

3-15-1986

California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt

Emery J. Mishky

Robert Tessier

Patrick G. Vastano

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Civil Procedure Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Torts Commons](#)

Recommended Citation

Emery J. Mishky, Robert Tessier, and Patrick G. Vastano *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 Pepp. L. Rev. Iss. 3 (1986)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol13/iss3/7>

This California Practicum is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt.

The common problem, yours, mine, everyone's
Is — not to fancy what were fair in life
Provided it could be — but, finding first
What may be, then find how to make it fair
Up to our means

Robert Browning, 1812-1889
Bishop Blougram's Apology,
line 87 (1855).

I. INTRODUCTION

The apportionment of loss among multiple defendants is a big money game in California. Because of the tremendous importance of this area of the law to all parties in multiple defendant cases, close examination of the underlying policies and practical application of the rules in California is essential, especially in light of *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.¹ Courts deciding cases in this area of the law historically have had to balance two competing policies: the equitable sharing of costs among the parties at fault, and the encouragement of settlement. This comment will examine the source of these policies and how courts have viewed and will continue to view the requirement of good faith² when scrutinizing settlements. Finally, the practical application of the criteria handed down by the court in *Tech-Bilt* will be discussed, particularly in connection with sliding scale recovery agreements.³

II. THE ASSERTION OF THE POLICY OF EQUITY

In 1975, the California Supreme Court considered the issue of assessment of liability in relation to the proportional fault of the plaintiff in *Li v. Yellow Cab Co. of California*.⁴ Prior to *Li*, California adhered to the all-or-nothing doctrine of contributory negligence. Under this doctrine, an injured plaintiff would be completely barred

1. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

2. See Cal. Civ. Proc. Code §§ 877-877.5 (West 1980).

3. *Id.* at § 877.5.

4. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

from recovering damages⁵ if the defendant(s) could successfully show that the plaintiff's negligence contributed to the plaintiff's injury. This precept held true regardless of the degree of the plaintiff's negligence, provided the negligent conduct contributed as a legal cause to the injury.⁶ The *Li* majority recognized the core of the criticism to the contributory negligence rule to be that, "the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault."⁷

The principle command of the *Li* court became "[l]iability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."⁸ Thus, California was brought into a comparative negligence scheme based on fault, under which a plaintiff's recovery would be diminished in proportion to the plaintiff's fault.⁹ The court's primary concern in *Li* was the apportionment of liability between a plaintiff and defendant; however, the principles enunciated in *Li* have been utilized to apportion liability in multiple defendant litigation. The lead case in California concerning treatment of multiple defendant apportionment is *American Motorcycle Association v. Superior Court*.¹⁰ This case was decided by the California Supreme Court in 1978, nearly three years after the *Li* decision.

The plaintiff in *American Motorcycle* was a teenage boy who suf-

5. For cases decided under the doctrine of contributory negligence, see *Billeter v. Rhodes & Jamieson*, 104 Cal. App. 2d 137, 231 P.2d 93 (1951) (contributory negligence of invitee); *Markham v. Hancock Oil Co.*, 2 Cal. App. 2d 392, 37 P.2d 1087 (1934); *Elsey v. Domecq*, 114 Cal. App. 42, 299 P. 794 (1931).

6. *Li*, 13 Cal. 3d at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861. For a definition of contributory negligence, see RESTATEMENT (SECOND) OF TORTS § 463 (1965), which states,

Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.

Id.

7. *Li*, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862 (footnote omitted). The court reasoned that arguments in support of the contributory negligence doctrine fall far short of justifying the doctrine in light of "intelligent notions of fairness." *Id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863. "[I]n a system in which liability is based on fault, the extent of fault should govern the extent of liability . . ." *Id.*

8. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864 (footnote omitted).

9. The *Li* court adopted a "pure" form of comparative negligence. *Id.* at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875. This form of comparative negligence "assign[s] responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties." *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875. The "50 percent" system commands that liability be apportioned based on fault up to the point where the defendant's negligence remains greater than that of the plaintiff. Once the defendant's negligence is ascertained to be 50 percent or less, a plaintiff's recovery is barred. The 50 percent system was rejected by the court. See, e.g., MASS. GEN. LAWS ANN. ch. 231 § 85 (West 1985). For a system in which a plaintiff must be less than 50 percent at fault to recover, see COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1984).

10. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

ferred a crushed spine from a crash in a motorcycle event that was organized by the American Motorcycle Association (AMA) and the Viking Motorcycle Club (VMC).¹¹ The boy, who was a participant in the race, brought an action naming AMA and VMC as defendants based on AMA's and VMC's alleged negligence in staging the sports event.¹² AMA filed a motion for leave to file a cross-complaint. The proposed cross-complaint asserted two causes of action. The first was for indemnity from the boy's parents, based upon the parents' alleged negligence in the supervision of their son.¹³ The second was for a declaration by the court of the parents' "allocable negligence,"¹⁴ so that damages against the named defendants could be reduced by this amount. Although the trial court was critical of the then existing state of the law, it denied AMA's motion for leave to file a cross-complaint.¹⁵

Generally, two doctrines of law exist for defendants to use in distributing a payment made to a plaintiff among themselves: contribution and equitable indemnity.¹⁶ The doctrine of contribution allows for the apportionment of loss between multiple tortfeasors in order to equalize a common burden.¹⁷ The rule of equitable indemnity allows for the recovery of the entire amount one has paid from another

11. *Id.* at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185.

12. *Id.* In its answer, AMA claimed the boy's negligence was a proximate cause of his injuries. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186. This invoked the *Li* principles of apportionment of liability in consideration of plaintiff's negligence. *See supra* notes 4-8 and accompanying text.

13. *American Motorcycle*, 20 Cal. 3d at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186. Indemnity, as it then existed in California, was an equitable doctrine that entirely shifted the loss from one tortfeasor to another. "Indemnity allows one who has discharged a common obligation to recover the entire amount he has paid from the party primarily liable." Comment, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 492 (1969) (emphasis added).

AMA's argument was that by signing the parental consent form required for entry in the race, the parents had "actively" engaged in negligent conduct, while AMA's negligence, if there was any, was "passive." Thus, AMA sought equitable indemnity. *American Motorcycle*, 20 Cal. 3d at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

14. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186. AMA was proceeding on the assumption that *Li* annulled the rule of joint and several liability and replaced it with a rule of "proportionate liability," where a concurrent tortfeasor could only be held liable "for a portion of plaintiff's recovery, determined on a comparative fault basis." *Id.* at 586, 578 P.2d at 903, 146 Cal. Rptr. at 186 (emphasis in original).

15. The court of appeal perceived the need for a speedy resolution of the issues presented in multiple party litigation, and thus granted a peremptory writ of mandate. *Id.* at 586, 578 P.2d at 903, 146 Cal. Rptr. at 186.

16. *See, e.g., American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190; Comment, *supra* note 13, at 491.

17. *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

tortfeasor who is primarily liable.¹⁸ Both doctrines are grounded in equitable considerations.¹⁹ Commentators, focusing on the outcome — namely the eventual allocation of the burden — have concluded that “indemnity is only an extreme form of contribution.”²⁰ Practically speaking, this position may hold some truth; however, the doctrines are based on a difference in the degree of culpability of the defendants (i.e., one party who is relatively blameless is being asked to bear the blameworthy party’s burden). Contribution addresses itself to a pool of relatively equally culpable tortfeasors.²¹ With these doctrines available, *American Motorcycle* was appealed to the California Supreme Court for determination.

American Motorcycle took as its signpost the utopic goal propounded by the *Li* court, that of “a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.”²² After a study of the equitable indemnity doctrine in light of *Li*, the California Supreme Court concluded that modification of traditional distribution doctrines was in order. The doctrine of partial equitable indemnity was introduced whereby a concurrent tortfeasor could obtain indemnity on a compar-

18. See, e.g., Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131 (1932).

19. Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31, 33, 48-49 (1966) (considerations of unjust enrichment and restriction); RESTATEMENT OF RESTITUTION § 1 & comment b (1937).

20. *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir. 1951) (Judge Learned Hand). See also *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

21. The California statutory right of contribution provides for contribution on a pro rata basis, and does not consider the degree of fault. See CAL. CIV. PROC. CODE § 875 (West 1980), which provides,

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.

(b) Such right of contribution shall be administered in accordance with the principles of equity.

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.

(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.

(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.

(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.

(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor.

Id.

22. *Li*, 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864. The phrase was quoted by the *American Motorcycle* majority. *American Motorcycle*, 20 Cal. 3d at 583, 591, 598, 578 P.2d at 902, 907, 912, 146 Cal. Rptr. at 185, 190, 195.

active fault basis²³ instead of the previous all-or-nothing doctrine of indemnity. The doctrine of indemnity had become the primary allocator of loss among joint tortfeasors because the California legislature had, for all practical purposes, frozen the development of the doctrine of contribution. This compelled practitioners to use the doctrine of indemnity to obtain any real relief.²⁴ Before *American Motorcycle*, the equitable indemnity doctrine had been difficult to wield due to vague standards for indemnification.²⁵ However, the *American Motorcycle* court looked beyond the issue of imprecision in the standards for indemnification²⁶ and attacked the very foundation of the rule. The court noticed that although equitable indemnity was advertised as having been based on equitable considerations, in cases where equity would have dictated apportionment in proportion to culpability, the loss had been administered in an all-or-nothing fashion.²⁷ To facilitate the administration of equitable justice through the use of the equitable doctrine of indemnity, partial indemnity on a comparative fault basis was mandated.²⁸

23. *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

24. In 1957, California passed legislation that restricted a tortfeasor's right to contribution to a narrow set of circumstances. CAL. CIV. PROC. CODE § 875 (West 1980). CAL. CIV. PROC. CODE § 877.5 (West Supp. 1985), concerning sliding scale recovery agreements, was added in 1977. See 1977 Cal. Stat. 1798.

California had espoused the principle that the law would not aid a tortfeasor, and thus a joint tortfeasor had no right to contribution. See, e.g., *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 P. 379 (1912). The equitable indemnity rule was created as an exception to the contribution rules in *San Francisco v. Ho Sing*, 51 Cal. 2d 127, 130, 330 P.2d 802, 803-04 (1958). The *Ho Sing* court relied on the fact that a majority of common law jurisdictions adhered to a rule of indemnification. *Id.* at 131-32, 330 P.2d at 804. It also relied on the Supreme Court decision in *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316 (1896), cited in *Ho Sing*, 51 Cal. 2d at 132, 330 P.2d at 804. In *Washington Gaslight*, the Court found that it is only fair that when two individuals are responsible for a loss, the more culpable individual should bear a greater share of the loss. 161 U.S. at 327-28.

25. Some authorities attempted to classify negligence on the more culpable side as "active," "primary," or "positive" and on the less culpable side as "passive," "secondary," or "negative" in deciding whether indemnification should be allowed. See Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 538-44 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 155-56 (1932). Other authorities relied on criteria such as whether liability was "primary," "secondary," "constructive," or "derivative." See Comment, *Procedure — Third Party Practice — Non-Contractual Indemnification*, 28 MO. L. REV. 307, 308-09 (1963). Under these tests it is difficult, if not impossible, to formulate a general rule of when indemnification takes place. See *Atchison, Topeka & Santa Fe Ry. v. Lan Franco*, 267 Cal. App. 2d 881, 73 Cal. Rptr. 660 (1968); PROSSER & KEETON ON TORTS 343 (5th ed. 1984).

26. *American Motorcycle*, 20 Cal. 3d at 596, 578 P.2d at 910, 146 Cal. Rptr. at 193.

27. *Id.* at 596-97, 578 P.2d at 910-11, 146 Cal. Rptr. at 193-94.

28. *Id.* at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

III. THE POLICY OF ENCOURAGING SETTLEMENT

With the ever-increasing number of lawsuits in California, settlement has become an important and expeditious manner of resolving lawsuits without which current California jurisprudence would be rendered inoperative. Thus, the law favors settlements.²⁹ Settlement provides for both peace and goodwill in the community, and the reduction of expense and persistence in litigation.³⁰ It also favors the compromise of doubtful rights and controversies.³¹ To this end, and in recognition of the fundamental policy, the legislature enacted sections 877³² and 877.6³³ of the California Code of Civil Procedure. Appellate courts have interpreted these sections as encouraging

29. *E.g.*, *Potter v. Pacific Coast Lumber Co. of Cal.*, 37 Cal. 2d 592, 602, 234 P.2d 16, 22 (1951) ("[t]he law wisely favors settlements"); *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 696, 319 P.2d 69, 79 (1957) ("it is fundamental that the law favors settlements").

30. *See* *Estate of Johanson*, 62 Cal. App. 2d 41, 56, 144 P.2d 72, 80 (1943) ("Compromises are favored in law and a man is allowed to negotiate for the purchase of his peace without prejudice to his rights."); *accord* *McClure v. McClure*, 100 Cal. 339, 343, 34 P. 822, 824 (1893).

31. *Potter v. Pacific Coast Lumber Co. of Cal.*, 37 Cal. 2d 592, 600, 234 P.2d 16, 20 (1951); *Hamilton v. Oakland School Dist.*, 219 Cal. 322, 329, 26 P.2d 296, 299 (1933); *Estate of Johanson*, 62 Cal. App. 2d 41, 56, 144 P.2d 72, 80 (1943).

32. CAL. CIV. PROC. CODE § 877 (West 1980). Section 877 provides:

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—

- (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and
- (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

Id. *See also* *Adler, Allocation of Responsibility After American Motorcycle Association v. Superior Court*, 6 PEPPERDINE L. REV. 1, 27 (1978) (The author of the article, Erwin E. Adler, represented the Petitioner, American Motorcycle Association, in *American Motorcycle*).

Section 877 does not bar other grounds for indemnity, such as contractual agreements. *See, e.g.*, *Peck Contractors v. Superior Court*, 159 Cal. App. 3d 828, 205 Cal. Rptr. 754 (1984).

33. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). Section 877.6 provides, in pertinent part, as follows:

- (a) Any party to an action wherein it alleged that two or more parties are joint tortfeasors 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

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

Id.

The legislature, by enacting section 877.6, specifically codified dictum in *American*

settlements.³⁴ The statutes achieve that goal by releasing a settling tortfeasor from liability to other tortfeasors after a good faith settlement has been reached with the plaintiff.³⁵

The determination of "good faith" under these sections is most important to all parties in the litigation, for without it, a settling tortfeasor is not protected from the demands of a nonsettling tortfeasor for partial equitable indemnity. Though courts are aware of this importance, the criteria of what constitutes good faith has changed dramatically over time.³⁶ This change has its roots in the ever present battle for preeminence between the policies discussed: the equitable distribution of fault between tortfeasors and the encouragement of settling cases before trial.

IV. THE GOOD FAITH REQUIREMENT: A CASUALTY OF CONFLICT

Appellate courts in California,³⁷ as well as the Ninth Circuit Court

Motorcycle. See *American Motorcycle*, 20 Cal. 3d at 604, 518 P.2d at 915, 146 Cal. Rptr. at 198.

[W]e conclude that from a realistic perspective the legislative policy underlying the provision [section 877] dictates that a tortfeasor who has entered into a 'good faith' settlement [citation omitted] with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor.

Id. See also *Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 283, 188 Cal. Rptr. 580, 582 (1983).

34. *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846 (1976); *Insurance Co. of N. Am. v. United States Fire Ins. Co.*, 34 Cal. App. 3d 391, 396, 110 Cal. Rptr. 48, 51 (1973); *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972).

35. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1984).

The question of what constitutes a "lack of good faith" was left to the courts. See *River Garden Farms*, 26 Cal. App. 3d at 989, 103 Cal. Rptr. at 500. It is also significant to note that "bad faith" is not required, only the softer standard of lack of good faith is required. A "joint tortfeasor" under section 877.6(c) is a joint, concurrent or successive tortfeasor. *Norton-Villiers*, 139 Cal. App. 3d at 283, 188 Cal. Rptr. at 582.

Procedurally, after a finding of "good faith," the party who settled in "good faith" brings a motion for summary judgment to dismiss the cross-complaint, or action, for partial indemnity. *Northrop Corp. v. Stinson Sales Corp.*, 151 Cal. App. 3d 653, 658, 199 Cal. Rptr. 16, 19 (1984).

36. For a complete collection of cases bearing on this issue, see Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 854-81 (1984).

37. See, e.g., *Riverside Steel Constr. Co. v. William H. Simpson Constr. Co.*, 171 Cal. App. 3d 681, 217 Cal. Rptr. 522 (1985); *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984); *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); *Widson v. International Harvester Co.*, 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984); *Ford Motor Co. v. Schultz*, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); *Kohn v. Superior Court*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); *Lopez v. Blecher*, 143 Cal. App. 3d

of Appeals,³⁸ have been unable to give litigants guidelines for finding good faith that could stand the test of time. For this reason, the California Supreme Court took the opportunity provided by *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*³⁹ to halt the erosion of the good faith requirement of section 877.6 and to provide guidelines for the courts of appeal in future cases.

To understand the importance of *Tech-Bilt*, and the incongruity in the law regarding good faith, two earlier cases should be first examined: *River Garden Farms v. Superior Court*,⁴⁰ and *Cardio Systems v. Superior Court*.⁴¹

River Garden Farms was decided in 1972, six years before *American Motorcycle* and eight years before the adoption of section 877.6; yet the interpretation of good faith in *River Garden Farms* was ultimately approved in *Tech-Bilt*.⁴² The suit in *River Garden Farms* centered around two children who were severely injured in a fire that claimed the lives of their parents. The wrongful death and personal injury claims of the children were settled as to all defendants except River Garden Farms. River Garden Farms objected to plaintiffs'

736, 192 Cal. Rptr. 190 (1983); *Wysong & Miles Co. v. Western Indus. Movers*, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983); *Burlington N. R.R. v. Superior Court*, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *overruled by*, *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *overruled by*, *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *overruled by*, *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980); *Mill Valley Refuse Co. v. Superior Court*, 108 Cal. App. 3d 707, 166 Cal. Rptr. 687 (1980); *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); *Lareau v. Southern Pac. Co.*, 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975); *River Garden Farms v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

38. *Owen v. United States*, 713 F.2d 1461 (9th Cir. 1983); *Commercial Union Ins. Co. v. Ford Motor Co.*, 640 F.2d 210 (9th Cir.), *cert. denied*, 454 U.S. 858 (1981). The Ninth Circuit, because the California Supreme Court had not yet spoken, was free to speculate as to how the California Supreme Court would resolve the issues presented. For this reason, the Ninth Circuit decisions deviated from the trend of the California Courts of Appeal, but set out principles that the supreme court would espouse in *Tech-Bilt*. The ability of plaintiffs to forum shop may have been an added incentive for the *Tech-Bilt* decision. *Tech-Bilt* cited both of the Ninth Circuit cases mentioned above. See *Tech-Bilt*, 38 Cal. 3d at 496-97, 497 n.6, 698 P.2d at 164-65, 165 n.6, 213 Cal. Rptr. at 261-62, 262 n.6.

39. 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729 (1983). The supreme court reversed the court of appeal in *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). For a brief analysis of the *Tech-Bilt* decision, see California Supreme Court Survey, 13 PEPPERDINE L. REV. 260 (1985).

40. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

41. 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *overruled by*, *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

42. *Tech-Bilt*, 38 Cal. 3d at 496, 698 P.2d at 164, 213 Cal. Rptr. at 261 ("the Legislature intended the term 'good faith' in section 877.6 to bear the meaning ascribed to that term in section 877 by the Court of Appeal's decision in *River Garden Farms* . . .").

counsel allocating a disproportionate share of the settlement proceeds to the wrongful death claims. Under California Code of Civil Procedure section 877,⁴³ River Garden Farms would receive credit for the amount of settlement paid by the settlors, but because of the disproportionate allocation of moneys to the wrongful deaths claims, River Garden Farms had a greater potential liability.⁴⁴ For this reason, as a nonsettling party, River Garden Farms alleged that the plaintiffs alone were not acting in "good faith" as required by section 877.

The court held that the good faith requirement of section 877 extended to all tortfeasors, settling and nonsettling alike,⁴⁵ but recognized that "[t]he goals of equitable sharing and settlement finality compete with each other."⁴⁶ Thus, while the court was required to strike a balance between these goals, top priority was given to serving these dual interests, since the court believed the 1957 legislature had established them.⁴⁷

The court's balancing approach produced the "reasonable range" test of good faith. The court reiterated that any settlement in good faith would be final, even if a jury later returns a verdict that would make the settlement figure appear disproportionate, thus appeasing the policy of encouragement of settlement.⁴⁸ The test indicated that the court "should not invalidate a settlement within a reasonable

43. CAL. CIV. PROC. CODE § 877 (West 1980). See *supra* note 32 for the full text of section 877.

44. This is so because one of the defendants connected with River Garden Farms was an employer, and, as an employer, plaintiff's exclusive remedy was worker's compensation. See *River Garden Farms*, 26 Cal. App. 3d at 990, 103 Cal. Rptr. at 501. Also, the value of the personal injury claim was appraised as substantially more than the wrongful death claims. *Id.* at 991, 103 Cal. Rptr. at 502.

45. *Id.* at 999, 103 Cal. Rptr. at 507.

46. *Id.* at 997, 103 Cal. Rptr. at 506.

47. *Id.* at 999, 103 Cal. Rptr. at 507 ("To promote equitable distribution of the loss, the statute [section 877] permits post-judgment contribution The second statutory objective, encouragement of settlement") (emphasis added). *Tech-Bilt* quoted *River Garden Farms* and reaffirmed the priority given the policies by the *River Garden Farms* court: "The major goals of the 1957 tort contribution legislation are, first, equitable sharing of costs among the parties at fault, and second, encouragement of settlements." *Tech-Bilt*, 38 Cal. 3d at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260 (quoting *River Garden Farms*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503).

48. *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

If the good faith clause demands equitable sharing as fixed by a jury verdict which has not yet taken place, the parties cannot negotiate safely, [and] cannot accomplish settlement with a fair assurance of finality When one tortfeasor chooses to settle and another chooses to litigate, inequality in the ultimate cost does not signalize bad faith.

Id.

range of the settlor's fair share."⁴⁹ Thirteen years later, the California Supreme Court accepted the ground rules that the *River Garden Farms* court had laid down for determining good faith under this standard:

The price levels are not as unpredictable as one might suppose. Despite the uncertainties, generalized valuation criteria are recognized by the personal injury bar, insurance claims departments and pretrial settlement courts. When testing the good faith of a settlement figure, a court may enlist the guidance of the judge's personal experience and of experts in the field. Represented by knowledgeable counsel, settlement negotiators can predict with some assurance whether a settlement is within the reasonable range permitted by the criterion of good faith. The danger that a low settlement violates the good faith clause will not impart uncertainty so long as the parties behave fairly and the courts maintain a realistic awareness of settlement imponderables.⁵⁰

The court in *River Garden Farms* also prophetically perceived that "if the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied. Neither statutory goal should be applied to defeat the other."⁵¹

Over the next decade, appellate courts, failing to heed the warning of the *River Garden Farms* court, tipped the delicate balance between the equitable distribution of fault and the encouragement of settlement in favor of settling cases. The focal point of the analysis of these cases was how the term "good faith" was to be construed. The case of *Cardio Systems v. Superior Court*,⁵² decided in 1981, typified the extent to which appellate courts were willing to stretch the term "good faith."

In *Cardio*, a man died on the operating table during open-heart surgery due to a defective machine distributed by Cardio. The machine was incorrectly assembled and a tube incorrectly injected air into the heart rather than creating a suction to remove blood from the heart. Cardio was originally named as a party defendant, but was later dismissed for a waiver of costs alone. The reason for the dismissal was one of trial strategy — plaintiff's counsel believed that a simple medical malpractice case would become a complex products liability case if Cardio remained a defendant. Despite the fact that

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

50. *Id.* at 998, 103 Cal. Rptr. at 506-07 (footnote omitted), quoted in *Tech-Bilt*, 38 Cal. 3d at 500-01, 698 P.2d at 167-68, 213 Cal. Rptr. at 264-65.

The justification for the reasonable range test, that it can be administered with relative ease, is not without its critics. Chief Justice Bird dissented in *Tech-Bilt* stating, "[The reasonable range test] will not only discourage settlements, but will place an intolerable burden on our trial courts." *Tech-Bilt*, 38 Cal. 3d at 502, 698 P.2d at 169, 213 Cal. Rptr. at 266 (Bird, C.J., dissenting). "Contrary to the majority's assertions, such a rule will unduly discourage settlements and severely burden the trial courts by convert[ing] the pretrial settlement approval procedure into a full-scale mini-trial." *Id.* at 508, 698 P.2d at 173, 213 Cal. Rptr. at 270.

51. *River Garden Farms*, 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506.

52. 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

experts were willing to testify that there was a defect in the machine, plaintiff's counsel opted for the dismissal.

The hospital, also a defendant, eventually settled with the plaintiff and pursued a cross-claim against Cardio for partial equitable indemnity. Cardio affirmatively defended against the cross-claim stating that the good faith dismissal by plaintiff barred any such recovery. The trial court rejected Cardio's argument because "the dismissal as to Cardio, which was without consideration other than the waiver of costs, [could not be] a good faith dismissal as that concept is used in Code of Civil Procedure section 877."⁵³

The appellate court, with reluctance, issued a writ of mandate that directed the trial court to vacate its order. The court realized the inequity that would result — a defendant dismissed in exchange for only a waiver of costs due to plaintiff's trial strategy was insulated from a partial equitable indemnity claim asserted by the nonsettling tortfeasors.⁵⁴ The reason for the court's holding, and for the inequitable result, was that "good faith" was defined so as to ignore the policy of equitable distribution of fault. The court stated that

[A] settling defendant owes no duty to a nonsettling codefendant except to refrain from tortious or other wrongful conduct and that, absent such conduct, a settling party may act to further its own interests without regard to the effect of the settlement upon codefendants. [citation omitted] Cardio Systems acted consistently with that principle and, under the rather simple terms of the statute that the settlement be in good faith, proceeded in good faith.⁵⁵

Sometime between the *River Garden Farms* and *Cardio Systems* decisions, the "reasonable range" test was replaced by a test that considered only whether a tort has been committed upon a nonsettling defendant — the so-called "tortious conduct" test. Even though it faced an inequitable result in *Cardio Systems*, the court of appeal for the fifth district chose to let the legislature act, if it desired, to reach a more equitable result and chose not to resurrect the *River Garden*

53. *Id.* at 883, 176 Cal. Rptr. at 255 (footnote omitted). This is one of many examples in which the trial court had a sense of good faith superior to that of the court of appeals. Clearly, if the spirit of *Tech-Bilt* is to be followed in the future, it is the trial courts that must shoulder the burden.

54. *Id.* at 890-91, 176 Cal. Rptr. at 260. The court's exact words were as follows:

The result is unsatisfactory. The rule permits a plaintiff to insulate a defendant (Cardio) from being liable to a codefendant (Hospital) for comparative indemnity by dismissing against Cardio in consideration of a waiver of costs where the dismissal is motivated by plaintiff's tactical considerations having little relationship to the potential liability of Cardio The result is fundamentally unfair, and cannot be what the Legislature intended.

Id.

55. *Id.* at 890, 176 Cal. Rptr. at 260.

*Farms rationale.*⁵⁶

In conjunction with the abandonment of the "reasonable range" test came the assertion, inbred from one dicta to another, that the policy of encouraging settlement was preeminent over, and was unchecked by, the equitable apportionment of liability among joint tortfeasors.⁵⁷ Moreover, the Ninth Circuit was applying a test of its own,⁵⁸ thus creating a tremendous impetus for the California Supreme Court to resolve the issue. It was under these pressing circumstances that the supreme court granted a hearing in *Tech-Bilt*.

V. *TECH-BILT, INC. v. WOODWARD-CLYDE & ASSOCIATES*

The plaintiffs, Mr. and Mrs. Andrew Fabula, bought residential property developed by Tech-Bilt. Due to structural defects in their residence, plaintiffs brought suit against Tech-Bilt and Woodward-Clyde, the soils engineer. The claim against Woodward-Clyde was barred by a ten-year statute of limitations.⁵⁹ However, Woodward-Clyde's counsel, before filing for summary judgment in the case, made plaintiffs' counsel an offer — a waiver of costs incurred thus far in defending the action in exchange for a dismissal with prejudice.⁶⁰ Plaintiffs accepted the offer, but one month later, Tech-Bilt filed an amended cross-complaint for indemnity and declaratory relief, naming Woodward-Clyde as a cross-defendant. Woodward-Clyde

56. See *id.* at 891, 176 Cal. Rptr. at 260 ("[T]he Legislature should move with dispatch to prevent the occurrence of such an unfortunate result as in this case.").

57. This misinterpretation of California Code of Civil Procedure section 877 in *River Garden Farms* appears to have its roots in the case of *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976). While paying lip service to the proposition that "plac[ing] a disproportionate burden upon the nonsettling joint tortfeasors [is] contrary to the rationale of the state's contribution statutes," *id.* at 235, 132 Cal. Rptr. at 846, the court of appeal for the first district surprisingly decided that [e]xcept in rare cases of collusion or bad faith . . . [citations omitted] a joint tortfeasor should be permitted to negotiate settlement of an adverse claim according to his own best interests, whether for his financial advantage, or for the purchase of peace and quiet, or otherwise. *His good faith will not be determined by the proportion his settlement bears to the damages of the claimant.* For the damages are often speculative, and the probability of legal liability therefore is often uncertain or remote.

Id. at 238, 132 Cal. Rptr. at 847-48 (emphasis added).

Not only does *Stambaugh* subordinate the equitable distribution of fault concept, but it also makes it virtually extinct. Cases citing *Stambaugh* abound, with a resulting schism in the law. See also *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 806-07, 173 Cal. Rptr. 38, 42-43 (1981) (overruled by *Tech-Bilt*) (*Stambaugh* applied in context of sliding scale recovery agreement); *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980); *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978) (prioritized settlement over equity). Roberts, *supra* note 36.

58. See *supra* note 38.

59. See CAL. CIV. PROC. CODE § 337.15 (West 1982).

60. Woodward-Clyde's total "costs" amounted to \$55. *Tech-Bilt*, 38 Cal. 3d at 492 n.2, 698 P.2d at 161 n.2, 213 Cal. Rptr. at 258 n.2.

rushed into court with the dismissal obtained from the plaintiffs; it sought to have the "agreement" confirmed as a good faith settlement under Code of Civil Procedure section 877.6, and moved for summary judgment as to Tech-Bilt's cross-complaint. With a plethora of precedent to justify its ruling,⁶¹ the lower court found the settlement to be in good faith and entered summary judgment dismissing Tech-Bilt's cross-complaint against Woodward-Clyde. The appellate court, not surprisingly, affirmed this ruling.

The supreme court, however, set the record straight. After a brief examination of the legislative history of sections 877 and 877.6, the court cited *River Garden Farms* for the proposition that "[t]he major goals of the 1957 tort contribution legislation are, first, equitable sharing of costs among the parties at fault, and second, encouragement of settlements."⁶² Invoking a renewed priority upon the true legislative intent was the death-knell of the "settlement agreement" between plaintiff and Woodward-Clyde, for under no circumstance could a waiver of costs be a "good faith" settlement given the facts of the case.⁶³

The court did not create a new test for determining good faith⁶⁴ in a settlement under sections 877 and 877.6; rather, the court resur-

61. See, e.g., *Burlington N. R.R. v. Superior Court*, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982); *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981); *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976). Note that each of these cases was either impliedly or expressly disapproved of by the *Tech-Bilt* court.

62. *Tech-Bilt*, 38 Cal. 3d at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260 (quoting *River Garden Farms*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503). See *supra* note 47 and accompanying text.

63. Notice, however, that under *Tech-Bilt* a dismissal in exchange for a waiver of costs is not *per se* evidence of a lack of good faith. Rather, under the "reasonable range" test, the court receiving the agreement must decide whether the amount of settlement was "in the ballpark." *Tech-Bilt*, 38 Cal. 3d at 499-500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64. Therefore, it is not inconceivable that a "ballpark" estimate of a settlor's liability in a case would simply be the costs of the suit. However, for this to be the case, the proportionate fault of the settlor must be marginal at best. For a more detailed discussion of the criteria outlined in *Tech-Bilt*, see *infra* notes 64-67 and accompanying text.

64. *Tech-Bilt* simplified, from a statutory perspective, the meaning of "good faith," in that the court determined that "the Legislature intended the term 'good faith' in section 877.6 to bear the meaning ascribed to that term in section 877 by the Court of Appeal's decision in *River Garden Farms* and by this court in *American Motorcycle*." *Tech-Bilt*, 38 Cal. 3d at 496, 698 P.2d 164, 213 Cal. Rptr. at 261. Therefore, there can be no question that the *Tech-Bilt* decision was intended to cover the entire area of settlements, including sliding scale recovery agreements. See CAL. CIV. PROC. CODE § 877.5 (West 1980). See also *City of Los Angeles v. Superior Court*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986); *Abbott Ford, Inc. v. Superior Court*, 172 Cal. App. 3d 675, 218 Cal. Rptr. 605 (1985), *petition for review granted*, No. B007911 (Cal. Sup. Ct. Dec. 19, 1985).

rected the *River Garden Farms* "reasonable range" test.⁶⁵ The court disapproved of a line of cases which defined good faith in settlement as simply refraining from tortious or other wrongful conduct.⁶⁶ Instead, the court reasoned that "'good faith of the dismissal alone is not sufficient. The dismissal must represent a settlement which is a good faith determination of relative liabilities. Only in this situation are both policies behind § 877 — equity and settlement — furthered.'" ⁶⁷ Therefore, while bad faith tortious conduct continues, the new test requires the court to inquire further into the substance of the case to determine "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."⁶⁸

The very nature of the "reasonable range" test precludes any bright-line type of analysis in ascertaining reasonable range. Thus, the court in applying the test could provide only touchstones for the lower courts to use in determining good faith. It is clear, however, that a settling defendant who pays "less than his theoretical proportionate or fair share" has not violated the good faith requirement per se.⁶⁹ The reason is twofold: first, settlements would be unduly discouraged;⁷⁰ and second, the pretrial settlement approval procedure

Although not specifically mentioned in *Tech-Bilt*, section 877.5 does deal with settlements and must satisfy "good faith" as determined under section 877.6. *Id.*

65. See *supra* note 48 and accompanying text. The decision of the supreme court followed the recommendations of at least one scholar in the area. See Roberts, *supra* note 36.

66. See *Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

67. *Id.* at 497, 698 P.2d at 164-65, 213 Cal. Rptr. at 261-62 (quoting *Commercial Union Ins. Co. v. Ford Motor Co.*, 640 F.2d 210, 213 (9th Cir.), *cert. denied*, 454 U.S. 858 (1981)).

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

69. *Id.* 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)). Ironically, *Tech-Bilt* also disapproved *Dompeling*.

70. The court recognized that even with the "reasonable range" test, the reasons for parties' willingness to settle have not changed. A virtual gratuitous dismissal in the name of trial strategy or fear of high-powered experts will not be upheld as a good faith dismissal. See, e.g., *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981); *Commercial Union Ins. Co. v. Ford Motor Co.*, 640 F.2d 210 (9th Cir.), *cert. denied*, 454 U.S. 858 (1981). However, there exists, and the *Tech-Bilt* decision allows for, practical economic justifications for a settlement figure below a "fair share" level. See Mankoff, *Structuring Settlements: An Update*, 19 TRIAL 70 (Aug. 1983) (tax considerations); Danninger, Johnson & Lest, *The Economics of Structuring Settlements*, 19 TRIAL 42 (June 1983); Phillips & Hawkins, *Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims*, 39 MOD. L. REV. 497 (1976).

Two factors which generally affect a settlement figure are the present value of money and the costs of continuing litigation. Moreover, with today's treble damage statutes and large awards, particularly when insurance companies or "bad faith" is involved, an important factor in deciding whether to settle is the understanding that exemplary damages are rarely given in settlement. In a multiple defendant suit, with both settling and nonsettling defendants, the settling defendants usually will not settle unless the plaintiff foregoes recovery of punitive damages as against them. Perhaps

would become, in effect, a mini-trial, straining the already overcrowded courts.⁷¹ Nonetheless, the amount of the settlement is relevant in determining good faith,⁷² for that amount must be equitable in light of the following factors: 1) a rough approximation of plaintiff's total recovery and the settlor's proportionate liability;⁷³ 2) the allocation of settlement proceeds among plaintiffs; 3) a recognition that a settlor should pay less in settlement than he would have if he were found liable after a trial; 4) financial conditions, including insurance policy limits;⁷⁴ and 5) any indications of fraud, collusion or

most important is the realization that the factors influencing the court's determination under the "reasonable range" test are far from pinpoint precision.

71. *Tech-Bilt*, 38 Cal. 3d at 502, 698 P.2d at 168, 213 Cal. Rptr. at 265 (Bird, C.J., dissenting).

72. See, e.g., *Burlington N. R.R. v. Superior Court*, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982) (plaintiff could continue litigation against the product manufacturer and could accept no settlement from manufacturer for less than two million dollars, equal to the amount of the settling defendant's guarantee, without the settling defendant's consent); *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981) (one million dollar settlement with subsequent suit against a product distributor for equitable indemnity); *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981) (\$100,000, the amount of defendant's insurance policy limits, plus \$10,000 on a sliding scale dependent upon plaintiff's recovery from the other defendant).

73. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263. The court, not accidentally, chose the term "rough approximation" in an attempt to placate the policy of settlement and to make the process easier on a practical level. Both of these concerns were raised by Chief Justice Bird in her dissent. See *id.* at 502-06, 698 P.2d at 168-71, 213 Cal. Rptr. at 256-58 (Bird, C.J., dissenting).

74. The problems inherent in the acknowledgement of insurance policy limits as a factor in settlement are grave. It is clear that a settlement for policy limits does not, by itself, establish that a settlement is in good faith. See *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64; *Ford Motor Co. v. Schultz*, 147 Cal. App. 3d 941, 950, 195 Cal. Rptr. 470, 475 (1983). If this factor is given too much weight in the good faith determination process, courts will be rewarding underinsured tortfeasors, most likely at the expense of deep-pocket joint tortfeasors whose comparative fault is often marginal. See Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 60 (July 1985) (analysis of a proposed California bill and a current survey of states which have abolished or limited joint and several liability); *Public Bodies Battle to Limit Joint-and-Several Doctrine*, L.A. Times, Feb. 21, 1985, at 24, col. 2; *Those With Money Pay Liability Suits*, L.A. Times, Feb. 21, 1985, at 34, col. 1. This factor only hints at the heart of the problem in our system of joint and several liability.

A case in trial at the time this comment is being written is illustrative. An anesthesiologist, whose malpractice had previously contributed to a patient's death, obtained professional liability insurance with a \$500,000 policy limit. This amount, considering his specialty and past, was ridiculously low. A six-year-old boy suffered permanent brain damage as a principal result of the anesthesiologist's malpractice. At the mandatory settlement conference, plaintiff's counsel submitted an itemized list of past and future special damages totaling nearly seven million dollars. Soon thereafter, on the eve of trial, a 45 million dollar settlement demand was made. The plaintiff and the anesthesiologist entered into a settlement, a release from all liability in exchange for

tortious conduct aimed to injure the interests of nonsettling defendants.⁷⁵

Lower courts are given broad discretion to determine good faith but must follow a rule of thumb in their case-by-case determinations: "[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."⁷⁶ The "at time of settlement" language is important, for the policy of encouraging settlement would be substantially impaired if the lower courts were required to examine the settlement in any other context.⁷⁷

The court further attempted to clarify the application of the reasonable range test by way of example. It approved of the court's decision in *Widson v. International Harvester Co.*⁷⁸ *Widson* had the same statute of limitations problem as that in *Tech-Bilt*, but unlike Woodward-Clyde, the defendant in *Widson* paid plaintiff \$30,000 in settlement. The *Tech-Bilt* court quoted the *Widson* court's analysis and agreed that the \$30,000 payment represented a good faith settlement:

Substantial evidence supports the trial court's determination the amount of the settlement is in fact fair. Evaluations of Louetto's potential liability ranged from zero to 10 percent of plaintiff's recovery. Counsel for Louetto expressed the view that in the worst case Louetto's exposure would tally 25 percent. Evaluations of plaintiff's total recovery ranged from \$200,000 to \$750,000.

\$500,000 — the policy limits. This payment was only 1/9 of the demand for settlement, yet the anesthesiologist was the most culpable party. It was admitted that he had personal assets which could be used to cover any liability beyond the policy limits. Nevertheless, the superior court, relying primarily on the fact that full policy limits were tendered, found the settlement to be in good faith. The Court of Appeal for the Second District denied a petition for writ of mandate on the issue, even though section 877.6(e) specifically directs that this avenue of relief be pursued. *Medical Center of Tarzana v. Superior Court*, 2d Civ. No. B015283 (filed July 23, 1985) (LASC No. NWC 91074, Diane Wayne presiding). The writ denial may be indicative of the appellate court's reluctance to give the reasonable range level of review the teeth needed to effect any significant change. See *infra* notes 85-88 and accompanying text.

75. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

76. *Id.* at 499, 698 P.2d at 167, 213 Cal. Rptr. at 264 (quoting *Torres V. Union Pac. R.R.*, 157 Cal. App. 3d 499, 509, 213 Cal. Rptr. 825, 832 (1984)).

77. Often settlement agreements are consummated before discovery is completed; indeed, the future cost of litigation is one valid reason for settling a case. In such a case, it would be unduly burdensome for the court to either speculate as to what future discovery would unveil, or stay its decision of good faith until more discovery is conducted.

The *River Garden Farms* case is in accord. "In advance of a jury verdict, most cases permit only a rough assessment of value. When one tortfeasor chooses to settle and another chooses to litigate, inequality in the ultimate cost does not signalize bad faith." *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

78. 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984). This case, along with *Kohn v. Superior Court*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 73 (1983), and *Wysong & Miles Co. v. Western Indus. Movers*, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983), were atypical of recent court of appeal decisions in this area. Each court recognized the injustices that were occurring at the hands of the "tortious conduct" rationale, so these cases undertook an inquiry along the lines of a "reasonable range" test.

In such a factual context, it cannot be said the \$30,000 paid by Louetto was unreasonable.⁷⁹

Tech-Bilt has ended the legal dogfight over the proper test for good faith under Code of Civil Procedure sections 877 and 877.6.⁸⁰ Key words such as "proportionality" and "ballpark" have replaced the concept of tortious or collusive conduct. However, in the wake of this resolution, the factual dogfights begin.

VI. THE PRACTICAL APPLICATION OF THE REASONABLE RANGE TEST

From a procedural standpoint, nothing has changed. California Code of Civil Procedure section 877.6(a) still entitles *any party* to a hearing on the issue of good faith, provided notice is given at least twenty days before the hearing.⁸¹ The party asserting lack of good faith has the burden of proof on that issue.⁸² Any party aggrieved by the lower court's determination may petition the proper court to review the determination by writ of mandate.⁸³

However, the *Tech-Bilt* decision made section 877.6(b) much more crucial. That section provides: "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 evi-

79. *Tech-Bilt*, 38 Cal. 3d at 501, 698 P.2d at 168, 213 Cal. Rptr. at 265 (quoting *Widson v. International Harvester Co.*, 153 Cal. App. 3d 45, 58, 200 Cal. Rptr. 136, 145 (1984)). The case of *Wysong & Miles Co. v. Western Indus. Movers*, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983), was also approved. The analysis followed in *Tech-Bilt* and *Widson* was strongly advocated by Roberts, *supra* note 36, at 927.

80. Likewise, recovery agreements under CAL. CIV. PROC. CODE § 877.5 (West 1980) must pass the reasonable range test.

81. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1985). *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 442-43, 163 Cal. Rptr. 47, 53 (1980), indicated that the issue of the good faith settlement between the plaintiff and the settling tortfeasor should be tried separately and in advance of the trial of the tort issues, and upon motion of any party to the action should be tried as soon after the settlement as the court's calendar permits.

82. CAL. CIV. PROC. CODE § 877.6(d) (West Supp. 1985).

83. CAL. CIV. PROC. CODE § 877.6(e) (West Supp. 1985). Note that under section 877.6(e)(2),

If the court grants a hearing on the writ, the hearing shall be given special precedence over all other civil matters on the calendar of the court except those matters to which equal or greater precedence on the calendar is granted by law.

The running of any period of time after which an action would be subject to dismissal pursuant to Section 583 shall be tolled during the period of review of a determination pursuant to this subdivision.

Id.

dence at the hearing.”⁸⁴ It appears as though the issue of good faith will be won or lost “in the trenches” by way of explicit affidavits and declarations by counsel and experts at the “good faith” hearing. Moreover, since the court has discretion to receive other evidence to aid it in rendering a decision, the court’s experience and interest could make for unexpected requests at the hearing. Courts will, no doubt, wish to fill the record with pertinent, favorable information so as to insulate the decision from an unfavorable review on a writ proceeding. Those parties wishing to challenge the good faith of an agreement must be prepared for the “mini-trial” against which Chief Justice Bird has warned.⁸⁵

Perhaps the relevant inquiry, in terms of the practical applications of *Tech-Bilt*, is whether trial courts can survive under the burden of more complex section 877 hearings, and whether appellate courts will grant litigants’ writ petitions arising from misapplications of the reasonable range test. Thus far, however, it has been business as usual in the trial and appellate courts. One case, *Bolamperti v. Larco Manufacturing*,⁸⁶ while dealing with the question of whether a settling tortfeasor may pursue a cause of action for equitable indemnity against a nonsettling tortfeasor,⁸⁷ actually prioritized the goal of encouraging settlement over the goal of distributing fault equitably.⁸⁸ Old dicta, it appears, will die a long, slow death in this area.

The potential for added and more extensive hearings and writ proceedings makes the *Tech-Bilt* decision an unpopular one with most courts. Nonetheless, the supreme court has passed the torch to the lower courts. Whether the lower courts will carry the spirit of *Tech-Bilt* into their arena remains to be seen.

VII. *TECH-BILT* AND SLIDING SCALE RECOVERY AGREEMENTS

The *Tech-Bilt* case also redefined the standard by which sliding scale recovery agreements are scrutinized. The reasonable range test, as applied to these agreements, poses unique problems that must be addressed, and are currently being addressed in both the appellate courts and the supreme court. While there are patent differences between sliding scale recovery agreements and other types of settlement agreements, the key distinction between an ordinary settle-

84. CAL. CIV. PROC. CODE § 877.6(6) (West Supp. 1985).

85. See *supra* note 71 and accompanying text.

86. 164 Cal. App. 3d 249, 210 Cal. Rptr. 155 (1985).

87. The court held that such a cause of action is permissible because the policy of encouraging settlement “is not hindered by allowing the settling tortfeasor to pursue its remedy In fact, the policy is enhanced.” *Id.* at 255, 210 Cal. Rptr. at 159. See also *Sears, Roebuck & Co. v. International Harvester, Inc.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

88. *Bolamperti*, 164 Cal. App. 3d at 252-53, 210 Cal. Rptr. at 159.

ment, such as the one in *Tech-Bilt*, and a sliding scale recovery agreement, lies in the inherent problems of determining good faith and placing a value on the guarantee given to the plaintiff. Before these problems are addressed, however, it is necessary to become acquainted with the mechanics and the history of the agreement in California.

A sliding scale recovery agreement is defined in California Code of Civil Procedure section 877.5(b) as follows:

An agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, where the agreement 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. This includes, but is not limited to, agreements within the scope of Section 877, and agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant.⁸⁹

Section 877.5 represented the legislature's attempt to clean-up the so-called "Mary Carter" agreement.⁹⁰ The typical Mary Carter agreement has four essential features:

89. CAL. CIV. PROC. CODE § 877.5(b) (West 1980).

90. Mary Carter Agreements have been litigated often, and law reviews have devoted reams of paper to the subject. The term originated in the Florida case of *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973). The court, upon reversal, referred to the case of *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). See also *Breitreutz v. Baker*, 514 P.2d 17 (Alaska 1973); *City of Tucson v. Gallagher*, 108 Ariz. 140, 493 P.2d 1197 (1972); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973); *Gatto v. Walgreen Drug Co.*, 61 Ill. 2d 513, 337 N.E.2d 23 (1975), *cert. denied*, *Gatto v. Calumet Flexicore Corp.*, 425 U.S. 936 (1976); *Burkett v. Crulo Trucking Co.*, 171 Ind. App. 166, 355 N.E.2d 253 (1976); *General Motors Corp. v. Lahocki*, 286 Md. 714, 410 A.2d 1039 (1980); *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); *Lum v. Stinnett*, 87 Nev. 402, 483 P.2d 347 (1971); *Bedford School Dist. v. Caron Constr. Co.*, 116 N.H. 800, 367 A.2d 1051 (1976); *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354 (Okla. 1978); *Degen v. Bayman*, 86 S.D. 598, 200 N.W.2d 134 (1972); *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), *overruled*, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Vermont Union School Dist. v. H.P. Cummings Constr. Co.*, 143 Vt. 416, 469 A.2d 742 (1983); *Trampe v. Wisconsin Tel. Co.*, 214 Wis. 210, 252 N.W. 675 (1934); *Freedman, The Expected Demise of 'Mary Carter': She Never Was Well!*, 633 INS. L.J. 602 (1975); Note, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 ARIZ. L. REV. 863 (1977); Note, *'Mary Carter' Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988 (1974); Note, *The Mary Carter Agreement — Solving the Problems of Collusive Settlement in Joint Tort Actions*, 47 S. CAL. L. REV. 1393 (1974); Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiating*, 12 PAC. L.J. 121 (1980); Comment, *Mary Carter Agreements: A Viable Means of Settlement?* 14 TULSA L.J. 744 (1978-79); Annot., 65 A.L.R.3D 602 (1975).

1. The agreeing defendants must remain in the action in the posture of defendants;
2. The agreement must be kept secret;
3. The agreeing defendants guarantee to the plaintiff a certain monetary recovery regardless of the outcome of the lawsuit;
4. The agreeing defendants' liability is decreased in direct proportion to the increase in the nonagreeing defendants' liability.⁹¹

The opportunities for injustice abound with Mary Carter agreements,⁹² and these agreements have been criticized as "champertous, violative of public policy, and a distortion of the adversar[ial] relationship between plaintiffs and defendants which results in a collusive proceeding adversely affecting the nonagreeing defendant's right to a fair trial."⁹³ Therefore, in order to alleviate part of the collusive nature of the Mary Carter agreement, section 877.5 mandates that the court be promptly informed of such an agreement.⁹⁴ It also required that if the settling tortfeasor is called as a witness at trial, the jury be informed of the agreement.⁹⁵ Although the element of secrecy has been eliminated from sliding scale recovery agreements in California, an examination of a typical agreement reveals that the potential for unfairness continues to exist.⁹⁶

A typical sliding scale recovery agreement is set up as follows: The plaintiff is guaranteed a certain amount by one of the joint tortfeasor defendants in a lawsuit as a "settlement." If plaintiff recovers a sum

91. *Vermont Union School Dist. v. H.P. Cummings Constr. Co.*, 142 Vt. 416, 427, 469 A.2d 742, 748 (1983).

92. Indeed, some jurisdictions prohibit Mary Carter agreements entirely. *See, e.g.*, *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971); *Trampe v. Wisconsin Tel. Co.*, 214 Wis. 210, 252 N.W. 675 (1934).

93. *Cummings*, 143 Vt. at 428, 469 A.2d at 749. *See Grillo v. Burke's Paint Co.*, 275 Or. 421, 426, 551 P.2d 449, 452 (1976). *See also Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971).

94. CAL. CIV. PROC. CODE § 877.5(a)(1) (West 1980) states, "The parties entering into any such agreement or covenant shall promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions"

95. CAL. CIV. PROC. CODE § 877.5(a)(2) (West 1980) states,

If the action is tried before a jury, and a defendant party to the agreement is a witness, 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.

The jury disclosure herein required shall be no more than necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.

Id.

96. Constitutional challenges to section 877.5 on the basis of due process and equal protection grounds have been unsuccessful. *See City of Los Angeles v. Superior Court*, *vacated opinion at*, 206 Cal. Rptr. 674 (1984), *reh'g granted and case retransferred*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986).

greater than the figure agreed upon, the guaranteeing defendant pays nothing and, so long as the sliding scale agreement is determined to be in good faith,⁹⁷ any claim for partial or comparative indemnity or equitable comparative contribution against the settling defendant is barred.⁹⁸ If plaintiff recovers nothing at trial from the nonsettling defendants, the guaranteed amount must be paid by the settling defendant. If any portion of the guaranteed amount is recovered by plaintiff at trial, the settling tortfeasor must pay the difference between that amount and the guaranteed amount. The settling tortfeasor normally reserves the right to reject any settlement between plaintiff and any other tortfeasor,⁹⁹ or the agreement contains a contingency clause that renders the agreement null and void in the event the plaintiff settles with a nonguaranteeing defendant.¹⁰⁰ There are variations on this theme, most notably "no interest loans" paid to plaintiff by a settling defendant that are held not to be in

97. The good faith standard for sliding scale recovery agreements is identical to that of any other settlement agreement. *Tech-Bilt* has reaffirmed this rule. See *supra* notes 42 and 63.

98. See CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1985). Note that a settling tortfeasor may pursue a claim for equitable indemnity against a nonsettling tortfeasor should he choose to do so. *Bolamperti v. Larco Mfg.*, 164 Cal. App. 3d 249, 255, 210 Cal. Rptr. 155, 158-59 (1985).

99. See, e.g., *Burlington N. R.R. v. Superior Court*, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982).

100. See, e.g., *Riverside Steel Constr. Co. v. W.H. Simpson Constr. Co.*, 171 Cal. App. 3d 781, 786-87, 217 Cal. Rptr. 569, 572 (1985). The agreement in this case provided (in pertinent part) as follows:

"FOR AND IN CONSIDERATION of the sum of THREE HUNDRED FIFTY THOUSAND & NO/100 (\$350,000.00) [Exclusive of any Workers' Compensation Lien], as a Guarantee against any verdict rendered against defendant RIVERSIDE STEEL plaintiff, ROBERT E. SEWARD, . . . release[s] . . . WILLIAM H. SIMPSON CONSTRUCTION COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, . . . from any and all claims, actions, causes of action, . . . which the undersigned now have or which may hereafter accrue on account of . . . the accident, casualty or event which occurred on the 11th day of September, 1978, at or near the Allstate Savings building under construction in the City of Glendale

"Said guarantee is to operate as follows:

1. In the event plaintiff obtains a verdict against RIVERSIDE STEEL in the amount of \$350,000.00 or above, defendant SIMPSON will owe plaintiff nothing;

2. In the event of a defense verdict in favor of RIVERSIDE STEEL and against plaintiff, SIMPSON will pay plaintiff \$350,000.00;

3. In the event of a verdict in favor of plaintiff SEWARD and against de-

good faith.¹⁰¹ As previously mentioned, upon entering into a binding sliding scale recovery agreement,¹⁰² court notification is required.¹⁰³

The potential for unfairness with such an agreement, with or without legislative approval, is obvious.¹⁰⁴ A clear example is when, by the terms of the agreement, a settling party remains a defendant at trial.¹⁰⁵ A defendant who enters into a sliding scale recovery agreement and remains a party to vindicate his "professional reputation" has an interest not in a defense verdict, but rather, in a plaintiff's verdict in excess of the guaranteed amount, thereby protecting his bank account.

Moreover, this settling defendant remains an ostensible adversary of the plaintiff at trial even though there is no actual controversy remaining between the parties. Granted, if a settling defendant is called as a witness, then the existence and content of the agreement is disclosed to the jury.¹⁰⁶ However, disclosing the agreement may also send a message to the jury that there was in fact culpability on the part of the defendants, thus impaling the nonsettling tortfeasor on the horns of a dilemma. In addition, plaintiff may use leading

fendant, RIVERSIDE STEEL, in an amount less than \$350,000.00, SIMPSON will pay plaintiff the difference between the verdict and \$350,000.00.

"Plaintiff is to dismiss, with prejudice, the complaint filed against SIMPSON, and each side to this agreement is to bear their own costs.

"The foregoing agreement is contingent on the following:

1. That the Court determine the above settlement to be in 'GOOD FAITH';

2. That the Court order RIVERSIDE's cross-complaint against SIMPSON dismissed in its entirety;

3. That in the event plaintiff chooses to settle with RIVERSIDE prior to a verdict, for a sum less than \$350,000.00, the above Guarantee becomes null and void. SIMPSON may, at its option, attempt to settle with plaintiff for a sum that will not exceed the difference between the settlement with RIVERSIDE and \$350,000.00;

4. In the event plaintiff chooses to settle with RIVERSIDE prior to a verdict for the sum of \$350,000.00, or above, defendant SIMPSON will pay nothing."

Id.

101. See, e.g., *Abbott Ford, Inc. v. Superior Court*, 166 Cal. App. 3d 280, 285-86, 212 Cal. Rptr. 389, 392 (1985).

102. A finalized, unambiguous agreement is required to be presented for a determination of good faith. The settling party has the burden of proof on this issue. See *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 449, 163 Cal. Rptr. 47, 57 (1980).

103. CAL. CIV. PROC. CODE § 877.5(a)(1) (West 1980).

104. It is clearly a mistake to assume that legislative action in the form of codification of a statute is tacit approval of the status quo or unfairness. At times, a legislature will attempt to merely improve the particular unfair situation. Therefore, arguments in favor of Mary Carter agreements based on supposed legislative approval ignore the reality of the situation. No statute is above reproach.

105. The nonsettling party in *City of Los Angeles v. Superior Court*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986), raised this argument, but the court rejected it. The challenge was on due process grounds; a procedure that does not run afoul of due process is not necessarily an equitable situation for a litigant.

106. CAL. CIV. PROC. CODE § 877.5(a)(2) (West 1980).

questions in a direct examination of the settling defendant¹⁰⁷ and the settling defendant receives a share of the nonsettling defendant's peremptory challenges under Code of Civil Procedure section 601.¹⁰⁸ In any event, if a settling defendant remains a party, the opportunities for prejudice abound and the nature of the adversarial process is distorted.

Even if the settling defendant does not remain a party in the action, as is generally the case, the courts must still determine whether the agreement was made in good faith.¹⁰⁹ Before *Tech-Bilt*, courts of appeal applied the same "tortious conduct"¹¹⁰ test that had become prevalent in all good faith determinations.¹¹¹ Only one pre-*Tech-Bilt* case, *Torres v. Union Pacific Railroad*,¹¹² deviated from that trend. It is clear that the tortious conduct test was unsatisfactory in the sliding scale recovery agreement context for the same reason it was unsatisfactory under sections 877 and 877.6; the policy of settlement dominated the policy of equitable distribution of fault.¹¹³ The case of

107. CAL. EVID. CODE § 776(a) (West Supp. 1985) provides: "[a] party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness."

108. CAL. CIV. PROC. CODE § 601 (West Supp. 1985). Section 601 provides:

Challenges; kinds; number of peremptory challenges

Challenges are to individual jurors and are either peremptory or for cause.

Each party is entitled to challenges for cause.

If there are only two parties, each party shall be entitled to . . . six peremptory challenges. If there are more than two parties, the court shall, for the purpose of allotting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to . . . eight peremptory challenges. If there are several parties on a side, the court shall divide the challenges among them as nearly equally as possible

Id.

109. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1985).

110. See *supra* note 56 and accompanying text.

111. See, e.g., *Abbott Ford, Inc. v. Superior Court*, 166 Cal. App. 3d 280, 212 Cal. Rptr. 389 (1985); *City of Los Angeles v. Superior Court*, 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984), *on retransfer to* 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986); *Burlington N. R.R. Co. v. Superior Court*, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982); *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981). Compare *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). The *Torres* court cited *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498, 506 (1972), as controlling, and fashioned a standard for determining good faith along the lines of *Tech-Bilt*. *Tech-Bilt* cited *Torres* with approval. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 264. In the future, courts scrutinizing sliding scale recovery agreements must perform an analysis similar to that of *Torres*.

112. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

113. See *supra* notes 51-61 and accompanying text.

*Burlington Northern Railroad v. Superior Court*¹¹⁴ is illustrative.

In *Burlington*, an off-duty employee of Burlington was paralyzed when the door of a refrigeration car, owned by Burlington and manufactured by Paccar, Inc., fell on him. Burlington and plaintiff entered into a settlement agreement whereby plaintiff was guaranteed \$2 million at the end of all litigation.¹¹⁵ Paccar did not settle. Paccar challenged the good faith of the settlement, and the lower court found the settlement not to be in good faith because "it both ignored equitable apportionment and failed to promote settlement of litigation."¹¹⁶ The appellate court was mindful of the fact that if plaintiff received a judgment over \$2 million against Paccar at trial, an ostensibly culpable tortfeasor, Burlington, would pay nothing to plaintiff by the terms of the agreement. Also, Paccar would not receive partial indemnity from Burlington if the agreement was determined to be in good faith.¹¹⁷ However, the court stated that "[t]he settling parties are only bound to refrain from tortious or other wrongful conduct against the nonsettling parties."¹¹⁸ Because no tortious conduct was evident in the case, the agreement was considered to be in good faith.

Tech-Bilt, while expressly dealing with basic settlements under sections 877 and 877.6, implicitly dealt with sliding scale recovery agreements. The *Burlington* decision was disapproved in a footnote,¹¹⁹ and in the context of sliding scale recovery agreements, the tortious conduct test was abandoned for the reasonable range test.¹²⁰

VIII. PRACTICAL PROBLEMS IN DETERMINING THE GOOD FAITH OF A SLIDING SCALE RECOVERY AGREEMENT UNDER THE REASONABLE RANGE TEST.¹²¹

While the supreme court in *Tech-Bilt* has determined that the reasonable range test will apply to sliding scale recovery agreements under California Code of Civil Procedure section 877.5,¹²² the court

114. 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982).

115. *Id.* at 944, 187 Cal. Rptr. at 377. The agreement prevented plaintiff from settling with Paccar for less than \$2 million without Burlington's consent, and it required Burlington to pay the difference between \$2 million and the actual amount recovered by plaintiff against Paccar. Note that no minimum payment was contemplated and apparently no money was exchanged between plaintiff and Burlington. *Id.*

116. *Id.* at 944, 187 Cal. Rptr. at 377. This case is another example of the trial court comporting with the spirit of Code of Civil Procedure sections 877.5 and 877.6 and the appellate court disagreeing. See *supra* note 53.

117. *Id.* at 947, 187 Cal. Rptr. at 379.

118. *Id.* at 946, 187 Cal. Rptr. at 378.

119. *Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

120. *Id.* at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264.

121. The authors would like to acknowledge the input of Alan G. Martin, a partner in the law firm of Greines, Martin, Stein and Richland, Beverly Hills, California. His ideas form the basis for much of the remainder of this comment.

122. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263. This rule has been followed in *Abbott Ford, Inc. v. Superior Court*, 172 Cal. App. 3d 675, 218 Cal.

has yet to address the practical problems inherent in determining good faith in the sliding scale recovery agreement context.¹²³ The problem is clear: the actual amount of the recovery from the settlor can "slide" anywhere from zero to possibly millions of dollars. Because one of the factors used to determine good faith under the reasonable range test is the amount paid in the settlement,¹²⁴ a court attempting to determine the good faith of a sliding scale recovery agreement before trial¹²⁵ is faced with the unenviable task of determining the good faith of an agreement that could allow the guarantor to walk away scott free or sting the guarantor for millions. There are only two cases that address this issue in the context discussed by *Tech-Bilt*.

The first case, *Torres v. Union Pacific Railroad*,¹²⁶ was cited with approval in *Tech-Bilt*.¹²⁷ In *Torres*, a Union Pacific Railroad (hereinafter Union) employee sustained personal injuries while operating a bumper jack borrowed from Union. The defendants in the case were Union and Hallman, the manufacturer. An agreement was reached between plaintiff and Union whereby Union paid \$200,000 to plaintiff; \$50,000 was an outright settlement and the additional \$150,000 was to be repaid to Union in the event that plaintiff recovered at least \$150,000 from Hallman. In essence, plaintiff was guaranteed \$200,000 by Union. Ultimately, plaintiff also settled with Hallman for \$300,000. This made plaintiff's total recovery \$350,000: \$300,000 from Hallman and \$50,000 from Union. Hallman, contending that the \$50,000 settlement between plaintiff and Union was too low to withstand good faith scrutiny, challenged the agreement between plaintiff and Union.

The *Torres* court declined to follow *Burlington Northern Railroad*

Rptr. 605 (1985), *petition for review granted*, No. B007911 (Cal. Sup. Ct. Dec. 19, 1985), and *City of Los Angeles v. Superior Court*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986).

123. As a recent case has stated, "The law is not yet settled . . . as to what standards are to be used by the trial court in determining the good faith of a sliding scale recovery agreement." *Riverside Steel Constr. Co. v. William H. Simpson Constr. Co.*, 171 Cal. App. 3d 781, 795, 217 Cal. Rptr. 569, 578 (1985), *petition for review granted*, No. B006676 (Cal. Sup. Ct. Dec. 19, 1985).

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

125. This is the time the determination must be made. "[P]ractical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement." *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 167, 213 Cal. Rptr. at 264.

126. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

127. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 167, 213 Cal. Rptr. at 264.

v. Superior Court.¹²⁸ The court, reasoning that "the price of a defendant's settlement bears some relationship to the merits and values of the case against that defendant,"¹²⁹ held that Union's guarantee "was [a] fair settlement of Union's dispute with Torres."¹³⁰ To determine the fairness of this figure, the court examined the potential liabilities of the parties. The facts indicated that Hallman's liability was clearer than Union's.

Moreover, the court indicated that

where the settlement involves no tortious conduct or motive, the policy of promoting settlements will be indulged; any moderate disparity between a defendant's settlement price and his fair share of the damages will be tolerated, and the good faith requirement will cause the balance to tip in favor of settlement.¹³¹

This policy of erring in favor of settlement is consistent with *Tech-Bilt's* "in the ballpark" standard and helps to keep the policies of equity and settlement counterbalanced.¹³² It also aids the courts that are charged with determining good faith at the pre-trial stage of the case.

The *Torres* case is helpful to courts and to future litigants in that it presents a methodology approved by *Tech-Bilt* for determining good faith in the context of a sliding-scale recovery agreement. Nonetheless, it is disturbing in that the court could, and did, ultimately fall back on the \$50,000 actually paid to the plaintiff. The *Torres* case, for all practical purposes, merely begged the question as to what is a good faith sliding scale recovery agreement, especially when the settling defendant has made no minimum payment to the plaintiff.

The recent case of *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*,¹³³ decided after *Tech-Bilt*, also dealt with the problem of the good faith determination of a sliding scale recovery agreement. In *Riverside*, a union worker fell from the eighth floor of a building under construction. Plaintiff sued, among others, the general contractor, Simpson, and the subcontractor, Riverside. Plaintiff and Simpson entered into a sliding scale recovery agreement

128. 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982). See *supra* notes 114-19 and accompanying text for a discussion of *Burlington*.

129. *Torres*, 157 Cal. App. 3d at 508, 203 Cal. Rptr. at 831. The *Torres* court leveled the same criticism at *Cardio Systems* and *Burlington* that the court in *Tech-Bilt* did: "[t]he *Cardio Systems* and *Burlington* decisions go astray by ignoring the accommodating role of the good faith requirement and by adopting, albeit under protest, the undesirable extreme of promoting settlement at all costs. This error is founded upon an unreasonably narrow definition of the term good faith." *Id.* at 506, 203 Cal. Rptr. at 830.

130. *Id.* at 509, 203 Cal. Rptr. at 832.

131. *Id.* at 506, 203 Cal. Rptr. at 830.

132. *Id.* Accord *Tech-Bilt*, 38 Cal. 3d at 499-501, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

133. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569 (1985), *petition for review granted*, No. B006676 (Cal. Sup. Ct. Dec. 19, 1985).

which guaranteed plaintiff \$350,000,¹³⁴ but which did not call for a minimum payment to plaintiff. Riverside challenged the agreement as not being in good faith in light of *Tech-Bilt*.¹³⁵

The *Riverside* court acknowledged that the *Tech-Bilt* reasonable range test was to be applied in the context of sliding scale recovery agreements, but admitted that the method of applying the test was undetermined.¹³⁶ Nevertheless, the court made three important determinations in this area. First, the court held that no minimum payment is required as a matter of law in order to find a sliding scale recovery agreement to be in good faith.

Because the determination of whether it was in good faith requires the balancing of several factors among which but one is the total value of the agreement and not just focusing on the fact that Simpson did not unconditionally commit itself to pay a minimum unconditional amount of money, we conclude that Simpson's failure to do so does not render the sliding scale recovery agreement a bad faith agreement as a matter of law.¹³⁷

In *Riverside*, two trial judges valued plaintiff's case at \$350,000 — the ceiling amount of the agreement. However, because the nonsettling tortfeasor failed to raise proportionality at the trial level, the court did not consider that issue in light of the possibility that the guarantor may escape the mandate of California Code of Civil Procedure section 877.5 without paying a cent.¹³⁸ Moreover, the legislature enacted section 877.5 without such a minimum payment requirement; therefore, no such requirement is necessary.

Second, the court stated that good faith need not be determined by

134. For the full text of the agreement, see *supra* note 100.

135. *Riverside*, 171 Cal. App. 3d at 792, 217 Cal. Rptr. at 576. The supreme court could characterize much of the appellate court's discussion of sliding scale recovery agreements as dicta, because the court ultimately decided the case on the issue of Riverside's failure to meet its burden of proof. *Id.* at 797, 217 Cal. Rptr. at 579.

136. *Id.* at 795, 217 Cal. Rptr. at 578.

137. *Id.* at 797-98, 217 Cal. Rptr. at 579. See also *Rogers & Wells v. Superior Court*, 175 Cal. App. 3d 545, 552-53, 220 Cal. Rptr. 767, 773-74 (1985).

138. This factor is also important in determining the value of the agreement. See *infra* note 159 and accompanying text. The court indicated that the nonsettling party must do more than merely object to the agreement:

[A]n important additional factor which should be considered in determining the good faith of a settlement or sliding scale recovery agreement is what amount of money the party objecting to the determination of good faith then sets as the total value of the injured plaintiff's case for settlement purposes is, and what amount of money that party then stands ready to contribute toward an overall settlement.

Riverside, 171 Cal. App. 3d at 798, 217 Cal. Rptr. at 579-80 (emphasis in original). See also *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 449, 163 Cal. Rptr. 47, 57 (1980); *Rogers & Wells v. Superior Court*, 175 Cal. App. 3d 545, 553-54, 220 Cal. Rptr. 767, 773 (1985).

looking only at the minimum payment the settling tortfeasor would be obligated to pay.¹³⁹ Rather, "the settlor's proportionate share of liability [is but] one factor in determining whether a settlement is in good faith."¹⁴⁰ To contend otherwise would create a floor on the settling tortfeasors liability while leaving an open ceiling. Such a determination would unduly discourage settlements.

Third, the court reiterated the proposition alluded to in *Pease v. Beech Aircraft Corp.*,¹⁴¹ that "a sliding scale recovery agreement which does not provide for an unconditional minimum payment does not constitute a settlement unless a value is ascribed to the giving of the guarantee."¹⁴²

The *Riverside* court reasoned that if no consideration passed from settlor to plaintiff, and if a judgment is rendered against the nonsettling defendant, then the nonsettling defendant has no dollar amount to claim as an offset against the "settlement" between plaintiff and settlor.¹⁴³ The so-called "settlement" between plaintiff and the guarantor is not evidenced by monies changing hands. For this reason, the *Riverside* court considered the agreement between plaintiff and Simpson not to be a settlement.

The court hinted at an alternative to leaving the nonsettling tortfeasor holding the entire bag, but did not pursue the analysis. The petition for hearing to the supreme court in this case was granted, and perhaps that court will take the opportunity to answer the question yet to be meaningfully addressed in California — the question of if and how the guarantee given to plaintiff by the guarantor should be valued.¹⁴⁴

A. Valuation of the Guarantee

In the most practical terms, valuing the guarantee given in a sliding scale recovery agreement amounts to affixing a premium to a policy of insurance. That is, plaintiff, in exchange for a guaranteed

139. *Riverside*, 171 Cal. App. 3d at 794, 217 Cal. Rptr. at 577.

140. *Id.* See also *Rogers & Wells*, 175 Cal. App. 3d at 554, 220 Cal. Rptr. at 773 ("Petitioners have taken a simplistic approach by saying that because the sliding scale agreements could result in no liability, they have no value.").

141. 38 Cal. App. 3d 450, 473, 113 Cal. Rptr. 416, 431-32 (1974).

142. *Riverside*, 171 Cal. App. 3d at 795, 217 Cal. Rptr. at 578.

143. *Id.* CAL. CIV. PROC. CODE § 877(a) (West 1980) entitles the nonsettling tortfeasor to offset the judgment in plaintiff's favor by the amount paid in settlement by other tortfeasors. But see *infra* note 146 and accompanying text.

144. Note that a rehearing has recently been completed in the case of *Abbott Ford, Inc.*, v. Superior Court, 166 Cal. App. 3d 280, 212 Cal. Rptr. 389 (1985). See *Abbott Ford, Inc. v. Superior Court* (Abbott Ford II), 172 Cal. App. 3d 675, 218 Cal. Rptr. 605 (1985), petition for review granted, No. B007911 (Cal. Sup. Ct. Dec. 19, 1985). While the court ostensibly applied the *Tech-Bilt* reasonable range test during rehearing, and once again held the agreement to be in good faith, no discussion of the valuation of the agreement was undertaken.

amount of recovery, agrees to dismiss his case against the guaranteeing tortfeasor. Thus, the risk of no recovery has been eliminated. For this risk elimination, plaintiff necessarily must pay a price. The soundness of the argument that a value should be placed on such a guarantee, for reasons of equity, is clear. Plaintiffs unhesitatingly admit that the primary purpose behind these agreements is "to obtain assurance that grievous permanent injuries will be compensated and to mitigate the uncertainties of the litigation process and the debilitating emotional drain which [their] case inflicts upon [them]."¹⁴⁵ For this assurance and peace of mind, fairness and equity dictate that the amount of judgment rendered against the nonsettling tortfeasors be offset by the value of the guarantee as determined by the court.

The argument that any amount in a sliding scale recovery agreement is too speculative to be valued is without merit. The value of the guarantee is the gravamen of the determination of good faith under the reasonable range test for sliding scale recovery agreements. If the value is speculative for valuation purposes, then it must also be speculative for determining good faith; hence, any guarantee that is too speculative to be valued must also fail the *Tech-Bilt* reasonable range test of good faith. Therefore, the arguments asserted by opponents of valuation, if true, ironically would be the death knell of the entire good faith determination of such agreements.¹⁴⁶

Moreover, there is no statutory dissonance created by such a valuation. On the contrary, California Code of Civil Procedure section 877(a) provides that a settlement agreement, including a sliding scale recovery agreement, "shall reduce the claims against the other [non-settling tortfeasors] in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater."¹⁴⁷

The court in *Riverside Steel Construction Co. v. William H. Simp-*

145. *Abbott Ford*, 166 Cal. App. 3d at 285, 212 Cal. Rptr. at 392 (emphasis added). See also *City of Los Angeles*, 206 Cal. Rptr. at 678.

146. Likewise, if a sliding scale recovery agreement is not a "settlement" at all, see *supra* notes 141-43, then it is both semantically and logically impossible for a "settlement in good faith" to occur under these circumstances as per Code of Civil Procedure section 877 and 877.6. While this result is the desired one, if the courts are unwilling to value the guarantee and offset against any judgment obtained by the plaintiff, such a finding ignores the plain language at section 877 and the analysis. See *infra* note 147 and accompanying text.

147. CAL. CIV. PROC. CODE § 877(a) (West 1980) (emphasis added).

son Construction Co.¹⁴⁸ recognized the soundness of this argument:

The value of the guarantee is obviously worth a determinable amount as is perhaps best illustrated in the analogous situation where a person buys liability insurance and is willing to pay a 'premium' to have the insurance company agree to discharge his legal liability or to indemnify him in the event of a loss. That agreement of the insurance company has a large value to the insured for which he is willing to pay a premium even though he realizes that the probabilities are that the insurance company will not have to pay anything to discharge its responsibility to him in any given policy year.¹⁴⁹

In addition, because the value of the guarantee is the primary consideration passing between the plaintiff and the guarantor tortfeasor for valuation purposes when there is no minimum payment,¹⁵⁰ the determination of good faith is inextricably tied to the value assigned to the guarantee. It is clear that when the court attempts to determine whether a sliding scale recovery agreement is entered into in good faith, a two step process must be undertaken. First, the court must value the guarantee, and second, the court must determine whether the value assigned to the guarantee satisfies the reasonable range test of *Tech-Bilt*.

No case in California has attempted to place a specific dollar figure on a sliding scale recovery agreement as of yet. However, the reasonable range test has provided the appellate courts with sufficient guidelines to do so.¹⁵¹ *Tech-Bilt* recognized numerous factors which should be balanced in arriving at a reasonable range, and ultimately, a determination of good faith.¹⁵² However, the court must consider three factors in the context of sliding scale recovery agreements: 1) the amount guaranteed in relation to the aggregate value of plaintiff's case;¹⁵³ 2) the proportionate liability of the guarantor in relation

148. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569 (1985). A petition for hearing to the Supreme Court was granted in this case on December 19, 1985. See also *Rogers & Wells*, 125 Cal. App. 3d at 553-54, 220 Cal. Rptr. at 773.

149. *Riverside Steel*, 171 Cal. App. 3d at 794, 217 Cal. Rptr. at 577. Accord *Rogers & Wells*, 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985).

150. Another form of consideration possible in a sliding scale recovery agreement is the interest and origination fees associated with loans in a typical loan transaction. Sliding scale recovery agreements in the past have provided for no-interest loans to plaintiff from the guarantor tortfeasor. See *Abbott Ford*, 166 Cal. App. 3d at 286, 212 Cal. Rptr. at 392. Had plaintiff pursued the same loans in the ordinary financial marketplace, depending upon the credit risk, the interest and origination fees could amount to a substantial sum, provided, of course, a lender is found. These amounts could be valued, and offset against any judgment rendered against a nonsettling tortfeasor. The I.R.S. has recognized the concept of imputed interest in other circumstances. See 26 U.S.C.A. § 7872 (West Supp. 1985).

151. It is becoming increasingly clear that appellate courts are unwilling to adhere to the spirit of *Tech-Bilt* in determining good faith. A very recent example is *Abbott Ford II*, 172 Cal. App. 3d 675, 218 Cal. Rptr. 605 (1985). In this case, the court ostensibly conducted a *Tech-Bilt* analysis of a sliding scale recovery agreement, but ignored any valuation issue. The supreme court has granted review of the case.

152. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

153. This factor has been adapted from *Tech-Bilt* to fit the unique nature of sliding scale recovery agreements. See *id.*

to all tortfeasors;¹⁵⁴ and 3) the plaintiff's overall likelihood of success in obtaining a judgment against all defendants.¹⁵⁵ These three factors must be weighted separately in light of the facts of a given case. While one factor may weigh heavily enough to make up for another that is weak, in general, a single strong factor should never be sufficient if there are two that are weak. A brief evaluation of the three factors will make their proposed application clear.

The amount guaranteed in relation to the total value of plaintiff's case is determined first by valuing the plaintiff's case as against all tortfeasors and then comparing it to the ceiling amount guaranteed by the guarantor. In terms of good faith, the closer the guaranteed amount approaches the estimated total value of plaintiff's case, the stronger the argument that the agreement is in good faith. Thus, if \$3 million is guaranteed and plaintiff's case is valued at \$3 million, then this individual factor points strongly in favor of a good faith determination.¹⁵⁶ However, as already stated, no one factor, should be able to satisfy the reasonable range test.¹⁵⁷

154. This factor is identical to the factor enunciated in *Tech-Bilt* for use in determining good faith in traditional settlement agreements. *Id.* See also *Rogers & Wells*, 175 Cal. App. 3d at 553, 220 Cal. Rptr. at 772-73 (the court recognized this factor in its analysis).

155. This factor was not mentioned in the *Tech-Bilt* opinion, but it is essential to a good faith evaluation procedure in the context of sliding scale recovery agreements. Clearly, the value of a guarantee when liability is conclusive against the remaining tortfeasors is much less than if the liability is doubtful against the remaining tortfeasors. Since obtaining assurance of recovery and mitigating uncertainties is a primary motivation for plaintiffs in entering into sliding scale recovery agreements (see *supra* note 145 and accompanying text), the absence of this factor from a good faith determination eliminates a very important aspect of the consideration for which non-settling tortfeasors are entitled to offset. The valuation procedure cannot ignore this crucial factor.

156. From a practical standpoint, it would be very unlikely that a guarantor would agree to guarantee a sum tremendously in excess of the total estimated amount of plaintiff's case. Therefore, it is assumed that a guarantee equal to the total value of plaintiff's case is the strongest this factor can be.

157. A diversion into logic will prove this point. If each of the three factors delineated in the text ((1) the amount guaranteed in relation to the estimated value of the case (or, for simplicity, AG); (2) the proportionate fault of the guarantor (PF); and (3) the plaintiff's likelihood of success as against all defendants (LS)) were quantified ranging from 1 to 10 in any given case, then each and every combination of factors and quantification could be represented by a truth table of sorts to arrive at a numerical representation of the amount of good faith in every conceivable sliding scale recovery agreement. As to the numbers assigned, one would represent the situation when an individual factor was least likely in good faith (i.e., when the ratio of the amount guaranteed to the estimated value of the case is low; when the proportionate fault of the guarantor is high; when the likelihood of plaintiff's success is high) and ten would represent the situation when an individual factor was most likely in good faith (i.e., when the amount guaranteed equals the estimated value of the case; when the proportionate

The proportionate liability of the guarantor in relation to all tortfeasors is measured on a percentage basis. The nearer the proportionate liability of the guarantor gets to 100%, the argument that the guarantee is in good faith becomes weaker. This is because the policy of distributing fault equitably, a policy reprioritized by *Tech-*

fault of the guarantor is low; when the likelihood of plaintiff's success is low) and six would represent the middle of these extremes.

	AG	PF	LS	TOTAL
†	H=10	H=1	H=1	12
†††	H=10	H=1	M=6	17
*	H=10	H=1	L=10	21
	H=10	M=6	H=1	17
	H=10	M=6	M=6	22
*	H=10	M=6	L=10	26
*	H=10	L=10	H=1	21
***	H=10	L=10	M=6	26
**	H=10	L=10	L=10	30
†	M=6	H=1	H=1	8
	M=6	H=1	M=6	13
	M=6	H=1	L=10	17
	M=6	M=6	H=1	13
	M=6	M=6	M=6	18
	M=6	M=6	L=10	22
*	M=6	L=10	L=10	26
††	L=1	H=1	H=1	3
†	L=1	H=1	M=6	8
†	L=1	H=1	L=10	12
†	L=1	M=6	H=1	8
	L=1	M=6	M=6	13
	L=1	M=6	L=10	17
†	L=1	L=10	H=1	12
	L=1	L=10	M=6	17
*	L=1	L=10	L=10	21

* these cases have two of the three factors on the end of the scale that indicate good faith.

† these cases have two of the three factors on the end of that scale that indicate lack of good faith.

** this case received the highest rating in favor of good faith.

†† this case received lowest rating in favor of good faith.

The chart indicates that if each of the three factors are weighed in equal proportion to one another, and if any two factors are strong, then the value of the recovery agreement should be in the *Tech-Bilt* "ballpark." Conversely, if any two of the factors are weak, then the value of the recovery agreement should never lie in the *Tech-Bilt* "ballpark." Reality bears out these results. The strongest factual scenario in favor of good faith (represented as **) is one in which the amount guaranteed is the estimated value of plaintiff's case, the proportionate fault of the guarantor as against all defendants is low, and the likelihood of success as against all defendants is high. The weakest factual scenario is one in which the amount guaranteed to plaintiff is low as compared to the value of plaintiff's case, the proportionate fault of the guarantor is high, and the plaintiff's likelihood of success is high. Courts would have no trouble finding the former in good faith and placing a high value on such a guarantee, but courts would have trouble finding the latter to be in good faith. Most cases are not this extreme, however, so a realistic rule of thumb for the courts would be to find any agreement with two strong factors to be in good faith, and to find any agreement with two weak factors not to be in good faith.

Bilt, cannot be satisfied if, for example, a 90% at fault tortfeasor makes a guarantee that a judgment will be had against a 10% at fault tortfeasor.¹⁵⁸ Viewed conversely, the lower the estimated percentage of fault of the guarantor, the stronger this factor appears to satisfy good faith. This was precisely the case in *Rogers & Wells v. Superior Court*.¹⁵⁹ It is offensive to the most basic notions of fundamental fairness that a tortfeasor who knows he was the primary cause of the plaintiff's injury should be permitted to guarantee a recovery against a tortfeasor whose culpability is grossly out of proportion to his own and not be required to pay a substantial up-front cash settlement in addition to the guarantee.

The plaintiff's overall likelihood of success as against all tortfeasors, like the proportionate liabilities of the tortfeasors, is an estimate made by parties in all types of tort cases. In terms of valuation, it is clear that the value of the guarantee is influenced by the plaintiff's likelihood of success. A guarantee in a case where liability is questionable or even negligible, is worth much more to the plaintiff than is a guarantee in a case where liability is conclusive. Hence, as the likelihood of plaintiff's success rises, the value of the guarantee diminishes. Therefore, this factor cannot be overlooked by a court in either determining good faith or valuing the guarantee.¹⁶⁰

These three factors interact in any given case so as to make no two cases alike. *Burlington Northern Railroad v. Superior Court* is a good example.¹⁶¹ Burlington guaranteed plaintiff \$2 million at the end of all litigation. In order to properly analyze the good faith of the guarantee in light of *Tech-Bilt*, the court would have to first determine whether the value of the Burlington guarantee was within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. To arrive at a dollar

158. While no one of the three factors by itself should be the death knell of a sliding scale recovery agreement, this 90% guarantor and 10% remaining tortfeasor scenario is most often played out in reality by an underinsured 90% culpable tortfeasor and a deep pocket 10% tortfeasor. Such a situation should be frowned upon due to *Tech-Bilt's* stated policy of promoting equitable distribution of fault. At the very least, this situation would also require a substantial cash payment in addition to the guarantee.

159. 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985) (sliding scale recovery agreement entered into by defendants whose proportionate liability was low and the amount guaranteed was \$2.4 million was in good faith).

160. Exact proportions or percentages cannot be placed on these factors with pinpoint precision. However, courts should be in favor of settlement to compensate for the potential inconclusiveness. See *supra* note 132, 154, and accompanying text. Nevertheless, each of the three factors must be carefully considered.

161. 133 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982). See *supra* notes 114-18 and accompanying text.

figure for this value the court would have to consider: 1) the proportionate fault of Burlington (PF); 2) the amount of the guarantee in relation to the estimated total value of plaintiff's case (AG); and 3) the likelihood of plaintiff's success against all tortfeasors (LS). Note once again that courts would rather err in favor of settlements when there is a moderate disparity between the value of the guarantee and the guarantor tortfeasor's proportional fault.¹⁶² Suppose that, as in the *Riverside*¹⁶³ case, two judges experienced in settlement valuation viewed the *Burlington* case as being worth \$2 million to plaintiffs (AG factor high), and that Burlington's proportional fault was estimated to be 10% (PF factor low), and that a judgment against Paccar was reasonably possible (LS factor medium).¹⁶⁴ In this case, to find the agreement to be in good faith, the court would have to find the value of the agreement to be "in the ballpark" of \$200,000.¹⁶⁵

Such a determination would be likely, since Burlington (in this hypothetical) is only 10% at fault (PF factor low), and the guaranteed total recovery of \$2 million is accurate (AG factor high); thus it satisfies the rule of thumb that if two factors are strong, then the agreement should be determined to be in good faith. A reasonable value for this guarantee of \$150,000¹⁶⁶ would be possible in this case, and the sliding scale recovery agreement, with no minimum payment, would be in good faith under the reasonable range test of *Tech-Bilt*. The result for the nonsettling defendant would be an offset of \$150,000 (this was the predetermined good faith valuation of the guarantee), regardless of the judgment amount in plaintiff's favor. Should the plaintiff lose, the guaranteeing tortfeasor must pay plaintiff two million dollars.

162. See *supra* note 132 and accompanying text. Of course, what constitutes a "moderate disparity" actually depends on the nature of the case and the disposition of the judge deciding the issue.

163. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569 (1985), *petition for review granted*, No. B006676 (Cal. Sup. Ct. Dec. 19, 1985).

164. See *supra* note 156. This scenario is represented by the symbols *** on the chart. Note that, according to the chart, this scenario is in good faith.

165. The court, when ascertaining the value of the guarantee, should be permitted to consider intangibles such as the particular economic condition of plaintiff and plaintiff's attorney, the overall experience and desire on the part of plaintiff's attorney to settle the case to avoid trial, and the guarantor's financial position, vis-a-vis insurance coverage and general economic health. The reason is clear: the value of the guarantee may be adjusted upward if a party to the agreement demonstrates an unusual need to settle. Of course, the conduct of the parties must not approach the level of fraud, collusion or other tortious conduct. See *supra* note 75 and accompanying text. For example, some plaintiff's lawyers in a given case would rather have a \$5 million sliding scale recovery agreement from a tortfeasor than an outright settlement of \$1 million. Does this mean that the value of the guarantee is \$1 million?

166. The \$150,000 figure is chosen arbitrarily to illustrate how the *Tech-Bilt* "ballpark" comes into play.

It would be wise for a cautious plaintiff and settlor to pre-assign a value to the guarantee at the time of its inception, so as to make the trial court's job easier and to avoid future conflicts.¹⁶⁷ A sliding scale recovery agreement with a pre-assigned value requires only that the trial judge determine if that value is within the *Tech-Bilt* ballpark under the 877.6 analysis instead of applying the necessary valuation analysis. Moreover, this value assigned to the parties will not be per se unfair to the nonsettling defendant because the plaintiff and the settlor have conflicting interests as to the amount for which the guarantee is to be valued. The plaintiff will negotiate for a low-side valuation, because the value assigned to the guarantee will be offset dollar for dollar against any plaintiff's judgment under Code of Civil Procedure sections 877 and 877.6. The settlor, on the other hand, wants the value to be on the high side, so as to ensure a finding of good faith at the hearing, without which the settlor is left exposed to a suit for partial equitable indemnity by the nonsettling defendant under section 877. The tension between the two ought to promote fairness in the agreed value and streamline the valuation procedure.

The nonsettling defendant under these circumstances, may challenge the amount guaranteed as not being within the *Tech-Bilt* ballpark and present evidence that its value should be much higher¹⁶⁸ (remember, whatever value the guarantee is assigned is the amount of offset to which the nonsettlor is entitled). In the alternative, the nonsettlor may accept the value assigned but argue that this agreement does not satisfy the good faith standards delineated in *Tech-Bilt*. This broader challenge is much more risky since the trial courts will be looking for evidence of lack of good faith.

It is clear from the analysis that not all guarantors will be able to escape without a minimum payment. Suppose that Burlington was estimated to be 90% at fault rather than only 10% (PF now high). The valuation of the agreement, in order to be in good faith, must be "in the ballpark" of \$1.8 million.¹⁶⁹ In this case, a guarantee for \$2 million with no minimum payment would be far from the type of

167. A court could interpret this requirement to be mandatory in this context because the settlor has the initial burden of showing there has been a settlement. See *supra* notes 102, 143, and accompanying text.

168. See *supra* note 138. This scenario is typical of a case in which an underinsured tortfeasor and a deep-pocket tortfeasor (e.g., a municipality) are involved as defendants. It is also the clearest case for requiring a substantial payment in addition to the guarantee.

169. See *supra* note 156. This scenario is represented by the symbols (†††) on the chart. Note that this scenario, according to the chart, fails the good faith test.

guarantee required under the reasonable range test, especially if plaintiff's likelihood of success against the remaining defendant is high.¹⁷⁰ More likely than not, a sliding scale recovery agreement would be inappropriate for this defendant.¹⁷¹

The result of applying this method of valuing guarantees made by settling tortfeasors would be to discourage unfair sliding scale recovery agreements. Discouraging unfair sliding scale recovery agreements was the purpose behind the enactment of section 877.5; but that section only addressed the tip of the iceberg. The valuation system proposed in this comment would bring about significant changes both in terms of fairness and the potential use of this mode of settling lawsuits. Any requiem for the defense of unfair sliding scale recovery agreements would be a forgotten melody when compared to the overture of equity in valuing the guarantee fairly. However, the future of this type of agreement may be in doubt if courts mandate the valuation scheme. All the intangibles relating to valuation and offset could discourage tortfeasors from gambling against the substantial risk that equity courts, in hearings on good faith, will force them to pay a fair price for the peace of mind purchased in a sliding scale recovery agreement. Nonetheless, it is better to promote fairness between all litigants than to allow culpable tortfeasors to gamble at a nonsettlor's expense.

IX. CONCLUSION

Tech-Bilt has answered many questions in the area of settlements between multiple tortfeasors. The schism in the appellate courts in California has been mended, and in the wake of the confusion, the reasonable range test has appeared once again. It is unclear at this juncture what the trial courts and the appellate courts will do with the test. Previous case law was indicative that the policy of encouraging settlement and the tortious conduct test were favored by those courts because of advantages in expedited litigation and ease in application. It is also unclear whether the good faith determination hearings will become the mini-trials that Chief Justice Bird predicted they would become. In essence, though the law has been settled, the practical application of the reasonable range test has yet to gel.

The sliding scale recovery agreement has been affected dramatically by *Tech-Bilt*. But the key to a good faith determination of such an agreement lies in the valuation of the guarantee between the

170. See *supra* note 156. This scenario is the first line of the chart. Note that with two weak factors, a good faith determination is not possible under the rule of thumb.

171. There are other imaginable cases which would present far more difficult problems from an analytic standpoint. Such cases are those not designated by a * or a † on the chart. See *supra* note 156. When courts are faced with these situations, other factors mentioned in *Tech-Bilt* could tip the balance one way or the other.

plaintiff and the guarantor tortfeasor, a subject yet to be addressed by the supreme court. Though courts will err in favor of settlement in all cases, a diligent valuation effort by the trial court or by the settling parties themselves, will promote fairness and equity in sliding scale recovery agreements by vindicating "ballpark" proportionality, yet will provide no sanctuary to the worthless guarantee.

The *Tech-Bilt* decision was a step in the right direction. Unfortunately, this step is only one of many needed to put California back on the path of fairness for all litigants.

EMERY J. MISHKY
ROBERT TESSIER
PATRICK G. VASTANO

