MULTIPLE PARTIES: ALLIANCES, TRAPS AND TACTICS

An Updated Version of Neal Manne's paper:
"Multiple-Party Problems: Discovery, Settlement, Unwritten Deals and Alliances"

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Multiple Parties:
Alliances, Traps and Tactics

I. SCOPE OF DISCUSSION

Multiple-party cases present unique problems, and unique opportunities, for trial lawyers on both sides of the case. This discussion identifies some of the issues that arise in the context of multiple-party cases and addresses tactics and strategies that a trial lawyer might employ in order to meet the unique challenges presented by such cases. This is not a discussion of legal developments, nor is it a "how-to" presentation – a trial lawyer must analyze each case in light of the facts and legal issues presented by that case. Rather, the purpose of this presentation is simply to identify, against the back-drop of a hypothetical case, some of the issues that arise in the context of multiple-party cases and to offer some practical insights that might help trial lawyers be better prepared to avoid the pitfalls, and take advantage of the opportunities, presented by such cases.

II. THE MULTIPLE-PARTY CASE

A. Generally. Multiple-party cases have become increasing commonplace in recent years. Antitrust, securities, toxic tort, and mass disaster cases typically involve a very large number of plaintiffs and often numerous defendants. Such cases unquestionably provide the most extreme examples of the complex issues a trial lawyer may encounter in prosecuting or defending multiple-party cases.

Of course, most trial lawyers never will be involved in a case with thousands of plaintiffs and numerous defendants. *See, e.g., In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981) (antitrust action brought on behalf of 200,000 purchasers of corrugated products against 37 defendants). But it does not take such a case to present a trial lawyer with difficult multiple-party issues. Indeed, given the right set of facts, a straight-forward, state-law tort action can present many of the same problems and opportunities that arise in more complex multiple-party cases.

B. The case file. Imagine, for example, that you have just been handed the file on a potential personal injury case. The basic facts are as follows: John, a twenty-eight year engineer—married and the father of two young children—is driving eastbound on the freeway, when an eighteen-wheeler in the westbound lane blows a tire. The tread strips off of the rotating tire, strikes the truck's battery-box, and jettisons the battery-box cover through the windshield of John's oncoming car. The accident leaves John with serious brain damage and spastic quadriplegia.[1]

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[1] The basic facts of our fictional case are taken from a case reported in the Houston Trial Reports on September 27, 1993, *Frances Dotson, et al. v. Bandag, Inc.*, No. 91-53314 (113th Dist. Ct., Harris County, Tex.). The names of the specific parties have been changed and many other specific details have been either changed or added for purposes of this presentation.

Preliminary investigation on the case has established that the truck is a late-model GM product; that the truck is owned by a leasing company and operated by a local bulk-chemical transporter; that the truck had undergone an in-house safety inspection the day of the accident; that the blown tire was a re-tread; that the tire was sold by a franchise operation in Houston, Texas; and that the tire was manufactured by a company located in Kansas City, Missouri.

III. PRELIMINARY CONSIDERATION

A. Generally. Whenever litigation is imminent, a trial lawyer must take stock of the situation and evaluate the courses of action open to her client. At this stage, multiple-party cases present the same basic issues as would any potential lawsuit. The existence of additional potential parties, however, can both complicate these basic issues and present a trial lawyer with alternative courses of action that she otherwise would not have.

B. The plaintiff. Having first resolved the threshold question of whether a lawsuit should be filed at all, the plaintiff's lawyer in a multiple-party case next must consider the mechanics of commencing the suit.

1. Whom do you sue? This is a fundamental issue for the potential plaintiff, and the existence of more than one potential defendant clearly presents the plaintiff's lawyer with choices she otherwise would not have.

a. Target defendant. Is there a potential defendant against whom your case for liability is particularly strong? Is there a defendant with deep-pockets? With high insurance limits? Who is likely to settle? Any or all of these considerations in the context of the facts of a specific case may point to one or more of the potential defendants as your target defendant-that is, the defendant you clearly will name in the lawsuit and against whom you likely will focus your case.

b. Insolvent parties. Should you bother to sue parties who are insolvent? Assume, for example, that the Houston franchise operation that sold the retread tire recently filed for bankruptcy.

c. Discovery considerations. Are there potential defendants who have or are likely to have in their possession information or documents essential to your case? If so, should they be named as parties to ensure discovery of those critical facts? Of course, the answer to this question may turn on whether the information may be obtained elsewhere.

d. Too many parties or too few. There is the risk that naming every possible defendant in lawsuit may weaken your case. Obviously, a trial lawyer can do the most efficient job for her client when she focuses her efforts on the strongest elements of the case. Adding

defendants may unnecessarily complicate a case and weaken its jury-appeal. Adding defendants also may make it look like your client is suing everybody in sight.

Of course, the flip side is that by failing to name a party who looks culpable a lawyer may give the appearance that her client is simply looking for the deepest pockets. It also might open the door for the named defendants to try an "empty chair" at trial.

e. **Proportionate fault.** Are there statutes or cases that allow the Defendants to include non-parties in a jury's consideration of proportionate fault? In Texas, a defendant can designate a non-party as a responsible third-party, and, if there is evidence related to that third party's fault, can include that third-party in the jury charge. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.001-33.004 (Thompson/West 2008). In this situation, the plaintiff may need to sue particular parties to prevent the defendants from using the "empty chair" defense.

f. **Pre-suit settlements.** Are there potential defendants who might have reasons to settle with the plaintiff before the lawsuit is filed? To avoid adverse publicity? To join forces against another potential defendant? To avoid the costs to defend a lengthy suit? If so, a plaintiff's lawyer should consider pre-suit settlement discussions, particularly if the plaintiff needs a war chest or the potential defendant can provide information or assistance at trial.

2. **Where do you file?** The choice of forum is another critical decision that takes on a new dimension where there exists more than one potential defendant. Clearly, this decision is intertwined with the threshold issue of who to name in the lawsuit. Adding a defendant may increase the number of forum choices available to the plaintiff; it also might destroy diversity and keep the case out of federal court.

a. **State or federal court.** Assuming that you have the choice, should you file in state or federal court? The conventional wisdom is that state courts are more favorable to plaintiffs. Why? Everyone has his or her opinion: because it is easier to convince ten out of twelve jurors than six out of six; because the juries are drawn from a smaller geographical area; because of state jury selection procedures; because it is easier to get your case to a jury.

Of course, the conventional wisdom may not hold true. The plaintiff's lawyer therefore must determine, based upon a review of the specific facts and circumstances presented by each case, which court system will provide the best forum in which to bring her client's case.

b. **Class Action Fairness Act (CAFA).** The CAFA may affect your ability to keep a multi-party case in state court, even if your case is not a class action. *See* 28 USC § 1332(d). Generally, if your case involves 100 or more individuals, you should consider the CAFA in your analysis. *See id.*

c. **Venue choices.** Choice of venue also can be critical to the success of a plaintiff's case. The case might play well in one part of the forum state, or in one federal district, but not in another. The case might also benefit from a quick trial date, or a very long wait. In either event, a particular venue within the state or federal system might be important to your case.

Because choice of venue, under both state and federal law, is largely a question of where the defendants in the action reside or do business (a plaintiff cannot change where he resides or where the cause of action arose), a plaintiff's lawyer should carefully consider whether adding a potential defendant would allow the action to be brought in a favorable venue.

C. **Potential defendants.** Some time before the plaintiff actually files his petition or complaint, potential defendants generally become aware that they may be named as parties to a lawsuit. If brought in early enough, trial lawyers can begin working to protect the interests of potential defendants even before the lawsuit is filed.

1. **The best defense . . . .** Under the right circumstances, the best defense might be a good offense. If the facts of the case are going to be hotly disputed, and the potential defendant has strong claims against the potential plaintiff arising from those facts, a trial lawyer should consider the benefit of beating the other party to the punch-that is, first file. This way the potential defendant can control the forum in which the case is filed as well as the venue in which it is tried. Needless to say, the advantage can be substantial.

2. **Pre-suit settlements.** As noted, *supra*, a potential defendant might have reasons-such as, the desire to avoid adverse publicity, the desire to avoid the costs of extended litigation, and the desire to join forces against another potential defendant-for wanting to settle a complaining party's claims before a lawsuit is filed. Another reason might be that the plaintiff does not yet know the full extent of the potential defendant's culpability. If the plaintiff has not yet identified a potential defendant as a major, or target, defendant, and discovery is clearly going to change his view, then there is no time like the present to settle.

D. **Do you need co-counsel?** In some cases, the right co-counsel can significantly enhance the value of your case.

1. **Local counsel.** If you are litigating a case in a forum where you do not normally practice, it is often beneficial to hire local counsel. These counsel will know the ins and outs of the local court system and the judge will be familiar with them.

2. **Cost sharing.** In large multi-party cases, it often makes sense to share the costs and risks of the litigation by joint-venturing your case with another firm. Determine whether this makes sense in your particular case.

3. **The big gun.** In some cases, a well-known trial lawyer can substantially enhance the value of your case. This is especially true in case involving complex areas of law where particular lawyers have established strong reputations with defendants and their insurers, who are often the ultimate payors.

IV. DISCOVERY

A. Generally. As the number of parties in a lawsuit increases, so does the potential for discovery difficulties and disputes. Even under the best of circumstances, multiple-party cases present considerable problems for coordinating discovery. Trial lawyers on both sides of the case should work with the court to facilitate the orderly, cost-effective acquisition of information and materials and the prompt resolution of discovery disputes.

B. Court management of discovery in complex cases. Most courts issue pretrial scheduling orders in complex cases to control the progress and process of discovery. *See* Fed. R. Civ. P. 16; *Manual for Complex Litigation* (Fourth) (2004) ("*MCL*") § 10.11. These orders commonly impose time limits, deadlines, and schedules, which force parties not only to proceed diligently, but also to be selective in conducting their discovery. *See, e.g.*, *MCL* § 10.13 *and* § 40.24 (sample scheduling order). The court also may require that discovery be conducted in a prescribed sequence--in "waves," by subject matter, by party, or according to the form of discovery request. Finally, the court may place limits on the quantity of discovery.

Such measures clearly deprive trial lawyers of a good measure of the control they might have had over the pace with which their case progresses. Yet the net effect of reasonable judicial management of the discovery process must be seen as positive. Orderly and cost-effective discovery benefits the parties on both sides of a multiple-party case. The discovery program in most cases involves the collaborative efforts of the judge and the attorneys. Trial lawyers thus retain some measure of control over the discovery process.

C. Focus on what is important. In complex cases, it is important to focus on the discovery that you really need to prosecute or defend your case. There is often an endless amount of discovery that you could collect from the other side. But your

efforts are wasted if this discovery does not help you at trial. It does not benefit your client to spend millions of dollars on discovery that you are not going to use.

D. **Do not waste time on unnecessary discovery disputes.** Courts hate discovery disputes. Before you go to the court or force the other side to go to the court over a discovery dispute, make sure it really matters. If the other side wants something and it is not a big deal to produce it or you will likely have to produce it anyway, go ahead and produce it. Do not bother the court. If you are seeking discovery, make sure you really need it before you go to the court. Fight when it is necessary, but do not fight just for the sake of fighting. The *MCL* instructs that "[e]ven where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute." *Id.*, § 10.21.

E. **Discovery agreements.** In multiple-party cases, defendants are in the position to implement joint defense strategies. Such strategies allow defendants to defend a lawsuit in a more efficient and cost effective manner by pooling their legal and financial resources.

1. **Joint defense agreements.** Defendants may enter into an agreement that involves pooling of legal resources to reduce or eliminate the duplication of efforts in preparing their defense. The use of deposition teams is a common example of how such an agreement might apply in the context of discovery. In some instances, similarly situated defendants with aligned interests may elect to retain the same attorney.

2. **Sharing agreements.** Defendants might also agree to share with the other defendants all information obtained during discovery. Like joint defense agreements, sharing agreements allow the various defendants to reduce or eliminate the duplication of efforts in preparing their defense. Such agreements also put each defendant in a better position to fully evaluate the case for purposes of deciding whether to settle or go to trial. Sharing agreements also may include a cost-sharing provision, which obligates each defendant to pay a *pro rata* share of the costs incurred during the discovery process.

3. **Plaintiff's resources.** As cases become increasingly complex, plaintiffs have developed additional resources for sharing or pooling the costs of discovery.

a. **Trial lawyer resources.** Groups such as the American Association for Justice (AAJ) have set up programs to facilitate the exchange of information on particular defendants and experts. These can be valuable sources of information.

b. **Other plaintiffs' in similar cases.** Plaintiffs' in similar cases often have an incentive to insure the best result in the earliest trials

or settlements on a particular claim. For example, in mass tort cases such as asbestos, past results have a substantial effect on future settlements. Some plaintiffs' may, therefore, be willing to share information or discovery helpful to plaintiffs trying similar cases.

V. SETTLEMENT

A. Generally. Perhaps the most difficult issues presented by multi-party cases arise in the context of settlement. The presence of additional parties – often with competing interests – not only changes the dynamics of the negotiation process but also gives rise to important tactical and legal considerations. Some of these considerations concern all parties, others concern only plaintiffs, or only defendants.

B. All parties.

1. The basic goal. The trial lawyers' basic settlement objectives are exactly the same in a multiple-party case as they would be in a straightforward, two-party lawsuit. The plaintiff's lawyer seeks to maximize recovery for her client, and the defense lawyers seek to minimize the exposure of their clients. Of course, specific *goals* must be established by the respective parties in light of the circumstances presented by each case.

2. Timing. The fundamental timing issues also remain essentially the same as in a two-party suit:

a. When should lawyer begin thinking about settlement? A plaintiff's lawyer should begin thinking about settlement from the first moment she considers taking the case. Conversely, a defense lawyer should begin considering settlement from the moment he knows that his client might be named in a suit. Needless to say, the trial lawyers should diligently prepare for trial, but they also should remain open at all times to the prospect of settling the case on terms favorable their clients.

b. What is the best way to get settlement negotiations started? Court-ordered mediation generally gets things moving, or request a settlement conference before the judge. Perhaps the most effective way, however, is for the plaintiff to propose a settlement agreement favorable to one of the defendants.

3. Effective limits on damages. All parties must be aware of any effective limits on the plaintiff's possible recovery. Settlement negotiations must focus on the plaintiffs recoverable damages as opposed to his actual damages. Insurance limits or a defendant's financial situation might work to place an effective limit on the plaintiff's recovery.

4. **Secrecy.** Finally, a multiple-party case may present a situation where it is desirable to maintain the secrecy of settlement negotiations between the plaintiff and one or more of the defendants.

   a. **How do you ensure secrecy?** You probably can't, but you can make it worth something to the other party.

   b. **Can you simply avoid the issue?** No. In the face of an on point discovery request or an inquiry from the court, you would be obligated to disclose.

   c. **How do you make sure you don't get burned?** Never deceive the court. Assume that the agreement will come before the judge and the jury—look at it through their eyes. Finally, assume that your opponent will reveal everything.

C. The plaintiff.

1. **Partial settlement or try-it-against-all?** In multiple-party cases, the plaintiff often has the opportunity to settle with one or more of the defendants prior to trial. Whether he should enter into a partial settlement, however, may depend on a number of factors:

   a. **Trial considerations.** The plaintiff's trial strategy may affect when he wants to settle and who he wants to settle with. Each case is different, but here are some considerations.

      (1) **Finger pointing.** You may not want to settle with a defendant prior to trial if you will benefit from the defendants pointing the finger at one another during trial. On the other hand, if the defendants have a joint defense strategy, you may want to remove the least culpable defendant or defendants from the mix.

      (2) **Empty chair.** You may not want to settle with a defendant, if the defendant's absence at trial will give the other defendants the opportunity to point the finger at the absent defendant. This is especially true in a case where the jury will be assigning proportionate fault to all parties, including the settling defendant.

   b. **Does the plaintiff need a war chest?** Depending upon his financial situation, the plaintiff may need to accumulate funds to finance the lawsuit. If he does, a partial settlement may be desirable. The client may have some resources, but he may not be able to afford to go for broke. A partial settlement would assure him at least some recovery. On the other hand, if the plaintiff can

afford to lose, or has nothing to lose, then he may want to try the case against all of the defendants.

c. **What is the plaintiff's fee arrangement?** This issue clearly is closely tied to the previous issue. Needless to say, a plaintiff who is paying his trial lawyer on an hourly basis, will be more likely to run out of funds and thus will be more likely to need funds to proceed with the lawsuit. On the other hand, in cases the trial lawyer has taken on a contingent fee basis, the plaintiff more likely than not will fall into the "has nothing to lose" category. Of course, in such cases, the trial lawyer may have a desire to streamline the case.

d. **What effect will the settlement have on non-settling defendants?** Whether a plaintiff should enter into a partial settlement agreement depends to a large degree upon the effect of the settlement upon non-settling defendants.

(1) **Joint liability or separate damages?** A threshold issue is whether the settling defendant was jointly and severally liable for the whole of plaintiff's damages, or whether he was liable for separate damages.

(a) If the settling defendant was liable for separate damage, those damages will not be recoverable from the non-settling defendants.

(b) If the settling defendant was jointly and severally liable, the full amount of damages would still be recoverable against the non-settling defendants. It is likely, however, that the judgment would be subject to reduction by one of the methods described below.

(2) **Pro rata.** The pro *rata* method apportions an equal share of the liability to each defendant in the lawsuit. Relative culpability is irrelevant. Thus, if the plaintiff settles with one defendant in a two-defendant case, any judgment against the non-settling defendant is reduced by one-half, regardless of whether the settling defendant was primarily or minimally at fault. This method often deters plaintiffs from entering into partial settlements. It is disfavored by most courts.

(3) **Proportionate fault.** Under the proportionate fault method, the jury assesses the relative culpability of the settling and the non-settling defendants. The non-settling

defendant then pays its proportionate part of the judgment. This method is always consistent with actual fault, but the plaintiff bears the risk of a bad settlement. Moreover, because defendants will never be required to pay more than their proportionate share of the total liability, this method provides a disincentive for defendants to settle. Finally, because the fact finder is still required to find the relative fault of settling parties, this method imposes a considerable burden on the judicial system. This method is employed in Texas, and, in Texas, the jury must consider designated non-parties, as well as settling and non-settling defendants in the jury question on proportionate fault. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.001 - 33.004 (Thompson/West 2008).

(4) **Pro tanto.** The *pro tanto* method reduces a non-settling defendant's liability for a judgment against him in the amount paid by the settling defendant. This method shifts the risk of a bad settlement to the non-settling defendant rather than the plaintiff. It also may result in a judgment that is inconsistent with actual fault. Moreover, it leaves the door open between a plaintiff and a favored defendant. Courts have addressed this latter problem by requiring a fairness hearing before approving the settlement bar. This method was employed by the Second Circuit in *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990).

(5) **Preserving rights against non-settling defendants.** It should be clear from the foregoing discussion that the question whether a plaintiff should enter into a partial settlement may turn on the judgment reduction method applied to non-settling defendants. Consequently, a plaintiff should conclusively establish which method will apply before making a final decision to settle. The appropriate method is often addressed by state statute. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 33.001 - 33.004.

2. **Timing.** We have already noted that a plaintiff's lawyer should begin considering settlement from the very outset of the lawsuit. But when should she settle? Should she settle early? Or should she settle late? The following are factors a plaintiff's lawyer might consider:

a. **Can the settling defendant help?** If so, consider settling early.

(1) **Discovery agreements.** Settling defendants may be able to provide access to important information or documents.

Negotiate a discovery agreement as part of the settlement agreement.

(2) **Trial testimony/affidavits.** Settling defendants may be able to provide helpful testimony at trial or by affidavit.

b. **Affect on non-settling defendants—work product agreement.** Consider settling at the last minute if you can deprive the defense team of a key lawyer or of work-product that they intended to use at trial.

D. The defendants.

1. **Exploit reasons to get your client out.** Trial lawyers representing defendants should exploit any reason that the plaintiff might have for wanting your client out of the case.

a. **Is your client insolvent?** Convince the plaintiff that it is a waste of time and money to pursue an action against an empty pocket.

b. **Would your client be helpful at trial?** Convince the plaintiff that your client is essential to his case.

c. **Does your client have unique counterclaims against the plaintiff?** Convince the plaintiff that he doesn't want these counterclaims to go before his jury.

d. **Your skill as an attorney.** Don't underestimate this one. Convince the plaintiff that he doesn't want to meet you in court.

2. **Timing.** Should a defendant settle early or late? If the plaintiff needs a war chest, consider settling early because the first defendant to settle may get off cheap.

3. **Getting maximum credit for your settlement.**

a. **Mary Carter agreements.** A Mary Carter agreement is an agreement between a plaintiff and defendant in which the plaintiff releases his cause of action in exchange for a settlement payment which may be reimbursed to some degree from any judgment that the plaintiff recovers at trial. The settling defendant agrees to remain in the lawsuit through trial. Essentially, the settling defendant purchases an interest in the eventual judgment, to the extent the judgment exceeds the amount paid under the agreement.

A Mary Carter agreement clearly gives a defendant maximum credit for his settlement. However, because such an agreement misrepresents to the jury the true alignment of the parties and tends

to subvert the litigation process, Mary Carters have been declared void as against public policy in some jurisdictions, including Texas *See Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992). The majority of courts that allow Mary Carter Agreements, require the agreements to be disclosed to the court, the parties and sometimes the jury. *See Monti v. Wenkert*, 947 A.2d 261, 275-76 (Conn. 2008) (discussing the state of the law relating to Mary Carter agreements).

b. **Most-favored-nation agreements.** Another way for a settling defendant to get maximum credit is to negotiate a most-favored-nation agreement. Under such an agreement, the plaintiff agrees to give the settling defendant a refund if he later settles with any other defendant on more favorable terms. In effect, the plaintiff warrants that no other defendant will get a better deal by holding out.

Although most-favored nations agreements of this type are good for defendants, plaintiffs should try to avoid them. They can make settlement with the remaining defendants difficult if there is a negative development in the case following the most-favored nations settlement. If the value of the case goes down, you will not be able to convince the remaining defendants to settle for the same amount as the most-favored nations defendant, in which case you will be either unable to settle or you will be forced to reduce the amount of the most-favored nations defendant's settlement. This may force you to go forward with a costly trial, which would not be necessary absent the most-favored nations agreement.

c. **Attacking settlements with other defendants.** As noted, *supra*, when a plaintiff enters into a partial settlement agreement, the judgment reduction method applied by the court may have a profound effect upon the amount of the ultimate judgment non-settling defendants must pay. For this and other reasons, non-settling defendants may want to challenge the settlement.

d. **Standing.** As a general rule, non-settling defendants have no standing to object to the fairness or the adequacy of a partial settlement, but they may object to any term of the agreement that purports to strip them of a legal right—such as a right to contribution or indemnity. *See, e.g., Smith v. v. Arthur Andersen LLP*., 421 F.3d 989, 998 (9th Cir. 2005); *see also McAllen Med. Ctr. v. Cortez*, 66 S.W.3d 227, 236 (Tex. 2001) (allowing appeal by non-settling defendant because it was adversely affected by class settlement notice).

e. **Urge most favorable judgment reduction method.** Even though you may not have standing to object to the financial terms of a

partial settlement, you may urge the court to apply the most favorable judgment reduction method.

f. **Enlist other defendants.** Of course, it is always helpful to get other parties to advocate the same position as yours.

g. **Ask the court for help.** Except in those cases where fairness hearings are required, the court may not prevent parties from settling. Nevertheless, you may ask the court to permit full discovery and admissibility of the settlement agreement at trial.

VI. UNWRITTEN DEALS AND ALLIANCES

A. **Generally.** Finally, multiple-party cases provide a unique opportunity for parties informally to join forces, to pool resources, or to enter into unwritten deals and alliances. The variety of such deals and alliances is limited only by the creativity of the trial lawyers.

B. **The plaintiff.** As cases become increasingly complex, plaintiffs have more opportunities for deals and alliances.

1. **With other plaintiffs.** There may be other plaintiffs in your case or in cases against the same companies you are suing who would be willing to join together to reduce costs or share recovery.

2. **With certain defendants.** There are many different arrangements a plaintiff could make with one or more defendants.

C. **The defendants.** Multiple-party cases also provide defendants the opportunity to pool their resources to keep down defense costs, or to enter into an agreement to reduce or limit their overall exposure.

1. **Damage sharing agreements.** A common tactic among multiple defendants is to agree to share liability for the total judgment, if any, ultimately obtained by the plaintiff. Such an agreement might provide for *pro rata* sharing or for sharing in accordance with a fact-driven formula. These agreements have the advantage of reducing uncertainty and spreading the loss over multiple parties. Obviously, such an agreement is good if you know of facts harmful to your client's case. They can backfire, however, if you later discover facts that change your liability assessment.

2. **Contribution and indemnity rights—forced alliances.** Where co-defendants have contribution and indemnity rights against one another, they generally are forced, as a practical matter, to cooperate in preparing their defenses.

3. **How go you detect secret deals?** Because side deals and alliances can have a profound effect on the dynamics of a lawsuit, it becomes critical for

a trial lawyer to be aware of what the other parties are doing. How do you find out if the plaintiff has cut a special deal with one of your codefendants? How do you discover deals between other co-defendants?

a. **Ask.** Perhaps the simplest way to detect deals between other parties is simply to ask. When taking depositions, ask the parties or their representatives if they have made any agreements. Include this type of inquiry in written interrogatories, and, if necessary, remind co-defendants of their duty to supplement their answers.

b. **Offer favorable sharing agreement.** Another way for a defendant to detect secret deals is to offer a co-defendant a favorable sharing agreement. If you make an offer that any reasonable defendant would accept, and it is rejected, that may indicate that some type of deal has been struck.

c. **Request settlement conference.** Finally, any party may ask the judge to hold a settlement conference. Get everybody before the judge and force the issue.

VII. ETHICAL CONSIDERATIONS

The issues discussed above give rise to numerous ethical considerations that a lawyer must factor into his strategic analysis. Listed below are some of more common of these considerations for multi-party cases.

A. **Conflicts of interest.** Before entering into an alliance with another party in a multi-party case, you must consider whether that arrangement will give rise to a conflict of interest for you or your client.

1. **Other alliances.** Does the client have other agreements that would prevent it from entering into this agreement? If so, the client may have to involve the parties to these other agreements in this alliance.

2. **Conflicting positions.** Are the parties seeking to enter into an alliance likely to have conflicting positions in the litigation? If parties have conflicting interests, they may not want to enter into such an agreement. It could create problems for them later in this lawsuit or in future litigation.

3. **Lawyer's other clients.** You must also consider whether an alliance will create problems in your relationships with your other clients. If a co-defendant provides you information under a joint-defense agreement, you may not be able to represent a client in another matter adverse to this co-defendant, even if the co-defendant was not your client at the time. *See, e.g, National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996).

B. **Common interest privilege.** If the parties do not have a common interest, their communications have little chance of being protected from discovery. Indeed, communications between co-parties are generally not protected. The exception is the common interest privilege. The common interest privilege applies in the Fifth Circuit when the protected communications were made (1) in confidence, (2) in a joint litigation effort, (3) to further that joint effort. *See, e.g., In re Santa Fe Int'l Corp*., 272 F.3d 705, 711-712 (5th Cir. 2001) (summarizing 5th Circuit cases on common interest privilege). But, like most privileges, the common interest privilege is narrowly construed, posing a significant trap for unwary counsel. *Id*. at 710.

Moreover, if a conflict develops between these co-parties, anything you disclosed in communications with the other party may be used by that party against your client.

C. **Assume everything is discoverable.** When you put things in writing, assume that opposing parties, courts and juries will see them. This will keep you from creating anything that is detrimental to your client.

D. **Dealings with other counsel.** Be honest in dealings with other counsel. It is extremely difficult to maintain alliances with counsel you do not trust. You should also be courteous and polite. It always helps your client if other counsel in the case like you.

E. **Consulting with clients.** Due to the intensity and complexity of multi-party cases, it is often difficult to advise your client of every possible scenario. Do not let this prevent you from advising them of the pros and cons of the strategic decisions you make in the litigation. The more you involve them in that process, the less likely you will have unhappy clients.

F. **Discovery abuse.** Multi-party cases provide a great opportunity for discovery abuse. Imposing costs on the other side is not a legitimate basis for conducting burdensome discovery. Increasing billable hours also is not a legitimate reason for conducting discovery. Scorched-earth discovery almost never benefits your client and it certainly does not help the parties resolve their dispute. Multi-party cases are time-consuming and expensive enough without excessive discovery.

VIII. CASE REVIEW

In light of the issues raised in the foregoing discussion, what is the likely result in our fictional case? Who will the plaintiff sue? Where? Who will be the target defendant? Will the plaintiff seek a partial settlement? With whom? Will any of the defendants pool their resources? Would any of the defendants benefit from sharing agreements?

IX. CONCLUSION

Multiple-party cases present unique problems and opportunities for trial lawyers on both sides of the case. In this discussion, I have identified some of those problems and opportunities

and addressed strategies and tactics that a trial lawyer might employ in order to meet these challenges. Although a trial lawyer must approach each case differently, taking into account the specific facts and circumstances of the case, the law of the forum in which the case is filed, and the special requirements of his or her client, I am hopeful that the practical insights offered in this discussion can help trial lawyers be better prepared to avoid the pitfalls, and take advantage of the opportunities, presented by multiple-party cases.