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COMMENTS

MARY CARTER AGREEMENTS: UNFAIR AND UNNECESSARY

by David R. Miller

More legal disputes are resolved out of court today than ever before. Unless this trend is encouraged, the presently sluggish pace of our judicial process will slow to an intolerable level. Nevertheless, a settlement device used in multiparty litigation, known as the Mary Carter agreement, has surfaced in recent years, and cannot be blindly accepted. Under the typical Mary Carter agreement the plaintiff releases his cause of action against a joint tortfeasor in return for the settling joint tortfeasor’s continued participation in the trial. The plaintiff also promises to pay the settling tortfeasor a portion of the recovery received from the nonsettling tortfeasor. The settling tortfeasor thus represents himself to be a defendant whose financial interest is adverse to the plaintiff, while in fact he has a vested financial interest in the success of the plaintiff’s cause of action against the nonsettling defendant. Although Mary Carter agreements have been used in multiparty litigation for several years, this subject was addressed by a Texas appellate court for the first time in 1977 in General Motors Corp. v. Simmons. In Simmons the Texas Supreme Court noted that these agreements tend “to undermine the adversary nature and integrity of the proceedings against the remaining defendant.” The court, in accord with most jurisdictions that have addressed the issue of Mary Carter agreements, held that the district court erred in refusing to admit the Mary Carter agreement into evidence.

1. The term “Mary Carter agreement” originated in Florida, where there has been an abundance of litigation involving these agreements. In Maule Indus. Inc. v. Rountree, 264 So. 2d 445 (Fla. Dist. Ct. App. 1972), rev’d, 284 So. 2d 389 (Fla. 1973), the Florida District Court of Appeals stated:

   The term arises from the agreement popularized by the case of Booth v. Mary Carter Paint Co., Fla. App. 1967, 202 So. 2d 8, and now appears to be used rather generally to apply to any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the nonagreeing defendant or defendants.

264 So. 2d at 446 n.1.

2. The Indiana Supreme Court noted in American Transp. Co. v. Central Ind. Ry., 255 Ind. 319, 264 N.E.2d 64, 67 (1970), that Mary Carter agreements have “been used by the railroads for at least thirty years to induce injured parties to proceed against the railroads’ joint tort-feasor.”

3. 558 S.W.2d 855 (Tex. 1977).

4. Id. at 858.
This Comment demonstrates that admitting agreements of this nature into evidence, even with the precautionary measures that the Texas Supreme Court omitted from their decision, will not prevent the prejudicial effect a Mary Carter agreement has on the nonsettling defendant. Whatever benefit a Mary Carter agreement is to the orderly administration of justice, this advantage is overwhelmingly outweighed by the inherent injustice the typical agreement imposes on the nonsettling defendant. This Comment concludes that the most satisfactory method of dealing with such agreements is to declare them illegal and unenforceable.

I. BACKGROUND CONCEPTS: JOINT TORTFEASORS, RELEASES, COVENANTS NOT TO SUE, AND COVENANTS NOT TO EXECUTE

Joint Tortfeasors. Under a Mary Carter agreement the plaintiff settles his claim against some, but not all, joint tortfeasors while expressly retaining his cause of action against the remaining joint tortfeasors. Such an agreement is only practical when there is joint liability because the plaintiff’s major objective in entering a Mary Carter agreement is the solicitation of assistance in his cause against the remaining defendants.

At early English common law, two or more persons became joint tortfeasors only when they participated in a concerted action pursuant to a common scheme which caused injury to the plaintiff. In a “true” joint tort, each tortfeasor could be joined in the same cause of action and was liable for the entire damage. In the absence of unity or common design, acts of independent tortfeasors at common law could not culminate in a joint tort, even though such acts produced a single, indivisible injury. Such “concurrent” tortfeasors had to be sued separately. Initially, American courts followed the common law doctrine, but the liberalization of the American procedural system permitted joinder of “concurrent” tortfeasors in one cause of action. In permitting joinder of “concurrent” joint tortfeasors, the term “joint tortfeasor” was applied indiscriminately by the courts to “concurrent” joint tortfeasors and to “true” joint tortfeasors. Consequently, every American jurisdiction now recognizes that when two or more persons concur in producing a single injury, those persons are

5. See notes 109-14 infra and accompanying text.
7. W. PROSSER, supra note 6, at 291. The jury was not permitted to apportion damages, although the plaintiff was only entitled to a single recovery.
8. Id. at 297. See also Phelps v. Drainage Dist. No. 1, 216 S.W.2d 842 (Tex. Civ. App.—Galveston 1948, writ ref’d n.r.e.); Houser v. Harris, 44 S.W.2d 784 (Tex. Civ. App.—Texarkana 1931, no writ) (although each tortfeasor acts independently, the tort is “joint” by common law standards when there exists a “community of responsibility” toward the plaintiff and concurrent wrongs produced the injury).
10. W. PROSSER, supra note 6, at 297; Kennedy, supra note 9, at 764.
jointly and severally liable, notwithstanding the absence of concerted action.\(^{12}\)

**Releases.** At common law release of one true joint tortfeasor released all other joint tortfeasors since the tortfeasors' united acts were regarded as one indivisible cause of action.\(^{13}\) A release or judgment against one joint tortfeasor extinguished the entire cause of action.\(^{14}\) This rule of "unitary discharge" often defeated the releasing party's intention to preserve the cause of action against the unreleased tortfeasor.\(^{15}\) This perversion of the releasing party's intent to achieve a partial settlement and the court's treatment of concurrent tortfeasors as true joint tortfeasors lead to dissatisfaction and criticism,\(^{16}\) and ultimately to judicial modification.\(^{17}\)

**Covenants Not to Sue and Covenants Not to Execute.** The most widely used method of circumventing the harshness of the unitary discharge rule is the covenant not to sue. Rather than surrender the entire cause of action through a release, the parties enter a contract whereby the injured party agrees not to enforce his cause of action against one of the tortfeasors.\(^{18}\) If the instrument is phrased in the language of a release, but reserves the right to sue another tortfeasor, most jurisdictions construe the agreement as a covenant not to sue,\(^{19}\) and the right to bring a cause of action against other tortfeasors is preserved.\(^{20}\) A covenant not to execute

\(^{12}\) Comment, **supra** note 11 at 57; see Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).

\(^{13}\) W. Prosser, **supra** note 6, at 301 (release is a surrender of a cause of action which may be gratuitous or given for consideration); Comment, Torts—Joint and Several Liability, Releases, Covenants Not to Sue, Covenants Not to Levy or Execute and Reduction of Debts Pro Tanto, 24 S. Cal. L. Rev. 466, 470 (1951).

\(^{14}\) W. Prosser, **supra** note 6, at 301.

\(^{15}\) Id. at 302; Comment, Settlement in Joint Tort Cases, 18 Stan. L. Rev. 486, 487 n.12 (1966).

\(^{16}\) See, e.g., McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943), in which Justice Rutledge stated: Compromise is stifled, first, by inviting all to wait for others to settle and, second, because claimants cannot accept less than full indemnity from one when doing that discharges all. Many, not knowing this, accept less only to find later they have walked into a trap. The rule shortchanges the claimant or overcharges the person who settles, as the recurring volume and pattern of litigation show. Finally, it is anomalous in legal theory, giving tortfeasors an advantage wholly inconsistent with the nature of their liability.

\(^{17}\) Id. at 662.

\(^{18}\) W. Prosser, **supra** note 6, at 302-03; Comment, **supra** note 11, at 56-58; Comment, **supra** note 13, at 470.

\(^{19}\) W. Prosser, **supra** note 6, at 303. The distinction between a release and a covenant not to sue is entirely artificial. Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P.2d 783 (1945).

\(^{20}\) Only two states, Washington and Virginia, follow the common law doctrine that release of one joint tortfeasor releases all joint tortfeasors, notwithstanding the fact that the document is drawn in the form of a covenant not to sue. See Bland v. Warwickshire Corp., 160 Va. 131, 168 S.E. 443 (1933); Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941).

\(^{20}\) Comment, **supra** note 11, at 56-58. This interpretation has been appropriately labeled "judicial fudging." In early phases of "judicial fudging," the courts construed the terms of the release according to the general rules of contract interpretation. The primary
The major distinction is that a covenant not to execute is entered after the proceedings have begun, while a covenant not to sue is generally used as a pretrial device.

The Texas Approach. Texas no longer differentiates between releases and covenants not to sue. Under the more pragmatic Texas approach, a party is not relieved of liability unless he is named in the releasing instrument. Thus, a release of one party releases only the tortfeasor who makes the partial settlement unless the settlement fully satisfies the injured party.

II. The Mary Carter Agreement

A. Elements

As in an ordinary covenant not to sue, a plaintiff who is a party to a Mary Carter or loan receipt agreement releases his cause of action against the settling defendant. A Mary Carter agreement, however, focus was on the intent of the parties at the time the release was executed. Notably, the Texas courts were very liberal in their construction of the parties' intent.

21. Kennedy, supra note 9, at 771.
24. Id. at 196.
25. See Prosser, Joint Torts and Several Liability, 25 Cal. L. Rev. 413, 423 (1973), in which Professor Prosser first advocated the approach now adopted in Texas.
26. The modern day loan receipt agreement is distinguishable from a Mary Carter agreement only in form, not substance. Such an agreement, in its simplest form, provides that one defendant will advance an interest free loan to the plaintiff in return for a covenant not to sue or a covenant not to execute. The nonsettling defendant, nonetheless, remains a party to the litigation. The plaintiff then agrees to pursue his claim against the nonagreeing defendant. The plaintiff also agrees to repay the loan according to a formula based on the amount recovered from the nonagreeing defendant. See Burkett v. Crulo Trucking Co., 355 N.E.2d 253, 258 (Ind. App. 1976). See also Note, Loan Agreements as Settlement Devices, 25 DePaul L. Rev. 792 (1976).
27. The agreement in the original Mary Carter case contained the following elements: (1) the plaintiff agreed not to execute a judgment against the settling defendant in return for the settling defendant's continued presence in the trial; (2) the plaintiff was guaranteed...
tains two conditions not found in a typical covenant not to sue. First, and most important, is the "incentive clause," or as one writer has labeled it, the "guarantee clause." This clause provides that the settling defendant will pay or agree to pay the plaintiff a stated sum in return for either a covenant not to sue, a covenant not to execute, or a covenant to dismiss the settling defendant at the close of the evidence. The plaintiff also promises to pay or credit to the settling defendant a sum of money based on the amount of the plaintiff’s recovery from the nonsettling defendant. The distinguishing feature of a Mary Carter agreement is that the plaintiff’s cause of action against the settling defendant is extinguished, yet the amount the settling defendant ultimately pays the plaintiff is determined by the success of the plaintiff’s action against the nonsettling defendant.

Although the plaintiff is guaranteed a certain sum, this clause is better described as an incentive clause because the settling defendant is encouraged to aid the plaintiff in obtaining a judgment against the remaining defendant. More importantly, the incentive clause encourages the settling defendant to assist the plaintiff in recovering a large judgment. Courts have often stated that in instances of alleged joint and several liability defendants occasionally maintain positions adverse to one another on the issue of liability. But never, in the absence of some form of a Mary Carter agreement.


30. See, e.g., General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).

31. See, e.g., Ponderosa Timber & Clearing Co. v. Emrich, 86 Nev. 625, 472 P.2d 358 (1970). In states that do not permit contribution the agreements are usually in the form of a covenant not to execute or covenant not to enforce judgment.


33. See General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977), in which the plaintiff agreed to pay the settling defendant 50% of the first $400,000 recovered from the nonsettling defendant. All recovery above $400,000 went solely to the plaintiff. The amount that a settling defendant is able to recoup from the plaintiff's recovery from a nonsettling defendant is generally the amount that a settling defendant originally "fronts" the plaintiff. Although the published opinion of the Texas Supreme Court in Simmons states that the amount paid for the covenant not to sue was unknown, a brief submitted on motion for rehearing clearly shows that settling defendant’s optimum recovery was equal to the amount advanced to the plaintiff, $200,000. Brief for Appellee on Rehearing at 12, General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).

But see Leger v. Drilling Well Control, Inc., 69 F.R.D. 358 (W.D. La. 1976), in which apparently no limit was placed on the settling defendant's optimum recovery.


[From the earliest stages of this case [the defendants] were engaged in an extensive effort to blame each other. Such conduct is not foreign to litigation defended by more than one party. There is no legal requirement that co-defendants must be friendly in defending a lawsuit. The realities of litigation clearly indicate that co-defendants are frequently unfriendly.

$12,500 if a take nothing judgment was entered; (3) if a judgment was entered against all defendants for less than $37,500, the settling defendant was to pay the difference up to $12,500; and (4) the agreement was to remain secret. Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967).
Carter agreement, will a defendant encourage a jury to award a large judgment.  

The second important way in which the typical Mary Carter agreement differs from the ordinary covenant not to sue is the continuing and active participation by the settling defendant in the trial of the case. This condition is often expressly required by the agreement. The incentive clause, however, aligns the settling defendant's interests with the plaintiff's cause so that enforcement by contract of his presence or allegiance is not necessary. Moreover, the settling defendant's continued presence as a defendant and an apparent adversary to the plaintiff permits him to advocate the plaintiff's cause in hope of reaping the benefits provided by the incentive clause. The presentation of the case, therefore, may be so warped by collusion, lack of adversarial vigor, and numerous other factors that the nonsettling defendant is denied a fair trial.  

Some commentators contend that Mary Carter agreements must also contain mutual promises to conceal the agreement from the court, the opposing attorneys, and the jury. Although this provision may be present in some agreements, neither the clause nor the satisfaction of the enumerated requisites is necessary in order to prejudice the nonsettling defendant. Concealing a Mary Carter agreement from opposing counsel and the court may increase the prejudicial effect of such an agreement, but the real prejudice is caused by the jury's inability to evaluate the testimony of witnesses and position of counsel in light of the incentive clause. Complete candor with the court and opposing counsel will not eradicate the damage caused by the false appearance of an adversary proceeding. Revealing the agreement to the jury, however, is in itself so prejudicial that it will deny the litigants a fair trial.

250 N.E. 2d at 393.

35. See notes 88-92 infra.

36. See Comment, supra note 29, at 1396; Comment, supra note 22, at 267.

37. See, e.g., Maule Indus., Inc. v. Rountree, 284 So. 2d 389 (Fla. 1973).

38. See notes 67-94 infra and accompanying text.

39. See Comment, supra note 22, at 267; Comment, supra note 29, at 1396.

40. Surprise to the nonsettling defendant is probably the most detrimental element of concealment. Although there are instances when a Mary Carter agreement has not been revealed to the court or opposing counsel until after the trial has been concluded, see, e.g., Leger v. Drilling Well Control, Inc., 69 F.R.D. 358 (W.D. La. 1976), it seems highly unlikely that the nonsettling defendant would be unaware that a Mary Carter agreement has been made. Realistically, the position of the agreeing parties would change dramatically during discovery or the trial, depending on when the agreement was made.

41. In Illinois the parties to a Mary Carter agreement are under an affirmative duty to disclose the existence of the agreement to the court and opposing counsel. Gatto v. Walgreens Drug Co., 61 Ill. 2d 513, 337 N.E.2d 23 (1975). This duty exists even in the absence of a discovery request to produce a settlement agreement. See Note, supra note 26, at 797-98. Oregon has enacted legislation forcing unsolicited disclosure of a settlement agreement. Ore. Rev. Stat. § 18.455 (1977) states in part:

When a convenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury . . . the claimant shall give notice of all of the terms of the covenant to all persons against whom he makes claims.

42. See notes 109-18 infra and accompanying text.
Other provisions may be included in a Mary Carter agreement. For instance, the plaintiff may promise to prosecute his claim diligently against the nonsettling defendant. The plaintiff may also be precluded from settling with the remaining defendant for less than a stipulated sum or without the consent of the settling defendant. The settling defendant may give the plaintiff additional consideration other than money in return for entering the agreement. As one court has noted: "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 . . . . [W]e therefore feel that we can neither condone nor condemn such agreements generically." One commentator has concluded that formulating a precise definition of Mary Carter agreements is so difficult that per se illegality is not "a desirable solution to the problems caused by Mary Carter Agreements." This reasoning is unsound because a definition of a Mary Carter agreement is formable. First, the settling defendant must actually participate in the trial so he is able to aid the plaintiff in his claim against the remaining defendant. Secondly, the settling defendant must benefit financially from a judgment for the plaintiff against the nonsettling defendant. This financial benefit may be a recovery of an actual dollar amount or a forebearance by the plaintiff to collect an amount of money due from the settling defendant.

B. The Law Favors Settlement, but Not Mary Carter Agreements

Advocates of Mary Carter agreements rely heavily on the rhetoric that "the law favors settlement" to strengthen their position. While the law does encourage out of court settlement of disputes, a Mary Carter agreement only partially resolves the dispute. Consequently, the salutory effects of settlement, such as relief to the overcongested court docket and


44. See, e.g., General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).

45. An interesting sequence of events in Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 564 P.2d 895 (1977), lead to a different sort of consideration. The plaintiff brought an action against Mountain States Telephone after his car was rear-ended by a Mountain States truck. Mountain States, after investigating the accident, found evidence that Mustang Equipment might be responsible in some way for the accident. Mountain States ultimately traded an engineer's report to the plaintiff in return for a covenant not to execute. The settling defendant in Daniel v. Penrod Drilling Co., 393 F. Supp. 1056 (E.D. La. 1975), covenanted not to maintain an aggressive or destructive posture to the plaintiff's case or its witnesses. The settling defendant in Daniel also made a more common, but unreported, concession to the plaintiff. He used his peremptory strikes as directed by the plaintiff.


47. Comment, supra note 29, at 1398.


50. See Kennedy, supra note 9, at 774; Comment, supra note 29, at 1398.
simplification of complex litigation,\textsuperscript{51} are not achieved. A Mary Carter agreement by its very nature insists upon continued litigation after the agreement is made. The plaintiff will continue to pursue his action against the nonsettling defendant and in some instances may be obligated to do so.\textsuperscript{52} The agreement, not being a final resolution among all parties, does not preclude further litigation.\textsuperscript{53} Partial settlement in states such as Texas that permit contribution\textsuperscript{54} does not simplify complex litigation. The settling defendant may be joined as a third party defendant, and his liability will still be at issue.\textsuperscript{55}

The existence of a Mary Carter agreement also inhibits the possibility of settlement with the remaining defendant. Since the settling defendant may escape liability completely by entering a Mary Carter agreement, he pays more to the plaintiff than he would under an ordinary covenant not to sue.\textsuperscript{56} The plaintiff thus obtains the best of all possible worlds: he is guaranteed an inordinately high pretrial recovery without releasing his cause of action against the nonsettling defendant, and more importantly, he secures the active participation and support of the settling defendant. Once the plaintiff attains this bargaining position, his settlement with the remaining defendant is less likely. Suppose, for example, the agreement stipulated that if the jury awarded less than $20,000, the settling defendant would pay the difference, up to a total of $20,000, and if the jury awarded $20,000 or more, the settling defendant would not contribute.\textsuperscript{57} In this situation, the plaintiff probably would not accept a $25,000 settlement from the remaining defendant since he would receive only a net increase of $5,000 over the guaranteed $20,000. The remaining defendant will be unable to make an appealing settlement offer since the settling defendant's guarantee is probably inflated. A Mary Carter agreement thus will not encourage settlement of the plaintiff's remaining claim, and litigation is almost inevitable.

In recent years the plaintiffs' bar has complained that overloaded court dockets and the resulting delay in the judicial process cause great hardship to their clients. This contention has merit. As one writer stated, "\textit{t}here have been instances where the sponge has been thrown in on a meritorious case simply because the litigant did not have the wherewithal to see it

\textsuperscript{51} See Michael, \textit{supra} note 48, at 524.
\textsuperscript{52} See note 43 \textit{supra} and accompanying text.
\textsuperscript{53} See, Comment, \textit{supra} note 15, at 489, in which promoting partial settlements is questioned as a worthwhile goal.
\textsuperscript{55} Even in common law jurisdictions where contribution is not permitted, the settling defendant may be joined under proper circumstances for implied indemnity. See, e.g., Cullen \textit{v. Atchison, Topeka \& Santa Fe Ry.}, 211 Kan. 368, 507 P.2d 353 (1973).
\textsuperscript{56} See Reese \textit{v. Chicago, B. \& Q.R.R.}, 55 Ill. 2d 356, 303 N.E.2d 382 (1973); Michael, \textit{supra} note 48, at 525.
\textsuperscript{57} This is essentially the agreement made by the parties in Lum \textit{v. Stinnett}, 87 Nev. 402, 488 P.2d 347 (1971).
Some courts, recognizing this dilemma, have upheld the validity of the Mary Carter agreement as a device that "puts the plaintiff in funds" to aid him in time of need and to help finance the litigation against the remaining defendants. A partial settlement will no doubt provide relief to an injured plaintiff, but the plaintiff's financial needs, assuming he has been wrongly injured, cannot justify denying the nonsettling defendant a fair trial.

While "putting the plaintiff in funds" is superficially appealing, this factor is rarely the plaintiff's true motive for entering a Mary Carter agreement. The real attraction to a Mary Carter arrangement is the ability to enlist support from the settling defendant and disguise him as an adversary, when he is actually a member of the plaintiff's camp. Justice Traynor's dissent in Pellett v. Sonotone Corp. accurately stated the plaintiff's genuine incentive to enter a Mary Carter agreement. In Pellett the plaintiff purchased a hearing aid from the defendant Sonotone Corporation. A salesman for Sonotone employed defendant Compton, a dentist, to make a plaster mold of plaintiff's ear so the hearing aid could be properly fitted. Compton failed to remove all the plaster from the plaintiff's ear, and he subsequently suffered hearing damage. After instituting an action against both Sonotone and Compton, the plaintiff entered into a Mary Carter agreement with Compton. In analyzing the purpose and effect of the agreement, Justice Traynor stated:

It is apparent that plaintiff was interested in maintaining the outward appearance of a law-suit against Compton in order to get Compton's testimony as a presumably hostile witness to prove Compton's negligence and to make Sonotone responsible for that negligence. Hence the agreement that in substance provided that Compton's testimony would not make him responsible to plaintiff. This scheme made the action against Compton a collusive proceeding. . . . [P]laintiff expected by this agreement to secure favorable testimony from

58. Scoby, Loan Receipts and Guaranty Agreements, 10 Forum 1300, 1314 (1975).
60. One commentator has stated:
   The solution to [the plaintiff's pre-trial financial] problem does not lie in gimmickry or in the encouragement of litigation against collateral defendants who will loan the plaintiff enough of a warchest to pursue the cause against the putative 'real' culprit. The cost to the integrity of the judicial process is too high.
   Scobey, supra note 58, at 1314-15.
61. The settling defendant in many Mary Carter agreements does not advance money to the plaintiff, but merely guarantees payment should the plaintiff fail to recover a stipulated sum from the nonsettling defendant. In these cases the "putting the plaintiff in funds" argument is totally without merit. See, e.g., City of Tucson v. Gallagher, 14 Ariz. App. 385, 483 P.2d 798 (1971), vacated, 108 Ariz. 140, 493 P.2d 1197 (1972).
63. The agreement was not technically a Mary Carter agreement, but the collusive aspects of the compact are obvious. The plaintiff agreed not to execute judgment against Compton in return for 10 dollars if a judgment would be entered in favor of the plaintiff against the "defendant in said action," and five dollars regardless of the outcome. These sums are meager at best, even by 1945 standards. Of more importance, however, was Compton's continued participation in the trial. Id. at 785-86.
Compton... and that Compton's true performance was to be the giving of favorable testimony. Since the contract could not set forth such an immoral consideration it was predicated on the agreement that Compton is not guilty of culpable conduct.  

Mary Carter agreements have likewise been noted for rewarding the defendant willing to settle with the opportunity to avoid liability completely. This result is socially desirable only when the settling defendant is not at fault. A basic premise of tort law is that a wrongdoer should compensate the injured party for his injuries. A defendant who has wronged the plaintiff should not be permitted to escape liability by wagering on the plaintiff's success against the remaining defendant, and then stack the deck against the nonsettling defendant by aiding the plaintiff's cause. This adjudicative gambling breeds collusion and deception, and erodes the integrity of the judicial system.

III. THE OBJECTIVES OF THE AGREEING PARTIES AND THE RESULTING PREJUDICE ON THE NONSETTLING DEFENDANT

The objectives of the plaintiff and the settling defendant are altered dramatically upon entering a Mary Carter agreement. The incentive clause insures that a substantial verdict against the remaining defendant will benefit both parties. Thus, the plaintiff and settling defendant, through various tactical devices, patronize one another's position. The jury, unaware of the reason for this transition in posture, is misled, and the nonsettling defendant is denied a fair and impartial trial.

In order to highlight further the potential prejudice caused by such agreements, an examination of the objectives of the plaintiff and the settling defendant is required. To accomplish their purpose the agreeing parties must obtain the following: (1) a finding of negligence on the part of the nonsettling defendant; (2) a finding of no negligence on the part of the plaintiff; (3) a finding of no negligence on the part of the settling defendant if the jurisdiction provides pro rata or comparative contribution among joint tortfeasors, and (4) a sufficiently large verdict for both

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64. Id. at 789.
65. See Kennedy, supra note 9, at 778; Michael, supra note 48, at 525.
66. The plaintiff, however, is usually more anxious to enter a Mary Carter agreement with the more blameworthy defendant, since he will be willing to guarantee more money to the plaintiff. Mary Carter agreements, thus, tend to shift the burden of liability to the less culpable party. See Reese v. Chicago, B. & Q.R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973) (dissenting opinion); see also Comment, supra note 26, at 231 (1976).
67. See notes 88-93 infra and accompanying text.
68. This objective must be satisfied in jurisdictions where plaintiff's recovery will be barred by any degree of contributory negligence. The plaintiff's recovery in jurisdictions controlled by comparative negligence is decreased in proportion to his negligence, although recovery can be denied completely if the plaintiff's negligence is equal to or exceeds (depending on the type of comparative negligence statute) the total negligence of the defendants. A finding that the plaintiff is not negligent, in either instance, however, is beneficial to the mutual goal of the plaintiff and settling defendant. See Keeton, Torts, Annual Survey of Texas Law, 28 Sw. L.J. 1 (1974), for a discussion of the Texas Comparative Negligence Statute, Tex. Rev. Civ. Stat. Ann. art. 2212a (Vernon Supp. 1978).
69. Assuming the nonsettling defendant seeks contribution from the settling defendant,
parties to benefit by the terms of the incentive clause.

Even in the absence of a Mary Carter agreement it is not unusual that the plaintiff and the settling defendant would both try to establish the first objective: the negligence of the nonsettling defendant. There is no rule that defendants must be allies against the plaintiff on the question of the defendants' liability. When the negligence of the plaintiff is at issue, however, it would seem extraordinarily uncommon for a codefendant to concede the contributory negligence question. Yet the settling defendants in *Ponderosa Timber & Clearing Co. v. Emrich* used this very method to assure a judgment for the plaintiff. In an action seeking recovery for injuries sustained in an automobile collision, all four defendants entered defenses of contributory negligence and assumption of risk. After the first day of trial, however, the plaintiff and two of the defendants entered a Mary Carter agreement. The following statement, taken from the closing argument of counsel for the settling defendants, clearly indicates where his sentiments lay:

'Mr. Shamberger [counsel for the nonsettling defendants] explained that the defendants were relying on two defenses, contributory negligence and assumption of risk.'

. . . .

'Now I am not going to stand here and make a fool of myself by telling you people that there is any merit in the defense of contributory negligence. There isn't. Even though that was asserted in the defenses here, as far as I am concerned, you can forget about that. You heard no instruction on assumption of risk. So the second side of this case, if there was a second side, is out of the case, too.'

. . . . 'This is the kind of a case when a lawyer . . . has to remind himself of the oath that he took when he was admitted to practice . . . to see that justice is done . . . '

The Supreme Court of Nevada, over a vigorous dissent, denied the nonsettling defendants' motion for new trial. The majority apparently believed that even though the jury was not aware of the Mary Carter agreements, the plaintiff's recovery under comparative contribution will be diminished by the percentage of the settling defendant's negligence. The plaintiff's recovery under pro rata contribution will be diminished in proportion to the number of defendants found liable. See notes 119-46 infra and accompanying text for a discussion of the effect of contribution among joint tortfeasors on Mary Carter agreements.

70. See note 34 supra and accompanying text.
72. 472 P.2d at 362-63 (emphasis added).
73. The dissent noted that the nonsettling defendants, as co-defendants, had every right to rely upon the position of [the settling defendants] as expressed in their pleadings, which asserted the affirmative defense of contributory negligence and assumption of risk. Indeed, NRCP 11 provides, in part: 'The signature of an attorney constitutes a certificate by him that he has read the pleading [and] that to the best of his knowledge, information and belief there is good ground to support it . . . .' *Id.* at 363.
74. The majority insisted that it was not improper for the settling defendants to abandon their defenses. Such action is just "a matter of trial strategy." *Id.* at 360. A "strate-
agreement, the false posture of the settling parties did not affect the outcome of the case.\textsuperscript{75} It is startling that the court could make such a finding since the defendants had settled their dispute with the plaintiff prior to abandoning their defenses and, thus, would benefit financially from a judgment against the remaining defendants.\textsuperscript{76} Favorable statements by defense counsel toward the plaintiff's case and against his own client's apparent interest may be weighed heavily by the jury. Simple logic would reason that such statements would be a determinative factor in finding for the plaintiff. The Nevada Supreme Court, however, reconsidered the position taken in \textit{Ponderosa Timber} one year later in \textit{Lum v. Stinnett}\textsuperscript{77} and became one of two jurisdictions to declare Mary Carter agreements against public policy and void.\textsuperscript{78}

In jurisdictions where pro rata or comparative contribution among joint tortfeasors is in effect, a finding of negligence on the part of the settling defendant will reduce the plaintiff's possible recovery.\textsuperscript{79} In such a jurisdiction the parties to the agreement try to absolve the settling defendant of liability. In contrast to his normal role in the adversary context, the plaintiff in furtherance of the Mary Carter agreement may assume a posture much like that of a settling defendant who abandons his defenses.\textsuperscript{80} At some point toward the end of the trial, the plaintiff may concede to the jury that the settling defendant is not negligent,\textsuperscript{81} or the plaintiff may dismiss the settling defendant at the close of the evidence. An instructive case is \textit{Lum v. Stinnett},\textsuperscript{82} a malpractice action against three doctors. The plaintiff entered a Mary Carter agreement with Drs. Greene and Romeo and retained his cause of action against Dr. Lum. While Romeo was the
prime target of the complaint, the plaintiff virtually disregarded Greene and Romeo after the agreement was made. In contrast to the placid attitude taken by counsel for the settling defendants, Lum's counsel's vigorous defense must have suggested that only Lum had cause for concern. This inference could only have been strengthened when the plaintiff dismissed Romeo and Green at the close of the evidence.

The collusive tactics of the agreeing parties take on a somewhat different flavor in no contribution and pro tanto contribution jurisdictions, where the settling defendant's negligence does not affect the recovery. There have been occasions in these jurisdictions when the settling defendant admitted liability to the jury in closing argument. The settling defendant usually continues this philanthropic candor by admitting negligence on the part of the other defendant as well.

In an action based on joint and several liability, the posture of the various defendants may vary on the liability issue. In all circumstances, however, a defendant who may be jointly and severally liable will deny or at least try to mitigate damages. This cooperation vanishes when the settling defendant enters a Mary Carter agreement because the settling defendant's liability under a Mary Carter arrangement will be diminished proportionately as the size of the plaintiff's verdict is increased. In this situation the settling defendant usually will not contest the plaintiff's damages or

83. 488 P.2d at 348.
84. Id. at 349.
85. If pro tanto contribution is in effect, the plaintiff's recovery will be diminished only by the amount paid for the covenant not to sue. The settling defendant's negligence, thus, is of no consequence. The settling defendant's negligence is likewise of no relevance in states that do not permit contribution. The plaintiff in no contribution jurisdictions will execute the judgment solely against the nonsettling defendant, and the settling defendant is immune from any subrogation efforts by the nonsettling defendant.
87. The closing argument of counsel for the settling defendants in Ponderosa Timber & Clearing Co. v. Emrich, 86 Nev. 625, 472 P.2d 358 (1970), is again illustrative:
I submit to you ladies and gentlemen there aren't three sides to this case, there aren't even two sides, there is one side, and that side is that all of these defendants are responsible to the plaintiff and I consider it my duty as an officer of this court to suggest to you that in the interest of justice, if we are to have justice in this case, there must be a plaintiff's verdict against all of the defendants.
Id. at 362.
88. See notes 29-35 supra and accompanying text. The situation in City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972), illustrates the contrast in the settling defendant's position on liability and damages. The court noted that:
In the absence of the arrangement, [the settling defendant's] defense would have been based upon a showing that he was not negligent, and that the accident was caused solely by the city's negligence. He had the same identical motives after the agreement was made. 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.
493 P.2d at 1199-1200.
89. See id.; Bill Currie Ford, Inc. v. Cash, 252 So. 2d 407 (Fla. Dist. Ct. App. 1971). In the latter case, the settling defendant failed to cross-examine the plaintiff's medical witnesses. The court noted that there is no duty on the part of the settling defendant to keep the verdict at a minimum through cross-examination of the plaintiff's doctors. Perhaps,
will overtly demonstrate that the plaintiff has been injured and deserves a substantial damage award. The closing statement by counsel for the settling defendant in *Degen v. Bayman* is illustrative of this last point.

I have no doubt, ladies and gentlemen, that in this case you're going to give Billy Degen a verdict and believe me, in this argument and particularly in a case like this, I think the attorneys have a real responsibility to be candid with the jury, and I'm trying to be with you because this is a very serious case.

There isn't any doubt in my mind but what you're going to give Billy Degen a verdict. There isn't any doubt in my mind that it's going to be a substantial one.

The jury, unaware of counsel's motivation in making this statement, may accept this astonishing admission of liability and damages at face value.

These examples are not the exclusive means by which the nonsettling defendant is prejudiced. The agreeing parties, ostensibly adverse, are able to employ evidentiary tactics to their advantage. Counsel may lead adverse witnesses, thus permitting the settling defendant to lead and control plaintiff's witnesses, and permitting the plaintiff to do likewise with the settling defendant's witnesses. On cross-examination the friendly parties are also able to correct errors and omissions made by each other on direct examination. For example, plaintiff's counsel in *Lum v. Stinnett* failed to ask plaintiff's former employer if plaintiff had received tips as well as wages. The settling defendant's counsel obligingly elicited this information from the witness on cross-examination.

Perhaps the most misleading factor to the jury is the degeneration of the adversary nature of the trial. The jurors, expecting to see plaintiff versus defendants, are confused by the benevolent and nonchalant attitude of the plaintiff and settling defendant toward one another. This deceptive posture tends to shift the apparent liability to the nonsettling defendant, who may or may not deserve it.

**IV. THE TEXAS SOLUTION: ADMITTANCE OF THE AGREEMENT INTO EVIDENCE**

The events in *General Motors Corp. v. Simmons*, which produced the first Mary Carter agreement to reach a Texas appellate court, illustrate a

there is no such "duty," but it cannot be denied that such a nonchalant attitude by one defendant will unfairly affect the jury's evaluation of damages.

90. 86 S.D. 598, 200 N.W.2d 134 (1972).
91. 200 N.W.2d at 139.
92. *See* Ponderosa Timber & Clearing Co. v. Emrich, 86 Nev. 625, 472 P.2d 358 (1970), in which the settling defendant's counsel admitted special damages in excess of $15,000, leaving the general damage assessment to the jury. It should be noted that the settling defendant in *Ponderosa* would escape liability if the judgment was over $20,000.
95. 488 P.2d at 349.
96. 558 S.W.2d 855 (Tex. 1977).
97. There are Texas cases involving assignment of a cause of action, dismissal, or settlement that border on collusion. But these agreements are distinguishable from Mary Carter
typical Mary Carter scenario. Curtis Simmons's 1962 Chevrolet was involved in a collision with a truck owned by Feld Truck Leasing Corporation and operated by its employee Hestle Johnston. The impact of the collision caused Simmons's car window to shatter, and Simmons was blinded by glass fragments. Contending that the glass in his automobile was defective, Simmons brought an action alleging product liability and negligence per se against General Motors Corporation. Simmons also sued Feld Truck Leasing Corporation and Johnston, alleging that Johnston negligently collided with Simmons's car. Feld and Johnston brought a third party action against General Motors for indemnity, and General Motors in turn sought contribution from Feld and Johnston.

Feld and Johnston entered a Mary Carter agreement with Simmons, acknowledging that Feld and Johnston had paid Simmons an undisclosed amount of money in return for Simmons's covenant not to sue. The agreement contained an incentive clause whereby Feld could recover as much as $200,000 from a successful prosecution of Simmons's case against General Motors. The agreement also prevented Simmons from settling with General Motors without the consent of Feld. Feld and Johnston subsequently participated in the trial as first party defendants, notwithstanding the settlement agreement. The agreement, however, was made known to all counsel well before trial, and a copy of the agreement was filed with the court. The jury, nonetheless, was not instructed that Simmons had settled his claim against Feld and Johnston, nor was the jury informed that Feld had a vested financial interest in the success of Simmons's action against General Motors. The jury was told on several occasions that there was "no adversity or diversity of interest" between agreements. See, e.g., McMullen v. Coleman, 135 S.W.2d 776 (Tex. Civ. App.—Waco 1940, no writ); Bradshaw v. Baylor Univ., 126 Tex. 94, 84 S.W.2d 703 (Tex. Comm'n App. 1935, opinion adopted).

98. The relevant portions of the agreement follow:

3. In the event the parties to this agreement are successful in their prosecution of their causes of action against General Motors and a judgment is rendered against General Motors for money damages, and thereafter paid, Feld Truck Leasing Corporation will be entitled to and will receive from the proceeds of such judgment fifty (50%) percent of each dollar recovered, up to $200,000.00. In no event shall Feld Truck Leasing Corporation be entitled to recover under this agreement more than $200,000.00. All sums not attributable to Feld Truck Leasing Corporation under this agreement shall be payable to and the property of plaintiff, Curtis Lee Simmons and his attorneys.

4. Both Curtis Lee Simmons and Feld Truck Leasing Corporation and Hestle Andrew Johnston, Jr. shall bear their own attorneys fees and litigation expense and neither party shall have any financial responsibility for the attorneys fees or litigation expense incurred by the other party.

5. No settlement of the causes of action against General Motors will be effected without the joint consent of all parties to this agreement.

558 S.W.2d at 855.

99. Id.


101. Post Submission Brief for Respondent at 3; General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).

102. 545 S.W.2d at 516.
plaintiff Simmons and defendants Feld and Johnston.103

Counsel for the agreeing parties in Simmons were clearly not attempting to deceive the court by concealing the agreement.104 Nonetheless, the Mary Carter agreement altered the posture of the parties and induced counsel for Feld and Johnston to promote Simmons's cause of action against General Motors. Counsel for Feld and Johnston took an active role in the damages dispute, made an extensive effort to establish that Simmons was totally blind,105 and on another occasion, attempted to evoke sympathy for the plaintiff.106 These gestures by counsel were inexplicable

103. Id. at 516-17. Plaintiff's counsel stated to the jury on voir dire examination: "This is a lawsuit against General Motors primarily, and only, as far as plaintiff is concerned. This is a suit seeking money damages and a great deal of money damages against General Motors Corporation which they have inflicted through their product on Mr. Curtis Lee Simmons." Id. at 516. Counsel for General Motors stated to the jury that "[t]here is no adversity of interest between plaintiff, Mr. Simmons, and his lawyers and Feld Truck Leasing and Hestle Andrew Johnston, Jr., and their lawyers." Id. at 517.

104. See, e.g., Leger v. Drilling Well Control, Inc., 69 F.R.D. 358 (W.D. La. 1976) in which the Mary Carter agreement was not disclosed until after trial. See also notes 39-44 supra and accompanying text for a discussion of secrecy as an element of Mary Carter agreements.

105. In cross-examining Dr. Louis Girard, who had stated unequivocally that Simmons was not totally disabled by his eye problems and who had also cast some doubt on Simmons's efforts to seek medical aid for his alleged discomfort and continuing handicap, counsel for Feld and Johnston asked the following questions:

Q: Now, Doctor, during the five months that you were seeing Curtis Lee Simmons, he was making every effort as you could observe to make a maximum recovery, was he not?
A: He was.
Q: He was making every effort insofar as you could observe to rehabilitate himself was he not?
A: He was.
Q: During the time of the time that you saw him and the condition or the time that the photophobia was noted in your records, on that occasion at least the photophobia was one hundred percent genuine was it not?
A: I believe it was.
Q: And it certainly is fair to say, sir, is it not, that you have no evidence, no solid medical evidence of any kind to tell us today that if Mr. Simmons has symptoms of photophobia, that those symptoms are anything less than one hundred percent genuine? You have no evidence to that effect?
A: I have not examined him since the latter part of November of '73, so I have no idea.
Q: And also in answer to my question you have no evidence, that is, symptoms of photophobia, today if he complains of them, they are not genuine to you?
A: I have no idea.
Q: And no evidence?
A: And no evidence.
Q: All right.

106. Counsel for Feld and Johnston asked the following questions to plaintiff Simmons on cross-examination:

Q: Mr. Simmons, you were present and you heard Dr. Girard's testimony, I guess, did you not, sir?
A: I heard his testimony, yes sir.
Q: Directing your attention to his testimony about water skiing and snow skiing and going to the beach without sunglasses and flying airplanes would you like to do those things if you could?
without knowledge of the Mary Carter agreement.

The Texas Supreme Court reasoned that informing the jury that Simmons was not "adverse" to Feld and Johnston was not a sufficient explanation of the true alignment of the parties. The court noted that by the terms of the agreement, "Feld acquired a direct financial interest in Simmons's lawsuit. The financial interest of the parties and witnesses in the success of a party is a proper subject of disclosure by direct evidence or cross-examination." The court concluded that exclusion of the settlement agreement was harmful error and remanded the case for trial.

The court, however, failed to set guidelines establishing when and for what purposes a Mary Carter agreement may be admitted in evidence. An unresolved problem is whether a Mary Carter agreement may be admitted only to impeach a witness or party, or whether it may also be admitted to show the true alignment of the parties. Determining what portions of the agreement should be disclosed to the jury is equally unclear. The trial may prove more unfair to the litigants if the agreement is admitted in toto than if the agreement is withheld. The parties to the agreement may load the document with self-serving statements and prejudicial comments about the nonsettling defendant. The agreement may proclaim that the nonsettling defendant is the negligent party, or that the nonsettling defendant has irresponsibly refused to negotiate a settlement, or that the plaintiff's damages are a specified sum, usually the

A: I would love to, sir.
Q: Can you?
A: No, sir; I can't.

Id. at 31.

107. 558 S.W.2d at 857. In a recent Texas case involving a Mary Carter agreement, the agreeing parties contended that their agreement was not a true Mary Carter agreement because the settling defendant's insurance carrier advanced the funds to the plaintiff, and this sum was to be repaid to the insurer out of any recovery from the nonsettling defendant. Although the settling defendant did not personally retain a financial interest in the lawsuit, the Texas Supreme Court refused to distinguish this agreement from the Simmons agreement. The court noted that the payment was made on behalf of the settling defendant, and therefore, the settling defendant and the insurer should stand in the same shoes. Bristol-Meyers Co. v. Gonzales, 561 S.W.2d 801 (Tex. 1978).

108. 558 S.W.2d 859 (Tex. 1977). The traditional rule is that settlement agreements are not admissible to show an admission of liability or an admission against interest. A contrary rule would thwart the policy favoring out of court settlements. See McGuire v. Commercial Union Ins. Co., 431 S.W.2d 347 (Tex. 1968); Skyline Cab Co. v. Bradley, 325 S.W.2d 176 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). The court, in ordering admittance of the Mary Carter agreement, relied on Trinity County Lumber Co. v. Denham, 88 Tex. 203, 30 S.W. 856 (1895) and Robertson Tank Lines, Inc. v. Watson, 491 S.W.2d 706 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.). Settlement agreements in these cases were properly revealed on cross-examination of a witness to show interest, prejudice, or bias.

109. In Simmons, for example, Feld was the only defendant who could profit by the Mary Carter arrangement, and he did not testify at the trial. Johnston was the only defendant to testify, and he had no financial interest in the lawsuit. Johnston was no longer an employee of Feld at the time of the trial, so there was no foundation for impeachment of Johnston by the Mary Carter agreement. Motion for Rehearing Brief for Respondent at 3-4, General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).


amount prayed for in the complaint.112 The jury would be informed of the amount of the settlement if an unedited version of the agreement were admitted. This information could be prejudicial to any of the parties, depending on the size of the settlement. If the agreement indicates that a nominal or “nuisance” settlement has been made with one defendant, the nonsettling defendant can use this fact to downgrade the plaintiff’s claim. If the settlement reveals that a substantial payment has been made, the nonsettling defendant would likely urge that the agreement proves that the settling defendant was the party responsible for the injury, and that he has already paid the damages.113 This potential prejudice prompted the South Dakota Supreme Court to declare that under no circumstances should the amount of the settlement be disclosed to the jury.114

Deleting the amount of the settlement and any self-serving statements that may be present, however, may not preclude the prejudicial impact of the agreement. If counsel attempts to impeach a witness through the existence of a Mary Carter agreement, the prejudicial elements of the agreement, such as the amount of the settlement, may inadvertently be disclosed to the jury.115 The mere fact that a settlement has been made may cause the jury to believe that the plaintiff has received full satisfaction of his claim116 or that the responsible party has already come forward, regardless of whether the plaintiff has received full satisfaction.117 The existence of a settlement, on the other hand, “may suggest to the jury that at least one defendant feels that the plaintiff should recover and [that] the nonagreeing defendants should pay.”118 In instances where there are multiple plaintiffs and only one plaintiff has entered a Mary Carter agreement, disclosure to the jury of an edited form of the agreement could substantially prejudice the nonsettling plaintiff.

The thought processes of twelve jurors are difficult to predict. But admitting a Mary Carter agreement into evidence will unquestionably prejudice one of the parties to the lawsuit in the eyes of a jury. The unknown factor is which of the parties will be prejudiced by the agreement. A jury will draw conclusions from a pretrial settlement, and they may not always be correct conclusions. Thus, disclosing Mary Carter agreements to the jury is an unsuitable means of dealing with these collusive settlement devices.

114. 200 N.W.2d at 139.
116. See Note, supra note 26, at 800.
118. 367 A.2d at 1054.
V. ALTERNATIVE METHODS OF DEALING WITH MARY CARTER AGREEMENTS

Contribution Under the Uniform Acts of 1939 and 1955. A plaintiff, under common law principles, could execute his entire judgment against any joint and severally liable defendant, and that defendant was precluded from seeking contribution from his fellow tortfeasors. The belief that joint tortfeasors should bear their share of liability has led to the adoption of contribution statutes in nearly three-quarters of the states. The various states, however, have adopted surprisingly different rules as to how contribution should be enforced. Several states have enacted either the 1939 or 1955 version of the Uniform Contribution Among Joint Tortfeasors Act. Section four of the 1939 Act provides that the claim against the nonsettling defendant will be diminished by the amount paid for the settlement or any other amount specified in the release. Section five, which was adopted to prevent collusion among the settling parties, permits the nonsettling defendant to obtain pro rata contribution from the settling defendant. Partial settlements, collusive or not, are virtually eliminated under the 1939 Act since a defendant will rarely settle with the plaintiff if he is still subject to an action for pro rata contribution by the remaining defendant. The 1939 Act precludes the formal use of Mary Carter agreements, but at the expense of barring noncollusive partial

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119. See W. Prosser, supra note 6, at 307.
120. Comment, supra note 29, at 1403.
123. Uniform Contribution Among Tortfeasors Act § 4 (1939): Release; Effect on Injured Person’s Claim-A release by the injured person of one joint tortfeasor, whether before or after judgment does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.
124. Uniform Contribution Among Tortfeasors Act § 5, Commissioners’ Note (1939).
125. Uniform Contribution Among Tortfeasors Act § 5 (1939): Release; Effect on Right of Contribution-A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person’s damages recoverable against all the other tortfeasors.
126. The 1955 Commissioners’ Note indicates that the 1939 Act did not prevent collusive settlements:
Reports from the state[s] where the [1939] Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three-party cases two parties join hands against the third, and this occurs even when the case goes to trial against both defendants. ‘Gentlemen’s agreements’ are still made among lawyers, and the formal release is not at all essential to them. If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so.

Uniform Contribution Among Tortfeasors Act § 4, Commissioners’ Note (1955).
The unsatisfactory effect of the 1939 Act led to its revision in 1955. Sections four and five of the original act were amended and combined into section four of the 1955 Act. The plaintiff's recovery under the revised act is reduced pro tanto if the settlement is in "good faith." Unlike the 1939 Act, however, the nonsettling defendant may not seek contribution from the released party. The explanation of the 1955 revision in the Commissioners' Note recognized that it was more important to encourage settlement than to attempt to prevent collusion in lawsuits. The 1955 revision, by not permitting pro rata contribution, seems to permit the exact collusive tactics the 1939 Act tried to eliminate. One writer, however, has noted that the 1955 Act requirement of a good faith settlement may exclude Mary Carter agreements. This proposition is certainly compatible with the views expressed in this Comment; however, the nebulous standard of "good faith" may not be sufficient protection against collusive settlements.

**Pro Rata Contribution in Texas.** Article 2212 of the Texas Revised Civil Statutes gives a party the right to seek pro rata contribution from any codefendant against whom a judgment is entered in an action based on tort, although the statute makes no provision for contribution when the

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   Release or Covenant Not to Sue—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
   (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
   (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
129. *Id.* If the settlement is made in bad faith, the nonsettling defendant may be entitled to pro rata contribution from the settling defendant.
130. *Id.*
132. Comment, *supra* note 29, at 1406-07. The nonsettling defendant, however, has the burden of proving the settlement was not made in good faith.

The Texas Supreme Court in General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977), noted that comparative contribution under art. 2212a is not appropriate between negligent tortfeasors and strictly liable tortfeasors; rather, pro rata contribution under art. 2212 is the proper means to apportion damages in such cases. Article 2212a applies only to actions based on "negligence," and, as the court noted, art. 2212a "nowhere uses the term 'strict liability.'" 558 S.W.2d at 862. Article 2212, on the other hand, contemplates pro rata contribution in "an action arising out of, or based on tort." *Tex. Rev. Civ. Stat. Ann.* art. 2212 (Vernon 1971). Thus, pro rata contribution would seem statutorily mandated between a strictly liable tortfeasor and a negligent tortfeasor.
plaintiff has settled his cause of action against one of the tortfeasors. The Texas Supreme Court, however, held in *Palestine Contractors, Inc. v. Perkins* that when one of two negligent joint tortfeasors settles with the plaintiff, the plaintiff’s claim against the remaining defendant is automatically reduced on a pro rata basis.

The pro rata reduction rule insures the finality guaranteed the settling defendant in the 1955 Act, enforces the policy of equity among tortfeasors provided in the 1939 Act, and deters collusive settlements. A plaintiff will generally not enter a Mary Carter agreement when his total recovery could be reduced on a pro rata basis if the settling defendant were found liable in a contribution action. On the other hand, the plaintiff may believe that enlisting the support of one defendant will produce the maximum possible recovery, notwithstanding pro rata reduction. Contribution may be completely avoided if the plaintiff concludes that, by mutual effort of the agreeing parties, liability can be shifted entirely to the nonsettling defendant. The plaintiff in *General Motors Corp. v. Simmons*, faced with the possibility of pro rata reduction, was probably motivated by the last hypothesis. Simmons’s claim against General Motors was for installing defective glass in his automobile, while his claim against Feld and Johnston was based on negligent collision. The plaintiff apparently believed it was possible to prove that, while the settling defendants Feld and Johnston were negligent in causing the collision, the sole proximate cause of plaintiff’s injuries was the defective glass. The agreeing parties amended their pleadings to pursue General Motors as the sole culprit, and as a result, plaintiff was awarded a $1,000,000 judgment solely against General Motors. In their amended pleadings, however, the settling defendants admitted that Johnston negligently collided with Simmons and confessed they owed Simmons some payment for his injuries. The Texas Supreme Court ruled that as a matter of law, General Motors could not be solely liable, and the verdict was reduced on a pro rata basis to $500,000. *Simmons*, nonetheless, clearly illustrates that pro rata reduction does not eliminate the use of Mary Carter agreements.

**Comparative Contribution in Texas.** Article 2212a of the Texas Revised Civil Statutes, adopted in 1973, provides for apportionment of damages

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134. 386 S.W.2d 764 (Tex. 1964).
135. If the settling defendant is a party to the primary suit, the nonsettling defendant must sue for contribution or the plaintiff’s recovery cannot be reduced on a pro rata basis. *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.).
138. 558 S.W.2d 855 (Tex. 1977). The accident in *Simmons* occurred prior to the effective date of article 2212a, thus article 2212 was applicable.
140. 558 S.W.2d at 856.
on a comparative basis in actions based on negligence. The statute makes specific provisions for instances where the plaintiff has settled his claim against a joint tortfeasor. Section 2(d) is applicable when the settling party is never joined in the action, and, therefore, is never applicable to cases involving Mary Carter agreements. If a settling defendant is joined in the primary suit, however, section 2(e) provides that the percentage of his negligence shall be determined, and that portion of the damages shall be released.

Comparative contribution under article 2212a does not have a forceful effect on the use of Mary Carter agreements. The plaintiff is not faced with an automatic fifty percent reduction in his recovery if the settling defendant is found negligent, as in pro rata contribution. The settling defendant’s negligence, under comparative contribution, can reduce the plaintiff’s recovery anywhere from one percent to ninety-nine percent. Although a risk exists that a jury will find the settling defendant to be the more culpable party, this is not likely. The plaintiff and the settling defendant may employ the tactical measures discussed earlier, and, through their mutual efforts, minimize the percentage of negligence attributable to the settling defendant.

**Dismissal and Severance.** Since no justiciable issues exist between the parties entering the Mary Carter agreement, dismissing the settling defendant is appropriate. In states that do not permit contribution and where no cross-action for implied indemnity is on file, dismissing the settling defendant will frustrate the collusive intentions of the agreeing parties. The solution, however, is not so simple in contribution jurisdictions where a defendant will invariably file a cross-action for contribution or indemnity if a codefendant has entered a Mary Carter agreement. Although severance of the cross-action may be a solution to the possible prejudice which arises from the presence of the settling defendant, two major

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143. TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 2(d), (e), (g) (Vernon Supp. 1978).
144. *Id.* § 2(d). Each remaining defendant is entitled to reduce the amount owed to the plaintiff in the following manner. The amount the settling defendant paid for his release is reduced by the percentage of the remaining defendant’s negligence, and that total is subtracted from the damages owed to the plaintiff by the remaining defendant.
145. *Id.* § 2(e).
146. See notes 67-94 *supra* and accompanying text.
148. See *Note, supra* note 26, at 796.
149. The Texas Supreme Court noted in Bristol-Meyers Co. v. Gonzales, 561 S.W.2d 801 (Tex. 1978), that the potential prejudice of a Mary Carter arrangement still exists when the settling defendant remains a party to the suit solely by a cross-action for contribution or indemnity.
150. A cause of action may be severed at the discretion of the court to prevent prejudice to a party. *TEX. R. CIV. P. 174(b).*
problems are created. First, severance forces the nonsettling defendant to participate in two separate proceedings, merely because a codefendant 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. The settling tortfeasor’s testimony, however, will likely favor the plaintiff’s case, and the nonsettling defendant will be permitted to show bias and prejudice of the settling tortfeasor’s testimony by evidence of a prior settlement.151 For the reasons discussed above, however, admitting a Mary Carter agreement into evidence is an unacceptable alternative.152 Severance, thus, will lead to multiplicity of suits and, inevitably, admission of the Mary Carter agreement into evidence.

VI. Conclusion

Litigants should be encouraged to resolve their disputes out of court, and should be permitted to do so with as little judicial supervision as possible. Mary Carter agreements, however, serve no worthwhile function in our judicial system; they neither simplify complex litigation nor decongest court dockets. The most unwholesome aspect of Mary Carter agreements, however, is the potential prejudice to the nonsettling defendant. The tactics of the agreeing parties can place the nonsettling defendant at a disadvantage difficult to overcome. The potential for collusion is always present and is tempered only by the ethical standards of counsel.

The methods that have been adopted to curtail the use and resulting injustice of Mary Carter agreements are ineffective. Admitting the agreement into evidence will produce uncertain results and may jeopardize the nonsettling defendant’s rights as well as the rights of the plaintiff. Contribution, as Simmons clearly illustrates, is an ineffective deterrent to the use of Mary Carter agreements. Dismissal and severance are equally unacceptable alternatives. The solutions adopted by Texas and other jurisdictions thus perpetuate use of a settlement device which does not promote the administration of justice. The only practical solution is to prohibit the use of Mary Carter agreements.

151. See note 108 supra. See also Leger v. Drilling Well Control, Inc., 69 F.R.D. 358 (W.D. La. 1976), in which the court noted that the settling defendants’ interest in the lawsuit was not terminated, even though they were dismissed. The court ordered the terms of the release made known to the jury so they could properly evaluate the testimony of the released defendants.

152. See notes 107-18 supra and accompanying text.