University of Miami Law Review

Volume 28 | Number 4 Article 8

7-1-1974

"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed

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clude the small claimant from diversity class actions the Court has taken a significant step[82] toward precisely the conversion which it purported to avoid.

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"MARY CARTER" LIMITATION ON LIABILITY AGREEMENTS BETWEEN ADVERSARY PARTIES: A PAINTED LADY IS EXPOSED

As the result of an accident involving a bus and two automobiles, the plaintiffs' minor son was killed. A wrongful death action was brought against Markam, the owner of the bus, Ward, the operator of the bus, and Brinkman, the owner and driver of the other automobile. Ward and Markam filed pre- and post-trial motions to produce[1] any "Mary Carter Agreement"[2] which existed between their co-defendant Brinkman and the plaintiffs. The motions were denied by the trial court on the theory that such agreements are inadmissable into evidence. A judgment for $15,000 was subsequently entered in the plaintiffs' favor. The Florida District Court of Appeal, Fourth District, affirmed and held that, although the trial court erred in denying the motions, the error did not result in prejudicial harm to the movants since they could have obtained a set-off for the amount paid by Brinkman to the plaintiffs.[3] On certiorari, the Supreme Court of Florida remanded the decision of the Fourth District and *held*: The failure, upon the request of any adversely affected defendant, to admit into evidence or to allow production of agreements which proportionately diminish the liability of one defendant by increasing the liability of other defendants is prejudicial to the conduct of a fair trial. *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973).

The Mary Carter agreement derived its name from *Booth v. Mary Carter Paint Co.*[4] There certain defendants secretly entered into an agree-

32. Another large step in this same direction is the Court's recent decision in Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974), under which the plaintiffs must bear the costs of notifying all members of the class.

1. FLA. R. CIV. P. 1.350.

2. A Mary Carter agreement is an 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 plaintitff is able to make against the nonagreeing defendant or defendants.

Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 446 n.1 (Fla. 4th Dist. 1972).

3. Ward v. Ochoa, 271 So. 2d 173 (Fla. 4th Dist. 1972).

4. 202 So. 2d 8 (Fla. 2d Dist. 1967) [hereinafter referred to as *Booth*]. For a recitation of the facts, see Booth v. Mary Carter Paint Co., 182 So. 2d 292 (Fla. 2d Dist. 1966), which involved an appeal from an order granting a summary judgment.

ment with the plaintiff whereby the maximum liability of the signing defendants, who were to remain active in the case, would be $12,500. The agreement also provided that if a verdict was returned in excess of $37,500, the plaintiff would satisfy the entire judgment against Mary Carter Paint Company, the non-signing defendant; and, if a verdict was returned between $12,500 and $37,500, the signing defendants' financial liability would be reduced proportionately from the $12,500 maximum.[5] The salient feature of a Mary Carter agreement is the incentive provision whereby the signing defendant may decrease the dollar amount of his liability by increasing the dollar amount of his co-defendants' liability. This must be distinguished from three other types of pre-trial agreements in which this feature is not present: (1) a release;[6] (2) a covenant not to sue;[7] and (3) agreements in which the participating defendants limit their liability to a fixed amount, regardless of the outcome of the trial or the amount of the judgment.[8]

The Supreme Court of Florida in *Ward* overruled several decisions of the District Court of Appeal, Second District, which held Mary Carter agreements inadmissible into evidence. In the first of these decisions, *Booth v. Mary Carter Paint Co.*,[9] a wrongful death action was brought against several defendants alleging that their concurrent negligence in blocking a highway was the proximate cause of the fatal accident. After a $15,000 verdict was entered for the plaintiff, the defendant, Mary Carter Paint Company, moved pursuant to Florida Statutes section 54.28(2) (1965),[10] for a set-off equal to the amount paid by the co-defendant who signed the Mary Carter agreement. The company's theory was that the aforementioned agreement was a release of the plaintiff's cause of action against the signing co-defendant. The trial judge declined

5. Booth v. Mary Carter Paint Co., 202 So. 2d 8, 10 (Fla. 2d Dist. 1967).

6. A release is a surrender of the cause of action, and may be with or without consideration. W. PROSSER, LAW OF TORTS § 49 (4th ed. 1971). Also, Florida courts have equated a settlement with a release. *See, e.g.*, Thomas Air Conditioning & Refrigeration Co. v. Bankston, 231 So. 2d 272 (Fla. 3d Dist. 1970).

7. A covenant not to sue is a recognition that the liability continues but the injured party agrees not to assert any rights against the covenantee. *See* Atlantic Coast Line R.R. v. Boone, 85 So. 2d 834, 843 (Fla. 1956).

8. *See, e.g.*, Leaseco, Inc. v. Bartlett, 257 So. 2d 629 (Fla. 4th Dist. 1971).

9. 182 So. 2d 292 (Fla. 2d Dist. 1966).

10. Former section 54.28(2) has been transferred to FLA. STAT. § 768.041 (1973). The transfer was effected by the Fla. Laws 1967, ch. 67-254. Section 768.041 reads as follows:

> (1) A release or covenant not to sue as to (1) tort-feasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tort-feasor who may be liable for the same tort or death.
>
> (2) At trial if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.
>
> (3) The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court, shall not be made known to the jury.

FLA. STAT. § 768.041 (1973).

to construe the agreement as a release and an appeal ensued. The District Court of Appeal, Second District, affirmed and held that the agreement was not a release in which the plaintiff surrendered his cause of action against the signing co-defendant, but was merely a contract limiting the co-defendant's liability.[11]

Although the court in *Booth* held that a Mary Carter agreement was not a release of the plaintiff's cause of action against the participating co-defendants entitling the remaining defendants to a set-off, the court did not resolve whether a Mary Carter agreement was admissible into evidence.[12] Four years later, however, the same court in *Bill Currie Ford, Inc. v. Cash*[13] erroneously referred to a Mary Carter agreement as a "settlement agreement" and, as such, held it inadmissible.[14] Since a settlement agreement and a release are synonymous in Florida,[15] an anomaly was presented: A Mary Carter agreement was a release for purposes of excluding it from the jury under section 768.041(3) of the Florida Statutes (1973) but was not a release for purposes of a set-off. Because of this apparently inconsistent interpretation, the use of Mary Carter agreements between plaintiffs and defendants wishing to achieve financial assurance became quite popular. The plaintiff was assured that his recovery would not be reduced by a set-off,[16] and that his case would not be prejudiced due to the inadmissibility of the agreement.[17] The "settling" defendant, as previously noted, had a means of avoiding or significantly reducing his financial responsibility.

The court in *Ward* implied that a Mary Carter agreement was not a release or a covenant not to sue, but instead was "basically a contract by which one co-defendant secretly agrees with the plaintiff that . . . his own maximum liability will be diminished proportionately . . . ."[18] This inference was reiterated later in the opinion when the court stated that a new trial must be granted since a set-off would be insufficient to correct possible injustice inherent in the nature of the agreement. Therefore, by implication, the court held that amounts paid as consideration under Mary Carter agreements could not be set-off by the non-signing defendant against the amount of the verdict.[19]

The court in *Ward* then turned its attention to the issue of the agree-

11. Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d Dist. 1967).

12. *Id.*

13. 252 So. 2d 407 (Fla. 2d Dist. 1971).

14. *Id.*

15. Thomas Air Conditioning & Refrigeration Co. v. Bankston, 231 So. 2d 272 (Fla. 3d Dist. 1970).

16. Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 2d Dist. 1967).

17. Bill Currie Ford, Inc. v. Cash, 252 So. 2d 407 (Fla. 2d Dist. 1971).

18. 284 So. 2d at 387.

19. *Id.* at 388. This issue, whether the agreement was or was not subject to the set-off provision of FLA. STAT. § 768.041(2) (1973), was clarified several months later by the District Court of Appeal, Third District. The Third District interpreted *Ward* to mean that no set-off can be obtained against a plaintiff who is a party to a Mary Carter agreement. Weinstein v. National Car Rentals, 288 So. 2d 509 (Fla. 3d Dist. 1973).

ment's admissibility into evidence. The District Court of Appeal, Fourth District, had previously held that

> when some of the defendants in a personal injury action have entered into a written agreement with the plaintiffs *whereby the signing defendants are assured of immunization from the judgment should the verdict . . . exceed an agreed sum . . .* evidence of such agreement would be a proper consideration for the jury in evaluating the credibility of the testimony of a party to the agreement.[20]

However, the Fourth District also held that the failure of the trial judge to allow production of the agreement was harmless error. This holding was subsequently rejected by the Supreme Court of Florida in *Maule Industries, Inc. v. Rountree*,[21] a companion case to *Ward*.

In accord with the Fourth District's holding that the agreement should be admissible, the court in *Ward* stated that the testimony of the signing defendants which usually paints "a gruesome testimonial picture" of the non-signing defendant's misconduct and which generally admits liability would be viewed in a different light if the agreement were known to the jury.[22]

While the court's rationale for its decision was equitable, it was probably unnecessary. For, at the outset, Mary Carter agreements were inadmissible, not because of a lack of relevancy or competency, but because the courts improperly construed such agreements as releases for purposes of exclusion under section 768.041(3) of the Florida Statutes (1973).[23] Having concluded that Mary Carter agreements were not within the purview of section 768.041 of the Florida Statutes (1973), the *Ward* court could have held that they would be admissable subject to the normal rules relating to relevancy, competency, authentication, hearsay, etc.[24]

The majority opinion in *Ward* discussed two methods of dealing with a Mary Carter agreement. The first, which was rejected, was to allow a set-off; the second, which was adopted, was to admit the agreement into evidence, permitting the jury to give it whatever effect they chose. In a one-sentence concurring opinion, Justice Ervin proffered a third method: declare the agreement void as against public policy and, hence, unenforceable.[25] As authority for this conclusion, Justice Ervin cited *Lum v.*

20. Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 448 (Fla. 4th Dist. 1972) (emphasis added).

21. 284 So. 2d 389 (Fla. 1973).

22. 284 So. 2d at 387. Besides damaging testimony, there are other pitfalls awaiting a non-signing defendant. For example, he may find his opening and closing remarks sandwiched between those of the plaintiff and an antagonistic co-defendant; leading questions favorable to the plaintiff may be asked on cross-examination of the plaintiff's witnesses by the signing defendant; and the plaintiff and signing defendant may pool their peremptory challenges to the obvious detriment of the non-signing defendant. *See* Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971).

23. *See* Bill Currie Ford, Inc. v. Cash, 252 So. 2d 407 (Fla. 2d Dist. 1971).

24. *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 184 (2d ed. 1972).

25. 284 So. 2d at 388.

Stinnett,[26] a Nevada case which discussed two reasons why admissibility alone would not solve a non-signing defendant's problems.[27]

The first reason was that the plaintiff and signing defendant would insert self-serving statements into the agreement which, if seen by the jury, would prejudice the non-signing defendant.[28] This objection, however, is without merit, since one Florida court has already expressed a rule whereby the agreements should be examined by the courts on an individual basis to determine whether they would contravene public policy.[29] Further, a defendant desiring to introduce a Mary Carter agreement may, prior to trial, request the trial judge to excise the prejudicial portions of the agreement.[30] Thus, the possibility of placing a non-signing defendant between "the devil and the deep blue sea" via the insertion of self-serving declarations in the agreement does not pose a serious problem.

The second, and more important, reason is that such agreements may be unethical.[31] While there are no express opinions of the Professional Ethics Committee of the Florida Bar as to whether Mary Carter agreements are ethical, the Arizona Bar has stated that such agreements come into conflict with ethical considerations that concern the representation of conflicting interests, candor, fairness, and taking technical advantage of opposing counsel.[32] Whether Florida would take such a position is at this stage speculative. However, it should be noted that the Florida Bar has promulgated general ethical considerations, similar to those of Arizona, relating to the representation of conflicting interests,[33] candor,[34]

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26. 87 Nev. 402, 488 P.2d 347 (1971) [hereinafter referred to as *Stinnett*].

27. *Id.*

28. Examples are statements which recite that the non-signing defendant was more negligent than the signing defendant; that the plaintiff's damages are a given (usually exorbitant) amount; and that the non-signing defendant's position is untenable. *Id.* at 404-05 n.1, 488 P.2d at 348 n.1.

29. *See* Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 447 (Fla. 4th Dist. 1972).

30. Although there are no cases involving the exclusion of prejudicial and scandalous matter from contracts sought to be admitted into evidence, an analogy exists with respect to instances where confessions in criminal cases are sought to be introduced. If parts of the confession relate to defendants other than the confessing defendant or relate to crimes other than the ones being tried, the court may, in lieu of a jury instruction or severance, exclude or excise those parts of the confession. *See, e.g.*, Moseley v. State, 60 So. 2d 167 (Fla. 1952); Hooper v. State, 115 So. 2d 769 (Fla. 3d Dist. 1959).

31. Lum v. Stinnett, 87 Nev. 402, 410, 488 P.2d 347, 351-52 (1971).

32. *Id.* Also, the court in *Stinnett* held that such agreements are unethical in Nevada. However, this holding was based on the theory that since the agreements were motivated by the respective parties' insurance companies and since, in Nevada, the parties' insurance companies were "strangers to the action," the agreements were, therefore, champertous.

33. Code of Professional Responsibility, Ethical Consideration 5-1 provides: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."

34. Code of Professional Responsibility, Disciplinary Rules 1-102(A)(4)-(5) provide that a lawyer shall not engage in any conduct involving misrepresentation or conduct that is prejudicial to the administration of justice.

and fairness;[35] and, in addition, has promulgated an ethical consideration which prohibits witnesses from testifying under the influence of financial inducements.[36]

Justice Dekle, in his concurring opinion in *Ward*, was of the belief that, if contribution between joint tort feasors were permitted, the deleterious effects of a Mary Carter agreement would be considerably reduced since the non-signing defendant could always seek contribution from the signing defendant.[37] This would, in turn, minimize any incentive to increase the size of the verdict. This position, however, ignores the practicalities of the situation. Since the signing defendant may have very limited assets and/or insurance coverage, obtaining contribution against a co-defendant who is financially unable to contribute is not a realistic remedy that is being afforded to the non-signing defendant.

The court in *Ward* reasoned that exposing a Mary Carter agreement was the best method of insuring a fair trial. This decision was based upon the belief that since secrecy from the jury is the essence of the agreement, exposure is the logical method to deal with it.[38] This reasoning, however, is deficient in several regards. First, Mary Carter agreements were excluded from evidence because of a decision which mistakenly equated these agreements with a release.[39] Second, secrecy from the jury of the entire agreement is not the "essence" of the agreement. The essence of the agreement is the aforementioned incentive provision which, when kept secret, does not give the jury an opportunity to place the testimony of a non-signing defendant in its proper perspective. Third, admissibility alone will not compensate for some of the other tactical disadvantages inherent in a Mary Carter agreement.[40] Such disadvantages include the possibility of the signing defendant being able to lead favorable witnesses under the guise of cross-examination, the pooling of peremptory challenges by the plaintiff and signing defendant, and the possibility of the non-signing defendant's closing and opening statements being placed between those of the plaintiff and signing defendant. As the Nevada court said in *Stinnett*: "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."[41] The fourth reason as to why the decision of the *Ward* court is deficient is that there are ethical problems posed by the existence of the agreement which are not solved by its being admissible into evidence. Two states have already taken a position on the ethical problems

35. *Id.*

36. Code of Professional Responsibility, Ethical Consideration 7-28 provides in part: "Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

37. 284 So. 2d at 388.

38. 284 So. 2d at 387.

39. Bill Currie Ford, Inc. v. Cash, 252 So. 2d 407 (Fla. 2d Dist. 1971).

40. *See* Lum v. Stinnett, 87 Nev. 402, 410-12, 488 P.2d 347, 352-53 (1971).

41. Lum v. Stinnett, 87 Nev. 402, 411, 488 P.2d 347, 352 (1971).

involved with Mary Carter agreements;[42] the Florida Supreme Court did not, thus deferring an issue which may cause a great degree of uncertainty in the future.

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STATE JUDICIAL MISCONDUCT: AN IMPROPER TARGET FOR FEDERAL INJUNCTIVE RELIEF

Plaintiffs instituted a federal civil rights action[1] against a state attorney, his investigator, a local police commissioner, a county magistrate and a judge. In addition to damages, they sought to enjoin the judges from alleged discriminatory practices in imposing bail, sentences and court costs[2] on plaintiffs and other citizens of Cairo, Illinois, who were or would be arrested while engaging in active protests against private and public racial discrimination in the city.[3] The district court dismissed the complaint on jurisdictional and judicial immunity grounds. The Court of Appeals for the Seventh Circuit reversed.[4] Upon writ of certiorari, the Supreme Court *held*, reversed as to defendant judges: (1) the case or controversy requirement is not met in a federal injunctive suit unless the named plaintiffs, not merely members of their class, suffer continuing adverse effects of the actions to be enjoined, and (2) even assuming a case or controversy existed, principles of federal-state comity preclude federal injunctive relief against state judicial misconduct. *O'Shea v. Littleton*, 94 S. Ct. 669 (1974).[5]

By a prior decision,[6] the Court had held that state judges were

42. *Id.* at 409-10, 488 P.2d at 351-52.

1. 42 U.S.C. §§ 1981-83 and 1951 (1970). Jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343 (1970).

2. The court costs were imposed to pay for jury trials. Littleton v. Berbling, 468 F.2d 389, 393 n.1 (7th Cir. 1972).

3. During the late 1960's and into the 1970's the [Civil Rights] Movement contended in the streets of Cairo with white forces seeking to maintain a racial status quo that blacks rejected. . . .

[B]lacks marched, boycotted and fought pitched battles with white vigilantes, and the city experienced a long night of shooting, burning and disorder unmatched in its duration anywhere else in the country. That night still has not ended.

P. GOOD, CAIRO, ILLINOIS: RACISM AT FLOODTIDE 2 (U.S. Commission on Civil Rights 1973). Mr. Good reported that as of March, 1972, no black had ever served on the county housing authority or welfare commission, or on the Cairo public utility commission or library board, that in Cairo's history only one black had been a fireman and another a city commissioner, that blacks comprised 30% of the county and 40% of the city population, and that the median county income was $6400 for white families and $2800 for black. *Id.* at 5-6.

4. Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972).

5. The case against the other defendants was remanded to determine the issue of mootness. Spomer v. Littleton, 94 S. Ct. 685 (1974).

6. Pierson v. Ray, 386 U.S. 547 (1967).