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GUARANTEE AND LOAN RECEIPT AGREEMENTS IN MULTI-PARTY LITIGATION

ERNEST B. LAGESON*

INTRODUCTION

AS LONG as cases have been tried, attorneys have sought ways to lessen the risks of litigation to their clients, if not avoid them entirely. Over the years, innumerable private arrangements have been designed and statutory provisions developed to dispose of cases without the risk of trial. The covenant not to sue, the covenant not to execute, partial release, full release, and other procedures have long been part of the trial attorney's arsenal of weapons in the ongoing struggle to protect his client from litigation.

In addition, methods of shifting the responsibility of payment to others have been conceived. Although no right of contribution among joint tortfeasors existed at common law, such a rule has been adopted by statute in approximately thirty-five jurisdictions.¹ Theories of indemnity, both express and implied, have been developed and are in common use today.

In recent years we have witnessed the creation of new devices and new uses of old devices which were not available to parties under traditional rules and procedures. The emergence of the so-called guarantee or Mary Carter agreement and, to a lesser extent, the use of the long established loan receipt agreement, have presented courts with new and unique problems. Basically, these

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¹ See statutes and cases collected at Note, Contribution and Indemnity in California, 57 CALIF. L. REV. 490, 499-500 nn.56 & 57 (1969) and the following recent codifications: ALASKA STAT. § 09.16.010 (Supp. 1973); IDAHO CODE § 6-803 (Supp. 1973); KAN. STAT. ANN. § 60-2413 (Supp. 1974); MONT. REV. CODES ANN. § 93-8108 (Supp. 1973); ORE. REV. STAT. § 18.430 (1971); UTAH CODE ANN. § 15-4-1 (Supp. 1973); WYO. STAT. ANN. § 1-7.3 (Supp. 1973).
agreements are simply other ways of accomplishing the long existing goal of reducing the risks inherent in litigation. Because of the methods employed in some of these accords, including the use of secret covenants and the potential for collusive and misleading conduct, such agreements have become the center of controversy. In addition, many of them create issues of ethics, morality, and the integrity of the adversary system.

The cases that have considered these agreements have raised numerous questions regarding their effect. Do they promote collusion between the agreeing parties? Do such agreements violate established rules regarding contribution among joint tort feasors? What ethical and/or moral considerations are involved? Is there a coercive effect? Do these agreements reduce litigation or do they foster it? Do they amount to the common law offenses of champerty or maintenance? By analyzing the decisions chronologically, it is possible to trace the development of the law regarding such agreements and form some conclusions regarding the future.

It has been stated that there are as many agreements as there are ingenious trial counsel; however, they fall into two categories: a guarantee agreement, which calls for the guarantee of a specific sum to the plaintiff by one or more, but not all the defendants, with payment dependent upon the success or failure of the plaintiff against the non-agreeing defendant, and loan receipt agreements, which include an interest-free loan by one or more, but not all defendants, repayment to be made out of the recovery from the non-agreeing party.

I. GUARANTEE AGREEMENTS

As defined in this presentation, guarantee agreements involve a multi-party situation in which one or more defendants guarantee the plaintiff a specific dollar amount. If the verdict is against the plaintiff, the guaranteed amount will be paid. If the verdict is in the plaintiff's favor for less than the guaranteed figure, payment will be made to make the plaintiff's recovery equal the guarantee. The plaintiff agrees that if there is a verdict equal to or greater than the amount of the guarantee, execution will be against the non-agreeing defendant(s) and no payment will be required by the guaranteeing defendant(s). The guaranteeing defendant may re-
main in the case through trial or receive a dismissal before or
during trial.

Probably the earliest case in which the elements of guarantee
appeared was in the California decision of Pellett v. Sonotone. In
that case, the plaintiff purchased a hearing aid from the defendant
Sonotone through one of its salesmen, Brown. A mold of plaintiff’s
ear had to be made and Brown arranged with defendant, Compton,
a dentist, to do this work. Compton, working under the direction
of Brown, prepared a plaster cast of the plaintiff’s ear, however,
he failed to remove all of the plaster. This resulted in injury to the
plaintiff and litigation followed.

An agreement between Compton and the plaintiff called for the
payment of $5.00 by Compton regardless of the outcome of the
trial, and a $10.00 payment if there was a verdict in plaintiff’s
favor. The agreement was not to be filed or revealed to the other
defendants and Compton was to remain in the case through trial.
Plaintiff appealed from a directed verdict.

Insofar as the guarantee agreement was concerned, the question
before the court was whether it constituted a release of Compton
and, therefore, amounted to a release of all defendants. The agree-
ment was unique to the California Supreme Court at that time and
they concluded it was more “akin to a covenant not to sue than a
release.” It, therefore, did not constitute a release of the other
defendants.

While not called upon to determine its validity, the court, by
dicta, expressed its disapproval of the provision of the agreement
requiring Compton to continue in the action as a defendant when
he had no stake in the outcome. The court also criticized the
secrecy involved. Noting that the trial court found no fraud and
that all of the parties were apprised of the agreement prior to trial
(the agreement was revealed during the second trial but not during
the first), the court pointed out the potential danger of concealing
the true position of one of the defendants.

In a vigorous dissent Justice Roger Traynor defined the arrange-
ment as a “collusive proceeding” with “immoral consideration.”

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*26 Cal. 2d 705, 160 P.2d 783 (1945).
*Id. at 787.
*Id. at 789.
He argued that the plaintiff should be bound by the agreement with Compton and not be permitted to pursue a separate cause against Sonotone and its salesmen for the same negligent acts from which Compton was released.

More than twenty years passed before another appellate decision in a guarantee-type case appeared. In 1967, the now famous Florida case of Booth v. Mary Carter⁶ was decided. The heirs of decedent Elsie Booth brought an action against the Willoughby Trucking Company and the Mary Carter Paint Company as a result of a two-truck, auto accident that caused Mrs. Booth's death. Prior to trial, the defendant Willoughby and the plaintiffs entered into an agreement limiting Willoughby's exposure to $12,500. If the verdict exceeded $37,500, the plaintiff would satisfy the verdict against Mary Carter only. If the verdict was less than $37,500, again the satisfaction would be against Mary Carter, but Willoughby agreed to pay up to $12,500 to make the recovery total $37,500. Finally, if there was a verdict for the defense, Willoughby agreed to pay $12,500. It was also provided that the agreement would not be revealed to the other defendants except by order of the court. Willoughby continued as a defendant in the case although neither the jury nor the court was advised of the arrangement limiting its exposure.

Following a plaintiff's verdict for $15,000 against both defendants, Mary Carter sought a setoff on the theory that the agreement constituted a release. The trial court denied the motion and this denial was affirmed on appeal. Without citing any cases in support of their ruling, the Florida court held that the agreement was what it appeared to be, a guarantee. There was no discussion of the points which caused the California court such grave doubts in Pellett v. Sonotone.⁷

The next stage in guarantee law came with the 1971 decision of Bill Currie Ford v. Cash.⁸ There the court upheld an agreement similar to that in the Mary Carter case and affirmed the trial judge's sound refusal to allow the non-settling defendant to introduce before the jury the contents of such an agreement. . . .

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⁵ 202 So. 2d 8 (Fla. App. 1967).
⁶ 26 Cal. 2d 705, 160 P.2d 783 (1945).
⁷ 252 So. 2d 407 (Fla. App. 1971).
Admission of the settlement agreement would have prejudiced the settling defendant and was properly excluded.⁸

The court was not impressed with the argument that the agreement led to collusion, which was demonstrated by the fact that the guaranteeing defendant did not cross-examine any of the plaintiff's medical witnesses. Noting simply that the law favors settlement of disputes out of court, the District Court of Appeals affirmed the trial court.

By these two decisions, the Florida court firmly established the validity of guarantee agreements which contemplate continuing the agreeing defendant as a party but without the jury knowing the true position of the parties, including the agreeing defendant's desire to maximize plaintiff's recovery.

In Ponderosa Timber & Clearing Company v. Emrich,⁹ a secret guarantee agreement came to the attention of the Nevada Supreme Court, but its validity was not at issue. The trial court had already set the agreement aside and ordered partial satisfaction on the ground the parties had misrepresented the status of settlement to the court. On appeal, the court was asked to determine whether, in the face of such an arrangement, the other defendants received a fair trial. The supreme court affirmed the trial court's determination that there had been a fair trial, although the dissenting Justices argued the agreement violated the adversary process and deprived appellants of a fair hearing.

The following year the Nevada Supreme Court faced the issue of the validity of such agreements in the landmark decision of Lum v. Stinnett.¹⁰ Speaking for a unanimous court, Justice Gunderson harshly criticized the arrangement and held it constituted champerty and was void as against public policy.

The Lum case was a medical malpractice action involving the alleged misreading of x-ray photographs and failure to properly diagnose a spinal fracture. During the trial the family physician, Romeo, and the hospital resident, Greene, entered into an agreement with plaintiff calling for a guarantee of $20,000 and, in the event of a verdict of $20,000 or more against the radiologist, Lum,

⁸ Id. at 407.
plaintiff would not execute against Greene or Romeo. Plaintiff also agreed not to oppose a motion for directed verdict by the two. The plaintiff covenanted to prosecute vigorously the case against Dr. Lum and not settle for less than $20,000 but urge the jury to return a verdict in excess of $20,000. At the conclusion of the evidence Romeo and Greene were dismissed and the case went to the jury as to the defendant Lum alone. Lum's attorney was thwarted in his efforts to have the jury apprised of the agreement. The agreement was not offered into evidence, however, apparently due to numerous prejudicial statements in the document placing all responsibility on Dr. Lum.

The court reversed, reinstating the cause of action against Greene and Romeo and awarding a new trial. The court declared that the irregularities in the proceeding so warped the presentation of the case as to deny Lum a fair trial. The agreement was improper and called for improper conduct by all of the attorneys concerned. The basis of the holding appears to be that the agreement constituted maintenance and champerty.

It is arguable that the court was erroneous in its reasoning on the question of maintenance and champerty and there is contrary authority in other jurisdictions. The opinion defined maintenance as intermeddling by a person "without interest in a suit" by assisting either party with money or otherwise to prosecute or defend it. The insurers of Romeo and Greene were strangers to the action and, as the authors of the agreement, had committed the common law offense of maintenance. Since the insurance carriers were to profit from the recovery of the plaintiff, the court concluded their conduct also amounted to champerty.

It is difficult to accept the conclusion that the insurers in this case had no interest since presumably they would satisfy any judgment against Greene and Romeo. Nonetheless, the court reasoned that the insurers had no interest in the subject matter and relied for that conclusion on a discovery case, Washoe County Board of School Trustees v. Pirhala. In the Pirhala case, a casualty insurer had resisted production of a liability policy during dis-

12 Id. at ___, 507 P.2d at 350.
covery, and the Nevada court had ruled, in accordance with the arguments of the carrier, that the policy was not discoverable. The Lum court interpreted this position taken by a casualty insurer regarding the discoverability of their policy as tantamount to urging that it had no interest in the litigation.

A second and more cogent argument set forth in Lum condemned agreements calling for a defendant's attorney to participate in litigation when he is actually interested in enhancing the plaintiff's recovery. To do so, the court held, violated standards of ethics and professional conduct. Because the jury was given the false impression that Greene and Romeo were adverse to the plaintiff when in reality they were not, a fair trial was not possible.

The court was not moved by the fact that the agreement was revealed to the other party, pointing out:

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.

The court believed that adversary proceedings should be candid and cited as authority decisions of the Arizona Bar Association Ethics Committee. It was considerations of ethics, fairness, and the integrity of the adversary process that the court stressed rather than technical rules.

Five months after the Nevada Supreme Court's pronouncement in Lum, including their reliance on the Arizona Bar Association Ethics Committee reports, the Arizona Court of Appeals considered the question of guarantee agreements in City of Glendale v. Bradshaw. That case involved a one-car accident which injured a passenger who sued the driver and the City of Glendale. During the course of the trial, it became apparent that a guarantee agreement adverse to the city existed and the terms were eventually divulged. According to the agreement, the driver was to pay the plaintiff $50,000 in the event of a defense verdict or a verdict against the driver only, but to pay nothing if the verdict was against

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14 Lum v. Stinnett, supra note 10, at 352, n.7.
15 Id. at 352.
the city or both defendants. The jury returned a verdict against both defendants in the amount of $280,000. On appeal, the trial court was affirmed.

Although critical of such arrangements, and specifically declaring they were not expressing their approval of this type of agreement, the court nevertheless refused to declare it in violation of public policy. The court also recognized the merit in the argument that such agreements foster collusive action with the attendant danger of fraud, but the court was impressed by the fact that the agreement was revealed to the trial judge and adverse parties as well as the fact that there was no finding below of fraud or collusion. The agreement was upheld on the authority of Damron v. Sledge,18 which held that an assignment by an insured defendant to the plaintiff of his rights against his insurance carrier for bad faith refusal to defend and his subsequent default in the injury action did not amount to collusion.

The agreement in City of Glendale differed from those involved in prior cases in that the amount to be paid by the guaranteeing defendant did not vary depending on the verdict against the remaining defendant. The agreement provided that a specific amount was to be paid in the event of a verdict against the driver and no payment in the event of a verdict against the city. Missing, therefore, was the motive by the agreeing defendant to assist the plaintiff in increasing the verdict against the non-agreeing defendant.

During the same month in which the Glendale decision was rendered, the Arizona Supreme Court considered the question in City of Tucson v. Gallagher.19 Employing rather naive reasoning, the court upheld the guarantee agreement without citing City of Glendale, but in reliance upon Damron v. Sledge.20

Again, the passenger, who had been injured in a one-car accident, sued the driver and city. The driver's limits of $10,000 were inadequate and, to avoid expense and an excess judgment, the policy limits were tendered. For tactical reasons, the plaintiff did not wish to proceed to trial against the city alone, so it was agreed he would have the option to accept the $10,000 and release the

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driver at any time; until the option was exercised, however, the
driver would remain in the case as a defendant. The plaintiff agreed
that if a judgment against the city exceeded $10,000, no attempt
would be made to collect from the driver; but if the judgment was
for less than $10,000, the driver's insurance carrier would pay the
difference. The trial resulted in a $33,000 verdict.

In responding to the defendant city's argument that the agree-
ment prevented a fair trial, the Arizona Supreme Court stated that
it was unable to see how the agreement could change either the
driver's motive or his trial tactics in that the

only difference is that he would be motivated in seeing that any
judgment obtained by the plaintiff against the city would exceed
$10,000.\(^{21}\)

The court further found no significance in the fact that the agreeing
defendant did not cross-examine the plaintiff or her medical wit-
tnesses and simply dismissed this point with a statement, "We know
of no rule of law requiring cross-examination."\(^{22}\) The situation that
had produced such vigorous condemnation by the Nevada Supreme
Court in \textit{Lum} caused the Arizona Supreme Court no difficulty
whatsoever. The court in \textit{Gallagher} did note that the appeal before
it was not concerned with the ethics of counsel, but that even if it
were, there was no showing that the agreement was unethical.

Although the most recent Arizona decision, \textit{Hemet Dodge v.
Gryder},\(^{23}\) expressed concern over the rule, the court continued to
uphold such agreements. It did so on the authority of \textit{Tucson
v. Gallagher}, while at the same time acknowledging that these
agreements "border on collusion and tend to mislead judges and
juries."\(^{24}\) None of the Arizona cases deal directly with the subject
of the admissibility of the agreements or how the jury is to be
instructed. Severance was discussed in \textit{Hemet Dodge}, although the
court rejected the argument that the non-agreeing defendant was
entitled to severance as a matter of law. Severance was discretionary
and in that particular case no abuse was found.

The first Florida cases following the \textit{Lum} decision to consider

\(^{21}\) 493 P.2d at 1200.
\(^{22}\) Id.
\(^{24}\) Id. at --, 534 P.2d at 460-61.
the problem were *Ward v. Ochoa*\textsuperscript{25} and *Maule Industries v. Rountree*\textsuperscript{26} which were decided on the same day. In the *Maule* case, the Florida Supreme Court noted with approval the district court's refusal to hold such agreements against public policy. The latter had considered the question in light of "the well reasoned decision of . . . *Lum v. Stinnett*"\textsuperscript{27} and rejected the public policy argument. The supreme court accepted without reservation the lower court's refusal to hold *Mary Carter* agreements void. In reliance on *Ward v. Ochoa*, however, the court did hold that such agreements were the subject of discovery and were admissible in evidence at trial.

*Ward v. Ochoa* was concerned not with the validity of such an agreement, but its discoverability and admissibility. Stating that such secret agreements tend to mislead judges and juries and border on collusion, the court sought to prevent such deception stating:

> To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial.\textsuperscript{28}

Stressing that the search for truth in order to afford justice to the litigants was the primary duty of the courts, the court firmly established that to deny the adverse party access to the agreement or deny its admissibility at the time of trial constituted prejudicial error. The Florida Supreme Court also directed that the trial court give consideration to severance if requested to do so, although noting the non-agreeing party was not entitled to severance as a matter of law.

Although in these recent decisions the Florida courts declined to hold the agreement void, a vastly more liberal view was expressed. They stressed the fact that the trial judge must approach these agreements with a view to accomplishing what is fair to all parties and must beware of collusion. Not specifically referred to were the procedural questions of how best to apprise the jury of such agreements. Since many of the agreements contain language highly prejudicial to the non-agreeing party, he may be reluctant to offer it into evidence. Although these points were not dealt with in the decisions, the court's preoccupation with the possible evils of

\textsuperscript{25} 284 So. 2d 385 (Fla. 1973).
\textsuperscript{26} 284 So. 2d 389 (Fla. 1973).
\textsuperscript{27} Id. at 447.
\textsuperscript{28} 284 So. 2d at 387.
such agreements suggests a rule permitting either edited versions of the agreement being admitted or instructions by the court describing the arrangement without the prejudicial language coming to the jury's attention.

Although several subsequent lower court decisions in Florida have dealt with the *Mary Carter* agreement, they have simply reiterated the earlier holdings that these agreements are subject to discovery and admissible.\(^9\)

The most recent pronouncements on the subject are in the Arizona case of *Hemet Dodge v. Gryder*,\(^{10}\) and the California decision of *Pease v. Beech*.\(^{11}\) The *Pease* case involved, among other issues, a guarantee during trial but including dismissal of the guaranteeing defendants as soon as the agreement was consummated. The case then continued against the non-agreeing defendants. Compensatory verdicts in the five consolidated death actions amounted to $4,497,000 and punitive verdicts totalled $17,250,000. The guarantee arrangement was affirmed on appeal. The agreement, at least as to the minor plaintiffs, had been approved by the trial judge so the court on appeal rejected any contentions of fraud. Since no secrecy was involved and the agreeing defendants were dismissed, none of the problems of the earlier *Sonotone* case were present. The court rejected the defendant's argument that the jury should have been advised of the agreement, noting that the defendant has no right to advise the jury of settlement by a co-defendant.

**II. Loan Receipt Agreements**

Although accomplishing basically the same result as a guarantee agreement, the loan receipt agreement includes the contemporaneous payment of money to the plaintiff. Typically, funds are advanced in the form of an interest-free loan to the plaintiff by the agreeing defendant with repayment to be made only from the pro-


\(^{10}\) 23 Ariz. App. 523, 534 P.2d 454.

\(^{11}\) 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (4th Dist. 1974).
ceeds of a verdict against the non-agreeing defendant. In the event of a defendant’s verdict, no repayment is necessary. In addition, various controls may be placed on the plaintiff’s right to settle either in terms of the amount he may accept from the non-agreeing parties or the right of the agreeing party to approve or disapprove settlement.

One of the earliest examples of a loan receipt agreement being utilized in a personal injury case was in Bolton v. Zeigler, a United States district court decision interpreting Iowa law. The action arose out of a three-car accident among the plaintiffs’ vehicle, a truck owned by the Denver-Chicago Trucking Company, and an automobile driven by Zeigler. Prior to any suit being instituted, the insurer for the trucking company and plaintiffs’ attorney entered into an agreement for an interest-free loan to each of the two plaintiffs to be repaid out of the proceeds of any recovery from defendant Zeigler. Plaintiffs further agreed not to sue the trucking company. Thereafter, suit was filed against Zeigler only. By various pre-trial motions Zeigler challenged the agreement and sought, among other things, dismissal of the action, claiming a general release or a pro tanto reduction of any verdict against him.

In a lengthy opinion tracing the history of loan receipt agreements, the district court concluded that the loan receipt agreement was contrary to the Iowa rule against contribution among joint tort feasors. The court held that the agreement, in fact, called for contribution in favor of the defendant trucking company out of any verdict in the plaintiffs’ favor against Zeigler. Rejecting Zeigler’s contention that the agreement amounted to a general release, the court ruled it was a covenant not to sue, thus allowing a pro tanto reduction in any eventual verdict against Zeigler, and thereby destroying the effectiveness of the agreement.

The first reported instance of a loan receipt agreement in which the lending party remained an active participant in the litigation was Northern Indiana Public Service Company (NIPSCO) v. Otis. Plaintiff was injured in a gas explosion in downtown Fort Wayne, Indiana, and sued the utility, NIPSCO, and the installing contractor, Dehner. In the agreement between NIPSCO and the plain-

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tiff, NIPSCO loaned $50,000 interest free to be repaid out of the verdict, if any, ultimately obtained against Dehner. Only in the event of a verdict against NIPSCO alone would their obligation exceed the $50,000 interest-free loan. In the event of a joint judgment, execution would be against Dehner only, the first $50,000 being repaid to NIPSCO. NIPSCO remained in the litigation and the jury returned a verdict of $235,000 against both defendants.

The validity of the loan receipt agreement became an issue when Dehner contended that the trial court erred in denying his request for separate trials. The granting of a separate trial or motion to sever was discretionary with the trial court and the appellate court found no abuse of this discretion. Although the appellate court could have stopped there, it went on to discuss the validity of loan receipt agreements generally and comment on some of the authorities cited by the parties. The court did not address itself to questions of possible collusion or unfairness, although it did note that the agreement was not offered in evidence by defendant Dehner. Review of the prejudicial language of the agreement, however, makes it clear why Dehner did not offer it into evidence.

In direct contrast to the Bolton case, the court in NIPSCO accepted the fact that the loan agreement was a device to evade the Indiana rule of no contribution among joint tort feasors. The court believed that the policy of the law favoring settlement outweighed any considerations relating to violation of existing contribution rules. The NIPSCO court came to this conclusion despite the fact that the agreement did not settle the case, but was merely the prelude to a lengthy trial and appeal. Furthermore, the terms of the agreement did not even settle the case as to NIPSCO under all circumstances since it was possible for the jury to return a verdict against them in excess of $50,000, in which case, NIPSCO would be obligated to satisfy the full judgment.

The following year the Indiana Supreme Court considered loan

\[\text{The agreement between NIPSCO and the plaintiff recited that the parties thereto agreed that Dehner was primarily liable to plaintiff and NIPSCO would be entitled to indemnity from Dehner for any monies it paid in settlement. The parties also agreed that Dehner had pursued a policy of delay in the litigation including filing of frivolous pleadings, manifesting a defiant attitude toward the rules of court and other misconduct. Finally, the parties recognized that Dehner was one of the largest contractors in the area and financially able to pay substantially more than the prayer of the complaint without any financial impairment to Dehner.}\]
receipt agreements in *American Transport Company v. Central Indiana Railway*, a case in which the loan agreement was consummated after trial and entry of judgment. One of the joint judgment debtors made an interest-free loan to the plaintiff to be repaid out of the proceeds of the judgment, if any, realized in a post-trial appeal by the plaintiff against the co-defendants. Citing the *NIPSCO* decision, the court stressed the desirability to the injured party of loan receipt agreements in that substantial sums can be placed in the hands of the injured party immediately, rather than after prolonged legal struggles during which the plaintiff's situation may change, litigants may die, or other changes in circumstances occur.

In 1973, the Illinois Supreme Court in *Reese v. Chicago, Burlington & Quincy Railway* followed *NIPSCO* in upholding the loan receipt concept despite its admitted effect of thwarting the rule of no contribution between joint tort feasors which prevailed in Illinois. That case was an FELA wrongful death action against the decedent's employer and the manufacturer of a crane which struck and killed decedent. Prior to trial, the plaintiffs and the railroad entered into a loan agreement, with repayment to be made from the proceeds of any judgment obtained against the crane manufacturer. Plaintiffs agreed to prosecute vigorously the action against the remaining defendant. On plaintiffs' motion, the railroad was dismissed without prejudice and trial resulted in a plaintiffs' verdict against the crane manufacturer for $149,000.

On appeal, the Illinois Supreme Court traced the development of loan receipt agreements from their origins in marine cases through the present employment of such agreements in personal injury cases. The court acknowledged the potential evils of a loan receipt agreement, including: evading the Illinois contribution rules, giving rise to inordinate cooperation between the agreeing defendant and the plaintiff, and the shifting of the entire burden by one joint tort feasor to another; but the court nevertheless upheld the agree-

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37 Loan receipt agreements developed in response to efforts by carriers and bailees to inequitably shift the burden of loss that was properly theirs to the insurance carrier of the shipper. By advancing funds to the shipper pending the outcome of the shipper's suit against the carrier, the insurer would compensate the shipper for his loss and be in a position to be reimbursed.
In doing so, the court asserted that such agreements had the salutary effects of immediately placing funds in the hands of the injured plaintiff, tending to simplify complex litigation and fostering settlement. Adequate protection for the non-agreeing party could be provided, in the court's opinion, by revelation of the agreement to the jury and affording the adverse parties the opportunity of full and complete cross-examination to develop any bias created by the arrangement.

In his dissent, in which he was joined by two of his fellow justices, Justice Schaefer argued that loan receipt agreements undermine the longstanding doctrine prohibiting assignment of causes of action for personal injury or wrongful death. He also distinguished the prior use of loan receipt agreements in marine insurance cases in which a contract relationship existed between the shipper and the insurer, and an advance by the insurer was simply advance payment of a contract obligation. No such contractual obligation exists in a personal injury case and, therefore, in Judge Schaefer's view, none of the prior loan receipt cases constituted authority for upholding the agreement. Rather than limiting litigation, the dissent argued that the loan receipt agreement fostered litigation since the plaintiff covenanted to pursue vigorously litigation against the remaining party. Also, such an agreement could be used by a more blameworthy defendant to coerce settlement by or shift responsibility to a less culpable defendant.

Most of the recent cases that have considered the validity of loan agreements have tended to reject them on various theories. In Biven v. Charlie's Hobby Shop, the agreement was found to be a partial release and valid only as such. The Kentucky Court of Appeals concluded, following a rationale of the Reese dissent, that a true loan receipt agreement must be based on a pre-existing contract such as existed in the marine cases. In the Kansas decision of Cullen v. Atchison, Topeka & Santa Fe, the court rejected arguments that a loan agreement amounted to maintenance and champerty. The Kansas Supreme Court also declared it was not a release of all defendants, nor was it an assignment of a cause of action for personal injuries. The loan agreement did, however,

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88 500 S.W.2d 597 (Ky. 1973).
violate the Kansas rule against contribution among joint tort feasors and, for that reason, it was rejected. The most recent judicial decree, also rejecting loan receipt agreements, is the case of Monjay v. Evergreen. The Washington Court of Appeals in Monjay cited numerous grounds for its ruling, including the potentially coercive effect, the presence of overtones of champerty, the absence of historical support for the adaptation of the loan receipt agreement in personal injury cases, and the fact that such agreements violate the Washington rule prohibiting contribution among joint tort feasors.

III. OTHER DECISIONS

Courts in other jurisdictions have considered problems similar to guarantee and loan agreements which do not fit categorically into either classification. The South Dakota case of Degnan v. Beyman involved a boating accident with suit against the boat owner and manufacturer. The operator settled with the plaintiff during trial for $65,000 but remained in the case pursuing an indemnity right against the manufacturer. The jury returned a substantial verdict in the plaintiff's favor against both defendants, and also found in favor of the operator against the manufacturer on the operator's indemnity claim.

On the authority of Lum v. Stinnett, the South Dakota Supreme Court reversed, citing the unfairness and prejudice to the non-settling defendant when the jury was not apprised of all of the facts. The court was concerned by the fact that the jury was presented with "benevolent candor" from a joint tort feasor, who at the outset of the litigation was defending himself vigorously, yet during argument urged liability as to himself and the co-defendant with the suggestion that a substantial verdict be returned in favor of the plaintiff.

In Weems v. Freeman, the Georgia Supreme Court held that an agreement entered into during trial and termed by the parties a covenant not to sue was in reality a covenant not to execute,

41 86 S.D. 598, 200 N.W.2d 134 (1972).
42 Id. at 139.
which in Georgia law amounted to a general release. The effect of the agreement was, therefore, a release of all defendants.

Daniel v. Penrod Drilling is a federal district court opinion interpreting Louisiana law. During the course of the trial the plaintiff and one defendant entered into an oral agreement which provided that the defendant would receive a dismissal at the conclusion of the evidence in exchange for not resisting the plaintiff's case, particularly insofar as damages were concerned. The agreement was made known to the other parties and the court near the close of trial, but the jury was not apprised of the situation. The court withheld submitting any issues to the jury against the agreeing defendant, but also withheld granting the motion to dismiss. Following the verdict against the remaining defendant only, the judge granted a new trial. He based his ruling on what he termed the need for integrity of the judicial process and total candor with the jury. In rather colorful language, the judge pointed out that the courts were not merely arenas where games of counsels' skill were played, noting, "Even in football, we do not tolerate point shaving." Citing many of the leading decisions interpreting Mary Carter agreements, Judge Rubin relied heavily on the attorney's duty in our adversary system to give his best without secret equivocation. The judge noted that while an attorney, in representing his client, may not have an obligation to disclose the whole truth, he does have a duty not to deceive the trier of fact and an obligation not to hide the facts behind a facade.

Conclusion

Although various agreements may contain different phraseology and the terms and circumstances vary, all of the arrangements present the same basic situation, namely, a conditional settlement with a possible reimbursement or shifting of the payment responsibility, the benefits of which inure to one defendant at the expense of another. Some of the agreements contain the added element of continuation in the litigation by the agreeing party as an apparent defendant, but with the pragmatic desire of furthering the plain-

45 Id. at 1060.
46 Id. at 1061.
tiff's interest and, in many instances, increasing the plaintiff's verdict against a co-defendant.

Advocates of these accords stress the fact that they foster settlement and lead to the early disposition of injury cases. This being one of the primary desires of our judicial system, anything that contributes to private settlements is to be encouraged. Such agreements are of particular advantage in cases in which one defendant recognizes the merits of the plaintiff's case and aspires to settle, while one or more of the other defendants, for whatever reason, refuse to consider the realities of the case.

It is obviously a distinct tactical advantage to the plaintiff to be guaranteed or loaned a specific sum and still be permitted to prosecute his suit against all defendants without the jury being advised that one or more of the defendants have entered into a settlement.

It is also argued that the use of such agreements can simplify complicated litigation by eliminating certain parties or issues, allowing the court, counsel, and the jury to concentrate more fully on fewer and simpler issues.

It is further noted that even in the absence of any agreement, the plaintiff is free to concentrate his efforts on one defendant while others may play a passive role. Inadequate or no insurance coverage, or clear liability as to one defendant, may result in that defendant maintaining a low profile while the plaintiff directs his case at others. Therefore, the complained of plaintiff-defendant cooperation is not new or uncommon.

Finally, another positive effect of such agreements is the making available to the plaintiff funds, or the guarantee of funds, which make it possible to continue the litigation. In the absence of such arrangements, many plaintiffs for lack of funds would be prevented from pursuing an otherwise just case, thereby going uncompensated.

On the other hand, opponents of the agreements point to their vices, stressing primarily the potential for collusive action. Courts and commentators emphasize the fact that the first consideration must be the integrity of the trial process, and that it is the search for truth that, in the final analysis, affords justice to the litigants. Agreements which have as one their effects misleading the court or the trier of fact cannot be tolerated. In particular, secret agreements receive the most criticism. Such agreements present the jury
with an incomplete picture of the relationships of the parties and make it impossible to evaluate fully testimony, argument, or the court's instructions.

It is also argued that rather than reducing litigation by fostering settlements, these types of agreements actually perpetuate litigation since nearly all of them require the plaintiff to continue his case against the non-agreeing defendants. A typical loan agreement requires that the plaintiff pursue his action with repayment from the proceeds of his recovery against the non-agreeing defendant. Guarantee agreements contemplate payment by the guaranteeing party only if the plaintiff fails to obtain the agreed upon amount from the co-defendants.

The coercive effect of such agreements is the objection of some courts. They cite instances in which the culpable defendant uses the strategic advantage of a pre-trial agreement to shift the total responsibility to a defendant with very little responsibility, thus placing the relatively blameless defendant in the position of settling or assuming the risk of a large adverse verdict. This result is particularly likely in a situation in which the less culpable defendant is the only defendant and the case involves a totally innocent and seriously injured plaintiff.

Many cases stress the fact that these agreements frustrate the established rules against permitting contribution among joint tortfeasors. Whatever the arguments against such a contribution rule may be, many courts have determined that such agreements are contrary to established contribution rules.

Some courts challenge the arrangements as constituting maintenance or champerty in which a stranger to the litigation officiously intermeddles to assist in the prosecution or defense of the case, either for profit (champerty) or other reasons (maintenance).

Finally, in instances involving secret accords, courts have relied on ethical and moral considerations in striking them down by describing them as fraudulent, in violation of public policy, and involving professional misconduct of those involved.

As to how the courts will view agreements of this type in the future, it seems clear from the authorities cited that candor and fairness will be the guiding considerations. The Florida courts, which gave life to the Mary Carter agreements, have in recent
years modified their position and now consider it prejudicial error to deny discovery and/or admissibility of such agreements. Most recent decisions emphasize the need for presenting a true factual picture to the jury. In line with this philosophy, it is likely that future cases will require not only revelation of the arrangement to the jury, but will also require that it be done in a way that is fair to the non-agreeing party. This will require either an edited version of a prejudicially drafted agreement or explicit instructions from the court. To do otherwise would place the non-agreeing defendant in a potentially prejudicial situation in which the jury is allowed to review an agreement describing the defendant's bad faith, unreasonable refusal to settle, and culpability.

In two recent California decisions, River Garden Farms v. Superior Court and Lareau v. Southern Pacific, the element of good faith was stressed in cases concerning apportionment of settlements. Although not involving agreements of the type discussed in this article, both decisions dwell on the need for good faith in settlement agreements among less than all of the defendants. In Lareau, the court specifically invited the aggrieved party to litigate the question of the good faith apportionment of funds paid in partial settlement to the plaintiff by the other defendants.

A substantial majority of the courts that have treated this subject have expressed some degree of reservation with regard to such agreements. It seems fair to state that, in general, courts do not favor such agreements and in all likelihood will continue to find ways to reject them. It is highly doubtful that an agreement such as the original Mary Carter agreement will ever be sustained by any court. It is also unlikely that in any case of first impression a court will look with favor upon an agreement, the terms of which contemplate the settling or guaranteeing party remaining in the case as an apparently viable defendant.

In jurisdictions following the common law rule of no contribution, such agreements, and particularly loan receipt agreements, face an uncertain future. Although the holdings are not unanimous and some courts have upheld them, the trend of the recent decisions casts considerable doubt on their validity in no-contribution juris-

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dictions. In jurisdictions permitting contribution, the test will be whether the agreeing parties acted in good faith.

Since questions of ethics, morality, and fairness do not appear to be considered in cases in which the agreements are entered into well in advance of trial and the agreeing defendant is dismissed from the lawsuit, the major objection to the agreements is missing. Obviously, such agreements will receive a far more receptive hearing from a court, and the proponents of the agreement will be met with the more technical and less emotional objections.

One possible approach to handling such agreements may be found in the philosophical approach giving rise to the rule of comparative negligence. This would involve the submission of all of the issues to the jury for their consideration. In states following the rule of comparative negligence or comparative conduct, the jury is frequently required to consider the conduct of all of the parties and apportion responsibility among the defendants, as well as the plaintiff. This procedure could also be employed in cases involving pre-trial agreements calling for partial payment by one of the defendants. The terms of the agreement could be presented to the jury as one more element for them to consider in arriving at the total amount of the damages to which the plaintiff is entitled and how these damages are to be apportioned. Such an approach would have the benefit of total candor with the jury, and would eliminate the potentially misleading situation of the case being presented to the jury with less than all of the defendants present and without an adequate explanation of their absence.

It seems obvious that the future of guarantee loan receipt and other similar agreements will depend on considerations of candor, fairness, and good faith. Agreements which do not meet these standards and which result in unfairness by way of prejudice to the non-agreeing party, or unfair advantage to the agreeing parties, may well run the risk of judicial rejection.