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Citation: 83 Geo L.J. 2215 1994-1995

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An Economic Analysis of Mary Carter Settlement Agreements

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This paper explores the social desirability of Mary Carter agreements,¹ a type of settlement agreement used most commonly in suits against multiple tortfeasors.² Under a typical Mary Carter agreement (“MCA”) one defendant either guarantees the plaintiff a minimum recovery or extends him a loan that need only be repaid if, and to the extent that, the plaintiff

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1. The term “Mary Carter Agreement” was first used in *Ward v. Ochoa*, 284 So. 2d 385, 386 (Fla. 1973), to refer to a settlement agreement used in *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). These agreements are also referred to as Gallagher covenants or agreements, *see, e.g., Bohna v. Hughes*, 828 P.2d 745, 756 (Alaska 1992); *Tucson v. Gallagher*, 493 P.2d 1197, 1199 (Ariz. 1972), loan receipt agreements, *see, e.g., Reese v. Chicago, Burlington & Quincy R.R.*, 303 N.E.2d 382, 382 (Ill. 1973), sliding scale settlements, *see, e.g., CAL. CIV. PROC. CODE § 877.5(b)* (West Supp. 1995); *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 149 (Cal. 1987), and guaranteed verdict agreements, *see Larry Bodine, The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 232 (1980). These types of agreements were, however, entered into long before these terms were used to describe them. *See, e.g., Seither v. Philadelphia Traction Co.*, 17 A. 338 (Pa. 1889); *Pellett v. Sonotone Corp.*, 160 P.2d 783 (Cal. 1945).

2. MCAs are used in many types of cases. *See Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992) (medical malpractice suit); *Hegarty v. Campbell Soup Co.*, 335 N.W.2d 758 (Neb. 1993) (personal injury suit arising out of a train-truck collision); *Christofferson v. Michelin Tire Corp.*, 273 Cal. Rptr. 356 (Cal. Ct. App. 1990) (products liability suit); *Mobil Chem. Co. v. Blount Bros. Corp.*, 809 F.2d 1175 (5th Cir. 1987) (contract litigation); *Spectra-Physics, Inc. v. Superior Court*, 244 Cal. Rptr. 258 (Cal. Ct. App. 1988) (environmental litigation); *see also Rita Jensen, Jones Day Trial in Lincoln S&L Debacle*, NAT'L L.J., Mar. 9, 1992, at 2 (noting that some law firms involved in S&L litigation “have agreed to pay a total of \$29 million in Mary Carter-type settlements”); *David T. Peterson & Thomas P. Redick, Innovations & Considerations in Settling Toxic Tort Litigation*, NAT. RESOURCES & ENV'T, Spring 1988, at 9 (toxic tort litigation); *Stacy Gordon, D&O Insurers, MGM Settle Bad-Faith Charge*, BUS. INS., Apr. 13, 1992, at 2 (suit for breach of officers' and directors' fiduciary duty).

There is no reliable data on how frequently MCAs are used. However, some courts and commentators have noted that they are being used with increasing frequency. *See, e.g., Watson Truck & Supply Co. v. Males*, 801 P.2d 639, 643 (N.M. 1990) (Wilson, J., concurring); *Slusher v. Ospital*, 777 P.2d 437, 440 (Utah 1989); *June Entman, Mary Carter Agreements: An Assessment of Attempted Solutions*, 37 DEF. L.J. 1, 2 (1988).

recovers from the other defendants. Under such agreements, the settling defendant (the "Mary Carter defendant") often remains a party to the suit and is generally given the right to veto any settlement between the plaintiff and the other defendants.

Mary Carter agreements have been described as "settlement virus[es],"³ "unholy alliance[s],"⁴ and "contractual monstrosit[ies]."⁵ They have been prohibited in four jurisdictions,⁶ most recently in Texas and Florida, and are viewed with suspicion even in jurisdictions that permit them.⁷ Some courts and numerous commentators from both academia⁸ and the practic-

3. Harold Brown, "Mary Carter" Deals: A Settlement Virus, MASS. L. WKLY, Feb. 1, 1993, at 11.

4. Bodine, *supra* note 1, at 233; John W. Thornton & William A. Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, INS. COUNS. J., Apr. 1976, at 226.

5. Warren Freedman, *The Expected Demise of "Mary Carter": She Never Was Well!*, 633 INS. L.J. 602, 603 (1975).

6. The four jurisdictions that have banned MCAs are Florida, Nevada, Oklahoma, and Texas. See *Dosdourian v. Carlsen*, 624 So. 2d 241 (Fla. 1993); *Lum v. Stinnett*, 488 P.2d 347 (Nev. 1971); *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354 (Okla. 1978); *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992). While some commentators have concluded that the supreme courts of Florida, Oklahoma, and Texas have banned all MCAs, it is possible to interpret their decisions as banning only MCAs in which the Mary Carter defendant remains in the case. See *Dosdourian*, 624 So. 2d at 246 ("We include within our prohibition any agreement which requires the settling defendant to remain in the litigation . . ."); *Cox*, 594 P.2d at 360 ("We hold any agreement wherein one defendant will directly benefit from a joint award to be void and unenforceable as against public policy if [the] agreeing defendant remains in the lawsuit."); *Elbaor*, 845 S.W.2d at 247 n.14 (noting that an agreement is an MCA only if the settling defendant participates in the trial beyond merely testifying as a witness).

Many courts and commentators maintain that Wisconsin also forbids MCAs. See *Dosdourian*, 624 So. 2d at 245; *Elbaor*, 845 S.W.2d at 251 n.21. However, the case cited in support of this assertion did not even involve an MCA. See *Trampe v. Wisconsin Tel. Co.*, 252 N.W. 675 (Wis. 1934) (dismissing a case in which there was an undisclosed agreement under which one defendant agreed to pay the plaintiff amount received in contribution from another defendant). In addition, the only recent case from Wisconsin involving an MCA (referred to as a "loan receipt agreement") does not question the validity of such agreements. See *Vonch v. American Standard Ins. Co.*, 442 N.W.2d 598, 601 (Wis. Ct. App. 1989).

Federal courts sitting in admiralty have occasionally invalidated MCAs on the grounds that a particular agreement was unfair to the plaintiff. See, e.g., *Wilkins v. P.M.B. Sys. Eng'r Inc.*, 553 F. Supp. 201, 204 (E.D. Tex. 1982), *vacated and remanded on other grounds*, 741 F.2d 795 (5th Cir. 1984).

7. Some courts have expressed concern about the effect of MCAs on the adversary process but have nevertheless held either that they are valid or that their validity should be examined on a case-by-case basis. See, e.g., *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985); *Carter v. Tom's Truck Repair, Inc.*, 857 S.W.2d 172 (Mo. 1993). Other courts have questioned the legality of MCAs, but have deferred decision on the issue. See, e.g., *Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Assocs.*, 1990 Del. Super. Ct. LEXIS 336 (Sept. 5, 1990); *Copper Mountain, Inc. v. Poma of Am., Inc.*, 890 P.2d 100 (Colo. 1995); *Watson Truck & Supply Co. v. Males*, 801 P.2d 639 (N.M. 1990); *Vermont Union Sch. Dist. No. 21 v. H.P. Cummings Const. Co.*, 469 A.2d 742 (Vt. 1983).

8. Academic commentators who oppose the use of MCAs include: Bodine, *supra* note 1, at 233 (describing MCAs as "inimical to an adversary system of justice"); Abigail Carson, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 ARIZ. L. REV. 863 (1977); June F. Entman, *Mary Carter Agreements: An Assessment of*

ing bar⁹ have suggested that MCAs are against public policy because they encourage perjury, discourage settlement, and result in an unfair allocation of liability and damages among tortfeasors. They have also been

Attempted Solutions, 38 U. FLA. L. REV. 521, 530 (1986) (arguing that “there are no adequate solutions to the problems of trial unfairness and inequitable distribution of liability created by Mary Carter Agreements”); June F. Entman, *Mary Carter Agreements: Learn the Inside Deal*, TENN. B.J., Jan.-Feb. 1988, at 10, 14 (concluding that MCAs raise serious ethical issues); Mark A. Harris, *Settling Multi-Party Contract Disputes Through the Use of Loan Receipt Agreements*, 76 NW. U. L. REV. 271 (1981) (arguing that MCAs should be prohibited in tort litigation but permitted in the surety context); John E. Herndon, *Mary Carter Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988 (1974); Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements, Fair Trials*, 20 WM. MITCHELL L. REV. 1, 17 (1994) (reviewing the negative effects of MCAs on the trial process); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity*, 30 AM. BUS. L.J. 486, 497 (1992) (arguing that “Gallagher or Mary Carter Agreements are difficult to defend on a public policy basis”); John E. McKay, *Loan Agreement: A Settlement Device that Deserves Close Scrutiny*, 10 VAL. U. L. REV. 231, 255 (1976) (arguing that “[a]mong the evils exposed to the courts by [MCAs] are ethical violations . . . and the undermining of . . . established legal principles, such as the rules prohibiting contribution or indemnity between cotortfeasors, concerning the real party in interest, barring assignment of tort claims and barring champerty”); David R. Miller, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779 (1978); Patricia M. Morrow, *Is Mary Carter Alive and Well in Michigan? Taking a Stand on Secret Settlements in Multi-Party Tort Litigation*, 1985 DET. C.L. REV. 605, 609 (concluding that “the benefits of [MCAs] are far outweighed by their detrimental impact both on the fair administration of justice and the ethics of the legal profession”); J. Michael Philips, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 WASH. L. REV. 255, 278 (1993) (concluding that MCAs “distort the traditional aspects of litigation to such an extent that they are simply incompatible with the trial process”); John E. Benedict, Note, *It’s a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368 (1987); Sara Connelly, Note, 25 DEPAUL L. REV. 792, 801 (1976) (suggesting that MCAs should be prohibited “because they may shift liability from a more culpable to a less culpable party”); Katherine Gay, Note, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 ARK. L. REV. 570, 570 (1983) (suggesting that MCAs create “a secret realignment of the parties, resulting in distortion of evidence, confusion of the jury, ethical problems, and the generation of still more litigation”); David J. Grant, Comment, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1417 (1974) (arguing that “[p]resent attempts at protecting the nonagreeing defendant . . . provide inadequate protection”); Meriwether D. Williams, Comment, *Blending Mary Carter’s Colors: A Tainted Covenant*, 12 GONZ. L. REV. 266, 281 (1977); Comment, *Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements: Unsettling Contributions to Conflict Resolution*, 77 ARIZ. ST. L.J. 117 (1977). *But see* William J. Deduck, *Mary Carter Agreements in Maritime Personal Injury Suits*, 22 S. TEX. L.J. 533, 563 (1982) (concluding that MCAs should be permitted in admiralty if there is “disclosure and adequate notice to the non-settling defendant”); Patrick Hughes, *Can What I Said be Held Against Me?: Admitting Settlement Agreements and Prior Pleadings in Multiple-Defendant Comparative Negligence Actions* [Lytle v. Stearns, 830 P.2d 1197 (Kan. 1992)], 32 WASHBURN L.J. 630 (1993) (remaining largely neutral about the desirability of MCAs); R. Michael Kennedy, *Settlement Devices with Joint Tortfeasors*, 25 U. FLA. L. REV. 762, 778 (1973) (noting that despite the problems created by MCAs, they “provide a refreshing alternative to statutorily restricted releases and covenants not to sue”); Pat Shockley, *The Use of Mary Carter Agreements in Illinois*, S. ILL. U. L.J. 223 (1994) (concluding that while MCAs create numerous adverse effects, they should be permitted if certain procedural safeguards are in place).

9. Commentators from the practicing bar who oppose the use of MCAs include: HENRY

criticized on the grounds that they are unethical¹⁰ and amount to champerty, barratry, and maintenance.¹¹

This article argues that contrary to the view of some courts and most

G. MILLER, *ART OF ADVOCACY: SETTLEMENT* § 18.80 (1988) (concluding that MCAs “are fatally flawed . . . due to their inherent ethical infirmity”); STUART SPEISER ET AL., *THE AMERICAN LAW OF TORTS* 1141 (1983) (“join[ing] in the disapproval of such ploys [as MCAs]”); HENRY WOODS, *COMPARATIVE FAULT* § 13.21 (2d ed. 1987) (noting that when MCAs are used “ethical problems may arise under the code of professional responsibility”); Brown, *supra* note 3, at 11; Freedman, *supra* note 5, at 603 (arguing that MCAs “plague[] the settlement aspect of liability law”); Edward W. Mullins, Jr. & Stephen G. Morrison, *Who is Mary Carter and Why Is She Saying All Those Nasty Things About My Pretrial Settlement*, FOR DEF., Dec. 1981, at 14, 22 (concluding that “Mary Carter is actually Typhoid Mary . . . [she] undermines the adversarial integrity of our trial procedure . . . [and is] inimical to the concept of fair play”); Peterson & Redick, *supra* note 2, at 12 (suggesting that MCAs are “[o]ne of the more distasteful settlement devices” in toxic tort suits); John H. Quinn III & Thomas B. Weaver, *Mary Carter Agreements*, 20 LITIGATION 41 (1994) (suggesting that MCAs should be viewed with great skepticism); Carl E. Schultz, *Guiding Principles for Cooperation In the Defense of Multi-Party Litigation*, FOR DEF., July 1982, at 16, 21 (recommending that because MCAs are “inherently inequitable and misleading to court and jury . . . the insurance industry should refrain from the use of such agreements”); Thornton & Wick, *supra* note 4, at 26 (describing MCAs as “machievellian device[s],” and “unholy alliance[s]”); *Compromise and Settlement, Disapproval of ‘Mary Carter,’* 23 DEF. L.J. 516, 528 (1974) (suggesting that the “only effective sanction against the evils of this type of arrangement is to declare [such agreements] void”); *Guiding Principles on Proliferation of Third Party Actions and Mary Carter Agreements*, FED’N INS. COUNS. Q., Summer 1979, at 361 [hereinafter *Guiding Principles*] (recommending that “carriers should instruct counsel not to become parties to so-called ‘Mary Carter’ agreements, to the detriment of general defense interests”); *Panel Details Ethical Problems Faced by Product Liability Lawyers*, 7 TOXICS L. REP. (BNA) 38 (1992) (describing MCAs as arrangements “in which the plaintiff and one or more defendants in a case agree to sandbag the remaining defendants”); cf. Ronald W. Eubanks & Alfonse J. Cocchiarella, *In Defense of Mary Carter*, FOR DEF., Feb. 1984, at 14, 25 (suggesting that “[b]road, abstract denunciations of guaranteed verdict agreements are clearly unwarranted,” and that MCAs should be permitted in some situations as long as the “dual safeguards of severance and disclosure [are used]”); Richard A. Michael, *Mary Carter Agreements in Illinois*, 64 ILL. B.J. 514 (1976) (suggesting that the validity of MCAs be looked at on a case-by-case basis).

10. See, e.g., Ariz. St. Bar Comm. on Rules Prof. Conduct, Op. No. 70-18 (1970) (suggesting that some MCAs violate the ethical canons); *Dosdourian*, 624 So. 2d at 244 (noting that MCAs “promote unethical practices”); *Elbaor*, 845 S.W.2d at 250 (noting that MCAs “may force attorneys into questionable ethical situations”); *Watson Truck & Supply Co.*, 801 P.2d at 643 (Wilson, J., concurring) (suggesting that MCAs “may violate ethical standards of professional conduct”).

11. See, e.g., *Lum v. Stinnett*, 488 P.2d 347, 352 (Nev. 1971) (holding that MCAs are champertous); *Elbaor*, 845 S.W.2d at 249 (noting that the MCA is “simply an unwise and champertous device”); *Monjay v. Evergreen Sch. Dist.*, 537 P.2d 825, 830 (Wash. Ct. App. 1985) (noting that the Mary Carter “agreement [at issue] contains strong overtones of champerty”). Champerty is “a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds.” BLACK’S LAW DICTIONARY 231 (6th ed. 1990). Barratry is “the offense of frequently exciting and stirring up quarrels and suits.” *Id.* at 150. Maintenance is “the officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation.” *Id.* at 954.

Although MCAs arguably do violate rules against champerty and maintenance, these rules have come under renewed academic attack. See Jonathan R. Macey & Geoffrey P. Miller, *Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV.

commentators the use and availability of MCAs may have socially desirable effects in a variety of circumstances. It suggests that these agreements may increase the amount of information revealed during discovery and trial, may enable plaintiffs to finance meritorious suits that might not otherwise have been brought, and may allocate some of the risk of trial to those best able to bear it. It concludes that while MCAs do create some of the problems suggested by their critics, these problems have been overstated and it is important to recognize that such agreements may have offsetting benefits. As the analysis presented here suggests, in some circumstances MCAs may further the compensatory and deterrent functions of tort law without adversely affecting the settlement rate, distorting the fair allocation of liability among defendants, or compromising adjudicative accuracy.

Part I of this article describes the most common types and features of MCAs. Part II presents three hypotheses that attempt to explain why parties enter into MCAs. Part III discusses the effects of MCAs on compensation and deterrence, settlement, fairness, and accuracy. It also critically examines some of the policy arguments that have been used by courts or suggested by commentators to prohibit or restrict the use of MCAs. Part IV considers the extent to which the analysis of earlier parts is dependent on the choice of settlement set-off rule. Finally, Part V presents some brief concluding thoughts about the analysis of multidefendant lawsuits.

I. MARY CARTER AGREEMENTS

There are two basic types of MCAs.¹² Under one type of MCA, the Mary Carter defendant¹³ extends a loan to the plaintiff that is only repayable if, and to the extent that, the plaintiff recovers from the nonsettling defendants.¹⁴ Under another type of MCA, the Mary Carter defendant

1 (1991) (suggesting that in the context of large-scale, small-claim class-action suits, "ethics rules on solicitation, maintenance, fee-splitting and the appearance of impropriety have virtually no current force or rationale" and recommending that such rules be jettisoned in this group of cases); Martin, *supra* note 8, at 511 (arguing that "[i]nvestment in litigation should not be barred by antiquated doctrines of maintenance and champerty").

12. For a sample Mary Carter agreement, see THOMAS MAUET, PRETRIAL 318, 321-22 (1993). For excerpts from some of the MCAs used in the leading cases, see MILLER, *supra* note 9; Edward V. Scoby, *Loan Receipts and Guarantee Agreements*, 10 FORUM 1300, 1317-25 (1975).

13. Although plaintiffs sometimes enter into MCAs with more than one defendant, see, e.g., *Elbaor*, 845 S.W.2d at 240 (noting that the plaintiff entered into MCAs with three of the four defendants), for simplicity of exposition this paper discusses MCAs in the context of a one plaintiff, two defendant lawsuit.

14. For example, in *Reese v. Chicago, Burlington & Quincy R.R.*, the agreement between the plaintiff (Reese) and the defendant railroad provided, in part, that:

Reese . . . hereby acknowledges receipt from the . . . Railroad Company the sum of Fifty-seven Thousand Five Hundred and No/100 Dollars (\$57,500.00) as a loan

guarantees the plaintiff a minimum recovery. The agreements are often structured as combinations of regular settlements and either guarantees or Mary Carter loans;¹⁵ when they are structured in this way they are referred to as hybrid MCAs. The guaranteed amount, or the extent of the loan repayment obligation, sometimes depends on whether the Mary Carter defendant and/or the nonsettling defendants are found liable. It is often linked to the amount of the plaintiff's recovery from the nonsettling defendants in complex ways.¹⁶ Some MCAs make the amount of the guaranty or the loan repayment obligation contingent on whether the case goes to trial or is settled.¹⁷ Others give the Mary Carter defendant a specified percentage of each dollar the plaintiff recovers up to the amount of the loan or guaranty. Under most MCAs, the Mary Carter defendant remains a defendant in the case. She is sometimes given the right to veto some or all settlements between the plaintiff and the other defendants.

Many early MCAs had provisions requiring the agreements to be kept secret.¹⁸ However, as MCAs came under greater judicial scrutiny, most

without interest which said sum I promise to pay from any judgment I am legally entitled to collect from Koehring . . . provided that I shall have no obligation to pay said sum from that amount of any judgment I obtain against Koehring Company . . . which exceeds Fifty-seven Thousand Five Hundred and No/100 Dollars . . .

303 N.E.2d 382, 383-84 (Ill. 1973).

15. See, e.g., *Bohna v. Hughes*, 828 P.2d 745 (Alaska 1992) (discussing a hybrid MCA).

16. For example, in *Booth v. Mary Carter Paint Co.*, the settlement agreement between the plaintiff and two defendants, Willoughby and Sutton, provided, in part:

[First], [t]hat the maximum liability, exposure or financial contribution of the defendants . . . Willoughby and . . . Sutton, shall be \$12,500.00. . . . Second, that in the event of a joint verdict against Willoughby and the Mary Carter Paint Company exceeding \$37,500.00, that the plaintiff will satisfy said judgment against Mary Carter Paint Company entirely, with no contribution from Willoughby and Sutton. Provided, however, that if the Mary Carter Paint Company is not financially responsible to the extent of \$37,500.00, the defendant Willoughby will contribute an amount of money between Mary Carter Paint Company's actual responsibility and the figure of \$37,500.00.

202 So. 2d 8, 10 (Fla. Dist. Ct. App. 1967).

17. For example, in *General Motors Corp. v. Lahocki*, the MCA provided, in part, that upon conclusion of the trial, defendant

Contee shall pay to plaintiff Lahocki the sum of \$150,000, except in the event of any of the following occurrences: (a) If Contee's pro rata share of any judgment against it is in excess of \$150,000, Contee shall pay to Lahocki said pro rata share, not to exceed \$250,000; (b) If final judgment is entered against GMC alone, then Contee shall pay nothing to Lahocki, even if Lahocki and GMC should thereafter settle their case; (c) If Lahocki settles with GMC, then Contee shall pay the sum of \$100,000 to Lahocki.

410 A.2d 1039, 1042 (Md. 1980).

18. In earlier MCA cases the inclusion of a "secrecy" provision was part of the definition of an MCA. See, e.g., *id.* at 1042, defining an MCA as follows:

(1) The agreeing defendant is to remain a party and is to defend himself in court. However, his liability is limited by the agreement. In some instances this will call for

courts held that they are both discoverable and at least partially admissible.¹⁹ As a result, secrecy provisions are no longer found in MCAs.

This article focuses primarily on the effects of a simple Mary Carter loan agreement that works as follows:

EXAMPLE

Suppose the plaintiff filed a claim against Mary and David, and entered into a \$40 Mary Carter loan agreement with Mary.

First, consider what would happen if the plaintiff prevailed at trial and obtained a judgment against David that was greater than the amount of the Mary Carter loan. If, for example, the plaintiff were awarded a \$50 judgment against David, he would be obligated to repay the entire loan. The plaintiff's net recovery would therefore be \$50, the \$40 Mary Carter loan plus the \$50 judgment against David minus the \$40 loan repayment. Mary's net liability would be \$0, because the entire loan would be repaid. David's net liability would be \$50, the amount of the judgment against him.

Second, consider what would happen if the plaintiff prevailed and obtained a judgment against David that was less than the amount of the Mary Carter loan. If, for example, the plaintiff were awarded a \$20 judgment against David, the plaintiff would be obligated to repay only part of the loan, the \$20 he received from David. The plaintiff's total recovery would therefore be \$40, the \$40 Mary Carter loan plus the \$20 judgment against David, minus the \$20 loan repayment. David's net liability would be \$20, the amount of the judgment against him, and Mary's net liability would be \$20, the \$40 loan minus the \$20 loan repayment.

increased liability on the part of the other codefendants. (2) The agreement is secret. (3) The agreeing defendant guarantees to the plaintiff that he will receive a certain amount, notwithstanding the fact that he may not recover a judgment against the agreeing defendant or that the verdict may be less than that specified in the agreement.

Courts and commentators took the position that "[s]ecrecy is the essence of [a Mary Carter] arrangement, because the court or jury as trier of the facts, if apprised of [the existence of the agreement], would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants." *Ward v. Ochoa*, 284 So. 2d 385, 387 (Fla. 1973). They suggested that the improper tactical advantages created by the use of secret MCAs were the primary reason parties entered into such agreements. However, the fact that MCAs are still used, even though most jurisdictions require them to be both disclosed to the nonsettling defendants and at least partially admitted into evidence, *see infra* note 19, suggests that parties' decisions to enter into MCAs must also be motivated by other considerations.

19. *See, e.g., Ratterree v. Bartlett*, 707 P.2d 1063, 1065 (Kan. 1985) (holding that MCAs must be immediately disclosed to the court and the other parties and may, in the discretion of the trial judge, be partially disclosed to the jury); *Riggle v. Allied Chem. Corp.*, 378 S.E.2d 282, 283 (W. Va. 1980) (holding that the admissibility of MCAs is properly left to the discretion of the trial judge). Some jurisdictions permit the amount of the loan or guarantee to be introduced into evidence, some do not. Most jurisdictions, wary of the self-serving language such agreements contain, give the judge the authority to redact the agreement for the jury. *See, e.g., Hatfield v. Continental Imports, Inc.*, 610 A.2d 446, 451 (Pa. 1992).

Finally, consider what would happen if the plaintiff lost at trial. In such a situation, the plaintiff would recover nothing from David and would keep the \$40 Mary Carter loan. Mary's liability would be \$40, and David's would be \$0.

MCAs can have a variety of other interesting features.²⁰ As one court observed, "the number of variations upon such agreements is limited only by the ingenuity of the mind of man."²¹

II. LEGITIMATE REASONS MCAs ARE USED

Most courts and commentators maintain that parties enter into MCAs primarily to gain improper tactical advantages at trial. However, there are also a variety of legitimate reasons that parties might find it desirable to enter into such agreements. This Part explores three explanations for the use of MCAs—the information hypothesis, the financing hypothesis, and the risk allocation hypothesis.

A. INFORMATION HYPOTHESIS

The use and availability of MCAs may enable plaintiffs to obtain recovery-enhancing information that would otherwise have remained hidden at the time of settlement or judgment. In a typical lawsuit, defendants have no incentive to voluntarily reveal information that would strengthen the plaintiff's case. Defendants generally have an incentive to withhold damaging evidence for as long as possible in the hope that they will be able to take advantage of this informational asymmetry to negotiate a favorable settlement or that they will succeed in concealing the information until after a trial judgment is entered.²² Adverse information is ordinarily disclosed only in response to narrowly tailored discovery requests or when a defendant or his attorney fears that not revealing the information will lead to the imposition of sanctions. A recent study of the discovery process found

20. For example, in jurisdictions that apply the no set-off with contribution rule, *see infra* note 117 and accompanying text, MCAs often contain provisions requiring the plaintiff to indemnify the Mary Carter defendant for amounts she is required to pay in contribution, *see, e.g., Gibson v. Bentley*, 605 S.W.2d 337, 338 (Tex. Civ. App. 1980). Some MCAs have vigorous prosecution clauses that require the plaintiff to proceed with the suit, *see, e.g., Moore v. Subaru of Am.*, 891 F.2d 1445, 1450 (10th Cir. 1989) (noting that plaintiff agreed to "diligently and vigorously prosecute" his action against nonsettling defendants); *Grillo v. Burke's Paint Co.*, 551 P.2d 449, 451 (Or. 1976) (quoting a clause from an MCA in which the plaintiff "expressly declares his intent and hereby covenants to prosecute with all due diligence" his claims against the nonsettling defendants).

21. *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354, 357 (Okla. 1979) (quoting *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445 (Fla. Dist. Ct. App. 1972)).

22. *But see* Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481 (1994) (using a game theoretic model of pretrial information revelation to show that defendants have an incentive to reveal some types of adverse information to plaintiffs).

that attempts to conceal information are often successful.²³ The study reported that in thirty-nine percent of settled cases, defendants' lawyers "believed they still knew something significant about the case that opposing counsel had not discovered."²⁴ It also found that even in cases that went to trial, defendants' lawyers thought they "knew something of consequence," that had not been revealed in thirty-two percent of their cases.²⁵

The use and availability of MCAs can increase the amount of information revealed in multidefendant lawsuits. As the examples below illustrate, entering into an MCA gives a defendant a way to reduce his own expected liability by revealing information that will increase the plaintiff's chance of prevailing.²⁶ As a consequence, it is likely that defendants will reveal more adverse information if MCAs are available than they would if MCAs were unavailable. In this regard, an MCA is similar to a plea bargain in which the prosecutor promises to drop certain charges or to request a more lenient sentence if a defendant cooperates by providing information or testimony that will help to convict a codefendant.²⁷

23. See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787.

24. *Id.* at 814. The problem of nondisclosure of information is particularly severe in large cases. Lawyers with a median case size of over \$1 million reported that "in one of every two settled cases their opponents had not discovered something arguably consequential." *Id.* at 811.

25. *Id.* at 813-14. The study also found that "evasive or incomplete responses to discovery probes impeded discovery by [attorneys whose median case size was \$25,000 or less] in about 40 percent of their cases," while attorneys whose median case size was \$1 million or more reported that such responses "made their discovery more difficult in 80 percent of the lawsuits on which they worked." *Id.* at 834.

26. Entering into an MCA might enable the plaintiff to obtain information that could have properly been withheld during both discovery and trial, such as information that is privileged or the work product of the Mary Carter defendant's attorney. The agreement might also induce the Mary Carter defendant to turn over documents or names of witnesses whose existence the plaintiff had no reason to suspect. In addition, MCAs may enable the plaintiff to obtain information that he is entitled to obtain through civil discovery, but earlier in the litigation or at a lower cost than would be possible without the agreement. For example, in *Mustang Equip., Inc. v. Welch*, 564 P.2d 895, 896-98 (Ariz. 1977), the plaintiff entered into a Gallagher covenant (the name for MCAs in Arizona) under which one defendant promised to provide the plaintiff with the name of another potentially liable third party, along with an engineer's report that would help the plaintiff prove his case against the third party. The plaintiff agreed, in turn, that if a verdict was rendered against both the original defendant and the new defendant, he would not execute against the original defendant. The court explicitly noted that the plaintiff would have "obtained both the report and the additional defendant's name had he followed the normal channels of discovery," but pointed out that obtaining them earlier in the litigation process pursuant to the MCA was enough of a benefit to the plaintiff to constitute consideration for the agreement. *Id.* at 898.

The Mary Carter defendant might also be able to provide information that can be used to undermine the credibility of the nonsettling defendant or his witnesses on cross-examination. The type of information most useful for these purposes may not be revealed in discovery since it may be unrelated to the merits of the litigation and the plaintiff would therefore have had no reason to request it.

27. See Bruce H. Kobayashi, *Deterrence with Multiple Defendants: An Explanation of "Unfair" Plea Bargains*, 23 RAND J. ECON. 507 (1992) (using economic analysis to show why a

EXAMPLE²⁸

Consider a medical malpractice suit against a surgeon and an anesthesiologist. The issue, upon which liability turns, is whether the doctors followed the sponge count procedures in the hospital's surgical manual. These procedures require the surgeon to call out the number of each sponge inserted and extracted and for the anesthesiologist to say "check." Assume that the jurisdiction apportions liability according to relative fault, applies the proportionate share set-off rule,²⁹ and that the plaintiff's damages are stipulated to be \$10,000.³⁰ Further assume that if the

prosecutor might offer a lower sentence to induce a criminal defendant to reveal information about one of his codefendants).

28. The examples presented in the text are based on an extension of the standard model of the litigation process developed in John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56-58 (1982). For the application of these models to multidefendant suits, see Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. L. & ECON. 331 (1980); A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447 (1981); Lewis A. Kornhauser & Richard L. Revesz, *Settlement Under Joint & Several Liability*, 68 N.Y.U. L. REV. 427 (1993) [hereinafter Kornhauser & Revesz, *Settlement*]; Lewis A. Kornhauser & Richard L. Revesz, *Multidefendant Settlements: The Impact of Joint and Several Liability*, 23 J. LEGAL STUD. 41 (1994) [hereinafter Kornhauser & Revesz, *Multidefendant Settlements*]; John J. Donohue III, *The Effect of Joint and Several Liability on the Settlement Rate—Mathematical Symmetries and Metaissues About Rational Litigant Behavior: Comment on Kornhauser and Revesz*, 23 J. LEGAL STUD. 543 (1994). The only published article applying these models to MCAs is Timothy J. Stanley, *An Analysis of the Rules of Contribution and No Contribution for Joint and Several Liability in Conspiracy Cases*, 35 SANTA CLARA L. REV. 1 (1995) (briefly discussing how MCAs might promote information revelation).

For simplicity, this and other examples presented in the text assume "perfectly correlated probabilities"—that is, if the plaintiff prevails at trial against one defendant, he also prevails or would have prevailed against the other defendant. See Kornhauser & Revesz, *Settlement*, *supra* at 432-34. It is also assumed, except where otherwise noted, that litigation costs are zero, that all parties are risk neutral, that both defendants are fully solvent, and that the plaintiff is not at fault.

29. The examples presented in Parts II and III of this article assume that a proportionate share settlement set-off rule will be applied. Under the proportionate share set-off rule, the trier of fact ascertains the plaintiff's damages and apportions liability between the settling and the nonsettling defendants according to relative fault. The nonsettling defendant's liability is the percentage of fault assigned to him, multiplied by the total damages. See *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1466-67 (1994) (describing how the proportionate share rule is applied to regular settlements); *Sullivan v. Rowan Co.*, 952 F.2d 141, 143-44 (5th Cir. 1992) (applying proportionate share rule to an MCA); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979) (same); *Stubbs v. Copper Mountain, Inc.*, 862 P.2d 978 (Colo. Ct. App. 1993), *aff'd*, 890 P.2d 100 (Colo. 1995). This assumption is relaxed in Part IV *infra*.

30. This example assumes that the information provided by the Mary Carter defendant affects the plaintiff's probability of prevailing, but not the amount he will recover if he prevails. This assumption is plausible in many tort cases since the plaintiff generally has better information about the magnitude of his damages. See Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, in *REFORMING THE CIVIL JUSTICE SYSTEM* (Larry Kramer ed., forthcoming 1995). The results presented in this Part would be substantially different if

plaintiff prevails, the surgeon and anesthesiologist will each be apportioned 50% of the liability.

Suppose that the doctors failed to follow the procedures in the manual, but nevertheless plan to collude and testify that they followed the manual's procedures. If they testify as planned, the plaintiff's probability of prevailing would be only 25%. His expected recovery would therefore be $\$2500 = (25\%)(\$10,000)$, and each defendant's expected liability would be $\$1250 = (50\%)(25\%)(\$10,000)$. If, however, one doctor were to testify truthfully (that is, provide the plaintiff with information), the plaintiff's probability of prevailing would increase to 75%. His expected recovery would be $\$7500 = (75\%)(\$10,000)$, and each defendant's expected liability would be $\$3750 = (50\%)(75\%)(\$10,000)$.

In such a situation, if the plaintiff could enter into an enforceable agreement with one of the doctors, for example the surgeon, whereby the surgeon promised to testify truthfully at trial and the plaintiff promised to release his claim against her, both parties would be better off than they would have been in the absence of the agreement. The plaintiff's expected recovery would increase from $\$2500$ to $\$3750$, and the surgeon's expected liability would decrease from $\$1250$ to zero. The anesthesiologist's expected liability would be $\$3750$, exactly what it would have been had he testified truthfully at trial.³¹

Although, as the example demonstrates, an agreement between the plaintiff and the surgeon could make them both better off and would lead to the revelation of the recovery-enhancing information, it is unlikely that such an agreement would be reached if MCAs were unavailable. Because

MCAs increased the plaintiff's damages rather than increased the plaintiff's probability of prevailing.

31. The type of operating room conspiracy of silence discussed in this example is similar to a case that arose recently in Kentucky. During minor surgery, anesthesia was improperly administered to a patient and an emergency tracheotomy had to be performed. However, the tracheotomy tube was improperly inserted and the patient was deprived of oxygen and wound up in a vegetative state. A few months after the surgery, the hospital's chief of staff called the patient's lawyer, and, according to the lawyer, "said that he had information that would change the medical malpractice lawsuit from $\$50,000$ to 1 million . . . but [that] he wouldn't give us the information unless we paid him $\$5000$." The lawyer decided to pay the money and wore a tape recorder to the meeting with the chief of staff. On the tape, the chief of staff said that the doctors were "sworn to secrecy" and would never admit that the tube was improperly inserted, so that the plaintiff would be unlikely to prevail unless he paid the chief of staff for his information. During deposition, however, the anesthesiologist "spilled the beans," and the case eventually settled for an undisclosed amount. See ATLANTA J. & CONST., Feb. 9, 1994, at A3; Mark Curriden, *Lawyer Says Rural Doctors Covered Up After Surgery*, NAT'L L.J., Feb. 28, 1994, at 8. For a more general discussion of the so-called conspiracy of silence among doctors, see Note, *Malpractice and Medical Testimony*, 77 HARV. L. REV. 333, 336-37 (1963) (exploring the psychological and economic reasons for the so-called conspiracy of silence, "the strong reluctance of doctors to testify against each other"); SYLVIA LAW & STEVEN POLAN, PAIN AND PROFIT 100 (1978) (reporting the results of a study which "found that 70% of the doctors polled would refuse to testify on behalf of a patient in a suit against a surgeon who had mistakenly removed the wrong kidney, despite the clear merit of the claim").

contracts to testify in a particular way are unenforceable, the plaintiff and the surgeon would face a negotiator's dilemma,³² a situation where an agreement could make both parties better off but would not be entered into because it would require one party to reveal information that could be used to make him/her worse off if the agreement was not concluded. The surgeon would be reluctant to disclose the information to the plaintiff before obtaining a release by, for example, giving sworn deposition testimony, because the plaintiff, having obtained the sworn statement, might then renege on his commitment to release the surgeon. Correspondingly, the plaintiff would be reluctant to release the surgeon before she was deposed or testified, because the surgeon might then either change her testimony, or testify unpersuasively. As a consequence, it is unlikely that an agreement would be reached, and the information would, in all likelihood, remain concealed.

In such a situation, an MCA can be used to solve the negotiator's dilemma. As the example below illustrates, entering into an MCA gives the surgeon a way to credibly bind herself to testify as promised, while ensuring that her testimony will not be used to increase her expected liability.

EXAMPLE

Continuing the example presented above, suppose that the surgeon offered to enter into a \$3000 Mary Carter loan agreement and promised to testify that the doctors had not followed the procedures in the hospital manual. Suppose further that this testimony would increase the plaintiff's probability of prevailing from 25% to 75%.

In deciding whether or not to enter into this MCA, the plaintiff would reason that if the surgeon testified as promised, he would have a 75% chance of obtaining a \$5000 judgment against the anesthesiologist, in which case he would repay the \$3000 loan leaving him a net recovery of \$5000, and a 25% chance of recovering nothing, in which case he would keep the \$3000 loan. His expected recovery would therefore be $\$4500 = (75\%)(\$5000) + (25\%)(\$3000)$. If, however, the surgeon did not testify as promised, the plaintiff's probability of prevailing would be 25%. He would therefore have a 25% chance of recovering \$5000 from the anesthesiologist, in which case he would repay the loan, leaving him a net recovery of \$5000 and a 75% chance of recovering nothing, in which case he would not be obligated to repay the loan and would keep the \$3000. His expected recovery would therefore be $\$3500 = (25\%)(\$5000) + (75\%)(\$3000)$. Thus, even if the surgeon reneged on the agreement and testified that the doctors followed the proper procedures, the plaintiff's expected recovery after entering into the MCA would be larger than it would have been in the absence of the agreement.

As long as she testifies truthfully, the surgeon is also made better off

32. See James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 J. MGMT. SCI. 18, 31-32 (1992) (discussing the structure of the classic negotiator's dilemma).

by entering into the agreement. When the surgeon testifies truthfully there is a 75% chance that the plaintiff will recover \$5000, in which case the loan would be repaid in full and her liability would be zero, and a 25% chance that the plaintiff would fail to recover anything, in which case her liability would be \$3000 since the loan would not be repaid. Her expected liability would therefore be $\$750 = (25\%)(\$3000) + (75\%)(\$0)$. In contrast, if the surgeon testified untruthfully, her expected liability would be $\$2250 = (25\%)(\$0) + (75\%)(\$3000)$, which is larger than it would have been had she not entered into the agreement.

Thus, the MCA can make both the plaintiff and the surgeon better off. It increases the plaintiff's expected recovery from \$2500 to \$4500 if the surgeon testifies as promised, gives the surgeon an incentive to testify as promised, and reduces the surgeon's expected liability from \$1250 to \$750.³³

In the example presented above, once the MCA is entered into, the Mary Carter defendant's expected liability if she does not testify as promised will be even higher than it would have been had she never entered into the agreement. By entering into the MCA, she has, in effect, posted a performance bond. When the amount of the Mary Carter loan is set in the mutually beneficial loan range,³⁴ even if the Mary Carter defendant decided to forgo the bond and withhold the promised information or testimony, the plaintiff's expected recovery would be greater than it would have been in the absence of the agreement. At a minimum, the plaintiff will be entitled to keep the Mary Carter loan even if he does not prevail. The agreement makes it rational for the plaintiff to release the Mary Carter defendant even before she has testified or been deposed. It solves the negotiator's dilemma by functioning as a combination of a performance bond and a guaranty.³⁵

33. Although the agreement does make the anesthesiologist worse off, increasing his expected liability from \$1250 to \$3750, his expected liability is still less than the actual harm caused by his tortious behavior.

34. See *infra* text accompanying notes 36-44 (discussing the range of mutually beneficial loan amounts).

35. The monetary bond posted by the Mary Carter defendant is, in many cases, reinforced by a reputation bond posted by the Mary Carter defendant's lawyer, who is usually an insurance company's counsel. An attorney who represents insurance companies on a repeat basis would not want to get a reputation for representing clients who reneged on their Mary Carter commitments, since this would make it less likely that his clients would be selected to be Mary Carter defendants in future cases. As a consequence, insurance company lawyers have a strong incentive to ensure that their clients strictly honor their Mary Carter commitments.

MCAs can also provide a partial solution to another type of negotiator's dilemma by serving a warranty-type function. If, for example, the information that the defendant offers the plaintiff is documentary, the defendant might be reluctant to reveal the type of document or the nature of the information before entering into a settlement agreement. She may fear that if she does so, the plaintiff will not enter into the agreement and will try to obtain the documents through discovery. Conversely, the plaintiff might be unwilling to enter into a

1. The Amount of the Mary Carter Loan

The plaintiff will find it advantageous to enter into an MCA as long as his expected total recovery with the agreement is greater than his expected total recovery without the agreement. In order to determine the range of mutually beneficial loan amounts, however, it is necessary to separately consider a situation where only one defendant could provide the recovery-enhancing information and a situation where either defendant could provide the information.³⁶

If only one defendant could provide the information, in determining the maximum MCA she would be willing to offer, the defendant with the information would compare her expected liability if she entered into an MCA to her expected liability if neither defendant entered into an MCA.

regular settlement since he will be unable to value the information contained in the documents prior to consummation of the agreement. As a consequence, a settlement is unlikely to be reached. In such a situation, however, the plaintiff might be willing to enter into an MCA since any MCA in the mutually advantageous range, *see infra* text accompanying notes 36-44, would give him a higher expected recovery than he would have had in the absence of the agreement. The agreement, therefore, at least partially warrants the value of the information to be disclosed. In addition, depending on the stage of the case when the agreement is entered into, the negotiations over the Mary Carter loan amount may give the plaintiff some sense of the value of the defendant's information. If the MCA is entered into after substantial discovery has taken place, the fact that the Mary Carter defendant is willing to extend the loan signals to the plaintiff that the information is valuable, much as the terms of a standard product warranty send a signal to consumers about the product's quality. However, when an MCA is entered into before much discovery has taken place, the signal may be noisy. The Mary Carter defendant's willingness to extend a large loan may signal either that the information she will provide is valuable or that the Mary Carter defendant knows that when the plaintiff completes discovery his probability of prevailing will be high, with or without the Mary Carter defendant's information. The inability of the plaintiff to value the information introduces a complicated dynamic into the negotiations over the loan amount because the defendant has an incentive to suggest that the information is less valuable than it really is. The greater the true value of the information, the larger is the maximum loan that a rational Mary Carter defendant will offer. However, because the Mary Carter defendant always prefers to extend the smallest loan possible, she has an incentive to downplay the value of the information so that the plaintiff will assume that the maximum loan she would extend is lower. If, however, plaintiffs recognize that Mary Carter defendants have such an incentive, they will tend to assume that any information offered by a Mary Carter defendant is more valuable than she claims. It is possible, in turn, that Mary Carter defendants, knowing this will happen, will downplay the value of their information even further. As a consequence of this sequence of re-evaluations of the value of the information, negotiations over Mary Carter loan amounts may become difficult.

36. In many contexts in which MCAs are used, even if a defendant had information, he might be unwilling to provide it to the plaintiff since doing so might hurt his reputation. For example, because anesthesiologists work with many surgeons, getting a reputation for turning on fellow doctors by entering into MCAs and giving injured plaintiffs information may cause an anesthesiologist more financial harm than an adverse judgment in a particular case since surgeons may be reluctant to work with him in the future. For simplicity, however, this article will assume, except where otherwise noted, that a defendant who has information would be willing to enter into an MCA if such an agreement decreased his expected liability.

EXAMPLE

Continuing the example presented above, assume that only the surgeon is able to provide the information. In such a situation, the plaintiff would be better off entering into any MCA with the surgeon that gave him an expected recovery of more than \$2500, his expected recovery in the absence of an agreement. Similarly, the surgeon would be better off entering into any MCA that left her expected liability below what it would have been in the absence of an agreement, \$1250. The minimum Mary Carter loan that would give the plaintiff an expected recovery of more than \$2500, even if the information were worthless, is \$1666.67. The maximum MCA the surgeon would offer is \$5000 since this would give her an expected liability of $\$1250 = (75\%)(\$0) + (25\%)(\$5000)$, her expected liability without the MCA. Thus, the mutually advantageous Mary Carter loan range is \$1666.67 to \$5000.

Thus, there is a range of Mary Carter loan amounts that would leave both the plaintiff and the Mary Carter defendant better off than they would have been had such agreements been unavailable.³⁷

In a situation where either defendant could provide the information, in deciding how large a Mary Carter loan to offer, each defendant will compare his expected liability if he enters into an MCA in a particular amount to his expected liability if he does not enter into an MCA but his codefendant does enter into such an agreement. When either defendant

37. It is interesting to note that even when only one defendant can provide the recovery-enhancing information, it is possible that an auction-type series of offers and counteroffers will be made. *See infra* notes 39-44 and accompanying text. Returning to the example presented in the text, suppose that only the surgeon had the recovery-enhancing information and that she offered the plaintiff a \$2000 MCA. Such an MCA would give the plaintiff an expected recovery of $\$4250 = (25\%)(\$2000) + (75\%)(\$5000)$, the surgeon an expected liability of $\$500 = (25\%)(\$2000) + (75\%)(\$0)$, and the anesthesiologist an expected liability of $\$3750 = (75\%)(\$5000)$. The anesthesiologist might respond by offering a regular settlement. He might, for example, offer a \$3250 regular settlement. Such a settlement would reduce his expected liability from \$3750 to \$3250, and would increase the plaintiff's expected recovery from \$4250 to \$4500 = $\$3250 + (25\%)(\$5000)$. The surgeon, however, could then respond by offering a higher MCA, and the anesthesiologist could, in turn, respond by offering a higher regular settlement. This process of bid and counterbid may continue, *but see infra* notes 51-54 and accompanying text, until the surgeon offered a \$5000 MCA, making her expected liability $\$1250 = (25\%)(\$5000) + (75\%)(\$0)$, and the anesthesiologist offered a regular settlement of \$3750, making his liability \$3750. At this point neither defendant would be willing to increase his or her bid since doing so would leave him or her worse off than he/she would be if the plaintiff accepted his/her codefendant's offer. A plaintiff would find each of these bids equally appealing because the \$5000 MCA would give him an expected recovery of $\$5000 = (25\%)(\$5000) + (75\%)(\$5000)$, and the \$3750 regular settlement would also give him an expected recovery of $\$5000 = \$3750 + (25\%)(\$5000)$. This example suggests that even when only one defendant has the information, the Mary Carter loan amount may be towards the top of the mutually advantageous range. Alternatively, the plaintiff may be able to negotiate a regular settlement which would give him the same expected recovery that he would have had if he had entered into an MCA at the top of the mutually beneficial range.

can provide the information, the availability of MCAs places the defendants in a situation similar to a prisoner's dilemma. In the absence of an effective way of maintaining collusion,³⁸ each defendant, fearful that his codefendant will enter into an MCA, feels pressured to enter into such an agreement himself. As a consequence, it is possible that an auction will take place with the plaintiff, in effect, selling the opportunity to be chosen as the Mary Carter defendant.

EXAMPLE

Continuing the surgeon and anesthesiologist example presented above, suppose that the surgeon offered to enter into a \$3000 MCA. If the plaintiff told the anesthesiologist about the offer,³⁹ and the anesthesiologist too could provide the information, the anesthesiologist would reason that if the plaintiff and the surgeon entered into the agreement, his expected liability would be \$3750, so he would be better off entering into any MCA that left his expected liability below this amount. He might, for example, offer to enter into a \$4000 MCA. His expected liability would then be $\$1000 = (25\%)(\$4000) + (75\%)(\$0)$.⁴⁰ However, if the anesthesiologist made such an offer and the plaintiff gave the surgeon the opportunity to make a counteroffer, the surgeon would reason that if the plaintiff accepted the anesthesiologist's offer, her (the surgeon's) expected liability would be \$3750, so she would be better off offering to enter into any MCA that left her expected liability below this amount. She might, for example, offer to enter into a \$5000 MCA.⁴¹ Her expected liability would then be $\$1250 = (25\%)(\$5000) + (75\%)(\$0)$.⁴²

38. See *infra* notes 45-50 and accompanying text (describing a variety of ways that defendants might collude).

39. In at least one jurisdiction, see CAL. CIV. PROC. CODE § 877.6 (West Supp. 1995), the plaintiff is required to inform all defendants that he has been offered an MCA before he consummates the agreement. However, it is important to note that because lawyers are repeat players, this requirement may be a mere formality. It may be a severe breach of proper behavior not to consummate an MCA that was informally agreed to before it was disclosed to the other defendants in compliance with the statute.

40. The anesthesiologist would reason that if he entered into the agreement there would be a 25% chance that the plaintiff would fail to recover anything, in which case his liability would be \$4000 since the loan would not be repaid, and a 75% chance that the plaintiff would recover \$5000, in which case his liability would be zero since the loan would be repaid in full.

41. As discussed *infra* note 55 and accompanying text, the Mary Carter loan is unlikely to be bid up to \$5000 or more because Mary Carter loans of \$5000 or more leave the plaintiff indifferent between winning and losing at trial, creating severe agency costs which make such agreements unattractive to defendants. However, when the possibility of hybrid MCAs—part Mary Carter loan, part regular settlement—are taken into account, see *infra* example accompanying note 57, it becomes apparent that hybrid offers could be constructed that would leave the plaintiff's expected recovery and each defendant's expected liability the same as the \$5000, \$7499.99, and \$7500 MCA loans discussed in the text.

42. The surgeon would reason that there would be a 25% chance that the plaintiff would lose and the loan would not be repaid, making her liability \$5000, and a 75% chance that the plaintiff would recover \$5000 so that the loan would be repaid in full and her liability would be zero.

This bidding process could continue until the Mary Carter defendant's expected liability was the same as the nonsettling defendant's expected liability. Consider what would happen if the surgeon offered an MCA of \$7499.99. In such a situation, the anesthesiologist would reason that his expected liability if he did not make a counteroffer would be \$3750. If, however, he offered to enter into a \$7500 MCA, his expected liability would be $\$3750 = (25\%)(\$7500) + (75\%)(\$2500)$,⁴³ the same as it would be if the surgeon entered into the MCA. At this stage, the anesthesiologist would be indifferent between being the Mary Carter defendant or the nonsettling defendant. The bidding would therefore end with either the surgeon's \$7499.99 bid or the anesthesiologist's \$7500 bid. The maximum potential bid would therefore be a \$7500 MCA.⁴⁴

Thus, when either defendant can provide the information and an auction takes place, the bidding may, in theory, continue until one defendant offers an MCA that leaves each defendant's expected liability equal to what his expected liability would have been in the absence of the agreement had the plaintiff had the information at the outset of the suit.

The previous examples demonstrated that entering into an MCA will often be beneficial to both the plaintiff and the Mary Carter defendant and that the pressure on defendants to enter into such agreements may be substantial. Nevertheless, it is important to note that the defendants have a strong incentive to collude and refuse to enter into an MCA since by

43. The anesthesiologist would reason that there is a 25% chance that the plaintiff would not prevail, in which case the loan would not be repaid and his liability would be \$7500, and a 75% chance that the plaintiff would recover \$5000, in which case part of the loan will be repaid and his liability would be \$2500.

44. The example presented in the text was structured so that the defendants made the MCA offers. However, in situations where the plaintiff believes he is able to value the information that the Mary Carter defendant will provide, the plaintiff might make the MCA offers. The most recent economic literature on regular settlement in multidefendant suits uses models in which the plaintiff proposes simultaneous settlements to the defendants. See generally Kornhauser & Revesz, *Settlement*, *supra* note 28 (discussing simultaneous offers of regular settlements); Kornhauser & Revesz, *Multidefendant Settlements*, *supra* note 28. These models can be extended to a situation where the plaintiff wants to enter into an MCA. However, because the plaintiff cannot enter into an MCA with both defendants, his offer to one of them must be contingent on the other defendant rejecting the offer made to him. Returning once again to the surgeon-anesthesiologist example, the plaintiff might simultaneously offer to enter into an MCA with the surgeon under which the surgeon would extend a loan in an amount just under \$7500, and offer to enter into an MCA with the anesthesiologist under which the anesthesiologist would extend a loan in an amount just under \$5000, with the offer to the anesthesiologist conditional on the surgeon's rejecting the offer made to her. The surgeon would reason that because entering into an MCA for just under \$5000 would leave the anesthesiologist with an expected liability that is below his expected liability if neither defendant enters into an MCA, the anesthesiologist would accept the offer. Knowing this, the surgeon would reason that she is best off agreeing to enter into the MCA for an amount just under \$7500, which would give her an expected liability of just under \$3750, since if she does not, the anesthesiologist would enter into the MCA offered to him and the surgeon's expected liability would be \$3750.

doing so they can prevent the plaintiff from increasing their joint expected liability.⁴⁵ Collusion among defendants can take a variety of explicit forms including anti-MCA agreements,⁴⁶ consolidated defense agreements,⁴⁷ and joint representation.⁴⁸ In addition, because many defendants in multidefen-

45. In a situation where both defendants can offer the information so that each fears his codefendant will enter into an MCA that will increase his expected liability, both defendants stand to gain if they both refrain from entering into an MCA. In a situation where only one defendant has the information, the parties still have an incentive to collude because by doing so they can reduce their joint expected liability. However, because some forms of collusion, such as an anti-MCA agreement, would not benefit the defendant with the information (it would leave his expected liability the same as it would have been had the MCA been bid up to the theoretical maximum, here, a \$5000 loan that would leave him with an expected liability of \$1250, *see supra* note 37 and preceding example), he would only find it in his interest to enter into this agreement if he obtained a side payment from the defendant without the information. However, because the promise of this type of side payment would not be enforceable, such agreements would not be beneficial to him unless nonlegal forces gave him sufficient confidence that a promise to make a side payment would be kept. One explicit form of collusion that might be sufficiently certain to make the defendant with the information better off is joint representation, *see infra* note 48, together with a judgment-sharing agreement, *see infra* note 149, which would permit the parties to allocate liability prior to trial and require them to be represented by the same lawyer, thus making it unlikely that an MCA will be entered into. Another possibility is for the defendants to simply offer the plaintiff a joint regular settlement, with each contributing some amount below what his expected liability would have been if an auction-like series of negotiations had taken place.

46. There are no published decisions discussing the enforceability of such agreements, and it is unclear whether they would survive judicial scrutiny. However, their use is suggested in the tort practitioner's literature. *See, e.g.*, CENTER FOR PUBLIC RESOURCES, CPR PRACTICE GUIDE: PRODUCT LIABILITY DISPUTES (1989); Roy L. Reardon & Molly K. Heines, *Comparative Fault and Problems of Contribution and Indemnification*, in PRODUCT DESIGN LITIGATION 349, 370 (PLI Litig. & Admin. Practice Course Handbook Series No. 205, 1982) (suggesting that defendants might try to enter into anti-MCA agreements, but noting such agreements might not be enforced).

47. In a consolidated defense agreement, sometimes called a joint defense agreement, lawyers representing different defendants agree (either informally or in writing) to share information and to coordinate their strategies. According to one authority, "the parties typically undertake to appoint a lead or liaison counsel, who speaks for all participants. Moreover, the participants generally agree to a method of apportioning costs incurred by the group, sharing both liaison counsel's fees and expenses. Also, the participants usually agree to refrain from cross-acting against one another (for contribution or indemnity) and agree that any adverse judgment(s) shall be (i) shared according to a pre-determined and agreed ratio; or (ii) determined in subsequent arbitration or separate litigation." Jeffrey R. Parsons & David K. Williams, *Considerations Regarding Consolidated Defense Arrangements in Environmental Litigation*, PLI Order No. H4-5143 (1993). The main purpose of such an agreement is to enable the defendants to "co-operate with each other, to avoid pointing fingers at each other, to refrain from unnecessarily assisting the plaintiff's efforts, and to make joint offers of settlement," since "where joint defense agreements are not in place, it is often the case that plaintiffs' attorneys will settle piecemeal with other defendants, obtaining funding for their litigation and, often significant assistance from the settling defendant in developing damaging evidence against a nonsettling defendant, who is then left to face trial as the sole defendant." Jeffrey R. Parsons & David K. Williams, *Considerations Regarding Consolidated Defense Arrangements in Environmental Litigation*, PLI Order No. H4-5128 (1992).

48. Joint representation means that the defendants are represented by the same lawyer or team of lawyers. The use of joint representation to avoid fingerpointing has been extensively discussed in the criminal law literature. *See, e.g.*, Pamela S. Karlan, *Discrete and Relational*

dant tort suits are represented by insurance company counsel who are repeat players in this type of litigation, norms against entering into MCAs are likely to develop. The development of such norms is actively encouraged by the defense bar and the insurance industry. For example, the Federation of Insurance Counsel suggests in its nonbinding code of conduct that insurance carriers "should instruct counsel not to become parties to so-called 'Mary Carter' agreements, to the detriment of general defense interests."⁴⁹ These anti-MCA norms are reinforced, at least in the medical malpractice context, by the strong professional and institutional ties among doctors, particularly those who are insured by the same company or who practice in the same hospital as well as by the traditional reluctance of doctors to testify against one another.⁵⁰ The variety of explicit coordinating devices that have been developed by the defense bar, and the strong anti-Mary Carter norms that have evolved, suggest that while the pressure on defendants to enter into MCAs is strong, it is by no means irresistible. As a consequence, there will be many cases where one or both defendants will have recovery-enhancing information but an MCA will not be entered into.

Even if an MCA is entered into, there are a number of reasons the loan might not be bid up to the theoretical maximum.⁵¹ First, in deciding

Criminal Representation: The Changing Vision of the Right to Counsel, 105 HARV. L. REV. 670, 694 (1992) (noting that "joint representation can help guilty defendants circumvent the prisoner's dilemma"); see also *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting) (suggesting that "[j]oint representation is a means of insuring against reciprocal recrimination").

49. *Guiding Principles*, *supra* note 9, at 361. A report that accompanied the adoption of these principles explained that "while a particular carrier may benefit in the short run [from the use of MCAs] by transferring a loss to another insurer, the shoe may well be on the other foot on the next occasion and an undeserved loss may be visited in return. The only certainty is that such practices ultimately benefit neither the insurance industry nor the public." *Id.* at 363. In addition, other insurance defense bar organizations encourage the development of anti-MCA norms by publishing anti-MCA articles in their journals. See *supra* note 9.

50. In the medical malpractice context, doctors may view the likelihood of cooperation as being quite high. Even in situations where they are called as expert witnesses who have nothing to do with the events at issue, doctors are reluctant to testify against one another. See *supra* note 31 and sources cited therein (discussing the so-called "conspiracy of silence" among doctors). If the surgeon and anesthesiologist in the example discussed in the text did hundreds of operations together each year, or if information about their litigation behavior were readily available to many other doctors they worked with, their behavior in a given lawsuit would also be influenced by how they expected others to behave in subsequent lawsuits. It would therefore be more appropriate to analyze their litigation decisions as a repeat play game. Models of repeat play games have been developed that demonstrate how a norm which results in cooperation (here, never testify against another doctor or never enter into an MCA) most of the time can evolve into a stable, though not unique, equilibrium. This is true even in situations where in a given round of the game (here, a lawsuit) the incentives to defect (here, testify against another doctor or enter into an MCA) are strong, and occasional deviations from the cooperative strategy are observed. See ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE* 9-33 (1986).

51. In a situation where only one defendant can provide the information, the consider-

whether to accept a particular bid, the plaintiff will take into account the possibility that if he "shops" the bid in an effort to obtain a larger loan, there is some probability that the defendants will succeed in colluding before an agreement is reached, thereby leaving the plaintiff's expected recovery below what it would have been had he entered into any MCA in the mutually beneficial range. It may therefore be in his best interest to accept a loan that is below the theoretical maximum.⁵² Second, a plaintiff's lawyer would not want to get a reputation for automatically "shopping" every MCA bid received. If both defendants knew they were negotiating with such a lawyer, each defendant would reason that if he made any offer, an auction would occur that would leave his expected liability equal to what it would be if his codefendant entered into an MCA. In such a situation, each defendant would reason that he is better off not offering to enter into an MCA since if he did so his expected liability would increase.⁵³ Thus, because a plaintiff's lawyer who developed a reputation for shopping every MCA bid would have difficulty negotiating MCAs on behalf of future clients, lawyers have independent incentives to recom-

ations discussed in the text may also explain why the loan offered by the defendant with the information, or the regular settlement offered by the defendant without the information, may not be negotiated up to the top of the mutually beneficial range. *See supra* note 37.

52. In order to understand why the plaintiff might rationally accept an MCA that is far below the largest one that is rational for one of the defendants to offer, consider once again the surgeon-anesthesiologist example in which both defendants could offer the information. Suppose that the surgeon offered the plaintiff a \$4000 MCA. Such an agreement would give the plaintiff an expected recovery of $\$4750 = (25\%)(\$4000) + (75\%)(\$5000)$. In deciding whether to accept this offer, the plaintiff might take into account the possibility that if he rejected the offer and attempted to continue the bidding, the defendants might succeed in colluding before he entered into an MCA with one of them. Assume, for simplicity, the plaintiff has two choices: he can either accept the offer, or reject it and attempt to run an auction until the bidding reaches its theoretical maximum, a \$7500 MCA. Assume further that if he chooses to run the auction there is some probability P that the defendants will succeed in colluding, leaving him with an expected recovery of \$2500. Faced with a \$4000 MCA offer, it would be rational for the plaintiff to accept the bid and end the auction if he thought that the probability of the defendants colluding was over 55%. He would reason that if he accepted the MCA his expected recovery would be \$4750, while if he rejected the offer, the defendants would succeed in colluding with probability P , in which case his expected recovery would be \$2500, and the defendants would be unable to collude with a probability of $(1-P)$, in which case the auction would continue until the bid reached the theoretical maximum, at which point the plaintiff's expected recovery would be \$7500. Therefore, if $\$4750$ (the plaintiff's expected recovery if he accepts the MCA with no further bidding) $> (P)(\$2500) + (1-P)(\$7500)$, the plaintiff would be better off accepting the \$4000 MCA. This condition would hold if P were greater than 55%. Thus, depending on the plaintiff's estimate of the likelihood of successful collusion between the defendants, the plaintiff may feel pressure to enter into an MCA when one is offered and may not try to start an auction.

53. In a situation where only one defendant can offer the relevant information and an auction-like series of negotiations is triggered, the expected liability of the defendant with the information, when the bid reaches its theoretical maximum, is the same as it would have been in the absence of the agreement. *See supra* note 37. Thus, even when only one defendant has the information, an auction-like series of negotiations may deprive the defendant with the information of any benefit she might receive from offering an MCA.

mend that their clients accept offers of MCA loans that are below the theoretical maximum.⁵⁴

2. Agency Costs

Agency costs are another reason that the Mary Carter loan amount may not be negotiated up to the top of the mutually advantageous loan range or bid up to its theoretical maximum in an auction. As the loan amount increases, the plaintiff's incentive to prevail at trial becomes weaker,⁵⁵ and the interests of the Mary Carter defendant (principal) and the plaintiff (agent) become increasingly divergent.

Several common features of MCAs can be understood as partial solutions to this agency problem. Most agreements give the Mary Carter defendant the right to veto any settlement or any settlement below a specified amount between the plaintiff and the nonsettling defendant. The veto prevents the plaintiff from accepting a small settlement from the remaining defendant when litigation costs exceed the expected benefit of going to trial. It is also common for the agreements to include a provision requiring or permitting the Mary Carter defendant to remain in the case as a defendant. When the Mary Carter defendant remains in the case she can closely monitor the plaintiff's lawyer's management of the litigation and can introduce arguments and/or evidence at trial if the plaintiff's lawyer

54. The recognition that the plaintiff might rationally accept a Mary Carter loan that was below the theoretical maximum auction bid and might not necessarily give the other defendant the opportunity to offer a higher bid also helps explain why fear of triggering a Mary Carter auction might not completely eliminate each defendant's incentive to be the first to offer an MCA in a situation where both defendants can offer the relevant information or testimony.

55. As the Mary Carter loan approaches the amount the plaintiff will recover from the nonsettling defendant if he prevails at trial, the plaintiff's incentive to prevail at trial becomes progressively weaker because an increasing proportion of his trial recovery will go towards repayment of the Mary Carter loan. If the loan amount were to equal or exceed the maximum amount the plaintiff would recover if he prevailed at trial, the plaintiff would have no incentive to proceed with the suit. His recovery would be the Mary Carter loan amount regardless of the trial outcome. He would therefore prefer to settle quickly with the remaining defendant or allow a nonsuit to be entered against him. As a consequence, the Mary Carter defendant would not knowingly extend a loan that equaled or exceeded the amount the plaintiff could recover from the nonsettling defendant because none of the loan would be repaid.

The plaintiff too would prefer not to enter into such an arrangement. To understand why, suppose the surgeon were considering whether to offer a \$5000 MCA. Because a \$5000 MCA would give the plaintiff a \$5000 recovery regardless of whether or not he prevailed, the surgeon would reason that her expected liability would be \$5000 since the plaintiff would have no incentive to take the case to trial and the loan would not be repaid. In such a situation, both the surgeon and the plaintiff would be better off if the surgeon offered a \$4500 regular settlement instead. Such a settlement would give the surgeon an expected liability of \$4500 instead of \$5000 and would increase the plaintiff's expected recovery from \$5000 to \$5250 = \$4500 + (25%)(\$3000). Thus the surgeon would never offer a \$5000 MCA since both she and the plaintiff would be better off entering into a \$4500 regular settlement.

fails to do so.⁵⁶

A number of variations on the structure of the repayment clause also provide a partial solution to this agency problem. Some repayment clauses (known as "incentive clauses") specify that the plaintiff and the Mary Carter defendant are to share each dollar recovered in a fixed proportion. Others vary the proportion of each dollar recovered that each party receives depending on the size of the total recovery. By giving the plaintiff a share of each dollar recovered, these clauses help align the incentives of the plaintiff and the Mary Carter defendant.

Another common response to this agency problem is to structure the agreement as a hybrid of a regular settlement and a Mary Carter loan or guaranty. When the agreements are structured in this way they can preserve the plaintiff's incentive to pursue the case while leaving his expected recovery, as well as the expected liability of each defendant, the same as it would have been had a regular MCA been used.

EXAMPLE

Consider once again the Mary Carter auction where, in the absence of agency costs, the top bid would be a \$7500 Mary Carter loan. Such a loan would not give the plaintiff an incentive to pursue the suit because his recovery would be \$7500 regardless of whether or not he prevailed at trial.⁵⁷

If, however, the plaintiff and the Mary Carter defendant were to enter into a hybrid MCA, for example, an agreement consisting of a \$3000 loan and a \$3000 regular settlement, the agency problem would be less severe. The plaintiff would no longer be indifferent between winning and losing at trial. If he prevailed at trial, his net recovery would be \$8000, the \$3000 regular settlement plus the \$3000 Mary Carter loan plus the \$5000 judgment against the nonsettling defendant, less the \$3000 loan repay-

56. The Mary Carter defendant may have other reasons to remain in the case. In a medical malpractice action, for example, a doctor who has entered into an MCA may wish to defend herself out of a desire to protect her professional reputation. See JAMES S. KAKALIK & NICHOLAS M. PACE, *RAND CORPORATION, COSTS AND COMPENSATION PAID IN TORT LITIGATION* 54-55 n.11 (1986). The plaintiff may also want the Mary Carter defendant to remain in the case in order to avoid the "phantom defendant" or "empty chair" problem, see *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1470 (1994), which arises when one defendant settles the case (or is never joined in the first place) and the nonsettling defendant attempts to foist liability on him. For a discussion of the practical effects of the empty chair, see *Quinn & Weaver*, *supra* note 9, at 43; see also *Gold, Vann, & White, P.A. v. DeBerry*, 639 So. 2d 47, 54 (Fla. Dist. Ct. App. 1994) (noting that the MCA recited that the Mary Carter defendant was to remain in the case to prevent the settling defendant from advancing an empty chair defense). When the Mary Carter defendant remains in the case she has an incentive to introduce evidence tending to show that the nonsettling defendant is more culpable, since the greater the proportion of fault allocated to the nonsettling defendant, the greater the amount of money available for repayment of the loan.

57. The plaintiff would reason that if he prevailed he would recover \$5000 from the nonsettling defendant and would repay \$5000 of the Mary Carter loan, leaving him with a total recovery of \$7500, and if he lost he would simply keep the \$7500 loan.

ment. If, however, he lost at trial his net recovery would be only \$6000, the \$3000 Mary Carter loan plus the \$3000 regular settlement.

If the parties entered into this hybrid agreement, the plaintiff's expected recovery would be $\$7500 = (25\%)(\$3000 + \$3000) + (75\%)(\$3000 + \$5000)$, the Mary Carter defendant's expected liability would be $\$3750 = (25\%)(\$3000 + \$3000) + (75\%)(\$3000)$, and the nonsettling defendant's expected liability would be $\$3750 = (75\%)(\$5000)$.

This hybrid MCA therefore both mitigates the agency problem and leaves the plaintiff's expected recovery and each defendant's expected liability the same as it would have been if there were no agency problem and the plaintiff and Mary Carter defendant had entered into a \$7500 Mary Carter loan.

There are also a number of extra-legal considerations which lessen the severity of this agency problem. Both the plaintiffs' bar and the insurance defense bar are well organized, and within particular jurisdictions they are each fairly close knit. Plaintiffs' lawyers and insurance companies are likely to view one another as repeat players.⁵⁸ A plaintiff's lawyer would not want to get a reputation for failing to pursue cases after an MCA was entered into since this would make it more difficult for him to negotiate MCAs on behalf of future clients.

3. Conclusion

Although courts and commentators have recognized that MCAs may induce the Mary Carter defendant to reveal information to the plaintiff, they view this as undesirable since they assume that the type of information the Mary Carter defendant will reveal is most likely to be perjured testimony or the work product of a codefendant's attorney.⁵⁹ However, as the examples presented here suggest, MCAs can also provide incentives for a defendant not to perjure herself or improperly withhold evidence in a situation where she would otherwise have had an incentive to do so. They may therefore have a beneficial effect on the amount of truthful information revealed. In addition, while critics of MCAs often argue that certain common features of MCAs—such as veto provisions, clauses requiring or permitting the Mary Carter defendant to remain in the case, and incentive clauses—can only be understood as attempts to gain improper tactical advantage at trial, the discussion presented here has suggested that these provisions can also be understood as sensible responses to the agency problems created by the agreements themselves.

58. See *supra* note 35 (discussing the reasons that insurance companies are likely to honor their Mary Carter commitments).

59. The information-revealing effect of MCAs was explicitly recognized by the Florida Supreme Court. See *Dosdourian v. Carlsen*, 624 So. 2d 241, 246 (Fla. 1993) (noting that MCAs "pressure the 'settling' defendant to alter the character of the suit by contributing discovery material"). The effect of MCAs on the aggregate amount of perjury is discussed in Part III *infra*.

B. FINANCING HYPOTHESIS

The use and availability of MCAs can serve important financing functions. Money advanced under a Mary Carter loan might provide the plaintiff with the funds needed to pay for hourly fee representation.⁶⁰ Alternatively, the prospect of entering into an MCA might induce contingent fee lawyers to take cases they would otherwise have rejected. MCAs may therefore enable an injured plaintiff to finance a suit that he would not otherwise have been able to bring. In addition, by enabling plaintiffs to pay medical bills or to meet expenses unrelated to the tort, MCAs may reduce the pressure on plaintiffs to enter into regular settlements well below their expected gain from trial.⁶¹

Although some courts and commentators⁶² recognize that MCAs can provide needed litigation financing,⁶³ others suggest that this financing function is better served by contingent fee arrangements.⁶⁴ MCAs, however, can serve a valuable financing function even if contingent fee representation is theoretically available. First, some suits that have a positive expected value to a plaintiff will have a negative expected value to a contingent fee lawyer and will therefore not be brought if the plaintiff is unable to obtain the funds necessary to pay for hourly fee representation.⁶⁵ Second, even if a contingent fee lawyer would be willing to take the

60. Although a plaintiff who is not represented by a lawyer is unlikely to negotiate an MCA on his own behalf, he might have the funds to pay for an initial consultation with a lawyer who could then negotiate an MCA on his behalf.

61. This pressure to settle has been recognized in the settlement literature. See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 234 (1982) (discussing the idea that plaintiffs' need for cash for reasons unrelated to the litigation may induce them to accept low settlements).

62. Bodine, *supra* note 1, at 234.

63. Some courts recognize that an injured person may have an immediate need for cash and may be unable to borrow the needed funds from any other source. See *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301, 1304 (5th Cir. 1986) (noting that the cash advanced under an MCA was used to finance the plaintiff's claim); *Abbott Ford, Inc. v. Superior Court*, 228 Cal. Rptr. 250, 255 (Cal. Ct. App. 1985) ("[O]ne practical effect [of MCAs] is to ensure the survival of the injured plaintiff while negotiating for a fair settlement of the claim or a jury verdict that affords 'maximum recovery.'"), *vacated*, 741 P.2d 124 (1987); *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1060 (Colo. 1986) (money needed for farm and litigation expenses); *Reese v. Chicago, Burlington & Quincy R.R.*, 303 N.E.2d 382, 385 (Ill. 1973) (explaining that loan-receipt devices evolved, in part, to provide plaintiffs with needed funds during the pendency of the litigation); *Northern Ind. Pub. Serv. Co. v. Otis*, 250 N.E.2d 378, 392 (Ind. Ct. App. 1969) (noting that the MCA provided plaintiff with "much needed" litigation financing); *Grillo v. Burke's Paint Co.*, 551 P.2d 449, 452 (Or. 1976) (noting that MCAs "help solve the economic needs of an injured person confronted with the delays in the court system").

64. See, e.g., Martin, *supra* note 8, at 497 (noting that "[t]here is no evidence that in typical cases [where MCAs are used] plaintiffs with meritorious cases cannot proceed to litigate because of lack of funds. Most of these are tort cases that plaintiffs' lawyers typically undertake on a contingency fee basis.").

65. Consider, for example, a case where the plaintiff's recovery if he prevails at trial is \$100. Suppose further that it will cost a lawyer \$45 in time and related expenses to bring the

case, a plaintiff may nevertheless be better off if he is able to obtain hourly fee representation. If the amount of the recovery against the Mary Carter defendant that the plaintiff must give up to obtain the needed funds, plus his total litigation costs,⁶⁶ is less than the implicit cost of contingent fee representation, using an MCA to finance hourly fee representation will increase the plaintiff's expected compensation.⁶⁷

case to trial and that an hourly fee lawyer would bill \$50 for the case. If the plaintiff could hire an hourly fee lawyer, this case would have a positive expected return of \$50. A contingent fee lawyer, working under a standard agreement which gives him a third of any recovery the plaintiff obtains, but requires him to pay almost all litigation costs, would not take this case. He would reason that if the plaintiff won, his fee would be $\$33 = (1/3)(\$100)$. However, he would still have to bear \$45 in costs, making his expected gain negative \$12 if the plaintiff prevailed, and negative \$45 if the plaintiff lost. In such a situation, if the plaintiff entered into an MCA with one of the defendants and used the money to finance hourly fee representation, he might be able to obtain a recovery, in a situation where in the absence of MCAs he would have been unable to pursue his claim. As long as the plaintiff gave up less than \$50 of his total expected recovery to induce the defendant to give him the MCA loan, the claim would have a positive expected return to him.

Although the contingent fee lawyer should be willing to take the case in exchange for a greater percentage of the plaintiff's recovery, many states place strict limits on the maximum allowable contingent fee, particularly in medical malpractice claims, and judges scrutinize contracts that provide for unusually high contingent fee percentages with great care. *See, e.g.*, California Medical Injury Compensation Act of 1975, 4 CAL. BUS. & PROF. CODE § 6146 (West 1990) (amended 1987) (providing a schedule of maximum allowable contingent fee percentages); HAW. REV. STAT. § 607 (1987) (providing that "[i]n all tort actions in which a judgment is entered by a court of competent jurisdiction, attorneys' fees for both the plaintiff and the defendant shall be limited to a reasonable amount as approved by the court having jurisdiction of the action"); *see also* 1986 Conn. Acts 338 (Reg. Sess.) (providing a schedule of maximum allowable contingent fee percentages in all suits for personal injury or wrongful death).

66. Entering into an MCA might also decrease the plaintiff's litigation costs. He would not have to incur the cost of establishing a strong case against the Mary Carter defendant, and the Mary Carter defendant would have an incentive to voluntarily provide the plaintiff with evidence or information that he would otherwise have had to obtain through costly research or civil discovery. *See, e.g.*, *Christofferson v. Michelin Tire Corp.*, 273 Cal. Rptr. 356, 358 (Cal. Ct. App. 1990) (where under the terms of a MCA, the plaintiff was permitted to use the Mary Carter defendant's expert witnesses and his attorney's work product). Furthermore, because information obtained from the Mary Carter defendant may enable the plaintiff to frame more narrowly-tailored discovery requests, an MCA may reduce the cost of obtaining additional information from the nonsettling defendant. The more narrowly discovery requests are framed, the more difficult they are to evade without incurring an unacceptably high risk of sanctions. In addition, if the nonsettling defendant thinks that the Mary Carter defendant might have turned over evidence which indicates that he has the material requested, he would be more likely to turn over the information than he would have been in the absence of the agreement, because his estimate of the likelihood that sanctions would be imposed if he improperly withheld the information would be higher.

67. In theory, the contingent fee percentage might be competed downward to the point where the plaintiff would be indifferent between contingent fee- and MCA-financed hourly fee representation. However, the available data suggest that contingent fee percentages in routine personal injury and medical malpractice cases do not flexibly adjust to reflect the merits of individual claims. *See, e.g.*, KAKALIK & PACE, *supra* note 56, at 38 (reporting that while contingent fee percentages vary in asbestos and toxic tort suits, "a one-third fee is common in ordinary tort litigation"). However, even if contingent fee percentages did adjust

Even in cases where the plaintiff prefers to obtain, or has already obtained, contingent fee representation, MCAs may serve a separate, yet important, financing function. To the extent that contingent fee lawyers have limited access to capital at reasonable interest rates, the availability of MCAs may induce them either to take cases they would otherwise have rejected or to undertake recovery-enhancing expenditures they would not otherwise have made. A contingent fee lawyer might find a case with large discovery and case development costs, such as a products liability claim, more desirable if he thought it likely that he would be able to persuade one of the defendants to enter into an MCA.⁶⁸ The money advanced under such an agreement would at least partially finance discovery and the hiring of experts; it would ensure that even if the plaintiff lost the case, the lawyer would not bear the entire cost of the suit out-of-pocket. Even in a routine personal injury case, a liquidity-constrained contingent fee lawyer might find it desirable to enter into an MCA if it gave him the money necessary to hire an investigator or a more expensive expert whose participation in the case would increase the plaintiff's probability of prevailing.

Regardless of the form of legal representation selected, MCAs may serve additional financing functions. In personal injury cases plaintiffs often have an immediate need for money to pay medical bills or to meet expenses unrelated to the tort.⁶⁹ Because they may be unable to borrow money at reasonable interest rates, they will often feel a strong pressure to settle.⁷⁰ In such a situation, a Mary Carter loan can ease the plaintiff's immediate need for cash, thereby reducing the financial pressure to accept a relatively small regular settlement in complete satisfaction of the claim.⁷¹

to reflect the merit of a plaintiff's claim, he might prefer to hire an hourly fee lawyer because in some types of cases hourly fee representation creates less serious agency problems than contingent fee representation. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987) (comparing and contrasting the agency problems in contingent fee and hourly fee representation).

68. Interestingly, the first set of interrogatories in the current silicone breast implant litigation asked whether the plaintiff had entered into MCAs with any of the defendants. See Aaron M. Levine, *From the Manufacturer's Standpoint*, in LITIGATING BREAST IMPLANT CASES: A SATELLITE PROGRAM (PLI Litig. & Admin. Prac. Course Handbook Series No. 263, 1992).

69. See, e.g., *Gold, Vann & White, P.A. v. DeBerry*, 639 So. 2d 47, 54 (Fla. Dist. Ct. App. 1994) (describing an MCA made "[i]n consideration of the [p]laintiffs' financial strain in attempting to care for the extraordinary needs of [the injured person], which have resulted in the severe need to recover some monies immediately to stave off having to give up a wheelchair livable home").

70. In all but five states, attorneys are prohibited from loaning money to clients to help them meet expenses during the pendency of the litigation. See Dawn S. Garrett, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 U. DAYTON L. REV. 221, 236 n.71 (1990). In addition, because the five states that permit attorneys to loan clients money for expenses nonetheless prohibit making the obligation to repay such loans contingent on the outcome of litigation, these loans may be far less desirable to plaintiffs than Mary Carter loans, which need not be repaid if the plaintiff loses.

71. Even a small MCA may be beneficial to a very risk-averse plaintiff. This is particularly

In some circumstances, the Mary Carter loan may also enable the plaintiff to minimize the harm (damages) he suffers by enabling him to get immediate medical attention that he would not otherwise have been able to afford.

Although a plaintiff may be able to obtain some financing by entering into a regular settlement, he may prefer to enter into an MCA instead. First, a defendant should be willing to advance the plaintiff a larger sum in the form of a Mary Carter loan than she would in the form of a regular settlement since at least part of the loan may be repaid.⁷² An MCA may therefore give the plaintiff a larger litigation "war chest" than a regular settlement. Second, if a regular settlement is entered into, the settling defendant will not remain in the case and the nonsettling defendant may therefore be able to take advantage of the "empty chair" to persuade the trier of fact to allocate a greater share of the fault to the settling defendant, thereby reducing the amount the plaintiff will recover at trial.⁷³

Thus, MCAs can serve important financing functions, giving some plaintiffs money to pay medical bills or to meet expenses unrelated to the tort and enabling other plaintiffs to hire an hourly fee lawyer either at a lower effective rate than a contingent fee lawyer or for a case that a contingent fee lawyer would be unwilling to take. In addition, by making some cases with high case development costs more attractive to contingent fee lawyers, the availability of MCAs may increase the likelihood that plaintiffs with these types of claims will be able to find contingent fee representation.

C. RISK ALLOCATION HYPOTHESIS

Another motivation for MCAs is to reallocate some of the risk and uncertainty associated with trial outcomes from a risk-averse plaintiff to a

true if the loan covers those costs that a tort plaintiff bears even when he is represented on a contingent fee basis. These costs include the cost of the plaintiff's time and the litigation expenses he must bear out-of-pocket. Although personal injury lawyers rarely attempt to collect even those expenses that the plaintiff is obligated to bear under the standard contingent fee contract (the provisions are typically included to avoid a conflict with the relevant state code of professional responsibility), a recent RAND study found that the "cost of plaintiffs' time and expenses other than legal fees and expenses" was \$364-\$663 for automobile injury cases filed in state court, \$1302-\$1667 for automobile cases filed in federal court, \$1660-\$2029 for other tort cases filed in state court, and \$1761-\$2053 for other tort cases filed in federal court. See KAKALIK & PACE, *supra* note 56, at 43.

72. In addition, in a situation where both defendants were overly optimistic in estimating their relative percentages of fault, a common occurrence in multidefendant litigation, see *infra* note 78, the maximum regular settlement that the plaintiff could obtain from either defendant might be so low that entering into an MCA might be the only way that the plaintiff could obtain the money needed to finance the suit.

73. For a discussion of the "empty chair" or "phantom defendant" problem, see *supra* note 56 and sources cited therein. Sometimes settling defendants remain in the case even when MCAs are not used, see *Everman v. Superior Court*, 10 Cal. Rptr. 2d 176 (Cal. Ct. App. 1992), but this is rare because regular settlements often give the settling defendant no incentive to participate at trial.

more nearly risk-neutral defendant, most commonly an insurance company.⁷⁴ The fact that MCAs are sometimes entered into after the plaintiff has rested his case, or after the case has gone to the jury,⁷⁵ suggests that risk allocation may be the primary motivation for at least some MCAs.

Contingent fee lawyers who are somewhat risk averse will also find MCAs attractive since they reduce the downside risk of taking a case to trial. The availability of such agreements might also make them more willing to take suits that involve large cash outlays because, if an MCA is entered into, there will be less of a chance that they will have to bear large out-of-pocket losses.

In addition, in certain types of cases, primarily those involving relatively low probabilities of recovery but extraordinarily high damages, a defendant insurance company—fearing that if the plaintiff prevailed it would be sued by its insured for bad faith failure to settle⁷⁶ and would have to pay out far in excess of policy limits (usually the amount of the adverse judgment plus punitive damages)—might find it desirable to enter into an MCA that would limit its total exposure even though it might increase its expected liability. The mere existence of the MCA is usually sufficient to protect an insurer from a successful suit for bad faith failure to settle.

D. CONCLUSION

This Part has demonstrated that contrary to the view of most courts and commentators, there are a variety of legitimate reasons why parties might find it advantageous to enter into an MCA. The only one of these rationales acknowledged by courts and commentators is the financing hypothesis.⁷⁷ However, this is generally dismissed as unimportant given the availability of contingent fee arrangements. This Part has also argued that several features of MCAs long viewed as ways of attempting to gain an unfair tactical advantage at trial, such as the veto provision and the fact that the Mary Carter defendant often remains in the case, can also be

74. See, e.g., KAKALIK & PACE, *supra* note 56, at 37 (reporting that in tort litigation, 93% of plaintiffs are individuals, while 59% of defendants are insurance companies, other businesses, or government agencies).

75. MCAs are sometimes entered into relatively late in the litigation process. See, e.g., *Taylor v. DiRico*, 606 P.2d 3, 6 (Ariz. 1980) (MCA entered into after the close of all evidence); *Sequoia Mfg. Co. v. Halec Constr. Co.*, 570 P.2d 782, 793 (Ariz. Ct. App. 1977) (MCA entered into the night before the plaintiff rested his case); *Franklin v. Guralnick*, 477 N.E.2d 405, 406 (Mass. 1985) (MCA entered into during jury deliberation); *Johnson v. Moberg*, 334 N.W.2d 411, 415 (Minn. 1983) (MCA entered into after the parties rested).

76. A suit for bad faith failure to settle is one in which an insured sues his insurance company alleging that the insurer, acting in bad faith, refused to settle a claim within policy limits. See, e.g., *Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1505 (10th Cir. 1994).

77. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1159 n.7 (5th Cir. 1985) (noting "that properly disclosed Mary Carter agreements serve a legitimate function of providing litigants with capital with which to continue prosecution of their claims").

understood as sensible responses to some of the agency problems created by the agreements. Having explored a number of the legitimate reasons parties might choose to enter into MCAs,⁷⁸ it is interesting to re-evaluate their social desirability and to reconsider some of the arguments that are most frequently made against their use.

III. THE SOCIAL DESIRABILITY OF MCAs

This Part draws on the hypotheses and examples presented in Part II to explore the effect of the use and availability of MCAs on compensation and deterrence, settlement, fairness, and accuracy in a jurisdiction that applies a proportionate share settlement set-off rule.⁷⁹ It also critically examines some of the policy arguments advanced by courts and commentators as reasons to prohibit MCAs or to place conditions or limitations on their use. This Part concludes that, to the extent that the hypotheses presented in Part II explain the use of MCAs, the availability of these agreements is likely to further the compensatory and deterrent goals of

78. There is an additional reason that parties might choose to enter into an MCA. In a multidefendant tort case, even in a situation where the plaintiff's expected gain from trial is less than either defendant's view of the defendants' total liability, so that a settlement range would have existed had the tort been committed by a single tortfeasor, a settlement range may not exist due to each defendant's over-optimism in estimating his proportionate share of fault. According to the Association of Insurance Defense Counsel and the Association of Insurance Attorneys, this is an important reason that multidefendant suits sometimes fail to settle. See Schultz, *supra* note 9, at 18 (noting that "[a]n incentive, and perhaps a prerequisite, for a joint settlement is the practical realization by each defendant of his potential liability to the plaintiff in comparison with the potential liability of the other defendants"); MILLER, *supra* note 9, § 7.11 (suggesting that the inability of the defendants to agree on an allocation of fault among them is one of the main barriers to the settlement of a multidefendant lawsuit). In some such situations, an MCA can lead to at least partial settlement of a claim where in its absence no settlement would be reached. Suppose the plaintiff sues two defendants, and all parties estimate that the plaintiff's damages are \$100. They disagree, however, on the plaintiff's probability of prevailing and on the apportionment of liability among the defendants. The plaintiff believes that his probability of prevailing is 40% and that each defendant is responsible for 50% of the damages. The first defendant (D1) thinks that the plaintiff has a 75% chance of prevailing, but that she is only 25% at fault. Similarly the second defendant (D2) thinks that the plaintiff has a 75% chance of prevailing, but that he is only 25% at fault. Plaintiff and D1 would both be willing to enter into a Mary Carter loan for between \$33 and \$50 (when agency costs are taken into account, neither defendant would be willing to extend \$50 or more in a nonhybrid MCA loan since such loans would make the plaintiff indifferent between winning and losing at trial). Suppose they enter into a \$40 MCA. The plaintiff would estimate his expected recovery to be $\$44 = (60\%)(\$40) + (40\%)(\$50)$, which is higher than his estimate of his expected recovery without the MCA, $\$40 = (40\%)(\$100)$. D1 would also perceive such an agreement to be beneficial, because she thinks there is a 75% chance that the plaintiff will recover 75% of his damages from the other defendant, in which case the entire loan will be repaid. She therefore estimates that her expected liability will be $\$10 = (75\%)(\$0) + (25\%)(\$40)$ if she enters into an MCA, which is less than her estimate of her non-MCA expected liability of $\$18.75 = (75\%)(25\%)(\$100)$.

79. Part IV of this article explores the extent to which the analysis and conclusions presented here might be different in jurisdictions that applied other settlement set-off rules.

tort law⁸⁰ without adversely affecting the settlement rate, distorting the fair allocation of liability among defendants, or reducing adjudicative accuracy.

A. COMPENSATION AND DETERRENCE

The use and availability of MCAs is likely to increase plaintiffs' compensation. In some instances, MCAs will increase plaintiffs' expected trial recoveries. In other circumstances, MCAs will decrease plaintiffs' expected trial recoveries, but may nonetheless increase compensation by relieving the pressure on plaintiffs to accept settlements far below their expected trial recoveries. MCAs may also increase compensation by enabling plaintiffs to finance some meritorious suits that they would not otherwise have brought. Because MCAs are likely to increase plaintiffs' expected compensation, they are also likely to increase defendants' view of their expected liability. As a consequence, the use and availability of MCAs may enhance deterrence by inducing some defendants, who in the absence of such agreements would have exercised a socially suboptimal amount of care, to exercise the socially optimal level of care.⁸¹

80. There is a debate in the tort literature over whether compensation or deterrence is the fundamental purpose of the tort system. The economic approach views the goal of tort law as achieving optimal deterrence of harm-causing behavior, that is, minimizing "the sum of accident losses and the costs of accident prevention." STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 3 (1987); *see also* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 23 (1987). The more traditional approach to tort law views the compensation of injured plaintiffs as the primary goal of tort law. *See, e.g.*, W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 7 (5th ed. 1984) (suggesting that tort law's "primary purpose is to compensate [the injured individual] for the damage suffered, at the expense of the wrongdoer"). For the purposes of assessing the social desirability of MCAs, however, it is unnecessary to choose between these goals since MCAs tend to both increase plaintiff compensation and enhance deterrence.

81. The socially optimal level of care is that level of care that minimizes the total social costs of the defendants' behavior—that is, the level of care that minimizes the sum of the cost of precautions and the expected external cost of the behavior. *See* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 348-49 (1988). In some instances, defendants will have an incentive to take the socially optimal level of care even when their expected liability is far below the harm they cause. *See, e.g., id.* at 351 (explaining that all that is required to induce a defendant to take the "social cost-minimizing amount of precaution . . . [is] that the sanction be large enough so that his [the defendant's] private costs are minimized by conforming to the legal standard"). If defendants are already exercising the socially optimal level of care, increasing their expected liability will not induce them to take more care and will therefore have no effect on deterrence. If, however, defendants are exercising below optimal care, increasing their expected liability may increase the amount of care they exercise and hence increase deterrence, but it may also leave the care level they select unchanged. In general, increasing the defendants' joint expected liability will not lead them to exercise less care, so if MCAs tend to increase defendants' joint expected liability, they may enhance deterrence. *But see* Marcel Kahan, *The Incentive Effects of Settlements Under Joint and Several Liability* (1994) (Harvard Working Paper Series in Law and Economics, No. 53) (demonstrating that when a defendant can choose from several levels of care, increasing his expected liability for each level of care may, in some circumstances, reduce his incentive to take care by reducing the marginal benefit he obtains from each additional unit of care).

MCAs will have the greatest impact on plaintiffs' expected recoveries when they are motivated by the information hypothesis. When either defendant can provide the information and an auction takes place, the plaintiff's expected recovery will increase, and may, in theory, even reach his expected trial recovery with full information. Because the agreements increase the expected liability of each defendant,⁸² they may enhance deterrence. When only one defendant can offer the relevant information, the plaintiff's expected trial recovery will also increase. In such a situation, however, while MCAs increase the expected liability of the nonsettling defendant, they decrease the expected liability of the Mary Carter defendant. If, at the time each potential defendant decides whether or not to engage in the activity and selects his level of care, one potential defendant is able to predict that in the event the activity causes harm he will become the Mary Carter defendant, the availability of MCAs may decrease deterrence.⁸³ If, however, neither potential defendant can predict that he will be chosen as the Mary Carter defendant, the use and availability of the agreements may enhance deterrence because it will increase the defendants' view of their joint expected liability.

When an MCA is motivated by the financing hypothesis, its effects on compensation and deterrence will depend on the reasons that the plaintiff needs the funds. If the plaintiff uses the money advanced under the Mary Carter loan to hire an hourly fee lawyer in a situation where a contingent fee lawyer would have been unwilling to take the case, the agreement will increase the plaintiff's expected compensation (from \$0 to the plaintiff's expected recovery). By increasing the likelihood that a suit will be filed, the availability of these agreements may increase the defendants' view of their expected liability and may therefore enhance deterrence. If, however, the agreement enables the plaintiff to hire an hourly fee lawyer at a cost that is below the implicit cost of contingent fee representation, the agreement will increase the plaintiff's expected compensation but should leave deterrence unchanged.

When the plaintiff's motivation for entering into an MCA is to finance expenditures other than litigation expenses or to ensure a fixed minimum recovery by reallocating some of the risk of loss to one of the defendants, entering into an MCA will decrease his expected trial recovery. His ex-

It is important to note that because under most settlement set-off rules MCAs do not enable the plaintiff to obtain more than a full recovery (that is, an amount equal to the actual harm the plaintiff suffered), *see infra* Part IV, the danger of overdeterrence is slight. *But see infra* note 136.

82. *See supra* text and example accompanying notes 39-44.

83. When one potential defendant anticipates being the Mary Carter defendant if the activity causes harm, the extent to which MCAs may decrease deterrence depends on whether the tort is a simultaneous joint care tort, an alternative care tort, or a successive joint care tort. For an explanation of these type of multidefendant torts, see LANDES & POSNER, *supra* note 80, at 190-227.

pected recovery from the nonsettling defendant should remain unchanged, but he must give up part of his expected recovery from the Mary Carter defendant to induce her to enter into the agreement.⁸⁴ However, by alleviating the pressure to accept a low regular settlement in complete satisfaction of the claim, the MCA may nevertheless increase the amount of compensation he receives.⁸⁵

The effect of MCAs on deterrence when the agreements are motivated by risk allocation or a need for cash depends, in part, on whether the availability of such agreements increases potential tortfeasors' view of their expected liability. Defendants' evaluation of their expected liability is based not only on their estimate of their expected liability at trial, but also on their view of the likelihood that the case will settle and the amount they will have to pay if it does. As a consequence, even MCAs that decrease plaintiffs' expected trial recoveries might increase defendants' *ex ante* view of their expected liability, since they make plaintiffs less likely to accept low settlement offers in complete satisfaction of their claims. Thus, the effect on deterrence of MCAs motivated by plaintiffs' risk aversion or need for cash cannot be predicted with certainty.

The availability of MCAs may also increase the amount that the defendants are willing to offer in a regular settlement. To the extent that the availability of MCAs decreases the defendants' estimate of the likelihood that they will be able to collude until a full settlement is reached or a judgment is rendered, the availability of such agreements should increase the defendants' view of their joint expected liability which may, in turn, increase the amount they are willing to offer in settlement since it becomes more difficult to maintain defendant collusion over time.⁸⁶ Thus, the mere

84. The plaintiff will have to give up part of his expected recovery against the Mary Carter defendant to induce her to enter into the MCA. However, since most defendants in these types of cases are insurance companies who can easily advance the needed funds, a financing auction may take place which should result in terms favorable to the plaintiff.

85. See Cooter et al., *supra* note 61, at 234-37.

86. To better understand why the availability of MCAs might increase defendants' initial settlement offers, consider once again the example where both the surgeon and anesthesiologist could provide the recovery-enhancing information. Suppose that immediately after the plaintiff served them with process, they held a joint conference with their lawyers to discuss settlement. The maximum settlement they would offer depends, in part, on their estimates of the likelihood that if the plaintiff rejected their offer, they would be able to successfully collude to prevent revelation of the inculpatory information until a full settlement was reached or the case was submitted to the jury. If, for example, the defendants thought that the likelihood of successful collusion was 100%, the maximum they would offer is their expected loss from trial assuming that collusion is successful, here \$2500. If, however, the availability of MCAs led defendants to believe that the likelihood of successful collusion was only 50%, they would be willing to offer a higher settlement at the outset. They would reason that if collusion were successful, they would face a 25% chance of paying \$10,000, for a joint expected liability of \$2500, and if collusion were not successful, a Mary Carter auction would take place so that they would (if the auction reached its theoretical maximum, *but see supra* notes 51-54 and accompanying text) face a joint expected liability of \$7500. As a consequence, it would be rational for them to offer a settlement equal to their joint expected

availability of MCAs may lead defendants to offer regular settlements that are greater than what the plaintiff's expected trial recovery would have been if such agreements were unavailable.

The use and availability of MCAs may also increase plaintiff compensation and enhance deterrence by making certain types of cases more attractive to contingent fee lawyers. For example, by decreasing the likelihood that conspiracies of silence among defendants will succeed, the availability of MCAs should increase the plaintiffs' expected recoveries in certain types of cases. This should in turn induce contingent fee lawyers to take cases they would otherwise have rejected. Similarly, the availability of MCAs should make risk-averse or liquidity-constrained contingent fee lawyers more willing to take cases with high case development costs, such as products liability suits, because if the lawyer is able to negotiate an MCA, she will not have to bear the case development costs out-of-pocket if the plaintiff loses. Thus, by enabling plaintiffs to bring some suits that otherwise would not have been brought, the availability of MCAs will increase compensation and may enhance deterrence.

In sum, the use and availability of MCAs are unlikely to decrease and quite likely to increase plaintiffs' compensation— by increasing plaintiffs' expected trial recoveries, by relieving the pressure on plaintiffs to accept small regular settlements, or by enabling plaintiffs to finance meritorious suits that they otherwise would not have brought. As a consequence, the use of such agreements may also enhance deterrence by increasing defendants' view of their expected liability.

In addition to the theoretical reasons for believing that the use and availability of MCAs tend to increase plaintiff compensation, the fact that organizations of the plaintiffs' bar filed amicus briefs arguing for their legality in recent Texas and Florida Supreme Court cases and that organizations representing the insurance industry and the defense bar as well as several medical associations filed amicus briefs arguing that MCAs should be declared void as against public policy,⁸⁷ suggests that such agreements

liability assuming that there was a 50% chance of collusion, here $\$5000 = (50\%)(25\%)(\$10,000) + (50\%)(\$7500)$, an increase of \$2500 over what they would have offered had MCAs been unavailable. Even if only the surgeon could provide the information, the defendants might be willing to offer more in settlement than they would if MCAs were unavailable, because their joint expected liability if collusion was successful would be \$2500 and their joint expected liability if a sequence of auction-like negotiations took place would be \$5000. Because the surgeon's expected liability would not exceed \$1250 even if the defendants were unable to collude and the MCA was bid up to its theoretical maximum, she would only be willing to contribute somewhat less than this amount to a settlement. However, by threatening to enter into an MCA and reveal information that would increase the anesthesiologist's expected liability, she might be able to persuade the anesthesiologist (who does not have the information) to contribute to a joint settlement offer some amount just under what his expected liability would be if the surgeon entered into the MCA and information were revealed.

87. See, e.g., Amicus Curiae Brief of Academy of Florida Trial Lawyers, *Dosdourian v.*

generally benefit plaintiffs and are detrimental to defense interests.⁸⁸

B. SETTLEMENT

Most courts⁸⁹ and commentators conclude that while MCAs encourage partial settlement,⁹⁰ they either “make litigation inevitable, because they grant the settling defendant veto power over any proposed settlement”⁹¹ or lead to a “diminution of [the] chances for a full settlement. . . [because] the non-agreeing defendant is hard pressed to offer an appealing settlement.”⁹² This section demonstrates that the use of an MCA does not necessarily preclude full settlement of a claim.

In analyzing the effects of veto provisions, courts and commentators suggest that the Mary Carter defendant will automatically veto all settlement offers that would result in less than full repayment of the Mary Carter loan. They fail to recognize, however, that even after parties enter into an MCA, the Mary Carter defendant’s expected liability is not necessarily zero. As a consequence, it will not be in her best interest to veto all settlements that result in less than full repayment of the loan. In fact, the Mary Carter defendant will not have an incentive to veto any settlement that, after partial repayment of the loan, will leave her liability below her expected liability if the case went to trial.

Critics of MCAs also suggest that MCAs will create a “roadblock against

Cartsen, 624 So. 2d 241 (Fla. 1993) (No. 78,370) (brief filed by an association of plaintiffs’ lawyers); Amicus Curiae Brief of American Insurance Association, *Dosdourian*, 624 So. 2d 241 (brief filed by a trade association whose members “underwrite approximately 33.3% of the commercial insurance coverage in Florida”); Amicus Curiae Brief of Texas Trial Lawyers’ Association, *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992) (No. D-1163); Amicus Curiae Brief of Texas Association of Defense Counsel, *Elbaor*, 845 S.W.2d 240.

88. See also *supra* note 49 and accompanying text (discussing the variety of ways that associations of the defense bar attempt to discourage the use of MCAs).

89. The California Supreme Court is, however, a notable exception. In *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 131-32 (Cal. 1987), the court noted that in some contexts the availability of MCAs might actually increase the number of full settlements since defendants who wished to settle the claim fully could use the threat of entering into an MCA to coerce a recalcitrant defendant to settle.

90. Achieving partial settlement of a multidefendant suit may be desirable. It enables the settling defendant to get on with her business knowing that her maximum liability is fixed. It removes the “cloud on title” effect of the lawsuit, that is, the discount on the value of an asset held by the defendant (such as her professional reputation) that is caused by the uncertainty created by the existence of the litigation. For a discussion of the cloud on title effect of lawsuits, see Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993). Partial settlement is also beneficial to the plaintiff since it makes it largely unnecessary for him to prove his case against the settling defendant.

91. *Elbaor*, 845 S.W.2d at 248; see also *Dosdourian*, 624 So. 2d at 245 (noting that because “[s]ome agreements . . . give the settling defendant veto authority over a prospective settlement with the other defendant . . . the existence of Mary Carter agreements may result in an increased number of trials”).

92. MILLER, *supra* note 9, § 18.62.

full settlements,"⁹³ because once parties have entered into an MCA, the nonsettling defendant would be unwilling to offer a settlement that the plaintiff would accept. Although, as the example below illustrates, critics are correct that a settlement range may not exist between the plaintiff and the nonsettling defendant, a full settlement of the claim can often be reached if the Mary Carter defendant is included in the settlement negotiations.

EXAMPLE

Returning to the example of the surgeon and anesthesiologist, once the plaintiff and the surgeon have entered into a \$3000 MCA, the plaintiff's expected recovery is, assuming that the surgeon tells the truth, \$4500.⁹⁴ Therefore the minimum settlement the plaintiff would accept from the anesthesiologist is one that would, after repayment of the Mary Carter loan, leave him at least as well off as he would have been if the case went to trial. He would therefore demand a settlement of at least \$4500. The maximum settlement the anesthesiologist would offer, however, is an amount equal to his expected liability, here \$3750. As a consequence, there is no settlement that it would be rational for the anesthesiologist alone to offer, that it would be rational for the plaintiff to accept.⁹⁵

If, however, the surgeon were included in the settlement negotiations, a complete settlement could be reached. Because the surgeon's expected liability is \$750, she should be willing to agree to any settlement that left her liability equal to or below this amount. Therefore, the surgeon would have no reason to veto a settlement that required her to accept \$2250 in full satisfaction of the loan, making her liability \$750 (which is the same as her expected liability if the case went to trial), and required the anesthesiologist to pay the plaintiff \$3750.⁹⁶ Under such a settlement the plaintiff would retain \$750 of the loan and receive \$3750 from the anesthesiologist, for a total recovery of \$4500, his expected recovery if the case went to trial, and the anesthesiologist's liability would be \$3750, the same as his expected liability if the case went to trial.

93. *Id.*

94. The surgeon's expected liability if she told the truth would be \$750, and her expected liability if she did not tell the truth would be \$2250.

95. The example presented in the text suggests that it would never be necessary for the surgeon to exercise the veto since any settlement that the plaintiff would be willing to accept from the anesthesiologist would result in full repayment of the loan. However, taking into account that litigation costs may be substantial, and that parties' estimates of the probability that the plaintiff will prevail, the amount of the plaintiff's recovery if he prevails, and the allocation of fault among defendants may change over the course of the litigation, suggests that the veto may give the Mary Carter defendant a check, albeit a highly imperfect one, on certain types of plaintiff opportunism.

96. Alternatively, the Mary Carter defendant might agree to contribute \$750 to a joint settlement offer, so that the plaintiff would receive \$4500 from the defendants and would then return the \$3000 paid under the initial MCA to the Mary Carter defendant.

Although the need to include both the Mary Carter defendant and the nonsettling defendant in settlement negotiations may be viewed as a barrier to complete settlement,⁹⁷ this problem can be avoided if the MCA includes a provision specifying a different repayment obligation if the plaintiff settles with the remaining defendant. In the example presented above, had the MCA provided that the plaintiff had to repay only \$2250 of the loan if he settled with the anesthesiologist, he would have been willing to accept \$3750 in settlement from the anesthesiologist. It is common for MCAs to contain such provisions.

There is, however, another way that the availability of MCAs may decrease the settlement rate. When MCAs are motivated by the financing or risk allocation hypotheses, they may relieve the financial pressure on the plaintiff to settle, causing some suits that might otherwise have settled to go to trial. These settlements, however, would most likely have been socially undesirable. For example, if inability to finance the litigation, the need to secure a fixed minimum recovery, or an immediate need for money to pay medical bills would have led the plaintiff to accept an early settlement far below the harm he suffered, such a settlement would be socially undesirable, because it would serve neither the compensatory nor, perhaps, the deterrent functions of tort law.

C. FAIRNESS

Many courts and commentators maintain that MCAs are "unfair" because they create a significant risk that the plaintiff could be under-compensated, that the nonsettling defendant could be required to pay more than his "fair" or proportionate share of the plaintiff's damages, and that the Mary Carter defendant could wind up paying less than her "fair" share of the total liability.⁹⁸ They are especially concerned that in situations where the defendants are not equally at fault, the more culpable defendant might be more likely than the less culpable defendant to become the Mary Carter defendant and thereby "escape" from all or most of her liability. This section demonstrates, however, that in a jurisdiction that applies a proportionate share set-off rule,⁹⁹ MCAs do not create a greater risk of these types of unfairness than regular settlements and that in situations where the defendants are not equally culpable, the more cul-

97. For a case which suggests that the plaintiff and the nonsettling defendant tried (albeit unsuccessfully) to bargain around an MCA by attempting to persuade the Mary Carter defendant to reduce the extent of the plaintiff's repayment obligation, see *Thompson v. Continental Emsco Co.*, 629 F. Supp. 1160 (S.D. Tex. 1986).

98. See, e.g., *Bass v. Phoenix Seadrill/78, Ltd.*, 562 F. Supp. 790, 796 (E.D. Tex. 1983), *rev'd*, 749 F.2d 1154 (5th Cir. 1985) (noting that "[i]t strikes the court as manifestly unfair that an allegedly negligent joint tortfeasor can settle with a plaintiff, thereby limiting his liability at trial, and then get a refund from damages paid by the nonsettling tortfeasors").

99. For a discussion of the effect of MCAs on fairness under other set-off rules, see *infra* notes 141-47 and accompanying text.

pable defendant is no more likely than the less culpable defendant to be chosen as the Mary Carter defendant.

First, the use and availability of MCAs tend to increase plaintiffs' expected compensation and the fact that MCAs are voluntarily entered into by plaintiffs and are favored by the plaintiffs' bar strongly suggests that these agreements are not unfair to plaintiffs. Second, under a liability regime of comparative fault, in a jurisdiction that applies the proportionate share set-off rule, MCAs are unlikely to result in the nonsettling defendant paying for more than his fair share of the plaintiff's damages because the judgment against him is reduced by the percentage of fault allocated to the Mary Carter defendant, multiplied by the plaintiff's damages.¹⁰⁰ Third, while an MCA may result in the Mary Carter defendant paying less than her fair share of the plaintiff's damages, it may also, depending on the outcome of the suit, result in her paying more than her fair share. If, for example, the defendants were found to have exercised due care and the plaintiff did not prevail, the Mary Carter defendant would have to forgo repayment of the loan. A similar risk of underpayment or overpayment is also present when the plaintiff enters into a regular settlement with one tortfeasor in a multidefendant suit because depending on the trial outcome and the amount of the judgment, the settlement could result in the settling defendant paying more or less than his fair share. Thus, the risk of underpayment by one tortfeasor in cases where MCAs are used is no different than the risk of underpayment in a case where one tortfeasor enters into a regular settlement with the plaintiff.

Finally, most courts and commentators maintain that MCAs are particularly unfair in cases where the defendants are not equally at fault, since the more culpable defendant will be chosen as the Mary Carter defendant and will therefore "escape" from all or most liability.¹⁰¹ However, as the example presented below illustrates, in a case where the defendants are not equally at fault but can both provide the recovery-enhancing information, if a Mary Carter auction takes place, the maximum hybrid MCA that could be offered by the less culpable defendant would give the plaintiff the same expected recovery and each defendant the same expected liability as the maximum hybrid MCA offered by the more culpable defendant.

100. If, however, the existence of the MCA caused the Mary Carter defendant to commit perjury or to testify in a way that increased the percentage of fault that the jury assigned to the nonsettling defendant, it is possible that the nonsettling defendant will be responsible for a larger proportion of the plaintiff's damages than he would have been had the plaintiff either gone to trial against both defendants or entered into a regular settlement with one of them. However, as discussed *infra* notes 103-06 and accompanying text, the Mary Carter defendant's incentive to commit perjury related to the issues of liability and the allocation of fault has been exaggerated by courts and commentators.

101. See, e.g., *Elbaor v. Smith*, 845 S.W.2d 240, 249 (Tex. 1992) (stating that MCAs "motivate more culpable defendants to 'make a 'good deal' (and thus) end up paying little or nothing in damages' ") (quoting *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 9 (Tex. 1986)).

EXAMPLE

Consider once again the situation of the surgeon and anesthesiologist where the plaintiff's total damages are \$10,000, his probability of prevailing in the absence of an MCA is 25% and his probability of prevailing with an MCA is, assuming that the Mary Carter defendant tells the truth, 75%. Assume further that the surgeon's percentage of fault if the plaintiff prevails is 30%, the anesthesiologist's percentage of fault is 70%, that either defendant can provide the information, and that the parties are cognizant of agency costs so that the more culpable defendant (the anesthesiologist) will not offer an MCA loan greater than or equal to \$3000 and the less culpable defendant (the surgeon) will not offer an MCA loan greater than or equal to \$7000. In such a situation, the surgeon would be willing to enter into any agreement that left her expected liability below her expected liability if the anesthesiologist entered into an MCA, here \$2250, and the anesthesiologist would be willing to enter into any agreement that left his expected liability below his expected liability if the surgeon entered into an MCA, here \$5250.

Suppose that the less culpable defendant offered the plaintiff a \$6000 Mary Carter loan. The plaintiff's expected recovery would then be $\$6750 = (75\%)(\$7000) + (25\%)(\$6000)$. Although the more culpable defendant could not match the \$6000 Mary Carter loan or offer enough in a regular settlement to induce the plaintiff to forgo the MCA, both he and the plaintiff would be better off entering into a hybrid MCA consisting of a \$4250 regular settlement and a \$2000 Mary Carter loan. The plaintiff's expected recovery if he entered into this hybrid would be $\$7000 = \$4250 + (75\%)(\$3000) + (25\%)(\$2000)$, which would be greater than his expected recovery had he entered into the \$6000 loan with the less culpable defendant. The more culpable defendant's expected liability if he entered into this hybrid would be $\$4750 = \$4250 + (25\%)(\$2000)$, which is less than what his expected liability would have been if the less culpable defendant entered into an MCA with the plaintiff.

While the hybrid offered by the more culpable defendant would give the plaintiff a larger expected recovery than the \$6000 MCA loan offered by the less culpable defendant, the less culpable defendant could offer a hybrid MCA that was even more attractive. She might, for example, offer a hybrid consisting of a \$6000 loan and a \$500 regular settlement. The plaintiff's expected recovery if he entered into this agreement would be $\$7250 = \$500 + (75\%)(\$7000) + (25\%)(\$6000)$, which is larger than what his expected recovery would be if he entered into the hybrid offered by the more culpable defendant. The less culpable defendant's expected liability under such an MCA would be $\$2000 = \$500 + (25\%)(\$6000)$, which would be less than her expected liability if the plaintiff had entered into an MCA with the more culpable defendant.

This process of bid and counter bid could continue until the more culpable defendant offered a hybrid consisting of, for example,¹⁰² a

102. There are many combinations of regular settlements and Mary Carter loans that

\$2000 loan and a \$4750 regular settlement, or until the less culpable defendant offered a hybrid consisting of, for example, a \$6000 loan and a \$750 regular settlement. Each of these hybrid MCAs would give the plaintiff an expected recovery of \$7500, the more culpable defendant an expected liability of \$5250, and the less culpable defendant an expected liability of \$2250.

Thus, the more culpable defendant is no more likely than the less culpable defendant to be the Mary Carter defendant. In addition, even if the more culpable defendant "won" the auction, the hybrid MCA would not enable him to "escape" from liability. Rather, it would increase his expected liability from the $\$1750 = (25\%)(\$7000)$ that it would have been in the absence of the agreement to \$5250.

D. ACCURACY

The most commonly voiced argument against permitting MCAs is that they undermine the adversary process by giving the Mary Carter defendant a strong incentive to commit perjury because her liability decreases as the plaintiff's recovery increases. In attempting to determine whether the use and availability of MCAs undermine the accuracy of trial outcomes in this manner, it is necessary to separately consider perjury relating to the issue of liability, to the allocation of fault among defendants, and to the amount of the plaintiff's damages. It is also important to recognize that even in the absence of MCAs, defendants frequently have an incentive to commit perjury.¹⁰³

MCAs may give one of two codefendants who have not been negligent an incentive to commit perjury on the issue of liability since by doing so she may be able to decrease her own expected liability. However, as the surgeon-anesthesiologist example suggests, it may also give one of two codefendants who have been negligent an incentive to provide the plaintiff with evidence of that negligence in a situation where in the absence of the MCA both defendants would have had an incentive to commit perjury in an attempt to escape liability. Whether the increase in adjudicative accuracy that results from defeating conspiracies of silence and/or inducing the

could constitute the maximum bid in this type of hybrid auction. Each of the combinations gives the plaintiff the same expected recovery and each defendant the same expected liability. For example, the less culpable defendant could offer a hybrid MCA consisting of a \$4000 loan and a \$1250 regular settlement. Such a settlement would give the plaintiff an expected recovery of $\$7500 = \$1250 + (25\%)(\$4000) + (75\%)(\$7000)$, the less culpable defendant an expected liability of $\$2250 = \$1250 + (25\%)(\$4000)$, and the more culpable defendant an expected liability of $\$5250 = (75\%)(\$7000)$.

103. Even when an MCA is not used, a defendant in a multidefendant suit has an incentive to commit perjury relating to the issue of liability (to exculpate himself), to the allocation of fault among defendants (to shift a greater proportion of fault to codefendants), and to the amount of the plaintiff's damages (to minimize them).

Mary Carter defendant to turn over evidence that might otherwise have remained concealed will outweigh the decrease in accuracy that will result from an increased incentive to commit perjury on the issue of liability when the defendants were not, in fact, negligent cannot be predicted with certainty. However, it is important to note that while MCAs do, in theory, create an incentive for one of two non-negligent defendants to enter into an MCA and perjure himself on the issue of liability, given the strong extralegal constraints on this type of behavior—such as, in the medical malpractice context, doctors' reluctance to testify against other doctors, or doctors' fear of damaging their own professional reputations¹⁰⁴—it is unlikely that MCAs will be used frequently in such situations.¹⁰⁵

In order to determine whether MCAs encourage the Mary Carter defendant to commit the type of perjury that will shift liability to the nonsettling defendant,¹⁰⁶ it is important to recognize that in a multidefendant suit each defendant always has an incentive to try to shift responsibility for the plaintiff's harm to his codefendants. As a consequence, in order to determine whether or not an MCA would increase the Mary Carter defendant's incentive to attempt to shift responsibility to the nonsettling defendant by committing perjury, it is necessary to compare her benefit from doing so in the absence of an MCA to her benefit from doing so once she has entered into an MCA.

104. See, e.g., KAKALIK & PACE, *supra* note 56, at 54-55 n.11 (observing that “[d]efendants in medical malpractice litigation have far more control over negotiations than do their counterparts in auto tort cases, and there is an increased tendency to withhold consent from potential settlement agreements that might adversely affect a physician's or surgeon's professional reputation. As a result, cases go further toward trial and incur greater defense costs.”).

105. In addition, in order to determine whether permitting MCAs would increase the aggregate amount of perjury, it is also necessary to consider whether a plaintiff has a better chance of revealing the perjury committed by both defendants on cross-examination in the absence of such an agreement, or whether the nonsettling defendant has a better chance of revealing the perjury of a codefendant on cross-examination. Because a codefendant will often have better information than the plaintiff about the events that surround the plaintiff's injury, the nonsettling defendant's ability to reveal the type of perjury encouraged by MCAs is probably stronger than the plaintiff's ability to reveal the type of perjury committed by colluding defendants.

106. In *Dosdourian v. Carlsen*, 624 So. 2d 241, 244 (Fla. 1993), for example, the court, in describing the way MCAs create an “inherently unfair trial setting,” observed that “[r]ather than cooperating with their codefendants to minimize the culpability of all defendants and to minimize the jury's assessment of plaintiff's damages, Mary Carter defendants offer to the plaintiff their counsel's services for the purpose of persuading the jury to apportion to nonsettling defendants the greatest percentage of fault and to award the full amount of damages the plaintiff has requested.” Although the court is correct that the MCA can eliminate the Mary Carter defendant's incentive “to minimize the jury's assessment of plaintiff's damages,” even in the absence of such agreements a defendant in a multidefendant tort suit has an incentive to persuade the jury to apportion the greatest percentage of fault to other defendants. In addition, at least in cases where the plaintiff's damages are high relative to the nonsettling defendant's liability if the plaintiff prevails, the MCA may actually decrease the Mary Carter defendant's incentive to try to shift the blame. See text accompanying notes 105-07.

In the absence of an MCA, each one percent of fault that one defendant shifts to another, up to one hundred percent, reduces her total liability by one percent. After the parties have entered into an MCA, however, the Mary Carter defendant's incentive to shift liability to the nonsettling defendant may be weaker than it would have been in the absence of the agreement. Once the percentage of fault attributed to the nonsettling defendant is large enough to ensure repayment of the loan, the Mary Carter defendant has no further incentive to attempt to shift liability. The use of the MCA may therefore weaken rather than strengthen the Mary Carter defendant's incentive to commit the type of perjury that would increase the percentage of fault attributed to the nonsettling defendant.

The effect of MCAs on the Mary Carter defendant's incentive to exaggerate the extent of the harm suffered by the plaintiff is more problematic. In an ordinary multidefendant lawsuit, each defendant has an incentive to attempt to minimize the plaintiff's total damages. In contrast, once the parties have entered into an MCA, the Mary Carter defendant may have an incentive to help the plaintiff increase the size of his recovery.¹⁰⁷ However, the Mary Carter defendant will not ordinarily have information about the magnitude of the plaintiff's damages that the plaintiff would not introduce on his own.¹⁰⁸ In addition, the Mary Carter defendant may be reluctant to introduce evidence about the extent of the plaintiff's damages because doing so might increase the share of liability the jury attributes to her or may undermine the credibility of the plaintiff's evidence on damages thereby reducing the funds available for repayment of the loan.

In sum, although the aggregate effects of MCAs on perjury cannot be predicted, critics have greatly exaggerated the extent to which these agreements increase defendants' incentives to commit perjury. They have also failed to recognize the ways that these types of agreements might actually reduce the amount of perjury by giving one of several defendants an incentive to tell the truth in a situation where she would otherwise have had a strong incentive to lie.

IV. OTHER SET-OFF RULES

The previous Parts assumed that in calculating the nonsettling defendant's liability a court would apply the proportionate share set-off rule,

107. However, depending on the relationship between the size of the loan and the amount the Mary Carter defendant expects the plaintiff to recover from the nonsettling defendant, the Mary Carter defendant may have no incentive to introduce any evidence about the plaintiff's damages if she thinks the loan will be repaid in full anyhow as long as the plaintiff prevails.

108. *But see* *Hegarty v. Campbell Soup Co.*, 335 N.W.2d 758 (Neb. 1983) (where an employee entered into an MCA with his employer and the employer provided the employee with information about what his future earnings would have been had he not been injured and had remained in the defendant's employ).

under which the nonsettling defendant is liable for an amount equal to his percentage of fault multiplied by the plaintiff's damages.¹⁰⁹ This Part discusses how the analysis presented in Parts II and III would change if a court applied one of the four principal alternatives to the proportionate share rule—no set-off without contribution; no set-off with contribution; pro tanto set-off without contribution; or the *Abbott Ford* set-off.¹¹⁰

Part IVA describes how each of the alternative set-off rules are applied in cases where MCAs are used. Part IVB then discusses how MCAs affect compensation, deterrence, and fairness in jurisdictions that apply one of these alternative set-off rules.¹¹¹ It demonstrates that under all of the alternative set-off rules, the use of MCAs motivated by the information hypothesis will increase plaintiffs' expected recoveries and may therefore enhance deterrence. It also shows that, in contrast to the situation in a proportionate share jurisdiction,¹¹² MCAs motivated by the financing and risk aversion hypotheses will not necessarily decrease plaintiffs' expected trial recoveries in jurisdictions that apply the no set-off without contribution rule, the pro tanto rule, or the *Abbott Ford* set-off rule. Finally, the Part concludes by noting that while the nonsettling defendant will often be liable for more than his proportionate or fair share of the plaintiff's damages in jurisdictions applying the no set-off without contribution, the pro tanto, or the *Abbott Ford* set-off rules, the risk of this type of unfairness is not a persuasive reason to prohibit MCAs because regular settlements create a similar risk of unfairness in these jurisdictions.

A. EXPLANATIONS OF THE ALTERNATIVE SET-OFF RULES

1. No Set-Off Without Contribution

In some jurisdictions, when an MCA is used, the nonsettling defendant is neither entitled to a set-off nor permitted to seek contribution from the Mary Carter defendant.¹¹³ In such jurisdictions, the nonsettling defendant

109. See *supra* note 29.

110. See *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124 (Cal. 1987).

111. This section does not discuss the effect of the alternative set-off rules on settlement or accuracy, because the discussions of these subjects presented in Part III remain valid regardless of the set-off rule selected.

112. See *supra* text accompanying note 84.

113. See, e.g., *Hemet Dodge v. Gryder*, 534 P.2d 454, 461 (Ariz. Ct. App. 1975); *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1067-69 (Colo. 1986); *J.D. Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 11 (Fla. Dist. Ct. App. 1967); *American Transp. Co. v. Central Ind. Ry.*, 264 N.E.2d 64, 66-67 (Ind. 1970) (reversing the grant of a pro tanto set-off); *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 258 N.W.2d 762, 765 (Minn. 1977); *Grillo v. Burke's Paint Co.*, 551 P.2d 449, 454 (Or. 1976); *General Motors Corp. v. Grizzle*, 642 S.W.2d 837, 842 (Tex. Ct. App. 1982). Courts which deny a set-off when MCAs are used usually reason that because a Mary Carter loan has to be repaid out of the judgment against the nonsettling defendant, MCAs do not create a risk of a double recovery (i.e., recovery in excess of damages) and a set-off is therefore inappropriate. See, e.g., *Webb*, 718 P.2d at 1067-69; *Pacific Indem.*, 258 N.W.2d at 765; *Grillo*, 551 P.2d at 454; *Grizzle*, 642 S.W.2d at 842.

is usually responsible for the entirety of the plaintiff's damages, regardless of his degree of relative fault.¹¹⁴

2. No Set-Off With Contribution

In other jurisdictions that apply the no set-off rule, the nonsettling defendant is given the right to seek contribution.¹¹⁵ The availability of an action for contribution has the potential to eliminate any benefit the Mary Carter defendant obtains from entering into the agreement. If the plaintiff prevailed at trial and repaid the loan, the nonsettling defendant would bring a contribution action against the Mary Carter defendant, and the Mary Carter defendant would have to pay the nonsettling defendant an amount equal to her (the Mary Carter defendant's) proportionate share. The Mary Carter defendant would therefore wind up paying exactly what she would have had to pay if no MCA had been entered into.¹¹⁶ Alterna-

114. The treatment of hybrid MCAs under the no set-off without contribution rule is unclear. There are no cases addressing the issue. Nevertheless, the fact that jurisdictions applying the no set-off without contribution rule usually apply the pro tanto rule to regular settlements suggests that courts would grant a set-off in the amount of the regular settlement component of a hybrid MCA. One reason for the lack of cases may be that if jurisdictions applying the no set-off without contribution rule to pure MCAs granted a set-off for the regular settlement component of a hybrid, parties would be unlikely to enter into hybrids. Because the use of a pure MCA for which no set-off is granted increases the expected liability of the nonsettling defendant, it creates a surplus that can be allocated between the plaintiff and the Mary Carter defendant, making it in their joint best interest to enter into such an agreement. In fact, in a jurisdiction that applied such a rule, for every hybrid MCA the Mary Carter defendant might offer, there is a pure MCA she could offer that would give the plaintiff the same expected recovery while decreasing her expected liability. For example, returning to the suit against the surgeon and the anesthesiologist, suppose that the plaintiff and surgeon were considering a hybrid MCA consisting of a \$3000 loan and a \$2000 regular settlement. They would not enter into such an MCA because a \$6000 pure MCA could make both better off. It would give the plaintiff an expected recovery of $\$9000 = (25\%)(\$6000) + (75\%)(\$10,000)$ rather than $\$8750 = (25\%)(\$2000 + \$3000) + (75\%)(\$2000 + (\$10,000 - \$2000))$, while reducing the surgeon's expected liability from $\$2750 = \$2000 + (25\%)(\$3000)$ to $\$1500 = (25\%)(\$6000)$. The anesthesiologist's expected liability, however, would increase from $\$6000 = (75\%)(\$10,000 - \$2000)$ to $\$7500 = (75\%)(\$10,000 - \$0)$.

115. See *In re Babb*, 642 N.E.2d 1195 (Ill. 1994) (allowing contribution but appearing not to disturb prior holdings that usually denied any set-off); *Smith v. Childs*, 497 N.W.2d 538, 541 (Mich. Ct. App. 1993) ("[S]tatute's 'good faith' test sufficiently protects any right of contribution . . ."); *Vonch v. American Standard Ins. Co.*, 442 N.W.2d 598, 601 (Wis. Ct. App. 1989) (holding that MCAs are not within the class of settlement agreements—"Pierringer releases"—that bar contribution). Although contribution was not granted in either the Michigan or the Wisconsin cases, the courts' dicta suggest that contribution actions would be allowed.

116. The discussion of the no set-off with contribution rule presented in the text assumes that if the plaintiff prevailed at trial, the nonsettling defendant would prevail in the contribution action with a probability of 100%. This assumption follows from the assumption that the plaintiff's probability of prevailing against one defendant is perfectly correlated with his probability of prevailing against the other defendant, so that if one defendant were to be found liable, then the other one would be as well. See *supra* note 28. Because the most significant issues in a contribution suit are whether the settling defendant was liable and whether the nonsettling defendant paid more than his proportionate share, in a situation

tively, if the plaintiff's suit were unsuccessful, the loan would not be repaid, and the Mary Carter defendant would be worse off than she would have been had she never entered into the agreement. Thus, regardless of whether or not the plaintiff prevailed at trial, the Mary Carter defendant would derive no benefit from the agreement.

The benefits of entering into an MCA can be restored, however, by including an indemnity provision in the agreement requiring the plaintiff to reimburse the Mary Carter defendant for any amounts the Mary Carter defendant pays in contribution to the nonsettling defendant.¹¹⁷ The contribution action would ensure that the nonsettling defendant ultimately paid only his proportionate share of the damages, and the indemnity would neutralize the effect of the contribution suit on the Mary Carter defendant. As a consequence, in a no set-off with contribution jurisdiction, when MCAs include an indemnity clause, each party is almost always¹¹⁸ in the same position he would have been in had the proportionate share rule been applied.¹¹⁹

where the plaintiff's probability of prevailing against one defendant is perfectly correlated with his probability of prevailing against the other, if the nonsettling defendant was held liable for all of the damages without any set-off, then the nonsettling defendant should prevail on both of the decisive issues in the contribution action.

117. Such clauses are common. *See, e.g.,* Gibson v. Bentley, 605 S.W.2d 337, 338 (Tex. Civ. App. 1980) (discussing an MCA in which the plaintiff "agreed to hold [the Mary Carter defendant] harmless for any loss arising out of the accident").

118. When the Mary Carter loan is higher than the nonsettling defendant's proportionate share, an indemnity clause will not ensure that all parties are in the same position they would have been in if the proportionate share rule had been applied. Agency costs, however, make it unlikely that loans that high will be negotiated. *See supra* note 55 and accompanying text. If, in spite of the agency problem, the plaintiff and Mary Carter defendant negotiated an MCA with an indemnity clause in which the loan was higher than the nonsettling defendant's proportionate share, the plaintiff's net recovery in a no set-off with contribution jurisdiction would be the amount of the loan plus the judgment for the total damages, minus repayment in full of the loan, minus the indemnity. Since the amount of the indemnity equals the amount the settling defendant paid in contribution, and since that amount is the difference between the plaintiff's total damages and the nonsettling defendant's proportionate share, the plaintiff's net recovery after the indemnity would be the nonsettling defendant's proportionate share. In contrast, in a proportionate share jurisdiction, if the plaintiff prevailed at trial and the loan was higher than the nonsettling defendant's proportionate share, the plaintiff's net recovery would be the amount of the Mary Carter loan.

119. In order to see how an indemnity clause can restore the benefits of MCAs and leave all parties in the same position they would have been in under the proportionate share rule, consider once again the surgeon-anesthesiologist example, where the plaintiff's damages were \$10,000, and the defendants were equally at fault. Assume that the plaintiff and surgeon entered into a \$3000 MCA containing an indemnity clause and that the plaintiff prevailed at trial. In such a situation, judgment would be entered for \$10,000 against the anesthesiologist, who would then bring a contribution action, through which the surgeon would be obligated to pay the anesthesiologist \$5000. Because of the indemnity clause, the plaintiff would be obligated to reimburse the surgeon for the \$5000 she paid in contribution to the anesthesiologist. The plaintiff's net recovery would therefore be \$5000: the \$3000 loan, plus the \$10,000 judgment, minus the \$3000 loan repayment, minus the \$5000 indemnity payment to the surgeon. The anesthesiologist's liability would be \$5000: the \$10,000 judgment, minus the \$5000 he received in contribution from the surgeon. The surgeon's

3. Pro Tanto Set-Off Without Contribution

In jurisdictions that apply the pro tanto set-off rule, the nonsettling defendant is liable for the total amount of the plaintiff's damages less the "consideration" the plaintiff received in the settlement.¹²⁰ Most pro tanto jurisdictions also bar suits for contribution against settling defendants as long as the settlement is in "good faith."¹²¹ In an ordinary settlement, the "consideration," and hence the set-off, is simply the settlement amount. When the pro tanto rule is applied to a pure MCA, that is, an MCA composed solely of a loan, the "consideration" is usually deemed to be the amount of the Mary Carter loan.¹²² Thus, in a pro tanto jurisdiction, if the

liability would be \$0: the \$3000 loan, minus the \$3000 loan repayment, plus the \$5000 paid in contribution to the anesthesiologist, minus the \$5000 indemnity payment from the plaintiff. From an ex ante perspective, the plaintiff's expected recovery would be $\$4500 = (25\%)(\$3000) + (75\%)(\$5000)$, the surgeon's expected liability would be $\$750 = (25\%)(\$3000)$, and the anesthesiologist's expected liability would be $\$3750 = (75\%)(\$5000)$. Thus, the plaintiff's expected recovery and recovery, and each defendant's liability and expected liability, are precisely what they would have been had the plaintiff and the surgeon entered into a \$3000 MCA in a proportionate share jurisdiction. *See supra* note 33 and preceding example.

The reasoning in the text and in this example assumes that the contribution action would be decided after judgment is entered on the underlying claim. If the contribution claim were resolved, as it sometimes is, at the same time as the underlying tort action, the judgment against the nonsettling defendant would be reduced by the Mary Carter defendant's proportionate share. The nonsettling defendant would then be liable for only his proportionate share, and each party would be in precisely the same position he would have been in had the proportionate share rule been applied, even if the MCA did not contain an indemnity clause and even if the amount of the Mary Carter loan was higher than the nonsettling defendant's proportionate share. Nevertheless, when an MCA is drafted, a Mary Carter defendant may be unable to predict the timing of a contribution action, so the Mary Carter defendant is likely to insist on an indemnity clause.

120. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(a), 12 U.L.A. 98 (1975).

121. *Id.* § 4(b), at 98. Although protection from contribution is usually conditioned on a finding that the settlement was in "good faith," findings of "bad faith" are rare. In addition, MCAs in pro tanto jurisdictions sometimes contain provisions making them contingent on a judicial finding of "good faith." This section will therefore assume that the MCA will be found to be in "good faith," so that the nonsettling defendant will not have a right of contribution. *But see* Reager v. Anderson, 371 S.E.2d 619, 632 (W. Va. 1988) (holding that when the Mary Carter defendant remains in case, the "verdict for the plaintiff will be reduced by the amount guaranteed in the settlement and the defendants' right to comparative contribution will be preserved"). While contribution actions in tandem with the pro tanto rule have the potential to make MCAs unattractive to defendants, as with the no set-off with contribution regime discussed above, *see supra* notes 117-19 and accompanying text, the inclusion of an indemnity clause can restore the benefit of MCAs in most cases.

122. Moore v. Subaru of Am., 891 F.2d 1445, 1447, 1451 (10th Cir. 1989); Bohna v. Hughes, 828 P.2d 745, 758-59 & n.34 (Alaska 1992) (adopting the pro tanto rule after discussion of both the no set-off without contribution and *Abbott Ford* set-off rules); Rose v. Pfister, 607 S.W.2d 587, 590 (Tex. Civ. App. 1980) (granting a set-off in the amount of a Mary Carter guaranty). California calculates the pro tanto set-off in a different way, *see infra* notes 124-29 and accompanying text. This method is referred to in the text as the "*Abbott Ford* set-off rule" rather than the pro tanto rule. It should be noted that some jurisdictions that apply the pro tanto rule to regular settlements do not apply it to MCAs. For

plaintiff prevailed at trial, the nonsettling defendant would be liable for the total amount of the plaintiff's damages minus the amount of the Mary Carter loan. Similarly, when a hybrid MCA is entered into, the nonsettling defendant's liability if the plaintiff prevailed would be the total amount of the plaintiff's damages minus the amounts of both the loan and regular settlement components of the hybrid.¹²³

4. *Abbott Ford* Set-Off

In *Abbott Ford v. Superior Court*,¹²⁴ the California Supreme Court adopted a unique method of calculating the appropriate set-off when MCAs are used. Interpreting a statute requiring a pro tanto set-off,¹²⁵ the court held that because the loan may be repaid, the appropriate set-off is not the amount of the Mary Carter loan but rather "the actual value of such an agreement [determined] by the use of actuarial or other valuation methods."¹²⁶ It explained that calculation of "the actual value" would "tak[e] into account the size of the guaranty figure [or the size of the loan] and the likelihood that the settling defendant will actually have to pay out [or will be repaid] either that amount or some lesser sum."¹²⁷ Although there are no reported cases in which the amount of the set-off has been contested, the court's references to actuarial methods, the size of the loan, and the probability of repayment suggest that the "actual value" of an MCA is the Mary Carter defendant's expected liability¹²⁸ given that the MCA has been

example, Illinois and Michigan, which apply the pro tanto rule to regular settlements, apply the no set-off with contribution rule to MCAs. See *supra* note 115; ILL. ANN. STAT. ch. 740, para. 1002(c) (Smith-Hurd 1993) (pro tanto rule applied to regular settlements); MICH. COMP. LAWS. ANN. § 27A.2925(4) (West 1981) (pro tanto rule applied to regular settlements).

123. See *Bohna*, 828 P.2d at 747, 759 (granting a set-off of \$4 million in a case where a hybrid consisting of a \$3 million loan and a \$1 million regular settlement was used).

124. 741 P.2d 124 (Cal. 1987).

125. See CAL. CIV. PROC. CODE § 877(a) (West Supp. 1995).

126. *Abbott Ford*, 741 P.2d at 137.

127. *Id.* at 137, 138 n.23. The "actual value" is determined before trial at a "good faith hearing." Because "the [settling] parties . . . are in the best position to place a monetary figure" on the value of the MCA, they are obligated to propose a value. The nonsettling defendant, however, can challenge the figure as undervaluing the agreement or as "not within [the] ballpark" of the Mary Carter defendant's proportionate share. *Id.* at 138. See *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159, 166 (Cal. 1985). If the nonsettling defendant convinces the court that the proposed set-off is too low, the Mary Carter defendant may be denied protection from contribution suits. Some MCAs contain a provision noting that they are contingent on a finding that they are in good faith.

128. The Mary Carter defendant's expected liability, assuming that she enters into a pure MCA with the plaintiff for an amount less than the nonsettling defendant's proportionate share (which is likely to be the case because larger loans would create severe agency problems, see *supra* note 55), is the plaintiff's probability of prevailing times zero (because the entirety of the loan would be repaid if the plaintiff prevailed) plus the plaintiff's probability of losing at trial, times the amount of the Mary Carter loan (since none would be repaid if the plaintiff lost). Thus, the Mary Carter defendant's expected liability, and hence the set-off under the *Abbott Ford* set-off rule, would be the plaintiff's probability of losing at

entered into.¹²⁹

B. THE EFFECT OF ALTERNATIVE SET-OFF RULES ON COMPENSATION,
DETERRENCE, AND FAIRNESS

1. Compensation and Deterrence

Tables 1 and 2 (below) draw on the surgeon-anesthesiologist example to explore how MCAs affect compensation and deterrence in jurisdictions applying one of the alternative set-off rules. Table 1 assumes that only one defendant can provide the recovery-enhancing information¹³⁰ and that a \$3000 MCA is entered into.¹³¹ Table 2 assumes that both defendants can provide the information and that an auction takes place.¹³²

As Table 1 illustrates, even if only one defendant can provide the

trial times the amount of the loan. By similar reasoning, if the MCA were a hybrid, the set-off would be the plaintiff's probability of losing at trial times the amount of the loan, plus the amount of the regular settlement.

129. *Abbott Ford*, 741 P.2d at 138 n.23. There are at least two alternative ways in which the set-off might be calculated. First, the "actual value" of the agreement might include the value of the information, financing, or risk allocation (a form of insurance) that the Mary Carter defendant provides to the plaintiff. See *Alcal Roofing & Insulation v. Superior Court*, 10 Cal. Rptr. 2d 844, 846 (Cal. Ct. App. 1992) (suggesting that in calculating the appropriate set-off when a regular settlement is entered into, the court should take into account "noncash consideration"); *Arbuthnot v. Relocation Realty Serv. Corp.*, 278 Cal. Rptr. 135, 136, 138-39 (Cal. Ct. App. 1991) (remanding with instructions to assign a value to a regular settlement that takes into account, among other things, the value of the settling defendant's promise "to cooperate" in actions against the nonsettling defendant). Second, when the Mary Carter defendant's expected liability is low, the plaintiff and Mary Carter defendant might stipulate a higher value in order to ensure that the settlement is found to be in "good faith," since this will better protect the Mary Carter defendant against suits for contribution. See CAL. CIV. PROC. CODE § 877(a) (West Supp. 1995) (allowing settling parties to stipulate a higher set-off).

130. This discussion further assumes that an auction does not take place. For a discussion of why an auction might occur and how it would proceed when only one defendant has the information, see *supra* note 37.

131. The chart illustrates the effects of a \$3000 MCA in order to facilitate comparisons with other examples presented in the text. See *supra* text accompanying notes 33, 94-96. Under all of the set-off rules, a \$3000 MCA is in the mutually advantageous loan range.

132. The formulae used to calculate the maximum bids at a Mary Carter auction under each of the set-off rules are set out and derived in a technical appendix on file with *The Georgetown Law Journal*. It should be noted that under the proportionate share and *Abbott Ford* set-off rules, there are many combinations of regular settlements and Mary Carter loans that could constitute the maximum bid in a hybrid auction. Each of these combinations would give the plaintiff the same expected recovery and give each defendant the same expected liability as the hybrid illustrated in the chart. (These other combinations would not, however, give the plaintiff the same recovery and each defendant the same liability if the plaintiff prevailed at trial as the hybrids illustrated in the chart). For example, under the proportionate share rule, a hybrid MCA consisting of a \$2000 loan and a \$3250 regular settlement would also give the plaintiff an expected recovery of \$7500 = \$3250 + (25%)(\$2000) + (75%)(\$5000), would give the Mary Carter defendant an expected liability of \$3750 = \$3250 + (25%)(\$2000), and would give the nonsettling defendant an expected liability of \$3750 = (75%)(\$5000). The hybrid MCA with the \$3000 loan and a \$3000 regular settlement, illustrated in Table 2, was chosen to facilitate comparisons with the pure MCAs with loans of the same amount that are used in other examples discussed in the text.

	Setoff rule	Setoff	Liabilities and recoveries if plaintiff prevails at trial			Expected liabilities and recoveries		
			Plaintiff's recovery	Mary Carter defendant's liability	Nonsettling defendant's liability	Plaintiff's expected recovery	Mary Carter defendant's expected liability	Nonsettling defendant's expected liability
No settlement	Any setoff rule	Not applicable	\$10,000	\$5,000	\$ 5,000	\$2,500	\$1,250	\$1,250
	Proportionate share	\$5,000	5,000	0	5,000	4,500	750	3,750
\$3,000 MCA	No setoff without contribution	0	10,000	0	10,000	8,250	750	7,500
	No setoff with contribution and indemnity	0	5,000	0	5,000	4,500	750	3,750
	Pro tanto	3,000	7,000	0	7,000	6,000	750	5,250
	<i>Abbott Ford</i>	750	9,250	0	9,250	7,687.50	750	6,937.50

Table 1. Surgeon-anesthesiologist example when only one defendant has the information

information, the plaintiff's expected recovery under each of the alternative set-off rules is higher than it would have been if no MCA had been entered into.¹³³ Under the no set-off with contribution rule the plaintiff's expected recovery is usually the same as it would have been under the proportionate share rule,¹³⁴ and under the no set-off without contribution rule, the pro tanto rule, and the *Abbott Ford* set-off rule, the plaintiff's expected recovery is higher than it would have been under the proportionate share rule.¹³⁵

If both defendants can provide the information and an auction takes place, the plaintiff's expected recovery under each of the alternative set-off rules is also, as Table 2 illustrates, higher than it would have been if no MCA had been entered into. Under the no set-off without contribution and *Abbott Ford* set-off rules, the plaintiff's expected recovery is higher than it would have been under the proportionate share rule,¹³⁶ while

133. To illustrate the plaintiff's expected recovery if no MCA had been entered into, the first line of the chart shows what would happen if the case went to trial against both defendants. If the plaintiff had negotiated a regular settlement with one or both of the defendants, the plaintiff's expected recovery without an MCA might have been somewhat higher than if he had gone to trial against both. See Kornhauser & Revesz, *Settlement*, *supra* note 28, at 453-55; Kornhauser & Revesz, *Multidefendant Settlements*, *supra* note 28, at 41.

134. See *supra* note 119 and accompanying text.

135. While the table only illustrates this conclusion for a \$3000 MCA, these three set-off rules will generally give the plaintiff higher expected recoveries than the proportionate share rule. There is, however, one exception. When the plaintiff's probability of prevailing without an MCA is very high, the plaintiff's expected recovery under the pro tanto rule may be lower than under the proportionate share rule. Returning to the surgeon-anesthesiologist example, suppose that the plaintiff's chances of prevailing without an MCA were 80%, and that if the surgeon entered into an MCA and testified truthfully, the plaintiff's probability of prevailing would be 90%. Under the pro tanto rule, if the minimum loan amount necessary to bond the Mary Carter defendant to testify were \$1666.67 as assumed in the chart, see *infra* note 138, the maximum MCA the surgeon would offer if only she had the information would be a hybrid consisting of a \$1666.67 loan and a \$3833.33 regular settlement. Such a hybrid would give the plaintiff an expected recovery of only \$8050 = (10%)($\$3833.33 + \1666.67) + (90%)($\$3833.33 + (\$10,000 - \$3833.33 - \$1666.67)$). Under the same assumptions, the maximum MCA the surgeon might offer in a proportionate share jurisdiction might also consist of a \$1666.67 loan and a \$3833.33 regular settlement, but in a proportionate share jurisdiction such an MCA would give the plaintiff an expected recovery of \$8500 = (10%)($\$3833.33 + \1666.67) + (90%)($\$3833.33 + \5000). Under the proportionate share rule, there are many other maximum MCAs the surgeon might offer, each of which would give the plaintiff the same expected recovery.

136. The table assumes that under the no set-off without contribution rule, the court would grant a set-off in the amount of the regular settlement component of a hybrid MCA. However, because the case law on this point is unclear, see *supra* note 114, it is important to note that if a court would not grant a set-off even for the regular settlement component of a hybrid MCA, the plaintiff's expected recovery would be even higher than it is in Table 2 because the plaintiff would be able to recover the full amount of his damages from the nonsettling defendant. Retaining the assumptions used in Table 2, but assuming further that a court would not grant a set-off for either the loan or regular settlement components of a hybrid, the maximum bid at the auction would be a hybrid consisting of a \$5000 regular settlement and a loan of just under \$10,000. Such a hybrid would give the plaintiff an expected recovery of just under \$15,000 = (25%)($\$5000 + \$10,000$) + (75%)($\$5000 +$

	Maximum bid at a Mary Carter auction	Setoff	Liabilities and recoveries if plaintiff prevails at trial		Expected liabilities and recoveries			
			Plaintiff's recovery	Mary Carter defendant's liability	Nonsettling defendant's liability	Plaintiff's expected recovery	Mary Carter defendant's expected liability	Nonsettling defendant's expected liability
No settlement, any setoff rule	Not applicable	Not applicable	\$10,000	\$5,000	\$5,000	\$2,500	\$1,250	\$1,250
Proportionate share setoff	Hybrid: \$3,000 loan & \$3,000 regular settlement	\$5,000	8,000	3,000	5,000	7,500	3,750	3,750
No setoff without contribution	Just under \$10,000 loan (pure MCA)	0	10,000	0	10,000	Just under 10,000	Just under 2,500	7,500
No setoff with contribution and indemnity	Hybrid: \$3,000 loan & \$3,000 regular settlement	0	8,000	3,000	5,000	7,500	3,750	3,750
Pro tanto setoff	Hybrid: \$1,666.67 loan & \$3,333.33 regular settlement	5,000	8,333.33	3,333.33	5,000	7,500	3,750	3,750
<i>Abbott Ford</i> setoff	Hybrid: \$3,000 loan & \$3,535.71 regular settlement	4,285.71	9,250	3,535.71	5,714.29	8,571.43	4,285.71*	4,285.72*

*The Mary Carter defendant's expected liability under the *Abbott Ford* setoff rule is one cent lower than the nonsettling defendant's expected liability because of error introduced by rounding all amounts to the nearest cent.

Table 2. Surgeon-anesthesiologist example when both defendants have the information

under the no set-off with contribution rule, the plaintiff's expected recovery is the same as it would have been under the proportionate share rule.¹³⁷ Under the pro tanto rule, in the example illustrated in Table 2, the plaintiff's expected recovery is exactly what it would have been under the proportionate share rule. However, because under the pro tanto rule, unlike any of the other set-off rules, larger Mary Carter loans may actually decrease the plaintiff's expected recovery, the plaintiff and the Mary Carter defendant will negotiate a hybrid MCA with the smallest possible loan component. The plaintiff's expected recovery if an auction takes place will therefore vary depending on the structure of the hybrid, which will in turn depend on the minimum loan necessary to adequately bond the Mary Carter defendant to provide the information.¹³⁸ Nevertheless, as long as

\$10,000). Thus, the plaintiff's expected recovery under the no set-off without contribution rule is higher than it would have been under the proportionate share rule, regardless of whether or not a set-off is granted in the amount of the regular settlement component of a hybrid MCA. In fact, when no set-off is granted to the regular settlement portion of a hybrid, plaintiff recoveries may be so high as to present a danger of overdeterrence. *See supra* note 81.

The table also assumes that there is no agency problem with a loan of just under \$10,000. Nevertheless, even if consideration of the agency problem required a much lower loan amount, the plaintiff's expected recovery under the no set-off without contribution rule would still be higher than under the proportionate share rule and indeed higher than under any other set-off rule. For example, even if the plaintiff and surgeon entered into a \$6000 MCA, the plaintiff's expected recovery would be $\$9000 = (25\%)(\$6000) + (75\%)(\$10,000)$.

137. This conclusion assumes that the loan amount is less than the nonsettling defendant's proportionate share. *See supra* note 118.

138. Because under the pro tanto rule each additional dollar of Mary Carter loan increases the set-off by one dollar, higher Mary Carter loans may actually reduce the plaintiff's expected recovery. In the surgeon-anesthesiologist example, a \$2000 Mary Carter loan gives the plaintiff an expected recovery of $\$6500 = (25\%)(\$2000) + (75\%)(\$10,000 - \$2000)$, while a \$3000 Mary Carter loan would give the plaintiff an expected recovery of only $\$6000 = (25\%)(\$3000) + (75\%)(\$10,000 - \$3000)$. Because increasing the amount of the Mary Carter loan may, especially when the plaintiff's probability of prevailing is high, decrease the plaintiff's expected recovery, the plaintiff and the Mary Carter defendant will find it in their mutual best interest to enter into hybrid MCAs with the smallest loan component that is adequate to bond the Mary Carter defendant to provide the recovery-enhancing information. *See supra* text accompanying notes 34-35. Because under the pro tanto rule defendants will offer MCAs with the minimum loan component, the only way they will be able to make more attractive bids at a Mary Carter auction is to offer hybrid MCAs with larger and larger regular settlement components. Because the size of the regular settlement component of the maximum bid at a Mary Carter auction will vary depending on the size of the minimum loan necessary to bond the Mary Carter defendant, so will the plaintiff's expected recovery under the maximum bid. For the purposes of the table, the minimum loan necessary to bond the Mary Carter defendant was assumed to be \$1666.67 because that amount is the bottom of the mutually beneficial loan range discussed *supra* example preceding note 37. If the minimum loan component were higher than \$1666.67, the plaintiff's expected recovery would be lower than the \$7500 in the table. For example, if the minimum loan component were \$2000, the maximum bid at a Mary Carter auction would be a hybrid consisting of a \$2000 loan and a \$3142.86 regular settlement, which would give the plaintiff an expected recovery of $\$7285.72 = (25\%)(\$3142.86 + \$2000) + (75\%)(\$3142.86 + (\$10,000 - \$2000 - \$3142.86))$. Conversely, if the minimum loan component were less than \$1666.67, the plaintiff's expected recovery would be higher than the \$7500 in the table.

the MCA is in the mutually beneficial range, the plaintiff's expected recovery after entering into an MCA will be larger than it would have been had MCAs been unavailable.

Thus, under each of the alternative set-off rules, entering into an MCA motivated by the information hypothesis increases plaintiffs' expected trial recoveries. As a consequence, the availability of these agreements should increase defendants' view of their expected liability and may therefore enhance deterrence.

In addition, unlike in a proportionate share or no set-off with contribution jurisdiction,¹³⁹ MCAs motivated by the financing and risk aversion hypotheses will not necessarily decrease plaintiffs' expected trial recoveries in jurisdictions that apply the no set-off without contribution, pro tanto, or *Abbott Ford* set-off rules. Although the plaintiff will still have to forgo some of his expected recovery from the Mary Carter defendant to induce her to enter into the agreement, his expected recovery from the nonsettling defendant will increase, so that entering into the agreement will not necessarily decrease his total expected trial recovery.¹⁴⁰

2. Fairness

As Tables 1 and 2 demonstrate, unlike in jurisdictions applying the

139. See *supra* text accompanying note 84 (discussing the effect of the financing and risk allocation hypotheses on plaintiff's expected recovery under the proportionate share rule). Since expected recoveries under the no set-off with contribution rule are ordinarily the same as under the proportionate share rule, see *supra* note 118 and accompanying text, the effect of the financing and risk hypotheses on expected recoveries under the no set-off with contribution rule will usually be the same as the effect of these hypotheses on expected recoveries under the proportionate share rule.

140. The effect of the alternative set-off rules on the plaintiff's expected trial recovery when the use of an MCA is motivated by the financing or risk allocation hypotheses can be illustrated by considering a suit in which two equally culpable defendants caused damages of \$10,000 and the plaintiff's probability of prevailing is 25%. In such a situation, if no MCA or other settlement were entered into, and the plaintiff went to trial against both defendants, his expected trial recovery would be $\$2500 = (25\%)(\$10,000)$, regardless of the set-off rule in effect. Now suppose that the plaintiff entered into a \$1000 MCA motivated by the financing hypothesis. Under any set-off rule, the Mary Carter defendant would benefit from the \$1000 MCA, because it would reduce her expected liability from $\$1250 = (25\%)(50\%)(\$10,000)$ to $\$750 = (75\%)(\$1000)$. In a proportionate share or no set-off with contribution jurisdiction, however, the agreement would reduce the plaintiff's expected trial recovery to $\$2000 = (75\%)(\$1000) + (25\%)(50\%)(\$10,000)$. (The previous two sentences assume that in a no set-off with contribution jurisdiction, the MCA includes an indemnity clause.) In contrast, in other jurisdictions, the plaintiff's expected trial recovery would increase. In a pro tanto jurisdiction, the plaintiff's expected recovery would increase from $\$2500$ to $\$3000 = (75\%)(\$1000) + (25\%)(\$10,000 - \$1000)$; in a no set-off without contribution jurisdiction it would increase to $\$3250 = (75\%)(\$1000) + (25\%)(\$10,000 - \$0)$; and under the *Abbott Ford* set-off rule, it would increase to $\$3062.50 = (75\%)(\$1000) + (25\%)(\$10,000 - (75\%)(\$1000))$. Thus, in jurisdictions applying these three set-off rules, MCAs motivated by the financing and risk allocation hypotheses will not necessarily reduce the plaintiff's expected trial recovery.

proportionate share or no set-off with contribution rules, in jurisdictions applying the no set-off without contribution, the pro tanto, or the *Abbott Ford* set-off rules, the use of MCAs creates the possibility that the nonsettling defendant will be liable for more than his fair or proportionate share of the plaintiff's damages.¹⁴¹ In such jurisdictions, the use of MCAs may, as critics have suggested, be motivated primarily by the Mary Carter defendant's desire to shift liability to the nonsettling defendant. This motivation is plausible because in such jurisdictions the set-off rule allows the settling parties to increase the nonsettling defendant's expected liability and thus creates a range of Mary Carter loan amounts that can benefit both the plaintiff and the Mary Carter defendant.¹⁴²

141. In the surgeon-anesthesiologist example, each doctor is 50% at fault, so each defendant's proportionate share is $\$5000 = (50\%)(\$10,000)$. As the columns labeled "Liabilities and recoveries if plaintiff prevails at trial: Nonsettling defendant's liability" show, the nonsettling defendant is often liable for more than $\$5000$ under these three set-off rules.

142. To see how MCAs might be motivated by a desire to shift liability, suppose the plaintiff is risk neutral and has access to sufficient funds to finance the litigation and meet his other expenses. Suppose further that all parties have the same information and that they believe that the plaintiff has a 25% chance of prevailing at trial, that if the plaintiff prevails his damages will be $\$10,000$, and that each defendant is 50% at fault. In a proportionate share jurisdiction, there is no MCA that would make both the plaintiff and the Mary Carter defendant better off. The minimum MCA the plaintiff would accept is one that left his expected recovery greater than it would be in the absence of the agreement, here $\$2500 = (25\%)(\$10,000)$. The smallest loan that satisfies this condition is one just above $\$1666.67$. Similarly, the largest MCA a defendant would offer is one that would leave her expected liability below her expected liability in the absence of the agreement, here $\$1250 = (25\%)(50\%)(\$10,000)$. The largest MCA that satisfies this condition is one for just less than $\$1666.67$. Thus, there is no Mary Carter loan amount that would make both plaintiff and Mary Carter defendant better off. In addition, even if they could agree on an MCA, the proportionate share rule makes it nearly impossible, *but see supra* note 100 and accompanying text, to shift liability to the nonsettling defendant because the judgment against the nonsettling defendant, if the plaintiff prevailed, would be his percentage of fault times the plaintiff's damages, which is the same as his liability if the case had gone to trial without an MCA. *See supra* note 29. In contrast, jurisdictions applying the no set-off without contribution, pro tanto, and *Abbott Ford* set-off rules allow the settling parties to increase the nonsettling defendant's expected liability. As a result, there are many MCAs that could make both the plaintiff and Mary Carter defendant better off. For example, in a no set-off without contribution jurisdiction, a $\$1500$ MCA would increase the nonsettling defendant's expected liability from $\$1250 = (25\%)(50\%)(\$10,000)$ to $\$2500 = (25\%)(\$10,000)$. As a result, such an MCA can both increase the plaintiff's expected recovery from $\$2500 = (25\%)(\$10,000)$ to $\$3625 = (75\%)(\$1500) + (25\%)(\$10,000)$, while decreasing the Mary Carter defendant's expected liability from $\$1250 = (25\%)(50\%)(\$10,000)$ to $\$1125 = (75\%)(\$1500)$. Similarly, under the pro tanto rule, a $\$1500$ MCA would increase the nonsettling defendant's expected liability from $\$1250$ to $\$2125 = (25\%)(\$10,000 - \$1500)$, increase the plaintiff's expected recovery from $\$2500$ to $\$3250 = (75\%)(\$1500) + (25\%)(\$10,000 - \$1500)$, and decrease the Mary Carter defendant's expected liability from $\$1250$ to $\$1125 = (75\%)(\$1500)$. Under the *Abbott Ford* set-off rule, a $\$1500$ MCA would increase the nonsettling defendant's expected liability from $\$1250$ to $\$2218.75 = (25\%)(\$10,000 - (75\%)(\$1500))$, increase the plaintiff's expected recovery from $\$2500$ to $\$3343.75 = (75\%)(\$1500) + (25\%)(\$10,000 - (75\%)(\$1500))$, and decrease the Mary Carter defendant's expected liability from $\$1250$ to $\$1125 = (75\%)(\$1500)$.

The recognition that, in jurisdictions that apply the no set-off without contribution, the pro tanto, and *Abbott Ford* set-off rules, MCAs might result in the nonsettling defendant paying more than his proportionate or fair share of the plaintiff's damages has led many courts and commentators to conclude that MCAs should be prohibited. However, because jurisdictions that apply one of these alternative set-off rules to MCAs usually apply the pro tanto rule to regular settlements, regular settlements entail a similar risk of unfairness. Under the pro tanto rule, regular settlements may result in the nonsettling defendant paying more than his proportionate share of liability when the plaintiff prevails at trial. Because the maximum regular settlement a defendant will offer is ordinarily his expected liability,¹⁴³ the pro tanto set-off (which is simply the settlement amount) will often be less than the settling defendant's proportionate share. As a consequence, in a pro tanto jurisdiction, even a regular settlement may result in an increase in the nonsettling defendant's liability,¹⁴⁴ which means that regular settlements, like MCAs, may be motivated by the settling defendant's desire to shift liability to the nonsettling defendant.¹⁴⁵

143. *But see* Kornhauser & Revesz, *Settlement*, *supra* note 28 (discussing a number of reasons including litigation costs and gaming behavior that defendants sometimes enter into settlements for more than their expected liability).

144. Consider once again the example *supra* note 142 where damages are \$10,000, the plaintiff's probability of prevailing is 25%, and the defendants are equally at fault. In such a situation, if the plaintiff and a defendant entered into a regular settlement for \$1250 (the defendant's expected liability if the case went to trial), and the plaintiff prevailed at trial, the nonsettling defendant would be liable for \$8750: the \$10,000 damages less a \$1250 set-off. The nonsettling defendant would therefore be required to pay for 87.5% of the plaintiff's damages even though he was only 50% at fault. *See McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1467 n.14 (1994) (giving another example demonstrating the unfairness of the pro tanto rule); Kornhauser & Revesz, *Settlement*, *supra* note 28, at 454 (showing how one of two equally culpable defendants may pay 50% more in settlement than the other). Although pro tanto jurisdictions attempt to protect the nonsettling defendant from this type of outcome by holding hearings to determine whether or not the settlement was in "good faith," settlements are rarely found to be in bad faith, and most settlements will introduce some degree of unfairness in the allocation of damages because defendants ordinarily settle for an amount less than their expected liability at trial. *See McDermott*, 114 S. Ct. at 1468 & n.19 (explaining that good faith hearings cannot protect the nonsettling defendant from unfairness because such protection would make settlements nearly impossible in cases where the plaintiff's probability of prevailing was less than 100%).

145. Consider once again the example, *supra* note 142, where damages are \$10,000, the plaintiff's probability of prevailing is 25%, and the defendants are equally at fault. If the plaintiff and a defendant entered into a \$1000 regular settlement in a jurisdiction applying the pro tanto rule to regular settlements, the nonsettling defendant's expected liability would increase from \$1250 to $\$2250 = (25\%)(\$10,000 - \$1000)$, the plaintiff's expected recovery would increase from $\$2500 = (25\%)(\$10,000)$ to $\$3000 = (75\%)(\$1000) + (25\%)(\$10,000 - \$1000)$, and the settling defendant's expected liability would decrease from $\$1250 = (25\%)(\$5000)$ to \$1000. The regular settlement thus allows the plaintiff to increase his expected recovery and the settling defendant to decrease his expected liability by shifting liability to the nonsettling defendant.

In sum, once it is recognized that in jurisdictions that apply the pro tanto rule to regular settlements, regular settlements also create a risk of an unfair allocation of liability among defendants, the risk of this type of unfairness no longer presents a persuasive reason to prohibit MCAs. In addition, courts that are concerned about the risk of this type of unfairness can greatly reduce or eliminate it by adopting the no set-off with contribution rule¹⁴⁶ or the proportionate share rule.¹⁴⁷

V. CONCLUSION

This article has argued that, contrary to the view of most commentators and even those courts that permit their use, MCAs may be entered into for legitimate reasons. It has also suggested that while MCAs may have some of the undesirable effects identified by their critics, the use and availability of these agreements may also create off-setting benefits that should be taken into account in evaluating the social desirability of MCAs.

The analysis presented here also suggests that discussions of suit and settlement need to recognize that a simple monetary payment from one defendant to the plaintiff in exchange for release of the claim is only one of many forms that a settlement can take, and that the existence of MCAs, as well as other types of explicit agreements and implicit understandings between the plaintiff and less than all of the defendants,¹⁴⁸ or among the

146. Under the no set-off with contribution rule, the nonsettling defendant's right to contribution ensures that he does not pay more than his proportionate share. *See supra* note 118 and accompanying text.

147. *See supra* text accompanying note 100. Another set-off rule that would minimize the potential for this type of unfairness is the pro tanto set-off with contribution rule, which usually puts the parties in the same position as the proportionate share rule. *See supra* note 121 and accompanying text. Courts have substantial freedom in choosing which set-off rule to apply to MCAs and need not apply the same set-off rule to MCAs as to regular settlements. *See supra* note 122 (noting that Illinois and Michigan, which apply the pro tanto rule to regular settlements, apply the no set-off with contribution rule to MCAs); *Harnischfeger Corp. v. Harbor Ins. Co.*, No. 90-0086, 1990 WL 250279, at *3-4 (Wis. Ct. App. Nov. 6, 1990) (discussing the disposition of a related case in which a Florida judge applied the proportionate share rule by apportioning liability between the nonsettling defendant and the Mary Carter defendant as though no settlement had been entered into, even though Florida applies the pro tanto rule to regular settlements).

148. One type of explicit agreement between the plaintiff and a defendant is a high-low settlement agreement, which fixes a maximum amount that a defendant will have to pay if the plaintiff prevails, as well as a minimum amount that the defendant will have to pay even if he prevails. *See Zeigler v. Wendel Poultry Servs., Inc.*, 615 N.E.2d 1022, 1028-29 (Ohio 1993); *see also* MILLER, *supra* note 9, § 7.03 (noting that there are no "iron clad" rules about the design of high-low agreements, and describing several common types); Luis F. Collins, *Admissibility of High/Low Settlements*, FLA. B.J., Jan. 1993, at 35 (reviewing the advantages of high-low agreements and describing their essential terms); John L. Shanahan, *The High-Low Agreement*, FOR DEF., July 1991, at 25 (discussing the use and origins of high-low agreements).

defendants themselves,¹⁴⁹ can have an important impact on the ways that legal rules affect parties' litigation decisions.

149. Explicit agreements among defendants include anti-MCA agreements, *supra* note 46, consolidated defense agreements, *supra* note 47, joint representation agreements, *supra* note 48, and judgment-sharing agreements. A judgment-sharing agreement is a contract that determines the percentage of the plaintiff's eventual judgment that each defendant will have to pay. It is often used in cases where all the defendants are represented by insurance companies. Judgment-sharing agreements sometimes take the form of a pretrial arbitration agreement, whereby the defendants agree to arbitrate their relative percentages of fault prior to trial and to contribute to the judgment according to the arbitrator's decision regardless of the jury verdict. Such agreements are generally upheld despite the fact that they will affect the defendants' trial strategy and their incentives to testify in particular ways at trial. For example, in the absence of such an agreement each defendant has an incentive to introduce evidence tending to place responsibility for the plaintiff's harm on other defendants. In contrast, when a judgment-sharing agreement exists, the defendants will try to show that none of them were at fault. Finger pointing will be avoided, and it will be left to the plaintiff to introduce all of the evidence against each defendant. Each defendant will then have an incentive to testify in a way that minimizes the defendants' total expected liability. Because the plaintiff will often have less information than each defendant about the cause of his harm, these agreements may decrease the likelihood that he will prevail. However, by eliminating one of the main barriers to settlement in multidefendant tort litigation, the inability of the defendants to agree on the allocation of fault, judgment-sharing agreements might increase the settlement rate.