In re the Exxon Valdez: The Danger of Deception in a Novel Mary Carter Agreement

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INTRODUCTION

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef in Alaska's Prince William Sound, disgorging eleven million gallons of North Slope crude[1] and causin2g the worst oil spill in American history.[2] In fewer than five hours the spill devastated one of the country's most sensitive ecosystems.[3] By August 1989, the oil had spread over nearly ten thousand square miles, soiling more than twelve hundred miles of shoreline.[4]

Following the spill, lawsuits for compensatory and punitive damages were filed against Exxon[5] and Captain Joseph Hazelwood, the skipper of the *Exxon Valdez*, by more than 32,000 people, including fishermen, Alaska Natives, business operators, and landowners.[6] Similar lawsuits were also filed against Exxon and Captain Hazelwood by seven Seattle-based seafood processors, known collectively as the "Seattle Seven."[7]

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1. *See* Mark Hansen, *$15 Billion in Punitives Sought, If Exxon Sets Record, It's Unlikely to Stand*, ABA J., Sept. 1994, at 30.

2. *See* Brief of Plaintiffs-Appellees (corrected) at 3, *In re Exxon Valdez*, Nos. 96-36038, 97-35036 (9th Cir. filed Apr. 18, 1997) [hereinafter Appellees' Brief] (on file with the *Seattle University Law Review*).

3. *See* Christine Cartwright, *Natural Resource Damage Assessment: The Exxon Valdez Oil Spill and Its Implications*, 17 RUTGERS COMPUTER & TECH. L. J. 451, 451 (1991).

4. *See id.*

5. "Exxon" refers collectively to Exxon Corporation and Exxon Shipping Company.

6. *See* Declaration of Lead Counsel in Support of Motion For Award of Attorneys' Fees and Reimbursement of Expenses at 9, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed Mar. 18, 1997) (on file with the *Seattle University Law Review*). For a definition of "Alaska Natives," *see Alaska Native Class v. Exxon*, 104 F.3d 1196 (9th Cir. 1997).

7. The Seattle Seven includes the following seafood processors and related entities: Icicle Seafoods, Inc.; Peter Pan Seafoods, Inc.; Seven Seas Corp.; Stellar Seafoods, Inc.; Ocean Beauty

On January 8, 1991, two years after the spill and three years before the beginning of the trial, Exxon and the Seattle Seven entered into a comprehensive agreement, settling the lawsuits filed by the Seattle Seven.[8] Learning of the settlement, plaintiffs'[9] attorneys requested information on the terms of the agreement.[10] The Seattle Seven's attorneys, however, declared that the terms of their agreement were confidential and that they would not reveal them to the plaintiffs.[11]

On April 15, 1994, U.S. District Judge H. Russel Holland, at Exxon's request, consolidated all of the lawsuits into one mandatory punitive damages class.[12] He then divided the trial into three phases.[13] In Phase I, the jury determined that Exxon and Captain Hazelwood acted recklessly in allowing the Exxon Valdez to run

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Seafoods, Inc.; Ocean Beauty Alaska, Inc.; Wards Cove Packing Co.; Alaska Boat Co.; North Pacific Processors, Inc.; Aleutian Dragon Fisheries, Inc.; Trident Seafoods Corp.; and North Coast Seafood Processors, Inc.

8. *See* Plaintiffs' Memorandum: (A) In Response to Objection of Certain Seafood Processors, on Behalf of Exxon, as Real Party in Interest, to Final Approval of Plan of Allocation; and (B) In Response to Exxon's Motion Seeking Reduction of Phase III Verdict at 1-2, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska memorandum filed Apr. 12, 1996) [hereinafter Plaintiffs' Memorandum] (on file with the *Seattle University Law Review*).

9. "Plaintiffs" include all individuals and business entities in the *Exxon Valdez* litigation who were signatories to the "Joint Prosecution Agreement, And Damages Allocation Agreement." *See infra* note 16. Nonsignatories included only a handful of institutional plaintiffs who refused to participate in the Joint Prosecution Agreement and elected to take their chances in separate trials. "Plaintiffs" do not include the Seattle Seven, who were not signatories and who settled their claims against Exxon prior to trial. *See* Plaintiffs' Memorandum in Support of Joint Motion of Plaintiffs and Defendants for Preliminary Approval of Phase IV Settlement, Plaintiffs' Motion for Preliminary Approval of Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation Arising from the Exxon Valdez Oil Spill, and the Orders Requested in Those Motions Scheduling a Hearing on Final Approval of the Phase IV Settlement and Plan of Allocation, and Authorizing Notice to Class Members at 24, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska memorandum filed Jan. 12, 1996) [hereinafter Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of the Plan of Allocation] (on file with the *Seattle University Law Review*).

10. *See* Declaration of David W. Oesting at 1, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 2, 1996) [hereinafter Oesting Declaration] (on file with the *Seattle University Law Review*). Plaintiffs learned of the settlement after the Seattle Seven's lawsuit had been dismissed on January 9, 1991. *See* Joint Opening Brief of Appellants, at 8, *In re Exxon Valdez*, No. 96-36038, 97-35036 (9th Cir. filed Jan. 30, 1997) [hereinafter Appellants' Brief] (on file with the *Seattle University Law Review*).

11. *See* Oesting Declaration, *supra* note 10, at 1.

12. *See* Plaintiffs' Memorandum, *supra* note 8, at 10. A mandatory punitive damages class is a class from which no member can opt out. It was sought by Exxon to prevent the possibility of multiple punitive damage awards. "At Exxon's request, the class was defined to include 'all persons or entities who possess or have asserted claims for punitive damages against Exxon . . . which arise from or relate in any way to the grounding of the Exxon Valdez or the resulting oil spill.'" Appellees' Brief, *supra* note 2, at 8.

13. *See* Appellees' Brief, *supra* note 2, at 8-11.

aground in Prince William Sound, thus opening the door for plaintiffs to claim punitive damages.[14] In Phase II, the jury awarded the plaintiffs $287 million in compensatory damages.[15] And in Phase III, the jury, determining that it was necessary to punish and deter Exxon, awarded the plaintiffs $5 billion in punitive damages, the largest such award in history.

Following the trial, plaintiffs' attorneys began the task of creating a plan to allocate the judgment among the members of the mandatory punitive damages class.[16] As part of this process, plaintiffs again contacted the Seattle Seven's attorneys to determine whether they planned to claim a portion of the punitive damages award.[17] Attorneys for the Seattle Seven responded that "[they] had released their punitive damage claims when they settled with Exxon in 1991 and that they did not believe the Seattle Seven were entitled to obtain any portion of the punitive damage award."[18] In reliance on these statements, the plaintiffs did not allocate punitive damages to the Seattle Seven.[19]

On January 12, 1996, plaintiffs sought approval of their Plan of Allocation.[20] Despite earlier statements, however, attorneys for the Seattle Seven filed a motion, objecting to the Plan of Allocation and contending that fifteen percent of the punitive damages award should

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14. *See id.* at 9.

15. *See id.* at 10-11.

16. *See* Plaintiff's Memorandum in Support of Motion for Preliminary Approval of the Plan of Allocation, *supra* note 9, at 5-9. Prior to trial, plaintiffs entered into a "Joint Prosecution Agreement, And Damages Allocation Agreement" whereby all plaintiffs would pool their recoveries in the consolidated litigation and share them based on a devised plan of allocation. This agreement enabled plaintiffs to proceed with an effective trial plan, "which subordinated the interests of each group of plaintiffs to the collective interests of all." *Id.* at 9. The development of the Plan of Allocation took more than two years of work by approximately 450 attorneys. *Id.* at 3.

17. *See id.* at 8; Declaration of Charles L. Miller, Jr. at 42, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed Mar. 22, 1996) (on file with the *Seattle University Law Review*); Plaintiff's Memorandum, *supra* note 8, at 15-16. In order to evaluate whether any claim by the Seattle Seven should be included in the Plan of Allocation, plaintiffs would have to review their agreement with Exxon.

18. Plaintiff's Memorandum, *supra* note 8, at 16.

19. *See* Plaintiff's Memorandum in Support of Motion for Preliminary Approval of the Plan of Allocation, *supra* note 9, at 8.

20. *See generally id.* "The Plan of Allocation specifically noted that no punitive damages are being allocated to the Seattle Seven, because 'these plaintiffs had previously settled and released claims against the Exxon defendants, did not execute the joint prosecution agreement, and as processors are subject to dismissal under the law of the case.'" Plaintiffs' Memorandum, *supra* note 8, at 18.

be allocated to them.[21] Their supporting documents made public for the first time the terms of the two settlement agreements between Exxon and the Seattle Seven.[22]

These secret agreements required the Seattle Seven, in return for a settlement of $70 million, to claim entitlement to allocated portions of any punitive damages.[23] According to the agreements, should the Seattle Seven obtain any punitive damages, they would return the damages to Exxon, thereby reducing Exxon's overall damages by what turned out to be $745 million.[24]

While counsel for Exxon had revealed to the jury during Phase III that Exxon had voluntarily paid damages to the processors, the jurors were not told that Exxon, through the Seattle Seven, intended to reduce its punitive damages by any amount awarded to the processors.[25] What is more, Exxon had affirmatively represented that it had sought nothing in return for its payments to the Seattle Seven. According to the court, "Exxon asked the jury to consider for purposes of mitigation, that Exxon paid $113,500,000 to seafood processors, including the Seattle Seven . . . and that in return Exxon asked for nothing more than a receipt."[26]

The Seattle Seven's revelation outraged Judge Holland, who called it an "astonishing ruse" and "deception" on the court and denied the Seattle Seven (and Exxon) an allocation of any punitive damages.[27] He stated that "the court had not identified any policy which rendered the settlement agreements per se unenforceable; rather, it was the use and in particular the misrepresentation of the substance of those agreements to the court and jury that the court found to be contrary to strong public policy."[28] Judge Holland further asserted that the court might have allowed the agreements had Exxon and the Seattle

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21. Certain Seafood Processors Objections To and Memorandum Opposing Approval of the Plan of Allocation, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska memorandum filed Mar. 18, 1996) [hereinafter Seafood Processors' Objections to the Plan of Allocation] (on file with the *Seattle University Law Review*). The Seattle Seven argued that it received 14.9% of the compensatory damages awarded to plaintiffs and should, therefore, receive 14.9% of the punitive damages, or $745 million. *See* Appellants' Brief, *supra* note 10, at 18.

22. Appellees' Brief, *supra* note 2, at 19.

23. *See* Order No. 327 at 3, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska issued Sept. 11, 1996) (order denying Exxon's Motion to Reconsider Order Granting Final Approval of the Plan of Allocation).

24. *See id.* at 9.

25. *See* Order No. 317 at 27, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska issued June 11, 1996) (order granting final approval of the Plan of Allocation).

26. *Id.* at 28-29.

27. *See id.* at 29-31.

28. Order No. 327, *supra* note 23, at 7.

Seven kept their agreement confidential, without any misrepresentation.[29]

Judge Holland's opinion has sparked much debate over the ethics and legality of the attempt by Exxon and the Seattle Seven to reduce punitive damages. Legal ethicists and other experts agree, however, that this "bold tactic was novel, saying they had never before come across such an agreement."[30]

This Note addresses the legality and ethics of the secret agreement between Exxon and the Seattle Seven by analogy to a similar type of collusive agreement, called a "Mary Carter" agreement.[31] Part I of this Note looks at the terms of the Exxon/Seattle Seven agreements. Part II examines Judge Holland's controversial decision with respect to the Exxon/Seattle Seven agreements. Part III describes the nature of a Mary Carter agreement and the factors used to determine whether such an agreement exists. Then Part IV argues that, like Mary Carter agreements, the Exxon/Seattle Seven agreements undercut the jury system, prolong litigation, contravene legal ethics, and run afoul of public policy. Part IV further argues that, while Judge Holland's ultimate conclusion was correct, he was wrong in stating that had there been no misrepresentation the Exxon/Seattle Seven agreements would have been valid. This Note concludes that secret assignment of punitive damages, being even more egregious than Mary Carter agreements, must be disclosed to the court.

I. THE EXXON/SEATTLE SEVEN AGREEMENTS

Exxon and the Seattle Seven entered into their first settlement agreement early in the litigation. In exchange for $63.675 million, the Seattle Seven surrendered all of their claims alleged in their 1989 complaint against Exxon, specifically including any claims to punitive damages.[32] The agreement provided that "by entering into this Agreement [the Seattle Seven] and Exxon intend to *compromise and*

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29. *See id.* at 11.

30. Charles McCoy and Peter Fritsch, *Exxon Defends Its Novel Approach To Reducing Valdez Punitive Damages*, WALL ST. J., June 14, 1996, at B3.

31. The "Mary Carter" agreement draws its name from *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). See the text discussion of these agreements *infra* in Part III.

32. *See* Appellees' Brief, *supra* note 2, at 5. The 1989 complaint included compensatory and punitive damages for the years 1989 and 1990. In April 1994, the Seattle Seven filed a second complaint seeking compensatory damages incurred after 1990. "Punitive damages, having been settled in the 1991 Agreement, were not sought in the 1994 complaint." *Id.*

settle all presently existing claims for actual damages and *all claims whatsoever for punitive damages.*"[33]

The primary purpose of the agreement was not to settle the claims of the Seattle Seven, however, but instead "to achieve setoffs and reductions, including setoffs and reductions to punitive damages. . . for the benefit of Exxon."[34] The "centerpiece"[35] of the agreement provided as follows:

> 4.b. As consideration for Exxon's Payments, *[the Seattle Seven] agree to take all reasonable, lawful and ethical (under the Rules of Professional Conduct) actions to assist Exxon so that Exxon may recapture or obtain a credit or offset for any punitive damages, awards, settlements, and claims against Exxon . . . to which [the Seattle Seven] may have been entitled.* If Exxon requests, [the Seattle Seven] will undertake to participate in any consolidated or class proceeding against Exxon . . . in which plaintiffs seek punitive damages, and will assert [the Seattle Seven's] entitlement to allocated portions of any punitive awards or settlements on the same basis as all other plaintiffs to that action. *[The Seattle Seven] also hereby assign . . . to Exxon . . . any rights they may ultimately obtain to a punitive damages award against Exxon, . . . [the Seattle Seven's] and Exxon's intent being that any such punitive damage proceeds to which [the Seattle Seven] become entitled will inure to Exxon's . . . benefit. . . .* If Exxon requests [the Seattle Seven] to take any of the actions described in this Part 4.b., Exxon Corporation agrees to reimburse [the Seattle Seven] for all reasonable costs and expenses and attorneys' fees incurred in complying with Exxon's requests.[36]

Finally, the agreement included several provisions, which reflected the parties' awareness of the questionable nature of the agreement.[37]

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33. Order No. 317, *supra* note 25, at 19 (emphasis added). Despite this clear language settling the Seattle Seven's compensatory and punitive damage claims, Exxon included a provision which provided that "this agreement is not to be construed as a release of any parties. (Settlement Agreement, 6)." Declaration of Geoffrey C. Hazard, Jr. at 6, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 2, 1996) [hereinafter Hazard Declaration] (on file with the *Seattle University Law Review*).

34. Order No. 317, *supra* note 25, at 19.

35. Order No. 327, *supra* note 23, at 3.

36. Order No. 317, *supra* note 25, at 20-21 (emphasis added).

37. *See* Plaintiffs' Memorandum, *supra* note 8, at 7. As Judge Holland observed, "even Exxon and the Seattle Seven perceived at the outset the possibility that their agreement might be unenforceable, and made specific provision that the overall agreement would survive even if the scheme to remit punitive damages to Exxon were to fail." Order No. 327, *supra* note 23, at 8 n.12.

The provisions Judge Holland referred to state:

> 4.c. If any of the undertakings described in Part 4.b. of this Agreement are for any reason judicially determined to be unenforceable, [the Seattle Seven] covenant not to

The most significant of these provisions provided that "the terms of the Agreement shall be deemed strictly confidential and shall not be disclosed to any person or entity."[38]

At no time during the trial did Exxon reveal to the court or the jury any of the provisions of its agreement with the Seattle Seven.[39] In fact, during Phase III Exxon attempted to convince the jury that it had been generous in paying the Seattle Seven and other plaintiffs over $300 million and obtaining only "receipts."[40] Exxon asked the jury to "consider this 'fact' as a mitigating factor in determining punitive damages."[41] Thus, the jury was told that Exxon had made settlement payments totaling $113,500,000 to several processors including the Seattle Seven.[42] Because of the secrecy of the agreements, however, the jury was not told that any punitive damages it would assess would automatically be reduced by fifteen percent through Exxon's agreement with the Seattle Seven.[43] Moreover, Exxon's Chairman of the Board, Lee Raymond, told the jury that Exxon had made these settlement payments without obtaining a single release.

> Mr. Raymond: I said from New York, forget the release, just pay the money, get a receipt that you paid the money and some day we'll sort all this out in court. Here we are. But someday we'll sort it out in court, because it isn't good to not pay the people.
> Q: So you paid claims without getting a release from the person you paid?
> Mr. Raymond: Right.[44]

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execute on, or unless otherwise directed by Exxon, accept an allocated share of any oil spill punitive damages award that [the Seattle Seven] may secure against Exxon. . . .
9. Neither Exxon . . . nor [the Seattle Seven] shall assert or contend in any judicial or nonjudicial context that this Agreement or any part of this Agreement is in any way invalid, unenforceable, or unreasonable. In the event any provision or portion of this Agreement is held or adjudicated to be invalid or unenforceable, all other provisions shall remain in full force and effect and the parties shall be bound thereby. Order No. 317, *supra* note 25, at 21.

38. Order No. 317, *supra* note 25, at 21.

39. *See* Order No. 327, *supra* note 23, at 10-11.

40. *See* Appellees' Brief, *supra* note 2, at 12.

41. *Id.*

42. *See* Order No. 317, *supra* note 25, at 27.

43. *See id.*

44. *Id.* "On cross examination, Mr. Raymond clarified that the $300 million in payments supposedly made 'without getting a release' *included the payments to the Seattle Seven.*" Appellees' Brief, *supra* note 2, at 13. The court stated in its order denying reconsideration that, while at least one Exxon attorney knowingly misrepresented the Seattle Seven settlement agreements, the court was willing to assume that Lee Raymond was honestly mistaken. Order No. 327, *supra* note 23, at 7.

In closing arguments, Exxon perpetuated this deception by reiterating that it had paid over $300 million in claims to fishermen, seafood processors, and others without asking for a single release.[45] But what Exxon had asked for was far greater than a release; it had asked for the return of fifteen percent of any punitive damages.[46] The settlement agreement thus contained a potentially enourmous rebate from the Seattle Seven to Exxon.

On September 16, 1994, the jury returned its verdict, awarding the plaintiffs $5 billion in punitive damages.[47] On September 30, 1994, Exxon filed more than twenty motions with the court seeking to change various aspects of the trial, and in particular the punitive damages award.[48] At no time, however, did Exxon attempt to rectify the misrepresentation made in court or disclose any of the provisions of its agreement with the Seattle Seven.[49] On January 27, 1995, Judge Holland denied Exxon's motions, upholding the punitive damages award.[50]

On January 11, 1996, Exxon and the Seattle Seven entered into a second agreement to amend their 1991 agreement.[51] The new agreement carried forward all of the terms of the earlier agreement, and added a financial incentive for the Seattle Seven should they be able to persuade the court to allocate a portion of the punitive damages to them.[52] Specifically, the Seattle Seven would receive between $6 million and $20 million, based on a formula, for objecting to the Plan

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45. *See* Order No. 317, *supra* note 25, at 28.

46. *See id.* at 29.

47. Plaintiffs' Memorandum, *supra* note 8, at 15.

48. *See id.*

49. *See id.*

50. *See id.* "Still unaware of Exxon's plan, the court noted that the jury had been presented with the evidence of settlements, and had been entitled to consider that evidence in mitigation." Appellees' Brief, *supra* note 2, at 16.

51. *See* Order No. 317, *supra* note 25, at 22. Yet another agreement, entered on the same day, settled the Seattle Seven's 1994 lawsuit for post-1990 compensatory damages. The 1996 Agreement provided:

> I.f. By entering into this Agreement [the Seattle Seven] and Exxon intend to compromise and settle all presently existing claims, whether asserted or not asserted and whether known or unknown, for actual damages and all other claims whatsoever, if any, arising out of the grounding of the Exxon Valdez. . . .
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> VI. Not a Release
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> This agreement is not to be construed as a release of any parties to litigation relating to the oil spill. Notwithstanding any other provision of this Agreement, nothing in this agreement shall waive, reduce, diminish or in any manner limit [the Seattle Seven's] status as members of the mandatory punitive damages class. . . .

Order No. 317, *supra* note 25, at 22.

52. *Id.* at 24.

of Allocation and asserting a claim to fifteen percent of the punitive damages award.[53] Exxon also agreed to pay all of the Seattle Seven's attorneys' fees incurred in pursuing punitive damages.[54]

On March 18, 1996, the Seattle Seven objected to the Plan of Allocation, and as described above, claimed entitlement to fifteen percent of the punitive damages award.[55] The Seattle Seven argued that they specifically did not settle their punitive damages claims because they had agreed to pursue them as directed in their 1991 and 1996 agreements with Exxon.[56]

II. EXXON ORDERED TO PAY FOR ITS DECEPTION

Judge Holland unequivocally held that the Seattle Seven had settled any and all claims against Exxon in their 1991 and 1996 agreements and, therefore, would not share in the allocation of the punitive damages award.[57] Using strong language, Judge Holland called the agreements "such pernicious and flagrant violations of public policy as to render unenforceable their requirements that the Seattle Seven seek punitive damages on behalf of Exxon. . . . [T]he provision in the 1991 Agreement that its terms be kept strictly confidential is a startling affront to the jury system."[58] The court continued, "Exxon has acted as a Jekyll and Hyde, behaving laudably in public, and deplorably in private. The court is shocked and disappointed that Exxon entered into such an agreement."[59] Specifically, the court held

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53. *See* Appellants' Brief, *supra* note 10, at 9. Had they been successful, the Seattle Seven would have received $12.4 million from Exxon for returning 14.9% of the punitive damage award, but were guaranteed a minimum of $6 million if they failed. *See* Plaintiffs' Memorandum, *supra* note 8, at 17-18.

54. *See* Order No. 317, *supra* note 25, at 24.

55. *See generally* Seafood Processors' Objections to the Plan of Allocation, *supra* note 21.

56. *See id.* at 4.

57. Order No. 317 stated:

> The Seattle Seven argue[d] that they settled compensatory damages only, but the 1991 and 1996 Agreements clearly settled all damages claims 'whatsoever.'
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> The Seattle Seven argue[d] that they did not release their punitive damages because they agreed to pursue their punitive damage claims against Exxon. Yet the agreements to pursue punitive damages against Exxon simply do not comport with the provisions of the 1991 and 1994 [sic] Agreements which plainly settled all claims for punitive damages. Having elected to settle their punitive damages claims against Exxon, the Seattle Seven could not also perpetuate such claims for the purpose of taking a share of punitive damages recovered by others--the class plaintiffs.

Order No. 317, *supra* note 25, at 26.

58. *Id.* at 26.

59. *Id.* at 30.

that Exxon would not share in the punitive award because of Exxon's deception and misrepresentation in court through Mr. Raymond.[60]

Despite the fact that Exxon and the Seattle Seven perceived that their agreements might be deemed unenforceable,[61] they objected to the court's opinion, filing a Motion to Reconsider Order No. 317.[62] Exxon stated, "We are disturbed not so much by the ultimate result stated in Order No. 317 (although we think the Court's conclusion is erroneous) as by the Court's observations suggesting that the Settlement Agreement was against public policy, and/or that improper or unethical conduct took place."[63]

Exxon's motion was supported by declarations from eight prominent lawyers and judges.[64] Despite the lawyers' eminence in the field, "the declarations focused primarily and in generally abstract

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60. *Id.* at 29.

> The secretive nature of the agreement is not the problem here, the problem is that the jury, plaintiffs, and the court were purposely misled about the settlement. Exxon set a trap in the court room, and intended to spring it at the time damages were allocated, but the court simply will not allow Exxon's ploy to alter the jury's verdict.

Appellees' Brief, *supra* note 2, at 21.

61. *See* Order No. 327, *supra* note 23, at 8 n.12. The parties added specific provisions to the agreements in order to keep them in force should Exxon's scheme to rebate punitive damages fail. *See supra* note 37.

62. Motion of Defendants Exxon Corporation and Exxon Shipping Company to Reconsider Order No. 317, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska motion filed June 18, 1996) [hereinafter Defendants' Motion to Reconsider Order No. 317] (on file with the *Seattle University Law Review*); Joinder of Seafood Processors in the Exxon Defendants' Motion to Reconsider Order No. 317, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska motion filed June 18, 1996) (on file with the *Seattle University Law Review*).

63. Memorandum In Support of Motion of Defendants Exxon Corporation and Exxon Shipping Company to Reconsider Order No. 317 at 1, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska memorandum filed June 18, 1996) [hereinafter Defendants' Memorandum] (on file with the *Seattle University Law Review*).

64. Appellants' Brief, *supra* note 10, at 19-20. The eight were:

- Arlin M. Adams, formerly Judge of the U. S. Court of Appeals for the Third Circuit;
- Griffin B. Bell, formerly Attorney General of the United States and Judge of the U. S. Court of Appeals for the Fifth Circuit;
- A. Leon Higginbotham, Jr., Public Service Professor of Jurisprudence at Harvard University, formerly Judge of the U.S. Court of Appeals for the Third Circuit;
- Shirley M. Hufstedler, formerly Judge of the U.S. Court of Appeals for the Ninth Circuit and U.S. Secretary of Education;
- Nicholas deB. Katzenbach, formerly chief counsel for IBM and Attorney General of the United States;
- Daniel A. Moore, Jr., formerly Chief Justice of the Supreme Court of Alaska;
- William H. Webster, formerly Judge of the U.S. Court of Appeals for the Eighth Circuit, Director of Central Intelligence, and Director of the Federal Bureau of Investigation;
- Charles W. Wolfram, Professor of Law, Cornell Law School, and Chief Reporter for the Restatement of the Law Governing Lawyers.

(Declarations on file with the *Seattle University Law Review*).

terms on the public policy favoring confidentiality of settlements, and largely ignored the particular circumstance of this case, including most notably the fact that the Exxon/Seattle Seven settlement had been disclosed but misrepresented."[65]

In the court's Order denying Exxon's Motion to Reconsider, Judge Holland modified his earlier opinion.[66] While the court continued to "doubt the propriety of rebating punitive damages as contemplated by the agreements, . . . the focus of the court's attention . . . [was] the manner in which Exxon used those agreements."[67] Judge Holland stated that "the court and jury were led to believe, by Exxon witnesses and counsel, that the Seattle Seven were paid $70 million in compensatory damages and left to pursue punitive damages against Exxon. That was not true."[68] Standing by his earlier opinion that what took place was pernicious,[69] Judge Holland found the misrepresentation of the Exxon/Seattle Seven settlement agreements to be "highly injurious to the civil justice system."[70]

Despite Judge Holland's concern over the use and misrepresentation of the agreements, he stated that "the court might [have] agree[d] with Exxon and its affiants, had Exxon succeeded in keeping the Seattle Seven settlement agreements entirely confidential."[71] While Judge Holland arrived at the correct conclusion in denying the Seattle Seven and Exxon a share in the punitive damages award, this statement undermines his own objections raised earlier in the proceedings. By adding this line, Judge Holland has clouded rather than clarified the issue of whether secret assignments of punitive damages are legal or ethical, and in doing so has encouraged rather than discouraged similar types of secret settlement agreements.

III. MARY CARTER AGREEMENTS

At the core of the argument concerning the legality of the Exxon/Seattle Seven agreements lies the issue of whether such an arrangement constitutes a Mary Carter agreement. The term "Mary Carter" agreement arises from the settlement pact in the Florida

65. Appellees' Brief, *supra* note 2, at 22.
66. Order No. 327, *supra* note 23, at 5.
67. *Id.* at 6.
68. *Id.* at 6-7.
69. *Id.* at 6.
70. *Id.*
71. Order No. 327, *supra* note 23, at 11.

collision case, *Booth v. Mary Carter Paint Co.*[72] A Mary Carter agreement is a partial settlement between some, but not all, of the parties involved in a multiparty litigation.[73] Such agreements have been defined in a number of ways, but generally exist when "the settling defendant possesses a financial stake in the outcome of the case and the settling defendant remains a party to the litigation."[74] Accordingly, parties that were once on opposite sides of the litigation secretly agree to cooperate to the detriment of the other parties.[75] While Mary Carter agreements are most often characterized as a settlement between the plaintiff and some, but not all, of the defendants in a trial, the number of variations of these agreements "is limited only by the ingenuity of counsel and the willingness of the parties to sign. . . ."[76]

Three factors are generally present in a Mary Carter agreement. First, the settling party agrees to remain a party to the litigation.[77] Second, the settling party retains a financial stake in the outcome of the

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72. Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). In *Booth v. Mary Carter Paint Co.*, the plaintiff's husband brought a wrongful death action against the drivers and owners of three trucks that were stopped blocking a highway late at night, thereby causing his wife's death when she collided with them. Two of the three defendants subsequently settled with the plaintiff, agreeing to defend themselves in court and to testify against the nonsettling defendants in exchange for reducing their own maximum liability. Additionally, the agreement required that the settling defendants keep the terms of their agreement secret. Although the Florida Court of Appeals upheld the agreement, the Florida Supreme Court overruled *Booth* in *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973), holding that such secret settlements "mislead judges and juries, and border on collusion. [And] to prevent such deception . . . such agreements must be produced for examination before trial." *Ward* at 387. In 1993, however, the Florida Supreme Court, finding the *Ward* disclosure policy insufficient, declared that all Mary Carter agreements are void as against public policy. Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993).

These agreements are sometimes also referred to as "Gallagher" agreements, *see, e.g.*, City of Tucson v. Gallagher, 493 P.2d 1197 (Ariz. 1972); loan receipt agreements, *see, e.g.*, Bohna v. Hughes, 828 P.2d 745, 756 (Alaska 1992); sliding scale settlements, *see, e.g.*, Abbott Ford, Inc. v. Superior Court, 741 P.2d 124, 149 (Cal. 1987); and guaranteed verdict agreements, *see, e.g.*, Bedford School District v. Union Pacific R.R., 367 A.2d 1051, 1052 (N.H. 1976).

73. *See* David Jonathan Grant, *The Mary Carter Agreement - Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1393 (1974).

74. Elabor v. Smith, 845 S.W.2d 240, 247 n.13 (Tex. 1992) (quoting Ward v. Ochoa, 284 So. 2d at 387).

75. *See* John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368, 371-372 (1987).

76. Maule Industries v. Rountree, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973).

77. *See, e.g.*, Elabor v. Smith, 845 S.W.2d at 247. "A Mary Carter Agreement does not have to expressly state that the settling defendant must participate in the trial. The participation requirement is satisfied by the mere presence of the settling defendant as a party in the case." *Id.* at 247 n.14.

trial.[78] Third, the parties agree to keep their agreement confidential.[79]

In a conventional settlement, the defendant pays the plaintiff a negotiated sum and in return the plaintiff executes a "release," discharging his claim against the defendant.[80] If the action has already begun, the settling party is dismissed from the lawsuit, leaving the remaining parties and claims to be judged on the merits.[81]

By contrast, in a Mary Carter agreement the settling defendant promises to remain a party to the lawsuit and work with the plaintiff to seek a judgment against the nonsettling defendant.[82] The settling defendant guarantees the plaintiff a minimum recovery,[83] and, as incentive, if there is a judgment against the nonsettling defendant, some or all of the guarantee will be rebated to the settling defendant, who may ultimately pay nothing.[84] However, in a Mary Carter agreement without a formal rebate provision, the settling defendant agrees merely to remain in the lawsuit to prejudice the nonsettling defendant.[85] Regardless of which Mary Carter agreement is used, the terms of the agreement are kept strictly confidential.[86] As the court held in *Ward v. Ochoa*, "[S]ecrecy is the essence of such an arrangement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the [settling] defendant."[87]

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78. *See, e.g., id.* at 247. Typically, "the settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may [*or may not*] be offset in whole or in part by an excess judgment recovered at trial." *Id.*

79. *See, e.g.*, Dosdourian v. Carsten, 624 So. 2d at 243.

80. *See* Benedict, *supra* note 75, at 371.

81. *See id.*

82. *See Dosdourian*, 624 So. 2d at 243-244. Unique to the Mary Carter agreement, the settling defendant remains a party in the lawsuit and continues to defend his case in court. Because of the economic incentive of the agreement, the settling defendant now uses his ability to participate at trial, bring witnesses, cross-examine witnesses, and argue to the jury to the advantage of the plaintiff. *Id.*

83. *See* Grant, *supra* note 73, at 1397.

84. *See* Elabor v. Smith, 845 S.W.2d at 247.

85. *See Dosdourian*, 624 So. 2d at 246.

86. *See* Ward v. Ochoa, 284 So. 2d at 387.

87. *Id.*

A. Pros and Cons of Mary Carter Agreements

Mary Carter agreements have been described as "unethical collusion[s],"[88] "settlement viruses,"[89] "unholy alliances,"[90] and "contractual monstrosit[ies]."[91] "They have also been criticized on the grounds that they are unethical and amount to champerty, barratry and maintenance."[92] In effect they can distort the trial process, mislead the jury, encourage unethical collusion among opposing parties, and promote further litigation.[93]

Since 1967, some twenty-eight state courts have considered the legality and ethics of Mary Carter agreements, finding their secrecy to be the most compelling reason for judicial disapproval.[94] Because of the secrecy, parties to the agreement enjoy a number of tactical and procedural advantages. For example, parties can share documents and information about the case,[95] share peremptory challenges in order to obtain a favorable jury,[96] support each other's motions and vehemently challenge the nonsettling party's motions,[97] lead witnesses on examination and cross-examination,[98] and abandon defenses earlier asserted in the pleadings.[99]

While the court and jury usually presume that parties and their counsel are motivated by their own interests, that presumption is no longer valid when parties secretly agree otherwise prior to trial.[100] As a result, courts and juries are deceived, not only by the presentation of

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88. *Elabor*, 845 S.W.2d at 250.

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

90. Larry Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L. J. 233 (1980).

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

92. Lisa Bernstein and Daniel Klerman, *An Economic Analysis of Mary Carter Agreements*, 83 GEO. L. J. 2215, 2216-17 (1995). "Maintenance generally refers to an arrangement in which one person agrees to support another in bringing or defending a legal action." Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L. J. 485, 485 (1992). "Champerty is a kind of maintenance in which the investor receives a share of the proceeds of the lawsuit in exchange for financing the legal action." *Id.* Barratry is the offense of stirring up or inciting quarrels and lawsuits. BLACK'S LAW DICTIONARY 103 (6th ed. 1991).

93. *See* Elabor v. Smith, 845 S.W.2d at 250.

94. *See, e.g.*, Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1978).

95. *See, e.g.*, Mustang Equipment Inc. v. Welch, 564 P.2d 895, 897 (Ariz. 1977).

96. *See, e.g.*, Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907, 920-22 (Tex. Ct. App. 1979).

97. *See, e.g.*, Ratterree v. Bartlett, 707 P.2d 1063, 1075 (Kan. 1985).

98. *See, e.g.*, General Motors Corp. v. Lahocki, 410 A.2d 1039, 1044-45 (Md. 1980).

99. *See, e.g.*, Ponderosa Timber & Clearing Co. v. Emrich, 472 P.2d 358, 362-64 (Nev. 1970).

100. *See* Dosdourian v. Carsten, 624 So. 2d at 243.

distorted facts and evidence, but also by being led to believe that they are resolving an existing dispute that has already been resolved.[101] As the court held in *Dosdourian v. Carsten*, "This undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens."[102]

As a result of Mary Carter agreements, lawyers are forced into questionable ethical situations that require them to violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility.[103] In carrying out the objectives of the agreement, lawyers must necessarily make misrepresentations to the court and jury "in order to maintain the charade of an adversarial relationship."[104] Such actions fly in the face of legal ethics concerned with representing conflicting interests, ensuring candor and fairness, taking technical advantage of opposing counsel, and pursuing unjustified litigation.[105]

The main argument in support of Mary Carter agreements is that they promote settlement of lawsuits. Public policy favors settlement because it lessens the expense and uncertainty of litigation and reduces court congestion.[106] While the law does favor settlement, Mary Carter agreements achieve only partial settlement and by design require a trial against the nonsettling party.[107] Additionally, Mary Carter agreements prevent settlement with the nonsettling party because, in order to accomplish the goal of the agreement, litigation must be pursued.[108] Thus, the benefits of settlement are not realized.

B. The Majority Position

Despite the widespread criticism of Mary Carter agreements, the majority of jurisdictions have decided to tolerate them, but they require disclosure of the agreements to the court and usually to the jury in

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101. *See id.*

102. *Id.*

103. *See* Elabor v. Smith, 845 S.W.2d at 250.

104. *Dosdourian*, 624 So. 2d at 244 (finding that the settling parties ability to retain influence over the outcome of the lawsuit and the adversarial process promotes unethical practices). *See also* Daniel v. Penrod Drilling, Co., 393 F. Supp. 1056 (E.D. La. 1975) (determining that deceptive trial tactics were outside the boundaries of ethical conduct).

105. Lum v. Stinett, 488 P.2d 347 (Nev. 1971); Benedict, *supra* note 75, at 378. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 1, 7, 9 (1981); MODEL CODE OF PROFESSIONAL CONDUCT Rules 3.1, 3.3, 3.4, 4.1 (1984).

106. *See* Patricia M. Morrow, *Is Mary Carter Alive and Well in Michigan?: Taking a Stand on Secret Agreements in Multi-Party Tort Litigation*, 2 DET. C.L. REV. 590, 625 (1985).

107. *See Elabor*, 845 S.W.2d at 248.

108. *See* David R. Miller, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779, 786 (1978).

order to overcome their secrecy.[109] Additional guidelines can require judicial supervision and may mandate that Mary Carter agreements be discoverable.[110] In *Elabor v. Smith*, the trial court additionally provided the nonsettling defendant the same number of peremptory challenges as the settling defendant and plaintiff combined, denied the settling parties the customary right of an opponent to lead each other's witnesses, and reversed the order of presentation to guarantee that the nonsettling defendant always had the final opportunity to present evidence and examine witnesses.[111] By implementing procedural safeguards and requiring mandatory disclosure of such settlements, courts are satisfied that the nonsettling parties will not be unfairly disadvantaged.[112]

C. *The Minority Position*

A minority of jurisdictions, however, have found such prophylactic measures unsatisfactory and have declared Mary Carter agreements void as against public policy.[113] These jurisdictions hold that Mary Carter agreements are "inimical to the adversary system and they do not promote settlement—their primary justification."[114] Instead, such agreements pressure the settling party "to alter the character of the suit by contributing discovery material, peremptory challenges, trial tactics, supportive witness examination, and jury influence to the

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109. *See, e.g.*, Hoops v. Watermelon City Trucking, Inc., 846 F.2d 637, 641 (10th Cir. 1988) ("Mary Carter agreements must be revealed to all parties and the court prior to trial and to the jury in some appropriate degree to be decided by the trial court"); Wilkins v. P.M.B. Systems Engineering, Inc., 741 F.2d 795, 798 n.2 (5th Cir. 1984) ("because of the inherent power of a trial court to enforce settlement agreements reached in cases pending before it, and to determine the validity of such agreements, it is important that the trial court retain a significant degree of discretion in approving and enforcing Mary Carter agreements, as well as in disclosing their terms to the jury").

110. Oklahoma has adopted a unique approach to dealing with Mary Carter agreements. The Oklahoma Supreme Court, in *Cox v. Kelsey-Hayes Co.*, required trial courts, on discovering such an agreement, either to dismiss the settling party prior to trial or to prohibit the portion of the agreement granting an interest in the recovery. Cox v. Kelsey-Hayes Co., 594 P.2d at 359. "The [Oklahoma] court reasoned that if the settling [party] is dismissed and subsequently appears as a witness, cross-examination regarding the [party's] interests and credibility will sufficiently protect the nonsettling [party's] interests." J. Michael Phillips, Comment, *Looking Out For Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 WASH. L. REV. 255, 261 (1994). Alternatively, if the settling party is prevented from acquiring a financial stake in the outcome, the adversarial nature of the proceedings will be preserved. *See Cox*, 594 P.2d at 359-360.

111. Elabor v. Smith, 845 S.W.2d at 255.

112. *See id.* at 248.

113. *See, e.g.*, Dosdourian v. Carsten, 624 So. 2d at 245; Lum v. Stinnett, 488 P.2d at 351; Trampe v. Wisconsin Tel. Co., 252 N.W. 675, 677-78 (Wis. 1934).

114. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 2 (Tex. 1986).

[opposing side]."[115] Even with mandatory disclosure, such a change in the adversarial nature of the parties could confound a jury charged with determining the liability and damages of the parties.[116] Additionally, a jury could be influenced by the fact that a settlement has been reached and by the behavior of the attorneys for the settling parties. The minority is convinced that "the only effective way to eliminate the sinister influence of Mary Carter agreements is to outlaw their use."[117]

D. Alaska's and Washington's Positions on Mary Carter Agreements

The Alaska and Washington courts have both indicated leanings toward the majority view. While the Alaska court has not had the opportunity to address directly the validity of Mary Carter agreements, it has determined that the use of a loan receipt agreement,[118] a close cousin to Mary Carter, is a valid settlement device provided it is disclosed to the jury.[119] The Alaska court held that the nonsettling party's concerns over the collusive nature of the agreement "were adequately met by allowing the [nonsettling party] to disclose the realignment of interests to the jury and by letting the jury evaluate the witnesses' credibility."[120] Citing an earlier opinion, the court additionally noted that "juries should be informed when settlements change the normal interests of parties."[121]

Washington's consideration of Mary Carter agreements has likewise been extremely limited. Only one post-tort reform case, *McCluskey v. Handorff-Sherman*, even mentions Mary Carter agreements.[122] The court in *McCluskey*, however, did not reach the

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115. *Elabor*, 845 S.W.2d at 249.

116. *See* Benedict, *supra* note 75, at 383.

117. *Dosdourian*, 624 So. 2d at 246.

118. "A loan receipt agreement is essentially the same as a Mary Carter agreement with one significant difference: the settling defendant actually transfers money to the plaintiff at the time of the agreement. This transfer is considered a 'loan' and is repayable if and to the extent that the plaintiff wins a judgment against the nonsettling defendants." Jerold S. Solovoy et al., *Settlement of Complex Civil Cases*, 584 PRAC. L. INST. 393, 477 (1987).

119. *See* Bohna v. Hughes, 828 P.2d at 757.

120. *Id.*

121. *Id.* (citing Breitkreutz v. Baker, 514 P.2d 17, 29 n.30 (Alaska 1973)).

122. McCluskey v. Handorff-Sherman, 841 P.2d 1300 (Wash. Ct. App. 1992). In *McCluskey*, the sixteen-year-old defendant driver was on his way home, accompanied by a few of his friends with whom he had shared some marijuana. It was raining hard and had begun to snow. While the defendant was stopped at a red light, he decided to pass the car ahead of him after the light turned green. As he pulled around the car on the right and started to accelerate, he began heading down hill toward a "dip" in the road where water had accumulated. As he hit the dip and accumulated water, his tires lost traction and his car slid across the median into oncoming traffic. The defendant's car slammed into Mr. McCluskey's car, forcing it down an

validity of Mary Carter agreements because the defendant State did not establish that any such agreement existed.[123] Nevertheless, the court stated in dicta that "the existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact."[124] The court indicated that only through pre-trial disclosure of the agreement to the court and jury can the credibility of witnesses be fairly evaluated.[125]

IV. A NOVEL MARY CARTER AGREEMENT

Although plaintiffs and their affiants argued that the Exxon/Seattle Seven agreements were a "form" of Mary Carter agreement,[126] Judge Holland held that they were not because they did not fall within the traditional Mary Carter definition.[127] The remainder of this article will argue, however, that the Exxon/Seattle Seven agreements are a novel form of Mary Carter agreement and that, despite their novelty, they are functionally similar to a Mary Carter agreement. Furthermore, such agreements are even more reprehensible than traditional Mary Carter agreements because they require that parties not only act secretly and to the detriment of plaintiffs, but also

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embankment and throwing Mr. McCluskey from the car. Mr. McCluskey died at the scene.

Mrs. McCluskey filed a wrongful death suit against Handorff-Sherman for negligently operating his vehicle and the State of Washington for maintaining a hazardous and unsafe roadway. A jury found the defendant driver and the State of Washington each fifty percent liable.

On appeal, the State moved for a new trial, arguing that the indigent, insuranceless defendant had secretly worked together with the plaintiff to obtain a verdict against the State, "the defendant with the deep pocket." *Id.* at 1304. In support of its contention, the State pointed to the defendant's failure to object to plaintiff's motions in limine, to defendant's agreement with plaintiff as to jury selection, and to defendant's and plaintiff's targeting of the State as the responsible party while reducing the liability of the defendant driver. *Id.* at 1304. Although the court agreed that the two parties were in "unusual synchronization," without evidence of some kind of agreement there was no basis for a new trial. *Id.* at 1305.

123. *See id.* at 1305.

124. *Id.* at 1304.

125. *See id.*

126. *See* Plaintiff's Memorandum, *supra* note 8, at 39; Hazard Declaration, *supra* note 33, at 10.

127. Order No. 317, *supra* note 25, at 30 n.42. Judge Holland did not elaborate as to why he believed the Exxon/Seattle Seven agreement was not a Mary Carter agreement, other than by citing to the *Ward v. Ochoa* traditional definition. "A Mary Carter agreement is a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of other co-defendants." *Id.* (citing *Ward*, 284 So. 2d at 387). If Judge Holland did not recognize the Exxon/Seattle Seven agreement as a Mary Carter agreement by definition, however, he did find the Exxon/Seattle Seven agreement "even more reprehensible." Order No. 317, *supra* note 25, at 30 n.42. *See also* Order No. 327, *supra* note 23, at 8 n.13.

mislead the court and, most egregiously, the jury.[128] To prevent this type of deception in the future, such novel Mary Carter agreements must be disclosed to the court.

A. *The Exxon/Seattle Seven Agreements are Equivalent to a Mary Carter Agreement*

Although the *Exxon Valdez* case did not involve one plaintiff and multiple defendants, all of the Mary Carter factors are present in the Exxon/Seattle Seven agreements. First, the Seattle Seven remained a party to the lawsuit. Second, Exxon and the Seattle Seven agreed that the terms of their agreement would be kept confidential. And third, the Seattle Seven acquired a financial stake in the outcome of the trial by virtue of the $70 million payment and the performance bonus for objecting to the Plan of Allocation and recovering possible punitive damages.[129]

In addition to satisfying the Mary Carter factors, the Exxon/Seattle Seven agreements caused the same kind of procedural and substantive damage that Mary Carter agreements cause.[130] By keeping secret its agreement with the Seattle Seven, Exxon was able to deceive the court and jury by testifying that it had obtained only receipts from the Seattle Seven and not the surrender of rights.[131] Its objective in misrepresenting the Seattle Seven agreement was to have the jury assess punitive damages without the benefit of knowing that Exxon intended to recoup a portion of whatever amount the jury assessed.[132] Had the jury been aware of Exxon's scheme to recoup nearly fifteen percent of the punitive damages award, the jury may well have increased the punitive damages by fifteen percent.[133] Thus as Judge Holland noted, "Exxon sought to reduce its exposure to punitive damages twice: once by informing the jury of its voluntary payments to the seafood processors, and a second time through its secret

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128. *See* Order No. 327, *supra* note 23, at 30 n.42.

129. Though the performance bonus was not added until the 1996 amendment, it is sufficient for a "financial stake" that the Seattle Seven received the $70 million payment. *See, e.g.*, Benedict, *supra* note 75, at 371 n.14 (stating that "even without a formal rebate provision," the financial factor is met when the defendant guarantees the plaintiff a fixed payment, "regardless of the court's judgment"); Elabor v. Smith, 845 S.W.2d at 247; Dosdourian v. Carsten, 624 So. 2d at 246 (prohibiting "any agreement which requires the settling defendant to remain in litigation, regardless of whether there is a financial incentive to do so").

130. *Cf. Elabor*, 845 S.W.2d at 250.

131. *See* Order No. 317, *supra* note 25, at 29.

132. *See id.* at 28.

133. *See id.* at 29.

agreement with the Seattle Seven."[134] Having failed to disclose the agreement before trial, Exxon succeeded in perpetrating a fraud on the court, and nearly received fifteen percent of the punitive damages award.[135]

Exxon and its affiants, however, disputed the assertion that its agreements with the Seattle Seven were analogous to a Mary Carter agreement.[136] They argued that, unlike a Mary Carter agreement, the Exxon/Seattle Seven agreements neither changed the adversarial relationship of the parties nor obligated the Seattle Seven to participate in the punitive damages phase of the trial.[137]

Contrary to Exxon's argument, however, the agreement did alter the adversarial relationship between Exxon and the Seattle Seven by requiring that the Seattle Seven pursue punitive damages on behalf of Exxon. Although the Seattle Seven did not participate in the punitive damages phase of the trial, Exxon used its new alliance with the Seattle Seven to mislead the court and the jury.

As Professor Geoffrey Hazard argued, "[the Seattle Seven's] participation in the arrangement made them accomplices to the deception of the court."[138] What is more, the Seattle Seven demonstrated its alliance with Exxon by objecting to the Plan of Allocation and claiming fifteen percent of the punitive damages award on Exxon's behalf. Without this alliance, Exxon would have been unable to pursue its scheme to rebate punitive damages.

Furthermore, as the court pointed out in *Elabor v. Smith*, participation at trial is not a requisite of a Mary Carter agreement. As previously noted, "the participation requirement is satisfied by the mere presence of the settling [plaintiff] as a party in the case."[139]

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134. *Id.*

135. *See id.* at 30 ("Although the court does not so find, it is probable that more than one of the many attorneys who represent Exxon and the Seattle Seven violated Rule 3.3 of the Alaska Rules of Professional Conduct requiring candor toward the tribunal"). Judge Holland stopped short of finding violations of the Rules of Professional Conduct, but left open the possibility for formal sanctions at a later date, including sanctions to the Alaska Bar Association. *See* Stanley Holmes, *Exxon, Fish Processors' Secret Deal Backfires—Oil Giant Would Have Gotten Part of Spill Money*, SEATTLE TIMES, July 1, 1996, at A1.

136. Reply Memorandum of Defendants Exxon Corporation and Exxon Shipping Company in Support of Motion to Reconsider Order No. 317 at 12, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska memorandum filed July 15, 1996) [hereinafter Defendants' Reply Memorandum] (on file with the *Seattle University Law Review*).

137. *Id.*

138. Hazard Declaration, *supra* note 33, at 12. This comment is not meant to infer that the Seattle Seven took part in the misrepresentation in court, only that their participation in the agreement altered the character of the lawsuit.

139. Elabor v. Smith 845 S.W.2d at 247 n.14.

Even if the settling defendant does not participate in the trial, the court and jury are still misled as to the actual relationship among the settling parties by the presence of the settling defendant as a party in the case.[140] Therefore, it is enough that the Seattle Seven seafood processors maintained their status as plaintiffs in the mandatory punitive damages class.

Exxon additionally argued that, unlike a Mary Carter agreement, the 1991 agreement did not provide any financial incentive for the Seattle Seven to assist Exxon.[141] However, even though the Seattle Seven did not receive the incentive bonus to pursue punitive damages until after the punitive damages phase of the trial, the Seattle Seven still had a financial incentive because they had received the $70 million settlement payment.[142] In any event, the $70 million settlement provided considerable incentive and security for the Seattle Seven at a time when it was unclear whether there would be a punitive damages recovery, and whether that recovery would include the Seattle Seven.[143] Once the Seattle Seven entered into the agreement with Exxon, they were bound by its terms to pursue punitive damages on behalf of Exxon, with or without a financial incentive. Additionally, it should be noted that the Seattle Seven did not object to the Plan of Allocation until after they had amended their agreement with Exxon in 1996. The amended agreement added a minimum $6 million incentive bonus.

Finally, Exxon's affiants argued that the Exxon/Seattle Seven agreements could not be analogous to a Mary Carter agreement because they did not oblige the signatories to "gang up on" or harm the nonsettling parties.[144] Like the nonsettling party in Mary Carter agreements, however, the plaintiffs in the Exxon case were significantly harmed by the Exxon/Seattle Seven agreements.

As a result of the secret agreement, plaintiffs were deceived by the misrepresentation of evidence during the punitive damages phase of the trial. Had plaintiffs been aware of the Exxon/Seattle Seven agreements at the time of trial, they could have addressed the issue, both in cross

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140. *See id.*

141. *See* Defendants' Reply Memorandum, *supra* note 136, at 12.

142. *See, e.g.*, Benedict, *supra* note 75, at 372 n.14.

143. *See* Seafood Processors' Reply Memorandum in Support of Motion for Reconsideration Regarding Order No. 317, at 4, *In re Exxon Valdez* No. A89-095-CV (HRH) (D. Alaska memorandum filed July 17, 1996) (on file with the *Seattle University Law Review*).

144. *See* Declaration of Shirley M. Hufstedler at 9, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 23, 1996); Declaration of William H. Webster at 5, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 15, 1996) [hereinafter Webster Declaration] (both on file with the *Seattle University Law Review*).

examination of Mr. Raymond and in closing argument.[145] Furthermore, the Seattle Seven's objections and Exxon's motions prolonged the litigation, causing undue delay in the conclusion of the trial and increasing legal expenses for plaintiffs and the federal court system. Moreover, Exxon and the Seattle Seven intend to prolong the litigation further by pressing the issue on appeal.[146]

1. The Exxon/Seattle Seven Agreements Contravene Legal Ethics

After considering the agreements between Exxon and the Seattle Seven, and after considering what the court and jury knew about those agreements, Judge Holland concluded that the Exxon/Seattle Seven agreements should not be enforced. He further concluded that a violation of the Alaska Rules of Professional Conduct had likely occurred.[147] Judge Holland stated that it was probable that more than one Exxon attorney violated Rule 3.3, which requires candor toward the tribunal, by misrepresenting the substance of those agreements to the court and jury.[148]

Rule 3.3 is one of the few rules in the Model Rules of Professional Conduct that places an affirmative duty on the attorney to prevent the court from being deceived.[149] The comment to Rule 3.3 suggests that a lawyer may make a statement in open court only "when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."[150] Additionally, Rule 3.3 requires

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145. *See* Declaration of Brian O'Neill at 2, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 2, 1996) (on file with the *Seattle University Law Review*).

146. *See generally* Appellants' Brief, *supra* note 10.

147. Order No. 327, *supra* note 23, at 2.

148. Order No. 317, *supra* note 25, at 30. Rule 3.3, Candor Toward the Tribunal, provides in relevant part:

> (a) A lawyer shall not knowingly:
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> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; . . . or
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6. (Confidentiality of Information)

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) [hereinafter MODEL RULES].

149. *See* Jill M. Dennis, Note, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 GEO. J. LEGAL, ETHICS 157, 158 (1994).

150. MODEL RULES, *supra* note 148, Rule 3.3, comment (2).

that a lawyer take remedial measures should the lawyer later learn that any of the evidence presented was false.[151]

In the Exxon case, both Mr. Raymond and Exxon's trial counsel made false and misleading statements to the court in violation of Rule 3.3.[152] Their testimony and argument was to the effect that Exxon voluntarily paid $113.5 million to the Seattle Seven and others, receiving only receipts in return. Exxon's statements, however, were false. In truth, Exxon sought to receive far more than receipts. It sought the return of fifteen percent of the punitive damages award. While Judge Holland did not specifically rule on the violations of professional conduct, he did twice find that Exxon intentionally and affirmatively misled the court, the jury, and the plaintiffs with regard to the terms of the Seattle Seven agreement.[153]

Writing for plaintiffs, Professor Hazard argued that Rules 1.2(d) and 8.4 of the Alaska Rules of Professional Conduct were also violated.[154] Rule 1.2(d) prohibits a lawyer from counseling a client to engage, or assisting a client to engage, in fraud.[155] Rule 8.4 states, "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice."[156]

Professor Hazard's rationale was essentially similar to Judge Holland's. Both agreed that Exxon, through its testimony and arguments, led the jury to believe that it was a "good corporate citizen."[157] In actuality, however, "Exxon and its attorneys withheld evidence of the agreements with the Seattle Seven that would have the effect of nullifying the jury verdict *pro tanto*."[158] Professor Hazard believed that the only purpose in withholding evidence of the

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151. MODEL RULES, *supra* note 148, Rule 3.3.

152. Though the court did not believe that either Lee Raymond or Exxon's trial counsel had knowledge of the details of the Seattle Seven agreement, the court stated that "at least one of the attorneys who represented Exxon had knowledge of the terms of the agreement." Order No. 327, *supra* note 23, at 7.

153. *See* Order No. 317, *supra* note 25, and Order No. 327, *supra* note 23.

154. Hazard Declaration, *supra* note 33, at 11. Geoffrey C. Hazard, Jr. is Trustee Professor of Law, University of Pennsylvania Law School; and Director of the American Law Institute. He was reporter and chief draftsman for the American Bar Association Rules of Professional Conduct; consultant and chief draftsman for the American Bar Association Code of Judicial Conduct; and consultant for the American Bar Association Code of Professional Responsibility.

155. ALASKA RULES OF PROFESSIONAL CONDUCT, Rule 1.2(d) (1993).

156. ALASKA RULES OF PROFESSIONAL CONDUCT, Rule 8.4 (1993).

157. *See* Hazard Declaration, *supra* note 33, at 11.

158. *Id.* at 11.

agreement was to mislead the court and jury.[159] In Professor Hazard's opinion, Exxon's deception constituted a violation of the professional duties owed to the tribunal.[160]

As earlier stated, Exxon's numerous affiants completely ignored the district court's findings that Exxon had affirmatively misrepresented to the court and jury the terms of the Exxon/Seattle Seven agreements. They argued simply that neither the agreements themselves nor the nondisclosure of the agreements were against public policy and, therefore, that they did not violate any ethical canons or rules.[161] As Mr. Webster contended, "If the pretrial settlement could be said to offend public policy, the vice must lie in the opportunity for mischief during trial resulting from such an agreement. *None appears to be present here.*"[162] Professor Wolfram likewise maintained that, "[the] Seattle Seven's agreements to cede back its award of punitive damages to Exxon in no way impeded or distorted the presentation of evidence to the jury at the Phase III trial."[163]

Only after the conclusion of the trial did Exxon admit that misrepresentations were made. Even then, Exxon argued that those misrepresentations were inadvertent and therefore did not violate public policy.[164] Exxon explained that Mr. Raymond and Exxon's trial counsel misspoke when they stated that Exxon had received only receipts.[165] But those statements were not literally true; Exxon did receive some releases.[166] What counsel should have said is, "[a]nd you know what, *for the most part* we never asked for a release."[167]

Plaintiffs now argue that the court's finding concerning the misrepresentations made by Exxon should be given deference.[168] Not only had Judge Holland heard the testimony in court, he had presided over the matter for seven years and had extensive experience with the parties and the design of the trial.[169] Based on his experience, "Judge

159. *Id.* at 11-12.

160. *Id.* at 11.

161. *See, e.g.*, Webster Declaration, *supra* note 144, at 7.

162. *Id.* at 4 (emphasis added).

163. Declaration of Charles W. Wolfram at 7, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 11, 1996) (on file with the *Seattle University Law Review*).

164. *See* Appellants' Brief, *supra* note 10, at 36.

165. *See id.*

166. *See id.*

167. *See id.* Exxon's Counsel actually said in closing arguments, "And you know what, we never asked for a release." *Id.*

168. *See* Appellees' Brief, *supra* note 2, at 51.

169. *See id.* at 52.

Holland knew that Exxon had misled not only the jury, but had misled him as well."[170]

2. The Exxon/Seattle Seven Agreements Violate Public Policy Encouraging Settlement

Exxon portrayed its agreements with the Seattle Seven as a noble effort to serve the public policy of encouraging settlement. It asserted that partial settlements should be encouraged because they reduce the size of the litigation and often lead to a complete settlement.[171] Exxon's argument, however, ignored the facts of the Exxon/Seattle Seven agreements. The agreement did not promote settlement or reduce the size of the litigation, but rather promoted additional litigation by requiring that the Seattle Seven object to the Plan of Allocation and pursue punitive damages on Exxon's behalf. Despite having "settled," the Seattle Seven stood ready to jump back into the litigation whenever Exxon so desired. Moreover, Exxon's settlement agreement prevented settlement with the remaining plaintiffs because in order to accomplish the goal of its agreement litigation had to be pursued.

Exxon additionally argued that Judge Holland's refusal to honor its agreements was contrary to public policy because it discourages and prevents settlement in mass tort litigation.[172] Judge Holland was quick to dispute this assertion, however, holding that "[h]onest settlements will always expedite resolution of mass tort litigation; dishonest ones, such as the ones at issue here, however, will be rejected."[173]

B. Courts Must Require Disclosure of Novel Mary Carter Agreements

Recognizing the potential for abuse, the majority of courts have required that Mary Carter agreements be disclosed to the court before trial.[174] Ordinarily, settlement agreements between a plaintiff and defendant are excluded from the jury because of the concern that juries may consider settlements an admission of liability or may inappropriately adjust jury awards.[175] Mary Carter agreements have become an exception to the rule because, if left undisclosed, the settlement

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170. *Id.*
171. *See* Appellants' Brief, *supra* note 10, at 27.
172. *See* Order No. 317, *supra* note 25, at 31 n.45.
173. *Id.* at 31.
174. *See* Cox v. Kelsey-Hayes Co., 594 P.2d at 359.
175. *See* FED. R. EVID. 408.

arrangement is likely to adversely affect the proceedings and outcome of the trial.[176]

Exxon argued that the Exxon/Seattle Seven agreements should not have been disclosed to the court because of the public policies protecting the confidentiality of settlement agreements.[177] It further relied on the declarations submitted with its motion to reconsider Order No. 317.[178] Exxon's argument, however, failed to consider two critical facts: "(1) in this case, Exxon *did disclose* the existence of settlement agreements and (2) in doing so, Exxon misrepresented the terms of the relevant agreement."[179]

According to Order No. 327, Judge Holland did not dispute Exxon's arguments concerning public policies encouraging settlements or keeping them confidential, but focused on the fact that Exxon disclosed part of the agreements.[180] As the court explained, "Exxon disclosed part of the agreement; and in making that disclosure, Exxon misrepresented the part of the agreement which was crucial to the punitive damages issue. Having failed to tell the whole story, Exxon perpetrated a fraud upon the court and jury."[181]

Because the agreements were misrepresented and later disclosed, Judge Holland did not reach the issue of whether the Exxon/Seattle Seven agreements should have been disclosed to the court absent a misrepresentation. This Note concludes that, as in Mary Carter agreements, courts must require pretrial disclosure of novel agreements like the Exxon/Seattle Seven agreements to prevent parties from deceiving courts and undercutting the jury system. As in Mary Carter agreements, the danger of deception in the Exxon/Seattle Seven agreements arises from the secrecy of the agreements combined with the realignment of the parties' interests in the outcome of the case. Such agreements pose a serious threat to the adversarial process, as well as to the rights of the nonsettling parties. In Exxon's case, the withholding of the agreement further provided Exxon an opportunity

176. *See* Benedict, *supra* note 75, at 383.

177. *See* Appellants' Brief, *supra* note 10, at 40.

178. *See id. See also* Declaration of Griffin B. Bell at 4 *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 15, 1996) (on file with the *Seattle University Law Review*) ("I am not aware of any ethical obligation to advise a jury in advance of its verdict as to the terms of pre-existing settlements. In fact, the law is to the contrary and generally militates against disclosing settlements to a jury so that the jury can decide the issue cleanly, without angling to affect or undo a settlement."); Appellees' Brief, *supra* note 2, at 52.

179. Appellees' Brief, *supra* note 2, at 52.

180. *Id.* at 53.

181. Order No. 327, *supra* note 23, at 11.

to promote unethical collusion, prolong the litigation, and mislead the court and jury.

In order to preserve the integrity of the adversarial system, such settlements must be disclosed to the court. Disclosure will prevent parties from taking unfair technical advantage of nonsettling parties, reveal the true interests of the parties to the jury, and prevent misrepresentation of the contents of the agreements to the court and jury. By requiring pre-trial disclosure of such agreements, courts can determine how best to limit the prejudicial effects of the agreements, while preserving the right of the defendant to settle with any plaintiff.

By removing the veil of secrecy from novel Mary Carter agreements, signatories to the agreements will be prevented from skewing the trial process and misleading courts and juries. Because the danger of deception is greatly diminished when disclosure of such agreements is made to the court, it is probably unnecessary to declare such agreements void altogether. Despite the presence of novel Mary Carter agreements, courts will be able to preserve judicial integrity through the implementation of reasonable procedural safeguards.

CONCLUSION

The Exxon/Seattle Seven settlement agreements are novel because a compulsory punitive damages class, such as the one at issue, is novel.[182] As compulsory punitive damages classes become more prevalent, however, so will novel forms of settlement agreements. Although Judge Holland reached the correct decision in refusing to allow Exxon to profit from its misrepresentation, he should have done more to prevent the mischief that future copy-cat agreements may bring.

By stating his approval of Exxon's craftiness, Judge Holland has endorsed a dangerous precedent. Exxon's novel Mary Carter agreement is not a new settlement device but a technique to subvert the adversarial process. As such, agreements like the one between Exxon and the Seattle Seven should be treated as Mary Carter agreements and be required to be disclosed to the court.

182. *See* Declaration of Nicholas DeB. Katzenbach at 3, *In re Exxon Valdez*, No. A89-095-CV (HRH) (D. Alaska declaration filed July 15, 1996) (on file with the *Seattle University Law Review*).