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NOTES AND COMMENTS

MARY CARTER AGREEMENTS: A VIABLE MEANS OF SETTLEMENT?

I. INTRODUCTION

A policy advocating out of court settlement is deeply seated in the law.¹ Settlement allows a plaintiff to quickly secure money damages for his injury, often alleviates the need for complex multi-party litigation, avoids the costs of litigation, and eases the burden of an already crowded docket. Settlement agreements have taken various forms and their substance is limited only by the ingenuity of the settling parties.² In suits involving multiple defendants, peculiar problems may arise when a settlement is made between the plaintiff and one or more, but less than all, the defendants.³ The most pressing of these problems is

1. "Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable effort to see that the agreed terms are fully and timely carried out. Public policy strongly favors settlement of disputes without litigation." *Aro Corp. v. Allied Witman Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976). "[S]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975), citing *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971). "The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto." *Pfizer Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972). "Voluntary settlement of civil controversies is in high judicial favor." *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969). See generally 154 C.J.S. *Compromise and Settlement* § 23 (1967).

2. See notes 4-91 *infra* and accompanying text for a discussion on the release, the covenant not to sue, the covenant not to execute, the loan receipt, and the Mary Carter, all of which are various forms of settlement agreements. While "it has been stated that there are as many agreements as there are ingenious trial counsel," Lageson, *Guarantee and Loan Receipt Agreements In Multi Party Litigation*, 42 J. AIR. L. 85, 86 (1976), the allowable ingenuity is certainly limited by public policy considerations. See notes 26-91 *infra* and accompanying text which deals with the Mary Carter agreement and policy limitations on its substance. Not considering the public policy considerations, *Maule Indus. Inc. v. Roundtree*, 264 So. 2d 445 (Fla. 1972), *rev'd*, 284 So. 2d 389 (Fla. 1973), found "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. . . ." *Id.* at 447. Referring to Mary Carter agreements one author finds "[t]his innovative scheme is the most flexible device to date. With it an endless variety of provisions may be molded to a particular fact situation." Comment, *Settlement Devices With Joint Torfeasors*, FLA. L. REV. 762, 773 (1973) [hereinafter cited as *Settlement Devices*].

3. Prosser finds that two particular problems arise. First, what will be the effect of the agreement on the plaintiffs' relationship with the non-settling defendants? Will the plaintiff still

the effect the settlement will have on those defendants who did not enter into the agreement and the ability of the settling parties, if left unfettered, to prejudice the non-settling defendants' chances for a fair trial.

This comment will examine the methods of settlement available and the pros and cons of each. The traditional methods of settlement will be given only brief treatment. The focus will be on the newest form of settlement, the Mary Carter agreement, and the problems it presents. These problems are a result of the tension between two competing policies: the desire to promote out of court settlement, and the desire to maintain the adversarial setting of a trial with the parties' actual positions known.

In order to accommodate these competing policies a compromise position must be assumed. Various approaches will be considered as a means for reaching such a position with suggestions as to the most attractive alternatives.

II. THE FORMS OF SETTLEMENT AGREEMENTS

A. *The Release*

Settlement agreements may take many forms. Of these, the oldest and most traditional is the release. When a plaintiff executes a release, he effectively surrenders his claim by extinguishing his legal right to proceed against the defendant.⁴ The release may be gratuitous or for

be able to proceed against the non-settling defendants? See note 4 *infra* and accompanying text. Second, what effect will the agreement have on the relationship between the settling and non-settling defendants? Prosser finds more difficulty arising from this second problem than any other. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 49-50 (4th ed. 1971). For a suggested solution to this problem, see UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (providing that the settling defendant is absolved from all liability which he may have to the non-settling defendants); *Tino v. Stout*, 49 N.J. 289, 229 A.2d 793, 799-800 (1967) (if settlement agreement provided for a pro-rata reduction in remaining defendants' liability then settling defendant is absolved from all liability he may have to non-settling defendants, else there is a pro tanto reduction and settling defendant has liability to non-settling defendants for a right of contribution); *Theobald v. Angelos*, 44 N.J. 228, 208 A.2d 129 (1964) (settling defendant must remain in lawsuit and have his liability litigated). If the settling defendant is found to have liability the judgment is reduced pro-rata. If the settling defendant is found to have no liability the judgment is reduced pro-tanto. In either situation, the settling defendant has no liability to the non-settling defendants. *Id.* at ___, 208 A.2d at 136.

4. "Although all the joint tortfeasors were jointly and severally liable, a plaintiff had but a single, indivisible cause of action which was extinguished by a release . . . against any one of the wrongdoers, thus eliminating plaintiff's right to sue others." Recent Development, *Release To One Tort-Feasor Held Not To Bar Suit Against Others Liable For Same Injury*, 63 COLUM. L. REV. 1142, 1143 (1963) [hereinafter cited as *Release To One Tort-Feasor*]; "The injured party had a single cause of action against the wrongdoers, and when he released one of them this single cause of action was extinguished." Recent Cases, *Torts—Joint Tortfeasors—Release Of One Not A Re-*

consideration.

An attribute of the release which diminishes its appeal is the fact that, at common law, a release of one defendant released all other joint tortfeasors.⁵ There have been numerous attempts to justify this rule⁶ but it has been rightly condemned by courts and commentators alike.⁷ Adherence to this common law rule discourages the plaintiff from set-

lease Of All, 12 VAND. L. REV. 1414, 1415 (1959) [hereinafter cited as *Joint Tortfeasors*]. See generally W. Prosser, *supra* note 3, § 49; Mead, *Releases and Covenants Not To Sue*, 30 ALA. LAW. 368 (1969).

5. W. PROSSER, *supra* note 3, § 49 n.96; RESTATEMENT OF TORTS § 885 (1939); Havinghurst, *The Effect of Settlement With One Co-Obligor Upon the Obligations of Others*, 45 CORNELL L.Q. 1, 1 n.1 (1959); Comment, *Torts: Release of Joint and Successive Tort-Feasors in Oklahoma*, 15 OKLA L. REV. 97 (1962) [hereinafter cited as *Tort Feasors in Oklahoma*]; Note, *Release: Action Not Barred Against Concurrent Tortfeasors*, 14 SYRACUSE L. REV. 526, 527 (1963) (finding this to also be the law in England, citing *Coke v. Jennor*, Hobbles, 80 Eng. Rep. 214 (K.B. 1614)).

6. Havinghurst gives the following reasons for the common law release rule: (1) construction of the instrument against the releasor; (2) the limitation of the claimant to one satisfaction; (3) the difficulties presented by the right of contribution; (4) the unitary character of the obligation. Havinghurst, *supra* note 5, at 3-7. Comment, *Release of One Tort Feasor Not a Release of Others When Tort Feasors Are Independent and Successive*, 51 DEN. L.J. 285, 286 (1974) [hereinafter cited as *Release of One Tort Feasor*]. See also *Settlement Devices*, *supra* note 2, at 767; Comment, *The Release of One Tortfeasor Does Not Release Others in South Carolina*, 24 S.C. L. REV. 293 (1972); Recent Cases, *Release-Construction and Operation-Joint Tortfeasors*, 38 N.D. L. REV. 356, 357 (1962). But see *Tort-Feasors in Oklahoma*, *supra* note 5, where the author recognizes the fallacies present in the reasons given to support the common law release rule and gives the following reasons for abolishing it: (1) the rule stifles compromise since each wrongdoer wants to wait until the other settles; (2) it gives tortfeasors an advantage inconsistent with the nature of their liability; (3) the wrongdoer who makes no attempt to settle is rewarded at the expense of the one who makes a partial settlement; (4) in applying the rule, the courts have disregarded the language of the release and the intent of the parties in executing it; (5) it provides a trap for the innocent plaintiff whereby he may be deprived of full compensation; (6) its result is generally unjust and unintended. *Id.* (footnote omitted).

7. "It is not possible to visualize any reasonable or compelling justification for persisting in the application of this harsh and unrealistic rule except on the basis of ancient formalisms, the reasons for which no longer prevail." *Cox v. Pearl Investment Co.*, 450 P.2d 60, 63 (Colo. 1973). *Sanderson v. Hughes*, 526 S.W.2d 308, 309 (Ct. App. Ky. 1975), where dissenting, Reed, J., takes an interesting approach by putting the burden on the non-settling tortfeasors to show the release is in full satisfaction of the claims. "[I]f plaintiff has relinquished his claim against one tortfeasor for only partial compensation and without any intent to release the other tortfeasor, it would seem equally abhorrent to any current sense of justice to absolve the wrongdoer who paid nothing whatever towards the plaintiff's damages and who merely stood by while his co-tortfeasor fairly effected a compromise for himself." *Brien v. Peck*, 28 N.J. 351, 146 A.2d 665, 671 (N.J. 1958). "Being untrammelled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of the parties, and extol technicality, we adopt the view that the release of one tortfeasor does not release the other. . . ." *Bartholomew v. McCartha*, 255 S.C. 489, ___, 179 S.E.2d 912, 914 (1971). See also *O'Bryan v. Peterson*, 563 S.W.2d 732 (Ct. App. Ky. 1977); *Save-lich Logging Co. v. Preston Mill Co.*, 265 Or. 467, ___, 509 P.2d 1179, 1184 (1973); Havinghurst, *supra* note 5; Comment, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 425 (1937) [hereinafter cited as *Joint Torts*]; *Settlement Devices*, *supra* note 2. "Nothing but false logic prevents a complete repudiation of this principle." Comment, *Release to One Joint-Tortfeasor*, 17 ILL. L. REV. 563, 564 (1923). The common law release doctrine is "illogical and worked injustice from its inception." *Joint Tortfeasors*, *supra* note 4, at 1417.

ting with any of the joint defendants.⁸ In a situation where there exists clear liability of more than one of the defendants there would be no reason for the plaintiff to settle with any of them, particularly when there exists joint and several liability.⁹ In light of the harsh consequences to the plaintiff, most jurisdictions have either abandoned the common law release rule or have abrogated it, thereby lifting the burden the rule places on the plaintiff.¹⁰

8. For a discussion of the differences and similarities of joint and concurrent tortfeasors and primary and secondary liability, see generally *Witucke v. Presque Isle Bank*, 68 Mich. App. 599, 243 N.W.2d 907 (1976); *Joint Torts*, *supra* note 7.

9. The common law rule on releases "compels the plaintiff either to forego any opportunity of obtaining what he can get from one defendant without suit or give up his entire claim against the other without full compensation. The argument that the plaintiff should not be permitted to make piecemeal collections from different defendants is pointless when he is allowed to do precisely that after judgment." *Sanderson v. Hughes*, 526 S.W.2d 308, 309 (Ct. App. Ky. 1975). See also *Christianson v. Fayette R. Plumb, Inc.*, 7 Wash. App. 309, 499 P.2d 72 (1972), where the court found that the common law release approach discourages settlement and, by adopting the approach taken by the RESTATEMENT OF TORTS § 885, it would "foster settlement and reduce litigation." *Id.* at ___, 499 P.2d at 74. "Anytime the unwitting victim of multiple wrongdoers released one of them for what seemed to him to be a roughly pro-rata share of his damages, the victim later discovered that he was foreclosed from collecting the balance of his damages from the other wrongdoers." *Release of One Tortfeasor*, *supra* note 6, at 286. The common law rule "on releases . . . tends to discourage rather than encourage settlement, even though compromise is generally encouraged." Note, *Effect of Release of One Tortfeasor Upon Liability of the Other, Where the Parties to the Release Did not Intend any Effect*, 11 DRAKE L. REV. 151, 156 (1963).

10. The common law rule on releases is now followed in only Virginia and Illinois. *Cotman v. Whitehead*, 209 Va. 377, 164 S.E.2d 681 (Va. 1968) (court expressly recognized the conflict but continued to follow the common law rule); *Berkson v. Quality Beauty Supply Co.*, 36 Ill. App. 3d 877, ___, 344 N.E.2d 629, 632 (1976). Prosser failed to recognize Illinois as a state maintaining the common law rule on releases. Rather, he recognized Virginia and Washington as jurisdictions maintaining the common law rule on releases. W. PROSSER, *supra* note 3, § 49. But see *Christianson v. Fayette R. Plumb Inc.*, 7 Wash. 309, 499 P.2d 72, (1972), which rejected the common law rule and adopted the position taken by the RESTATEMENT OF TORTS § 885. *Id.* at ___, 499 P.2d at 74. "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them." RESTATEMENT OF TORTS § 885(1). Many jurisdictions have taken the approach that the intent of the parties shall govern. See generally *Weems v. Freeman*, 234 Ga. 575, ___, 216 S.E.2d 774, 775 (1975); *Sanderson v. Hughes*, 526 S.W.2d 308 (Ct. App. 1975). This approach was questioned in *O'Bryan v. Peterson*, 563 S.W.2d 732 (Ct. App. 1977), but the court found itself bound to follow the rule of the Kentucky Supreme Court while expressing its disapproval and urging the Supreme Court to review its decisions and find that a release of one tortfeasor is not a release of all. *Id.* at 736. See also *Rossum v. Jones*, 97 N.J. Super. 382, ___, 235 A.2d 206, 210 (1967); *Savelich Logging Co. v. Preston Mill Co.*, 265 Or. 467, 509 P.2d 1179, 1184 (1973); *Bartholomew v. McCartha*, 255 S.C. 489, ___, 179 S.E.2d 912, 914 (1971); *Armstreet v. Greer*, 411 S.W.2d 403, 407 (Ct. App. Tex. 1967). Some jurisdictions follow the common law rule governing releases unless there is an express reservation to the contrary. See generally *Cox v. Pearl Investment Co.*, 168 Colo. 67, 450 P.2d 60 (Colo. 1969); *Liberty v. J.A. Tobin Constr. Co.* 512 S.W.2d 886, 890 (Ct. App. 1974); *McCloskey v. Porter*, 161 Mont. 307, ___, 506 P.2d 845, 848 (1972); *Montgomery Ward & Co. v. McKesson & Robbins, Inc.*, 55 Misc. 2d 529, ___, 285 N.Y.S.2d 462, 464 (1967). Other jurisdictions have adopted the rule that a release of one tortfeasor does not release other joint tortfeasors. *Young v. State*, 455 P.2d 889 (Alaska 1969), where the court said that in their "opinion the rule which will bring most clarity to this area of ambiguous and conflicting release rules is one under which a release of one tortfeasor does not release other joint tortfeasors. . . ." *Id.* at 893. See

B. *The Covenant Not to Sue or Execute*

Due to the harsh effect a release had on a settling plaintiff, it was necessary that some other means of settlement be devised. The result was what is termed a covenant not to sue. As a response to the release,¹¹ the covenant not to sue is practically no different from the release, other than its effect on the plaintiff's right to proceed against other joint tortfeasors.¹² The theoretical difference is that while a release relinquishes all rights to a claim against another party, the covenant not to sue retains those rights and grants a promise not to enforce them.¹³

The distinction between a release and a covenant not to sue has been found to be artificial.¹⁴ The current trend is to focus on the intent

also *Holve v. Draper*, 95 Idaho 193, 505 P.2d 1265 (1973); *Witacke v. Presque Isle Bank*, 68 Mich. App. 599, ___, 243 N.W.2d 907, 911 (1976); *Thorton v. Charleston Area Medical Center*, __ W. Va. ___, 213 S.E.2d 102, 105 (1975).

11. See *Reese v. Cradit*, 12 Ariz. App. 233, ___, 469 P.2d 467 (1970). The court found that "[c]ovenants of this type are resorted to in an effort to avoid pitfalls in the common law rule that the release of one joint tort-feasor releases all." *Id.* at ___, 469 P.2d at 471. See W. PROSSER, *supra* note 3, § 49.

12. "A covenant not to sue or not to execute is not considered a release of tort liability and rights are thereby preserved against joint tortfeasors not a party to the covenant." *Reese v. Cradit*, 12 Ariz. App. 233, ___, 469 P.2d 467, 471 (1970). See *also Holve v. Draper*, 95 Idaho 193, ___, 505 P.2d 1265, 1268 (1973) (covenant not to sue does not release joint tortfeasors unless it is found to be in full satisfaction of the claim); *Cullen v. Atchinson, Topeka and Santa Fe R.R.*, 211 Kan. 368, ___, 507 P.2d 353, 362 (1973) (a covenant not to sue does not release joint tortfeasors, however, it does operate a pro tanto reduction against any judgment obtained against others). "Under Illinois law a covenant not to sue does not have the same legal effect as a release, and has no effect on the liability of other wrongdoers not parties to the covenant." *Kravis v. Smith-Marine, Inc.*, 20 Ill. App. 3d 483, ___, 314 N.E.2d 577, 582 (1974). "Such a covenant is held not to release other tortfeasors, even in the absence of any reservation of rights against them, unless it is found that there has in fact been full satisfaction of the claim." W. PROSSER, *supra* note 3, § 49 at 303. "The practice of executing a covenant not to sue rather than a release is in modern times resorted to in order to avoid releasing all joint tortfeasors. . . ." *Mead*, *supra* note 4, at 368; "[S]ince plaintiff's cause of action is not extinguished, he may proceed against others." *Release To One Tort-Feasor*, *supra* note 4, at 1145. See *also Joint Tortfeasor*, *supra* note 4, at 1415.

13. "A covenant not to sue contemplates a reservation of rights by the plaintiff while the release does not." *Lousberg, Actions Against Multiple Tortfeasors: Credits Against Verdicts*, 55 ILL. B.J. 500, 502 (1967). See *also Tort Feasors in Oklahoma*, *supra* note 5, at 99. This purely theoretical distinction is criticized in that it puts the focus on form rather than the intent of the parties. "[A] covenant not to sue is merely an enforceable promise by the injured party not to pursue his claim against the covenantee. . . ." *Release to One Tort-Feasor*, *supra* note 4, at 1145. "A covenant not to sue, however, does not release any of the tortfeasors but is an agreement not to enforce the cause of action or claim against one or more of them." *Joint Tortfeasors*, *supra* note 4, at 1415.

14. We agree with defendant that distinction between a "release" and a "covenant not to sue" is entirely artificial. When one surrenders all means of enforcing his claim against another and does this in settlement of a dispute and threatened litigation, he effectually extinguishes the underlying right. Thereafter, if it is right at all, it is right without remedy. We know that courts of highest authority have recognized the existence of such "rights" in exceptional situations involving particularly matters of international adjust-

of the parties, ignoring the form of the instrument, thereby only attaching a label to the agreement once the intent has been discerned.¹⁵ By focusing on the intent of the parties, and exalting substance over form, the formal distinction between a release and a covenant not to sue has become practically meaningless.¹⁶

ment and of governmental credit. Absence of means of compulsion against the sovereign may make judicial assertion that rights exist against it, without other remedy, an appropriate sanction in such cases and possibly in others. But for the ordinary run of private rights and private litigation, the idea of right without remedy is hardly a working hypothesis. Everyday law is predicated upon the courts' capacity to do something about disputes. When one wholly surrenders his recourse to the courts in such matters, he insulates his adversary against his claim as effectually as when in so many words he releases him.

The distinction gains no strength from the conflict which exists concerning what is a release and what is a covenant not to sue. Some courts regard the matter as one of intention to be gathered from the whole instrument. Giving lip service to the rule, they avoid its effects when the purpose to reserve rights against the wrongdoers not released can be found, as generally it may be. Specific terms of release give way before a clause expressly reserving such rights or other indication of like intent. In this view the present instrument would be merely a covenant not to sue.

Other courts adhering to the distinction refuse to permit such a clause to overcome express words of release and allow escape only when the formula is limited to covenanting not to sue. To the extent that they decline to give effect to the clause they disregard the parties' intention, as would a court refusing entirely to recognize the distinction. In this view the agreement now in question would be a release and would discharge defendant by operation of law.

In determining the character as well as the effect of such an agreement, we are unwilling to concede so much potency to mere verbalism. The matter does not require the formalism of conveyancing. Whether words of "release" or of "covenant" are used, the effect should be the same. Wide acceptance of the distinction, notwithstanding its want of substance, and the decisions that in applying it intention should control, point the way to reexamination of the rule and its foundations.

McKenna v. Austin, 134 F.2d 659, 661-62 (D.C. Cir. 1943) (footnotes omitted). "This is probably the worst of all fictions for how can we say that the surrender of right to sue does not release the person to whom it is given." [sic] O'Bryan v. Peterson, 563 S.W.2d 732, 735 (Ct. App. 1977). The distinction between a release and covenant not to sue is a "hypertechnical distinction." Holve v. Draper, 505 P.2d 1265, 1268 (Idaho 1973). "A covenant not to sue is not a release, but it is to be distinguished from a release, and the distinction, although technical or artificial is clear." 76 C.J.S. *Release* § 3 at 630 (footnotes omitted). "[T]he distinction between a covenant not to sue and a release is entirely artificial." *Release To One Tort-Feasor*, *supra* note 4, at 1145. "This distinction has been criticized as being nebulous and artificial." *Tortfeasors in Oklahoma*, *supra* note 5, at 97.

15. "Whether an instrument is to be construed to be a covenant not to sue depends upon the language used, the substance of the agreement, and the intention of the parties." *Edgar County Bank & Trust Co. v. Paris Hosp. Inc.*, 10 Ill. App. 3d 465, ___, 294 N.E.2d 319, 323 (1973). "The underlying rationale is that this construction would thereby give force and effect to the intention of the parties to the instrument." *Plath v. Justus*, 28 N.Y.2d 16, 19, 319 N.Y.S.2d 433, 435, 268 N.E.2d 117, 118 (1971). "The correct rule adopted by this court is that the distinction between a covenant not to sue and a release will be preserved according to the intention of the parties." *Christianson v. Fayette R. Plumb, Inc.*, 7 Wash. App. 309, ___, 499 P.2d 72, 74 (1972), *citing* *Mills v. Inter Island*, 68 Wash. 2d 820, ___, 416 P.2d 115, 121 (1966). "A covenant not to sue, while technically not a release, has a similiar effect. . . ." *Mead*, *supra* note 4, at 368. *Tort Feasors in Oklahoma*, *supra* note 5, at 97.

16. "The rule that the reservation of a right shows the intention of the parties not to release the non-settling defendant and that such a document should be considered a covenant not to sue

A mode of settlement closely related to the covenant not to sue is the covenant not to execute. This is a promise given by the plaintiff that he will not execute upon any judgment rendered against the settling defendant. Like the covenant not to sue, this is not a surrender of the right to execute on the judgment but rather is a promise not to enforce that right. The covenant not to execute provides the plaintiff greater flexibility than the covenant not to sue because it allows him to settle at a later time.¹⁷

C. *The Loan Receipt*

The loan receipt agreement had its origin in the context of common carriers and shippers and the attempts of each to shift liability for shipping losses to the other.¹⁸ Under this agreement, the insurance company makes a loan to the insured-shipper prior to any adjudication of liability. If it subsequently is determined that the common carrier has some liability for loss to the shipper, then the amount of damages recovered by the plaintiff-shipper is reimbursed to the insurance company to the extent of the loan or as stipulated by the agreement.¹⁹

rather than an absolute release are numerous." *Cox v. Pearl Investment Co.*, 168 Colo. 67, __, 450 P.2d 60, 63 (1969). "[I]nstruments in the form of releases will be construed as 'covenants not to sue' in order to carry out the intention of the parties." *Lows v. Warfield*, 149 Ind. App. 569, __, 274 N.E.2d 553, 556-57 (1971). "A covenant not to sue will be treated as a release of all tortfeasors if reasonably compensatory consideration has been paid by one or more tort-feasors to the plaintiff." *Monjay v. Evergreen School Dist.*, 13 Wash. App. 654, __, 537 P.2d 825, 828 (1975). "An instrument though nominally a release, will be construed as a covenant not to sue if it reserves rights against any remaining tortfeasor." Lousberg, *Actions Against Multiple Tortfeasors: Credits Against Verdicts*, 55 ILL. B.J. 500, 503 (1967). See also UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, where a release and covenant not to sue receive identical treatment relative to their effect on contribution.

17. A covenant not to execute "is generally used where plaintiff has obtained a joint and several judgment. However, the covenant not to execute has also been used where judgment has not yet been obtained in an action pending against the defendant." Note, *Loan Agreements as Settlement Devices—Affirmative Duty to Disclose Loan Agreement to the Court and to the Remaining Defendants*, 25 DE PAUL L. REV. 792, 795 (1976).

18. See *Luckenbach v. W.J. McCahan Sugar Co.*, 248 U.S. 139 (1918). See generally Annot., 13 A.L.R.3d 42, 48-49 (1967).

19. An example of the typical loan receipt agreement is found in McKay, *Loan Agreement: A Settlement Device That Deserves Close Scrutiny*, 10 VAL. L. REV. 231, 231 (1976).

For instance, Ray is insured by the Safety Insurance Company on all shipments of sugar cane made in the course of Ray's commercial enterprise. Tarry Shippers is in the business of shipping cargoes of sugar cane. Unfortunately, Tarry Shippers loses the sugar cane which was shipped by Ray. In order to fulfill its contractual obligation to indemnify, Safety Insurance Company enters into a loan receipt agreement with Ray. The agreement provides the following: (1) The amount turned over to Ray, the insured, is received as a loan. (2) It is repayable only in the event and to the extent of a recovery by the insured from Tarry Shippers or other third persons on account of the loss described therein. (3) The insured's claim against third persons who may be liable for the loss is pledged as security for such repayment. (4) Ray, the insured, shall institute an

Arrangements of this type were indorsed by the United States Supreme Court in *Luckenbach v. W.J. McCahan Sugar Refining Co.*²⁰ In approving the loan receipt agreement, the Court said: "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."²¹

While this rationale may stand in the business world, the loan receipt agreement has expanded beyond that realm. Its use has infiltrated personal injury cases involving multiple defendants.²² In personal injury cases, the loan receipt agreement operates by one or more, but not all, of the defendants loaning a specified amount of money to the plaintiff prior to the lawsuit. If the plaintiff is subsequently successful against the defendant(s) not entering the agreement, he promises to reimburse the settling defendant(s) to the extent of his loan. If liability is found to lie only with the settling defendant(s), then his loan is not repaid and the plaintiff promises not to execute on the judgment. By executing the loan receipt agreement, the plaintiff's recovery is no longer contingent on the success of his lawsuit.

Loan receipt agreements in the area of joint tortfeasors have been both upheld²³ and struck down.²⁴ The position supported by most

action in his own name against Tarry Shippers and such third persons or appoint the insurer, Safety Insurance Company, his attorney, with irrevocable power to prosecute or settle such an action in the insured's name and to execute any documents necessary to effectuate the agreement. In any event, the action against Tarry Shippers is to be under the insurer's exclusive control, direction, and expense. (5) Ray, the insured, warrants, that he is the person entitled to the payment and that he has not and will not settle with or release Tarry Shippers or anyone responsible for the loss without the consent of the insurer, Safety Insurance Company. This example sets forth the typical situation from which these agreements arose and upon which they have been held valid.

Id. The author adds that use of the word loan in this type of agreement is a fiction. *Id.* at 236. 20. 248 U.S. 139 (1918).

21. *Id.* at 149.

22. "Loan receipts are quite common between insurer and insured. Their use stems from the early case of *Luckenbach v. W.J. McCahan Sugar Ref. Co.* . . . Since then their use has been greatly extended by insurance carriers but rarely have they been used between joint tortfeasors." *Tober v. Hampton*, 178 Neb. 858, ___, 136 N.W.2d 194, 201 (1965) (questioning the extension of the loan receipt agreement to cases involving joint tortfeasors). Recognizing that the rationale may not hold, one commentator finds that

"[i]t is absolutely crucial to distinguish between the two main contexts in which loan agreements appear: (1) the . . . traditional plaintiff-insured and plaintiff's insurer context and (2) the more recent plaintiff-codefendant context. . . . [I]n the former there are several positive reasons in favor of loan agreements while in the latter several negative reasons exist for prohibition of loan receipt agreements."

McCay, *supra* note 19, at 232. See generally, Scoby, *Loan Receipts and Guaranty Agreements*, 10 FORUM 1300 (1975).

23. Thus in considering the efficacy of loan receipts in Illinois, we contemplate those situations in which a concurrent tortfeasor, perhaps otherwise unable to obtain indemnity from his joint tortfeasor, may escape liability and judgment by loaning funds to a

commentators is to put to an end the use of loan receipt agreements in cases involving joint tortfeasors as multiple defendants,²⁵ thus limiting the avenues of settlement methods open to plaintiffs.

III. THE HISTORY OF MARY CARTER AGREEMENTS

Mary Carter agreements, and the problems they present, have been addressed by many jurisdictions. While the treatment afforded them varies, cases from four jurisdictions (Florida, Texas, Arizona and

plaintiff. Thus framed the question becomes whether our policy of denying contribution between joint tortfeasors outweighs the considerations favoring private settlement of lawsuits. We think it does not.

Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, __, 303 N.E.2d 382, 386 (1973). "The willingness of one joint tort-feasor to place a substantial sum of money at the disposal of the damaged party with a possibility of no recoupment is certainly to be encouraged." *American Transp. Co. v. Central Ind. R.R.*, 255 Ind. 319, __, 264 N.E.2d 64, 67 (1970). See also *Northern Ind. Pub. Serv. Co. v. Otis*, 145 Ind. App. 159, __, 250 N.E.2d 378, 393 (1969) (upholding a loan receipt agreement finding that it neither violated the rule against contribution among tortfeasors nor was it an assignment of a cause of action); *Cullen v. Atchinson, Topeka & Santa Fe R.R.*, 211 Kan. 368, __, 507 P.2d 353, 360 (1973) (found loan receipt agreement was valid and did not violate public policy by constituting champerty or maintenance); *Bivens v. Charlie's Hobby Shop*, 500 S.W.2d 597 (Ct. App. Ky. 1973); *Klotz v. Lee*, 36 N.J. Super. 6, 114 A.2d 746 (1955). *Grillo v. Burkes Point Co.*, 275 Or. 421, __, 551 P.2d 449, 453 (1976). See also Scoby, *supra* note 22, where the author finds three reasons advanced in support of loan receipt agreements: 1) they tend to encourage settlement; 2) they make funds readily available to plaintiff; 3) they tend to simplify multi-party litigation. The author answers these reasons by saying that loan receipts do not actually encourage settlement because the plaintiff is obligated to continue litigation. While human in terms of putting the plaintiff in funds the real question is whether he is entitled to those funds. Finally, the only time multi-party litigation will be simplified is in that limited situation in which the tortfeasor would have to show he was only passively or secondarily liable in order to claim indemnification. *Id.* at 1313-15.

24. *Tober v. Hampton*, 178 Neb. 858, __, 136 N.W.2d 194, 207 (1965) (disallowed the use of the agreement in the context of joint tortfeasors because the real party in interest was not in the suit); *Monjay v. Evergreen School Dist.*, 13 Wash. App. 654, __, 537 P.2d 825, 829-830 (1975) (found that the agreement violated public policy of pro-tanto reduction of judgment against the remaining tortfeasors; that had it a potentially coercive effect; and that it contained strong overtones of champerty).

25. Lageson, *supra* note 2, at 105. While not assuming a position pro or con as to the validity of a loan receipt agreement, Lageson suggests an interesting approach. Namely, the terms of the agreement should be submitted to the jury as one element to consider in determining and apportioning damages. *Id.* This approach has also been suggested as a method of dealing with Mary Carter agreements. See notes 78-83 *infra* and accompanying text. It has been opined that loan receipt agreements are a violation of ethics, contrary to public policy, a circumvention of the rule prohibiting contribution or indemnity between cotortfeasors, do not present the real party in interest, act as an assignment of a claim, are champertous, and prejudicial to the nonagreeing defendant. McKay, *supra* note 19, at 246-56.

At a time when the trend of the law is toward candor, disclosure and efforts to make trials reflect substance and reality rather than an exercise in guile and form for the amusement of lawyers, endorsement of use of the loan receipt agreement is regression. Trial of a lawsuit should not be encouraged to degenerate into a battle of clever phrasing and disguised postures; use of the loan receipt is a step in that direction for no demonstrable need.

Scoby, *supra* note 22, at 1316.

Nevada) are representative and reflect the extreme approaches being taken.

Mary Carter agreements had their genesis in the Florida case of *Booth v. Mary Carter Paint Co.*²⁶ and the phrase was coined in *Maule Industries, Inc. v. Roundtree*.²⁷ *Booth* involved an automobile accident between the plaintiff and three truck drivers, all named as defendants. Two of the trucks belonged to the Mary Carter Paint Company. Prior to the trial, attorneys for the plaintiff entered into a settlement agreement with the third truck driver. The agreement established a maximum liability to which this driver could be subjected. Additionally, he would not have to pay any damages if the amount of recovery against the drivers of the trucks belonging to the Mary Carter Paint Company equaled or exceeded his maximum liability.²⁸ The court gave the

26. 202 So. 2d 8 (Fla. Dist. Ct. App. 1967).

27. 264 So. 2d 445, 446 (Fla. Dist. Ct. App. 1972), *remanded*, 284 So. 2d 389 (Fla. 1973) (case was remanded in light of *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973), dealing with the extent of the agreement's admissibility).

28. The following is the agreement used in *Booth v. Mary Carter Paint Co.*

An agreement between William T. Keen of the firm of Shackelford, Farrior, Stallings, Glos & Evans, as counsel of record for the defendants, B.C. Willoughby and Harry Lee Sutton, and Mark R. Hawes, of the firm of Hawes and Hadden, counsel of record for the plaintiff, J.D. Booth, provides:

"1. That the maximum liability, exposure of financial contribution of the defendants, B.C. Willoughby and Harry Lee Sutton, shall be \$12,500.00."

The agreement further provides:

Second, that in the event of a joint verdict against Willoughby and the Mary Carter Paint Company exceeding \$37,500.00, that the plaintiff will satisfy said judgment against Mary Carter Paint Company entirely, with no contribution from Willoughby and Sutton. Provided, however, that if the Mary Carter Paint Company is not financially responsible to the extent of \$37,500.00, the defendant Willoughby will contribute an amount of money between Mary Carter Paint Company's actual responsibility and the figure of \$37,500.00, but not to exceed \$12,500.00.

Third, Willoughby and Sutton agreed that in the event of a verdict for all the defendants, they would pay the plaintiff \$12,500.00; and in the event of a verdict against Mary Carter Paint Company less than \$37,500.00, that Willoughby and Sutton would contribute the sum of \$12,500.00.

Fourth, Willoughby and Sutton shall continue as active defendants in the active defense of said litigation until all questions of liability and damages are resolved between the plaintiff and the other defendants.

Fifth, that should the conditions laid down in the agreement result in any financial responsibility on the part of Willoughby and Sutton, they will pay the plaintiff when five days after the questions of liability and damages between the plaintiff and the other defendants are settled or concluded.

In paragraph 6 we again find the provision that the financial responsibility, exposure of liability of Willoughby and Sutton shall not exceed the sum of \$12,500.00.

Seventh, it is stated:

"It is the intention of the parties hereto that this agreement shall be construed as a conditional agreement between them as to financial responsibility only, and that it shall in no wise constitute, or be construed to constitute, a release, settlement, admission of liability, or otherwise, and shall have no effect upon the trial of this case as to liability or extent of damages, nor shall said agreement be revealed to the jury trying said case."

agreement a cursory treatment and concluded that "the instrument is what it purports to be, an agreement that would limit the liability of defendants . . . to pay a sum not exceeding \$12,500 and which would guarantee the plaintiff the sum of \$12,500 if any verdict was secured for less than \$37,500."²⁹

Four basic elements emerge from *Booth* which distinguish Mary Carter agreements from other types of settlement agreements. First, the settling defendant agrees to remain in the action. Second, the agreement is kept secret. Third, the plaintiff is guaranteed a certain amount of damages regardless of the success of his lawsuit. Fourth, the settling defendant has the chance of eventually paying no damages.³⁰

Eighth, it was agreed that the contents of this agreement would be furnished to no one, unless so ordered by the court, and

Ninth, that the terms and conditions specified in the agreement, which are dependent upon a jury verdict, should be equally applicable to and binding on the parties in the event plaintiff Booth amicably settles the issues of liability and damages with Mary Carter Paint Company.

202 So. 2d at 10.

29. 202 So. 2d at 11. The court's cursory treatment might be explained by the fact that the defendant did not complain of the agreement's existence, but rather claimed that he should have a pro tanto reduction of his damages. *Id.* at 8.

30. *Id.* A Mary Carter agreement has been defined as "a contract by which one codefendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other codefendants. Secrecy is the essence of such an arrangement. . . ." *Bedord School Dist. v. Caron Const. Co.*, 116 N.H. 800, ___, 367 A.2d 1051, 1053 (1976) (citing *Ward v. Ochoa*, 284 So. 2d 385, 387 (Fla. 1973)).

The typical Mary Carter agreement generally embodies four principal collusive features:

(1) Secrecy, in that both the plaintiff and the contracting defendant or defendants agree to keep the "agreement" secret and confidential;

(2) The contracting defendant or defendants agree to remain as party defendants in the action, and they also become active proponents of the plaintiff's case;

(3) The contracting defendant or defendants "guarantee" to the plaintiff a specific sum of money in the event that the plaintiff loses the case or in the event that the plaintiff recovers less than that specific sum of money; and

(4) The contracting defendant or defendants partake of an interest in the outcome of the litigation.

Friedman, *The Expected Demise of "Mary Carter": She Never Was Well*, 633 Ins. L.J. 602, 609-10 (1975). It has been stated that there are three basic elements of a "Mary Carter" agreement: (1) The defendants entering the agreement agree to remain parties to the law suit; (2) all parties agree to keep the agreement secret; and (3) the defendants entering the agreement guarantee that the plaintiff will receive a given sum, and the plaintiff agrees that this guarantee will be enforced only to the extent the plaintiff fails, after appropriate efforts, to recover the guaranteed sum from the other potential defendants.

Michael, *"Mary Carter" Agreements in Illinois*, 64 ILL. B.J. 514, 516 (1976). See also Comment, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1396 (1974) [hereinafter cited as *Problems of Collusive Settlements*].

A fifth element which might be added is that the possibility of the settling defendant having to pay no damages is contingent on the plaintiff's success. *Cox v. Kelsey-Hayes*, 49 OKLA. B.J. 2157 (1978). It appears that a number of the features which distinguish a Mary Carter may also be

In *Maule Industries*, the Florida Supreme Court was asked to declare Mary Carter agreements void as against public policy. The court refused to do so but, in an apparent attempt to buffer the effects of *Booth* said, "we neither condone nor condemn such agreements generically."³¹

It was not until *Ward v. Ochoa*³² that the loose language and implications of *Booth* were corralled. In *Ward*, the court expressly rejected *Booth* and decided that when an agreement exists which decreases the settling defendant's liability by increasing the other defendant's liability, the agreement must be admitted into evidence at the request of the non-settling defendants. The court further held that the non-settling defendants may move for severance due to possible prejudice and the judge should exercise his discretion in ruling on this motion.³³

*General Motors Corp. v. Simmons*³⁴ is the leading Texas case dealing with Mary Carter agreements. In *Simmons*, the plaintiff was involved in an automobile accident and was injured when the window in his automobile shattered. Simmons sued General Motors, Feld Truck Leasing Corporation, the owner of the other vehicle, and the driver. Prior to the trial, Simmons entered into a Mary Carter agreement with Feld and the driver.³⁵ Judgment was entered in favor of Simmons.

found in other forms of settlement. Any settlement agreement may be kept secret and, under a covenant not to sue, the plaintiff is guaranteed a certain amount of damages regardless of the success of his lawsuit. The pivotal point of distinction would seem to be the incentive the settling defendant has for placing liability on the non-settling defendant with the possibility that he will have to pay no damages. "This must be distinguished from three other types of pretrial agreements in which this feature is not present: (1) a release; (2) a covenant not to sue; and (3) agreements in which the participating defendants limit their liability to a fixed amount, regardless of the outcome of the trial or the amount of judgment." Note, "*Mary Carter*" *Limitation On Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988, 989 (1974) [hereinafter cited as *Limitation on Liability Agreements*].

31. 264 So. 2d at 447. See also *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971), where the court found that the Mary Carter Agreement contravened public policy, was void, and unenforceable. *Id.* at 351-53.

32. 284 So. 2d 385 (Fla. Dist. Ct. App. 1973).

33. *Id.* at 388. This is currently the state of the law in Florida, the birthplace of Mary Carter agreements. This is a rather liberal approach and recent Florida decisions have begun nurturing the use of Mary Carter agreements. See, e.g., *Kuhns v. Fenton*, 288 So. 2d 253 (Fla. 1973); *Frier's, Inc. v. Seaboard Coastline R.R.*, 355 So. 2d 208 (Fla. Dist. Ct. App. 1978); *Atl. Ambulance & Convalescent Serv. v. Asbury*, 330 So. 2d 477 (Fla. Dist. Ct. App. 1975); *General Portland Land Div. Co. v. Stevens*, 291 So. 2d 250 (Fla. Dist. Ct. App. 1974).

34. 558 S.W.2d 855 (Tex. 1977).

35. In *Simmons*, plaintiff and defendant executed an agreement whereby settling defendant would pay plaintiff a certain sum prior to trial and, at the same time, remain a defendant in the lawsuit. In return, the plaintiff promised not to execute against the settling defendant and pay 50%

General Motors appealed, claiming error by the trial court in failing to admit the agreement into evidence.

The Texas Supreme Court set out the traditional rule preventing disclosure of settlements, relying on the public policy of encouraging settlement.³⁶ But the court distinguished the agreement in *Simmons* from traditional settlement agreements. Because the defendant remained in the lawsuit and acquired a financial interest in the outcome, the court concluded that the policy behind prohibiting admission of settlement agreements into evidence did not apply in this situation. Finding that the financial interests of the parties and their adverse positions were proper areas of inquiry, the court ruled that the settlement agreement should be admitted into evidence.³⁷

Apparently the two factors used by the court in *Simmons* to justify admission of the agreement are pivotal. In *Miller v. Bock Laundry Machine Co.*,³⁸ the Texas Supreme Court distinguished *Simmons* and ruled that evidence of a settlement agreement may be excluded where

of every dollar up to \$200.00 which was collected from the non-settling defendant, to the settling defendant. *Id.* at 857.

36. "[A] settlement agreement is not admissible as an admission against interest or otherwise, because to admit such agreements would frustrate the policy favoring the settlement of lawsuits." *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347, 352 (Tex. 1968).

Where two parties are engaged in a lawsuit arising out of a transaction which involved other persons, the fact that one party made a compromise with a third person cannot generally be received in evidence as an admission of the party's liability. Thus, in a negligence action evidence that the defendant has paid third persons on claims arising from the same transaction or incident as that from which the plaintiff's claim arose is generally held not admissible as an admission of liability.

Although having a slight bearing upon the injured person's credibility, evidence of a compromise between him and one of several tortfeasors is properly excluded over the objections of another tortfeasor sought to be held liable for the injuries, since the evidence would have informed the jury that one of the defendants had admitted liability and might also have been used as a basis for an argument that the injured person had accepted the amount of the settlement as fair compensation for his injuries.

29 AM. JUR. 2d *Evidence* § 632 (1967).

37. The court was able to admit the agreement by finding that, in the course of a proper cross examination, it could be used. The court determined that there was a strong policy behind establishing a party's interest in a suit. Viewing this as analogous to insurance cases, the court found this to be an exception to the general rule prohibiting admission of settlement agreements.

[T]here is another strong policy in Texas that one may not develop testimony that a party's loss was covered by insurance since that fact is not considered material to the issue of liability. . . . When, however, as in another case, an agent of an insurance company that was the real party at interest took the witness stand under the semblance of being a disinterested witness to testify against the opposing party, his connection with the insurer was not exempt from cross-examination.

558 S.W.2d at 858. The court then continued by laying down the rule "that interest, bias, or motive on the part of a witness may be elicited on cross-examination even though it incidentally discloses that the defendant is protected by insurance." *Id.* Under the court's reasoning the Mary Carter agreement would be analogous to the insurance agreement.

38. 568 S.W.2d 648 (Tex. 1977).

the settling defendant, even though he remained in the law suit, did not acquire a financial interest in the plaintiff's case.³⁹ A recent limitation on *Simmons* may be found in *Bristol-Myers Co. v. Gonzales*.⁴⁰ In *Gonzales*, the court allowed admission of an agreement they identified as a Mary Carter, but only to show bias and attack the credibility of witnesses.⁴¹ The approach taken by Texas, allowing Mary Carter agreements but requiring that they be admitted into evidence under certain circumstances and for a limited purpose, is common to other jurisdictions.⁴²

City of Glendale v. Bradshaw,⁴³ a case decided by the Arizona Court of Appeals, involved a Mary Carter agreement minus one important element found in *Booth*. In *Bradshaw*, the plaintiff was a passenger in a car involved in a one car accident. The car struck a mound of dirt when the road on which it was traveling came to an end. The car was hurled into the air coming to rest at some distance. Plaintiff brought suit against the driver of the vehicle for her negligent operation and the City of Glendale for failing to properly maintain a warning sign indicating that the road ended. Prior to trial, the plaintiff entered into a Mary Carter agreement with the driver of the vehicle. At trial, the City of Glendale argued that, in light of the Mary Carter agreement, the court should either declare a mistrial or dismiss the action against the driver. The trial court overruled both motions and was affirmed on appeal.

The element missing in *Bradshaw* and pivotal to the court's decision, was secrecy. The agreement had the other elements of a Mary Carter, and, had it contained the element of secrecy, the agreement

39. In *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), we held that it was reversible error to exclude evidence of a "Mary Carter" settlement agreement whereby the settling defendant acquired a direct financial interest in plaintiff's lawsuit. In so holding, we distinguished that type of settlement agreement from an ordinary settlement agreement which is properly excluded from the jury. The settlement agreement entered into here was not a "Mary Carter" agreement because Jenkins [settling defendant] did not acquire a financial interest in Miller's [plaintiff] recovery against Bock [non-settling defendant].

Id. at 652.

40. 561 S.W.2d 801 (Tex. 1978).

41. *Id.* at 805. The settling defendant attempted to distinguish this case from *Simmons* by alleging that since his insurer was paying the guarantee he had no financial interest. The court did not accept this argument finding that the "payment was made on behalf of [the settling defendant], and therefore, [the insurer] and [the settling defendant] should stand in the same shoes." *Id.*

42. See notes 64-75 *infra* and accompanying text.

43. 16 Ariz. App. 348, 493 P.2d 515 (1972).

would have been voided and found to involve unethical conduct.⁴⁴ Recognizing that there was some chance for collusiveness and a likelihood that the jury would be presented with a distorted view of the lawsuit, the court nonetheless upheld the agreement on the legal principal "that a defendant may choose to defend in the manner of his choice."⁴⁵ The court seemed to find solace in the fact that the plaintiff could have chosen to execute solely against the non-settling defendant even without the agreement.⁴⁶ Careful not to permit all types of agreements, the court concluded by saying that "we . . . do not voice our unqualified approval of the agreement"⁴⁷

In *City of Tucson v. Gallagher*,⁴⁸ the Supreme Court of Arizona gave further approval to Mary Carter agreements. The court reasoned that even present the agreement, the settling defendant's motive was identical: first, to argue that he in no way caused the injury and second, to attempt to place all liability on the non-settling defendant. While this may be superficially true, absent the agreement a difference in motive is quite possible. Arguably, the defendant in response to the plaintiff's case would assume a defensive posture, attempting to show no liability. With the agreement being present, there is no need for the defendant to assume this posture. His liability to the plaintiff has been decided; the only remaining question is that of degree. Present the agreement, the settling defendant assumes an offensive position directed towards the non-settling defendant. Rather than showing that "he did not do it," the settling defendant would be showing "the other

44. Dealing with two similar agreements that both involved secrecy, the Ethics Committee of the State Bar of Arizona found them to be improper. The court then found that:

[W]hile the committee concluded that both of these agreements were improper, this Court cannot overlook the fact that an essential part of each agreement was that counsel for the third defendant would not be made aware of these agreements prior to the rendering of a verdict. This factor alone substantially reduces the recognition which this Court will afford to the ethics opinion when its facts and holding are viewed in the light of the circumstances surrounding the covenant not to execute in the case at bar. The agreement in our case was made known to defense counsel prior to the beginning of the trial. . . . Inasmuch as the City's counsel was aware of the subject covenant prior to trial and because the plaintiff could have chosen to execute against only the City even in the absence of a covenant not to execute, it is the holding of this Court that the trial court's rulings . . . were correct and are affirmed.

Id. at 522-23.

45. 16 Ariz. App. at ___, 493 P.2d at 523. This would appear to be a rather hollow argument. Certainly the court would not sanction perjury because the defendant may defend himself in any manner he chooses.

46. *Id.* While this may be true, the fact remains that in the absence of the agreement, the plaintiff had a choice as to which defendant he would execute against. With the agreement, no such choice existed.

47. *Id.*

48. 108 Ariz. 140, 493 P.2d 1197 (1972).

defendant did do it." The settling defendant would have no concern with his liability. His focus shifts to convincing the jury that the damages recoverable against the defendants jointly are of such an amount that under the agreement he would be absolved of all responsibility for the judgment.⁴⁹

*Hemet Dodge v. Gryder*⁵⁰ gave further approval to Mary Carter agreements, although recognizing that the settling defendant may be severed from the lawsuit at the discretion of the trial judge. In *Hemet Dodge*, the court recognized that this type of agreement allows a plaintiff to be assured of some recovery without the disadvantage of having to try a case without the presence of the settling defendant.⁵¹ The present state of the law in Arizona relating to Mary Carter agreements is found in *Sequoia Manufacturing Co. v. Halec Construction Co.*⁵² There, the Arizona Court of Appeals retreated from the position asserted in *Gallagher*. The court found that an agreement which allows a settling defendant to improve his financial position if a verdict for a certain amount is returned against a non-settling defendant, should be admitted into evidence at the discretion of the trial judge.⁵³ The court found no fraud, collusion, or change in trial strategy when such an agreement is present. It did, however, believe that there may exist some unintentional prejudice towards the non-settling defendant and as a result, hinged admission of the agreement upon the discretion of the trial judge rather than making it one of absolute right.

An extreme approach to Mary Carter agreements, taking the position that such agreements are void and unenforceable as against public policy, was adopted by Nevada in *Lum v. Stinnett*.⁵⁴ This case involved a malpractice suit instituted by the plaintiff against three physicians. Upon sustaining a back injury, the plaintiff went to a hospital emergency room to have the injury treated. There he was treated by Dr. Greene, the attending physician, in consultation by phone with Dr. Romeo, the plaintiff's family physician. X-rays were taken of the plaintiff's back and were read by Dr. Lum. Plaintiff alleged that all

49. In the typical Mary Carter agreement, the settling defendant's damages are inversely proportional to the amount of the award given by the jury. See note 30 *supra*.

50. 23 Ariz. App. 523, 534 P.2d 454 (1975).

51. *Id.* at ___, 534 P.2d at 461.

52. 117 Ariz. App. 11, 570 P.2d 782 (1977).

53. *Id.* at ___, 570 P.2d at 795. The reason for leaving the decision in the discretion of the trial judge is that, at times, the agreement may prejudice the non-settling defendant. See note 79 *supra* and accompanying text.

54. 87 Nev. 42, 488 P.2d 347 (1971).

three doctors were negligent in failing to detect and treat a compression factor in his spine.

Defendants Greene and Romeo negotiated a Mary Carter agreement with the plaintiff.⁵⁵ During trial, the settling defendants were, on their own motion, dismissed from the lawsuit. The non-settling defendant then moved to have the suit dismissed. This motion was denied. A verdict was returned against the remaining non-settling defendant. On appeal, the Nevada Supreme Court reversed and remanded, reinstating the cause of action against the two dismissed defendants. The court, in "[c]onsidering the propriety of certain 'settlement agreements' calling for defense counsel to participate in litigation when they were actually interested in furthering the plaintiff's cause,"⁵⁶ found them to be champertous and in contravention of policies behind the Canons of Professional Conduct.⁵⁷ Contrary to the po-

55. The court found the agreement to be as follows:

(1) if the jury awarded nothing or less than \$20,000, the insurance carriers for Greene and Romeo were to pay the sum necessary to bring recovery to \$20,000; (2) if the verdict exceeded \$20,000, respondent would not execute against Greene and Romeo; and (3) respondent would not oppose a motion for directed verdict in favor of Greene and Romeo.

Id. at ___, 488 P.2d at 348.

The court then continued and found that

[M]elded into the proposal were at least these self-serving recitals: (a) appellant's insurance carrier had taken an "irresponsible position"; (b) this was why respondent would deal separately concerning Greene and Romero; (c) respondent's counsel believed Greene and Romero negligent; (d) nonetheless, they "recognize[d] that the greater share of responsibility is upon Dr. Lum," and believed him 80% to blame; (e) respondent's damages were approximately \$100,000; (f) accordingly, respondent was willing to settle concerning Greene and Romero for \$20,000; (g) a smaller verdict was no more than a "remote possibility."

Id. at ___, 488 P.2d at 348 n.1.

56. *Id.* at ___, 488 P.2d at 351.

57. *Id.* (relying on conclusions of the Arizona State Bar Committee on Rules of Professional Conduct). The manner in which the trial proceeded was very unusual and is illustrative of the effects of a Mary Carter agreement. The court found that

while Romeo seemed the prime target of respondent's Complaint, respondent's counsel focused on appellant in his opening statement to the jury, displaying apparent candor regarding Greene and Romeo. Greene's counsel then announced he would reserve his opening statement; thus, appellant's counsel could do the same, or hazard being left no way to meet opening statements made later by counsel for the "co-defendants."

Thereafter, though now furthering the interests of Greene, Romeo, and their insurance carriers, respondent's counsel called Greene as an "adverse party," and then opposed full cross-examination by appellant's counsel on the ground his own interrogation was "cross-examination"; he defeated an objection that he was leading Romeo by contending Romeo was an "adverse witness," and led him at will. When respondent's counsel omitted to ask respondent's former employer if respondent had received "tips" as well as wages, Greene's counsel went into this item of special damage on "cross-examination," in a notable departure from his usual nonchalance. In contrast to the placid role played by counsel for appellant's "co-defendants," his own counsel's efforts must have suggested only appellant had cause for concern. This inference can only have been

sition assumed by the Florida Supreme Court that admission of the agreement into evidence is a panacea for Mary Carter agreements, the Nevada Supreme Court in *Lum* expressly rejected the argument of the settling defendants that disclosure of the agreement and its admission into evidence are sufficient safeguards for the non-settling defendants. Responding to the disclosure argument, the court said, "[i]t is no answer to appellant that he was not stabbed in the back. If his hands were tied, it matters little that he could see the blow coming."⁵⁸

The cases summarized above do not comprise an exhaustive survey of all cases dealing with Mary Carter agreements.⁵⁹ They do, however, provide a representative overview of the current state of the law as it relates to this form of settlement.

IV. RESOLVING THE PROBLEMS

A. *Void as Against Public Policy*

Treating Mary Carter agreements as being void and unenforceable

strengthened when, at the close of respondent's case, the court granted 41(b) motions for dismissal of Greene and Romeo, without opposition by respondent's counsel, but over appellant's objection that he would be prejudiced if not similarly dismissed. Appellant's 41(b) motion for dismissal was denied.

Id. at __, 488 P.2d at 348-49. In conclusion, the court found that "[i]t is sufficient to see from the record as we do, that such irregularities so warped presentation of the case as to deny a fair trial. . . ." *Id.* at __, 488 P.2d at 353. See also *Settlement Devices*, *supra* note 2, where the author found "[a]s to the issue of whether [an agreeing defendant] may be called as an adverse party witness, it has been held that he may be cross-examined by leading questions by both the plaintiff and the non-settling defendant." *Id.* at 777. "Mary Carter Agreements distort the normal relationships between the plaintiff and defendants in multiparty tort litigation. The result is a nonadversary, collusive proceeding which unfairly prejudices the nonagreeing defendants right to a fair trial." *Problems of Collusive Settlements*, *supra*, note 30, at 1398-99. It has been suggested by one commentator that allowing Mary Carter agreements is 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 30, at 619. That author finds "that the mere judicial act of the state in permitting the enforceability of such Mary Carter agreements constitutes sufficient state action in violation of the fourteenth Amendment" to find a constitutional violation. *Id.* But cf. *Problems of Collusive Settlements*, *supra* note 30, where the author finds "[a] Mary Carter Agreement is clearly a private agreement between the plaintiff and agreeing defendants." *Id.* at 1399 n.31. *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Barrows v. Jackson*, 346 U.S. 249 (1953), were cited as situations where private agreements judicially supported were found to constitute state action. However, the author found that in "Mary Carter Agreements the judicial role is passive and the parties 'discriminating' against the nonagreeing defendant are not being compelled by the court to do so against their will. . . . Accepting this interpretation of *Shelley* and *Barrows*, it follows that Mary Carter Agreements do not involve state action." *Id.*

58. 87 Nev. at __, 488 P.2d at 352.

59. See *Mustang Equip. Co. v. Welch*, 115 Ariz. 206, 564 P.2d 895 (1977); *Swanson v. State Farm Fire & Casualty Co.*, 349 So. 2d 202 (Fla. Dist. Ct. App. 1977); *Bedford School Dist. v. Caron Const. Co.*, 116 N.H. 800, 367 A.2d 1051 (1976); *Reese v. Chicago, Burlington & Quincy R.R.*, 55 Ill. 2d 356, 303 N.E.2d 382 (1973); *Burkett v. Crulo Trucking Co.*, __ Ind. App. __, 355 N.E.2d 253 (1976); *Brillo v. Burkes Paint Co.*, 275 Or. 421, 551 P.2d 449 (1976).

creates a great deal of tension with the policy promoting settlement. This approach was taken in *Lum v. Stinner*⁶⁰ where Mary Carter agreements were found inimical to the adversary process. It is true that, if left unfettered, Mary Carter agreements are not conducive to the adversary setting desired in our legal system. By reaching the decision it did however, Nevada has taken an inflexible approach and has disregarded a strong, deeply rooted policy advocating settlement. More flexibility should have been demonstrated.

Even if this flexibility does not approach that of some jurisdictions,⁶¹ the court, at the least, might have used what may be referred to as partial voidability. This is the approach taken in *Cox v. Kelsey-Hayes*,⁶² a case decided by the Oklahoma Supreme Court. Under this approach, the agreement would remain enforceable except when the settling defendant remains as a defendant in the lawsuit.⁶³ This accommodates very well the competing policies of providing the defendant with a fair trial and allowing the plaintiff freedom to settle. Plaintiff is allowed assurance of a certain amount of damages while the defendant is given a chance to settle and possibly absolve himself of all liability. It might, however, be argued that requiring the settling defendant to cease participation in the lawsuit would, under certain circumstances, make a settlement impossible; for example, where it is clear that the fault of the settling defendant is appreciable. If the plaintiff is forced to drop that defendant, he is jeopardizing his chances of winning the lawsuit. If the remaining defendant clearly has some fault, but of slight degree, the chance of convincing a jury is tenuous. In the alternative, if

60. 87 Nev. 402, 488 P.2d 347 (1971).

61. See notes 26-59 *supra* and accompanying text.

62. 49 OKLA. B.J. 2157 (1978).

63. See *Settlement Devices*, *supra* note 2, where this approach was foreseen: "Caution should . . . be observed in negotiating . . . Mary Carter Agreements, since it appears that if a complainant and one of the co-obligors determine all rights and responsibilities between them, then such obligor will lose his standing to remain in the proceedings." *Id.* at 775. See also Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779 (1978). "Since no justiciable issues exist between the parties entering the Mary Carter agreement, dismissing the settling defendant is appropriate." *Id.* at 800 (footnote omitted). However, that author does not feel that requiring the settling defendant to remain out of the lawsuit is an acceptable rationale for allowing enforcement of the Mary Carter agreement. He cites two reasons for this.

First, severance forces the nonsettling defendant to participate in two separate proceedings, merely because a co-defendant entered an unrighteous agreement to avoid liability. Severing a cross-action for contribution thus may penalize the innocent party. Secondly, the testimony of a joint tortfeasor is generally desirable evidence in joint tort cases.

Id. at 801. See also *Hemet Dodge v. Gryder*, 23 Ariz. App. 523, ___, 534 P.2d 454, 461 (1975) (the court found that severance of the settling defendant was in the discretion of the trial court).

the settling defendant remains in the lawsuit, his greater degree of fault will ease the plaintiff's burden of convincing the jury and more likely will result in a plaintiff's verdict. In light of joint and several liability, the non-settling defendant may then find himself solely liable for the entire judgment. Due to his slight degree of fault, such a result would be improbable if he alone were the defendant.

B. Admissibility of the Agreement

A major complaint leveled against the use of Mary Carter agreements is that they present a distorted view of the case to the jury. Courts attempt to remedy this by admitting the Mary Carter agreement into evidence. Admission of settlement agreements into evidence has traditionally been disfavored. The fear was that the jury would use such settlements as admissions of guilt.⁶⁴ In spite of this, jurisdictions dealing with Mary Carter agreements have concluded that admission of the agreement into evidence is permissible.⁶⁵

Admission of the settlement into evidence raises two questions. For what purpose and to what extent should the agreement be admitted? Some courts have allowed the settlement to be admitted only for attacking a witness' credibility⁶⁶ while others have allowed admission of the settlement for substantive purposes.⁶⁷ In order to determine

64. See notes 69-73 *infra*.

65. *General Portland Land Dev. Co. v. Stevens*, 291 So. 2d 250, 251 (Fla. Dist. Ct. App. 1974) (court found that production alone was not enough but that the agreement must be admitted into evidence); *Cox v. Kelsey Hayes Co.*, 49 OKLA. B.J. 2157, 2160 (1978) (court held that the agreement may be admitted at the discretion of the trial court); *Grillo v. Burke's Pain Co.*, 275 Or. 421, ___, 551 P.2d 449, 453 (1976); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857 (1977) (court found that failure to admit the agreement into evidence was reversible error).

66. "[T]he disclosure [of a Mary Carter agreement] is required so as to enable the trier of fact, i.e. the jury, to be fully apprised of all factors bearing upon the testimony and conduct of the signing as well as non-signing parties." *Atlantic Ambulance Inc. v. Asbury*, 330 So. 2d 477, 478 (Dist. Ct. App. Fla. 1975). "[E]vidence of the . . . agreement in any case may be considered solely on the issue of motive and credibility of witnesses and not on the liability or damage issues." *Reese v. Chicago, Burlington & Quincy R.R.*, 55 Ill. 2d 356, ___, 303 N.E.2d 382, 387 (1973). "The existence of the settlement may be considered only on the issue of motive and credibility of the witness and not on the issue of liability." *Bedford School Dist. v. Caron Const. Co.*, 116 N.H. 800, ___, 367 A.2d 1051, 1055 (1976). "We conclude that the trial court erred in excluding evidence of the settlement agreement which was properly offered. . . for the purpose of showing . . . bias or credibility." *Bristol Myers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978).

67. *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973); *Grillo v. Burkes Paint Co.*, 275 Or. 421, ___, 551 P.2d 449, 453 (1976) (the court speaks only of admitting the agreement into evidence and never addresses the issue of limiting its use); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857 (Tex. 1977) (court never suggests a limiting instruction and says that parties' financial interests are proper areas of inquiry on direct or cross-examination).

which approach is preferable it is necessary to examine the underlying rationale for allowing admission of the settlement into evidence.

One of the fears present when a Mary Carter agreement exists, which is not present in a traditional settlement agreement, is that the settling defendant, because of his financial interest in the outcome, will perjure his testimony. In order for this to be brought to the attention of the jury, allowing them to weigh the testimony accordingly, it is necessary that the credibility of the witness be attacked.⁶⁸ By admitting the agreement into evidence, the motive that might drive the witness to lie is brought to the jury's attention. The problem, however, is the damage that necessarily occurs when the settlement is admitted into evidence. Knowing that the agreement will be admitted into evidence, and aware of its great potential for prejudice as an implicit admission, parties may be hesitant to settle.⁶⁹ There is the possibility that the settlement evidence will be used substantively by the jury, rather than for the limited purpose of attacking credibility.⁷⁰

This creates no problem for those who advocate admission of the agreement for purposes other than attacking credibility. If, however, the only desired purpose of admission is to attack credibility, a dilemma is created. The desire to have the witness' testimony fairly evaluated must be balanced against the possibility that the jury will use the agreement for substantive purposes. In light of the nature of a Mary Carter agreement and its perjurious influence on a settling defendant's testimony, it would seem best to admit it for the purpose of attacking credibility in the hope that the jury heeds the limiting instruction from the judge.

When the Mary Carter agreement is admitted for purposes other than attacking credibility, the court is allowing it to bear on the jury's

68. "The need for evaluating the credibility of the witness may be as insistent as the policy of encouraging compromise." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 274 at 665 (2d ed. 1972).

69. The agreement may be found to be an admission by the plaintiff of his damages. "For example if the jury is told the amount which the defendant agreed to pay, it might erroneously conclude that the sum is the plaintiff's estimate of his damages." *Beckford School Dist. v. Caron Constr. Co.*, 116 N.W. 800, ___, 367 A.2d 1051, 1054 (1976).

70. An instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best available reconciliation of the respective interests. It seems, however, that in situations, where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight or the point for which it is competent can readily be proved by other evidence, the judge's power to exclude the evidence altogether would be recognized. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 59 at 136 (2d ed. 1972).

determination of fault. In light of the treatment courts have given other settlement agreements, this is not justified. It is difficult to perceive why a Mary Carter agreement would be any more or less indicative of fault than any other type of settlement agreement.⁷¹ Courts which have not limited the admissibility of Mary Carter agreements have done so in order that the jury will not only be fully apprised of the testimony of the settling defendant but also of the "conduct of the signing as well as the non-signing parties."⁷² Seemingly, the same result could be achieved by using the evidence only to attack credibility. In light of the ineffectiveness of a limiting instruction,⁷³ once the posture of the settling defendant is disclosed to the jury, they will reach their own explanation for the conduct of the parties. While this result may be unavoidable it need not be condoned by omitting a limiting instruction. The danger that the settlement evidence will be used by the jury to conclusively establish fault seems of such magnitude that a limiting instruction should be required. The Oklahoma Supreme Court held in *Cox v. Kelsey-Hayes*⁷⁴ that "any pretrial agreement between plaintiff and a defendant must be revealed to all parties and the court prior to trial and to the jury in some appropriate degree to be decided by the trial court."⁷⁵ Limiting the use of the settlement agreement to impeachment of testimony should be part of the "appropriate degree."

Once it is determined that the Mary Carter agreement should be admitted into evidence for some purpose, it must then be determined to what extent it will be admitted. There are three choices available to the court: (1) disclosure of the agreement's existence; (2) disclosure of all the terms of the agreement except for the amount; or, (3) disclosure of all the terms of the agreement including the amount. It is possible that "the extent to which a settlement should be disclosed to the jury will vary from case to case and must rest in the sound discretion of the trial

71. McCormick finds that "[t]he relevancy of the offer will vary according to circumstances, with a very small offer of payment to settle a very large claim being much more readily construed as a desire for peace rather than an admission of weakness of position. Relevancy would increase, however, as the amount of the offer approached the amount of the claim." *Id.* at 663. This same rationale would seem to hold to Mary Carter agreements. The offer at issue would be the ceiling the settling defendant has set on his possible liability for damages. Simply because there exists a chance that the settling defendant's damages may be less than his original offer does not seem to have any effect on the relevancy of the offer as it relates to liability. The higher the ceiling on the settling defendant's damages the more indicative it would be of liability.

72. *Atl. Ambulance v. Asbury*, 330 So. 2d 477, 478 (Dist. Ct. App. Fla. 1975).

73. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 59 at 136 (2d ed. 1972).

74. 49 OKLA. B.J. 2157 (1978).

75. *Id.* at 2160.

court."⁷⁶ This was the approach taken by the court in *Cox*.⁷⁷ While this allows for the greatest flexibility, it would seem preferable to have more concrete guidelines. By having specific parameters governing the extent to which the agreement will be disclosed, parties can make a more informed pretrial determination of the desirability of entering into a settlement. For example, if admission is limited to showing only the agreement's existence, the plaintiff will know the degree of prejudice that is likely to result at trial and will be better able to balance this against the benefits resulting from settlement. If admission is dealt with on an ad hoc basis, the plaintiff will not be able to accurately quantify the prejudice that is likely to result from admission. In turn, he will not be able effectively to balance the pluses and minuses that go into determining the desirability of a settlement. Absent concrete guidelines, the end result would doubtless be fewer settlements.

In limiting the admission of the settlement to the extent of showing its existence, there is a possibility of prejudice to both parties. The non-settling defendant may be prejudiced by the jury's assumption that inasmuch as one defendant has admitted liability the other must also be liable. The plaintiff may be prejudiced by the jury's assumption that the responsible party, namely the settling defendant, has already come forward.⁷⁸ If the terms of the Mary Carter agreement are admitted into evidence they may aid in explaining the relative positions of the parties and correct any faulty inferences the jury may have made knowing only of the agreement's existence.

A problem with admitting the terms of the agreement is the possibility that the settling parties will include inculcating statements.⁷⁹ This difficulty could be alleviated by admitting the agreement in an excised form.⁸⁰ This approach, however, has been disapproved by at least one court which found "admission of a Mary Carter agreement in a modified and excised form . . . was prejudicial."⁸¹ When the agree-

76. *Frey v. Snelgrove*, __ Minn. __, 269 N.W.2d 918 (1978).

77. See note 62 *supra* and accompanying text.

78. See note 69 *supra*.

79. *Lum v. Stinnett*, 87 Nev. 42, __, 488 P.2d 347, 352 (1971).

80. Finding the excising of inculcating statements a very attractive approach, it has been said that "the possibility of placing a non-signing defendant between 'the devil and the deep blue sea' via the insertion of self-serving declarations in the agreement does not pose a serious problem." *Limitation On Liability Agreements*, *supra* note 30, at 992. That author found an analogy in criminal cases where parts of confessions relating to other defendants or other crimes are excised before the confession is admitted. *Id.* at 988 n.30.

81. *Swanson v. State Farm Fire and Cas. Co.*, 349 So. 2d 202, 202 (Dist. Ct. App. Fla. 1977).

ment is admitted in an excised form, the same fears exist that are present when the jury is only made aware of the agreement's existence. Omission of certain parts of the agreement could allow the jury to make incorrect inferences which might possibly prejudice either party.

The best approach would seem to be admission of the agreement, including its terms, into evidence excising any inculpatory statements unless they are absolutely necessary to an understanding of the agreement. If it is found that the inculpatory statements are necessary and therefore must be included, the harm should be minimal in light of the jury's knowledge of the circumstances surrounding the agreement.⁸² These guidelines should dictate the appropriate degree of admission when it is left to the court's discretion.⁸³

The final question to be addressed in considering the extent to which an agreement should be admitted is whether the amount of the settlement should be disclosed to the jury. One court has said that it "can visualize no circumstances where the amount involved in a release or covenant need be disclosed to the jury."⁸⁴ There is a likelihood, if the court allows admission of the amount of the settlement, that the plaintiff will be unduly prejudiced. A jury might use the settlement figure as an estimate of the plaintiff's damages and lose sight of the actual damages suffered. The amount of the settlement might be used by the jury as bearing on the strength of a particular party's case, a fact which may sometimes be true but which nonetheless has been generally rejected.⁸⁵ Any benefit that might exist if the amount is admitted into evidence is greatly outweighed by the harm admission would impart.

The desired result, making the jury aware of the defendant's position and its effect upon his testimony, could seemingly be achieved by admission of only the agreement's existence and terms. When the amount of the agreement is admitted into evidence, the danger is high that the jury will use this to conclusively establish the existence of liability and the extent of the damages. For this reason the amount of the settlement should not be admitted.

82. Ideally the inculpatory statements would be excluded in order to protect the non-settling defendant. However, it might be that, in the absence of the inculpatory terms, the inferences drawn by the jury will be more prejudicial. See notes 71-72 *supra* and accompanying text. The court should balance these prejudices and determine which course of action is most favorable to the non-settling defendant.

83. 49 OKLA. B.J. at 2160.

84. *Degen v. Bayman*, 86 S.D. 598, ___, 200 N.W.2d 134, 139 (1972).

85. See note 69 *supra*.

The Supreme Court of Alaska in *Breitkreutz v. Baker*⁸⁶ approached the problem of dealing with the settling defendant who remains in the lawsuit in an interesting way.⁸⁷ The court extensively limited the role which the settling defendant was allowed to play. The settling defendant was restricted in his voir dire of the jury; not allowed to put witnesses on except in a limited capacity; and prohibited from having instructions given to the jury relating to his liability.⁸⁸ By taking this approach, the court allowed the settling defendant to remain in the lawsuit, thereby preserving the fairness of the trial toward the plaintiff. While certainly not the optimum situation for the plaintiff, it is a very appealing compromise position. The compromise does not allow the settling defendant to actively pursue the plaintiff's case. This is the same result that is reached when the settling defendant is severed from the lawsuit. However, by allowing the settling defendant to remain in the lawsuit, the plaintiff receives the benefit of presenting the settling party not only as a favorable witness but also as a defendant. In taking this approach, a court would not be as apt to discourage a plaintiff from settling as when it required the settling defendant be severed from the lawsuit.⁸⁹ The nonsettling defendant(s) would have the benefit of the settling defendant appearing neutral in the case.

The court in *Breitkrutz* felt that by limiting the settling defendant's participation in this manner the jury's view of the case was not as apt to be distorted.⁹⁰ In light of the benefits received by the plaintiff in allowing the settling defendant to remain in the lawsuit, this may not be true. Even recognizing the effectiveness of limiting the settling defendant's participation, the court in *Breitkrutz* hinted that it might still be best if the settling defendant were severed from the lawsuit.⁹¹

V. CONCLUSION

Mary Carter agreements present a unique type of settlement agree-

86. 514 P.2d 17 (Alaska 1973).

87. It is not exactly clear what the agreement in *Breitkreutz* involved. However, it is clear that it limited the settling defendant's liability and the court hinted that it might be best if the settling defendant were severed from the lawsuit. "There is some question in our minds as to whether the trial court should have allowed [the settling defendant] to remain as a nominal defendant in this case. The question arises because [he] had no interest in the case and there would seem to be no 'actual controversy' as to him." *Id.* at 29 n.29.

88. *Id.* at 28.

89. See section IVA *supra*.

90. See note 62 *supra* and accompanying text.

91. There is some question as to whether there exists an actual controversy as to the settling defendant. 514 P.2d 17, 29 n.29. See note 62 *supra*.

ment for use in lawsuits involving multiple defendants. The treatment given them by the courts is a result of the balancing of two important policies: the desire to promote settlement and the desire to maintain a true adversarial trial with the actual positions of the parties known to the jury. The recent trend has been to sacrifice the former policy for the latter. Caution should be exercised before such a step is taken in light of the importance and necessity of pretrial settlement. Possible remedial measures should be given careful consideration in an attempt to arrive at a true compromise position. Such a position should accommodate the interests of those parties desiring a settlement as well as the societal interests of having a trial accurately reflect the positions of the parties involved.

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