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Settlements - Loan Agreements as Settlement Devices - Affirmative Duty to Disclose Loan Agreement to the Court and to the Remaining Defendants - Gatto v. Walgreen Drug Co., 61 Ill.2d 513, 337 N.E.2d 23 (1975)

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Court's growing recognition of the criminal nature of juvenile proceedings,[51] it can hardly be expected that more time, cost and effort will not be asked of the juvenile justice system in the future.

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Settlements—Loan Agreements as Settlement Devices—AFFIRMATIVE DUTY TO DISCLOSE LOAN AGREEMENT TO THE COURT AND TO THE REMAINING DEFENDANTS—*Gatto v. Walgreen Drug Co.*, 61 Ill.2d 513, 337 N.E.2d 23 (1975).

The Illinois Supreme Court approved loan agreements as a method of apportioning liability for damages between joint tortfeasors in the 1973 case of *Reese v. Chicago, B. & Q. R.R.*[1] Two years later, however, in *Gatto v. Walgreen Drug Co.*,[2] the court reevaluated its position on loan agreements and imposed limitations as to their use. Unfortunately, the court did not consider all of the problems which are inherent in these agreements. This Note will argue that the court should extend its *Gatto* holding to void loan agreements as against public policy because they undermine the adversary system and because they shift liability between joint tortfeasors without respect to culpability.

A loan agreement is one of many methods of apportioning liability between joint tortfeasors in Illinois tort actions. Contribution,[3] an in-

51. The *Breed* Court, noting the failure of the juvenile justice system to live up to its benign ideals, cited with approval prior Court responses which have been "to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions." 421 U.S. at 528-29.

1. 55 Ill.2d 356, 303 N.E.2d 382 (1973). In *Reese*, plaintiff sued the railroad and crane manufacturer for the death of her husband, a railroad employee. The railroad entered into a loan agreement/covenant not to sue and was dismissed before trial. A verdict was entered against the crane manufacturer, and the trial court set off the amount paid by the railroad against the verdict, holding that the agreement was a covenant not to sue and therefore deductible. On appeal, the Illinois Supreme Court decreed that the amount paid by the railroad was a loan and could not be set off against the judgment amount. The court held that loan agreements were a valid settlement tool in Illinois. To avoid the possibility of undermining the adversary process, the court held further that loan agreements could be admitted into evidence, and cross-examination would be allowed to establish a witness' knowledge of the agreement.

2. 61 Ill.2d 513, 337 N.E.2d 23 (1975), *petition for cert. filed sub nom* Gatto v. Calumet Flexicore Corp., 44 U.S.L.W. 3494 (U.S., Feb. 18, 1976) (No. 75-1173).

3. Contribution is the allocation of payment of a judgment between joint tortfeasors.

court alternative, is not available in Illinois.[4] However, courts can and do imply indemnification of a passively negligent tortfeasor by an actively negligent tortfeasor.[5] Thus, the burden of liability is shifted from the less culpable to the more culpable party. Out-of-court alternatives include settlements, releases, covenants not to sue, covenants not to execute, and recently, loan agreements. A discussion of the various settlement devices is essential to understanding loan agreements because loan agreements invariably employ one of these devices.

There are two devices which act to extinguish the plaintiff's cause of

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The two most common forms of contribution are pro rata and pro tanto. Under pro rata contribution, the share of one joint tortfeasor is determined by dividing the total judgment amount by the total number of tortfeasors who are solvent parties to the action. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §2 (1939 version). Pro tanto contribution reduces the plaintiff's verdict against the non-settling defendants by the amount stipulated in a settlement agreement or by the amount of consideration actually received by the plaintiff as a result of a settling agreement, whichever is greater. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §4(a) (1955 version).

4. The rule against contribution between joint tortfeasors was first stated in Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 133 (K.B. 1799) (involving an intentional, non-negligent tort). The decision in Nelson v. Cook, 17 Ill. 443 (1856) incorporated the *Merryweather* decision into Illinois law. Use of the courts for relief of wrongdoers is the principal objection to contribution. Reese v. Chicago, B. & Q. R.R., 55 Ill.2d 356, 363-64, 303 N.E.2d 382, 386 (1973). However, nearly three-quarters of the states have adopted contribution in some form. Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 So. CAL. L. REV. 1393, 1401 n.59 (1974). *See generally* Havighurst, *The Effect of a Settlement with One Co-Obligor upon the Obligations of the Others*, 45 CORNELL L.Q. 1 (1959); Comment, *Torts—Contribution Among Joint Tortfeasors—Effect of Partial Release on Pro Rata Allocation of Liability*, 58 CORNELL L. REV. 602 (1972). *See also* Polelle, *Contribution Among Negligent Joint Tortfeasors in Illinois: A Squeamish Damsel Comes of Age*, 1 LOYOLA (CHI.) L.J. 267 (1970), arguing that Illinois case law does not prohibit contribution.

5. Indemnity is the duty one party (indemnitor) has incurred to completely compensate another party (indemnitee) for any loss the second party (indemnitee) has incurred on behalf of the indemnitor. Parties may contract for express indemnification. 42 C.J.S. *Indemnity* §2 (1944). Parties may also be indemnified by operation of law, *id.* §20, either by statute, *e.g.*, the Illinois Structural Work Act, ILL. REV. STAT. ch. 48, §§60-69 (1975), or out of a liability imposed by law. An implied contract of indemnity arises in favor of a person who, without fault on his part, is exposed to liability and damages due to the negligent or tortious act of another. 42 C.J.S. *Indemnity* §21 (1944). In Illinois, where one party's liability is based on passive negligence (technical or less culpable negligence), the passively negligent party can seek indemnity from another party whose active negligence caused the injuries alleged. Harris v. Algonquin Ready-Mix, Inc., 59 Ill.2d 445, 322 N.E.2d 58 (1974); Sargent v. Interstate Bakeries, Inc., 86 Ill.App.2d 187, 229 N.E.2d 769 (1st Dist. 1967); Brown v. Joseph J. Duffy Co., 31 Ill.App.2d 272, 175 N.E.2d 277 (1st Dist. 1961); Moroni v. Intrusion-Prepakt, Inc., 24 Ill.App.2d 534, 165 N.E.2d 346 (1st Dist. 1960); Chicago Ry. Co. v. R. F. Conway Co., 219 Ill.App. 220 (1st Dist. 1920). *See also* Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287 (1976).

action. The first is a settlement,[6] a private agreement which discharges the plaintiff's claims against all of the settling defendants. Each defendant contributes a portion of the total settlement amount, thereby apportioning responsibility for damages according to the terms of the agreement. In contrast, a release[7] extinguishes plaintiff's cause of action against the consenting defendant and, by operation of law, releases all other defendants. The release thereby operates to the benefit of all defendants, with the defendant who pays for the release assuming responsibility for damages.

There are also two devices which do not extinguish the plaintiff's cause of action, but do serve to protect the covenanting defendant from liability. Under a covenant not to sue,[8] a verdict rendered against the

6. Settlement, as used in this context, means either an accord and satisfaction or a compromise and settlement. An accord is an agreement deciding a former claim, and satisfaction is the performance of the terms of the accord. Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill.App. 622, 624, *aff'd*, 215 Ill. 244, 74 N.E. 143 (1905). In an accord and satisfaction the demand must be fully met. *Id.* at 244, 74 N.E. at 144; Apex Motor Fuel Co. v. Stiglitz, 348 Ill.App. 123, 108 N.E.2d 29 (1st Dist. 1952). *See* 6 A. CORBIN, CONTRACTS §1276 (1962); 15 S. WILLISTON, CONTRACTS §§1838-61 (3d ed. 1972). Compromise and settlement is generally deemed a species of accord and satisfaction in that it has the same effect of discharging plaintiff's claim against the parties. However, the settlement may be less than the full amount sought. 15 AM. JUR. 2d *Compromise and Settlement* §3 (1964). *See* English, *A Year of Pre-Trial Settlement Conferences*, 40 CHI. BAR RECORD 343 (1959); Lynn, *Groundwork for the Law Suit*, 1954 U. ILL. L. FORUM 533, 554-56 (1954). Accord and satisfaction, compromise and settlement, and the doctrine of releases often overlap. *See* note 7 and accompanying text *infra*.

7. A release is giving up or abandoning an existing right or claim against a party. Shaw v. Close, 92 Ill.App.2d 1, 235 N.E.2d 830 (1st Dist. 1968). In addition, if an injured party releases one joint tortfeasor, all other joint tortfeasors are also released, whether or not they engaged in concerted action. Anderson v. Martzke, 131 Ill.App.2d 61, 266 N.E.2d 137 (1st Dist. 1970). However, where separate tortious conduct results in separate injuries, release of one tortfeasor does not release another. *Id.* at 67, 266 N.E.2d at 141. The "release of one releases all" rule can be traced back far into the common law. Plaintiff could elect to sue one or all defendants, but since defendants had acted in unity, all causes of action were merged; therefore a judgment against one merged against the others, barring any further action. *See* Note, *Torts—Joint and Several Liability, Releases, Covenants Not to Sue, Covenants Not to Levy and Execute—Reductions of Debts Pro Tanto*, 24 SO. CAL. L. REV. 466, 470 (1951).

8. A covenant not to sue one of two joint tortfeasors is not a bar to a suit against the other. Holcomb v. Flavin, 34 Ill.2d 558, 216 N.E.2d 811 (1966); Yeates v. Illinois Cent. R.R., 145 Ill.App. 11, *aff'd*, 89 N.E. 338, 241 Ill. 205 (1908). When a plaintiff receives payment for a covenant not to sue from a potential joint tortfeasor, such payment may be deducted from damages recoverable against the other joint tortfeasor, irrespective of whether the covenanting party is made a defendant to the suit or not. Hyde v. Montgomery Ward & Co., 343 Ill.App. 388, 99 N.E.2d 382 (3d Dist. 1951). The covenant not to sue was developed to combat the harsh effects of the "release of one releases all" rule.

non-covenanting defendants will be set off[9] by the amount paid under the agreement. The reduced verdict is then entered into judgment. This results in at least partial apportionment of liability for damages between the settling defendant and whichever defendant(s) plaintiff chooses to pursue for the judgment amount.

In a covenant not to execute,[10] the defendant's liability is limited to an agreed sum regardless of the judgment amount. It is generally used where plaintiff has obtained a joint and several judgment. In return for a partial payment, plaintiff gives a covenant not to execute, reserving his rights against other defendants who have not paid. However, the covenant not to execute has also been used where judgment has not yet been obtained in an action pending against the defendant. It does not extinguish the cause of action.[11] Again, this results in partial apportionment of liability for damages.

See note 7 *supra*. Rather than release his rights, a plaintiff contracts not to enforce his cause of action against the covenanting party. W. PROSSER, THE LAW OF TORTS §49, at 303 (4th ed. 1971); Lousberg, *Actions Against Multiple Tortfeasors: Credits Against Verdicts*, 55 ILL. B.J. 500, 502 (1967); Note, *Release to One Tort-Feasor Held Not to Bar Suit Against Others Liable for the Same Injury*, 63 COLUM. L. REV. 1142 (1963).

9. Submission of the question of setoff to the jury was approved by the Illinois Supreme Court in New York, C. & St. L. R.R. v. American Transit Lines, Inc., 408 Ill. 336, 97 N.E.2d 262, 268 (1951). However, the more common procedure is the one sanctioned in DeLude v. Rimek, 351 Ill.App. 466, 115 N.E.2d 561 (1st Dist. 1953), where it was held that the court should determine the issue of setoff.

10. A covenant not to execute is ordinarily used where two or more tortfeasors are found jointly and severally liable. Instead of exercising the option to proceed against only one defendant for the entire amount, plaintiff will covenant with each defendant for a portion of the total judgment amount. This allows the plaintiff to proceed against the other defendant(s) for the remaining amount. *See* Note, *Torts—Joint and Several Liability, Releases, Covenants Not to Sue, Covenants Not to Levy and Execute—Reductions of Debts Pro Tanto*, 24 So. CAL. L. REV. 466 (1951); Note, *Settlement Devices With Joint Tortfeasors*, 25 U. FLA. L. REV. 762 (1973); Ivy v. Pacific Automobile Ins. Co., 156 Cal. App.2d 652, 320 P.2d 140 (1958); Whittlesea v. Farmer, 86 Nev. 347, 469 P.2d 57 (1970).

11. Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945) (loan agreement/covenant not to execute); Ivy v. Pacific Automobile Ins. Co., 156 Cal.App.2d 652, 320 P.2d 140 (1958) (covenant not to execute); Farrell v. Kingshighway Bridge Co., 117 S.W.2d 693 (Mo. App. 1938) (agreement not to enforce judgment against one joint tortfeasor held not to release other joint tortfeasors due to Missouri contribution statute); Whittlesea v. Farmer, 86 Nev. 347, 469 P.2d 57 (1970) (covenant not to execute); Gillette Motor Transport Co. v. Whitfield, 186 S.W.2d 90 (Tex. Civ. App. 1945) (agreement not to execute).

A loan agreement,[12] also known as a Mary Carter agreement,[13] is an agreement between a plaintiff and less than all defendants. The plaintiff agrees not to sue or not to execute against the signing defendant and in return, the defendant guarantees plaintiff a stated amount of money. A contingency clause, the loan provision, is then inserted. The clause states that in the event plaintiff recovers a judgment from a non-signing defendant which is equal to or more than the amount of the agreement, the money paid to plaintiff under the agreement is a loan which is to be repaid from the proceeds of the judgment against the non-signing defendant. In addition, plaintiff promises to pursue his claim against the non-signing defendant to legal limits. Some agreements also provide that the agreement or its terms are to be kept secret. The signing defendants may either be dismissed from the action or retained as defendants to verdict.[14]

The result of such an agreement is to shift the entire burden of liability from the signing defendant to the non-signing defendant, regardless of the degree of culpability of either party. Although the signing defendant loses the amount of the loan if plaintiff fails to recover a judgment from the other defendants, he has limited his liability in case of a judgment against him. Where plaintiff recovers a judgment against a non-signing defendant, the signing defendant is then indemnified from the judgment proceeds for the amount of the loan. In effect, the loan agreement gives the signing defendant a subrogated claim against the non-signing defendant for the full amount of the loan.

In *Gatto v. Walgreen Drug Co.*,[15] plaintiff sued the owners-lessors (Lessors) of a Walgreen drug store when the roof of the building col-

12. Loan agreements originated in marine insurance cases. In such cases the insurance agreement provided that the shipper of goods could be compensated by the insurer for loss only if the carrier was unable to make compensation. However, the carrier's agreement provided that it was to have the proceeds of the shipper's insurance. The losing party was the shipper under both agreements. In this battle between the insurer and the carrier as to whom would bear the burden of the shipper's loss, the insurers created the loan agreement in an attempt to indemnify themselves. The loan agreement permitted the shipper to be compensated immediately. In return, the shipper promised to sue the carrier to judgment, and repay the loan from the judgment proceeds, thus subrogating the insurer's claim and saving the insurer from any prejudice a jury might have against insurance companies. This arrangement was approved by the United States Supreme Court in Luckenbach v. McCahan Sugar Refining Co., 248 U.S. 139 (1918). *See* Note, 95 U. PENN. L. REV. 231, 233 n.13 (1946).

13. Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. App. 2d Dist. 1967). The nickname was first alluded to in Maule Industries, Inc. v. Rountree, 284 So.2d 389 (Fla. App. 4th Dist. 1973). *See, e.g.*, Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady Is Exposed*, 28 U. MIAMI L. REV. 988 (1974).

14. *See* Comment, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 So. CAL. L. REV. 1393 (1974). For examples of loan agreements used in various cases, *see* Scoby, *Loan Receipts and Guaranty Agreements*, 10 THE FORUM 1300, 1317-25 (1975).

15. 61 Ill.2d 513, 337 N.E.2d 23 (1975).

lapsed. Plaintiff was precluded from suing Calumet Flexicore Corporation (Calumet), the installers of the roof, by the statute of limitations. The Lessors, however, joined Calumet as a third-party defendant for implied indemnity. Subsequent to the commencement of the trial, plaintiff and defendant Lessors entered into a loan agreement for $80,000. By its terms, the agreement acted as a covenant not to execute. In the event the jury awarded Lessors indemnity from Calumet, the third-party defendant, the $80,000 would be repaid to the Lessors from the proceeds of the indemnity judgment. Any amount in excess was to be paid to the plaintiff. In effect, if the jury awarded Lessors indemnity, the payment under the agreement was a loan, to be repaid from the judgment recovery against Calumet. The agreement was not formally disclosed to Calumet.

The jury returned a $120,000 judgment for plaintiff against Lessors, and for Lessors on their indemnity claim against Calumet. Calumet appealed. The judgments were affirmed in an opinion filed in June of 1972.[16]

Calumet appealed a second time, alleging that it had just obtained knowledge of the loan agreement, that the agreement had been fraudulently concealed from it, and that as a result of the agreement there was no longer a justiciable controversy to submit to trial. The appellate court again affirmed the decision; however, it limited execution on the judgment against Calumet to the $80,000 paid by Lessors pursuant to the agreement.[17] On appeal, the Illinois Supreme Court reversed the judgments.[18]

Three important holdings can be extracted from the *Gatto* decision. The first is that non-disclosure of the agreement amounted to fraudulent concealment.[19] The decision indicated that the parties to a loan agreement are under an affirmative duty to disclose the agreement to the court and to the remaining defendants.[20] The court specifically rejected

16. Gatto v. Curtis, 6 Ill.App.3d 714, 286 N.E.2d 541 (1st Dist. 1972). Lessors assigned their judgment against Calumet (third-party defendant) to the plaintiff, with a provision for repayment of the loan. In addition, a substitution of attorneys was made so that the Lessors were represented on appeal by counsel for the plaintiffs. *Id.* at 720-21, 286 N.E.2d at 544.

17. Gatto v. Walgreen Drug Co., 23 Ill.App.3d 628, 320 N.E.2d 222 (1st Dist. 1974). The court found that the judgment of liability for active negligence was properly entered against Calumet, but held that the agreement resulted in substantial prejudice to Calumet in connection with the amount of the recovery. *Id.* at 640, 320 N.E.2d at 231.

18. 61 Ill.2d 513, 337 N.E.2d 23 (1975).

19. *Id.* at 522, 337 N.E.2d at 29.

20. In holding the nondisclosure of the agreement to be fraudulent, the court sub silentio held that parties to a loan agreement are under an affirmative duty to disclose the agreement.

the argument that failure of Calumet to make official inquiry precluded any charge of fraudulent concealment on the part of the signers of the agreement. Failure to disclose the agreement, therefore, is reversible error.[21]

The court also held that the term "purchase of peace" used in the agreement acted as a surrender of all claims which the plaintiff had against the defendants. Since the parties no longer had adversary interests to litigate, no "justiciable matter" existed which was subject to court jurisdiction.[22] As a result, any practitioner who hereafter uses the words "purchase of peace" in an instrument of compromise or settlement is on notice that such words may define the instrument as a release, with all of its legal effects.[23] Finally, the court held that the loan agreement settled all triable issues between the plaintiff and the signing

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21. This standard of disclosure may have ramifications as to all settlement devices in Illinois, since it is unclear as to whether the *Gatto* court referred only to loan agreements, or considered the matter from the standpoint of any agreement entered into by plaintiff and less than all defendants.

22. 61 Ill.2d at 522-23, 337 N.E.2d at 29. A justiciable controversy is one which "must be definite and concrete, touching the legal relations of parties having adverse interests." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). *See* Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229 (1969); Note, *The Non-Justiciable Controversy*, 48 VA. L. REV. 922 (1962). Three fundamental needs of a justiciable controversy are: a full record of the facts, a presentation of opposing claims and defenses related to prior judicial settlements, and the potential of effective resolution of the dispute. Note, *Mootness on Appeal In the Supreme Court*, 83 HARV. L. REV. 1672, 1672-73 (1970). Having kept the agreement secret, the parties denied the court a full record of the facts. Having worked to recover a verdict adequate for both parties to the agreement, the parties failed to present "that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult . . . questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Such results militate against a true, effective resolution of the dispute.

23. The agreement read:

> The above payments, and each of them, are made solely as a purchase of peace and are not to be construed as an admission of liability on the part of any of the said defendants.

61 Ill.2d at 516, 337 N.E.2d at 25. In context, the term "purchase of peace" was used to deny the liability of the settling defendants, a use which is consonant with the Illinois rule that a document admitting liability may be used in evidence. McNealy v. Illinois Cent. R.R., 43 Ill.App.2d 460, 193 N.E.2d 879 (1st Dist. 1963); Steiner v. Rig-A-Jig Toy Co., 10 Ill.App.2d 410, 135 N.E.2d 166 (1st Dist. 1956); Maltby v. Chicago Gr. W. Ry. Co., 347 Ill.App. 441, 106 N.E.2d 879 (2d Dist. 1952). The court seems to have pulled these words out as determinative of the issues in order to narrow its holding. In effect, though, the court has put drafters of settling agreements on notice that a clause denying liability must be carefully worded in order to avoid the settlement of all issues. Because the supreme court did not specifically define "purchase of peace" in relation to a loan agreement, any settlement device in Illinois which uses this term is subject to construction as a release.

defendant, removing the defendant's status as an adverse party.[24] This holding indicates that once a loan agreement is executed, the signing defendant must be dismissed from the action.

If *Gatto* is read in conjunction with *Reese*, it is apparent that the holding is supported by important policy considerations. If the signing defendant is retained as an ostensible adverse party, the adverse relationship necessary for judicial jurisdiction of "cases and controversies" is distorted.[25] By requiring dismissal of the signing defendant and disclosure of the agreement, the *Gatto* court ameliorates the prejudicial effects of a secret agreement. By then applying the *Reese* requirements of admission of the agreement into evidence and cross-examination of witnesses,[26] the court superficially rectifies the problems of adversity.

If the signing defendant remains as a litigant, the signing parties could work together to enable the plaintiff to recover a judgment bountiful enough to repay the loan. The signing defendant may change the presentation of his defense to the plaintiff's advantage. He may abandon pleaded or tactical defenses. He may be called by plaintiff as an adverse witness.[27] Plaintiff's attorney may lead and cross-examine the signing defendant as an adverse party,[28] even though he may not do so with his own client.[29] Moreover, favorable statements elicited by a plaintiff's attorney from an apparent adverse party are weighed heavily by the jury.[30] By admitting, impliedly or actually, the merit of plaintiff's

24. In *Reese*, the covenanting defendant was dismissed from the action, while in the *Gatto* trial, the covenanting defendant stayed until judgment. The *Gatto* court's emphasis of this distinction, 61 Ill.2d at 523, 337 N.E.2d at 29, implies sub silentio that once a loan agreement is entered into, all triable issues between the parties are settled.

25. ILL. CONST. art. VI, §9 (1970). *See* note 23 *supra*. The Illinois judiciary has held that the existence of an actual case or controversy is essential for state appellate jurisdiction. People *ex rel.* Cairo Turf Club, Inc. v. Taylor, 2 Ill.2d 160, 116 N.E.2d 880 (1954); People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949); Johnson v. Board of Educ., 79 Ill.App.2d 22, 223 N.E.2d 434 (1st Dist. 1976); Harney v. Cahill, 57 Ill.App.2d 1, 206 N.E.2d 500 (1st Dist. 1965).

26. 55 Ill.2d at 364, 303 N.E.2d at 387.

27. *See* ILL. REV. STAT. ch. 110, §60 (1975). *See generally* J. HORSLEY, ILLINOIS CIVIL PRACTICE AND PROCEDURE 120 (1970). A true adversity of interest must exist in order to authorize the calling of a litigant under section 60. Corderey v. Hughes, 6 Ill.App. 401 (2d Dist. 1880) (parties in will contest made defendants by plaintiff had an interest common to that of plaintiff).

28. ILL. REV. STAT. ch. 110, §60 (1975). *See* 3 J. WIGMORE, EVIDENCE §773 (1940).

29. *Id.* at §769.

30. An example of abuse of this evidentiary procedure is Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971). There, plaintiff called a signing defendant as an adverse witness and "led him at will," while opposing full cross-examination by the non-agreeing defendant. *Id.* at 405, 488 P.2d at 349.

cause, the signing defendant insures a jury verdict for the benefit of himself and the plaintiff at the expense of the non-signing defendant.

The *Gatto* standards of disclosure and dismissal, coupled with the *Reese* requirements of admission and cross-examination, relieve the problems created by a signing defendant remaining a litigant. However, they create other adversity problems. Disclosure to the court and the non-signing defendant puts those parties on notice that plaintiff has an interest in common with a former defendant. However, disclosure to the jury that plaintiff has entered into an agreement with a former adversary may be prejudicial to the plaintiff. The jury may decide that the plaintiff has received one settlement and should not receive another. In addition, disclosure to the jury may be prejudicial to the non-signing defendant. The jury may interpret a settlement with one defendant as evidence of the non-signing defendant's unreasonable failure to compromise with the plaintiff.

Further, if the signing defendant is dismissed as a litigant, the non-signing defendant cannot join him as a third-party defendant for implied indemnity, although the signing defendant may be the more culpable party.[31] This leaves the jury with two choices: find the non-signing, less culpable defendant liable, or leave an injured plaintiff remediless. In addition, if the signing defendant is called as a witness, his testimony would probably be stated in a light most advantageous to the plaintiff, to insure repayment of the loan provision.[32]

If the agreement is admitted into evidence in toto, the signing parties

31. Although the non-signing defendant can pursue the signing defendant in a separate proceeding for implied indemnity, he loses the advantages of a consolidated proceeding. Further, in the separate proceeding, the signing party may plead the agreement as a defense.

32. Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945). Plaintiff sued Sonotone Corporation and the dentist who made a plaster cast of plaintiff's ear for a Sonotone hearing aid. The dentist covenanted with plaintiff and agreed to remain as a litigant. Sonotone, learning of the agreement, pleaded it as a release. The California Supreme Court held for the plaintiff. The court reasoned that since judgment could not be enforced against the dentist, he was not a witness adverse to the plaintiff. In addition, since the lower court and the remaining defendants were fully informed, they could weigh the signing defendant's testimony in light of that knowledge. *Id.* at 713, 160 P.2d at 788. However, Justice Traynor, in a strong dissent, called the proceeding collusive. *Id.* at 715, 160 P.2d at 789. *See* Degen v. Bayman, 86 S.D. 598, 200 N.W.2d 134 (1972), where the court reversed judgment against the non-signing defendant since there had not been protection against the effect on the jury of "evaporation of adversary vigor" between the signing parties. *Id.* at 608, 200 N.W.2d at 139. *See also* Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971), where, when plaintiff's attorney failed to question a witness about plaintiff's damages, the attorney for the signing defendant elicited the information. *Id.* at 405, 488 P.2d at 349.

can load the document with declarations of the signing defendant's innocence and references to the liability of the non-signing defendant and the reasonableness of the settlement amount.[33] Admitting an edited version of the agreement with inappropriate portions excised by the court would apprise the jury of the true relationships of the parties. However, the problems inherent in disclosing any settlement to the jury would not be solved.[34] Cross-examination can bring the agreement to the jury's attention. But once testimony about the agreement is allowed into evidence, plaintiff's attorney can elicit from a cooperative witness prejudicial information which is contained in the agreement.[35]

Although the court's rationale in limiting the use of loan agreements is laudable, it would seem that loan agreements should be voided as against public policy because they may shift liability from a more culpable to a less culpable party. The philosophy of tort law is to punish the wrongdoer and to make an injured party whole.[36] Loan agreements circumvent this philosophy. By shifting liability from one defendant to

33. In Maule Indust., Inc. v. Rountree, 264 So.2d 445 (Fla. App. 4th Dist. 1972), the Florida court held that Mary Carter loan agreements were proper subjects for pretrial discovery and could be admitted, with limiting instructions, into evidence. *But see* Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 172, 250 N.E.2d 378, 388 (1969). On the basis of a loan agreement filled with self-serving recitals, the non-signing defendant asked for, and was refused, a separate trial, and did not offer the prejudicial document into evidence. Despite this, the Indiana Appellate Court upheld the loan agreement as a blend of rules allowing covenants not to sue or execute and proceedings against other than signing defendants. *Id.* at 181-82, 250 N.E.2d at 393. *Accord,* American Transport Co. v. Central Ind. Ry., 255 Ind. 319, 264 N.E.2d 64 (1970). *See also* Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971); Bolton v. Zeigler, 111 F. Supp. 516 (N.D. Iowa 1953). Phrasing the loan agreement in terms of the reasonableness of the agreeing parties and the obstinacy of the non-signing defendant is a common tactic which tends to prejudice the mind of the jury against the non-signing defendant.

34. Once a settlement is introduced, it is difficult to eradicate the jury's conclusion that payment is made out of admission of liability. Note, *Settlement Devices With Joint Tortfeasors*, 25 U. FLA. L. REV. 762, 771 (1973). *Accord*, Fenberg v. Rosenthal, 348 Ill.App. 510, 109 N.E.2d 402, 405 (1st Dist. 1952). Where plaintiff has covenanted with one, but not all, of the potential defendants, the proper procedure is for plaintiff to sue for the full damages with no mention being made of settlement. J. MIRZA & J. APPLEMAN, ILLINOIS TORT LAW AND PRACTICE 481-82 (1974). The settlement amount is then set off from the judgment amount. Frame v. Grecivich, 30 Ill.App.2d 271, 175 N.E.2d 415 (1st Dist. 1961) (abstract). Even in *Reese*, the supreme court noted that there was no showing that the jury had seen the agreement. 55 Ill.2d at 365, 303 N.E.2d at 387.

35. *See* note 30 *supra*.

36. Tort law originated to punish the wrongdoer. However, the damages aspect of tort law did not appear until a few centuries later. Woodbine, *The Origin of the Action of Trespass*, 33 YALE L.J. 799 (1924) and 34 YALE L.J. 343 (1925); F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 65 (1947).

another, they subrogate one wrongdoer to the plaintiff's claim for injury against another wrongdoer.[37] The signing defendant escapes liability and stands in the shoes of the plaintiff, ready to recoup his losses.[38] As one commentator has noted, loan agreements provide "the plaintiff enough of a warchest to pursue the cause against the putative 'real' culprit."[39]

It is exactly this type of situation which the common law prohibition of maintenance and champerty attempted to prevent. Maintenance is the financing of all or a portion of another's lawsuit.[40] Champerty, a species of maintenance, is an agreement with a party to the lawsuit to maintain or finance the suit for a portion of the recovery.[41] It was precisely on these grounds that the Nevada Supreme Court made loan agreements invalid per se. The court stated:

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37. In Kopperud v. Chick, 27 Wis.2d 591, 135 N.W.2d 335 (1965), the Wisconsin Supreme Court held that the loaning party was the "real party in interest," and the loan receipt was not a valid device to indirectly enforce subrogation rights. The same conclusion was reached in Cleveland Paint & Color Co. v. Bauer Mfg. Co., 155 Ohio St. 17, 97 N.E.2d 545 (1951), where a painter, injured by a defective ladder, was loaned the amount of the judgment against the retail store by the retailer's insurer, in order to recover in an indemnity suit against the manufacturer. The court held that the retailer's insurance company was the real party in interest. *See also* American Alliance Ins. Co. v. Capital Nat'l Bank, 75 Cal.App.2d 787, 171 P.2d 449 (1946); *cf.* FED. R. CIV. P. §17(a), 3A J. MOORE, FEDERAL PRACTICE ¶17.02 (2d ed. 1967). *Contra*, Klukas v. Yount, 121 Ind. App. 160, 98 N.E.2d 227 (1951), which held that the agreement was a valid loan and not a subrogation, so the insurance company did not have to be shown as a real party in interest. *See also* State Farm Mut. Auto. Ins. Co. v. Hall, 292 Ky. 22, 165 S.W.2d 838 (1942).

38. In so doing, the defendant has in effect purchased an interest in plaintiff's personal injury claim in violation of the doctrine prohibiting assignment of a cause of action for personal injuries. North Chi. St. R.R. v. Ackley, 171 Ill. 100, 108, 49 N.E. 222, 225 (1897). *See also* Putnam v. Continental Air Trans. Co., 297 F.2d 501 (7th Cir. 1961), where an appeal from an order granting judgment n.o.v. to defendant in favor of plaintiffs was dismissed when it was shown that plaintiffs had received a loan agreement from another defendant, repayable from proceeds of any judgment against the defendant. The court held that Illinois public policy prohibited assignment of a cause of action for personal injuries.

39. Scoby, *Loan Receipts and Guaranty Agreements*, 10 THE FORUM 1300, 1314-15 (1975).

40. 14 C.J.S. *Champerty and Maintenance*, §1(b) (1939); RESTATEMENT OF CONTRACTS §540(1) (1932).

41. 14 C.J.S. *Champerty and Maintenance* §1(b) (1939); RESTATEMNT OF CONTRACTS §540(2) (1932). *See* Reece v. Kyle, 49 Ohio St. 475, 31 N.E. 747 (1892), for a discussion of maintenance and champerty. *See also* Mock v. Higgins, 3 Ill.App.2d 281, 295, 121 N.E.2d 865, 871 (2d Dist. 1954); Thomson v. Reynolds, 73 Ill. 11 (1874). A contingent fee technically violates the champerty standard. However, in the United States, taking tort cases on a contingent fee basis is an exception to the common law rule.

> We deem agreements whereby insurance carriers agree to pay any consideration to foster litigation in which they are not interested, in order to avoid their own liabilities, contrary to law and public policy.[42]

In addition, the Nevada Supreme Court found that loan agreements violated the policies expressed in the "Canons of Professional Conduct concerned with representing conflicting interests, candor and fairness, taking technical advantage of opposing counsel, and unjustifiable litigation."[43]

Indeed, the stance taken by the Nevada judiciary seems to be better than the view expressed in *Gatto*. Loan agreements subvert the adversary process. The limitations enunciated by the Illinois Supreme Court in *Gatto* do not and cannot mitigate against the fact that loan agreements often work to shift liability from the most culpable defendant. The Illinois judiciary should take cognizance of the inherent defects and invalidate such agreements as against public policy.

Sara Connelly

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42. Lum v. Stinnett, 87 Nev. 402, 409, 488 P.2d 347, 351 (1971). Two out of the three defendants contracted with the plaintiff to guarantee the plaintiff a minimum recovery of $20,000. Pursuant to that contract, the signing defendants remained in the action, working to place the entire responsibility upon the non-signing defendant. Immediately before the case went to the jury, the signing defendants were dismissed on the plaintiff's motion, leaving the jury to find only the non-signing defendant negligent.

43. *Id.* at 405-6, 488 P.2d at 351.