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The Changing Face of Mary Carter Agreements in California: The Aftermath of *Abbott Ford* and Proposition 51

I. INTRODUCTION

Legal scholars have long predicted the demise of the Mary Carter agreement,¹ the popular name for a sliding scale settlement agreement.² Despite such forecasts, the agreement has continued to survive. In California, however, it appears that the death knell for Mary Carter may have finally been sounded. *Abbott Ford, Inc. v. Superior Court*³ and Proposition 51⁴ together may prove to be the agreement's biggest challenge in its fight for survival.

Abbott Ford is a clear victory for nonsettling defendants since most

1. See, e.g., Freedman, *The Expected Demise of "Mary Carter": She Never Was Well!*, 633 INS. L.J. 602 (1975); Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779 (1978). Many other law review articles have criticized the Mary Carter agreement. See Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 233 (1980); McKay, *Loan Agreement: A Settlement Device that Deserves Close Scrutiny*, 10 VAL. U.L. REV. 231 (1976); Scoby, *Loan Receipts and Guaranty Agreements*, 10 FORUM 1300 (1975); Note, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 ARIZ. L. REV. 863 (1977); Comment, *Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements: Unsettling Contributions to Conflict Resolution*, 1977 ARIZ. ST. L.J. 117 (1977); Note, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 ARK. L. REV. 570 (1983); Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 GONZ. L. REV. 266 (1977); Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiation*, 12 PAC. L.J. 121 (1980); Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393 (1974); Comment, *Mary Carter Agreements: A Viable Means of Settlement?*, 14 TULSA L.J. 744 (1979); Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988 (1974).

2. In some other jurisdictions, the sliding scale settlement agreement is referred to by other names. In Arizona, this agreement is known as a Gallagher covenant (named after *Tucson v. Gallagher*, 14 Ariz. App. 385, 483 P.2d 798 (1971)). One commentator has used the term "guaranteed verdict agreements." See Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 233 (1980). The term "loan receipt agreement" has commonly referred to sliding scale settlement agreements in which a loan advance is part of the agreement. See McKay, *Loan Agreement: A Settlement Device that Deserves Close Scrutiny*, 10 VAL. U.L. REV. 231 (1976).

3. 43 Cal. 3d 858, 741 P.2d 124, 239 Cal. Rptr. 626 (1987).

4. CAL. CIV. CODE §§ 1431-1431.5 (West Supp. 1989) (Fair Responsibility Act of 1986).

of the unfair advantages to settling parties have vanished,⁵ thereby destroying many of the incentives to enter into the Mary Carter agreement.⁶ Thus, while the agreement is still available, as a practical matter the agreement may be dead.

In addition to the effects of *Abbott Ford*, the Mary Carter agreement is subject to Proposition 51 and its apportionment restrictions. The result is unclear since no court, as of yet, has ruled on the applicability of Proposition 51 to such agreements. However, the likely result will be that these contracts will be limited where noneconomic damages are expected to be a significant portion of the awarded damages.⁷

This practicum recognizes the possibility that the Mary Carter agreement will remain viable in California. To do so, the agreement must be adapted to comply with recent changes in the law. Thus, a new model agreement is presented which has adapted a standard sliding scale agreement with several new provisions to recognize these changes.

This practicum has three basic objectives: first, to examine the California Supreme Court decision in *Abbott Ford* and determine its impact on Mary Carter agreements; second, to look at Proposition 51 and predict how it will be applied to Mary Carter agreements; and third, to provide a model sliding scale agreement which can serve as a guide to practitioners.

Part II of this practicum serves to acquaint the reader with Mary Carter agreements. Part III discusses the good faith standard in the California statutes and its interpretation by *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.⁸ Part IV discusses *Abbott Ford* and looks at its role in shaping the future of Mary Carter agreements. Part V introduces Proposition 51 and discusses its probable effect on Mary Carter agreements. Part VI concludes this practicum with a model sliding scale agreement.

II. THE MARY CARTER AGREEMENT

The Mary Carter⁹ agreement is a sliding scale settlement agreement which is made between the plaintiff and one or more, but not all, of the defendants. Section 877.5 of the California Civil Procedure Code defines a sliding scale settlement as "an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged

5. See *infra* notes 56-139 and accompanying text.

6. See *infra* notes 114-39 and accompanying text.

7. See *infra* notes 170-86 and accompanying text.

8. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

9. The term "Mary Carter" is from a Florida District Court of Appeal case, *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967), the first case to examine this settlement device.

tortfeasor defendants, which limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants."¹⁰

Mary Carter agreements typically involve three elements: (1) the settling defendant guarantees the plaintiff a minimum recovery whereby the settling defendant's liability decreases in proportion to an increase in the liability of any nonsettling defendant; (2) the plaintiff agrees not to collect a judgment against the settling defendant; and (3) the settling defendant remains in the action.¹¹ Some agreements have a fourth element which provides that the agreement must be kept secret.¹²

This device has many forms¹³ but is most commonly a device allowing one or more defendants to make a guaranteed settlement. In illustration, one defendant might guarantee a recovery amount (e.g., \$300,000) to the plaintiff. If the Mary Carter agreement is made and the judgment is less than the guaranteed recovery amount (e.g., \$200,000), then the defendant must pay the difference between the amount guaranteed and the amount of damages awarded (\$300,000 - \$200,000, or \$100,000). On the other hand, if the judgment award is greater or equal to the amount guaranteed in the Mary Carter agreement (e.g., \$400,000), then the settling defendant has no liability. In both cases, the nonsettling defendant pays the entire amount of the judgment. This is the type of agreement most often falling under the rubric of a Mary Carter agreement and is the subject of this practicum.¹⁴

10. CAL. CIV. PROC. CODE § 877.5 (West Supp. 1989).

11. See Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368, 369-70 (1987); Comment, *California Code of Civil Procedure Sections 877, 877.5, and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823, 841-42 (1986); Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1396-97 (1974).

12. See, e.g., *General Motors Corp. v. Lahocki*, 286 Md. 714, 720, 410 A.2d 1039, 1042 (1979); *Vermont Union School Dist. 21 v. H.P. Cummings Constr. Co.*, 143 Vt. 416, 427, 469 A.2d 742, 748 (1983). California does not permit secrecy but mandates disclosure. See *infra* notes 19-22 and accompanying text.

13. *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 870, 741 P.2d 124, 131, 239 Cal. Rptr. 626, 633 (1987). "[T]he number of variations of the so-called 'Mary Carter Agreement' is limited only by the ingenuity of counsel and the willingness of the parties to sign." *Id.* at 870 n.11, 741 P.2d at 131 n.11, 239 Cal. Rptr. at 633 n.11 (citing *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972)).

14. Another version of a sliding scale agreement may exist where the plaintiff makes several different guarantees depending on the judgment. For example, a settling defendant may promise a payment of \$500,000 for any recovery under \$100,000; a payment of \$400,000 for any recovery less than \$200,000; and so on, until there is no

The Mary Carter agreement is very different from a traditional settlement agreement. In the traditional settlement agreement, the settling defendant pays the plaintiff a certain amount for the plaintiff's promise not to sue.¹⁵ Unlike the payments in the sliding scale agreement, the payments of a traditional agreement are noncontingent because they do not depend on the amount of judgment against the nonsettling defendants.

Settlement agreements may combine some aspects of traditional agreements with sliding scale agreements, since a settlement may consist of both noncontingent payments and sliding scale payments. These are hybrid Mary Carter agreements rather than pure Mary Carter agreements.¹⁶ For example, the settling defendant may promise the plaintiff \$200,000 regardless of the recovery, and also guarantee a recovery of \$500,000. As will be shown, pure sliding scale agreements where noneconomic damages are sought may be effectively eliminated by Proposition 51. Thus, pure sliding scale agreements after Proposition 51 will be rare.¹⁷

Mary Carter agreements have been subject to much criticism.¹⁸ Originally, the Mary Carter agreement was secretive as it was made without the knowledge of the nonsettling defendant.¹⁹ This led to many problems. The agreement, for example, was a vehicle for collusion or ganging up on one or more defendants.²⁰ California corrected this problem by enacting section 877.5 of the California Civil Procedure Code.²¹ Subsection 877.5(c) requires disclosure to all parties: "No sliding scale recovery agreement is effective unless a notice of intent to enter into an agreement has been served on all non-signatory alleged defendant tortfeasors."²²

payment if the recovery reaches \$600,000. In essence, this agreement is like the typical sliding scale guarantee except that payments step down for each \$100,000 of recovery. The payments of this agreement are incremented in a step-like fashion rather than in the linear manner of a typical sliding scale agreement. See Model Agreement, para. 2, alternative B in Appendix of this practicum.

15. See Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368, 371 (1987) [hereinafter *It's a Mistake*].

16. A hybrid agreement was used in *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981). In *Dompeling*, the settling defendant promised \$100,000 and possible additional payments up to \$10,000 to plaintiff depending upon plaintiff's recovery from the nonsettling defendant. *Id.* at 802, 173 Cal. Rptr. at 40. Similarly, in *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 503, 203 Cal. Rptr. 825, 828 (1984), the settling defendant made a noncontingent payment of \$50,000 and provided an additional \$150,000 guarantee on a sliding scale basis.

17. *But see infra* note 188.

18. *See supra* note 1.

19. *See It's a Mistake, supra* note 15, at 370 & nn.10-11.

20. Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1398-1403 (1974) [hereinafter *Collusive Settlements*].

21. CAL. CIV. PROC. CODE § 877.5 (West Supp. 1989).

22. *Id.* § 877.5(c).

Additionally, the agreement was unfair to the nonsettling defendant at trial since the settling defendants favored the plaintiff rather than their co-defendant.²³ Subsection 877.5(a)(2) diminishes this unfairness to the nonsettling defendant in a jury trial by disclosing the existence and the content of such agreement to the jury.²⁴ Thus, the jury will be aware of any bias the settling defendant has against any nonsettling defendant.

Although California has improved the fairness of Mary Carter agreements, such agreements may still be unfair to nonsettling defendants.²⁵ Critics view the agreement as harsh since settling defendants may have no liability and consequently subject the nonsettling defendants to the entire judgment.²⁶ The good faith requirement in California has attempted to remedy this unfairness.

III. THE GOOD FAITH STANDARD

A. *Competing Policies of Equitable Apportionment and Settlement*

Two policies should be considered whenever a Mary Carter agreement is entered—apportionment of damages equitably among defendants and encouragement of settlements.²⁷ Equitable apportionment of damages is necessary to uphold fairness to the parties and to keep certain parties from being unduly punished. At the same time, settlements encourage parties to resolve their own disputes, avoid expensive and time consuming litigation, and keep the court's docket moving. However, there is a potential conflict between these two policies when multiple defendants are involved.²⁸

23. *Collusive Settlements*, *supra* note 20, at 1400.

24. CAL. CIV. PROC. CODE § 877.5(a)(2) (West Supp. 1989). This section provides: If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Id.

25. See *infra* text accompanying notes 79-84 discussing problems of equitable apportionment.

26. This has changed after *Abbott Ford*. See *Abbott Ford Inc., v. Superior Court*, 43 Cal. 3d 858, 885 n.27, 741 P.2d 124, 142 n.27, 239 Cal. Rptr. 626, 644 n.27 (1987). The nonsettling defendant now receives an offset for the value of the sliding scale agreement. See CAL. CIV. PROC. CODE § 877(b) (West Supp. 1989).

27. *Abbott Ford*, 43 Cal. 3d at 872, 741 P.2d at 133, 239 Cal. Rptr. at 635. See also Comment, *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823, 823-29 (1986).

28. *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 807-08, 173 Cal. Rptr. 38, 43 (1981). In *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980), the

This tension can be illustrated as follows. Where a Mary Carter agreement permits a defendant to escape liability, the defendant will be encouraged to settle;²⁹ and where the plaintiff receives a guarantee without forfeiting anything, the plaintiff is encouraged to settle.³⁰ Thus, left unregulated, the Mary Carter agreement is an attractive settlement vehicle. However, the unfairness is that a nonsettling defendant is liable for the entire judgment.³¹ Thus, the traditional Mary Carter agreement encourages settlement at the expense of fair apportionment among all defendants. California has attempted to balance these two goals by enacting a statutory good faith requirement.³²

B. California Civil Procedure Code Sections 877 and 877.6

California's good faith requirement under section 877 of the California Civil Procedure Code³³ mandates that courts review Mary

court announced a priority of interests. The court stated: "The relevant public policy considerations underlying multiparty tort litigation in decreasing order of priority are: (1) the maximization of recovery to the injured party, (2) settlement of the injured party's claim, and (3) equitable apportionment of liability among concurrent tortfeasors . . ." *Id.* at 447, 163 Cal. Rptr. at 56 (quoting *American Bankers Ins. Co. v. Avco-Lycoming Div.*, 97 Cal. App. 3d 732, 736, 159 Cal. Rptr. 70, 73 (1979)).

29. The Mary Carter agreement has several attractive features to the settling defendant. First, the guarantee amount acts as a ceiling on the liability. Thus, the settling defendant will not be liable for any amounts beyond the guarantee amount. This may allow use of a liability insurance policy to make a guarantee up to the policy limits and have no personal liability. Second, the settling defendant will have no liability if the guarantee amount is less than the judgment. The settling defendant is liable for only the excess between the guarantee amount and the judgment. *See Comment, Sliding Scale Settlements: The Need for a Minimum Contribution to Comply with the Reasonable Range Test for Good Faith*, 19 LOY. L.A.L. REV. 995, 1020-21 (1986) (discussion of costs and benefits of sliding scale settlements) [hereinafter *Sliding Scale*].

30. The view in California prior to *Abbott Ford* was that there was no consideration since the settling defendant could have no liability. *See Abbott Ford*, 43 Cal. 3d at 885 n.27, 741 P.2d at 142 n.27, 239 Cal. Rptr. at 644 n.27. *See Sliding Scale*, *supra* note 29 at 1020-21 (costs and benefits of sliding scale settlements).

31. Before *Abbott Ford* was decided in 1987, the nonsettling defendant was subject to the entire judgment and did not have the right of contribution or equitable indemnity. *See CAL. CIV. PROC. CODE* § 877.6(c) (West Supp. 1989). It was not clear whether there remained a potential total indemnity action. *See Comment, Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?*, 74 CALIF. L. REV. 1057, 1057-58 (1986). *See also Sliding Scale*, *supra* note 29, at 1021 (cost of sliding scale settlements).

32. *See CAL. CIV. PROC. CODE* § 877 (West Supp. 1989). *See also Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 494, 698 P.2d 159, 163, 213 Cal. Rptr. 256, 260 (1985) (discussion of what constitutes good faith).

33. Section 877 states:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount

Carter agreements to ensure that such settlements appropriately balance these dual objectives.³⁴ Where the agreement is found to have been entered into in good faith, section 877 provides that the settling party will be discharged of all liability for contribution.³⁵ Thus, where the good faith standard has not been met, the settling defendant may be subject to a contribution action which would thwart the purpose of a Mary Carter agreement.³⁶ Another important provision under section 877 is that the plaintiff's claim against the nonsettling defendants will be reduced by the amount of consideration or the amount stipulated in the agreement if greater.³⁷

Under section 877.6 of the California Civil Procedure Code, any party to the suit may move for a hearing to determine the good faith of the settlement.³⁸ As there is no statutory definition of good faith, parties must look to the courts for evaluation of their agreement. In

stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.

CAL. CIV. PROC. CODE § 877 (West Supp. 1989).

34. *Tech-Bilt*, 38 Cal. 3d at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260.

35. *Id.* § 877(b) (West Supp. 1989). The principle of contribution allows a tortfeasor against whom a judgment is executed to recover an appropriate proportion of the judgment from other liable joint tortfeasors whose negligence contributed to the injury. *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 729 (D.C. Cir. 1972).

36. If the good faith standard is not met, the agreement may still be valid between the plaintiff and the nonsettling defendant. However, the statutory benefit of no contribution to the settling defendant is lost. Therefore, the parties should stipulate in the agreement as to what should happen in that event.

37. CAL. CIV. PROC. CODE § 877(a) (West Supp. 1989). This reduction is more fully discussed in *infra* notes 108-10 and accompanying text.

38. The pertinent text of section 877.6 is as follows:

(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice thereof

(b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing.

(c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contri-

Tech-Bilt, the California Supreme Court set guidelines to determine whether good faith exists as defined in section 877.³⁹

C. *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*

Prior to *Tech-Bilt*, the meaning of good faith as applied to settlement agreements in section 877 was unsettled. The California appellate courts made conflicting interpretations of this good faith standard. Two prominent views emerged. Under *Dompeling v. Superior Court*, good faith was found if there was no tortious conduct.⁴⁰ In *River Garden Farms, Inc. v. Superior Court*,⁴¹ the view was expressed that a settlement was made in good faith if the settlement amount was within a reasonable range of the settling defendant's fair share of damages.⁴²

In *Tech-Bilt*, the California Supreme Court resolved the conflict.⁴³ The supreme court rejected the view that a settlement is in good faith unless it arises from tortious conduct.⁴⁴ Instead, it adopted an

bution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

(d) The party asserting the lack of good faith shall have the burden of proof on that issue.

(e) When a determination of the good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate

CAL. CIV. PROC. CODE § 877.6 (West Supp. 1989).

39. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

40. 117 Cal. App. 3d 798, 809-10, 173 Cal. Rptr. 38, 45 (1981). The court stated its view of good faith as follows: "The settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." *Id.* The court gave an example of bad faith: "An agreement between the settling defendant and plaintiff, in settling for a disproportionate amount, to aid plaintiff's case by committing perjury" *Id.* at 810 n.7, 173 Cal. Rptr. at 45 n.7.

41. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

42. *Id.* at 998, 103 Cal. Rptr. at 506.

43. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). The facts in *Tech-Bilt* are as follows: Plaintiffs, Mr. & Mrs. Fabula owned residential property. Plaintiffs brought an action against Tech-Bilt (developer), Woodward-Clyde (soils engineer), and others to recover damages for structural defects in their residence. Woodward-Clyde's services were performed more than 10 years earlier and were barred under the applicable statute of limitations. Woodward-Clyde and plaintiffs agreed that the action against Woodward-Clyde would be dropped and they would waive any claim against plaintiffs for the costs of defending the action. Tech-Bilt brought a cross-claim against Woodward for indemnity and declaratory relief. Woodward then moved for a good faith hearing. The lower court found the agreement in good faith within the meaning of section 877.6 of the California Civil Procedure Code and consequently dismissed the cross-complaint. *Id.* at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258.

44. The court reasoned that the *Dompeling* "tortious conduct" test is capable of "harsh results." *Tech-Bilt*, 38 Cal. 3d at 498, 698 P.2d at 165, 213 Cal. Rptr. at 262. The court cited *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981) as an example. In *Cardio Systems*, the plaintiff filed a medical malpractice and products liability action after the decedent had died on an operating table for al-

analysis similar to the reasonable range test in *River Garden Farms*. The reasonable range used in *Tech-Bilt* has become more popularly known as the *Tech-Bilt* "ballpark."⁴⁵

Under the *Tech-Bilt* test, good faith is determined by considering several factors. Recognizing the importance of proportionality, the court articulated that a "definition of 'good faith,' . . . [should allow] the trial court to inquire . . . whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries."⁴⁶ However, the court noted that bad faith will not necessarily be "established by a showing that a settling defendant paid less than his theoretical proportionate or fair share."⁴⁷

Another important factor which the court recognized is that a settling defendant "should pay less in settlement than he would if he were found liable after a trial."⁴⁸ Also, the court may look at the financial condition and insurance policy limits of settling defendants,⁴⁹ and at any possible collusion, fraud, or tortious conduct intended to harm nonsettling defendants' interests.⁵⁰

Practical considerations dictate that the evaluation of good faith should be made at the time of the settlement without the benefit of hindsight.⁵¹ The *Tech-Bilt* court applied a reasonable person stan-

legedly improper use of a heart-lung machine. Plaintiff dismissed the machine's distributor from the case in return for a waiver of costs. The agreement was found in good faith under the tortious conduct standard. Though the court felt bound to this definition of good faith, it stated that the result was unfair because "[t]he rule permits a plaintiff to insulate a defendant . . . from being liable to a codefendant . . . for comparative indemnity" *Tech-Bilt*, 38 Cal. 3d at 498, 698 P.2d at 165, 213 Cal. Rptr. at 262 (quoting *Cardio Systems*, 122 Cal. App. 3d at 890-91, 176 Cal. Rptr. at 266).

45. This term came from the court's comment that "[t]he party asserting the lack of good faith . . . should be permitted to demonstrate, if he can, that the settlement is so far 'out of the ballpark' . . . as to be inconsistent with the equitable objectives of the statute." *Tech-Bilt*, 38 Cal. 3d at 499-500, 698 P.2d at 167, 213 Cal. Rptr. at 263-64.

46. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263. The court based its conclusion on the policies of *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (doctrine of equitable indemnity established expanding the principles of comparative liability between defendants).

47. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (quoting *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 809, 173 Cal. Rptr. 38, 44 (1981) (determining that bad faith was not established by such a showing)).

48. *Id.* The court also noted that where there are multiple plaintiffs, an important factor is "the allocation of settlement proceeds among plaintiffs." *Id.*

49. This factor is examined in detail in Roberts, *The Financial Condition and Insurance Policy Limits of a Joint Tortfeasor Wishing to Settle in Good Faith: Problems of Discovery and Confidentiality*, 26 SANTA CLARA L. REV. 63 (1986).

50. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263.

51. *Id.* at 499, 698 P.2d at 167, 213 Cal. Rptr. at 263 (evaluation of good faith should

dard: "A defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be."⁵² The court concluded that "[t]he party asserting the lack of good faith, who has the burden of proof on that issue,⁵³ should be permitted to demonstrate . . . that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute."⁵⁴

Under the facts in *Tech-Bilt*, the court held that the defendant's waiver of any defense costs in exchange for a promise not to sue by the plaintiff was not enough to qualify the agreement as a good faith settlement. Consequently, the agreement failed to bar actions against the settling defendant for contribution. However, *Tech-Bilt* did not provide the court with an opportunity to apply the newly articulated standard to a sliding scale agreement. Thus, the *Tech-Bilt* decision left unresolved the questions of "(1) whether the good faith reasonable range standard applies to sliding scale agreements; and (2) if so, the manner in which this standard is to be applied."⁵⁵

IV. *ABBOTT FORD V. SUPERIOR COURT*: THE RESCUE OF THE NONSETTLING DEFENDANT

*Abbott Ford v. Superior Court*⁵⁶ was the first California Supreme Court case following the *Tech-Bilt* decision to contest a sliding scale settlement agreement. Thus, the court had to determine whether the *Tech-Bilt* analysis of good faith was to be extended to Mary Carter agreements.

A. *Facts in Abbott Ford*

An accident occurred when defendant Ramsey Sneed was driving a used 1979 Ford van purchased from defendant Abbott Ford. While Sneed was driving, the van's left rear tire flew off and crashed into plaintiff Phyllis Smith's windshield. The plaintiff suffered serious injuries including lost vision in both eyes and lost sense of smell.⁵⁷

Smith, along with her husband, proceeded with an action against

be made to determine the effect of a settlement agreement before main trial is held and damages ultimately decided).

52. *Id.* (citing *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984)).

53. See CAL. CIV. PROC. CODE § 877.6(d) (West Supp. 1989).

54. *Tech-Bilt*, 38 Cal. 3d at 499-500, 698 P.2d at 167, 213 Cal. Rptr. at 263-64.

55. See Comment, *Sliding Scale Settlements: The Need for a Minimum Contribution to Comply with the Reasonable Range Test for Good Faith*, 19 LOY. L.A.L. REV. 995, 1006-07 (1986).

56. 43 Cal. 3d 858, 741 P.2d 124, 239 Cal. Rptr. 626 (1987).

57. *Id.* at 864, 741 P.2d at 127, 239 Cal. Rptr. at 629.

four defendants:⁵⁸ Sneed, the driver of the van;⁵⁹ Abbott Ford (Abbott), who sold Sneed the used van;⁶⁰ Ford Motor Co. (Ford), which manufactured both vehicles;⁶¹ and Sears who serviced the van prior to the accident.⁶²

Following failed settlement negotiations with the parties,⁶³ a sliding scale agreement was entered into between the plaintiffs and Abbott's insurer.⁶⁴ The agreement guaranteed the plaintiffs a \$3 million recovery.⁶⁵ Thus, if the plaintiffs did not collect the guaranteed amount from the other defendants, Abbott's insurer would pay the balance up to the guaranteed amount.⁶⁶ In return, the plaintiffs agreed to dismiss all of their actions against Abbott and to continue the action against Ford and Sears.⁶⁷ Additionally, Abbott's insurer agreed to pay \$3 million to the plaintiffs if the guarantee was found invalid or not in good faith.⁶⁸

Abbott then moved for a court hearing on the good faith of the agreement.⁶⁹ Ford and Sears argued that the settlement agreement was not made in good faith.⁷⁰ The trial court found that the agreement was not a good faith settlement for two reasons. First, there

58. *Id.*

59. Plaintiffs' case against Sneed was based on negligence in driving while hearing sounds indicating a possible malfunction with the tires. *Id.* Plaintiff settled with Sneed for \$25,000. *Id.* at 867 n.6, 741 P.2d at 129 n.6, 239 Cal. Rptr. at 631 n.6.

60. Plaintiffs' case against Abbott was based on negligence and strict liability for Abbott's installation of inappropriate wheels and the later sale of the van to Sneed without adequate warnings. *Id.* at 864, 741 P.2d at 127, 239 Cal. Rptr. at 629.

61. Plaintiffs' case against Ford was based on negligence, strict liability, and breach of warranty for alleged defects in the rear wheel portion of the van and for failure to adequately warn against using certain tires. Ford also was allegedly liable for a defective windshield. *Id.* at 865, 741 P.2d at 127, 239 Cal. Rptr. at 629.

62. Plaintiffs' case against Sears was based on negligence in failing to properly inspect the brakes when the van was serviced three months prior to the accident. *Id.*

63. Ford and Sears were unwilling to bear 30% of a proposed \$2.5 million settlement. Ford and Sears also declined to enter into a sliding scale agreement which would guarantee the plaintiffs \$1.5 million. *Id.* at 866, 741 P.2d at 128, 239 Cal. Rptr. at 630.

64. *Id.*

65. *Id.* Abbott had expressed the opinion that the settlement value of the case was approximately \$2.5 million. *Id.*

66. *Id.* It is common for a settling defendant to make a guarantee up to the limits of a liability insurance policy. See Roberts, *supra* note 49, at 63 for a general discussion of such use.

67. Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 867, 741 P.2d 124, 128-29, 239 Cal. Rptr. 626, 631 (1987).

68. *Id.* at 867, 741 P.2d at 129, 239 Cal. Rptr. at 631.

69. *Id.* See CAL. CIV. PROC. CODE § 877.6 (West Supp. 1989) procedures for having a good faith hearing; see also *supra* note 38.

70. Abbott Ford, 43 Cal. 3d at 867, 741 P.2d at 129, 239 Cal. Rptr. at 631.

was no minimum payment; second, it "[did] not constitute a settlement, but rather constitute[d] a gambling transaction."⁷¹ Abbott appealed; the appellate court reversed the trial court and held that the agreement was not tortious, and therefore was a good faith settlement.⁷² The California Supreme Court remanded the case back to the appellate court to determine "good faith" in compliance with the newly announced *Tech-Bilt* standard.⁷³ The court of appeals again found that, as a matter of law, the agreement was made in good faith.⁷⁴ The California Supreme Court granted review to reconsider the issues presented.⁷⁵

B. Holdings in Abbott Ford

1. Applicability of *Tech-Bilt* Standards to Sliding Scale Agreements

The California Supreme Court concluded that sliding scale agreements are subject to the good faith standard as set out in *Tech-Bilt*, thus concurring with the appellate court's rationale.⁷⁶ The appellate court had reasoned that "[t]he same considerations apply to sliding scale agreements as to [regular] settlements . . . and the *Tech-Bilt* analysis is equally feasible when so applied."⁷⁷

The supreme court rejected the nonsettling defendants' contention that all sliding scale agreements per se lack good faith.⁷⁸ Sears and Ford argued that sliding scale agreements lack good faith by conflicting with the goals of equitable apportionment and encouragement of settlement.⁷⁹ To support their claim, Ford and Sears noted that under the sliding scale agreement at issue, "if a jury were to assess plaintiff's damages from the accident at \$3 million or more . . . Ford or Sears would ostensibly be required to bear *all* of the damages, and Abbott—the party who, by all appearances, is the most culpable tortfeasor—would escape any ultimate out-of-pocket loss whatsoever."⁸⁰

The supreme court examined sliding scale agreements in other cases. In *Dompeling*, the settlement agreement included a noncon-

71. *Id.* at 868, 741 P.2d at 129, 239 Cal. Rptr. at 631.

72. *Id.* The court applied the *Dompeling* test. See *supra* note 40 and accompanying text.

73. *Abbott Ford*, 43 Cal. 3d at 868, 741 P.2d at 130, 239 Cal. Rptr. at 632. See *supra* notes 44-55 and accompanying text.

74. *Abbott Ford*, 43 Cal. 3d at 868, 741 P.2d at 130, 239 Cal. Rptr. at 632.

75. *Id.*

76. *Id.* at 875, 741 P.2d at 134-35, 239 Cal. Rptr. at 637.

77. *Abbott Ford, Inc. v. Superior Court*, 228 Cal. Rptr. 250, 255 (1985) (omitted from official reporter).

78. *Abbott Ford*, 43 Cal. 3d at 875, 741 P.2d at 135, 239 Cal. Rptr. at 637.

79. *Id.*

80. *Id.* at 876, 741 P.2d at 135, 239 Cal. Rptr. at 638 (citations omitted).

tingent \$100,000 outright payment and a sliding scale agreement for \$10,000. Since the \$100,000 noncontingent payment could be offset against the plaintiff's recovery, the court concluded that the fair apportionment doctrine was not violated.⁸¹ In *Rogers & Wells v. Superior Court*, the settlement agreement did not have a noncontingent payment.⁸² However, the *Rogers* court found that since the defendant was only minimally at fault, the agreement was not at odds with the fair apportionment objective.⁸³ Thus, the court concluded that sliding scale agreements per se do not necessarily conflict with the objective of fair apportionment.⁸⁴

The court also rejected the argument of Ford and Sears that such agreements *deter* the remaining defendants from ever settling.⁸⁵ The court agreed that in some cases this may occur, but maintained that in other situations an agreement may encourage additional settlement.⁸⁶

Neither policies of equitable apportionment nor encouragement of settlements are per se violated by a sliding scale agreement. Consequently, each agreement must be considered individually to determine whether it meets the *Tech-Bilt* good faith standard. The sliding scale agreement will meet the *Tech-Bilt* good faith standard if the amount of consideration paid by the settling defendant falls within the *Tech-Bilt* ballpark.⁸⁷

81. *Id.* at 876, 741 P.2d at 136, 239 Cal. Rptr. at 638 (citing *Dompeling v. Superior Court*, 117 Cal. App. 3d 802, 173 Cal. Rptr. 38 (1981)).

82. *Id.* at 875, 741 P.2d at 136, 239 Cal. Rptr. at 632 (citing *Rogers & Wells v. Superior Court*, 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985)).

83. *Id.*

84. *Id.* at 877, 741 P.2d at 136, 239 Cal. Rptr. at 638 (citing *Rogers & Wells v. Superior Court*, 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985)).

85. *Id.* at 880, 741 P.2d at 138, 239 Cal. Rptr. at 640. See Comment, *Sliding Scale Settlements: The Need for a Minimum Contribution to Comply with the Reasonable Range Test for Good Faith*, 19 LOY. L.A.L. REV. 995, 1021 (1986). Initially, the agreement will deter settlements as the plaintiff has already received a cash outlay and is thus in a well funded and "litigious frame of mind." *Id.* With a guaranteed minimum recovery, the plaintiff is relatively secure in holding out for a larger settlement. *Id.* Thus, "sliding scale agreements may work not to promote settlement but rather to ensure that litigation will continue." *Id.*

86. *Abbott Ford Inc. v. Superior Court*, 43 Cal. 3d 858, 880, 741 P.2d 124, 138-39, 239 Cal. Rptr. 626, 640-41 (1987).

87. *Id.* at 877, 741 P.2d at 136, 239 Cal. Rptr. at 638. The court said that equitable apportionment will be satisfied if the agreement is fair to the nonsettling defendant. *Id.* The court further noted that, under section 877 of the California Civil Procedure Code, a good faith settlement will reduce the claims of the plaintiff by the amount of the consideration. *Id.* Thus, "[i]f a court finds that a settling defendant, by entering into a sliding scale agreement, has realistically paid a 'consideration' that is within its *Tech-Bilt* 'ballpark,' and if the nonsettling defendants obtain a reduction in the plain-

2. Determination of Consideration and the Ballpark

Since the amount of consideration must fall within the *Tech-Bilt* ballpark, both the amount of consideration and the reasonable range or "ballpark" need to be determined. The amount of consideration is important for two reasons. First, it is an essential factor in determining if the agreement was made in good faith.⁸⁸ Second, the judgment against the nonsettling defendants is statutorily reduced by the amount of consideration.⁸⁹ The court recognized the difficulty in determining an accurate price for the consideration paid by a settling defendant who enters into a sliding scale agreement.⁹⁰

In *Tech-Bilt*, the parties disagreed as to the value of the consideration. Ford and Sears argued that the minimum amount of the payment, zero, should be used.⁹¹ Abbott argued that the maximum amount, or \$3 million, should be used.⁹² The court adopted a compromise position, reasoning that the guarantee "is not completely cost-free . . . [nor is it] equal to the maximum amount that the guarantor may possibly be required to pay under the agreement."⁹³

Declining to determine the actual value, the court stated that the parties to the agreement are in a superior position for determining value, and therefore the burden of valuation is properly placed upon the parties, not upon the court.⁹⁴ This valuation should be negotiated as part of the sliding scale agreement by joint valuation.⁹⁵ The justification for joint valuation is that the plaintiff will advocate a low value to minimize the reduction of claims against the other defendants,⁹⁶ whereas the settling defendant will seek a higher value so that the agreement will be found within the *Tech-Bilt* ballpark—thus relieving liability for contribution or equitable indemnity.⁹⁷ Therefore, requiring a joint valuation should result in a reasonable

tiff's claims against them in an amount equal to that consideration, the statutory fair apportionment objective should be satisfied." *Id.* (citations omitted).

88. See *supra* note 87 and accompanying text.

89. See CAL. CIV. PROC. CODE § 877 (West Supp. 1989).

90. *Abbott Ford*, 43 Cal. 3d at 878, 741 P.2d at 137, 239 Cal. Rptr. at 639.

91. *Id.* This was the view before *Abbott Ford*. See *infra* note 113 and accompanying text.

92. *Abbott Ford*, 43 Cal. 3d at 878, 741 P.2d at 137, 239 Cal. Rptr. at 639.

93. *Id.* at 878-79, 741 P.2d at 137, 239 Cal. Rptr. at 639.

94. *Id.* at 879, 741 P.2d at 137, 239 Cal. Rptr. at 639-40.

95. *Id.* at 879, 741 P.2d at 137, 239 Cal. Rptr. at 640.

96. *Id.*

97. *Id.* It may not necessarily be that the settling defendant wants a high value on the consideration. The settling defendant must reduce this amount from the judgment before its guarantee applies. See *infra* notes 120-21 and accompanying text. Also, the settling defendant's clause may be void if an agreement fails; if this occurs, he is no worse off than without the agreement. The settling defendant will be primarily concerned with the terms because without favorable terms, the settling defendant probably will not care if the agreement satisfies the good faith standard.

valuation.⁹⁸

Once the settling parties have determined a value, the nonsettling party can accept the value and argue that the settlement is in bad faith because the declared value is outside of the settling defendant's *Tech-Bilt* ballpark.⁹⁹ Alternatively, the nonsettling party can argue that the valuation is too low and that a larger reduction of plaintiff's claims against the nonsettling defendants is warranted.¹⁰⁰ When the trial court must determine whether the valuation is accurate, an estimate is sufficient if it considers the size of the guarantee along with the likelihood that the settling party will actually have to pay out either that amount or some lesser sum.¹⁰¹

In arriving at the ballpark or reasonable range, the court will use the same set of criteria that was enumerated in *Tech-Bilt*.¹⁰² In addition, the *Abbott Ford* court recognized that sometimes a sliding scale agreement is entered into solely because some of the defendants refuse to cooperate in settlement negotiations.¹⁰³ Should this occur, the court is authorized to adjust the ballpark figure to take into account the nonsettling defendant's acts which have impeded settlement negotiations.¹⁰⁴ Thus, the court upon finding such conduct "may reduce the lower threshold of the 'ballpark' cut-off, and find a settlement in good faith even if the 'consideration' . . . is somewhat lower than the court would otherwise have found acceptable."¹⁰⁵

98. *Abbott Ford*, 43 Cal. 3d at 879, 741 P.2d at 137, 239 Cal. Rptr. at 640. In many cases, traditional settlements may have been negotiated as an alternative to the sliding scale agreement. *Id.* These negotiations will be useful in ascertaining the value of consideration for the sliding scale settlement agreement. *Id.*

99. *Id.* at 879, 741 P.2d at 138, 239 Cal. Rptr. at 640.

100. *Id.* But see Justice Broussard's concurring opinion which suggests that permitting such an alternative will create a "mini-trial with actuaries and economists testifying at length." *Id.* at 887, 741 P.2d at 143, 239 Cal. Rptr. at 646 (Broussard, J., concurring).

101. *Abbott Ford*, 43 Cal. 3d at 879 n.23, 741 P.2d at 138 n.23, 239 Cal. Rptr. at 640 n.23 (citations omitted).

102. See *supra* notes 46-55 and accompanying text.

103. The court reasoned that "the recalcitrant defendant's unyielding position may . . . make it impossible for any of the defendants to settle the litigation . . . because the plaintiff may be unwilling to release any of the . . . [joint] defendants without an assurance that he will at least recover a minimum sum . . . necessary to compensate him for his injuries." *Abbott Ford*, 43 Cal. 3d at 881, 741 P.2d at 139, 239 Cal. Rptr. at 641.

104. *Id.* at 882, 741 P.2d at 139-40, 239 Cal. Rptr. at 642. The court expressed some concern for defendants who in good faith believe they bear no liability for a plaintiff's injury. *Id.* at 881, 741 P.2d at 139, 239 Cal. Rptr. at 641. Thus, the court was unwilling to universally deny a defendant the right to attack good faith where recalcitrance was evident. *Id.*

105. *Id.* at 882, 741 P.2d at 139, 239 Cal. Rptr. at 642.

After the consideration and the "ballpark" are determined, the court will decide whether the consideration falls within the ballpark of the settling defendant's fair share of liability. If so, the agreement is in good faith and there are two important consequences. First, there can be no contribution action against the settling defendant.¹⁰⁶ Second, the amount of consideration must be reduced from the plaintiff's judgment.¹⁰⁷

The court answered, in a footnote, the question as to how this reduction would apply to the guarantee made by the settling defendant.¹⁰⁸ According to the court, "the obligation of the settling defendant to the plaintiff . . . will now be the difference, if any, between the amount of total damages awarded against a nonsettling defendant, reduced by the valuation of the sliding scale agreement, and the guaranteed amount."¹⁰⁹ Thus, the judgment will be reduced before the settling defendant's amount of payment is determined.¹¹⁰ Consequently, the settling defendant will be called upon more often to make good under the guarantee in the sliding scale settlement agreement.¹¹¹

C. *Effect of Abbott Ford on Sliding Scale Agreements*

The *Abbott Ford* decision substantially affects sliding scale agreements. One of the most dramatic results of the decision is that plaintiffs must subtract a consideration from the judgment against the nonsettling defendants.¹¹² In prior decisions, only noncontingent payments were reduced from the judgment.¹¹³ Thus, a plaintiff could not lose by entering into a sliding scale agreement: the plaintiff would always receive the judgment and, where the guarantee was

106. See CAL. CIV. PROC. CODE § 877(b) (West Supp. 1989).

107. *Id.* § 877(a). See *supra* note 33 for full text of statute.

108. *Abbott Ford*, 43 Cal. 3d at 885 n.27, 741 P.2d at 142 n.27, 239 Cal. Rptr. at 644 n.27.

109. *Id.* The court could have just as easily placed the cost directly on the plaintiff by not reducing the judgment amount to which the guarantee applies. Perhaps, the court desired to uphold the policy of providing a maximum recovery for injured plaintiffs. See *supra* note 28.

110. *Abbott Ford*, 43 Cal. 3d at 885 n.27, 741 P.2d at 142 n.27, 239 Cal. Rptr. at 644 n.27. See *infra* notes 120-25 and accompanying text (hypothetical in following discussion).

111. See *Abbott Ford*, 43 Cal. 3d at 885 n.27, 741 P.2d at 142 n.27, 239 Cal. Rptr. at 644 n.27 ("The result of the offset requirement . . . [will] increas[e] the odds that the settling defendant will be obligated to perform under its guaranty agreement with plaintiff.").

112. See *supra* note 89 and accompanying text.

113. *Abbott Ford*, 43 Cal. 3d at 877 n.21, 741 P.2d at 136 n.21, 239 Cal. Rptr. at 638-39 n.21. The court reasoned that if nothing is paid to the plaintiff, there is no consideration. *Id.* (citing *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 473, 113 Cal. Rptr. 416, 431 (1974)).

larger, he could receive that amount instead.¹¹⁴ This was at the expense of the nonsettling defendant who was always liable for the entire judgment and was prohibited from obtaining contribution from the settling defendants. *Abbott Ford* causes the plaintiff to lose this "free lunch" and thus requires payment for this advantage.¹¹⁵ Consequently, the agreement has become less attractive to the plaintiff.¹¹⁶

The settling defendant also loses a great deal because of *Abbott Ford*. In fact, the settling defendant will usually be the most negatively affected party because the *Abbott Ford* ruling requires a reduction of consideration from the judgment.¹¹⁷ As discussed earlier, the settling defendant must pay the difference between the judgment which is now reduced by the consideration, and the guaranteed amount which is not reduced.¹¹⁸ The consequence is that the agreement is substantially more unattractive to settling defendants.

The effects of *Abbott Ford* can best be illustrated through hypotheticals. In the first hypothetical, the plaintiff has a sliding scale settlement agreement with the settling defendant for a guaranteed recovery amount of \$800,000. The agreement, which meets the good faith requirements in *Tech-Bilt*, has a consideration value of \$400,000. The judgment is \$600,000. Prior to *Abbott Ford*, the plaintiff would receive \$800,000; the nonsettling defendant would pay \$600,000; the settling defendant would pay \$200,000.¹¹⁹ After *Abbott Ford*, the

114. Thus, prior to *Abbott Ford*, the plaintiff had a "free lunch." There was no consideration to be paid and the plaintiff could only stand to benefit by having a sliding scale agreement. After *Abbott Ford*, however, the plaintiff pays a price whenever the judgment is greater than the guarantee. See *infra* notes 120-25 and accompanying text (hypothetical).

115. Although the settling party usually pays for most of the offset that the nonsettling defendant gets, the plaintiff may pay indirectly with less favorable terms, e.g., lower guaranteed payments. However, the plaintiff does have direct costs when the judgment exceeds the guarantee. See *infra* note 126 and accompanying text.

116. According to the *Abbott Ford* court, "[t]he rapid increase in the attractiveness of such agreements to plaintiffs in recent years may have been based, in large part, on the fact that prior decisions have permitted plaintiffs to receive [the benefit] . . . without any corresponding reduction . . ." *Abbott Ford*, 43 Cal. 3d at 885 n.27, 741 P.2d at 142 n.27, 239 Cal. Rptr. at 644 n.27.

117. The settling defendant pays whenever the judgment is less than the total of the guarantee plus the consideration. See *infra* notes 120-26 and accompanying text for hypotheticals. Note that the settling defendant pays nothing if the judgment is \$200,000 or more.

118. See *supra* notes 108-10 and accompanying text.

119. Prior to *Abbott Ford*, the guarantee applied to the entire judgment, which is not reduced further by the value of the consideration. Thus, the settling defendant must pay only \$200,000 (\$800,000 - \$600,000). The nonsettling defendant does not obtain an offset for the value of the consideration from the judgment in which he is jointly liable; thus, the defendant must pay \$600,000 to the plaintiff. Furthermore,

plaintiff would still recover \$800,000, but the nonsettling defendant's payment would be only \$200,000, and the settling defendant would now pay \$600,000 to make up the balance of the guarantee.¹²⁰

In this first hypothetical, where the plaintiff's judgment is less than the guaranteed amount, the plaintiff's outcome is not changed by *Abbott Ford*.¹²¹ The settling defendant, however, pays substantially more after *Abbott Ford*.¹²² The next hypothetical case will illustrate differences if the judgment exceeds the guarantee amount.

This second hypothetical will use the same sliding scale agreement as above. However, this time the judgment will be changed to \$1,000,000. Prior to *Abbott Ford*, the result would be \$1,000,000 to plaintiff; the nonsettling defendant would pay \$1,000,000; the settling defendant would pay nothing.¹²³ After *Abbott Ford*, the plaintiff recovers only \$800,000, the guarantee amount as opposed to the judgment.¹²⁴ The nonsettling defendant's payment is reduced to \$600,000 and the settling defendant must pay \$200,000.¹²⁵

This hypothetical shows that both the plaintiff and the settling defendant can be adversely affected by the decision in *Abbott Ford*, which permits nonsettling defendants to offset an amount of consideration when a sliding scale agreement is used. Plaintiff will always have a less favorable outcome after *Abbott Ford* whenever the judgment exceeds the guarantee.¹²⁶ However, the plaintiff's position

since the agreement is in good faith, the nonsettling defendant is barred from seeking a contribution action against the settling defendant. See CAL. CIV. PROC. CODE § 877(b) (West Supp. 1989).

120. The value of the consideration (\$400,000) is subtracted from the judgment (\$600,000) so that the nonsettling defendant owes \$200,000. The settling defendant guarantees a recovery of \$800,000 and \$200,000 has already been paid by the nonsettling defendant. Thus, the settling defendant must pay the difference (\$600,000).

121. But see *supra* note 115. Note that the plaintiff's position does change after *Abbott Ford* where the judgment exceeds the guarantee. See *infra* notes 124-25 and accompanying text.

122. Here, the settling defendant must pay \$400,000 more. The settling defendant will always pay more after *Abbott Ford* unless the guarantee amount or maximum liability has been reached.

123. Prior to *Abbott Ford*, the judgment was not reduced by the value of the agreement. Therefore, the nonsettling defendant would pay the full judgment amount (\$1,000,000). Furthermore, as the guarantee was less than the judgment, the settling defendant would pay nothing.

124. When subtraction of the consideration value from the judgment equals less than the guaranteed amount, the plaintiff will receive only the amount of the guarantee.

125. The value of the consideration (\$400,000) is subtracted from the judgment (\$1,000,000) so that the nonsettling defendant owes \$600,000. The settling defendant guarantees a recovery of \$800,000 and \$600,000 has already been paid by the nonsettling defendant. Thus, the settling defendant must pay the difference (\$200,000).

126. This is illustrated in the first hypothetical. See *supra* text accompanying notes 119-22.

does not change if the judgment is less than the guarantee amount.¹²⁷ The settling defendant will always be in a worse position after *Abbott Ford* except where the judgment is greater than the combined total of the guarantee plus the consideration.¹²⁸

In another blow to the settling defendant, the court placed a limit on the right of the settling defendant to veto a subsequent settlement.¹²⁹ In *Abbott Ford*, the agreement contained a common provision stating that "[plaintiffs] shall not settle all or any portion of this litigation with defendants Ford and Sears Roebuck for less than the amount of [their] guarant[eed recovery], *without the express written consent of [Abbott's insurer]*."¹³⁰ This open-ended veto clause was deemed excessive. The court now permits only a veto of a subsequent settlement which is unfairly low and results in the settling defendant bearing more than its proportionate share of the plaintiff's damages.¹³¹ This limitation of power for the settling defendant makes the agreement less attractive to the settling defendant.¹³² On the other hand, it allows the remaining defendants to have a fair opportunity to settle.

The decision also burdens the negotiation process since the parties must determine a value of consideration on the sliding sale agreement.¹³³ This forces parties to negotiate a term that would not otherwise need to be negotiated in a regular settlement setting. This additional burden on the parties may be enough to discourage the

127. This is illustrated in the second hypothetical. See *supra* text accompanying notes 119-22 and 123-25. But see *supra* note 115.

128. This is evident in both hypotheticals. See *supra* text accompanying notes 119-25. If the judgment exceeds the guarantee and the consideration, i.e., \$1,200,000 in the hypothetical (\$800,000 + \$400,000), the nonsettling defendant would pay the judgment amount minus the consideration value (\$1,200,000 - \$400,000; or \$800,000); the settling defendant would pay nothing because his liability would remain constant at \$800,000 since the agreement limits the liability to the guarantee amount.

129. *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 883, 741 P.2d 124, 140, 239 Cal. Rptr. 626, 642-43 (1987).

130. *Id.* at 882-83, 741 P.2d at 140, 239 Cal. Rptr. at 642 (emphasis in original).

131. *Id.* at 883, 741 P.2d at 140, 239 Cal. Rptr. at 642-43.

132. The settling defendant must be willing to settle under a standard settlement agreement since a later settlement may have the effect of changing the guaranteed amount (or value of guarantee) into a noncontingent payment. The settling defendant should anticipate this contingency and state another amount acceptable, if a later settlement is reached with the remaining defendants. Alternatively, the settling defendant may decide that the sliding scale settlement agreement should be void if a later settlement occurs. The courts may, however, refuse to uphold such a clause since it gives settling defendants some degree of control.

133. See *supra* note 94 and accompanying text.

sliding scale settlement and encourage regular settlements which are simpler to negotiate.

The effect is that, when sliding scale agreements are litigated, minitrials may become common. Thus, using the Mary Carter agreement may actually create rather than obviate litigation.¹³⁴ In *Tech-Bilt*, Chief Justice Bird's dissenting opinion expressed concern that the adoption of the *Tech-Bilt* ballpark test will result in an "unworkable standard to every settlement."¹³⁵ She felt it would "clog our trial courts with unnecessary hearings, discourage the settlement of legitimate claims, and severely strain the resources of the parties . . ."¹³⁶ Justice Broussard, in a concurring opinion in *Abbott Ford*, feared that the ballpark test could even cause a second minitrial in many cases.¹³⁷ He predicted that "sliding scale agreements will contain a provision that the agreement is void, not only if the court finds that the settlement figure furnished by the parties is less than the 'ballpark' figure, but also if the court finds that the agreement is worth more than that figure."¹³⁸ Therefore, he concluded that "[i]n either event . . . [we] may then have a second minitrial."¹³⁹

The result is that after *Abbott Ford*, Mary Carter agreements are less attractive. Most significantly, plaintiffs and nonsettling defendants, in many cases, will be monetarily worse off by using the agreement. Further, *Abbott Ford* has created limitations on the right to veto, has increased burdens in negotiating the value of consideration, and quite possibly, has introduced additional litigation in the form of a minitrial. Although the courts may not like the strain on judicial calendars from adding another layer of adjudication, nonsettling defendants will benefit by receiving fairer treatment.

V. PROPOSITION 51 AND ITS EFFECT ON MARY CARTER AGREEMENTS

A. *Proposition 51—Background*

In 1986, California voters approved Proposition 51 which modified

134. The objective of encouraging settlements entails an element of judicial economy. If this objective is thwarted, agreements may become invalid.

135. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 502, 698 P.2d 159, 168, 213 Cal. Rptr. 256, 265 (1985) (Bird, C.J., dissenting).

136. *Id.* (Bird, C.J., dissenting).

137. *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 888, 741 P.2d 124, 144, 239 Cal. Rptr. 626, 646 (1987) (Broussard, J., concurring).

138. *Id.* (Broussard, J., dissenting).

139. *Id.* (Broussard, J., dissenting). Broussard noted that "[w]hile a trial judge could attempt to undertake the complex calculation of the estimate of the value of the sliding scale agreement on the basis of affidavits, . . . most judges will want the experts before them, [resulting in] an extended mini-trial." *Id.* at 888, 741 P.2d at 144, 239 Cal. Rptr. at 646 (Broussard, J., concurring).

the law of joint and several liability in California.¹⁴⁰ Proposition 51 was a response to the inequitable treatment of deep pocket defendants who often had to bear a substantial financial burden even when they were only slightly at fault.¹⁴¹ Proposition 51, also known as the Fair Responsibility Act, limits noneconomic damages for each defendant to their respective degree of fault.¹⁴² Consequently, Proposition 51 may play a significant role in limiting the use of Mary Carter agreements.

Under the rule of joint liability,¹⁴³ joint or multiple tortfeasors are each individually liable for the entire judgment.¹⁴⁴ Prior to Proposition 51, all damages were subject to joint liability.¹⁴⁵ However, under

140. CAL. CIV. CODE §§ 1431-1431.5 (West Supp. 1989).

141. Section 1431.1, which is part of Proposition 51, states as follows:

(a) The legal doctrine of joint and several liability, also known as "the deep pocket rule," has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

CAL. CIV. CODE § 1431.1 (West Supp. 1989).

142. CAL. CIV. CODE § 1431.2(a) (West Supp. 1989).

143. Several cases made inroads on the common law joint and several liability doctrine: *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (comparative equitable indemnity claim via cross-complaint or separate indemnity action); *Li v. Yellow Cab*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (comparative negligence); *Paradise Valley Hosp. v. Schlossman*, 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983) (developed rule that where defendant is insolvent, shortfall is apportioned equitably among remaining parties).

144. See, e.g., *American Tobacco Co. v. Transport Corp.*, 277 F. Supp. 457, 461 (E.D. Va. 1967) (joint tortfeasors equal persons jointly or severally liable in tort for same injury to person or property); *Winzler & Kelly v. Superior Court*, 48 Cal. App. 3d 385, 391-92, 122 Cal. Rptr. 259, 263 (1975).

145. CAL. CIV. CODE § 1431 (West 1982) (statute prior to 1986 amendment).

Proposition 51, noneconomic damages are not subject to joint liability.¹⁴⁶ Consequently, only economic damages still remain subject to joint liability.¹⁴⁷

In *Evangelatos v. Superior Court*,¹⁴⁸ the California Supreme Court held that Proposition 51 applied prospectively rather than retroactively.¹⁴⁹ Proposition 51 became operative on June 4, 1986, and applies to causes of action originating on or after this date.¹⁵⁰ It applies to "any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault . . ."¹⁵¹ Principles of comparative fault apply to cases involving negligence, strict liability, and willful misconduct.¹⁵² Although Proposition 51 applies where the plaintiff is partially at fault, there is disagreement among

146. Section 1431.2, a key part of Proposition 51, states:

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

CAL. CIV. CODE § 1431.2 (West Supp. 1989).

147. Section 1431 was amended after Proposition 51 and reads as follows:

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except as provided in Section 1431.2, and except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

CAL. CIV. CODE § 1431 (West Supp. 1989).

148. 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988).

149. *Id.* Before this case was decided, conflicting decisions by the California appellate courts were made. In *Russell v. Superior Court*, 185 Cal. App. 3d 810, 812, 230 Cal. Rptr. 102, 103 (1986), the court determined that Proposition 51 applied prospectively. The appellate court in *Evangelatos* held that Proposition 51 applied retroactively. *Evangelatos v. Superior Court*, 198 Cal. App. 3d 320, 328, 234 Cal. Rptr. 344, 349 (1987), *rev'd*, 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988). *Evangelatos* was appealed to the supreme court and reversed. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1193, 753 P.2d 585, 587, 246 Cal. Rptr. 629, 631 (1988).

150. The initiative was passed on June 3, 1986. See CAL. CIV. CODE §§ 1431-1431.5 (West Supp. 1989) (legislative history). As a statute which is adopted by an initiative, Proposition 51 took effect and became operative the day after the election. See CAL. CONST. art. II, § 10(a).

151. CAL. CIV. CODE § 1431.2(a) (West Supp. 1989).

152. See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978) (comparative fault in strict liability action); see also *Sorensen v. Allred*, 112 Cal. App. 3d 717, 726, 169 Cal. Rptr. 441, 446 (1980) (comparative fault in willful misconduct case). However, comparative fault does not apply to inten-

commentators as to whether it applies when the plaintiff is not at fault.¹⁵³

Some commentators have interpreted the clause "[i]n any action . . . based upon principles of comparative fault"¹⁵⁴ to mean that the plaintiff must exhibit some negligence for comparative fault to exist.¹⁵⁵ However, it has also been suggested that the phrase is meant to apply more broadly to encompass any situation comparing the conduct of any parties.¹⁵⁶ Both the *California Ballot Pamphlet*¹⁵⁷ and the *Joint Hearing of the Senate and Assembly Judiciary Committee on Proposition 51*¹⁵⁸ provide illustrations which apply Proposition 51 to situations where the plaintiff is not at fault. The policy behind Proposition 51—to provide equitable treatment for deep pocket defendants—is equally applicable regardless of whether a plaintiff is at fault.¹⁵⁹ Although the latter view appears more reasonable, the issue will remain unresolved until decided by the courts.

The procedural steps to implement Proposition 51 are as follows.¹⁶⁰ First, a dollar amount for noneconomic damages must be determined separate from the amount awarded for economic and other damages.¹⁶¹ Second, a separate fault percentage must be assigned to each liable defendant.¹⁶² Third, each liable defendant must receive a separate judgment.¹⁶³

The following example illustrates how damages are calculated after Proposition 51. *P*, the plaintiff, initiates a personal injury action

tional acts. See *Allen v. Sundean*, 137 Cal. App. 3d 216, 225-27, 186 Cal. Rptr. 863, 868-70 (1982).

153. See *Special Proposition 51 Issue: Does Proposition 51 Apply If Plaintiff Is Not at Fault?*, 76 CAL. TORT REP. 153, 163 (July 1986) [hereinafter *Special Issue*].

154. CAL. CIV. CODE § 1431.2 (West Supp. 1989).

155. *Special Issue*, *supra* note 153, at 163.

156. *Id.*

157. *California Ballot Pamphlet; Argument in Favor of Proposition 51* (reprinted in *Joint Hearing of the Senate and Assembly Judiciary Committee on Proposition 51*, at 96 (Apr. 18, 1986)).

158. *Joint Hearing of the Senate and Assembly Judiciary Committee on Proposition 51* at 99 (Apr. 18, 1986).

159. The major reason for adopting Proposition 51 was to lower insurance prices and thereby keep consumer costs down. *Id.* To meet this objective, Proposition 51 should be applied regardless of whether plaintiff is at fault.

160. For instance, many jury instructions have been changed. See Peyrat, *Proposition 51: A First Analysis* 29-32 (CCEB Spec. Supp. Aug. 1986) (Appendix B lists 26 jury instructions which were considered for modification by the BAJI committee.). See *id.* at 11 for a discussion of the role of the jury and the trial judge after Proposition 51.

161. See CAL. CIV. CODE § 1431.2(a) (West Supp. 1989).

162. *Id.*

163. *Id.*

against *A* and *B*, defendants, for \$100,000 in economic losses and \$200,000 in noneconomic losses. The defendants, *A* and *B*, are determined to be 50% and 30% at fault respectively, while *P* is determined to be 20% at fault.¹⁶⁴ *A* and *B* are jointly and severally liable for \$80,000 $((50\% + 30\%) \times \$100,000)$ for *P*'s economic losses. In addition, *A* would be individually liable for \$100,000 $(50\% \times \$200,000)$ of *P*'s noneconomic losses, and *B* would be liable for \$60,000 $(30\% \times \$200,000)$.

B. Applicability to Settlement Agreements

1. Effect on Traditional Settlements

While there is almost no discussion of Proposition 51's application to sliding scale agreements, commentators have discussed Proposition 51's application to traditional settlement agreements.¹⁶⁵ Under a traditional settlement agreement, the settling defendant would provide a noncontingent payment to the plaintiff which would represent either economic or noneconomic damages, or both. There are three possible ways a court may allocate this settlement amount. First, the court can initially apply the settlement amount to the defendant's share of noneconomic damages and then apply the remainder to the economic damages.¹⁶⁶ Second, the court may apply the settlement amount first to the economic damages and then apply the remaining amount to the noneconomic damages.¹⁶⁷ Finally, the court may allocate the settlement amount in proportion to the overall percentage of economic and noneconomic damages.¹⁶⁸ Of these views, the third method has received the most support among commentators.¹⁶⁹

164. In a Proposition 51 case with all tortfeasors present, the jury determines damages by computing the comparable fault of each party and the amount of the plaintiff's economic and noneconomic damages. Presumably, this will be done by special verdict. See BAJI, California Jury Instructions: Civil, BAJI No. 16.00 (7th ed. 1986) (Form of Special Verdict-Negligence).

165. See *Joint and Several Liability: The Tough Issues* 23-24 (CCEB July/Aug. 1986); *Special Issue*, *supra* note 153, at 167-70; Klein & Day, *Prop. 51 and the House that Tech-Bilt*, 6 CAL. LAW. 25 (Nov. 1986).

166. Illustration 1. *A* and *B* are defendants who are both 50% liable for a recovery of \$200,000 of economic damages and \$800,000 of noneconomic damages. *A* settles for \$500,000. The court would apply the first \$400,000 toward *A*'s share of the noneconomic damages $(50\% \times \$800,000)$, and the remaining \$100,000 would be applied against the economic damages.

167. Illustration 2. Same facts as in Illustration 1. See *supra* note 166. Under this approach, the settlement would first be allocated to economic damages, \$200,000, and the remaining \$300,000 toward *A*'s share of noneconomic damages. The plaintiff could not collect the full \$400,000 for noneconomic damages from *A*.

168. Illustration 3. Same facts as Illustration 1. See *supra* note 166. Under this approach, the proportion of economic damages to noneconomic damages is 25% $(\$200,000/\$800,000)$. Thus \$125,000 $(25\% \times \$500,000)$ is allocated to economic damages and \$375,000 is allowed for noneconomic damages.

169. This view has been described as "fairest to the nonsettling defendant." *Special Issue*, *supra* note 153, at 169. See also *Bracket v. State*, 180 Cal. App. 3d 1171, 226 Cal.

2. Applicability to Sliding Scale Settlements

Many unanswered questions exist regarding the application of Proposition 51 to sliding scale settlement agreements. Although the effects of Proposition 51 on regular settlement agreements are relatively straightforward,¹⁷⁰ the application to Mary Carter agreements is more complex.¹⁷¹

As discussed earlier, the liability for noneconomic damages is several not joint.¹⁷² Consequently, nonsettling defendants are not liable for the settling defendant's share of noneconomic damages.¹⁷³ In addition, each defendant is subject to a separate judgment for their own share of noneconomic damages.¹⁷⁴ However, sliding scale agreements must have one judgment with at least two defendants.¹⁷⁵ Thus, a sliding scale agreement would not be appropriate for noneconomic damages because a separate judgment is imposed on each defendant.¹⁷⁶ Therefore, a sliding scale agreement should be used only for economic damages.¹⁷⁷

Rptr. 1 (1986) (indemnity action using similar apportionment). There is no noticeable support for the second position. If the settlement amount were allocated first to the economic damages for which all defendants remain jointly and severally liable, then there would be no incentive for the plaintiff or defendant to settle. *Special Issue*, *supra* note 153, at 169. Some commentators reject the second position by using the following rationale:

Assuming that the appellate courts . . . will allow the non-settling defendant to compare fault using the fault of the settling party as a basis of comparison . . . it [is] likely that they will reject allowing the non-settling defendant also to credit all dollars from the settlement towards joint liability. This "double discount" to a non-settling defendant would be a disincentive to plaintiffs being willing to reach partial settlements. Similarly, any system in which a settling defendant could be held liable to a non-settling defendant for sums by which his settlement was deficient, as later determined at the trial, would be an enormous disincentive for that defendant to settle.

Id.

170. See *supra* notes 165-69 and accompanying text.

171. A sliding scale agreement is more complex than a standard settlement because there are more variables, e.g., valuation to offset nonsettling defendant's liability.

172. CAL. CIV. CODE § 1431.2(a) (West Supp. 1989).

173. This liability is several and not joint, and thus, cannot be imposed on another. See *Special Issue*, *supra* note 153, at 168.

174. CAL. CIV. CODE § 1431.2(a) (West Supp. 1989).

175. See *supra* notes 9-10 and accompanying text.

176. See *Special Issue*, *supra* note 153, at 168 ("[The settlement] should not affect the share of non-economic damages for which the nonsettling defendant can be held severally liable, since the settling defendant is not a 'joint judgment debtor' for that amount.").

177. "[A] settlement by one defendant with the plaintiff should affect only that defendant's joint liability for economic damages and his *own* several liability for non-economic damages." *Id.* (emphasis in original).

Ironically, noneconomic damages rather than economic damages have a greater need for settlement agreements. As noneconomic damages are more uncertain, they provide an inducement to enter into some form of settlement agreement.¹⁷⁸ When noneconomic damages constitute the majority of damages, a sliding scale agreement for economic damages may be of little benefit.¹⁷⁹

Plaintiffs agree to sliding scale agreements in order to ensure a minimum recovery.¹⁸⁰ Thus, the plaintiff may view such an agreement as a form of insurance where the premium is in the form of a reduced recovery. In an action where substantial noneconomic loss exists, this insurance effect becomes severely diluted. A plaintiff, at best, can insure only a minimum amount of economic damages. Thus, plaintiffs will find that Proposition 51 has made the Mary Carter agreement less attractive.

Defendants agree to sliding scale agreements in order to limit potential liability, to remove themselves from the suit, and to possibly avoid all liability.¹⁸¹ Attempts to limit liability by a sliding scale agreement are not effective since noneconomic damages in personal injury suits can be astronomical.¹⁸² In addition, a settling defendant must remain in the action to contest noneconomic damages.¹⁸³ Finally, a defendant cannot normally escape without some liability.¹⁸⁴ Thus, the purposes for entering into sliding scale agreements are now frustrated and the agreements are thus less attractive to settling defendants in light of Proposition 51.¹⁸⁵

An alternative to this frustration is to settle the noneconomic damages through a traditional settlement agreement and use a sliding

178. A ceiling on such damages reduces the risk of astronomical damages.

179. See *infra* notes 185-85 and accompanying text.

180. See *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980). The *Fisher* court stated that the most important policy is that the injured party receive a maximum recovery to the extent that others have caused these injuries. See *supra* note 28.

181. See Comment, *supra* note 55, at 1020-21.

182. Noneconomic damages such as pain and suffering and emotional distress can cause astronomical damages.

183. The settling defendant cannot escape liability for his share of plaintiff's noneconomic damages.

184. In addition to noneconomic damages liability, the defendant will usually incur liability under the agreement due to *Abbott Ford*.

185. In addition, a settling defendant may also be placed in inconsistent positions. With a sliding scale agreement, the defendant desires a large recovery because his liability is reduced as the recovery approaches the guaranteed amount. However, if the defendant fails to settle his liability for noneconomic damages, he wants noneconomic damages to be low. Thus, to the extent that there is a correlation between large economic damages and large noneconomic damages, the defendant may lose regardless of the outcome. The defendant wants the plaintiff to receive a large recovery in order to incur little or no liability for the guaranteed payment. On the other hand, the defendant wants the plaintiff to receive a small recovery so that he has little or no liability for noneconomic damages.

scale agreement for the economic damages,¹⁸⁶ thus necessitating two settlement agreements. However, a settling defendant may prefer to make one noncontingent payment to satisfy both types of damages.¹⁸⁷ Thus, it appears that the Mary Carter agreement has not only lost its attractiveness to both plaintiffs and defendants, but has suffered a severe blow to its very survival.¹⁸⁸

VI. A PROPOSED MODEL AGREEMENT

In light of the recent changes, forms for sliding scale agreements need to be adapted to conform with Proposition 51 and *Abbott Ford*. As an aid to the practitioner considering the use of a sliding scale agreement, a proposed model agreement is set forth in the Appendix of this practicum. Despite the inclusion of a *model* agreement, the agreement should always remain flexible and tailored to the client's need. The model agreement is intended only to make the practitioner aware of the essential provisions that should be included in a sliding scale agreement.

The introductory paragraph of the model agreement identifies the parties. When more than one defendant or plaintiff is to be part of the agreement, a separate agreement should be entered into by each.¹⁸⁹ Paragraph 1 lists the causes of action which are subject to the agreement.¹⁹⁰ All actions arising from the same occurrence or event shall be deemed subject to the agreement. Causes of action unrelated to the described event are not part of the action and should not bar one party from bringing an action against another party.

Paragraph 2 is the heart of the sliding scale agreement. It contains the terms defining the payment structure of the agreement. In response to Proposition 51, the agreement is split into two parts to con-

186. This eliminates the uncertainty of astronomical damages. If a sliding scale agreement is entered into, the best way to limit potential liability for noneconomic damages is through a standard settlement agreement.

187. This is probably preferable because the complexity is reduced for the parties.

188. There may be a few limited situations in which a Mary Carter agreement retains its attractiveness. One such case is where noneconomic damages are not sought or are unlikely to be awarded. However, it is unusual for a personal injury case not to involve any noneconomic injury. Furthermore, it is difficult to be certain that noneconomic losses will not be awarded. Nevertheless, in these isolated cases the Mary Carter agreement may still provide an alternative to defendants.

189. In *Abbott Ford*, the plaintiffs each entered into a separate sliding scale agreement with the defendant Abbott Ford. *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 866, 741 P.2d 124, 128, 239 Cal. Rptr. 626, 630 (1987).

190. This can be rather general since there will be a reference to the case number which in turn will reference the pleadings.

sider noneconomic and economic damages separately.¹⁹¹ Noneconomic damages are subject to several liability and thus each defendant is liable only for his share¹⁹² regardless of the solvency of the other defendants. Although a sliding scale agreement cannot be used for noneconomic damages, a regular settlement agreement may. This is optional, but in most cases recommended.¹⁹³

A sliding scale agreement may be used for economic damages. Two alternatives are provided reflecting two common versions of sliding scale agreements.¹⁹⁴ Under alternative A, a typical sliding scale agreement is outlined. The plaintiff receives one guaranteed amount of recovery regardless of the amount of the actual recovery. Under alternative B, a "step" sliding scale agreement is used which permits different guaranteed amounts depending on the amount of actual recovery. A party may define as many steps as it desires.¹⁹⁵

Paragraph 3 permits a defendant to make a loan advance to the plaintiff. This is a common practice with Mary Carter agreements. Generally, the loans are interest free and are deducted from any amount owed by the settling defendant. If the loan exceeds the amount the settling defendant owes to the plaintiff, a provision is included to set a date for the repayment of the loan.

Paragraph 4 is a valuation section. In compliance with *Abbott Ford*, parties must predetermine the value of the settlement agreement made by the settling defendant. Under section 877 of the California Civil Procedure Code¹⁹⁶ this value or consideration is reduced from the judgment against the nonsettling defendants. The valuation should reflect only the sliding scale agreement made for the economic damages. Any simultaneous settlement for the defendant's share of noneconomic damages should not be subject to this valuation.

Paragraph 5 addresses the good faith requirement as a condition precedent to the court's determination of effectiveness. Paragraph 6 deals with the effect of the agreement on a subsequent settlement agreement between the same plaintiff and another defendant.¹⁹⁷

191. One commentator "recommended that in all settlement agreements in multi-party tort litigation, the settlement agreement explicitly state two separate sums: one for settlement of plaintiff's economic damages and the other for settlement of plaintiff's noneconomic damages." *Special Issue, supra* note 153, at 170.

192. *See supra* notes 173-77 and accompanying text.

193. *See supra* notes 186-87 and accompanying text.

194. *See supra* note 14 and accompanying text.

195. These provisions are optional. The drafter may include as many of these provisions as are necessary. However, if many of these provisions are included, it is probably more practical to use the sliding scale under alternative A of this subparagraph. These provisions may provide some flexibility by allowing a certain payment depending on a range of recoveries. *See supra* note 14.

196. CAL. CIV. PROC. CODE § 877 (West Supp. 1989).

197. *See supra* notes 129-32 and accompanying text.

Paragraph 7 releases the settling defendant from all liability which may arise from the events described in paragraph 1. Release of liability may take the form of a release, a covenant not to sue, or a covenant not to enforce judgment. Paragraph 7 has no effect on other parties.¹⁹⁸

Paragraph 8 provides that the plaintiff must diligently pursue the claim. As the plaintiff receives a guaranteed recovery, the plaintiff may be tempted not to zealously pursue the claim. However, in many cases the plaintiff will be sufficiently motivated because of substantial noneconomic damages or the receipt of a recovery greater than the guaranteed amount.

Paragraph 9 disclaims liability. If the agreement becomes ineffective because of a subsequent event, the agreement still cannot be admitted for the purpose of proving liability.

Paragraph 10 includes a hold harmless clause which protects the settling defendant from any action taken by the plaintiff in violation of the agreement. Paragraph 11 states that the release or covenant not to sue in paragraph 7 will not release any defendants.¹⁹⁹ Paragraph 12 provides that the signing parties have entered into the agreement on the advice of their attorneys and that the parties fully understand the terms of the agreement. The remaining paragraphs are self-explanatory and are found in most contracts. The practitioner should add other paragraphs if necessary to suit the client's needs and to provide additional protection.

VII. CONCLUSION

The viability of Mary Carter agreements is now in serious doubt. *Abbott Ford* makes these agreements less attractive, while Proposition 51 limits their applicability. Consequently, there may be little reason for a party to choose these agreements over a traditional settlement agreement. Mary Carter agreements have also become more complex and their application is more uncertain as a result of recent changes in the law. The end appears near for these agreements in California. Mary Carter has lost her appeal.

THOMAS M. GROSS

198. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 332-34 (5th ed. 1984).

199. The common law rule provided that a release of one defendant released all parties. *Id.* at 332.

APPENDIX
SLIDING SCALE SETTLEMENT AGREEMENT²⁰⁰

_____ [name of plaintiff], _____ [address], hereinafter referred to as "Plaintiff", and _____ [name of defendant], _____ [address], hereinafter referred to as "Settling Defendant," in consideration of the promises made herein, agree as follows:

Nature and Status of Dispute

1. On _____, 19____, Plaintiff filed a complaint against settling Defendant and _____ [names of other defendants] in the [Municipal or Superior] Court (Court) in and for the County of _____, California, designated as _____ [case number], alleging _____ [generally describe nature of action] by or on the part of the Settling Defendant and other defendants who are not a party to this Agreement (Nonsettling Defendants).

Sliding Scale Settlement Agreement

2. Plaintiff hereby agrees to settle all [his or her] claims against Settling Defendant that arise from the complaint described in Paragraph 1, in accordance with the following terms:

2.1 Treatment of Noneconomic Damages:

In accordance with Proposition 51, Settling Defendant is solely liable for [his or her] share of Plaintiff's noneconomic damages. Noneconomic damages are defined as subjective, non-monetary losses including, but not limited to pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation. Plaintiff and Defendant agree to settle Defendant's share of liability for noneconomic damages for \$_____.

2.2 Treatment of Economic Damages:

In accordance with Proposition 51, economic damages are subject to joint liability. Economic damages are defined as objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. Judgment as defined in this section reflects all economic damages awarded to Plaintiff pursuant

200. See *California Legal Forms: Transaction Guide* 77-202 (Cum. Supp. Mar. 1988). The model agreement uses Form No. 77.63 for Sliding Scale Settlement Agreements as a basis for this agreement. Several new paragraphs have been added and some modified to satisfy *Abbott Ford* and Proposition 51.

to the action described in paragraph 1 in which Settling Defendant has joint liability with all Nonsettling Defendants and is reduced by the value of the consideration as determined under paragraph 4.

Alternative A

Settling Defendant guarantees a total recovery to Plaintiff of \$_____ ("guarantee amount").

(a) If a judgment is rendered in favor of all Nonsettling Defendants and against Plaintiff, Settling Defendant will pay Plaintiff the sum of \$_____ (guarantee amount).

(b) If Plaintiff reaches a settlement with or obtains a judgment against some or all of the Nonsettling Defendants, and the combined total of all such settlements or judgments less the value of any consideration determined under paragraph 4 (recovery amount) is less than \$_____ (guarantee amount), Settling Defendant will pay Plaintiff an amount equal to the guarantee amount less the recovery amount.

(c) If Plaintiff reaches a settlement with or obtains a judgment against some or all of the Nonsettling Defendants, and the combined total of all such settlements or judgments less the value of any consideration determined under paragraph 4 (recovery amount) is an amount equal to or in excess of \$_____ (guarantee amount), Settling Defendant will pay Plaintiff the sum of \$_____ (noncontingent payment).

Alternative B

(a) If a judgment is rendered in favor of all Nonsettling Defendants and against Plaintiff, Settling Defendant will pay Plaintiff the sum of \$_____.

(b) If Plaintiff reaches a settlement with or obtains a judgment against some or all of the Nonsettling Defendants, and the combined total of all such settlements or judgments less the value of any consideration determined under paragraph 4 (recovery amount) is less than \$_____ (amount-1), Settling Defendant will pay Plaintiff the sum of \$_____.

[If the recovery amount is less than \$_____ (amount-2), Settling Defendant will pay Plaintiff the sum of \$_____.

If the recovery amount is less than \$_____ (amount-3), Settling Defendant will pay Plaintiff the sum of \$_____. . . . If the recovery amount is less than \$_____ (amount-n), Settling Defendant will pay Plaintiff the sum of \$_____.]

(c) If Plaintiff reaches a settlement with or obtains a judgment against some or all of the Nonsettling Defendants, and the combined total of all such settlements or judgments less the value of any consideration determined under paragraph 4 (recovery amount) is an amount equal to or in excess of \$____, Settling Defendant will pay Plaintiff the sum of \$____ (noncontingent amount).

Advance Payment by Loan

3. Settling Defendant shall advance to Plaintiff the sum of \$____ as a loan, without interest. This loan shall be made contemporaneously with the execution of this agreement and shall be repaid only in the event, and to the extent that the amount loaned is greater than the amount which Plaintiff is ultimately entitled to recover from Settling Defendant under paragraph 2.

[If amount loaned is less than maximum amount potentially recoverable under paragraph 2 above, add: any balance due to Plaintiff from Settling Defendant under the terms of paragraph 2 shall be paid within ____ (e.g., 30) days following the final disposition of Plaintiff's claims against all Nonsettling Defendants, whether by execution of a settlement agreement or entry of a final judgment (including any appeals).]

Value of This Agreement

4. Plaintiff and Settling Defendant agree that the fair valuation of the sliding scale portion of this agreement covering economic damages subject to joint liability has a value of \$____. Should this value be determined to be too low or not in good faith then the provisions under paragraph 5 apply.

Determination of Good Faith as Condition Precedent

5. Plaintiff and Settling Defendant agree that a condition precedent to the effectiveness of this Agreement shall be that the court specified in paragraph 1 determine that this Agreement has been entered into in good faith. ____ [Plaintiff or Settling Defendant] shall move that court for such a determination within ____ [number] days after execution of this Agreement by all parties. The agreement shall be void if the court finds that the agreement is either (1) not in good faith pursuant to the court's determination or (2) the valuation under paragraph 4 is found to be too low.

Effect of a Subsequent Settlement

6. Plaintiff shall not settle all or any part of this dispute defined under paragraph 1 in which Settling Defendant is jointly liable for less than the guarantee amount without the written consent of Set-

tling Defendant if such settlement will cause Settling Defendant to bear more than [his or her] proportionate share of the joint damages.

Covenant Not to Enforce Judgment

7. In consideration of the receipt of payments [or guarantee or both] made under this Agreement by Settling Defendant to Plaintiff, Plaintiff covenants and agrees that neither Plaintiff nor any person acting on Plaintiff's behalf shall at any time take any action at law or in equity to enforce in any manner any judgment that may subsequently be obtained against Settling Defendant in the action described in paragraph 1 or in any other action that relates to the subject matter of the action described in paragraph 1.

Pursuit of Claim Against Nonsettling Defendants

8. Plaintiff agrees to pursue the action described in paragraph 1 with due diligence, and shall use all legitimate and reasonable means to collect any judgment obtained against Nonsettling Defendants.

Disclaimer of Liability

9. This agreement shall not constitute an admission of liability by Settling Defendant.

Hold Harmless Agreement

10. Plaintiff agrees to indemnify and hold harmless Settling Defendant against any loss, costs, damages, or liability, including court costs and attorneys' fees incurred on account of any action taken by Plaintiff in violation of this Agreement.

Effect on Nonsettling Defendants

11. Plaintiff and Settling Defendant agree that this Agreement is not intended as, and shall not be deemed to be, a release of any cause of action that Plaintiff has against any Nonsettling Defendant arising out of the facts and incidents involved in the action described in paragraph 1. Plaintiff and Settling Defendant expressly acknowledge that Nonsettling Defendants are not parties to this Agreement and that this Agreement is not intended to benefit Nonsettling Defendants in any manner.

Advice of Attorney

12. (a) Each party warrants and represents that in executing this

agreement, [he or she] has relied upon legal advice from the attorney of [his or her] choice, that the terms of this Agreement and its consequences have been read and completely explained to [him or her] by that attorney, and that [he or she] fully understands the terms of this Agreement.

(b) Each party further acknowledges and represents that, in executing this release, [he or she] has not relied on any inducements, promises, or representations made by the other party or any party representing or serving [him or her].

Conditions of Execution

13. Each party acknowledges and warrants that [his or her] execution of this release is free and voluntary.

Execution of Other Documents

14. Each party to this Agreement shall cooperate fully in the execution of any and all other documents and in the completion of any additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

Attorney's Fees

15. Each party shall bear all attorney's fees and costs arising from that party's own counsel in connection with the complaint, this Agreement, the matters referred to herein, and all related matters. Except to the extent provided in paragraph 10, this provision shall be applicable to this entire Agreement.

Entire Agreement

16. This agreement contains the entire agreement between the parties.

Effective Date

17. This Agreement shall become effective immediately upon execution by the parties.

Governing Law

18. This agreement is entered into, and shall be construed and interpreted in accordance with, the laws of the State of California.

Executed at ____, California, on _____ [month], ____ [day], 19.____

Plaintiff

_____ [signature of Plaintiff]

[typed name]

Settling Defendant

_____ [signature of Settling Defendant]
[typed name]

