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Mary Carter Agreements

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Why would a settling defendant who has paid the plaintiff money ever want to remain in a lawsuit and incur the costs of going to trial? The fact that there are not many good answers to this question is the reason why Mary Carter agreements are rarely used except in high-exposure cases.

Mary Carter agreements originated in the United States.[1] The agreements are essentially a Pierringer agreement with the important distinction that the settling defendant remains active in the litigation. For practical purposes, the only two characteristics of a modern Mary Carter agreement are as follows:

1. The settling defendant agrees to pay the plaintiff a certain sum of money in order to settle the case against him or her.

2. The settling defendant remains in the action and, in most cases, helps the plaintiff's case against the non-settling defendants.

Other than the above, a Mary Carter agreement can be tailored to suit the needs of the individual case or the desires of the settling parties. That being said, Mary Carter agreements typically involve the plaintiff reimbursing the settling defendant for an amount recovered against the non-settling defendant. In other words, the plaintiff and the settling defendant team up against the non-settling defendants and share in whatever recovery is ordered by the court.[2]

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[1] By way of history, Mary Carter agreements originated from the 1967 Florida case of *J.D. Booth v. Mary Carter Paint Company*, 202 So. 2d (Fla. 2d DCA 1967). In this case, the plaintiff and two of the several defendants settled for $12,500. The catch was that the settling defendants would only pay this amount at the end of trial and would only have to pay if the plaintiff did not receive a guaranteed amount from the non-settling defendants.

[2] For example, imagine a plaintiff is catastrophically injured in a multi-party motor vehicle accident and sues two of the other drivers involved. After examinations for discovery are complete, one of the defendant drivers ("Defendant A") believes that liability will be evenly split between himself and the other defendant ("Defendant B"). Defendant B, though, is being difficult and takes a strict no-liability position. Rather than spin his wheels trying to get Defendant B to contribute towards settlement, Defendant A (who has assessed the plaintiff's total damages as being at least $1 Million) instead enters into an agreement with the plaintiff to pay $500,000 (all-inclusive). However, as part of this agreement, the plaintiff agrees to reimburse Defendant A for any amount in excess of $1 Million that is ordered against Defendant B. Defendant A remains in the action and, at trial, focuses on increasing liability against Defendant B and does not dispute the plaintiff's damages. The plaintiff receives a judgment of $2 Million, 75-percent of which Defendant B is found liable for. The plaintiff must therefore reimburse Defendant A the full $500,000.00 that was paid as part of the settlement.

Given the implications that a Mary Carter agreement can have on non-settling defendants, an important detail to note about Mary Carter agreements is that they cannot remain secret—their existence must be immediately disclosed to the non-settling parties.[3]

Since the purpose of a Mary Carter agreement is usually for a settling defendant to recover some amount at trial, Mary Carter agreements are typically most effective in cases where the likelihood of recovery against the non-settling defendants exceeds the settling defendant's anticipated costs of trial.

That being said, Mary Carter agreements can also be strategically useful in placing increased pressure on an uncooperative co-defendant who refuses to contribute anything towards settlement. This is because the risk against a non-settling defendant increases if the plaintiff has entered into a Mary Carter agreement with the other defendants.

Mary Carter agreements have been known to backfire. The Ontario Court of Appeal decision of *Laudon v. Roberts* was a devastating decision for a plaintiff who settled with one defendant but proceeded to trial with another defendant.[4] The case involved a Mary Carter agreement because the settlement with the settling defendant did not involve his release from the action (even though the plaintiff was not required to reimburse the settling defendant for any money paid for damages). The matter proceeded to trial and the total judgment in the plaintiff's favour was actually less than the settlement received from the settling defendant.[5] The non-settling defendant argued that the judgment should be reduced by the amount the plaintiff had already received from the Mary Carter agreement. The trial judge disagreed, allowing the plaintiff to keep the settlement funds in addition to recovering the judgment.

On appeal, the Court of Appeal ruled that allowing the plaintiff to keep both the settlement funds and the judgment amounted to double recovery, which is not allowed save for a few narrow exceptions. Since the settling defendant had actually overpaid the entire claim, then the plaintiff was disentitled to recover any further amount from the other parties. As a result, the Court of Appeal dismissed the plaintiff's claim and awarded the non-settling defendant costs of both the action and appeal.

The Supreme Court of Canada refused leave to appeal. The matter was referred back to trial in order to determine the non-settling defendant's costs, which were assessed at $763,000 (all-inclusive). The ultimate result was that the plaintiff ended up being out of pocket by $325,000 (i.e. the amount of the costs award less the amount of the settlement funds received from the settling defendant).

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[3] See *Aecon Buildings v. Stephenson Engineering Ltd.*, 2010 ONCA 898.
[4] [2009] O.J. No. 1824 (C.A.).
[5] The plaintiff accepted a settlement of $438,000.00 from the settling defendant whereas the jury assessed damages at only $312,000.00.

Given the result in *Laudon*, plaintiffs have become much more hesitant to enter into Mary Carter agreements. However, Brian Cameron (a prominent plaintiff's lawyer with Oatley Vigmond LLP) suggests that Mary Carter agreements can be drafted in a way so as to avoid the outcome in *Laudon*. Mr. Cameron recommends drafting the agreements in such a way so that any perceived double recovery would flow to the settling defendant rather than to the plaintiff.

With an agreement like that, a defendant may just be so enticed to pay the plaintiff money and remain in the lawsuit.