

Loan Receipt Agreements Revisited: Recognizing Substance Over Form

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I. INTRODUCTION

Loan receipt agreements have long been recognized and accepted by Indiana courts as a means of settling disputes involving multiple tortfeasors.¹ In the traditional sense, a loan receipt agreement is a settlement which by its terms involves the advancement of funds by a tortfeasor to an injured party in the form of a non-interest loan which is *fully* repayable from any recovery obtained by the injured person from any other tortfeasors. In return for the advancement of funds, the injured party promises not to pursue any claim he may have against the settling tortfeasor and/or not to enforce any judgment which might be rendered against the settling tortfeasor.² A loan receipt agreement provides the injured party with a guaranteed sum which can be used to pay expenses incurred as a result of the injury and to fund the prosecution of his claim against the non-settling tortfeasors. In return, the settling tortfeasor limits his liability while at the same time retaining the opportunity to recover the amount loaned should the injured party recover from the non-settling tortfeasors. Loan receipt agreements are approved of and encouraged because they tend to settle litigation and provide immediate funds to injured parties.³

Like the covenant not to sue and/or execute, and unlike the general release, a loan receipt agreement permits the injured party to settle with

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¹Northern Ind. Public Service Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969). The earliest Indiana decision which discusses the use of a loan receipt agreement as a tool for settling a claim for personal injuries is Klukas v. Yount, 121 Ind. App. 160, 98 N.E.2d 227 (1951). The loan receipt agreement apparently originated as a device to enable cargo insurers to place funds in the hands of an insured shipper pending litigation against a common carrier responsible for the loss. See generally Annotation, *Validity and Effect of "Loan Receipt" Agreement Between Injured Party and One Tortfeasor, For Loan Repayable to Extent of Injured Party's Recovery from a Tortfeasor*, 62 A.L.R.3d 1111 (1975).

²American Transport Co. v. Central Ind. Railway Co., 255 Ind. 319, 323, 264 N.E.2d 64, 67 (1970); Fullenkamp v. Newcomer, 508 N.E.2d 37, 39 (Ind. Ct. App. 1987); Ohio Valley Gas, Inc. v. Blackburn, 445 N.E.2d 1378, 1382 (Ind. Ct. App. 1983).

³American Transport, 264 N.E.2d at 67; Fullenkamp, 508 N.E.2d at 39; Ohio Valley Gas, 445 N.E.2d at 1382.

one or more joint tortfeasors while at the same time preserving his claim against any nonsettling tortfeasors.⁴ A loan receipt agreement insures that the injured party will receive a guaranteed sum no matter what the outcome of the law suit against the nonsettling tortfeasors, because the funds received as a loan by the injured party are not subject to repayment unless the injured party recovers from the nonsettling tortfeasors. Thus, the loan receipt agreement provides the plaintiff with a guaranteed sum free from any chance of loss and any of the uncertainties inherent in all litigation.⁵

It has long been the law and public policy of Indiana that an injured party is entitled to a single recovery for a single wrong, regardless of how many individuals may have contributed to the injury, and that a payment by one joint tortfeasor inures to the benefit of all joint tortfeasors.⁶ Therefore, to avoid the possibility that a plaintiff might recover more than his adjudicated damages, courts have consistently held that any funds received by an injured party through settlements must be credited against any judgment entered against the nonsettling tortfeasors.⁷ The amount received in settlement is considered satisfaction (whether partial or full) of the judgment, and it is the court's responsibility to credit this amount against the judgment.⁸ If the settlement amount exceeds the amount of judgment, the injured party has been fully satisfied and receives nothing from the nonsettling tortfeasor. However, even if the

⁴A release is an abandonment or relinquishment of a claim for damages, and the unqualified release of one joint tortfeasor acts to release all other joint tortfeasors. On the other hand, covenants not to sue and/or execute and loan receipt agreements are contractual agreements by which a party specifically reserves the right to proceed against other joint tortfeasors. *Cooper v. Robert Hall Clothes, Inc.*, 271 Ind. 63, 64-65, 390 N.E.2d 155, 157 (1979). In determining the nature of the agreement, the court must examine the language of the document to determine the intention of the parties, a task much more difficult than it may first appear as discussed later in this article. *See id.* at 66, 390 N.E.2d at 158.

⁵*Fullenkamp*, 508 N.E.2d at 39; *Burkett v. Crulo Trucking Co.*, 171 Ind. App. 166, 174, 355 N.E.2d 253, 258 (1976).

⁶*Sanders v. Cole Municipal Finance*, 489 N.E.2d 117, 120 (Ind. Ct. App. 1986), *transfer denied*, September 15, 1986; *Barker v. Cole*, 396 N.E.2d 964, 970 (Ind. Ct. App. 1979). A recent expression of this policy against over-compensating injured parties can be found in the General Assembly's partial abrogation of the "collateral source rule." *See* IND. CODE §§ 34-4-36-1 to -3 (Supp. 1987). The stated purposes for partially abrogating the rule are to enable the trier of fact to determine the actual amount of loss sustained by an injured party, and to provide that a prevailing party does not recover more than once from all applicable sources for each item of loss sustained. IND. CODE § 34-4-36-1. *See generally* Wilkins, *A Multi-Perspective Critique of Indiana's Legislative Abrogation of the Collateral Source Rule*, 20 IND. L. REV. 399 (1987).

⁷*E.g.*, *Sanders*, 489 N.E.2d at 120.

⁸*See, e.g.*, *Sanders*, 489 N.E.2d at 120; *Barker*, 396 N.E.2d at 970.

injured party loses the lawsuit, he still retains the funds received pursuant to the settlement.

Based upon Indiana's policy limiting an injured party's recovery to his adjudicated damages, one would think that if funds received pursuant to a loan receipt agreement were not in fact repayable, then the loan receipt agreement would be similar in effect to a covenant not to sue and/or execute and, as with a covenant, these funds would be subject to set-off against any judgment rendered. However, unlike funds received pursuant to a covenant not to sue and/or execute, Indiana courts have consistently held that amounts received by an injured party pursuant to a loan receipt agreement do not, *under any circumstances*, constitute partial satisfaction of any judgment which might be rendered against the remaining tortfeasors and are not to be credited against the judgment.⁹ Inexplicably, Indiana courts have failed to look beyond mere form of the agreement to truly analyze the mechanics of the agreement and to give effect to its substance. Judge Garrard addressed this particular problem in his concurring opinion in *Sanders v. Cole Municipal Finance*.¹⁰ This issue will be the principal focus of this article.¹¹

⁹*American Transport Co. v. Central Indiana Railway Co.*, 255 Ind. 319, 323, 264 N.E.2d 64, 67 (1970); *Sanders*, 489 N.E.2d at 120; *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1122 (Ind. Ct. App. 1983).

¹⁰489 N.E.2d at 125 (Garrard, J., concurring). Perhaps this is one of the potential misuses of loan receipt agreements which the court hoped to discourage by "firing a shot across the bow" in *Burkett v. Crulo Trucking Co., Inc.*, 171 Ind. App. 166, 179, 355 N.E.2d 253, 261 (1976).

¹¹Of further interest to the trial attorney are the many effects loan receipt agreements have had on both pre-trial and trial practice. Once the loaning defendant has advanced funds to the plaintiff, the defendant's interest in the trial has shifted because now the defendant has become aligned with the plaintiff in that the defendant would benefit through repayment of the loan should the plaintiff recover from the nonsettling defendant. Since no litigable issue remains between the plaintiff and the loaning defendant, the loaning defendant's only purpose for continuing to participate in the trial is to assist the plaintiff in recovering from the nonsettling defendant. For this reason, courts have held that if the loaning defendant is not dismissed from the lawsuit, once the loan receipt agreement is made known, the nonsettling defendant may move for a separate trial and/or introduce the loan receipt agreement into evidence to inform the jury of the loaning defendant's interest in the outcome of the trial. *Health & Hospital Corp. of Marion County v. Gaither*, 272 Ind. 251, 257, 397 N.E.2d 589, 594 (1979); *Burkett v. Crulo Trucking Co.*, 171 Ind. App. 166, 175, 355 N.E.2d 253, 259 (1976).

Even if the loaning defendant is dismissed from the lawsuit or a separate trial is granted, the loaning defendant or one or more of its agents or representatives may be called to testify at trial. Under these circumstances, the loan receipt agreement is admissible to show the witnesses' interest in the outcome of the trial. *Ohio Valley Gas, Inc. v. Blackburn*, 445 N.E.2d 1378, 1382 (Ind. Ct. App. 1983); *Gray v. Davis Timber and Veneer Corp.*, 434 N.E.2d 146, 148 (Ind. Ct. App. 1982). If used solely to show bias, the amount of the loan must be deleted from the agreement. Also, if under all

II. THE NATURE OF THE BEAST

Many settlement agreements labeled as "loan receipt agreements" are in reality "hybrid" agreements containing characteristics of both the loan receipt and the covenant not to sue and/or execute. Many loan receipt agreements used in Indiana practice include "threshold" levels which must be exceeded by any judgment rendered against the non-settling tortfeasor before repayment of the loan begins.¹² If this threshold level is not exceeded, repayment does not occur at all and the injured party retains both the loan amount and the judgment amount. Under these circumstances, the injured party may recover more than the damages adjudicated by the jury. Thus, the settling parties can structure an agreement which precludes any possibility of a set-off against the judgment as a result of settlement funds previously received by the injured party by simply labeling the agreement a "loan receipt agreement." This is true even though by the very terms of the agreement the likelihood of actual repayment is minimal if, in fact, it exists at all. Unless trial courts analyze the substance of this type of agreement a settlement which is not in fact a loan will nonetheless be treated as a loan and the injured party may be over-compensated.

In *Sanders v. Cole Municipal Finance*,¹³ the Sanders sued multiple defendants as a result of injuries Mr. Sanders sustained while at his place of employment. Prior to trial, the Sanders entered into settlements with all of the defendants except Cole Municipal Finance. The settlement agreements were in the form of covenants not to sue and/or execute, except for one agreement which was designated as a "loan receipt agreement." All of the agreements reserved the right of the Sanders to proceed against any other individuals potentially liable for the loss.¹⁴ The jury returned a verdict in favor of the Sanders in the amount of \$320,000. The trial court then credited against the verdict the amounts the Sanders had received for the covenants not to sue and/or execute. The Sanders had received more through the settlements than the verdict

the facts and circumstances of the case any statements in the agreement do not constitute fair comment on the subjects covered in the agreement or were drafted for the sole purpose of "manufacturing evidence" they must be deleted before the agreement is admitted. *Ohio Valley Gas*, 445 N.E.2d at 1383. An appropriate instruction limiting the affect of the admission of the terms of the loan receipt agreement into evidence should be requested. *See, e.g., Reese v. Chicago, Burlington & Quincy R.R.*, 55 Ill.2d 356, 364, 303 N.E.2d 382, 387 (1973).

¹²*See, e.g., Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1122 (Ind. Ct. App. 1983); *Burkett v. Crulo Trucking Co.*, 171 Ind. App. 166, 174, 355 N.E.2d 253, 258 (1976).

¹³489 N.E.2d 117, 119 (Ind. Ct. App. 1986), *transfer denied*, September 15, 1986.

¹⁴*Id.*

amount, so the trial court entered an order of judgment in favor of the only remaining defendant, Cole Municipal Finance.¹⁵ The Sanders appealed, arguing, among other things, that the court erred in crediting the amounts received for the covenants not to sue and/or execute against the verdict and in entering judgment in favor of Cole.¹⁶

The appellate court held that the funds received by the Sanders in return for the covenants not to sue and/or execute were properly credited against the judgment rendered against the remaining defendant.¹⁷ As the court noted, the principle behind requiring the credit is that an injured party is entitled to but one satisfaction for a single injury, and the payments by the settling defendants inured to the benefit of the only remaining defendant, Cole.¹⁸ The court further held that the funds received by the Sanders pursuant to the loan receipt agreement were not to be credited against the judgment.¹⁹ These funds were not to be considered as partial satisfaction of the judgment.²⁰ The court held, however, that it was error for the trial court to enter *judgment* for Cole, for the trial court should have entered judgment for the Sanders in the amount of the verdict and then should have made any necessary set-off against the judgment rather than against the verdict.²¹ Because the amount received by the Sanders pursuant to the covenants exceeded the judgment, the judgment was considered fully satisfied without any payment by Cole.²²

Apparently, the defendant in *Sanders* did not raise the issue of partial satisfaction insofar as the loan receipt agreement was concerned. None of the parties challenged the court's characterization of the agreement as a loan receipt agreement, nor was there any mention of a request by the defendant that the court set-off against the judgment the amount received by the Sanders pursuant to the loan receipt agreement which was not repayable under its terms.²³ The terms of the loan receipt agreement were not disclosed in the majority opinion. However, the terms were disclosed in Judge Garrard's concurring opinion, although it is difficult to discern from the concurring opinion the precise nature

¹⁵*Id.* at 119.

¹⁶*Id.* at 119-20.

¹⁷*Id.* at 120-21.

¹⁸*Id.* at 120.

¹⁹*Id.*

²⁰*Id.* at 120, 125.

²¹*Id.* at 124-25.

²²*Id.* at 125.

²³It should be noted that since the amounts received by the Sanders pursuant to the covenants exceeded the judgment, crediting the additional funds received pursuant to the loan receipt agreement which were not repayable would not have altered the result and perhaps this is why the issue was not raised.

of the terms for repayment of the loan.²⁴ It is clear from the opinion, however, that based upon the verdict rendered in the case, a portion of the loan was not in fact repayable.²⁵ Although concurring with the result reached by the majority, Judge Garrard disagreed with the majority opinion in its analysis of the effect of the Sanders' loan receipt agreement. Judge Garrard's comments bear repeating:

While the basic concept of such [loan receipt] agreements may be the same, they exist in almost infinite variety as to the terms, conditions and amounts subject to repayment. Certainly, in the extreme an agreement could be constructed with the amount of repayment so small or the conditions so far-fetched that the court might conclude it was in fact something else. That is not my concern.

The cases appear to genuinely adhere to the concept that the plaintiff is entitled to only one satisfaction. I do not disagree. But, if that is so, why should monies received upon a covenant not-to-sue or a covenant not-to-execute be counted toward that satisfaction? According to the recitations of the parties the money is paid *as a consideration for the promise* or to avoid the expense and uncertainty of litigation, not as compensation for injury. Many would deem it silly to allow such a transparent device to alter the substance of what was being done and thereby evade the mandate of a principle we endorse in the law.

In point of fact much the same thing occurs in the typical "genuine" loan receipt agreement. . . .

Of course, whatever actual amounts they [the Sanders] were obligated to repay were not and should not be treated as "satisfaction." On the other hand it seems inescapable to me that to the extent there was no obligation to repay in fact, there was a partial satisfaction and the law should recognize it.

The court in *American Transport Co.* recognized the desirability of permitting loan receipt agreements. That desirability does not appear to me to be hindered by enforcing the rule that amounts received which under the terms of the agreement need not be repaid, constitute a partial satisfaction of a plaintiff's claim.

I would therefore also credit against the judgment the amount

²⁴*Sanders*, 489 N.E.2d at 125-26 (Garrard, J., concurring).

²⁵The concurring opinion states that the Sanders received \$200,000 pursuant to the agreement. They were obligated to repay 25% from the first \$400,000 they recovered from Cole and if they recovered more than \$400,000 from Cole they were obligated to repay the loan on a dollar for dollar basis for the remaining 75%. *Id.*

paid under the loan receipt agreement which Sanders had no obligation to repay.²⁶

Clearly, Judge Garrard advocates giving effect to substance over form, even though that might require that the trial court take a more detailed look at the agreement constructed by the parties. As in *Sanders*, the true nature of the agreement may not be known until after the verdict has been rendered and the repayment terms have become operative. However, trial courts must scrutinize these agreements if the public policy against over-compensating injured parties is to continue intact.

III. FULL OR PARTIAL SATISFACTION?

As Judge Garrard recognized in *Sanders*, a loan is not a loan when, pursuant to the terms of the agreement, there is no obligation to repay the loan. If an agreement exists in which the "threshold" amount, that is, the amount designated in the agreement which the judgment must exceed before repayment of the loan begins, is so high that counsel can reasonably argue that the injured party has been fully satisfied and, therefore, liability has been discharged as against the remaining defendants, counsel should be permitted to make such an argument.²⁷ For example, assume that a potential defendant "loans" the injured party \$300,000 in return for dismissal of the lawsuit. The terms of the agreement do not require repayment of any portion of the loan amount unless and until the injured party recovers over \$300,000 from the nonsettling defendants. The injured party has received \$300,000 free and clear of any chance of loss. If the nature of the injured party's damages are such that counsel can reasonably argue that the receipt of \$300,000 fully and fairly compensates the injured party, counsel should be permitted to argue to the jury that the injured party has been fully satisfied and that the defendant's liability has been discharged because the injured party has already received \$300,000 which is not subject to repayment. The terms of the agreement, including the loan amount and the terms

²⁶*Id.* Illinois courts apparently support Judge Garrard's view. *Popovich v. Ram Pipe & Supply Co.*, 82 Ill. 2d 203, 209-10, 412 N.E.2d 518, 521 (1980); *Webb v. Toncray*, 102 Ill. App. 3d 78, 80-81, 429 N.E.2d 874, 877 (1981) (set-off resulted in reducing verdict to zero). Loan receipt agreements with "threshold" amounts are designated as "platform loan agreements" by the Illinois courts. See *Palmer v. Avco Distributing Corp.*, 82 Ill. 2d 211, 215, 223, 412 N.E.2d 959, 961, 965 (1980).

²⁷Trial counsel must consider whether or not he can reasonably argue that the "threshold" amount constitutes full satisfaction in light of the nature of the injuries suffered, the special damages incurred, etc. It might not be wise to argue full satisfaction if the plaintiff's damages greatly exceed the "threshold" amount, for in this instance trial counsel could lose credibility with the jury. Clearly, however, full satisfaction is a compelling argument to make to a jury if the facts support such an argument.

of repayment, clearly become relevant;²⁸ further, the jury should be instructed as to the manner in which the agreement should be considered in arriving at its verdict.²⁹

If counsel chooses not to argue full satisfaction, or if the jury rejects this argument, the issue of partial satisfaction may arise if amounts received pursuant to the agreement are not, in fact, subject to repayment. For example, in the hypothetical loan receipt agreement discussed above, assume that the injured party must repay on the loan only if the judgment exceeds \$300,000, in which case the injured party will repay in full any and all amounts received between \$300,000 and \$350,000, between \$400,000 and \$450,000, between \$500,000 and \$550,000, etc. Based upon these repayment terms, the possibility exists that the injured party will recover more than the jury has determined will fully and fairly compensate him for his injuries. For example, if judgment is rendered against a non-settling defendant in the amount of \$400,000, the injured party must repay only \$50,000 of the judgment amount to the loaning defendant pursuant to the terms of the agreement. Thus, if no set-off is made for funds received by the injured party pursuant to the loan receipt agreement

²⁸The General Assembly's partial abrogation of the "collateral source rule" supports an argument that the trier of fact must be informed of the amount of any funds received by an injured party through any type of settlement.

In a personal injury or wrongful death action the court *shall* allow the admission into evidence of:

- (1) proof of collateral source payments, other than:
 - (A) payments of life insurance or other death benefits;
 - (B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or
 - (C) payments made by the state of Indiana or the United States, or any agency, instrumentality, or subdivision thereof, that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;
- (2) proof of the amount of money that the plaintiff is required to repay, including workmen's compensation benefits, as a result of the collateral benefits received; and
- (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

IND. CODE § 34-4-36-2 (Supp. 1987) (emphasis added).

²⁹See, e.g., *State v. Ingram*, 427 N.E.2d 444, 446 (Ind. 1981). However, in *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1122 (Ind. Ct. App. 1983), a jury instruction on the issues of full and partial satisfaction was refused, although the loan receipt and agreement was admitted into evidence in its entirety and the defendant had affirmatively pled full and partial satisfaction. The trial court's refusal to instruct the jury on these issues was affirmed by the court of appeals. *Id.* Based on the verdict rendered by the jury and the terms of the agreement, none of the loan amount was subject to repayment so the plaintiff received more than the jury had awarded as damages. See *id.* at 1120.

which are not repayable by the terms of the agreement, the injured party receives \$400,000 from the nonsettling defendant as a result of the judgment and \$250,000 (\$300,000 loan amount minus \$50,000 repaid on the loan) from the loaning defendant for a total of \$650,000. The injured party has received \$250,000 more than the jury has awarded in damages. Had funds not subject to repayment pursuant to the terms of the agreement been credited toward the judgment, the injured party would have received a total of \$400,000, the amount of the jury's verdict. In no event would the injured party be left with nothing. Even if the verdict had been against the injured party, he still would have retained the "threshold" amount of the loan which under the hypothetical agreement is \$300,000. If the issue of partial satisfaction has been properly raised by the defendant, the court should credit any amounts not subject to repayment pursuant to the terms of the loan receipt agreement against the judgment after the judgment has been entered. This can be done immediately after the judgment is entered or at a hearing held to determine the nature of the agreements and the amount of any credit.³⁰

Assuming the issue of full satisfaction has not been argued, the issue of partial satisfaction can be resolved without placing the terms of the agreement before the jury. However, if full satisfaction has been argued, the terms of the agreement will most likely be before the jury, including the terms of repayment. If the jury does not find full satisfaction, the partial satisfaction defense is still available although the court and not the jury should address the issue of partial satisfaction. This is particularly true since the amount to be credited against the judgment may not be known until after the verdict has been rendered and the repayment terms become operable. To avoid the confusion which will likely result if the jury is required to deal with the repayment terms, the jury should be instructed that the court will address the issue of partial satisfaction. Therefore, in a case where full satisfaction is argued, the jury should be instructed that it is to consider the "threshold" payment made to the plaintiff only to the extent that the "threshold" payment constitutes full satisfaction of the plaintiff's claim. If the plaintiff has been fully satisfied, the jury should enter a verdict in favor of the defendant. If, however, the jury finds that the "threshold" amount does not fully satisfy the plaintiff's claim, the jury should be instructed that it is not to consider the loan agreement and its terms in deciding the issue of damages. Instead, it should determine the amount of damages which will fully and fairly compensate the plaintiff for his injuries without reference to the agreement. The jury should be instructed that the court

³⁰See *Sanders v. Cole Municipal Finance*, 489 N.E.2d 117, 123 (Ind. Ct. App. 1986), *transfer denied*, September 15, 1986.

will credit toward the judgment any amounts retained by the plaintiff pursuant to the loan receipt agreement to insure that there is no double recovery.³¹

IV. THE EFFECT OF COMPARATIVE FAULT

It is yet unclear what effect Indiana's Comparative Fault Act³² will have on the use of loan receipt agreements as a settlement tool. It has been noted that the widespread use of loan receipt agreements has continued even in those states adopting some form of comparative negligence.³³ Because under comparative fault each tortfeasor is liable only for that portion of the plaintiff's damages attributable to his percentage of fault, the concern of having to pay all of an injured party's damages as a result of application of joint and several liability principles has diminished. However, where allocation of fault is hotly contested and the damages are considerable and could potentially fall solely or disproportionately upon one of multiple defendants, plaintiffs and defendants may sometimes find the loan receipt agreement a welcome settlement tool.

Assuming that Indiana's stated public policy of one recompense for a single wrong has survived the adoption of comparative fault,³⁴ one can legitimately argue for the continued validity of the full and partial satisfaction defenses. These defenses would be available whether the settling party is a defendant or nonparty defendant. Under comparative fault, a defendant may assert as a defense that the damages

³¹This appears to be the approach taken by the Illinois courts when the amount of the loan and the terms of repayment are disclosed to the jury. The jury is instructed that the loan amount should not be considered in arriving at the verdict because the court will make any set-off necessary for amounts not subject to repayment. See *Palmer v. Avco Distributing Corp.*, 82 Ill. 2d 211, 226-28, 412 N.E.2d 959, 967 (1980).

³²IND. CODE §§ 34-4-33-1 to -14 (Supp. 1987). As defined in the Act, "fault" is: any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

IND. CODE § 34-4-33-2. Because the Act does not apply to actions against qualified health care providers, tort claims against governmental entities or governmental employees, strict liability actions, or breach of warranty actions, it is clear that loan receipt agreements will continue in widespread use. IND. CODE §§ 34-4-33-1, -8, -13.

³³See Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 910 n.10 (1984).

³⁴The General Assembly's partial abrogation of the "collateral source rule" tends to support this conclusion. See IND. CODE §§ 34-4-36-1 to -3 (Supp. 1987).

suffered by the plaintiff were caused in full or in part by a nonparty.³⁵ This defense is not lost simply because the plaintiff settled with the nonparty defendant. If the amount received by the plaintiff from the settling defendant or nonparty defendant can reasonably be argued as having fully compensated the plaintiff regardless of the assessment of fault, the defendant should be permitted to make this argument in seeking a discharge from liability. Obviously, this situation will seldom be encountered whether under comparative fault or traditional tort principles. However, the result is wholly consistent with the policy of avoiding double recoveries and with the case law discussing full satisfaction.³⁶

If the full satisfaction argument cannot be made, partial satisfaction may be appropriate if the settling defendant or nonparty defendant has paid more in settlement to the plaintiff than he should have based upon the fact-finder's allocation of fault. For example, assume that a single plaintiff sues two defendants who name one nonparty defendant, the nonparty having settled with the plaintiff for \$50,000.³⁷ Assume further that the jury assesses the fault of all parties, including the plaintiff and the nonparty, at twenty-five percent each, and awards damages of \$100,000. The verdict represents the jury's determination that the plaintiff is only entitled to \$75,000 as a result of the fault of other individuals. However, the nonparty has paid in settlement \$25,000 more than the jury has assessed as his proportion of the

³⁵IND. CODE § 34-4-33-10 (Supp. 1987). IND. CODE § 34-4-33-2 (Supp. 1987) defines a "non-party" as: "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by a claimant. A nonparty shall not include the employer of the claimant." As to settlements with nonparties, see generally Eilbacher, *supra* note 33, at 908-11, and Smith & Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 983-85 (1984).

³⁶*E.g.*, *Bedwell v. DeBolt*, 221 Ind. 600, 609, 50 N.E.2d 875, 877 (1943).

³⁷It is assumed that any potential defendant who has settled with the plaintiff will have been identified by the nonsettling defendant and pleaded as a nonparty defendant. It is highly unlikely that a defendant will know of a potential nonparty defendant who has settled with the plaintiff and yet not name that individual as a nonparty defendant in order to have that individual's percentage of fault assessed. However, a question arises as to how a settlement with a tortfeasor who is not a defendant or nonparty defendant and whose fault has not been assessed should be treated. Many courts addressing this issue have held that if the settling party is not a party whose fault will be assessed, the nonsettling parties receive credit only for the amount paid by the settling party or provided in the settlement agreement. *See, e.g.*, *Woodard v. Holliday*, 235 Ark. 744, 750-51, 361 S.W.2d 744, 748-49 (1962); *Tucker v. Palmer*, 112 Idaho 648, 735 P.2d 959 (1987). Counsel for the defendant should diligently conduct the necessary investigation and discovery to identify potential nonparties in order to meet the requirements of timely pleading of nonparty defenses as required by statute. IND. CODE § 34-4-33-10 (Supp. 1987).

damages based upon the allocation of fault. Although the jury has determined that the plaintiff is entitled to \$75,000 as a result of the fault of others, the plaintiff will receive \$100,000 total through payment of the judgment and the settlement. In order to avoid over-compensating the plaintiff, the court should reduce the amount to be paid by each of the nonsettling defendants to reflect the nonparty's over-contribution. There are several ways in which this reduction can be accomplished.

The credit could be apportioned among the nonsettling defendants based upon their relative percentages of fault. That is, each nonsettling defendant's contribution is reduced by the amount which results when the over-contribution of the nonparty is multiplied by the ratio of the nonsettling defendant's fault to the total fault of all nonsettling defendants. On the other hand, the court could allocate the over-contribution equally among the nonsettling defendants without any reference to the relative percentages of fault. Under the facts of this hypothetical, the result will be the same. Alternatively, the court could include the plaintiff in the allocation of the settlement funds whether the funds be allocated equally among all parties or based upon the relative percentages of fault. However, including the plaintiff in the allocation could result in an over-payment to the plaintiff. Allocating the over-contribution to the non-settling defendants insures that the plaintiff receives an amount equal to the jury's award and that the plaintiff is not over-compensated.³⁸ Under comparative fault, the set-off principle applies whether the agreement is a release, covenant not to sue and/or execute, or a loan receipt agreement where the terms of the agreement do not require full repayment. The precise manner in which settlements will be handled by Indiana courts under comparative fault remains to be seen.

³⁸This approach, with any of the variations discussed, is particularly well-suited for Indiana because in most cases the fault of all individuals contributing to the injury, including plaintiffs, defendants, and nonparties, will be assessed. It must be recognized that by using this approach the plaintiff will suffer by settling with a party for an amount less than the jury ultimately assesses as the settling party's percentage of fault. Eilbacher, *supra* note 33, at 911, argues that it should not matter that the plaintiff might realize a windfall by a settlement which results in the plaintiff recovering more than his adjudicated damages, because the plaintiff should voluntarily accept the risk of any windfall or penalty resulting from over- or under-valuing the settlement. *See, e.g.,* Rogers v. Spady, 147 N.J. Super. 274, 277-78, 371 A.2d 285, 287-88 (1977); Pierringer v. Hoyer, 21 Wis. 2d 182, 192, 124 N.W.2d 106, 112 (1963). For a discussion of other approaches taken to avoid windfalls and penalties as a result of settlements under comparative negligence, see generally Smith & Wade, *supra* note 35, at 983-85; H. WOODS, COMPARATIVE FAULT, §§ 13.14-.21, at 279-94 (2d ed. 1987), C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL, §§ 4.10-.310 (Rev. ed. 1986).

V. CONCLUSION

As Judge Garrard recognized in his concurring opinion in *Sanders v. Cole Municipal Finance*,³⁹ much has been learned about loan receipt agreements since they were first introduced in Indiana. Many loan receipt agreements of today would be better classified as "hybrid" agreements because they contain features of both the traditional loan receipt agreement and the covenant not to sue and/or execute. If the public policy of this state is truly "one satisfaction for a single injury," the courts must begin recognizing substance over form when dealing with the various types of loan receipt agreements encountered today and the unlimited resourcefulness of counsel in drafting them. The resourcefulness which resulted in the creation of the loan receipt agreement is now being used to devise agreements that will result in over-compensating an injured party in contravention of Indiana's stated public policy. Courts must now decide whether the resourcefulness of counsel must give way to public policy considerations.

³⁹489 N.E.2d 117, 125-26 (Ind. Ct. App. 1986) (Garrard, J., concurring), *transfer denied*, September 15, 1986.

