



Update on Prior Post on *Mary Carter* Agreements

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On Feb. 23 I posted about *Goodin v. White*, 342 S.W.3d 282 (Ky. App. 2011), the first Kentucky appellate decision dealing with *Mary Carter* settlement agreements (<http://civilprocedure.dbllaw.com/2012/02/nonsettling-defendants-should-beware/>). After running the post I received additional information, including the fact that the agreement in *Goodin* did have the characteristic of a *Mary Carter* agreement that it rewarded the settling defendant on a dollar-for-dollar basis with a set-off (via indemnity) for damages imposed against the nonsettling defendant. Also, I learned that the plaintiff in *Goodin* filed an amended complaint against the third-party defendant, making that party a defendant as well. I believe the opinion properly upheld the admissibility of the occurrence of a *Mary Carter* settlement agreement and correctly found that such a settlement may be admissible to show bias or for impeachment.

However, an indemnity agreement between the plaintiff and a defendant taking part in a jury trial would arguably give the settling defendant a hidden interest (and greater than usual bias) against the nonsettling defendant that distorts the normal adversarial process. This is one of the reasons why some jurisdictions have banned secret *Mary Carter* agreements, and why others hold them admissible. On the other hand, one could argue that attempting to educate the jury about the terms of such an indemnity agreement might cause confusion, and that admission of the fact of the settlement agreement itself is sufficient to let the nonsettling defendant argue to the jury that the settling parties are in league. Also, under the particular circumstances of the *Goodin* case, there was already antagonism evident between the nonsettling defendant and the settling third-party defendant -- the filing of the third-party complaint itself.

The bottom line on *Goodin v. White*? The court and all parties should be advised of the existence of a *Mary Carter* agreement; and such an agreement should be admissible to show bias or to impeach prior testimony. I would have preferred if the opinion had added that individual terms of the agreement that would distort the normal adversarial process or that cause a de facto misalignment of the parties should be admissible to the jury as well, subject to the trial court's discretion.