against the nondiverse defendant, and the nondiverse defendant would abandon its motion for summary disposition and appear and remain throughout the trial).

292. *See supra* notes 284-85 & 288-89 and accompanying text.

293. 471 F. Supp. 328 (D.S.C. 1979).

the truth by the records in this particular case."[294] The federal district court held that the case became removable under 28 U.S.C. § 1446(b) when the plaintiffs' counsel, by directing the jury not to return a verdict against the only nondiverse defendant, "in effect, dismissed their claim against this defendant."[295]

It is a sad commentary that federal court jurisprudence is so well equipped with doctrines to combat the wiles of attorneys seeking to either create or defeat diversity jurisdiction contrary to the reality of the litigation.[296] While these doctrines nevertheless appear sufficient to assure that Mary Carter agreements, if disclosed, will not deprive a nonsettling defendant of his right to a federal forum, they do require an expenditure of court and attorney time in litigating the removal issue in federal court.

IV. Should Mary Carter Agreements Be Tolerated?

As demonstrated in section II, Mary Carter agreements defeat the policies underlying all systems of allocation of liability among tortfeasors used in the United States today. Mary Carter agreements are used purposely to defeat any system of equitable sharing and to shift liability to the nonsettling defendant through manipulation of the trial process. One effect of a Mary Carter agreement on the trial process can be to present to the jury a sham of adversity between the plaintiff and one codefendant, while these parties are actually allied for the purpose of securing a substantial judgment for the plaintiff and, in some cases, exoneration for the settling defendant.[297] With regard to equitable sharing, a Mary Carter agreement, while not reducing the plaintiff's claim against nonagreeing defendants, allows and induces the plaintiff to pursue the nonsettling defendant alone for the entire claim.[298] In addition, where contribution is ordinarily allowed, a Mary Carter agreement may permit the settling defendant to avoid his duty of contribution to the nonsettling defendant.[299]

Thus, when Mary Carter agreements are permitted, the relative liability of tortfeasors is not determined according to the policymakers' idea of fairness and the results of an adversary trial. Rather, the allocation is determined by the cleverness of some of the parties in manipulating the trial process and in avoid-

---

294. *Id.* at 332. The court did not reveal why the plaintiffs did not simply dismiss their claim against Ralph. One can only speculate that Ralph was kept in the suit to defeat removal jurisdiction or that a secret Mary Carter agreement was in effect.

295. *Id.* at 333. In response to the plaintiffs' argument that the literal requirements of 28 U.S.C. § 1446(b) were not met because no "paper" existed from which it could be ascertained that the case had become removable, the court stated that the purpose of the "paper" requirement is only to initiate the thirty day removal period. *Id.* at 335.

296. In Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941), after discussing the doctrine of realignment, the Court stated, "Litigation is the pursuit of practical ends, not a game of chess." Other courts have made similar statements about Mary Carter agreements. *See* Daniel v. Penrod Drilling Co., 393 F. Supp. 1056, 1060 (E.D. La. 1975) ("Courts are not merely arenas where games of counsel's skill are played. Even in football we do not tolerate point shaving.").

297. *See supra* notes 9-22 and accompanying text.

298. *See supra* § II.B.

299. *See supra* § III.C.

ing the rules of settlement, release, and contribution. Moreover, it is likely that Mary Carter agreements are most attractive to, and more frequently used by, the more culpable of the codefendants.[300] Shifting liability through a Mary Carter agreement, therefore, is especially antithetical to equitable sharing because the shift is more often in the direction of the less culpable party.

Why, then, have not more courts followed the lead of cases such as *Lum*,[301] *Cullen*,[302] and *Alder*,[303] and taken steps to eliminate these agreements? The most frequent rationale expressed by the courts is the notion that Mary Carter agreements facilitate settlement of litigation.[304] That rationale is highly questionable. Mary Carter agreements normally require the plaintiff to continue to pursue the nonsettling defendant and often give the settling defendant the right to veto any proposed settlement between the plaintiff and the nonsettling defendant.[305] In this scenario, settlement with the nonagreeing defendant is less likely because the plaintiff will demand a higher figure than he otherwise might expect from the nonagreeing party. This is true because to fulfill the settling defendant's purpose of shifting liability, the Mary Carter agreement requires the plaintiff to refuse settlements with other defendants that are lower than an amount agreed to by the settling defendant.[306] Also, because the agreement provides the plaintiff with an assured recovery, the plaintiff has little to gain from accepting a settlement offer from the nonsettling defendant that is not considerably above the amount of the Mary Carter guarantee, even though the remaining defendant may make a generous offer.[307]

---

300. *See infra* text accompanying note 310; Palmer v. Avco Distrib. Corp., 82 Ill. 2d 211, 234, 412 N.E.2d 959, 970 (1980) (Ryan, J., dissenting):

> [T]he use of the loan agreement tends to throw the entire loss upon the less blameworthy party because the more blameworthy party will be willing to offer more in the pre-trial auction for the opportunity to enter into a loan agreement and thus hopefully to escape liability altogether.

Id. (citation omitted); *see* Abbott Ford, Inc. v. Superior Court, 181 Cal. App. 3d 1205, ___, 228 Cal. Rptr. 250, 253 (Ct. App.), *review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (during settlement negotiations involving all the parties, defendant who subsequently entered into a Mary Carter agreement with the plaintiff was willing to shoulder 70% of the proposed recovery).

301. *See supra* notes 39-49, 82, & 95-99 and accompanying text.

302. *See supra* notes 121-31 and accompanying text.

303. *See supra* notes 146-51 and accompanying text.

304. Slaughter v. Pennsylvania X-ray Corp., 638 F.2d 639, 641 (3d Cir. 1981) (Pennsylvania law); *Reese*, 55 Ill. 2d at 363, 303 N.E.2d at 386 (1973); Jensen v. Beaird, 40 Wash. App. 1, 10, 696 P.2d 612, 618 (1985) (citing *Reese*). *Contra Florow*, 502 F. Supp. at 5 ("In no way has this agreement saved this court or these parties one minute of court time or one dollar of litigation expenses."); *Reese*, 55 Ill. 2d at 367, 303 N.E.2d at 388 (1973) (Schaefer, J., dissenting); Scurlock Oil Co. v. Smithwick, No. C-4838, slip op. at 3 (Tex. Nov. 26, 1986) (LEXIS, States library, Tex file) (Spears, J., concurring) ("Mary Carter agreements make further ligitation [sic] more likely.").

305. *See supra* notes 10-11.

306. *See supra* notes 10, 14 & 150.

307. *See supra* note 14. In Eubanks & Cocchiarella, *supra* note 3, at 21-22, the authors argue that because of the uncertainties inherent in jury trials, the plaintiff is amenable to settlement with the nonagreeing defendant if the settlement amount equals or exceeds the guaranteed sum in the agreement. This argument fails to recognize that once the plaintiff has a Mary Carter agreement,

A recent California opinion, arguing that Mary Carter (sliding scale) agreements encourage settlement, stated that few multi-defendant cases go through to trial once such an agreement has occurred.[308] If and to the extent that nonagreeing defendants are encouraged to settle in such situations, one must then consider the reason. Mary Carter agreements may have the effect of forcing defendants into unreasonable settlements for fear they will be subject to both an unfair trial and, under California's treatment, the prospect of bearing the entire burden of a verdict for the plaintiff, without any credit for the settlement or any contribution from the settling defendant.[309]

In deciding whether to permit Mary Carter agreements, courts should consider not simply whether these agreements encourage settlement, but more importantly, whether they do so in a manner fair to all parties. As a Washington court reasoned:

> We also believe that the use of [a Mary Carter agreement] has a potentially coercive effect that should not be countenanced by the judiciary. This would be particularly true in a situation in which the liability of the settling defendant is relatively clear, while the liability of the litigating defendant is not. The more culpable defendant is in a position to force the less culpable defendant to either litigate, and risk the possibility of bearing the burden of the entire judgment, or settle — thus, coercing a contribution. While it is the policy of the law to encourage settlements, this policy should not be applied to the detriment of possibly innocent parties.[310]

Finally, Mary Carter agreements do not simplify the litigation. As demonstrated in section III, the agreement itself and its impact on the parties' positions becomes an additional issue that must be dealt with at trial and considered by the jury.[311]

Mary Carter agreements, particularly the loan receipt variety, have also been defended on the grounds that, as early interim settlements, they provide an injured plaintiff with funds to pursue his claim.[312] The argument that Mary Carter agreements should be tolerated because the plaintiff acquires litigation funds depends upon the unjustified assumption that the nonsettling defendant

---

the uncertainty of trial provides less incentive to settle. The plaintiff's minimum recovery is guaranteed regardless of the trial results and he stands only to gain by going to trial. In addition, the nonsettling defendant is unlikely to offer an amount far in excess of the guarantee amount if the nonsettling defendant continues to consider the settling defendant to have a duty to contribute to the settlement. The argument also fails to address the unfairness of shifting all liability to the nonsettling defendant. If the plaintiff accepts a settlement with the nonsettling defendant for the guarantee amount or more, the settling defendant will have successfully shifted all liability to the nonsettling defendant.

308. Riverside Steel Constr. Co. v. William H. Simpson Constr. Co., 171 Cal. App. 3d 781, 791, 217 Cal. Rptr. 569, 575 (Ct. App.), *review granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985).

309. *See supra* notes 186-99 and accompanying text (discussion of California cases).

310. Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 661, 537 P.2d 825, 829 (1975); *see also supra* note 300.

311. *See supra* § III.A.

312. *See supra* note 59.

is a highly culpable party who is being intransigent about settlement.[313] A recent criticism by the Maine Supreme Judicial Court[314] with regard to another settlement device[315] applies to this assertion. The court stated, "Policies favoring settlement help to reduce the burden upon the judicial system. Such policies are adopted primarily for the benefit of the judicial system as a whole, not for the purpose of allowing plaintiffs a quicker or more substantial recovery of damages to the detriment of defendants."[316]

One can also discern, and sympathize with, a feeling in some opinions that it is too difficult to comprehend the ramifications of these agreements. On the assumption that the agreements may have some, albeit unknown, legitimate function, courts are reluctant to ban them per se.[317] Rather, exercising a sense of judicial restraint, courts tolerate Mary Carter agreements, attempting to negate trial unfairness by requiring disclosure of the agreement to the court, counsel, and sometimes the jury and, at least in Oklahoma, requiring dismissal of the settling defendant as a party defendant.[318]

There is reason, however, to doubt the adequacy of the protections commonly afforded the nonsettling defendant. First, it is difficult to know whether juries that are informed about a Mary Carter agreement are capable of appreciating its effect when the settling defendant continues to participate in the trial as a defendant. There is considerable potential for juror confusion, as well as other prejudice to the nonsettling defendant, if the settling defendant plays a defendant's role at trial.[319] Second, even if the settling defendant is dismissed

---

313. *See* Eubanks & Cocchiarella, *supra* note 3, at 21-22 (Mary Carter agreement encourages a highly culpable nonagreeing defendant to take a "realistic" and "serious" approach to settlement). *But cf. supra* notes 300 & 310 and accompanying text (culpable defendants may use Mary Carter agreements to coerce contribution by codefendants whose culpability is not so clear).

314. Lavoie v. Celotex Corp., 505 A.2d 481 (Me. 1986).

315. *Lavoie* involved a Pierringer arrangement. *Id.* at 482; *see supra* note 160.

316. 505 A.2d at 483.

317. *See Bass*, 749 F.2d at 1158 n.7; Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 447 (4th D.C.A. 1972) ("Obviously, the number of variations of the so-called 'Mary Carter Agreement' is limited only by the ingenuity of counsel and the willingness of the parties to sign, and we, therefore, feel that we can neither condone nor condemn such agreements generically."), *rev'd*, 284 So. 2d 389 (Fla. 1973); Lahocki v. Contee Sand & Gravel Co., 41 Md. App. at 608, 398 A.2d at 507 (Ct. Spec. App.) (court declined to "brand Mary Carter, like Hester Prynn, without regard to the hows or whys of her conduct or what good or harm resulted by what was done"), *rev'd*, 285 Md. 714, 410 A.2d 1039 (1980); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558 (Minn. 1977) ("It is not proper or desirable for this court to condone or condemn types of settlement agreements generically. Rather, we must examine them on a case-by-case basis and assess their validity and effect."). On the other hand, in Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 176-77, 355 N.E.2d 253, 259 (Ct. App. 1976), the court ordered separate trials as a remedy for the Mary Carter problem, but noted,

> [W]e cannot avoid the realization that a modicum of resourcefulness will permit a future Burkett [plaintiff] and a future McMurry [settling defendant] to enter into a loan receipt agreement circumventing this holding to the same detriment of a future Crulo [nonsettling defendant]. Considering the loan receipt agreement's potential for abuse, we have, by this holding, applied a Band-Aid to an abcess.

318. *See infra* § III.

319. *See supra* notes 15-22 and accompanying text.

from the suit, as the Oklahoma Supreme Court has required,[320] the Mary Carter agreement is still a strong inducement to perjury on the part of the settling defendant who appears as a witness. If such perjury occurs, the nonsettling defendant may be unable to expose it through cross-examination or introduction of the agreement for impeachment purposes.[321] In addition, the nonsettling defendant's exercise of his right to remove the case to federal court may be complicated by the presence, even temporarily, of the settling defendant as a nondiverse party defendant.[322]

As more trials are affected by Mary Carter agreements, the proposition that such trials can be fair to the nonsettling defendant is put to the test. Courts that have rejected the ban on Mary Carter agreements imposed by the Nevada Supreme Court in 1972[323] may wish to reconsider that court's assessment that although it did not know how the jury would react if informed of the agreement, it did know the nonsettling defendant "had the right to litigate his case without hazarding the prospect that such considerations might affect the jury's verdict."[324]

Such reconsideration appears to have begun in Texas, where Mary Carter agreements have been permitted and have been admissible at trial for some time.[325] In a recent decision, *Scurlock Oil Co. v. Smithwick*,[326] the Texas Supreme Court held that a trial judge may exercise his discretion to refuse to apply collateral estoppel or issue preclusion to a judgment rendered in a case in which a Mary Carter agreement was in effect. The court explained:

> The resolution of [whether to allow issue preclusion or collateral estoppel effect to the jury findings in the prior case] requires us to weigh the public policy of encouraging settlements against the obvious prejudicial effects on a non-settling defendant in a "Mary Carter" situation. Such a settlement means the plaintiff and the settling defendant inevitably gang up on the non-settling defendant and jointly point the finger of liability. The settling defendant likewise argues for high damages, something usually foreign to defendants' advocacy.
>
> Although the non-settling defendant may advise the jury of portions of the "Mary Carter" agreement, as we held in *Simmons*, we nevertheless conclude that a jury verdict in those situations is one having the potential of being obtained without full and fair litigation. . . .Notwithstanding for public policy reasons, we permit "Mary Carter" agreements in spite of the potential skewing of a non-settling defendant's liability.[327]

In a concurring opinion, Justice Spears stated that Mary Carter agreements do

---

320. *See supra* notes 236-37 and accompanying text.

321. *See supra* § III.A.

322. *See supra* § III.E.

323. *Lum*, 87 Nev. at 402, 488 P.2d at 347; *see supra* § II.A.

324. 87 Nev. at 412, 488 P.2d at 353.

325. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977); *Unfair and Unnecessary*, *supra* note 3.

326. No. C-4838, slip op. at 11 (Tex. Nov. 26, 1986) (LEXIS, States library, Tex file).

327. *Id.* at 10-11.

not promote settlement and are inconsistent with a fair trial.[328] He concluded, "I am ready to hold Mary Carter agreements void as against public policy."[329]

V. Conclusion

The best that can be said of Mary Carter agreements is that they are more trouble than they are worth. In order to give a plaintiff and codefendant the freedom of making whatever arrangement they wish in settling their dispute, the civil litigation system and the nonsettling parties must pay the price of risking perjury, confusing juries and permitting evasion of the various allocation systems designed to ensure equitable sharing of liability among tortfeasors. Because it is not possible to ensure a fair trial for the nonsettling defendant when a Mary Carter agreement is involved, and because these agreements do not fairly encourage settlements, there is no reason to permit a Mary Carter agreement to determine the relative liability of those responsible to the plaintiff. Rather, public policy and an untainted adversary trial should determine the distribution of liability among the potential obligors.

The best solution is outright prohibition of Mary Carter agreements. Neither one of the less direct approaches to eliminating these agreements is entirely satisfactory. Refusing to consider the Mary Carter agreement as a bar to contribution against the settling defendant is an uncertain remedy because the settling defendant may be exonerated at trial from most or all liability to the plaintiff, and hence from contribution to the nonsettling defendant.[330] Reducing the plaintiff's judgment by the guarantee amount is a more effective remedy, but still permits the settling parties to gamble on a large verdict against the nonsettling defendant.[331] In both approaches, it is still possible that a nonsettling defendent may be victimized by an unfair trial because the settling parties are motivated by the Mary Carter agreement to cooperate in shifting all liability to the nonsettling defendant.

Judicial resources are not well spent in trying to keep one step ahead of settlement devices designed to contravene a jurisdiction's policy choices with regard to distribution of liability among obligors.[332] The best solution to the Mary Carter problem is to prohibit all settlements between a plaintiff and a potential obligor in which the settling obligor's ultimate extent of liability to the plaintiff depends upon the amount of the plaintiff's recovery from other obligors.

---

328. *Id.* at 3-4.
329. *Id.* at 2.
330. *See supra* § II.C.
331. *See supra* § II.B.
332. The expenditure of judicial resources is illustrated by the considerable number of recent California cases struggling with the issue of whether a Mary Carter ("sliding scale") agreement is a good faith settlement that relieves the settling defendant from a duty of contribution. *See supra* notes 190-95.