NO. 66527-8-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DONALD COLLINGS and BETH COLLINGS, husband and wife,

Plaintiffs/Defendants in Intervention/Respondents,

vs.

CITY FIRST MORTGAGE SERVICES, LLC,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE RICHARD EADIE

BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENSE TRIAL LAWYERS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, is composed of more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients, which it does on a pro bono basis.

II. STATEMENT OF THE CASE

Amicus relies upon the statement of the case as set forth by Defendant/Appellant City First Mortgage Services.

III. ANALYSIS

A. *Mary Carter* Agreements Generally.

"The *Mary Carter* agreement, named for an early case[1] is a

[1] *Booth v. Mary Carter Paint Co.,* 202 So.2d 8. (Ct. App. Fla.1967). Actually, such agreements date back further than 1967. In *Trampe v. Wisconsin Telephone Co.*, 214 Wis. 210, 252 N.W. 675, 678 (1934), an agreement that would today be labeled a Mary Carter agreement was declared invalid more than 30 years earlier. In Arizona, such agreements are called "Gallagher" agreements, after *City of Tucson v. Gallagher,* 108 Ariz. 140, 493 P.2d 1197 (1972) (en banc). See Abigail Carson, Note, *Are Gallagher Covenants Unethical?:* An Analysis Under the

contract between a plaintiff and one defendant allying them against another defendant at trial. It arises in tort litigation where a plaintiff sues two or more defendants for the same injury." Note, *It's a Mistake to Tolerate the Mary Carter Agreement,* 87 Colum.L.Rev. 368, 368-69 (1987).

"It is probably safe to say that no two pacts dubbed '*Mary Carter* Agreement' have been alike." *Lahocki v. Contee Sand & Gravel Co., Inc.,* 410 A.2d 1039, 1042 (1980). However, they share common features. The term "now appears to be used rather generally to apply to any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants...." *Id.*

> *Mary Carter* agreements may incorporate any variety of terms, but are generally characterized by three basic provisions. First, the settling defendant guarantees the plaintiff a minimum payment, regardless of the court's judgment. Second, the plaintiff agrees not to enforce the court's judgment against the settling defendant. Third, the settling defendant remains a party in the trial, but his exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount. Some Mary Carter agreements include a fourth element: that the agreement be kept secret between the settling parties.

Code of Professional Responsibility, 19 Ariz. L. Rev. 863 (1977); and, Charles W. Lowe, Comment, *Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements:* Unsettling Contributions to Conflict Resolution, 1977 Ariz. St. L.J. 117.

It's a Mistake to Tolerate the Mary Carter, supra at 369-370.

B. The Harm From Secret Agreements.

These agreements distort the true nature of the litigation, and when kept secret deceive the trier of fact. One of the major dangers of *Mary Carter* agreements lies in the distortion of the relationship between the settling defendant and the plaintiff, which allows the settling defendant to remain nominally a defendant to the action while secretly aiding the plaintiff's case, either directly or indirectly.

This Court has cataloged the problems that are created by *Mary Carter* agreements, including "secrecy, foisting a fictitious controversy on the courts, failing to identify the true parties litigant or unfairly concealing from the trier of the fact the true battle lines and interests of the parties litigant...." *Giambattista v. National Bank of Commerce of Seattle,* 21 Wn.App. 723, 735 n. 5, 586 P.2d 1180 (1978).

One federal court analogized such secret deals to point shaving, with the jury being the deceived spectator:

> Courts are not merely arenas where games of counsel's skill are played. Even in football we do not tolerate point shaving. It is perhaps because the trial is adversary that each side is expected to give its best, without secret equivocation. Counsel have no duty to seek ultimate truth in a system where the lawyer's duty is primarily to represent his client. But even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive

> the trier of fact, an obligation not to hide the real facts behind a façade.

Daniel v. Penrod Drilling Co., 393 F.Supp. 1056, 1060-61 (E.D. La. 1975) ("The first consideration of the court is the integrity of the trial process.").

C. Some Jurisdictions Ban Such Back Room Deals Because They Corrupt the Integrity of the Trial Process.

Some jurisdictions ban *Mary Carter* agreements completely.[2] Even their disclosure (to the court and the non-settling defendant) will not cure the problems inherent in the deal. As the Nevada Supreme Court observed:

> [The settling defendants] contend everything they did was "open and aboveboard," and we are sure they did not perceive the essential impropriety of the agreement. Yet they cannot, we think, suggest they did not bargain for and utilize its inherent advantages, which we find inimical to true adversary process. If they wanted no more than a fair trial against [plaintiff], why was the agreement framed to retain [two defendants] as sham "adverse parties" in the case?

Lum v. Stinnett, 488 P.2d 347, 352 (Nev. 1971). The court refused to accept the plaintiff's claim that merely disclosing the deal to the targeted defendant would cure the taint. "It is no answer to say [the non-agreeing defendant] was not stabbed in the back. If his hands were tied, it matters little that he could see the blow coming." *Id.*

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[2] See, e.g., *In re: Exxon Valdez,* 1996 U.S. Dist. LEXIS 8173 (D. Alaska 1996); *Dosdourian v. Carsten*, 624 So.2d 241, 246 (Fla.1993); *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354, 360 (Okl. 1978); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex.1992); and, *Hoops v. Watermelon City Trucking Inc.*, 846 F.2d 637, 640 (10th Cir. 1988).

The question in Washington is open as to whether such agreements violate public policy *ab initio*. Contract law provides that "parties to a contract may determine the specific terms of the agreement, but the contract provisions are subject to limitation and invalidation if they contravene public policy." *Whitaker v. Spiegel Inc.*, 95 Wn.2d 661, 667, 623 P.2d 1147, 1150 (1981) (citing *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 95 Wn.2d 373, 622 P.2d 1234 (1980).[3]

While not addressed by the parties, Amicus WDTL urges the court to tread carefully in this problematic area, and *assume* for purposes of this appeal that such agreements are even allowed to begin with, reserving this issue for another day.

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[3] A substantial number of commentators have criticized *Mary Carter* agreements on these and other grounds. See, e.g., Robin Renee Green, Comment, *Mary Carter Agreements: The Unsolved Evidentiary Problems in Texas,* 40 Baylor L. Rev. 449 (1988); John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum. L. Rev. 368 (1987); Richard Casner, Note, *Admission into Evidence of a Mary Carter Agreement from a Prior Trial is Harmful Error,* 18 Tex. Tech. L. Rev. 997 (1987); June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. Fla. L. Rev. 521 (1986); Katherine Gay, Note, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 Ark. L. Rev. 570 (1983); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary,* 32 Sw. L.J. 779 (1978); Meriwether D. Williams, Comment, *Blending Mary Carter's Colors: A Tainted Covenant,* 12 Gonz. L. Rev. 266 (1977); John Edward Herndon, Jr., Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties:* A Painted Lady Is Exposed, 28 U. Miami L. Rev. 988 (1974); and, David Jonathan Grant, Note, *The Mary Carter Agreement-Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. Cal. L. Rev. 1393 (1974).

D. The Jurisdictions That Allow Such Deals Do Not Allow Secrecy, and Require Their Disclosure to the Other Parties and Often to the Jury.

The majority of jurisdictions require that the agreements limiting a party's liability be disclosed *and* admitted into evidence. *General Motors Corp. v. Lahocki*, 410 A.2d 1039 (Md. 1989) (citing cases); *Packaging Corp. of America v. DeRycke*, 49 So. 3d 286, 291-92 (Fla. 2010) (reversing trial court's failure to disclose to jury agreement where plaintiff accepted payment of insurance policy limits from defendant who remained a party at trial).

Our Supreme Court has made some observations critical of these agreements:

> The existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact. Such agreements are referred to as "*Mary Carter* Agreements." ***Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court.*** The trial court can then advise the jury of the agreement so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses.

McCluskey v. Handorff-Sherman, 68 Wn.App. 96, 103-04, 841 P.2d 1300 (1992)(citation omitted), *affirmed on other grounds*, 125 Wn.2d 1 (1994)

(emphasis supplied).[4]

> The Kansas Supreme Court has likewise observed:
>
> Due to the possibility of prejudice arising from such secret "Mary Carter" agreements, ***the overwhelming majority of courts***, though approving such agreements, ***have required disclosure of the settlement terms to the parties and the court*** and, under certain circumstances, to the jury.

Ratterree v. Bartlett, 707 P.2d 1063, 1074-75 (Kan. 1985).[5]

E. *All* Agreements Must Be Disclosed, Not Just Those That Encourage Fraud.

Secrecy corrupts. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money: and How The Bankers Use It* (Frederick A. Stokes Co., NY, 1914), at 92.

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[4] *Citing Daniel v. Penrod Drilling*, 393 F.Supp. 1056 (E.D.La.1975); *Ward v. Ochoa,* 284 So.2d 385 (Fla.1973); *Maule v. Rountree*, 284 So.2d 389 (Fla.1973); and, *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985).

[5] Citing *Breitkreutz v. Baker,* 514 P.2d 17 (Alaska 1973); *Taylor v. DiRico*, 606 P.2d 3 (Ariz. 1980); *Firestone Tire & Rubber Co. v. Little*, 639 S.W.2d 726 (Ark. 1982); *Pellett v. Sonotone Corp.*, 160 P.2d 783 (Cal. 1945); *Bashor v. Northland Ins.*, 29 Colo.App. 81, 480 P.2d 864 (1970), aff'd 177 Colo. 463, 494 P.2d 1292 (1972); *Ward v. Ochoa*, 284 So.2d 385 (Fla.1973); *General Motors Corp. v. Lahocki,* 410 A.2d 1039 (Md. 1980); *Johnson v. Moberg,* 334 N.W.2d 411 (Minn.1983); *Hegarty v. Campbell Soup Co.*, 335 N.W.2d 758 (Neb. 1983); *Bedford School Dist. v. Caron Const. Co.*, 367 A.2d 1051 (N.H. 1976); *Grillo v. Burke's Paint Co.*, 551 P.2d 449 (Or. 1976); *Bristol-Myers Co. v. Gonzales,* 561 S.W.2d 801 (Tex.1978).

Plaintiffs argue that there was no requirement to disclose the secret deal because the agreement was not a classic *Mary Carter* agreement, but rather merely a covenant not to execute. *Brief of Respondents*, at 39. Plaintiffs state that disclosure is mandated only when "a testifying defendant's true interests lie in supporting the plaintiff's recovery." *Id.* And, here they contend, the undisclosed agreement was not contingent upon "any particular testimony" by Defendant Mullen. *Id.*

First, this seems to ignore Defendant Mullen's admission that the agreement was contingent upon his deposition testimony being "acceptable" to the plaintiff. CP 1772-74. While Defendant Mullen was apparently not asked to exaggerate (or dissemble) in any "particular" way, Plaintiffs' undefined (and subjective) veto power had the potential for a significant corrupting influence. When one who does not know what specifically is "acceptable" testimony, the obvious tendency would be to shade his testimony (or downplay neglect to mention some facts) on pain of his liability being hundreds of thousands of dollars as instead of a mere $500. When the consequence for "unacceptable" testimony is bankruptcy, the corrosive power of the secret deal is strong. This is fertile territory for cross examination for financial bias.

Second, most courts impose the requirement of disclosure of all secret deals between fewer than all parties, *regardless of fraud or*

collusion. The primary concern is the integrity of the civil trial system in general (including public confidence therein). Equally weighty concerns are the potential for mischief that such secret deals create which, due to the numerous forms the take, is difficult to anticipate. It is the secrecy *in and of itself* that raises the red flag. The trial judge acting as referee is in the best position to determine what if any remedies to impose to assure the jury is not mislead. Otherwise, we leave it to the covenanting parties themselves to decide who should know what and whether their deal would create fraud or collusion. Very few people would admit that -- under threat that their immunity from financial ruin could be removed if their testimony was not "acceptable" -- their testimony was shaded to favor the deciding party.

Plaintiffs also argue that they had no obligation to disclose the secret agreement because Defendant City First was not only jointly and severally liable with Defendant Mullen, but also "independently" liable. Why this matters is unclear. Joint and several liability still exists, making the agreement corrosive. And, as argued above, it does not matter whether the agreement encourages collusion, all such agreements must be disclosed.

Most importantly, there was no ruling on the issue of "independent" liability until after trial. That is, the factual basis for

Plaintiffs excuse for concealing the agreement before trial did not even exist until after trial, when the judgment was entered. CP 932-942 (Notice of Presentation of Judgment, Judgment on Verdict, and Cost Bill). To accept Plaintiffs' position would allow parties to carte blanche decide what agreements (in their opinion, and subject to future rulings) are disclosable. This is yet another reason to adopt a *blanket* disclosure rule.

The Arizona cases are instructive as that state's tort law is similar to Washington's especially as to comparative fault and joint and several liability.[6] The courts there do not create such fine distinctions as the Plaintiffs do. Every agreement must be disclosed:

> The clear intention of the Arizona Supreme Court ... is to include in the "*Gallagher*" category all covenants, assuming the requisite elements of consent and consideration are present, involving plaintiffs and settling codefendants, *even if there is no agreement or incentive to sabotage the non-agreeing defendants or to enhance the plaintiffs' total verdict or verdict against the non-agreeing defendants.*

Sequoia Mfg. Co., Inc. v. Halec Const. Co., Inc., 570 P.2d 782, 795 (Ct. App. Ariz. 1977) (emphasis supplied) (requiring disclosure of an "in between" agreement, even though it "did not encourage fraud or collusion," not did it alter the defendant's trial strategy).

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[6] Arizona has abolished joint and several liability in most circumstances and established a system of comparative fault, making "each tortfeasor responsible for paying his or her percentage of fault and no more." *Dietz v. Gen. Elec. Co.*, 510, 821 P.2d 166, 171 (Ariz. 1991) (citing A.R.S. §12-2506(A)). *Compare*, RCW 4.22.060 and .070.

The rule is the same in Kansas, even if the agreement is not a "classic" *Mary Carter*. Rather, it is its secrecy that creates the problem.

> To that extent the settlement in this case is not a classic "Mary Carter" agreement. However, the potential for injustice is so great from the use of secret settlement agreements in any tort action where there are multiple defendants, whether under joint and several liability or comparative fault principles, that we believe a disclosure rule should be adopted. Therefore, we hereby adopt this rule: When a settlement agreement is entered into between the plaintiff and one or more, but not all, alleged defendant tortfeasors, the parties entering into such agreement shall promptly inform the court in which the action is pending and the other parties to the action of the existence of the agreement and its terms.

Ratteree, supra at 1076.

As a matter of procedure, the courts in Arizona have concluded that, in the absence of timely disclosure to the court and the non-settling defendant, the agreement is *void.* Even though not finding fraud, the court in one case held "we cannot condone secret agreements between a plaintiff and defendant which, by their very secretiveness, may tend to encourage wrongdoing and which, at the least, may tend to lessen the public's confidence in our adversary system." *Mustang Equipment, Inc. v. Welch*, 564 P.2d 895, 900 (Ariz. 1977).

F. These Agreements Conflict With Tort Reform Act.

These types of agreements conflict with the spirit of the Tort Reform Act of 1986, specifically RCW 4.22.070, which was enacted with

an intent to protect "deep pocket defendants" from bearing more than their fair share of liability. J. Michael Phillips, Comment, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation,* 69 Wash. L.Rev. 255, 257 (1994). They also violate the letter.

While not squarely addressing the larger public policy issue of *Mary Carter* agreements, Division Three of the Court of Appeals held that a variant of such agreement (a "covenant not to execute) violates public policy as set forth in the Tort Reform Act, and refused to allow its enforcement. *Romero v. West Valley School Dist.,* 123 Wn.App. 385, 98 P.3d 96 (2004), *review denied*, 154 Wn.2d 1010, 113 P.3d 481 (2005).[7] The plaintiffs and one defendant agreed to a policy-limits settlement offer, but also agreed to leave the settling defendant in as a defendant. This, they conspired, would have the effect of creating joint and several liability with the remaining defendant under the Tort Reform Act, RCW 4.22.070. That is, the court would enter judgment against both defendants, and the

[7] The details of this agreement are as follows: "[One defendant] agreed to pay the limits of her automobile insurance and $5,000. [The plaintiffs] agreed that if they obtained a judgment of more than $30,000 against the [non-agreeing defendant], they would reimburse [the agreeing defendant] $1 for every $2 they collected from the [other defendant] over the $30,000 amount, up to $5,000. They also agreed that [the agreeing defendant] would remain in the suit as a defendant. But [the plaintiffs] would not execute on any judgment obtained against her. The agreement also provided that the attorney hired by [the agreeing defendant's] insurance company to represent her would withdraw. And plaintiffs' attorney would represent her at trial. They called their agreement a 'Settlement Agreement and Covenant Not to Execute.' The trial judge ultimately concluded that the settlement agreement was reasonable." *Id.* at 388.

plaintiff could then execute against the targeted defendant for the entire amount, even if it was only 5% at fault. The Court would have none of it, holding that the *Covenant Not to Execute* "effectively released [the agreeing defendant]." *Id.* at 392.

> It allowed [the plaintiffs] to collect 100 percent of any judgment from the [non-settling defendant]. And, like the result in *Alder [v. Garcia,* 324 F.2d 483 (10th Cir.1963], ***the intended result here is contrary to the letter and spirit of the tort reform act.*** We hold then that the [non-settling defendant] is liable for only its proportionate share of the jury's award of damages--75 percent.

Id. (emphasis supplied) (reversing judgment of joint and several liability).[8]

One court has held:

> If the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants, such agreement should be admitted into evidence at trial upon the request of any other defendant who may stand to lose as a result of such agreement.

Ward v. Ochoa, 284 So.2d 385 (Fla. 1973). The court suggested that the prejudice can be so substantial that the trial court could sever the defendants for separate trials. *Id.* at 387-88.

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[8] As this writer has argued previously "it can be argued that a judgment (as that term is used in the 1986 Act) with real, adverse consequences has not been entered [when a covenant not to execute exists]. Such a hollow judgment cannot create joint and several liability." Stewart A. Estes, *The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation After Washington's Tort Reform Acts,* 21 Seattle Univ. L. Rev. 17, 81 (1997).

Plaintiffs' case, *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 726 P.2d 706 (1986), is easily distinguished. The agreement only stated that "the agreeing defendants would not contest plaintiff's damage case" at trial, in exchange for their dismissal afterwards. *Id.* at 716. The court held that the absence of "some sort of financial guarantee clause" rendered it materially different from a Mary Carter Agreement. *Id.* For example, the plaintiff did not promise the defendants that as long as the damages were at least $100,000, they would recover only from the non-settling defendants.

The court additionally noted that the "depositions were taken long before the instant agreement was entered into." *Id.* at 719. Thus, they were locked into their testimony before they had any incentive to dissemble. Here, Mr. Mullen stated that the validity of the agreement was *contingent upon* how he testified. CP 1772-74.

Soria is also distinguishable because the Plaintiffs' lawyers, keenly aware of their obligations, disclosed the deal. "Shortly after the agreement was reached, the district court and the attorneys for the non-agreeing defendants were notified of its contents." *Id.* at 715.

In sum, *Soria* stands only for the proposition that -- once properly disclosed -- the trial court does not abuse its discretion by not disclosing to the jury a settlement agreement that does not provide a settling defendant

with "an incentive ... to increase the amount of plaintiffs' damages. *Id.* at 717.[9]

G. The Tort Reform Act, RCW 4.22.060, Requires Notice To The Court And All Parties To Prevent Sham Defendants From Remaining In A Lawsuit

The pre-settlement notice requirement of RCW 4.22.060 is designed to prevent sham defendants from remaining in a lawsuit.

In 1986, the Legislature further revised Washington's tort law by establishing proportionate liability, making joint liability the exception rather than the rule. Under RCW 4.22.070(2), RCW 4.22.060 comes into play in determining contribution rights against other jointly and severely liable defendants. See *Bunting v. State,* 87 Wn. App. 647, 651-52, 943 P.2d 347 (1997). However, because under RCW 4.22.060(2) a covenant not to execute negates contribution rights, it also negates joint liability. *Id.*

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[9] This conclusion is at odds with logic and with *Davis v. Penrod Drilling, supra* at 1061, that held "Nor was the vice in the agreement eliminated by the last minute offer to disclose it to the jury. [The targeted defendant] should not have been placed in the position of having to decide on the morning of the last day of trial how to deal with the secret agreement, or how to mitigate its impact on the jury."

In addition, the court's logic begs the question of why the plaintiffs in *Soria* proposed this deal in the first place except for the fact that it would increase their damages? The harm lies in the fact that the secret deal results in a larger damage award, not that the settling defendants had a direct hand in causing that result. A jury will easily pick up on the fact that only the targeted defendant challenged the damages case, and conclude that the silent defendants believed that the damages were reasonable and the target's position lacked credibility.

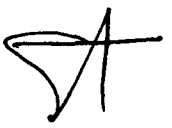
It would be a "procedural sham" to allow a party to settle with one tortfeasor, keep the settlement proceeds, and then retain that tortfeasor as a party in order to maintain joint liability for non-settling defendants. *Bunting*, supra at 653.

IV. CONCLUSION

In sum, the Court should reverse the trial court's ruling denying Defendant a new trial based on the covenanting parties' withholding evidence of their secret deal.

Respectfully submitted this 23rd day of April, 2012.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.



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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on April 23, 2012, I caused the foregoing *Brief of Amicus Curiae* Washington Defense Trial Lawyers to be couriered for filing with the Clerk of this Court and further caused to be served the same document(s) via Email with next day follow-up via ABC Legal Messenger on the parties identified below:

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