

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

[Florida Appellate Court Reaffirms Prohibition of "Mary Carter" Agreements](#)

November 12, 2010 by [Eric L. Lundt](#)

Conditional settlement agreements between a plaintiff and a codefendant are nothing new. But when such an agreement is premised on the notion that the “settling” codefendant will continue to defend itself at trial, diminishing its own liability proportionately by increasing the liability of the other codefendants, it is against public policy.

The term “Mary Carter agreement” originated in the case *Booth v. Mary Carter Paint Co.* and evolved through its progeny. It is essentially a contract by which one codefendant secretly agrees with the plaintiff that, if the defendant will proceed to defend itself in court, its own maximum liability will be diminished proportionately by increasing the liability of the other codefendants.

Secrecy is the essence of such an agreement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the nonsigning defendants. By painting a gruesome testimonial picture of the other defendants’ misconduct or, in some cases, by admissions against himself and the other codefendants, he could diminish or eliminate his own liability by use of the secret “Mary Carter Agreement.”

In *Packaging Corporation of America, Great American Insurance Company, and Zurich American Insurance Company v. DeRycke .pdf*, Florida’s Second District Court of Appeal reexamined Florida’s disfavor -- and ultimate prohibition -- of Mary Carter agreements as being against public policy. As the Second District noted, the first line cases following *Booth v. Mary Carter Paint Co.* required only that such agreements would be admissible in evidence at the request of any defendant who stood to lose as a result of such an agreement. However, after continuing abuses of these agreements that tended to mislead juries and border on collusion, Florida’s Supreme Court ultimately ruled Mary Carter agreements void and inadmissible, explaining that:

“Mary Carter agreements defeat the policies underlying all systems of allocation of liability among tortfeasors used in the United States today. Mary Carter agreements are used purposefully to defeat any system of equitable sharing and to shift liability to the nonsettling defendant through manipulation of the trial process.... Because it is not possible to ensure a fair trial for the nonsettling defendant when a Mary Carter agreement is involved, and because these agreements do not fairly encourage settlements, there is no reason to permit a Mary Carter agreement to determine the relative liability of those responsible to the plaintiff. Rather, public policy and an untainted adversary trial should determine the distribution of liability among the potential obligors. The best solution is outright prohibition of Mary Carter agreements.”

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In *DeRycke*, a wrongful death automobile accident case, the plaintiff entered into a “conditional agreement” whereby she would not hold one of the defendants responsible for a judgment in excess of his insurance coverage in return for his admission of liability and his agreement not to contest damages. The trial court granted plaintiff’s motion in limine to preclude any reference to settlement discussions and prohibited the disclosure of the agreement to the jury.

On appeal, the Second District ruled that the trial court erred in not disclosing the agreement between the plaintiff and codefendant to the jury. Because neither party argued below or raised on appeal any issue as to whether the agreement itself was against public policy, the appellate court was constrained to ordering a new trial, and leaving the enforceability question for the trial court to address at retrial if raised by the parties.

The Florida Supreme Court’s prohibition of Mary Carter Agreements has not stopped parties from trying to make -- and get away with -- them. The *DeRycke* opinion leaves little doubt that trial courts will continue to have to deal with enforceability and admissibility issues of such agreements no matter how cleverly parties try to draft them.