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THE "GOOD FAITH" SETTLEMENT: AN ACCOMMODATION OF COMPETING GOALS

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I. INTRODUCTION

The "good faith" settlement is a vehicle by which a joint tortfeasor can free himself from the obligation to pay his proportionate share of plaintiff's damages. In *American Motorcycle Association v. Superior Court*,[1] the California Supreme Court applied the doctrine of comparative negligence to multi-party cases. The court held that although the doctrine of joint and several liability remained in full force,[2] the liability for the plaintiff's losses should be apportioned among the tortfeasors on the basis of comparative fault.[3] This apportionment could be made under the theory of partial indemnity[4] whereby a tortfeasor who had paid more than his allocable share could recover the excess from his joint tortfeasors. However, the court allowed one important exception; a tortfeasor who had previously entered into a "good faith" settlement with the plaintiff would be released from claims by his fellow tortfeasors for partial indemnity.[5] Not every settlement would constitute a release—only a settlement that was in "good faith."

A. Summary of the Article

This article focuses on what type of settlement between one tortfeasor and the plaintiff should be determined to be in "good faith" so as to discharge that settling tortfeasor from liability for his proportionate share of the plaintiff's judgment. Its purpose is to examine the issue within the parameters of current legislation and California Supreme Court opinions. The article advocates no legislative change or change in the rules articulated by the supreme court. Rather, it recommends an approach to the "good faith" issue within these estab-

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1. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
2. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.
3. *Id.* at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.
4. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.
5. *Id.* at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

lished guidelines. Part II traces the theories of apportionment of fault and discusses the effect of a settlement on such apportionment. Part III serves three purposes. First, it provides an analysis of the important California cases dealing with the issue of a "good faith" settlement. Second, it illustrates the chronological progression of the definition of "good faith." It shows how the present definition resulted from each court in succession adding its own dicta to prior dicta until recent decisions have reached results which the courts themselves have admitted are inequitable. Third, it provides the framework for the analysis of the possible definitions of a "good faith" settlement found in the remainder of the article. Part IV proposes a methodology for defining "good faith," identifies the policy considerations relevant to an interpretation of a "good faith" settlement, and recommends that these policies be accommodated rather than ranked. Part V analyzes four possible definitions of "good faith" in terms of these policies and recommends a definition of a "good faith" settlement to be utilized by the courts. The test proposed by this article is that a settlement is in "good faith" if it falls within the reasonable range of the settlor's liability to the other parties. The components of the reasonable range test are discussed in Part V-D.

B. An Illustration of the Effect of a "Good Faith" Settlement

The effect of a finding that a settlement between the plaintiff and one of several alleged joint tortfeasors[6] has been made in "good faith" can be illustrated by the following example.

Assume that the plaintiff was injured and sued joint tortfeasors *A* and *B*. Under the comparative fault principles of *American Motorcycle Association v. Superior Court*,[7] the jury would determine the percentage of fault of each party. Let us suppose that the jury rendered a $100,000 judgment against both defendants and found that *A* was 80% at fault, *B* was 20% at fault and the plaintiff had no fault. The plaintiff could then recover the entire $100,000 from either co-defendant under the rules of

6. The term "joint tortfeasors" is used today to encompass both tortfeasors acting in concert, which was its original meaning, and tortfeasors who, though acting independently, cause an individual injury (also called "concurrent tortfeasors"). Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 282-83, 188 Cal. Rptr. 580, 582 (1983); Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Association v. Superior Court, 30 HASTINGS L.J. 1464, 1482 (1979) [hereinafter cited as Fleming]. The term "joint tortfeasors" as used in Code of Civil Procedure § 877.6(c) (West Supp. 1984) embraces joint, concurrent, and successive tortfeasors. *Turcon Constr.*, 139 Cal. App. 3d at 283, 188 Cal. Rptr. at 582.

7. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

joint and several liability.[8] Assume that the plaintiff chose to collect the entire judgment from *B*. Defendant *B* could then by way of a separate action or a cross-complaint for partial indemnity[9] recover from *A* the amount equal to *A's* proportionate share of the loss, or $80,000. Even if the plaintiff chose to sue only *B* without naming *A* as a co-defendant the result would be the same. *B* could cross-complain against *A* for partial indemnity in the same action[10] or seek partial indemnity from *A* in a separate action.[11] In either event, *B* would have the right to recover *A's* proportionate share of the judgment from *A*. *B* would end up being out of pocket $20,000 for plaintiff's injuries, and *A* would be out of pocket $80,000. Each of the tortfeasors would have paid an amount equivalent to his percentage of fault.

However, when there is a settlement between the plaintiff and one joint tortfeasor, that settling tortfeasor may end up paying less than his proportionate share of the plaintiff's ultimate recovery.[12] If that settlement is determined to be in "good faith," the other joint tortfeasors may seek no partial indemnity from the settling joint tortfeasor.[13] The dollar amount of the settlement is deducted from the amount the plaintiff may recover against the other joint tortfeasors, but the remaining joint tortfeasors will be required to pay the balance of the plaintiff's judgment without any right to partial indemnity from the settling tortfeasor.[14] In the above example, if the plaintiff settled in "good faith" with co-defendant *A* for $10,000 and the jury entered the same judgment of $100,000 in the trial against nonsettling co-defendant *B*, the $10,000 judgment would be subtracted from the amount that plaintiff could recover against *B*, but *B* would be required to pay the entire remaining $90,000 to the plaintiff and would have no claims against *A*. Therefore, even though *B* was only 20% at fault, because of *A's* "good faith" settlement with the plaintiff, *A* would pay $10,000 or 10% of

8. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

9. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200. The term "partial indemnity" is used in *American Motorcycle* and will be used in this article. Other terms used to describe the same principle are "equitable indemnity" and "comparative indemnity."

10. *Id.*

11. E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 510, 579 P.2d 505, 513, 146 Cal. Rptr. 614, 622 (1978).

12. He could also pay more, but the issue of whether a settlement is in "good faith" presents itself only when the nonsettling tortfeasors think that the settling tortfeasor is paying less than his or her fair share.

13. CAL. CIV. PROC. CODE § 877 (West 1980); CAL. CIV. PROC. CODE § 877.6 (West Supp. 1984); *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199.

14. CAL. CIV. PROC. CODE § 877 (West 1980); *American Motorcycle*, 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

plaintiff's judgment and *B* would be forced to pay $90,000 or 90%.[15]

If the settlement is determined not to be a "good faith" settlement, then each tortfeasor bears his proportional share of the loss. Assuming *A* still wished to settle, which is unlikely, *B* could recover $70,000 from *A* in a suit for partial indemnity so that *B* would end up paying $20,000 and *A* would end up paying $80,000 ($10,000 in settlement and an additional $70,000 to *B*).

Therefore, each prejudgment settlement found to be in "good faith" affects the ultimate expense borne by each tortfeasor. Absent any settlement, all defendants are liable in direct proportion to their respective degree of fault. By settling before judgment, one tortfeasor may discharge his entire liability by contributing less than his proportionate share, leaving the other defendants saddled with the entire judgment reduced only by the amount of the settlement. The cheaper the settlement, the smaller the reduction. Thus, the remaining tortfeasors have a definite and calculable financial interest in the amount of any settlement.

Because only a settlement that a court finds to be in "good faith" will alter the comparative liabilities of the tortfeasors, the decision as to whether the settlement was made in "good faith" is crucial. It is this finding of "good faith" that triggers the release of the settling tortfeasor from subsequent liability for partial indemnity.[16]

The settlement which releases a "good faith" settlor can take place in several factual settings. Probably the most common situation occurs where a named defendant in plaintiff's action settles with the plaintiff.[17] However, there is no requirement that the settling tortfeasor be a named defendant.[18] Thus, tortfeasor *A* could pay an amount to the plaintiff before any action was filed and if plaintiff later sued other tortfeasors *B* and *C*, the "good faith" settlor *A* would be immune from any cross-complaints by *B* or *C*. Also, if the plaintiff chose to sue only tortfeasors *B* and *C*, and if *B* or *C* cross-complained against tortfeasor

15. The result would be the same if the plaintiff had settled with *A* before trial and had only named *B* in the complaint. *B* would still have no right to seek partial indemnity from *A*. *See infra* text accompanying notes 17-21.

16. A finding of "good faith" is usually followed by a motion for summary judgment to dismiss the cross-complaint or the action for partial indemnity. Northrop Corp. v. Stinson Sales Corp., 151 Cal. App. 3d 653, 658, 199 Cal. Rptr. 16, 19 (1984).

17. *See, e.g.*, Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); Burlington N. R.R. Co. v. Superior Court, 137 Cal. App. 3d 942, 186 Cal. Rptr. 793 (1982).

18. Widson v. International Harvester Co., 153 Cal. App. 3d 45, 57, 200 Cal. Rptr. 136, 145 (1984). California Code of Civil Procedure sections 877 and 877.6 use the word "tortfeasor" not "defendant," thus implying a broader scope of applicability. *Id.*

A for partial indemnity, *A* could obtain a release from the claims for partial indemnity by making a "good faith" settlement with the plaintiff prior to trial, even though *A* was not a defendant in the plaintiff's action.[19] In another situation, one tortfeasor *A* could settle in "good faith" with the plaintiff, and if he thought his settlement reflected more than his fair share, he could sue or continue to pursue a cross-complaint against a nonsettling tortfeasor *B*.[20] However, as soon as *B* also settled in "good faith" with plaintiff, *A*'s right to such partial indemnity would terminate.[21]

For ease of analysis, this article often refers to the settling or nonsettling *defendant*. However, the same principles would apply to any tortfeasor, regardless of whether he was named as a defendant in plaintiff's action.

C. The "Good Faith" Hearing

The issue of "good faith" most often presents itself today in a pretrial hearing pursuant to California Code of Civil Procedure section 877.6[22] which allows a party to seek a court order determining a settlement or proposed settlement to be in "good faith." The hearing is usually requested by a co-defendant who wishes to settle with the plaintiff, although the plaintiff sometimes is the moving party. Understandably, the defendant seeks this determination so that he can be assured that if he settles, he will be totally free from the litigation by being released not only from plaintiff's claims but from claims for partial indemnity by the joint tortfeasors as well. Usually, the defendant makes the finding that his proposed settlement is in "good faith" a condition to his final execution of the settlement agreement and will not enter into the settlement absent this finding. Without it, he would still be liable for partial indemnity so his settlement would have accomplished nothing.

If a nonsettling co-defendant thinks that the settlement is too low, he will oppose the finding of "good faith" at the hearing. The nonsettling co-defendants do not want the settling defendant released from liability for partial indemnity for a settlement price that is below the settling defendant's "fair share" of proportionate liability for plaintiff's

19. *Id.*

20. Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

21. Owen v. United States, 73 F.2d 1461 (9th Cir. 1983); Mill Valley Refuse Co. v. Superior Court, 108 Cal. App. 3d 707, 166 Cal. Rptr. 687 (1980).

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

harm, because the co-defendants are liable for the remaining amount of the plaintiff's damages without reimbursement from the settlor.

II. BACKGROUND

The law regarding the obligation of a joint tortfeasor to pay a share of any recovery awarded to plaintiff has undergone two dramatic changes in the last thirty years. One rule that has remained constant is that a joint tortfeasor who *settles* with the plaintiff is free from any obligation to contribute further toward the plaintiff's recovery. Since 1957, the only requirement of the settling tortfeasor's freedom has been that the settlement made with the plaintiff be in "good faith."

This section will discuss briefly how California law developed from a system of no contribution, to a system of contribution, to the present system of partial indemnity among joint tortfeasors. The focus will be on the effect that one tortfeasor's settlement with the plaintiff has on that tortfeasor's obligation vis-a-vis his joint tortfeasors to pay a portion of the plaintiff's judgment.

A. The Common Law Rule

Until 1957, California utilized the common law rule that there was no right by joint tortfeasors to apportion or allocate the plaintiff's damages among themselves.[23] The rule was penal in nature, punishing the tortfeasors as "wrongdoers" by refusing to grant relief to them in adjusting losses among themselves.[24] Accordingly, each tortfeasor against whom the plaintiff received a judgment was liable for the entire amount of that judgment. The plaintiff could choose from which tortfeasor to collect the judgment and once paid, that tortfeasor had no right to seek contribution from other joint tortfeasors regardless of whether they were defendants against whom the plaintiff had also received a judgment or tortfeasors the plaintiff had chosen not to name in the complaint.[25]

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23. Merryweather v. Nixon, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799); Thornton v. Luce, 209 Cal. App. 2d 542, 550, 26 Cal. Rptr. 393, 398 (1962); Comment, *Contribution and Indemnity Collide With Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779 (1978).

24. River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 993 n.5, 103 Cal. Rptr. 498, 503 n.5 (1972); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46, at 291 (4th ed. 1971) [hereinafter cited as LAW OF TORTS].

25. Prosser has said of this rule that "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to . . . the plaintiff's whim or spite, or his collusion . . . ." *See* LAW OF TORTS, *supra* note 24, § 50, at 307.

The rules with respect to settlement were equally rigid as far as the plaintiff was concerned. If the plaintiff settled with one tortfeasor and released him from liability, that release constituted a release of all other tortfeasors as well.[26]

B. The Contribution Statutes

In 1957, the California Legislature sought to remedy the harshness of the common law rule by passing the contribution statutes.[27] These

26. Ellis v. Jewett Rhodes Motor Co., 29 Cal. App. 2d 395, 400, 84 P.2d 791, 793 (1938); Chetwood v. California Nat'l Bank, 113 Cal. 414, 45 P. 704 (1896), *appeal dismissed*, 171 U.S. 441 (1898); LAW OF TORTS, *supra* note 24, § 49, at 301-02 n.5. The basis and reasons for the common law rule are somewhat cloudy. However, it appears to be based on the assumption that where the tortious conduct of two or more persons combines to cause a single, indivisible injury to another, the injured party only has one cause of action and is entitled to only one satisfaction. Therefore, a release of the cause of action against one of the tortfeasors necessarily releases the others. McKenna v. Austin, 134 F.2d 659, 662-63 (D.C. Cir. 1943); Thaxter, *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HASTINGS L.J. 180, 182 (1958) [hereinafter cited as Thaxter]. Covenants not to sue, instead of releases, became the vogue because courts ruled that covenants not to sue were not releases, and thus did not release the other tortfeasors. Kincheloe v. Retail Credit Co., 4 Cal. 2d 21, 23-24, 46 P.2d 971, 972 (1935).

27. CAL. CIV. PROC. CODE §§ 875-880 (West 1980). The legislation had two general objectives: equitable sharing of costs among the parties at fault and encouragement of settlements. River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972); *see* Thaxter, *supra* note 26, at 185. The 1957 contribution legislation was sponsored by the State Bar of California. *See* Mull & Farley, *1957 Legislative Program*, 32 CAL. ST. B.J. 13, 17 (1957). In explaining the bill to the Senate Judiciary Committee, the State Bar declared:

> The ancient basis of the rigid rule against contribution in this type of case is the policy that the law should deny assistance to tortfeasors in adjusting losses among themselves because they are wrongdoers and the law should not aid wrongdoers. But this over-emphasizes the supposed penal character of liability in tort; it ignores the general aim of the law for equal distribution of common burdens and of the right of recovery of contribution in various situations, e.g., among cosureties. It ignores also the fact that most tort liability results from inadvertently caused damage and leads to the punishment of one wrongdoer by permitting another wrongdoer to profit at his expense.

1 Sen. J. Appendix 130 (Reg. Sess. 1957).

The right of contribution applied only to negligent tortfeasors, and the bar to contribution among intentional wrongdoers under the common law was retained. CAL. CIV. PROC. CODE § 875(d) (West 1980).

Another doctrine, although non-statutory in nature, which had evolved to temper the common law bar to allocation of liability among tortfeasors was the doctrine of indemnity. Indemnity, unlike contribution, did not divide responsibility among tortfeasors, but rather totally shifted that responsibility from one tortfeasor to another. Express or contractual indemnity arose as a matter of contract between the parties. Implied or equitable indemnity was a means by which a passively, impliedly, or secondarily negligent party, who without active fault on his part had been compelled by reason of some obligation to pay damages occasioned by the initial negligence of another, could shift the entire liability for the loss to the person whose negligence was active or primary. Barth v. B.F. Goodrich Tire Co., 15 Cal. App. 3d 137, 143, 92 Cal. Rptr. 809, 812-13 (1971). *See also* Molinari, *Tort Indemnity in*

statutes are still part of the Code of Civil Procedure, but their general applicability after the *American Motorcycle* decision is doubtful.[28]

The contribution statutes made two major changes in the common law rules. The first change was to provide for the equal sharing of a judgment by joint judgment debtors. In order for the right of contribution to have arisen, two factors must have been present: (1) a joint judgment must have been rendered against two or more defendants in a tort action[29] and (2) one defendant must have paid the entire joint judgment or more than his pro rata share.[30] A pro rata share was an equal share,[31] so if there were two joint judgment debtors, a pro rata share was one-half; if there were three, a pro rata share was one-third. A tortfeasor could not be compelled to make contribution beyond his pro rata or equal share of the judgment.[32]

Even under the contribution statutes, the plaintiff was still able to control the distribution of the loss among the tortfeasors. He did this when he made his choice of which defendants to sue. Because contribution was limited to tortfeasors against whom "a money judgment has been rendered jointly,"[33] no action for contribution could be filed against a tortfeasor not sued by the plaintiff. Accordingly, no cross-complaint could be filed by a named defendant against an unnamed defendant in order to make him a defendant in the action so that the required joint judgment could be obtained.[34]

California, 8 SANTA CLARA L. REV. 159 (1968). The contribution statutes did not affect the existing common law rights of express and implied indemnity. CAL. CIV. PROC. CODE § 875(f) (West 1980).

28. The method of sharing plaintiff's loss among joint tortfeasors according to comparative fault established under the supreme court's partial indemnity doctrine superseded the method of sharing established by the contribution statutes. "In effect, the court read [the contribution statutes] out of the statute book . . . ." Fleming, *supra* note 6, at 1487. The only one of the contribution statutes still applied today is Code of Civil Procedure section 877 dealing with "good faith" settlements. *See infra* note 36 and accompanying text.

29. CAL. CIV. PROC. CODE § 875(a) (West 1980); E.B. Wills Co. v. Superior Court, 56 Cal. App. 3d 650, 653, 128 Cal. Rptr. 541, 543 (1976); Guy F. Atkinson Co. v. Consani, 223 Cal. App. 2d 342, 344, 35 Cal. Rptr. 750, 751 (1963).

30. CAL. CIV. PROC. CODE § 875(c) (West 1980). Under the principle of joint and several liability, the plaintiff could satisfy the judgment against whichever defendant he or she chose. General Electric Co. v. State *ex rel.* Department of Public Works, 32 Cal. App. 3d 918, 926, 108 Cal. Rptr. 543, 548 (1973).

31. CAL. CIV. PROC. CODE § 876(a) (West 1980).

32. CAL. CIV. PROC. CODE §§ 875(c), 876(a) (West 1980). When one defendant had been held liable because of the acts of another defendant, e.g., an employer's liability for the tort of his employee, the two were obligated to contribute only one single pro rata share for which there was a right of indemnity between them. CAL. CIV. PROC. CODE § 876(b) (West 1980).

33. CAL. CIV. PROC. CODE § 875(a) (West 1980).

34. *General Electric Co.*, 32 Cal. App. 3d at 925-26, 108 Cal. Rptr. at 547-48; Thornton v.

A second major change made by the 1957 contribution legislation was in the area of settlements. It was in this context that the concept of a "good faith" settlement was first introduced into the law. The applicable statute is Code of Civil Procedure section 877[35] which is still important today for two reasons. First, it provides the historical context of the "good faith" requirement. Second, although it applies specifically to contribution, the court in *American Motorcycle* applied its rationale to partial indemnity, and the cases grappling with the concept of a "good faith" settlement in the partial indemnity area specifically refer to section 877 and treat it as applicable in that context as well.[36]

Section 877 establishes as a threshold determination whether or not a settlement is in "good faith."[37] If "good faith" is found, several things occur: (1) the settling tortfeasor is discharged from any obligation to make contribution to other tortfeasors (i.e., a judgment debtor who pays more than his pro rata share of the plaintiff's judgment cannot claim contribution from the settling tortfeasor);[38] (2) the nonsettling

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Luce, 209 Cal. App. 2d 542, 551-52, 26 Cal. Rptr. 393, 398-99 (1962); Fleming, *supra* note 6, at 1488. "The result is a circular series of contingencies that cannot be satisfied. The defendant has no right of contribution unless he obtains a joint judgment, he cannot obtain a joint judgment unless he states a cause of action [by cross-complaint], and he cannot state a cause of action unless he has a right of contribution." Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors: The Aftermath of* Li v. Yellow Cab Co., 8 U. WEST L.A. L. REV. 23, 45 (1976).

35. CAL. CIV. PROC. CODE § 877 (West 1980) 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.

36. *E.g.*, Widson v. International Harvester Co., 153 Cal. App. 3d 45, 57-58, 200 Cal. Rptr. 136, 144-45 (1984); Northrop Corp. v. Stinson Sales Corp., 151 Cal. App. 3d 653, 657, 199 Cal. Rptr. 16, 18 (1984); Kohn v. Superior Court, 142 Cal. App. 3d 323, 326, 191 Cal. Rptr. 78, 80 (1983); Cardio Systems, Inc. v. Superior Court, 122 Cal. App. 3d 880, 887, 176 Cal. Rptr. 254, 258 (1981); Dompeling v. Superior Court, 117 Cal. App. 3d 798, 805, 173 Cal. Rptr. 38, 42 (1981).

37. Code of Civil Procedure § 877 does not use the term "settlement." However, it pertains to settlements because it refers to "a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment" which could be given only by a plaintiff, and "the amount stipulated by the release, the dismissal or the covenant, or . . . the amount of the consideration paid for it," which would be an amount given by a defendant in exchange therefor. Accordingly, § 877 refers to a plaintiff's settlement with one of several joint tortfeasors. Cases interpreting § 877 have applied it in this context. *See supra* note 36.

38. CAL. CIV. PROC. CODE § 877(b) (West 1980). An intriguing problem is created by the interplay between §§ 877 and 875. Section 875(a) provides that the right of contribution

tortfeasors are not released from liability by the settlement with one tortfeasor (as was true under the common law);[39] and (3) the plaintiff's judgment against any nonsettling tortfeasor is reduced by the dollar amount of the settlement.[40]

C. *Comparative Fault and Partial Indemnity*

California tort law has changed radically since the passage of the contribution statutes. With the California Supreme Court cases of *Li v.*

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exists only where a money judgment has been rendered jointly against two or more defendants in a tort action. If there is a settlement prior to trial between the plaintiff and one co-defendant, as discussed in § 877, there would not be a judgment rendered against the settling co-defendant as required by § 875. Therefore, even assuming the settlement was not made in "good faith" as required by § 877, there would never be a judgment against the settling co-defendant as required by § 875. Accordingly, without a joint judgment, no right to contribution exists. Thus, § 877's provision for a discharge for a settling defendant is unnecessary. Likewise, the requirement of "good faith" of the settlement in order to achieve such discharge seems to be without meaning. Fleming answered this question without asking it when he stated "due to California's joint-judgment rule, a settlor still cannot be sued for contribution even if the settlement is set aside." Fleming, *supra* note 6, at 1497 n.134.

The court in River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 1000, 103 Cal. Rptr. 498, 508 (1972) discussed the effect of a release not found to be in "good faith" pursuant to § 877. The court noted that if the bad faith settlement resulted from collusion between the plaintiff and the settlor, the nonsettling tortfeasor may seek to have the settlement set aside. *Id.* Conceivably, he might seek the offending settlor's joinder to the lawsuit as a party defendant, thus preserving his own contribution claim against the possibility of a judgment. *Id.* The issue in *River Garden Farms* was the effect of a bad faith settlement where only the plaintiff breached the duty of good faith. *Id.*, 103 Cal. Rptr. at 508. The court stated that in that situation, the tortfeasor who himself compromised in good faith should receive exactly what the statute tenders him—a discharge from his liability for pro rata contribution. *Id.*, 103 Cal. Rptr. at 509. Thus, the nonsettling tortfeasor is damaged by the loss of a co-defendant who would have shared pro rata payment of the judgment. *Id.* The amount of the loss would be calculated by the pro rata share which the settlor would have paid had he been a party to the judgment. *Id.* Thus, the nonsettling tortfeasor has a civil claim for damages against the plaintiff who exercised bad faith. *Id.* He may set off his claim against the latter's tort recovery and receive credit against any judgment awarded in the tort suit. *Id.* In economic terms, he receives pro rata rather than pro tanto credit against the judgment. *Id.* The charge of the bad faith settlement is regarded as "new matter constituting a defense" to be raised by answer to the plaintiff's complaint. *Id.* at 1002, 103 Cal. Rptr. at 510.

This problem is unique to § 877 and is not found in § 877.6. Unlike § 877, § 877.6 deals with the partial indemnity theory established in *American Motorcycle*. Under this theory, one defendant named in the lawsuit by the plaintiff may seek apportionment of the loss against a joint tortfeasor either named or not named in the lawsuit by plaintiff either by way of cross-complaint or after a judgment is entered. Under the doctrine of partial indemnity addressed by § 877.6, there is no requirement that a judgment first be obtained against the tortfeasors named by plaintiff in the complaint.

39. CAL. CIV. PROC. CODE § 877(a) (West 1980).

40. *Id.*

Yellow Cab Co.[41] and *American Motorcycle Association v. Superior Court*,[42] California adopted a system of comparative negligence whereby damages are apportioned among the plaintiff and all joint tortfeasors according to their degree of fault. In *Li v. Yellow Cab Co.*, the court replaced the all-or-nothing doctrine of contributory negligence with a system of comparative negligence. Under the former contributory negligence system, if the defendant was found negligent, but the plaintiff was found even a slight bit contributorily negligent, the plaintiff would recover nothing. After *Li*, the plaintiff's contributory negligence would not completely bar his recovery but would serve to reduce his damages in proportion to the degree of his fault.[43]

In 1978, the case of *American Motorcycle Association v. Superior Court* extended *Li's* rule of comparative negligence to multi-tortfeasor situations. It established a system of partial indemnity whereby all tortfeasors responsible for plaintiff's injury would be obligated to pay in accordance with their percentage of fault.[44] A defendant who pays all or part of a plaintiff's judgment may, under the principle of partial indemnity established in *American Motorcycle*, obtain reimbursement from other tortfeasors in proportion to the fault attributable to each. Furthermore, this right may be asserted against any joint tortfeasor, whether named by the plaintiff in the original action or not, either by cross-complaint[45] or independent action.[46]

1. The effect of a settlement in the context of partial indemnity

While the allocation of damages among tortfeasors was changed radically by *American Motorcycle*, the effect of a settlement on the obligations of a settling tortfeasor was not changed at all. The court retained the same rules that existed in the context of contribution. First, a tortfeasor who entered into a "good faith" settlement with the plaintiff would be discharged from any claim for partial indemnity that might be pressed by another tortfeasor.[47] Second, the plaintiff's recov-

41. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

42. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

43. 13 Cal. 3d at 829, 532 P.2d at 1244, 119 Cal. Rptr. at 875.

44. 20 Cal. 3d at 607-08, 578 P.2d at 918, 146 Cal. Rptr. at 201.

45. *Id.* at 607, 578 P.2d at 917-18, 146 Cal. Rptr. at 200.

46. E.L. White v. City of Huntington Beach, 21 Cal. 3d at 510, 579 P.2d at 513, 146 Cal. Rptr. at 622. Compare this to the situation under the contribution statutes where there is no right to contribution against a party not sued by the plaintiff.

The doctrine of partial indemnity did not contain "two unwelcome limitations [found in the contribution statutes]: (1) the requirement of a joint judgment and (2) the 'pro rata' allocation of shares." Fleming, *supra* note 6, at 1487.

47. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

ery from nonsettling tortfeasors would be diminished only by the amount that the plaintiff actually recovered in a "good faith" settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury.[48]

Therefore, while establishing a system whereby all tortfeasors would be ultimately charged according to their degree of comparative fault, the court allowed a tortfeasor to be free from this allocation once he entered into a settlement with the plaintiff that was found to be in "good faith." Accordingly, the definition of a "good faith" settlement is as crucial under today's partial indemnity doctrine as it was under the principles of contribution. Because of the importance of the *American Motorcycle* decision in the evolution of the definition of the "good faith" settlement requirement, the case will be discussed in Part III.[49]

2. Code of Civil Procedure section 877.6

In 1980, the California Legislature enacted Code of Civil Procedure section 877.6[50] which codified the portion of the opinion of *American Motorcycle* establishing that a settlement in "good faith" discharges the settling tortfeasor from liability to other tortfeasors, and established procedural rules for an early determination of whether a settlement is in "good faith." Section 877.6 is the most recent statute dealing with the concept of a "good faith" settlement, and it will be discussed in Part III.[51]

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48. *Id.*, 578 P.2d at 916, 146 Cal. Rptr. at 199.

49. *See infra* notes 96-102 and accompanying text.

50. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1984) provides:

> (a) Any party to an action wherein it is 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, upon giving notice thereof in the manner provided in Sections 1010 and 1011 at least 20 days before the hearing. Upon a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced.
>
> (b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter-affidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing.
>
> (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor 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.

51. *See infra* notes 115-123 and accompanying text.

III. THE EVOLUTION OF THE DEFINITION OF "GOOD FAITH"

This section will examine how a "good faith" settlement has been and is being defined by the California courts. The statutes and the major California cases dealing with "good faith" will be analyzed. They will be discussed for the most part in chronological order so the evolution of the present definition of "good faith" may be seen. Two federal cases applying California law which have refused to follow California court of appeal decisions on the "good faith" issue will also be examined. Although the Ninth Circuit opinions are not binding on the California courts,[52] they provide an alternate interpretation of a "good faith" settlement.

The California Supreme Court has never decided the issue of what constitutes a "good faith" settlement. California appellate courts have considered the issue of a "good faith" settlement in different contexts in approximately eighteen cases.[53] In five decisions the court formulated a definition of a "good faith" settlement even though the "good faith" of a particular settlement was not in issue.[54] In seven cases the appellate court squarely faced a determination of whether the settlement before it was made in "good faith."[55] Several of the cases defining

52. City of Oakland v. Buteau, 180 Cal. 83, 89-90, 179 P. 170, 173 (1919).

53. *See* list of cases in this note and *infra* notes 54-55. The following cases have involved the concept of a "good faith" settlement in contexts other than defining the term: Northrop Corp. v. Stinson Sales Corp., 151 Cal. App. 3d 653, 199 Cal. Rptr. 16 (1984) (holding that the proper procedure for a settlor to obtain a dismissal from a cross-complaint for indemnity is to obtain a ruling pursuant to CAL. CIV. PROC. CODE § 877.6 that the settlement was in "good faith" followed by a motion for summary judgment); Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d 353, 195 Cal. Rptr. 116 (1983) (discussing the allocation among the nonsettling tortfeasors of a "good faith" settlor's proportional share of the judgment in excess of the amount of his settlement); Lopez v. Blecher, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983) (discussing who are "joint tortfeasors" within the meaning of CAL. CIV. PROC. CODE § 877.6); Turcon Const., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 282, 188 Cal. Rptr. 580 (1983) (discussing the definition of "joint tortfeasors"); Golden Bear Forest Products, Inc. v. Misale, 138 Cal. App. 3d 573, 188 Cal. Rptr. 48 (1982) (holding a party whose settlement was paid by an insurance company obtained a release pursuant to § 877); Mill Valley Refuse Co. v. Superior Court, 108 Cal. App. 3d 707, 166 Cal. Rptr. 687 (1980) (holding that where joint tortfeasors each settled with the plaintiff in "good faith," each was released from claims for partial indemnity by the other).

54. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981); Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980); Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); Lareau v. Southern Pac. Transp. 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).

55. Widson v. International Harvester Co., 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984); Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729 (1983) (hearing granted Nov. 10, 1983, LA 31826); Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); Wysong & Miles Co. v. Western Indus. Movers, 143

"good faith" arose in the contribution context before the decision in *American Motorcycle*,[56] several cases were decided between the time of *American Motorcycle* and the passage of Code of Civil Procedure section 877.6,[57] and several cases discussed the issue in the context of section 877.6.[58]

A trend can be seen in the California appellate decisions beginning with *River Garden Farms, Inc. v. Superior Court*[59] and ending with *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.[60] Originally, the courts viewed the "good faith" requirement as a means to accommodate two competing policies found in the law—the policy of encouragement of settlements and the policy of equitable apportionment of loss. Both policies were considered in formulating a definition of a "good faith" settlement. The early cases advocated a test whereby a settlement would be in "good faith" if its monetary value was within the reasonable range of the plaintiff's potential recovery.[61] Through an evolutionary process the courts have moved to an approach where the monetary value of the settlement is unimportant and a settlement will be found to be in "good faith" as long as the joint tortfeasors cannot establish collusion or tortious intent on the part of the plaintiff and the settling defendant.[62] This current definition of "good faith" results from the courts giving priority to the policy of encouragement of settlement and ignoring the policy of equitable apportionment of loss.

Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983); Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); Burlington N. R.R. Co. v. Superior Court, 137 Cal. App. 3d 942, 186 Cal. Rptr. 793 (1982); Cardio Systems, Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

56. Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); Lareau v. Southern Pac. Transp. 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).

57. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981); Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980).

58. Widson v. International Harvester Co., 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984); Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729 (1983) (hearing granted Nov. 10, 1983, LA 31826); Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); Wysong & Miles Co. v. Western Indus. Movers, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983); Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); Burlington N. R.R. Co. v. Superior Court, 137 Cal. App. 3d 942, 186 Cal. Rptr. 793 (1982); Cardio Systems, Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

59. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

60. 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729, *hearing granted*, Nov. 10, 1983 (L.A. 31842).

61. *River Garden Farms*, 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506 (1972); Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 796, 118 Cal. Rptr. 837, 845 (1975).

62. *See, e.g.*, Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); Cardio Systems, Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

Under the present definition, a settlement which constituted nothing more than a waiver of costs in exchange for a dismissal was found to be in "good faith," shielding the settlor from claims for partial indemnity.[63] It is interesting that the cases decided before the California Supreme Court established the system of comparative negligence were more concerned with the policy of equitable apportionment of fault than the cases decided thereafter.[64]

Step by step, the appellate courts have moved away from a meaningful interpretation of the "good faith" concept. The cases built one upon the next, often incorporating dicta from previous cases that made sense in the context of the prior case but was inapplicable to the case at hand. Each case in turn established its own dicta to be followed by subsequent cases to the point that the courts now feel bound by a rule that they acknowledge provides inequitable results. The following discussion illustrates this pattern.

A. The "Reasonable Range" Test of River Garden Farms, Inc. v. Superior Court

The first case to consider the meaning of a "good faith" settlement did so in the context of the contribution laws. That case, *River Garden Farms, Inc. v. Superior Court*,[65] decided in 1972, is still discussed in the major cases involving "good faith" settlements and is thought of as the leading case in the area.[66] The *River Garden Farms* court promulgated the first, and most workable, definition of "good faith." Its test for "good faith" will form the framework for the recommendation made in Part V of this article.

River Garden Farms did not involve the usual objection that the settlement entered into was too low and, therefore, should not be determined to be in "good faith." The charge of lack of "good faith" was aimed at the plaintiff alone, and was based upon the plaintiff's allocation of certain settlement proceeds among various claims so as to increase the potential liability of the nonsettling defendant, River Garden Farms.[67] The suit involved claims by two minors resulting from a fire

63. *Cardio*, 122 Cal. App. 3d at 888, 176 Cal. Rptr. at 259 (1981).

64. *Compare* River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) *with* Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983).

65. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

66. Kohn v. Superior Court, 142 Cal. App. 3d 323, 327, 191 Cal. Rptr. 78, 81 (1983). *River Garden Farms* was also cited by the California Supreme Court in *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

67. 26 Cal. App. 3d at 991-92, 103 Cal. Rptr. at 502.

in which their parents were killed and they were severely injured. The minors' attorneys settled the children's claims for both their own personal injury and the wrongful death of their parents against all of the defendants except River Garden Farms. The attorneys allocated the major share of the settlements to the less valuable wrongful death claims and a minor share to the potentially large personal injury claims.[68] Defendant River Garden Farms claimed this worked an injustice because it was thereby isolated as the sole target for a potentially large personal injury judgment, and, under Code of Civil Procedure section 877, it would bear this judgment alone, without contribution. It would receive credit only for the minor share of the settlements allocated to the personal injury claims.[69]

Although not deciding the issue of the "good faith" of the allocation of the settlement proceeds because that was a question of fact to be decided by the trial court,[70] the court in *River Garden Farms* exhaustively discussed the concept of "good faith" settlements. The court disagreed with the plaintiff's contention that the obligation of "good faith" was limited to the settling parties, because if this were so, no statutory demand for a release given in "good faith" would have been necessary. Thus, the duty of "good faith" runs to the nonsettling tortfeasors, and the requirement of section 877 that a settlement be in "good faith" establishes a standard of equitable conduct embracing other defendants

68. The settlements of the three other tortfeasors totalled $1,290,000. The attorneys allocated the settlement proceeds between the wrongful death claims and the personal injury claims so that $800,000 was applied to the wrongful death claims and $490,000 to the personal injury claims. The personal injury claims had a potential for a very large verdict because the children had suffered severe and permanent physical handicaps. *Id.* at 991, 103 Cal. Rptr. at 502. On the other hand, the wrongful death claims were far less valuable because one or more of the parents may have been guilty of contributory negligence. *Id.*

69. *Id.* at 992, 103 Cal. Rptr. at 502. Because this case arose before the partial indemnity doctrine was established by *American Motorcycle*, there was not much River Garden Farms could do to contest this situation. It moved to dismiss the action, asserting that the settlements were not made in "good faith" within the meaning of § 877. It argued the common law rule providing that "a release of one joint tortfeasor releases all" applied and, therefore, it had been released by virtue of the releases the plaintiffs had given to the three settling defendants. *Id.* at 999, 103 Cal. Rptr. at 507. The trial court, without holding an evidentiary hearing on the issue of "good faith," denied River Garden Farms's motion to dismiss. *Id.* at 1000, 103 Cal. Rptr. at 508. On an application for a writ, the court of appeal did not decide whether the allocation violated the duty of "good faith" but held that River Garden Farms was entitled to assert the invalidity of the releases for lack of "good faith" by way of answer or new matter in the lawsuit by the plaintiffs that could be offset against any judgment, or by an action for declaratory relief. *Id.* at 1001-03, 103 Cal. Rptr. at 509-10. Because of the "joint judgment" rule, River Garden Farms did not have the option of suing the settling parties for contribution. *See* Thaxter, *supra* note 26, at 1497.

70. 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 507.

as well as the immediate parties to the settlement.[71]

The court specifically refused to limit the interpretation of "good faith" to lack of collusion,[72] and held the "good faith" requirement has a far broader meaning than merely prohibiting collusive behavior.[73] The court stated in language that has been cited repeatedly in case after case construing "good faith":

> Although many kinds of collusive injury are possible, the most obvious and frequent is that created by *an unreasonably cheap settlement*. Applied *pro tanto* to the ultimate judgment, such a settlement contributes little toward equitable—even though unequal—sharing. . . . *Prevention of collusion is but a means to the end of preventing unreasonably low settlements which prejudice a non-participating tortfeasor. The price of a settlement is the prime badge of its good or bad faith.*
>
> . . . .
>
> Lack of good faith encompasses many kinds of behavior. . . . When profit is involved, the ingenuity of man spawns limitless varieties of unfairness. . . . The Legislature has here incorporated by reference the general equitable principle of contribution law which frowns on unfair settlements, *including those which are so poorly related to the value of the case as to impose a potentially disproportionate cost on the defendant ultimately selected for suit.*[74]

In defining a "good faith" settlement, the *River Garden Farms* court attempted to strike a compromise between two competing policies: (1) equitable sharing of costs among the parties at fault and (2) encouragement of settlements.[75] It was careful not to overlook the

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71. *Id.* at 995, 103 Cal. Rptr. at 504. "The good faith clause . . . establishes a duty relationship among the plaintiff, the settling defendant and the nonsettling defendant." *Id.* at 999, 103 Cal. Rptr. at 507. "In concluding a bad faith settlement with one of several tortfeasors, the [plaintiff] breaches a statutory duty of good faith he owes the others." *Id.* at 1001, 103 Cal. Rptr. at 509. Therefore, even though a plaintiff could still attack his antagonists one by one under the contribution statutes in California, he would at least be compelled to abide by the moral standards signified by the demand for a good faith release. *Id.* at 996, 103 Cal. Rptr. at 505.

72. The Uniform Law Commissioners had accompanied § 4 of the Uniform Contribution Among Tortfeasors Act, a provision that was probably the model for § 877, with a statement declaring that the "good faith" clause " 'gives the court occasion to determine whether the transaction was collusive, and if so, there is no discharge.' " *Id.* at 995, 103 Cal. Rptr. at 505.

73. *Id.* at 997, 103 Cal. Rptr. at 505-06.

74. *Id.* at 996-97, 103 Cal. Rptr. at 505-06 (emphasis added).

75. These were the goals of the 1957 tort contribution legislation. *Id.* at 993, 103 Cal. Rptr. at 503.

statutory objective of encouraging settlements and assuring them a measure of finality,[76] but, unlike the more recent cases dealing with "good faith," the court did not look solely to that goal to provide the answer. "[I]f the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied."[77]

The test espoused by the *River Garden Farms* court to determine "good faith" is one of *reasonable range*: "Applied to strike a balance between dual statutory objectives [of encouraging settlements and equitable financial sharing], the good faith clause should not invalidate a settlement within a reasonable range of the settlor's fair share."[78] The "good faith" clause does not demand equitable sharing as fixed by a jury verdict which has not taken place. If this were the case, the parties could not accomplish settlement with a fair assurance of finality because it is impossible to determine what the jury will decide.[79] Rather, a court should make only a rough assessment of value.[80] The mechanics of making this assessment are discussed in Part V-D-3 of this article.[81]

In summary, the *River Garden Farms* court expressly rejected the absence of collusion as the sole criterion of "good faith."[82] It balanced competing policies and recommended an examination of the amount of the settlement to determine if it falls within the reasonable range of the settlor's fair share of the ultimate verdict to be received by the plaintiff.[83] If the price of the settlement falls within the reasonable range, then the settlement is in "good faith" and carries the ramifications of section 877. If the price is too low and is not within the reasonable range of the settlor's fair share of the plaintiff's predicted recovery, then the settlement is not in "good faith."[84]

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76. *Id.*

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

78. *Id.*

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

80. *Id.*

81. *See infra* text accompanying notes 320-36.

82. *Id.* at 997, 103 Cal. Rptr. at 505-06.

83. *Id.* at 998, 103 Cal. Rptr. at 506-07.

84. Adopting this test and citing language from *River Garden Farms* with approval was the next case dealing with "good faith," Lareau v. S. Pac. Transp. Co., 44 Cal. App. 3d 783, 796, 118 Cal. Rptr. 837, 845 (1975). Like *River Garden Farms, Lareau* involved the question of a "good faith" allocation of settlement proceeds between different claims.

Since the issues in *Lareau* arose after a trial on the merits, the court stated that the proper procedure for the nonsettling defendant to test the "good faith" of the settlement allocation would be a separate action against the plaintiffs and the settling parties. 44 Cal. App. 3d at 798-99, 118 Cal. Rptr. at 846-47.

B. *The Beginning of the Demise of the Reasonable Range Test:* Stambaugh v. Superior Court

The reasonable range definition of "good faith" established by *River Garden Farms* was undermined by the 1976 case of *Stambaugh v. Superior Court*.[85] *Stambaugh* did not specifically disapprove of *River Garden Farms*'s reasonable range test, but used language that would be relied upon by other cases to do so.

The proceedings in *Stambaugh* took place after *Li v. Yellow Cab Co.*,[86] but before *American Motorcycle Association v. Superior Court*.[87] In *Stambaugh*, a nonsettling tortfeasor was attempting to bring a tortfeasor who had settled with the plaintiff back into the case to determine his percentage of fault under the principles of *Li*.[88] The court rejected this argument, but the nonsettlor raised for the first time at the appellate level the argument that the settling defendant was properly brought into the action in order that the "good faith" of his settlement with the plaintiff could be determined. No lack of "good faith" had been expressly alleged. It is in this context that the appellate court discussed the issue of "good faith."[89] It admitted that this issue was not properly before it because it had not been raised below. However, by way of dicta the court expressed its opinion on the "good faith" issue.

Instead of considering the competing interests of equitable apportionment and settlement of disputes as was done in *River Garden Farms*, the court in *Stambaugh*, without discussion, thrust the policy of encouragement of settlement of litigation into the forefront. It cited a list of cases for the proposition that the law favors settlements.[90] The

85. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

86. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *Li* abolished California's contributory negligence defense and replaced it with a comparative negligence rule.

87. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

88. *Stambaugh* involved a wrongful death action resulting from a motor vehicle accident. The heirs of the decedent settled a wrongful death claim with alleged tortfeasor Stambaugh prior to suit for $25,000, the full amount of his insurance coverage, and gave him a release. The heirs later commenced an action against other alleged joint tortfeasors, including Pacific Gas and Electric Company (PG&E), for the same wrongful death action. Thereafter, PG&E cross-complained against Stambaugh under the rationale of *Li*, for the purpose of determining the proportion of fault attributable to Stambaugh. 62 Cal. App. 3d at 234, 132 Cal. Rptr. at 845.

89. The settling defendant, Stambaugh, moved for summary judgment on the cross-complaint, and the motion was denied by the trial court. The appellate court issued a writ of mandate, holding that the cross-complaint violated Code of Civil Procedure § 877 because a settling tortfeasor is discharged from further obligation by way of contribution or otherwise. 62 Cal. App. 3d at 235, 132 Cal. Rptr. at 845-46.

90. *Id.*, 132 Cal. Rptr. at 846. As shown in Part IV, these cited cases do indeed stand for that proposition, but none dealt with a conflict between the goals of settlement and equitable

court's emphasis on this policy is understandable because a nonsettling tortfeasor was attempting to force the settling defendant against whom no lack of "good faith" had been alleged to participate in the trial. If such a procedure were allowed, it would certainly discourage a party from settling. In this context then, *Stambaugh*'s oft-cited language regarding encouragement of settlement is applicable.[91]

The *Stambaugh* court refused to define the bounds of "good faith."[92] It did not focus on what constituted "good faith," but rather on what did not. It said that "good faith" would *not* be determined by the proportion the settlement bears to the damages of the plaintiff.[93] Again, this made sense in the context of this case because the nonsettlor was arguing the settlor had to take part in a trial in order that his *exact* percentage of fault could be determined so the "good faith" of the settlement could thereby be judged. The court properly refused to follow this approach.[94]

However, in so doing, the court added by way of dicta that if the settlement is not a result of collusion or bad faith it is, therefore, in "good faith." The court also opined that instances of such collusion or bad faith are rare. While not specifically rejecting the *River Garden Farms* test, *Stambaugh*'s broad language that "good faith" is not to be determined by the proportion the settlement bears to the plaintiff's damages and its strong language that the law favors settlements were utilized by future courts to undermine the *River Garden Farms* approach.[95]

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apportionment. *See infra* text following note 199. Ironically, the last case cited in the list was *River Garden Farms*.

91. The *Stambaugh* court stated: "Few things would be better calculated to frustrate this policy [of encouraging settlements], and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would but lead to further litigation with one's joint tortfeasors, and perhaps further liability." 62 Cal. App. 3d at 236, 132 Cal. Rptr. at 846. This language was cited in *American Motorcycle*, 20 Cal. 3d at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. *See infra* text accompanying note 100.

92. 62 Cal. App. 3d at 238, 132 Cal. Rptr. at 848.

93. *Id.*

94. The court stated:

> We have heretofore pointed out the policy of the law favoring settlement of litigation. Except in rare cases of *collusion or bad faith*, such as were proclaimed in *River Garden Farms* . . . and *Lareau* . . . , 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., 132 Cal. Rptr. at 847-48 (emphasis added).

95. *See, e.g.*, Dompeling v. Superior Court, 117 Cal. App. 3d 798, 806, 173 Cal. Rptr. 38, 42 (1981); Mill Valley Refuse Co. v. Superior Court, 108 Cal. App. 3d 707, 710, 166 Cal.

It is this shift from the balancing of interests, found in *River Garden Farms*, to the elevation of the policy favoring settlements, first found in *Stambaugh*, that caused the dilution of the "good faith" requirement.

C. American Motorcycle Association v. Superior Court *and the Concept of "Good Faith"*

The next step in the interpretation of a "good faith" settlement came two years later in the landmark case of *American Motorcycle Association v. Superior Court*.[96] *American Motorcycle* established a cause of action for partial indemnity by which joint tortfeasors could apportion damages among themselves in direct proportion to their respective fault,[97] and applied the "good faith" settlement provisions of Code of Civil Procedure section 877 to the partial indemnity theory.[98]

Rptr. 687, 689 (1980); Fisher v. Superior Court, 103 Cal. App. 3d 434, 445, 163 Cal. Rptr. 47, 54 (1980). *See infra* notes 106, 110 and accompanying text.

96. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The plaintiff in *American Motorcycle* was a teenage boy who had been injured in a cross-country motorcycle race. He chose to sue only the sponsoring organizations. Under the then current state of the law, those defendants would be able to seek contribution only among themselves after the judgment. One of the defendants, the sponsor of the race, sought leave of court to file a cross-complaint against the boy's parents asserting two causes of action. The first cause of action alleged the parents negligently failed to exercise their power of supervision over their minor child, and sought indemnity from the parents if the organization was found liable. The second cause of action asked for a declaration of "allocable negligence" of the parents so that damages awarded against the organization, if any, could be reduced by the percentage of damage attributable to the parents' negligence. The trial court denied the motion on the ground that Code of Civil Procedure § 875 allowed contribution only among tortfeasors held jointly liable. Since the plaintiff had not named the parents as co-defendants, the defendant had no cause of action against them for contribution. The court of appeal reversed. *Id.* at 585-86, 578 P.2d at 903, 146 Cal. Rptr. at 185-86.

The California Supreme Court ordered a hearing on its own motion. It directed the trial court to vacate its order denying the sponsoring organization leave to file its proposed cross-complaint against the parents. *Id.* at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201.

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

98. *Id.* at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. Other important provisions of the court's decision were: (1) the "joint and several liability" doctrine, whereby each tortfeasor whose negligence contributes to an injury remains liable for all compensable damages attributable to that injury, remained in force, *id.* at 582, 578 P.2d at 901, 146 Cal. Rptr. at 184; (2) the partial indemnity doctrine is a different concept than contribution and is not precluded by the contribution statutes which provide that contribution be allocated among tortfeasors "pro rata" (according to the number of defendants) and not in accordance with their individual shares of fault, *id.* at 583-84, 578 P.2d at 902, 146 Cal. Rptr. at 185; (3) partial indemnity may be asserted by a cross-complaint against a tortfeasor who has not been made a party defendant by the plaintiff, *id.* at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185; and (4) the plaintiff's share of fault must be ascertained by weighing his negligence against the combined total of all causative negligence, not only that of the named defendants, *id.* at 589 n.2, 578 P.2d at 906 n.2, 146 Cal. Rptr. at 189 n.2.

In analyzing the effect of a settlement by one joint tortfeasor on the right of other tortfeasors to obtain partial indemnity from him, the California Supreme Court specifically considered the application of Code of Civil Procedure section 877 dealing with "good faith" settlements under the contribution statutes.[99] The court stated, quoting with approval *River Garden Farms* and language from *Stambaugh*:

> Although section 877 reflects a strong public policy in favor of settlement, this statutory policy does not in any way conflict with the recognition of a common law partial indemnity doctrine but rather can, and should, be preserved as an integral part of the partial indemnity doctrine that we adopt today. Thus, while we recognize that section 877, by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, we conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a "good faith" settlement (*see River Garden Farms, Inc. v. Superior Court* [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. As the Court of Appeal noted recently in *Stambaugh v. Superior Court* [citation omitted]: "Few things would be better calculated to frustrate [section 877's] policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would lead to further litigation with one's joint tortfeasors, and perhaps further liability." This observation is as applicable in a partial indemnity framework as in the contribution context. Moreover, to preserve the incentive to settle which section 877 provides to injured plaintiffs, we conclude that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury. . . .[100]

In summary, while holding that the partial indemnity doctrine was separate and apart from the contribution statutes, the court used section 877 which applied only to contribution as part of the partial indemnity theory. The court did not state that section 877 specifically

99. *Id.* at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99.
100. *Id.* (citation omitted).

applied to partial indemnity, but rather adopted a rule for partial indemnity that is identical to the section 877 rule for contribution, i.e., that a settlement in "good faith" both (1) precludes any claim to partial indemnity against the settling tortfeasor and (2) diminishes the plaintiff's recovery from the nonsettling tortfeasors by the amount of the "good faith" settlement rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury. The appellate cases after *American Motorcycle* are a bit confused on this point and apply section 877 itself (rather than the court's rule which simply mirrors the language of section 877) when discussing the concept of good faith settlements under the partial indemnity rule of *American Motorcycle*.[101]

It is important to note at this point that the supreme court in *American Motorcycle* did not define "good faith." Nor did it approve the *Stambaugh* court's definition of "good faith." In fact, when mentioning "good faith," it cited *River Garden Farms*. All that *American Motorcycle* did with respect to the issue was to establish that a tortfeasor who settles in "good faith" with the plaintiff will be released from further liability by way of claims for partial indemnity. The requirement remained that the settlement be in "good faith" before this release occurs.

Also, even though citing with approval *Stambaugh*'s language regarding encouragement of settlements, the California Supreme Court did not express any opinion as to the priority of the goal of settlement vis-a-vis the goals of comparative negligence. In fact, its expressed method to accomplish the policy of encouragement of settlements was to rule that a plaintiff's recovery from the nonsettling tortfeasors is diminished only by the amount that the plaintiff has actually recovered in a "good faith" settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury—[102] not to hold that virtually every settlement should be found to be in "good faith."

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101. *See supra* note 36 and accompanying text.

102. 20 Cal. 3d at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199. For example, if a settling tortfeasor who settled for $10,000 was found at plaintiff's trial against other tortfeasors to have been 40% responsible for plaintiff's damages of $100,000, under a dollar amount or pro tanto reduction the other tortfeasors would be liable to plaintiff for $90,000. Under a proportionate or pro rata reduction the other tortfeasors would be liable to plaintiff for $60,000. (This is a different meaning of pro rata than was used in the contribution statutes where a pro rata share meant an equal share.) The plaintiff would collect a total of only $70,000 under the pro rata approach, $10,000 in settlement and $60,000 from the other tortfeasors.

The plaintiff's bar has been the principle advocate of pro tanto rather than pro rata reduction because under the pro tanto rule an under-value settlement in "good faith" does

D. *The Tortious Conduct Test:* Fisher v. Superior Court *and* Dompeling v. Superior Court

The cases of *Fisher v. Superior Court*[103] and *Dompeling v. Superior Court*[104] abandoned the *River Garden Farms* analysis of "good faith" and instead instituted a tortious conduct test. The *Dompeling* case is most frequently cited as authority for the tortious conduct test and has been repeatedly incorporated by subsequent appellate decisions,[105] sometimes leading to ludicrous results.

1. *Fisher v. Superior Court*

Fisher was the first case to discuss a "good faith" settlement after *American Motorcycle* was decided. It did not involve a determination of whether or not a settlement had been made in "good faith" but rather concerned the issue of *when* the determination of "good faith" should be made. In explaining its reasons for reaching its decision that the trial on the issue of "good faith" should occur before the trial on the merits, the court expressed its opinion on the proper interpretation of "good faith" by way of dicta.[106] It said a settlement is in "good

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not prejudice the plaintiff. Fleming, *supra* note 6, at 1495. The plaintiff still collects a total amount equal to the amount of his judgment under this rule.

For a further discussion of the pro rata reduction proposal, see *infra* note 293.

103. 103 Cal. App. 3d 433, 163 Cal. Rptr. 47 (1980).

104. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).

105. *E.g.*, Widson v. International Harvester Co., 153 Cal. App. 3d at 58, 200 Cal. Rptr. at 145; Wysong & Miles Co. v. Western Indus. Movers, 143 Cal. App. 3d at 289, 191 Cal. Rptr. at 679; Burlington N. R.R. Co. v. Superior Court, 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 378; Cardio Systems, Inc. v. Superior Court, 122 Cal. App. 3d at 890, 176 Cal. Rptr. at 260.

106. The dicta of *Fisher* should be examined in light of the facts and lower court's order in that case. The underlying action arose out of a traffic accident in which a Ford-manufactured vehicle operated by Schultz struck and injured the plaintiff, Fisher. Fisher sued Schultz and Ford and settled all his claims against Schultz for $100,000, the entire amount of the available insurance policy limits. Ford cross-complained against Schultz for partial indemnity. *Id.* at 437-38, 163 Cal. Rptr. at 50.

Schultz, in her answer to Ford's cross-complaint, raised as an affirmative defense that she had made a "good faith" settlement with Fisher, which, if true, would discharge her from liability to Ford. However, the trial court ruled that the trial on the cross-complaints and the issue of "good faith" would be held *following* the trial on plaintiff's complaint. The trial court also indicated that it might have the same jury that tried the main action try the cross-complaints, and might make the jury's special findings in the main trial on the proportion of fault binding on the determination of the cross-complaints if the settlement was not later found to be in "good faith." *Id.* at 438, 163 Cal. Rptr. at 50. Thus, defendant Schultz and her insurance carrier were placed in the position of having to undergo a lengthy and costly trial on the merits even though they had previously settled because the trial court refused to hold the hearing on the "good faith" of the settlement first.

The *Fisher* court focused on the language of *Stambaugh* quoted by the supreme court in

faith" "absent evidence of collusion or grossly inappropriate . . . apportionment of the settlement proceeds to injure the nonsettling alleged tortfeasors."[107] Thus, *Fisher* speaks to an element of *intent to injure* that was not seen in the prior cases.

2. *Dompeling v. Superior Court*

As with the previous cases that discussed "good faith," *Dompeling* did not directly deal with the issue of whether a settlement was made in "good faith." *Dompeling* was a discovery case, and the court's discussion of "good faith" arose in its analysis of the scope of discovery.

The plaintiff in *Dompeling* was involved in an automobile accident and sued two defendants, Dompeling and Chatom, who each cross-complained against the other for partial indemnity. Prior to trial, the plaintiff entered into a settlement with Dompeling for $100,000, which was the limit of his insurance policy, plus a possible $10,000 more from Dompeling personally on a sliding scale depending on the plaintiff's recovery from Chatom. The trial court ruled that the issue of whether the settlement was entered into in "good faith" would be decided in a separate trial preceding the trial of the personal injury action.[108]

Pursuant to the action on the cross-complaint for partial indemnity and Dompeling's defense of a "good faith" settlement, Chatom took the deposition of Dompeling and inquired exhaustively into his personal and business assets. Dompeling refused to answer on the grounds that such information was not discoverable and was irrelevant to the issue of the "good faith" of the settlement. The trial court ordered Dompeling to answer the deposition questions, but the appellate court held that the trial court abused its discretion in ordering discov-

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American Motorcycle, and seized upon *Stambaugh*'s assertion that the encouragement of settlements is a strong public policy and that a defendant's knowledge that a settlement lacked finality would frustrate the policy of encouraging settlements. *Id.* at 440, 163 Cal. Rptr. at 52. Thus, *Fisher* articulated the strong policy in favor of settlements as the correct rationale for its holding that it is not proper to make a settling defendant pay for and defend a long trial on the merits before it can be determined whether the settlement was in "good faith." *Id.* at 442, 163 Cal. Rptr. at 53. There can be no quarrel with this analysis. The *Fisher* court, however, did not stop its inquiry at this point. By way of dicta the court offered a restrictive definition of the "good faith" requirement.

107. *Id.* at 445, 163 Cal. Rptr. at 55.

108. The trial court denied Dompeling's motions for approval of the settlement agreement as a settlement in "good faith" and for entry of the judgment in Dompeling's favor on Chatom's cross-complaint for indemnity. 117 Cal. App. 3d at 802, 173 Cal. Rptr. at 40. Presumably, § 877.6 had not taken effect at the time of the trial court's ruling because pursuant thereto, Dompeling was entitled to a hearing on the issue of "good faith" upon the filing of his motion, rather than at a separate trial.

ery of Dompeling's finances.[109]

In order to determine the scope of discovery on the issue of "good faith," the appellate court sought to define the concept. It discussed and relied on previous cases, notably *Stambaugh*.[110] It acknowledged the strong policy in favor of settlement, and having done this, established a rule giving effect solely to this policy. It made no attempt to accommodate the policy of equitable apportionment of loss. The court stated:

> Bad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share of the value of plaintiff's case. A settlement always removes the settling defendant from the action; this necessarily results in a possibility that the remaining defendants will suffer judgment greater in amount than if there had been no settlement.
>
> Where plaintiff settles with fewer than all defendants, the defendants are clearly adverse parties. A settling defendant does not owe a legal duty to adverse parties, the nonsettling defendants, to pay the plaintiff more so that the adverse parties may pay the plaintiff less. Plaintiff and defendants are also adverse parties; the plaintiff does not owe a legal duty to the nonsettling defendants to seek more from a settling defendant so that the nonsettling defendant may pay less.
>
> The settling parties owe the nonsettling defendants a legal duty *to refrain from tortious or other wrongful conduct*; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants.[111]

An example given by the court of conduct violative of such duty would be an agreement between the settling defendant and the plaintiff that in return for settling for a disproportionate amount, the defendant would aid the plaintiff's case by committing perjury.[112]

The court felt it was compelled to further the policy of encouragement of settlements. Because a rule allowing nonsettling defendants to

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109. *Id.* at 803, 173 Cal. Rptr. at 40-41.

110. *Id.* at 806, 173 Cal. Rptr. at 42. The court cited with approval and emphasis the following language of *Stambaugh*: "Except in rare cases of collusion or bad faith, . . . *a joint tortfeasor should be permitted to negotiate settlement of an adverse claim according to its own best interests*. . . ." *Id.*, 173 Cal. Rptr. at 42-43 (emphasis added by *Dompeling* court).

111. *Id.* at 809-10, 173 Cal. Rptr. at 44-45 (emphasis added).

112. *Id.* at 810 n.7, 173 Cal. Rptr. at 45 n.7.

depose settling defendants regarding their finances would discourage defendants from settling, the court chose to deal with this discovery problem by defining "good faith" in such a way as to "substantially narrow the scope of the pretrial hearing upon the issue of good faith settlement,"[113] so that financial status would not be an issue except in the most extreme case.[114] Thus, the *Dompeling* court in dicta relied on the *Stambaugh* and *Fisher* dicta, and thereby further restricted the concept of "good faith."

E. The Effect of Code of Civil Procedure Section 877.6

The next event in the evolution of the "good faith" concept was the passage by the California Legislature in 1980 of Code of Civil Procedure section 877.6[115] dealing with "good faith" settlements in the context of the partial comparative indemnity doctrine established by the *American Motorcycle* case. In section 877.6 the legislature specifically codified the portion of the *American Motorcycle* dicta regarding the effects of a "good faith" settlement between the plaintiff and a joint tortfeasor.[116] Section 877.6(c) provides that a "good faith" settlement shall bar the other joint tortfeasors from "any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[117] Compare the language in *American Motorcycle*: "[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 in-

113. *Id.* at 810, 173 Cal. Rptr. at 45.

114. While specifically disavowing the *River Garden Farms* case without acknowledging that it had done so, the court in *Dompeling* actually engaged in a *River Garden Farms* type of reasonable range analysis and concluded that the settlement was not unreasonable. *See infra* note 275 and accompanying text and text accompanying notes 308-09. The court could have based its decision on this ground, i.e., that the settlement was within the reasonable range of potential exposure and, therefore, was in "good faith," or it could have decided that discovery into the financial matters of the defendant is not relevant to a reasonable range test of "good faith."

115. See *supra* note 50 for text of § 877.6. Actually, *Dompeling* was decided after its passage but the events in the trial court occurred before, so the case did not discuss this statute.

116. Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 283, 188 Cal. Rptr. 580, 582 (1983); Kohn v. Superior Court, 142 Cal. App. 3d 323, 326-27, 191 Cal. Rptr. 78, 81 (1983). *See also* CAL. ASSEMBLY COMM. ON JUDICIARY, BILL DIGEST A.B. 3425 at 1 (hearing date April 30, 1980) (analysis of A.B. 3425 CAL. SENATE COMM. ON THE JUDICIARY, REPORT A.B. 3425 at 2 (analysis of A.B. 3425 as amended May 7, 1980)).

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

demnity that may be pressed by a concurrent tortfeasor."[118] The language of section 877.6 "for partial or comparative indemnity" is derived directly from the *American Motorcycle* case. The term "equitable comparative contribution" is not found in *American Motorcycle* or subsequent cases applying its doctrine. However, it appears that the legislature used these terms in an attempt to cover all the bases, and that its intent was to make section 877.6 apply to joint tortfeasor cases under *American Motorcycle*'s theory of partial or comparative indemnity, or any theory by whatever name based on comparative negligence or comparative fault.[119]

Section 877.6 did not define the term "good faith." Furthermore, nothing in the legislative history of the section indicates that the legislature gave any consideration to this aspect of the statute.

The remaining subsections of section 877.6 deal with the hearing on the issue of a "good faith" settlement. In this respect, section 877.6 codified the holding of *Fisher v. Superior Court*.[120] Before this section, there was no statute establishing when, during a lawsuit, the issue of "good faith" was to be determined. The statute provides that the hearing shall be held on at least twenty days' notice.[121] Section 877.6 fur-

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118. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

119. In fact, § 877.6(c) was specifically added by amendment to the text of the bill as originally introduced. The assembly amendments adopted on May 7, 1980, added, among other things, subsection (c), which used the term "equitable comparative contribution." These amendments did not refer to partial or comparative indemnity. "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 based on comparative negligence or comparative fault." Text of A.B. 3425 as amended in the assembly May 7, 1980; 8 CAL. J. OF THE ASSEMBLY 1979-80, at 14435 (amendments to A.B. No. 3425). The bill was later amended in the senate on July 1, 1980, to change subsection (c) to include the phrase "or partial or comparative indemnity," which specifically tracked the language of the *American Motorcycle* case. The senate amendment stated: "(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." A.B. 3425 (as amended in the senate July 1, 1980) (emphasis in original).

120. 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980). *See also* CAL. ASSEMBLY COMM. ON JUDICIARY, BILL DIGEST A.B. 3425 at 3 (hearing date April 30, 1980) (analysis of A.B. 3425); CAL. SENATE COMM. ON THE JUDICIARY, REPORT ON A.B. 3425 at 2-4 (analysis of A.B. 3425 as amended May 10, 1980).

121. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1984). *Fisher* stated that the issue of "good faith" should be decided at the earliest possible time. Section 877.6 adopted this approach and provides for this hearing. Interestingly, the original version of the bill as introduced provided for the hearing to be conducted by the court at the time another noticed hearing or conference was conducted relative to the particular case or the time the trial was commenced. However, in its May 7, 1980 amendments, the assembly amended the bill to

ther provides that the hearing shall be held upon affidavits and counter-affidavits, or in the court's discretion, evidence received at the hearing,[122] and that the burden of proof on the issue of "good faith" is on the party who asserts the lack of "good faith."[123]

F. The Results of the Tortious Conduct Test

Several cases decided after *Dompeling* illustrate the inequitable results that can occur when the tortious conduct test of "good faith" is applied. Up to and including the *Dompeling* case, all cases defining "good faith" had done so in dicta. The subsequent cases beginning with *Cardio Systems, Inc. v. Superior Court* [124] were the first to face squarely the issue of whether a settlement had been made in "good faith." Yet, instead of analyzing the problem critically, the courts simply looked to the language of the previous cases. They did not examine the prior cases in light of the issues present before those courts, or acknowledge that the language they were citing was dicta. The courts reached results they admitted were unfair, yet they felt compelled to do so by prior precedent.

1. *Cardio Systems, Inc. v. Superior Court*

Cardio exemplifies the problem that resulted from the courts' procedure of successively incorporating language from one case to the next, with each case narrowing further the test of "good faith." In *Cardio*, the plaintiffs were the widow and seven children of a man who died during open heart surgery. The plaintiffs sued the hospital, several doctors, and Cardio, the distributor and manufacturer of the heart-lung pump machine that was a factor in the patient's death. The hospital filed a cross-complaint for partial indemnity against Cardio.

Before trial, the plaintiff dismissed Cardio with prejudice. Cardio

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provide for the hearing to be held any time upon the giving of at least twenty days notice (or a shorter time, if necessary) to permit the determination to be made prior to trial.

122. CAL. CIV. PROC. CODE § 877.6(b) (West Supp. 1984). The original bill provided that any party to the action should have the right to object and present any "actual evidence" to prove that the settlement was not made in "good faith." The present language was added by the assembly amendments of May 7, 1980.

123. CAL. CIV. PROC. CODE § 877.6(d) (West Supp. 1984) (incorporating the decision of *Fisher*, 103 Cal. App. 3d at 447, 163 Cal. Rptr. at 56). This language was contained in the original version of the bill as introduced on March 20, 1980, and was not changed by any subsequent amendments. The *Fisher* court also held that "the burden of proving that there has been a *settlement* is on the settlor who asserts that settlement as a bar to all claims for contribution or comparative (equitable) indemnity by any other tortfeasor." 103 Cal. App. 3d at 447, 163 Cal. Rptr. at 56 (emphasis added).

124. 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

made no payment toward the plaintiff's recovery, and the only consideration plaintiff received for the dismissal was a waiver of costs by Cardio. The hospital pursued its cross-complaint against Cardio for partial indemnity. Cardio defended on the ground that it had entered into a "good faith" settlement, and the trial court ordered a separate trial on this issue which was held before the trial of the main action on the cross-complaints. At the trial, the plaintiff's counsel testified that he had dismissed Cardio from the case as a tactical move. While he felt that there was a substantial case against Cardio, he had a straightforward, uncomplicated case against the hospital for the negligent act or omission of its employees in operating the machine. Since the hospital had sufficient assets and sufficient insurance to pay the judgment, he had no desire to complicate a simple medical malpractice case where there was clear liability by bringing in a complicated products liability cause of action. He thought that it was in the best interest of his clients to simplify the case.[125]

The trial court analyzed the issue of whether the settlement had been made in "good faith" by using a *River Garden Farms* reasonable range analysis and rejecting the tortious conduct test of *Dompeling*. While there was no collusion between plaintiffs and Cardio in connection with the dismissal, the trial court thought it would be unreasonable and unfair to permit the dismissal to operate as a bar to the claim of the hospital for partial indemnity. This dismissal for a waiver of costs could not have been reasonably proportionate to Cardio's potential liability to the plaintiffs. Therefore, the trial court ruled that Cardio did not receive the dismissal in "good faith" to the extent that "good faith" is required before a dismissal can be used as a bar to an action for partial indemnity.[126]

The court of appeal issued a writ of mandate directing the trial court to vacate its order and to enter a new order sustaining Cardio's defense to the cross-complaint on the basis that Cardio had entered into a "good faith" settlement. The appellate court quoted *Dompeling* to the effect that a settling defendant owes no duty to a nonsettling co-defendant except to refrain from tortious or other wrongful conduct, and that absent such conduct, a settling party may act to further its own interest without regard to the effect of the settlement upon co-defendants.[127] Since Cardio had acted consistently with that principle, the

125. *Id.* at 884-85, 176 Cal. Rptr. at 256-57.

126. *Id.* at 887, 176 Cal. Rptr. at 258.

127. *Id.* at 890, 176 Cal. Rptr. at 260 (citing Dompeling v. Superior Court, 117 Cal. App. 3d 798, 809-10, 173 Cal. Rptr. 38, 44-45 (1981)).

settlement was made in "good faith."[128]

The appellate court acknowledged that the trial court had recognized the serious complications in the present law and had reasoned that to immunize Cardio would frustrate the entire purpose of the comparative fault cases.[129] Further, the court of appeal acknowledged that its own decision created a miscarriage of justice:

> The result is unsatisfactory. The rule permits a plaintiff to insulate a defendant . . . from being liable to a codefendant . . . for comparative indemnity by dismissing [one defendant] in consideration of a waiver of costs where the dismissal is motivated by plaintiffs' tactical considerations having little relationship to [that defendant's] potential liability . . . . The result is fundamentally unfair, and cannot be what the Legislature intended.[130]

The *Cardio* court thought that its hands were tied by the terms of section 877. However, if it had followed the *River Garden Farms* test for "good faith" under section 877, it clearly could have found that the *Cardio* settlement was not within the reasonable range of defendant's liability and would not have been in "good faith." Instead of applying that precedent, however, the court in *Cardio* called upon the legislature to act to amend section 877 in light of the *American Motorcycle* decision.[131]

What the *Cardio* court overlooked was that the legislature had acted in response to the *American Motorcycle* case by enacting Code of Civil Procedure section 877.6(c) in 1980.[132] This section incorporated the same "good faith" rule in the partial indemnity context of *American Motorcycle* as was found in section 877. The *Cardio* court failed to recognize that because the legislature did not define the term "good

128. 122 Cal. App. 3d at 890, 176 Cal. Rptr. at 260. The court concluded that "without further legislative clarification, the term 'good faith' must be given a meaning within the usual sense of the term," and that under this test, the *Cardio* settlement had been in "good faith." *Id.* The court gave no authority for the proposition that "good faith" must be given a meaning within the usual sense of the term, and offered no opinion as to what the "usual sense of the term" was.

129. *Id.* at 888, 176 Cal. Rptr. at 259.

130. *Id.* at 890-91, 176 Cal. Rptr. at 260.

131. The court stated: "The Legislature is equipped with the facilities and the forum to hear from all interested parties and to pass appropriate amendments to Code of Civil Procedure section 877; the Legislature should move with dispatch to prevent the occurrence of such an unfortunate result as in this case." 122 Cal. App. 3d at 891, 176 Cal. Rptr. at 260.

132. This section was applicable to the *Cardio* case but the court failed to mention it. For a discussion of Code of Civil Procedure section 877.6(c) and its legislative history, see *supra* notes 115-19 and accompanying text.

faith," it is up to the courts to interpret the "good faith" requirement in a manner to prevent the inequity that the *Cardio* court acknowledged its decision had created.

The practical effect of the *Cardio* decision can be illustrated using the underlying facts of that case. If the plaintiff had decided earlier that it did not want to get involved in a complicated products liability case and had only proceeded against the hospital and not against Cardio, then, by way of cross-complaint, the hospital could have obtained partial indemnity from Cardio. Of course, it is a rare case indeed where a plaintiff will choose not to name a potential defendant in the complaint. Even so, if the plaintiff had simply dismissed Cardio as a defendant, the hospital still could have obtained partial indemnity. However, under the *Cardio* decision, as soon as some meager consideration accompanied the dismissal, that tactical dismissal by the plaintiff became a "settlement." Because it was not done with the intent to injure the hospital, but rather to help the plaintiff, it was found to be in "good faith," thus cutting off the hospital's rights to partial indemnity. By that transaction, then, the plaintiff effectively, although not maliciously, terminated the hospital's rights to seek partial indemnity from Cardio. There can be no doubt that such a result violates the policy of comparative fault among tortfeasors enunciated by the *American Motorcycle* decision.

After the *Cardio* decision, a number of cases reached the appellate courts involving the specific issue of the "good faith" of a settlement. Each of these cases cited the language of *Cardio* and *Dompeling* and reaffirmed the rule that only if a settlement was tortious toward nonsettling tortfeasors, would the settlement be determined not to have been made in "good faith." The more important of these cases are discussed below.

2. *Burlington Northern Railroad Co. v. Superior Court*

The settlement reached in *Burlington Northern Railroad Co. v. Superior Court* [133] illustrates the statement in *River Garden Farms* that "when profit is involved, the ingenuity of man spawns limitless varieties of unfairness."[134] In *Burlington*, the plaintiff was injured when a railroad car door fell on him. He sued the railroad, Burlington Northern, and the manufacturer of the car, Paccar. In a settlement with Burlington, the plaintiff agreed to proceed to trial against Paccar only. In

133. 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982).
134. 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

exchange, Burlington guaranteed the plaintiff would recover at least $2,000,000 at trial from Paccar. If the judgment was less than $2,000,000, Burlington would pay the difference. If the judgment went over $2,000,000, Burlington would pay nothing. Thus, by gambling that the plaintiff would be able to recover at least $2,000,000 from Paccar and agreeing to cover any difference, the railroad had a good chance of evading any financial responsibility.[135]

Burlington moved for an order pursuant to Code of Civil Procedure section 877.6 that the settlement was in "good faith," thereby attempting to cut off Paccar's rights to seek partial indemnity. The trial court denied the motion, but the court of appeal issued a writ directing the trial court to enter an order that the settlement was in "good faith."

Citing *Fisher* and *Stambaugh*, the court articulated its view of the competing interests involved. "While inequity may result, it has been thought that the policy of encouraging settlement, *and of removing at least the settling party from the case*, would suffer serious impairment if it were subordinated to a policy requiring equitable apportionment."[136] Thus, the court in *Burlington* did two things. First, it redefined the settlement goal as settlement between the plaintiff and the settling party, rather than overall settlement of the litigation. Second, unlike the court in *River Garden Farms* which balanced the competing policies of encouragement of settlement of litigation and equitable apportionment of loss, the *Burlington* court subordinated the policy of equitable apportionment to this redefined policy of encouragement of settlement. As is evident, once the court establishes the primary policy as the encouragement of settlement *between the plaintiff and the settling party*, then virtually no settlement agreement will be found to be lacking "good faith," because an agreement must be upheld to support this policy.

Additionally, the court of appeal adopted the *Dompeling* court's view that the requirement of "good faith" is a means to insure that the settling parties do not tortiously injure the nonsettling parties.[137] Be-

135. Burlington also reserved the right to veto any settlement between plaintiff and Paccar for less than $2,000,000, thus maintaining the right to prevent any settlement that would require it to contribute anything. 137 Cal. App. 3d at 944, 187 Cal. Rptr. at 377.

136. *Id.* at 945, 187 Cal. Rptr. at 378 (emphasis added).

137. *Id.* at 946, 187 Cal. Rptr. at 378. The court cited *Dompeling*'s language that the settling defendant does not have a duty to pay the plaintiff more so that the adverse parties may pay the plaintiff less. *Id.* (citing *Dompeling*, 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44-45; *Cardio*, 122 Cal. App. 3d at 890, 176 Cal. Rptr. at 260). The court then concluded that the settling parties are bound only to refrain from tortious or other wrongful conduct against the nonsettling parties. 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 378.

cause the trial court found no tortious conduct directed toward the non-settling party,[138] the appellate court held this was equivalent to the finding of "good faith" required by the statute.

As in *Cardio*, the appellate court acknowledged that the fairness of such a result was "highly debatable" but concluded that the courts have regularly upheld settlements found free of tortious effect on the nonsettling party, irrespective of their overall fairness.[139] In this respect, the court was indeed correct.

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

The appellate court decision in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* [140] is another illustration of an unfair and incongruous result that can be reached when a court adopts language from previous cases without trying to accommodate the various competing policy considerations. The California Supreme Court has granted a hearing in the *Tech-Bilt* case, so the appellate decision has no force or effect and cannot be cited as authority.[141] However, the case will be discussed here briefly to illustrate the extreme result that was compelled by the wording of prior decisions.

In *Tech-Bilt*, the settlement in question consisted of the plaintiff's dismissal with prejudice of a subcontractor against whom it could not proceed because the statute of limitations had run in exchange for a waiver of costs amounting to approximately $55.[142] Another defend-

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138. *Id.*

139. *Id.* (citing *Cardio* and *Fisher*).

140. 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729, *hearing granted*, Nov. 10, 1983 (L.A. 31826).

141. CAL. CT. R. 28(a) provides in part: "Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision . . . ." This rule has been interpreted as rendering the lower court's opinion, decision and judgment a nullity. *See* Ponce v. Marr, 47 Cal. 2d 159, 161, 301 P.2d 837, 839 (1958). *See also* CAL. CT. R. 976(d) which provides: "No opinion superseded by the granting of a hearing . . . shall be published," and CAL. CT. R. 977(a), which provides: "An opinion that is not ordered published shall not be cited or relied upon by a court or a party . . . ."

142. In *Tech-Bilt*, plaintiffs, owners of a residential property, brought an action against the developer, Tech-Bilt Construction Corp., the soils engineers, Woodward-Clyde & Assocs., and others on various theories to recover for structural defects in their residence. Later, realizing that their action against Woodward-Clyde was barred by the applicable statute of limitations (Code of Civil Procedure § 337.5), plaintiffs agreed to dismiss the suit against Woodward-Clyde with prejudice in exchange for a waiver of costs. Presumably, Woodward-Clyde would have prevailed against plaintiffs in a motion for summary judgment based on the statute of limitations and they would have been able to recover their costs of suit, namely their filing fee in the amount of $55. Thereafter, Tech-Bilt filed an amended

ant, a contractor, had a cause of action against this subcontractor for partial indemnity that was not barred by the statute of limitations under the recent supreme court case of *Valley Circle Estates v. V.T.N. Consolidated, Inc.*[143] Nevertheless, the *Tech-Bilt* court found the release by the plaintiff of the subcontractor to be a "good faith" settlement simply because no tortious conduct was involved, thereby eliminating the contractor's ability to obtain partial indemnity from his subcontractor.[144]

A decision such as *Tech-Bilt* illustrates how the present tortious conduct test for "good faith" gives the plaintiff inordinate control over the defendant's right of partial indemnity. If the plaintiff had realized his claim against the subcontractor was barred and had not sued him, the contractor would have been able to seek partial indemnity from the subcontractor.[145] However, because the plaintiff chose to sue the subcontractor, and then later agreed to dismiss that defendant for a waiver of costs upon discovery that his action was barred by the statute of limitations, the contractor's right to partial indemnity was terminated. True, the plaintiff did not act with bad faith as that term is commonly used. The plaintiff's actions seemed to be quite rational. Yet, this can-

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cross-complaint for partial indemnity and declaratory relief against Woodward-Clyde. Woodward-Clyde defended by seeking a confirmation that its agreement with plaintiffs was a "good faith" settlement, thus entitling it to summary judgment on the cross-complaints. After a hearing, the trial court found the settlement to be in "good faith" and entered summary judgment dismissing Tech-Bilt's cross-complaint against Woodward-Clyde. Tech-Bilt appealed.

143. 33 Cal. 3d 604, 189 Cal. Rptr. 871, 659 P.2d 1160 (1983). In *Valley Circle Estates*, the California Supreme Court held that even though a plaintiff's cause of action against a subcontractor is barred by the statute of limitations, a cross-complaint against the subcontractor for partial indemnity by the general contractor is not barred as long as the main action was brought in a timely fashion by the plaintiff against the general contractor. The supreme court stated:

> To impose on general contractors the liability of their subcontractors would not only be unfair, but could effectively deter the activities of the construction industry. On the other hand, to require that subcontractors remain liable for their work for the period of time during which general contractors must remain liable, should not only promote responsibility in the construction industry generally, but provide an additional incentive on the part of subcontractors to be certain of their work.

Id. at 614, 659 P.2d at 1167, 189 Cal. Rptr. at 878.

144. The opinion of the appellate court quoted verbatim the language from *American Motorcycle* and *Dompeling* set forth earlier in this article. *See supra* notes 100, 111 and accompanying text. The court then cited the definition of "good faith" found in Webster's Dictionary, and also relied on the *Cardio* case which held that a settlement in which the plaintiffs released a defendant in consideration for nothing more than a waiver of costs was a "good faith" settlement.

145. This is true assuming the plaintiff did not "settle" with the subcontractor before suit by accepting money not to sue him.

not be the result intended by the supreme court in its *American Motorcycle* decision, its *Valley Circle Estates* decision or the result intended by the legislature in drafting section 877.6. Presumably, in granting the hearing in the *Tech-Bilt* case, the California Supreme Court found that this case has gone too far in emasculating the "good faith" requirement. Whether the court's granting of the hearing was motivated predominantly by the fact that *Tech-Bilt* provides an escape for subcontractors from their liability to general contractors under the *Valley Circle Estates* case or whether the court intends to reevaluate the test for "good faith" remains to be seen.

It is the thesis of this article that the "good faith" requirement must indeed be redefined in a way to foster the competing policies of equitable sharing among tortfeasors and the encouragement of settlements. Part V-D of this article provides a recommendation to achieve this purpose.[146]

4. Other cases applying the tortious conduct test

Two cases, *Kohn v. Superior Court*[147] and *Wysong & Miles Co. v. Western Industrial Movers*,[148] are somewhat out of step with other appellate decisions in their analysis of whether a settlement was in "good faith." While specifically advocating the tortious conduct test,[149] each court did not merely say the settlements were in "good faith" because there was no tortious conduct. Instead, these courts actually performed a reasonable range type of analysis to uphold the trial court's finding of "good faith" settlements.[150] *Kohn* and *Wysong* will be discussed later to illustrate the mechanics of a reasonable range analysis.[151]

A recent California case on the issue, *Ford Motor Co. v. Schultz*,[152]

146. *See infra* text accompanying notes 301-83.

147. 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983).

148. 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983).

149. The *Kohn* court cited "the most recent decisions in the area"—Golden Bear Forest Prods., Inc. v. Misale, 138 Cal. App. 3d 573, 188 Cal. Rptr. 48 (1982); Burlington N. R.R. Co. 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); and Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981)—for the proposition that only rarely will a settlement be disapproved. 142 Cal. App. 3d at 327, 191 Cal. Rptr. at 81.

150. Also performing a reasonable range analysis, although citing *Dompeling* and *Wysong*, was the court in the recent case of Widson v. International Harvester Co., 153 Cal. App. 3d 45, 58, 200 Cal. Rptr. 136, 145 (1984). *See infra* notes 354-56 and accompanying text.

151. *See infra* text accompanying notes 346-53.

152. 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983). This case involved the same lawsuit in which writ proceedings resulted in the second district's opinion in Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980).

reaffirmed the tortious conduct definition of "good faith" by following the trend of giving priority to the goal of encouragement of settlements and subordinating the policy of equitable apportionment of loss. It upheld a finding of a "good faith" settlement merely because no tortious conduct was present on the part of the settling parties.[153]

G. The Ninth Circuit Cases

The Ninth Circuit has decided two cases[154] involving "good faith" settlements in California under its diversity of citizenship jurisdiction and has refused to follow the tortious conduct test of the California decisions. Unlike the California cases in which a settlement has never been found not to have been made in "good faith," both Ninth Circuit cases found lack of a "good faith" settlement. The Ninth Circuit test of "good faith" is different than that enunciated in any California decision—to be in "good faith," a dismissal of a party by the plaintiff must represent a settlement which is a "good faith" determination of relative liabilities and must not reflect merely a tactical maneuver by the plaintiff.[155]

In *Commercial Union Insurance Co. v. Ford Motor Co.*,[156] plaintiff sued Ford Motor Company and a dealership for personal injuries. Immediately prior to trial, the plaintiff's attorney dismissed Ford because he thought he had a better chance of recovery if Ford's expert witnesses did not testify and because he believed he had little chance to recover from Ford. Ford paid no money to the plaintiff. The plaintiff prevailed in his suit against the dealer, and the dealer's insurer, Commercial Union Insurance Company, instituted a diversity action against Ford for partial indemnity under the principles of *American Motorcycle*. Ford defended on the ground that section 877 of the Code of Civil Procedure discharged it from liability for equitable indemnification because the dismissal by the plaintiff was in "good faith."

The district court found that the settlement was in "good faith."

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153. "[T]he rationale to be applied in any instance where the good faith character of a settlement is challenged is one which will find the existence of that element, absent any adequate showing of collusion 'aimed at injuring the interests of an absent tortfeasor.'" Ford Motor Co. v. Schultz, 147 Cal. App. 3d at 950, 195 Cal. Rptr. at 475 (quoting *River Garden Farms*, 26 Cal. App. 3d at 996, 103 Cal. Rptr. at 505).

154. 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).

155. *Owen*, 713 F.2d at 1464; *Commercial Union*, 640 F.2d at 213. This test is evaluated in Part V-C. *See infra* text accompanying notes 294-99.

156. 640 F.2d 210 (9th Cir.), *cert. denied*, 454 U.S. 858 (1981). This case was decided after *Stambaugh* and *American Motorcycle* but before *Dompeling*.

The Ninth Circuit reversed, adopting a rule that it believed the California Supreme Court would adopt if confronted with a similar situation.[157] Unlike the California cases which looked only to the goal of encouragement of settlement, the Ninth Circuit used the *River Garden Farms* analysis of identifying two *competing* policies involved in the relationship between section 877 and the doctrine of partial indemnity: the policy in favor of settlement and the equitable rule developed by the California Supreme Court allocating liability among tortfeasors in proportion to fault. The court concluded that it was bound by these two goals of California law—equity and settlement—and that neither statutory goal should be applied to defeat the other.[158]

The Ninth Circuit concluded that the decision to dismiss Ford was a tactical maneuver by the plaintiff's attorneys to remove a deep pocket defendant because of the experts it could produce and the skilled trial attorneys it could retain. Thus, the decision did not reflect the cooperative decision-making between parties that is the earmark of a settlement, and did not reflect a consideration of relative liability.[159] The court spoke of two intertwined tests in its decision that the settlement had not been made in "good faith." It is difficult to determine whether the court based its opinion on the fact that the dismissal was a tactical maneuver and, therefore, no settlement had occurred, or whether the dismissal was not in "good faith" because the plaintiff did not receive an amount related to the liability of the settling party. In all likelihood, it was a combination of the two.

A more recent Ninth Circuit case is *Owen v. United States*.[160] There, the settling party argued that the *Commercial Union* "good faith" test had been superseded by subsequent opinions of the California Court of Appeal, particularly *Dompeling v. Superior Court* which

157. 640 F.2d at 214. The court stated: "When we confront a situation not yet met by the California Supreme Court, we must seek the rule we believe that court would adhere to were it confronted with a similar situation." (citing Takahashi v. Lomis Armored Car Serv., 625 F.2d 314, 316 (9th Cir. 1980)).

158. 640 F.2d at 213 (quoting *River Garden Farms*, 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506).

159. 640 F.2d at 213. The court noted that the case involved a $3,250,000 damage recovery by the plaintiff and, therefore, even a slight probability of liability on Ford's part would have warranted substantial contribution.

The court stated that the "good faith" of the dismissal alone was not sufficient. That did not satisfy § 877 because it did not establish the existence of settlement or the "good faith" required toward interested individuals not participating in the dismissal. 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. *Id.*

160. 713 F.2d 1461 (9th Cir. 1983). *Owen* was decided in August of 1983, falling chronologically between the California cases of *Wysong* and *Ford Motor Co. v. Schultz*.

imposed the tortious or other wrongful conduct test for lack of "good faith".[161] However, the Ninth Circuit refused to follow *Dompeling*. It acknowledged that its interpretation of section 877 in *Commercial Union* would only be binding in the absence of any subsequent indication from the California courts that its interpretation was incorrect. It stated that although these recent California decisions cast a new light on the question,[162] the issue of "good faith" settlements "presents one of those rare instances where convincing evidence exists that the highest court of the state will not follow the result reached by some of the state's inferior appellate courts."[163] The court concluded that the *Commercial Union* approach, based on effectuating both of the goals of equity and promotion of settlement as set forth in *River Garden Farms*, rightly predicted what the California Supreme Court will hold.[164] *Owen* is interesting, however, because, even though the court expressly disavowed the *Dompeling* tortious conduct test for lack of "good faith" and instead embraced a proportionate test, an examination of the court's opinion reveals that it did just the opposite.[165]

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161. *Id.* at 1464.

162. *Id. Owen* acknowledged that the *Dompeling* test has been followed in *Cardio, Burlington*, and *Wysong*. The court stated: "In the absence of a pronouncement by the highest court of a state, the federal courts must follow the decision of the intermediate appellate courts of the state unless there is 'convincing evidence that the highest court of the state would decide differently.' " *Id.* (quoting Andrade v. City of Phoenix, 692 F.2d 557, 559 (9th Cir. 1982) (per curiam)).

163. 713 F.2d at 1465.

164. *Id.* at 1466.

165. In *Owen*, an employee was killed in a crash of his employer's airplane. The heirs brought suit under the Federal Tort Claims Act in federal court against the United States, and brought a second wrongful death action against the employer in state court. The Government impleaded the employer in federal court for partial indemnity, alleging pilot error as a partial cause of the accident. The heirs then settled with the Government for over $1,000,000. This payment represented over 95% of the eventual total recovery by the heirs. Subsequently, the heirs and the employer settled the state case for $55,000, contingent upon the district court's certification that the agreement was a "good faith" settlement. If the employer's settlement with the heirs was in "good faith," then the Government's indemnity action against the employer would be terminated by § 877(b).

Having stated that the criteria for "good faith" should be in an evaluation of relative liabilities between the parties, the court's application of this test to the facts of the case seems dubious at best. The court made a point on several occasions of noting that both sides, by their own admission, agreed that the employer had minimal exposure to plaintiffs. *Id.* at 1467. After making this point, it seems logical that the court would then go on to conclude that the settlement was made in "good faith" because it was an evaluation of relative liabilities. The court even noted that had the employer and the heirs concluded this settlement before the Government settled the case, the court would have had no occasion to question the "good faith" of the award. *Id.* at 1466 n.7. However, instead of reaching this conclusion, the court seemed to apply a tortious conduct type of analysis.

The court was disturbed because the Government had made a prompt, substantially full

H. Summary of the Law Regarding "Good Faith" Settlements

This section has traced the development of the definition of a "good faith" settlement both under California law and under two federal cases interpreting the California law. The early California decisions attempted to accommodate the competing values of equitable apportionment of loss among joint tortfeasors and encouragement of settlement, and, in so doing, defined a "good faith" settlement as one being within the reasonable range of the settlor's fair share of liability.

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value settlement with the plaintiffs based on its belief that liability would eventually be apportioned pursuant to its cross-complaint for indemnity against the employer. If the plaintiff/employer settlement was found to be in "good faith," then the Government would lose its ability to gain indemnity. Future deep pocket tortfeasors would thereby be discouraged from making early and full value settlements because of the fear that another tortfeasor would "manipulate the statute" to achieve immunity from an indemnity action. Therefore, the court held the settlement was not made in "good faith" and that the Government could have its day in court on the indemnity claim. *Id.* at 1467-68.

Obviously, the *amount* of the settlement was not the stumbling block for the *Owen* court. The Government had already paid the heirs their money, and even if the employer had settled with the plaintiffs for more than $55,000 (which the court admitted would have been an improvident settlement since they had minimal exposure), the only result would have been that the plaintiff would be compensated for full value by the Government and would be compensated even more by any settlement it could obtain from the employer. This still would not have helped the Government, because once the employer's settlement was found to be in "good faith," the Government would be barred from claiming indemnity against the employer.

Therefore, the court was not concerned that the employer had not paid the plaintiff enough, (i.e., the settlement did not reflect the "relative liabilities" of the parties) but rather that a settlement had been made *at all*. Under this rationale, no settlement between the employer and the plaintiff could be in "good faith" after the Government had settled with the plaintiff for full value, because, under § 877, once the employer's settlement is found to be in "good faith," the Government is barred from claiming indemnity against the employer.

What was present in the *Owen* case, then, was an improvident settlement by the Government. Instead of settling for "full value" (i.e., virtually the entire amount claimed by plaintiffs) it should have settled for what it thought was a reflection of its proportionate liability. Assuming it did wish to settle for full value and then later apportion the damages among the tortfeasors through a cross-complaint for partial indemnity, the Government could have included a provision in its settlement agreement that is commonly included in full value settlements, namely a release and dismissal by the plaintiff of *all* potential joint tortfeasors. In this way, a joint tortfeasor cannot later "settle" with the plaintiff in order to obtain a discharge from partial indemnity claims under § 877 and § 877.6. This is precisely what occurred in American Bankers Insurance Co. v. Avco-Lycoming Division, 97 Cal. App. 3d 732, 159 Cal. Rptr. 70 (1979). The insurance carrier settled the tort action for the full amount of plaintiff's claim and had obtained the plaintiff's dismissal with prejudice as to *all defendants.* It was then able to pursue claims against the other defendants for partial indemnity. Whether or not the plaintiff will agree to dismiss all defendants is simply one more factor to consider in evaluating a settlement. 5 CEB CIV. LITIGATION REP. 194, 195 (1983).

Thus, even though the *Owen* court said that the settlement was not in "good faith" because it was not "proportional," the court seemed to be disqualifying a proportional settlement in order to allow the Government to pursue its claim for partial indemnity.

The more recent cases have moved away from this definition, and now the courts will find any settlement to be in "good faith," regardless of the payment received by the plaintiff, as long as the nonsettling defendant cannot prove tortious conduct on behalf of the settlors. The courts have reached this result by attempting to foster the policy of encouragement of settlement while ignoring the policy of equitable apportionment of loss. It is ironic that the cases decided before *American Motorcycle* in the contribution context defined the concept of "good faith" in a way which sought to achieve a degree of equitable apportionment of loss, whereas the *Dompeling* case and its progeny decided after *American Motorcycle* completely ignored this policy. The Ninth Circuit has refused to follow the recent California decisions and has adopted a test requiring the settlement to bear a relationship to the liability of the settling party.

This section has also analyzed and discussed the facts of each case and the actual approach used by each court where it differed from the stated approach. This was done to illustrate that the rules formulated by the decisions were often dicta, were often established to cure a particular problem present in the case, and were often not applicable to subsequent cases citing them. Part V of this article will analyze four alternative definitions of "good faith" suggested by the cases just discussed.[166]

IV. A METHODOLOGY FOR FORMULATING A DEFINITION OF "GOOD FAITH"

The remainder of this article is concerned with developing an interpretation of the "good faith" requirement to be utilized by the courts. This section proposes a methodology for formulating a definition of "good faith." Part V analyzes four possible definitions and makes a recommendation.

A useful method for defining "good faith" can be found in principles of statutory construction. Even though the concept of a "good faith" settlement has been established by case law as well as statutes,[167] two maxims of statutory construction, with slight modification to per-

166. *See infra* text accompanying notes 263-383.

167. It is present in Code of Civil Procedure § 877, which, although a part of the contribution statutes, is still being applied. *See supra* note 36 and accompanying text. The "good faith" provision was incorporated by the California Supreme Court in *American Motorcycle* as part of the doctrine of partial indemnity. Finally, Code of Civil Procedure § 877.6 put in statutory form a portion of the holding of *American Motorcycle* regarding "good faith" settlements.

tain to a judicial rule as well, provide logical guidelines for the interpretation of the "good faith" provision. First, the intent of the legislature or court should be ascertained so that the purpose of the provision in question can be effectuated. Second, a statute or rule should be construed with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.[168]

Therefore, as an aid to formulating an appropriate definition of a "good faith" settlement, this section will identify and examine the policies underlying both the "good faith" requirement itself and the entire legal scheme of which it is a part. It will also be shown that these policies conflict with each other in the "good faith" settlement context. Accordingly, in order to give effect to the legislative intent and the relevant policy considerations, the "good faith" requirement should be viewed as an accommodating factor between competing goals, and should be defined in a way to let it carry out this purpose.

A. The Relevant Policy Considerations

Three major policies and two lesser policies that should be considered in formulating a definition of "good faith" have been identified by the courts and can be discerned from legislative history. The major policies are: (1) maximizing the plaintiff's recovery, (2) encouragement of settlement, and (3) equitable distribution of loss according to proportion of fault.[169] Other relevant policies, although of lesser importance, are: (1) practical considerations regarding the "good faith" settlement hearing, and (2) privacy of financial information.

1. The policy of maximizing recovery for the plaintiff

One of the policies underlying the California Supreme Court decisions dealing with comparative fault is the maximization of recovery to the injured party for the amount of his injury to the extent the fault of others has contributed to it.[170] This policy is evident in the court's

168. People *ex rel.* Younger v. Superior Court, 16 Cal. 3d 30, 40, 544 P.2d 1322, 1331, 127 Cal. Rptr. 122, 128 (1976); Clean Air Constituency v. California State Air Resources Bd., 11 Cal. 3d 801, 813-14, 523 P.2d 617, 624-25, 114 Cal. Rptr. 577, 584-85 (1974).

169. These are the three policies underlying the comparative fault cases decided by the California Supreme Court as identified in the case of Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 496, 147 Cal. Rptr. 262, 264 (1978).

170. *Id.* Several appellate decisions have identified the maximization of plaintiff's recovery as the foremost and highest ranking policy underlying the supreme court decisions. *Id.*; American Bankers Ins. Co. v. Avco-Lycoming Div., 97 Cal. App. 3d 732, 736, 159 Cal. Rptr. 70, 73 (1979).

decision in *Li* to eliminate the total bar to recovery if a plaintiff is contributorily negligent.[171] It is also the basis for the court's refusal in *American Motorcycle* to abandon the concept of joint and several liability in favor of making each defendant liable to the plaintiff for only his proportional share of the award. The rule of joint and several liability permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability.[172] The court held that if one of the tortfeasors cannot pay the full amount of his judgment, fairness dictates that the "wronged party should not be deprived of his right to redress."[173] Justice Clark acknowledged this policy in his dissent in *American Motorcycle* by stating that one of the rationales present in the majority's opinion was an "asserted public policy for fully compensating accident victims."[174]

2. The policy of encouragement of settlements

Perhaps the principal and most often discussed policy relevant to the issue of a "good faith" settlement is the policy of encouragement of settlements. This policy has been identified by all of the cases discussing "good faith" settlements. As stated by the court in *Stambaugh*:

> " 'The law wisely favors settlements . . . .' " [citations omitted]. "[I]t is the policy of the law to discourage litigation and to favor compromises of doubtful rights and controversies, made either in or out of court." [citations omitted]. Settlement agreements " 'are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation.' " [citations omitted]. Indeed, it has been said that a major goal of section 877 is the "encouragement of settlements." [citations omitted].[175]

That settlement of litigation is a major goal in California law cannot be disputed.[176] It is indeed the policy behind Code of Civil Procedure sections 877 and 877.6 and the early cases dealing with "good faith"

171. 13 Cal. 3d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875 (1975).

172. *American Motorcycle*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

173. *Id.* (quoting Summers v. Tice, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948)).

174. 20 Cal. 3d at 612, 578 P.2d at 921, 146 Cal. Rptr. at 204 (Clark, J., dissenting).

175. 62 Cal. App. 3d at 235-36, 132 Cal. Rptr. at 846 (citations omitted).

176. California courts have stressed repeatedly that settlements and compromises are favored by the law. *See* Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264, 1268 (1977); *See also* Ash v. Mortensen, 24 Cal. 2d 654, 658, 150 P.2d 876, 878 (1944); Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 86, 91 Cal. Rptr. 301, 304 (1970).

settlements. It is also one of the policies recognized in *American Motorcycle*. Because reliance on this policy alone has resulted in the current interpretation of "good faith" applied by the California courts, it is important to analyze this policy in detail to determine both its origin and its effect in a multiparty situation.

a. encouragement of settlements by giving them finality

The way the statutes and the California Supreme Court sought to encourage settlements was to give them *finality* by allowing a defendant, once he settled, to be free from the litigation entirely, including claims by his joint tortfeasors. It was recognized that a defendant would have no incentive to settle with the plaintiff if he could still be forced to litigate the case in the context of claims for contribution or partial indemnity.[177] The legislative history of Code of Civil Procedure sections 877 and 877.6 illustrates that the policy of encouragement of settlements embodied in those statutes reflected mainly this concern for providing finality. Similarly, *American Motorcycle* and the early appellate cases discussing encouragement of settlements were addressing this same concern. In Part IV-C it will be shown that the California appellate courts have misconstrued this policy as a directive for them to encourage settlements by finding virtually all settlements to be in "good faith," and in so doing they have ignored the role of "good faith" requirement as a limitation on those settlements that should be encouraged.[178]

A discussion of the policy of encouragement of settlements must begin with Code of Civil Procedure section 877 because it is the main authority cited for this policy. The legislative history of this statute reveals the concern for settlement finality, i.e., that settlements not be discouraged because of continued liability to joint tortfeasors. Section 877 achieved this purpose by releasing a "good faith" settlor from claims for contribution.[179] The *River Garden Farms* court speculated

177. A potential defendant's desire for settlement is blunted when he cannot close his file on the case. *River Garden Farms*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503; UNIF. CONTRIB. AMONG TORTFEASORS ACT § 4(b), Commissioners' Comment, 12 U.L.A. 99-100 (1975); Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 488-89 (1966); Thaxter, *supra* note 26, at 187-88. If the settlor were still liable for partial indemnity, then the settling tortfeasor would be deprived of the benefit of his bargain with the plaintiff. "He would suffer all the expense and inconvenience of a multiparty trial and could still possibly be held liable for more than he settled for through the back door of a cross-complaint for comparative indemnity against him. Obviously that would destroy every incentive for settlement . . . ." *Fisher*, 103 Cal. App. 3d at 443, 163 Cal. Rptr. at 53.

178. *See infra* text accompanying notes 237-62.

179. CAL. CIV. PROC. CODE § 877(b) (West 1980).

that section 877 was modeled after section 4 of the Uniform Contribution Among Tortfeasors Act.[180] The Commissioners' notes to that section state that an earlier draft, which did not discharge the settling tortfeasor from contribution to any other tortfeasors, discouraged settlement. Therefore, in order to encourage settlements, the new subsection, almost identical to section 877, provided that a release in "good faith" of one tortfeasor discharged that tortfeasor from all liability for contribution.[181] Thus we find the language of *River Garden Farms* that the statutory objective is "encouraging settlements and insuring a measure of finality."[182]

Unfortunately, finality was not necessarily achievable under the

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180. 26 Cal. App. 3d at 995, 103 Cal. Rptr. at 504. The court acknowledged that no legislative history specifically identifies it as such.

181. The commissioners noted:

> No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far as to say that the 1939 Act has made independent settlements impossible. . . .
>
> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution.

UNIF. CONTRIB. AMONG TORTFEASORS ACT § 4(b), Commissioners' Comment, 12 U.L.A. 99-100 (1975).

Some of the commentators disagree with this interpretation of legislative intent in California. For example, Fleming stated that the 1939 Uniform Contribution Among Tortfeasors Act provided that a settling tortfeasor remained liable for contribution in the amount by which his share exceeded the dollar value of the settlement. California did not adopt this version and only three states did, a common explanation being that it discouraged settlements by providing little incentive for either the settling defendant or the plaintiff to settle. The second version of the Act (which is almost identical to § 877) abandoned this approach and provided that a "good faith" settlement released the settling tortfeasor from contribution and further provided that plaintiff's recovery would be decreased only by the amount actually paid or the consideration for the settlement, whichever is larger. This version was adopted by a great many states, including California. However, "it is far from clear whether it was this feature [the encouragement of settlements] rather than an increasing disenchantment with the common law rule of no contribution which was the primary motive [for states to adopt this version]." Fleming, *supra* note 6, at 1495.

Another commentator has noted that the 1955 version of the Uniform Act (after which § 877 was copied) was not necessary in California because California also adopted the provision that the right to contribution does not attach unless a joint money judgment has been rendered. Thus, the rule of the 1939 Uniform Act that a release does not also release the settling tortfeasor from liability from contribution would have no application in California because no joint judgment can ever be obtained against a party who has settled. Thus, in California, it was not necessary to adopt § 877 to encourage settlements as was the case with other states which did not have the joint judgment rule. Thus, while the purpose of § 877, which was modeled after § 4 of the 1955 Uniform Act, may have been to encourage settlements, this provision was unnecessary in California, and only served to detract from the contribution act as a whole. Thaxter, *supra* note 26, at 188.

182. 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

contribution statutes.[183] For example, *Stambaugh*[184] addressed the situation of a nonsettling tortfeasor who was trying to bring a settlor back into the case for purposes of deciding his "good faith." The strong articulation of the policy of encouragement of settlement underlying section 877 made by the court in *Stambaugh* can be explained by the concern to provide a settling defendant with a total release from all aspects of the litigation. The court defined "good faith" in such a way as to provide this measure of finality.[185]

Even after the contribution statutes were replaced by the theory of partial indemnity for apportioning loss, the courts in expressing the policy of encouragement of settlements were actually concerned with finality of settlement. In *American Motorcycle*, the California Supreme Court reaffirmed that section 877 reflected a strong public policy in favor of settlement.[186] The court sought to further this same purpose in the partial indemnity context by providing an incentive for both plaintiffs and defendants to settle. It encouraged tortfeasors to settle by ruling that a settlor who settles in "good faith" is free from partial indemnity claims. Plaintiffs were given an incentive to settle by the rule that the amount of the plaintiff's judgment is reduced pro tanto

183. Code of Civil Procedure § 877 only provided for the discharge of a settling tortfeasor from further liability if the settlement was in "good faith." Yet under the joint judgment rule no contribution was possible from someone who had settled, regardless of whether the settlement was in "good faith." Therefore, the early cases grappled with the problem of what would be the nonsettling tortfeasor's remedy for a settlement that was not in "good faith," but which, by operation of the contribution joint judgment rule, cut off his right to contribution from the settling tortfeasor. In Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975), the court suggested that a nonsettling defendant's remedy would lie in the form of a recovery from both the plaintiff and the settling defendant in an independent action asserting "bad faith." Thus, after the trial on the merits against the nonsettling tortfeasors had been concluded, a settling tortfeasor could be forced to litigate the entire case in the guise of a bad faith claim, because the nonsettlor's damages would include an amount that the settlor would be required to pay had the joint judgment been entered. This, of course, would discourage settlements.

An analogous finality problem was illustrated by Justice Clark in his dissent in *American Motorcycle*. He stated that because the possibility exists of establishing "bad faith," a nonsettling tortfeasor must continue to maintain his cross-complaint for partial indemnity against a settling tortfeasor. Aware that a settlement would not ordinarily prevent his participating in the litigation on the issue of damages and relative fault, and that he might be liable for further damages, a defendant contemplating settlement will rarely do so alone. 20 Cal. 3d at 610 n.2, 578 P.2d at 920 n.2, 146 Cal. Rptr. at 203 n.2 (Clark, J., dissenting).

184. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

185. *See supra* text accompanying notes 85-95.

186. 20 Cal. 3d at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198. *See supra* text accompanying note 100.

and not by the percentage of the settlor's fault.[187]

Similarily, in *Fisher v. Superior Court*,[188] the appellate court was reacting to a trial court decision that completely frustrated the policy of finality of settlement by ordering that the issue of "good faith" would not be tried until *after* the full trial on the merits of the plaintiff's liability claim. The trial court further ruled that the jury findings in that trial might be binding in the subsequent trial on the nonsettling defendant's cross-complaint for partial indemnity and on the issue of "good faith." Thus, the trial court was forcing a settling defendant to fully participate in and defend against the plaintiff's case in order to protect herself against a possible adverse ruling on the "good faith" issue.[189] In dealing with this problem the appellate court emphasized the policy of encouragement of settlements and ruled that the issue of the "good faith" of a settlement must be determined first.[190] Unfortunately, in so doing, it also significantly narrowed the definition of "good faith" to one of tortious conduct.[191] Therefore, in *Fisher*, the appellate court's strongly stated articulation of the policy of encouraging settlements was in actuality a concern that defendants were not being provided with the incentive to settle—namely, the assurance that a settlement would be final and would free the settlor entirely from future involvement in the action.[192]

Also concerned with the finality problem was section 877.6. Passed in 1980, it had the same purpose as section 877, namely to encourage settlements by providing that a settlor would be free from future claims by his joint tortfeasors.[193] The legislative history supports this conclusion. The bill's proponents stated: "A procedural uncertainty under existing law had caused the loss of settlements in a substantial number of trial court cases . . . . [D]efendants contemplating settlement with the plaintiff are reluctant to risk vulnerability to a later jury trial in which a concurrent tortfeasor may claim that the settlement lacks 'good faith.' "[194] Unlike section 877, section 877.6 provided a cure for the finality problem by allowing a pretrial hearing to deter-

187. 20 Cal. 3d at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198. *See supra* note 102 and accompanying text.

188. 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980).

189. *Id.* at 437-38, 163 Cal. Rptr. at 49-50.

190. *Id.* at 442-43, 163 Cal. Rptr. at 53.

191. *Id.* at 445, 163 Cal. Rptr. at 55.

192. *See supra* notes 103-07 and accompanying text.

193. The clear policy of § 877.6(c) is to encourage settlement by providing finality to litigation for the settling tortfeasor. Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 230, 232, 188 Cal. Rptr. 580, 582 (1983).

194. CAL. ASSEMBLY COMM. ON THE JUDICIARY, BILL DIGEST A.B. 3425, at 2 (hearing

mine the issue of the "good faith" of a settlement.[195] Under this procedure the defendant is not discouraged from entering into a settlement with the plaintiff because of the fear he may be required later to litigate the issue of his liability if the issue of "good faith" is decided against him. Thus, section 877.6 permits a defendant who wants to settle to know in advance whether his settlement is in "good faith" and whether he will, therefore, be free from partial indemnity claims.

In conclusion, the statutes, *American Motorcycle*, and even the early appellate decisions sought to encourage settlements by providing the settling defendant with total freedom from the litigation. This is the origin of the stated policy of encouragement of settlement that is emphasized and relied upon in the "good faith" cases. However, this is a far cry from the position being taken by some California appellate courts that the statutes and *American Motorcycle* sought to encourage settlements by mandating that virtually all settlements be found to be in "good faith."[196]

b. the policy of total versus partial settlement

In the context of "good faith" settlements, possible definitions of "good faith" differ as to whether they foster total settlement of litigation, partial settlement, both, or no settlement at all. Therefore, recognizing that the courts have identified a general policy of encouragement of settlements,[197] a crucial question arises as to whether that policy speaks to total settlement of a case, partial settlement, or both. The term "total settlement" means a settlement between all parties, or one that will lead to a settlement between all parties, so as to end the litigation entirely. The term "partial settlement" means a settlement between the plaintiff and one joint tortfeasor only, with the plaintiff proceeding to trial against the remaining tortfeasors.

(1) total settlement of litigation

The reason the law encourages settlements is that settlements save time, effort, and expense for the parties and the community.[198] The benefit from a settlement accrues when the case is removed from the judicial system, and this occurs only when all claims relating to the loss

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date April 30, 1980) (analysis of A.B. 3425). *See also* CAL. SENATE REPUBLICAN CAUCUS, THIRD READING ANALYSIS OF A.B. 3425, at 2.

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

196. *See infra* text accompanying notes 237-40, 249-52.

197. *See supra* note 176 and accompanying text.

198. *See* Thaxter, *supra* note 26, at 186; Fleming, *supra* note 6, at 1495.

are settled. As stated in *Stambaugh*, settlement agreements are " 'highly favored as productive of peace and goodwill in the community and [because they] reduc[e] the expense and persistency of litigation.' "[199] In fact, the cases cited by the *Stambaugh* court for the proposition that the law favors settlements are all instances (with the notable exception of *River Garden Farms*) where the effect of the settlement in question was to end the litigation entirely.

In identifying the three policies underlying the California Supreme Court comparative fault cases, the court of appeal in *Sears, Roebuck & Co. v. International Harvester Co.* articulated the settlement goal as "encouragement of settlement of the injured party's claim."[200] Although it is not absolutely clear from this language or from the court's opinions, the predominant policy goal seems to be the settlement of a case in its entirety.

(2) partial settlement of litigation

Whether partial settlement of litigation is a worthwhile goal is open to question.[201] For example, the *Sears* court concluded that the reduction of transaction costs from the simplification of litigation that results from having one less joint tortfeasor in a case because of a settlement is at most a subordinate policy consideration.[202] It does not justify support of partial settlements to the same extent that the law favors complete settlement of a case.[203]

On the other hand, the commissioners suggested in their comments to section 4 of the Uniform Act that the goal of partial settlement is desirable.[204] Furthermore, sections 877 and 877.6 and the court in

199. 62 Cal. App. 3d at 236, 132 Cal. Rptr. at 846.

200. 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264.

201. *Settlement in Joint Tort Cases, supra* note 177, at 489.

202. 82 Cal. App. 3d 492, 497, 147 Cal. Rptr. 262, 264-65. The court based this conclusion on the fact that in the appellate court decision of *American Motorcycle* (which was authored by the same judge in the same division of the court of appeal who wrote the *Sears* opinion) the goal of reduction of transactional cost by simplification of litigation was one of the principal policy underpinnings. The supreme court, by vacating that opinion, treated that policy consideration as subordinate. *Id.* at 496, 147 Cal. Rptr. at 264.

203. Similarly, Fleming stated, the saving of "transaction costs" in the form of legal and court expenses resulting from having one fewer joint tortfeasors involved in litigation because of a settlement is too marginal and speculative a goal to justify support for partial settlements to the same extent that the law favors complete settlements. Fleming, *supra* note 6, at 1495.

204. *See supra* note 181 and accompanying text. A commentator has noted:

> The only clear advantage offered by the 1955 [Uniform Contribution Among Tortfeasors] Act is the promotion of final, but partial, settlements. . . . The 1955 Act allows the plaintiff to obtain the entire unsatisifed portion of his claim from the nonsettlor, and insures finality of settlement for the settlor by denying contribution.

American Motorcycle seem to encourage partial settlement by providing finality of the settlement to the settling defendant and by providing an incentive for the plaintiff to settle by reducing his ultimate judgment only by the pro tanto amount of any prior settlement rather than by the percentage of the settling defendant's fault.[205] In the "good faith" settlement context, at least one case, *Burlington*, has expressly articulated the policy in favor of partial settlements, although it did not analyze the issue specifically. In the *Burlington* case, the court described the goal of settlement as the encouragement of settlement *between the plaintiff and the settling defendant*.[206]

However, whether partial settlement is an intentional goal or is but a means to achieve the end of total settlement of the litigation is unclear. For example, section 877.6 has as a stated purpose the easing of court congestion by providing an incentive to settle the *entire*

> As a consequence, partial settlements are attractive; in fact, the major reason given for the change from the 1939 Act was that the 1955 approach promoted settlements more effectively. . . . It is arguable that, as the nonsettlor can be held for all the damages without gaining a right to contribution, *all* of the tortfeasors will be eager to settle, and entirety of settlement will be promoted. . . . [A]ny conclusion that the act promotes entirety of settlement is at best speculative.

Settlement in Joint Tort Cases, supra note 177, at 492.

205. Section 877.6 does not itself contain a provision for a pro tanto reduction.

206. 137 Cal. App. 3d at 945, 187 Cal. Rptr. at 378.

Another appellate court expressed the opinion that plaintiffs should be encouraged to settle even if it is with fewer than all the tortfeasors. Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d 353, 358, 195 Cal. Rptr. 116, 119 (1983). In that case, the court decided how to allocate among remaining joint tortfeasors the percentage of responsibility attributable to joint tortfeasors who have previously entered into "good faith" settlements with the plaintiff and are, therefore, free from paying amounts in excess of their settlement. The court of appeal held that the solvent (nonsettling) tortfeasors must share in direct proportion to their respective degree of fault the liability of the judgment-proof (settling) tortfeasors, and this computation must be made as though the judgment-proof tortfeasors had not been involved in the accident. Thus, an insolvent defendant's shortfall should be shared proportionately by the solvent defendants as though the insolvent or absent person had originally not participated. *Id.* As part of its argument, a nonsettling tortfeasor (the state) contended that the allocation of insolvent or settling defendants' shortfalls must include plaintiffs who are at fault. The court expressly rejected this and held that the suggestion was at odds with the explicit rationale of *American Motorcycle* that in order to encourage settlements, the rule must be that one who enters into a "good faith" settlement must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor. The court emphasized that it is not only the defendant in the main action, but also the *plaintiff*, who has an interest in finality of settlements. The state's suggestion that the plaintiff's fault be taken into account would eliminate any incentive an injured plaintiff would have *to settle with fewer than all of the tortfeasors*. In expressing this policy, the *Lyly* court stated: "We understand *American Motorcycle* to have ended the discussion definitively." 147 Cal. App. 3d at 358, 195 Cal. Rptr. at 119. Of course, *American Motorcycle* did not deal with the issue of whether partial settlements, as such, should be encouraged.

litigation.[207]

It has been argued that much of the agitation for encouraging partial settlements has come from the plaintiffs' bar to whom settlement is an economical way of life, often yielding high rewards.[208] The benefits to a plaintiff from a partial settlement come not in the form of ending the litigation, but rather in the form of getting some money to the plaintiff more quickly. As such, a partial settlement may help achieve the goal of maximizing the plaintiff's recovery.

The interesting and crucial consideration is whether a settlement with fewer than all defendants will encourage or discourage settlement with the remaining tortfeasors. This is central to an analysis of whether a given interpretation of a "good faith" settlement actually fosters the policy of settlement of the entire case. This determination varies with the different alternative definitions of "good faith" and will be considered in the analysis of those alternatives.[209]

3. The policy of equitable distribution of loss according to proportion of fault

The third major goal that is significant in dealing with the issue of a "good faith" settlement is the public policy of equitable apportionment of loss among the parties in relation to their degree of fault.[210] In this respect, the goals of apportionment of loss according to fault and equity and fairness are intertwined. Thus, the courts talk about apportionment of loss according to fault as "equitable" apportionment, because it is primarily from a sense of equity and fairness that the courts have moved to the present comparative negligence system.[211]

The importance of the policy of equitable apportionment of loss is clear. It is this policy which caused the supreme court in *Li v. Yellow Cab Co.* to abrogate the prior California rule of contributory negligence which barred any recovery by a negligent plaintiff, regardless of

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207. The fact that settlements were discouraged under the procedural system before Code of Civil Procedure § 877.6 "contributed widely to metropolitan court congestion." CAL. SENATE COMM. ON THE JUDICIARY, REPORT ON A.B. 3425, at 3 (analysis of A.B. 3425 as amended May 7, 1980). The Senate Judiciary Committee cited the *Fisher* case for the proposition that the legislation was needed to stop "the needless proliferation of a great number of more complex trials." *Id.*

208. *See Settlement in Joint Tort Cases, supra* note 177, at 489; UNIF. CONTRIB. AMONG TORTFEASORS ACT § 4, Commissioners' Comment; Fleming, *supra* note 6, at 1495; *American Motorcycle*, 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

209. *See infra* notes 266-67, 360-61 and accompanying text.

210. *Sears*, 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264.

211. Daly v. General Motors Corp., 20 Cal. 3d 725, 736-37, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978).

his percentage of fault, and in its place adopt a pure system of comparative negligence which apportions liability in direct proportion to fault in all cases. In so doing, the court also rejected the system whereby the plaintiff may recover up to the point at which the plaintiff's negligence is equal to that of the defendant in favor of the pure form because of this policy that liability for damage should be borne in direct proportion to the amount of negligence of each of the parties.[212] The court based its decision in *Li* on logic, practical experience and fundamental justice.[213] In fact, the major precept guiding the court in *Li* seemed to be that of fairness or justice.[214]

Also stressing the policy of fairness was *Daly v. General Motors Corp.*[215] in which the court applied comparative fault principles to apportion responsibility between a strictly liable defendant and a negligent plaintiff in a products liability action. The court stated that "[f]ixed semantic consistency . . . is less important than the attainment of a just and equitable result,"[216] and that the *Li* principle could best be described as "equitable apportionment of loss" rather than comparative fault or negligence.[217]

Of course, the policy of apportioning liability according to fault as mandated by considerations of fairness and equity was the theme underlying the California Supreme Court's decision in *American Motorcycle Association v. Superior Court*. In *American Motorcycle*, the court identified the common goal of the doctrines of contribution and indemnity as "the equitable distribution of loss among multiple tortfeasors."[218] The court stated that the existing California common law equitable indemnity doctrine, while ameliorating inequity and injustice in some cases, suffered from the same basic "all-or-nothing" deficiency as the discarded contributory negligence doctrine, and fell far short of fulfilling *Li*'s goal of " 'a system under which liability for dam-

212. 13 Cal. 3d at 829-30, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

213. *Id.* at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

214. Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of* American Motorcycle Association v. Superior Court, 14 LOY. L.A. L. REV. 775, 777 n.8 (1981) [hereinafter cited as Zavos].

215. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

216. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

217. *Id.* at 736-37, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87. The court also said that *Li* stood for the principle that "loss should be assessed equitably in proportion to fault." *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387. Also, the *Daly* court spoke in terms of "logic, justice and fundamental fairness" and indicated that "[t]he law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation." *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390. *See generally* Zavos, *supra* note 215, at 777 n.8.

218. 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

age will be borne by those whose negligence caused it in direct proportion to their respective fault.' "[219] In concluding that the force of *Li*'s rationale applied equally to the allocation of responsibility between two or more negligent tortfeasors, thus requiring a modification of the state's traditional all-or-nothing common law equitable indemnity doctrine, the court further expressed its concern with equity and fairness as mandating apportionment of loss. "Again, we concur with Dean Prosser's observation in a related context that '[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were . . . unintentionally responsible, to be shouldered onto one alone . . . while the latter goes scot-free.' "[220] Accordingly, the *American Motorcycle* court held that a joint tortfeasor may obtain partial indemnity from his joint tortfeasors on a comparative fault basis.[221]

Even before comparative negligence was adopted in California, equitable apportionment of loss among tortfeasors was an important goal. The belief that it was inequitable to place the entire burden of liability on one wrongdoer when another was also responsible for the harm prompted erosion of the common law doctrine denying contribution and led to the enactment of the contribution statutes.[222] In the early cases dealing with the "good faith" issue under the contribution statutes, courts were concerned with effectuating the policy of equitable distribution of loss among tortfeasors, even though that equitable distribution was limited to an equal division among judgment tortfeasors.[223] Thus, the strong public policy of allocating loss among the parties in an equitable fashion formed the basis for the California Supreme Court decisions in the area of comparative negligence, and was also present in the context of the old rules of contribution and indemnity.

4. Lesser policy considerations

a. practical considerations regarding the "good faith" hearing

A lesser policy consideration, yet nevertheless one which must be

219. *Id.* (quoting Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975)). Under the common law equitable indemnity doctrine, the *total* loss was shifted from one tortfeasor to another. For a discussion of this doctrine, see *supra* note 27.

220. 20 Cal. 3d at 607-08, 578 P.2d at 918, 146 Cal. Rptr. at 201 (citation omitted).

221. *Id.* at 607, 578 P.2d at 918, 146 Cal. Rptr. at 201.

222. *River Garden Farms*, 26 Cal. App. 3d at 993 n.5, 996-97, 103 Cal. Rptr. at 503 n.5, 505-06. *See supra* notes 27, 74 and accompanying text.

223. *See, e.g., id.* at 993, 103 Cal. Rptr. at 503.

discussed with respect to defining the concept of a "good faith" settlement, is the practical effect of the definition chosen on the "good faith" hearing itself. California Code of Civil Procedure section 877.6 provides for a pretrial hearing on the issue of "good faith" to be conducted upon twenty days written notice.[224] The hearing is similar to ones conducted in other law and motion matters, and the judge may in his discretion decide the issue based on affidavits and declarations.[225] Thus, any definition of "good faith" must be one that will allow the issue to be determined at a pretrial hearing.[226] This concern for practical considerations was expressed by the court in *Dompeling* and caused the court to provide a very limited definition of "good faith" in order to narrow the scope of the hearing and, correspondingly, the scope of discovery.[227] It will be argued that the *Dompeling* court narrowed the definition of "good faith" too much. However, the court's concern with practical considerations is a valid one.

b. the protection of defendant's financial affairs

The *Dompeling* court was also concerned that if a settling defendant had to undergo discovery into his financial affairs for purposes of determining the "good faith" of a settlement, settlements would be discouraged.[228] The protection of defendants from discovery regarding their financial assets in order not to discourage a settlement was a crucial policy consideration present in *Dompeling*, and resulted in the court espousing a definition of "good faith" which made the discovery of the defendant's financial information not relevant to the subject matter of the action.[229]

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224. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1984). See *supra* note 50 for text of § 877.6.

225. CAL. CIV. PROC. CODE § 877.6(b) (West Supp. 1984). There is no right to a jury trial in a "good faith" hearing pursuant to § 877.6. Widson v. International Harvester Co., 153 Cal. App. 3d 45, 56-57, 200 Cal. Rptr. 136, 144 (1984).

226. A trial court's decision to delay the determination of the issue of the "good faith" of a settlement until a bifurcated trial instead of deciding it at a pretrial hearing was rejected by an appellate court in a writ proceeding. The appellate court determined that the moving party was entitled to a prompt hearing on the merits of its motion pursuant to § 877.6. This proceeding, which is unreported, was part of the pretrial stages of *Wysong*, and was mentioned by the court in deciding an appeal in the same case. Wysong & Miles Co. v. Western Indust. Movers, 143 Cal. App. 3d 278, 283, 291, 191 Cal. Rptr. 671, 675, 681 (1983).

227. 117 Cal. App. 3d at 810, 173 Cal. Rptr. at 45.

228. *Id.* at 809, 173 Cal. Rptr. at 44.

229. *Id.* at 810, 173 Cal. Rptr. at 45. *See supra* notes 108-14 and accompanying text.

B. Conflict Among the Policy Considerations

In summary, let us assume that three major policies should be considered in establishing the definition of a "good faith" settlement: maximization of recovery to the injured party, encouragement of settlement of the injured party's claim, and equitable apportionment of liability among tortfeasors.[230] Also present are considerations regarding the feasibility of having the issue of "good faith" determined at a pretrial hearing and the protection of the settling defendant's financial information. A definition of a "good faith" settlement must be fashioned in such a way as to further these policies. However, inherent in any definition of a "good faith" settlement is a clash between these policy considerations.

Foremost is the conflict between the goals of equitable apportionment of loss among joint tortfeasors and encouragement of settlements.[231] Consider first the effect of a finding of "good faith" on the policy of equitable apportionment of loss. A settling tortfeasor is discharged from claims for partial indemnity by his joint tortfeasors if his settlement with the plaintiff is in "good faith." He will need to contribute no more than the amount of that settlement to either the plaintiff or to any other tortfeasor. The nonsettlors remain liable for plaintiff's entire damages and receive nothing more than a credit for the amount of the settlement to be offset against any eventual judgment against them. The judgment is not reduced by the settlor's percentage of fault. The lower the settlement figure, the lower the credit, and the greater the potential liability of the nonsettlors. Therefore, a finding that a settlement is in "good faith" will alter the proportional liability of the joint tortfeasors, and almost always results in apportionment unrelated to percentage of fault; i.e., "inequitable" apportionment. Such disproportionality results whether the remaining defendant goes to trial or settles. As an illustration, reconsider the example found in the beginning of this article. Assume that the plaintiff seeks damages for personal injury in the amount of $100,000 against defendant *A* who is 80% at fault and defendant *B* who is 20% at fault. If *A* settles with the plaintiff for $10,000 in a "good faith" settlement, and if *B* proceeds to trial and loses, *B* will have to pay the plaintiff $90,000 or 90% of the verdict even

230. *Sears*, 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264. *See supra* text accompanying notes 169-223.

231. *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506. As stated in *Dompeling*, "There is an obvious tension between California's well recognized public policy to promote the settlement of claims and a policy permitting such settlements to be attacked as unfair." 117 Cal. App. 3d at 808, 173 Cal. Rptr. at 43.

though he was only 20% at fault. This is, of course, a disproportionate allocation. But disproportionality may also result if *B* wishes to settle. Once *A* and the plaintiff have settled, the risks to *B* have changed. He now faces a $90,000 liability instead of the $20,000 one attributable to his percentage of fault. Also, by settling cheaply with defendant *A*, the plaintiff now needs to hold out for a higher settlement from defendant *B* in order to be compensated. Thus, defendant *B* will probably be forced to settle for a higher amount than he would have if the settlement between the plaintiff and defendant *A* had not been found to be in "good faith." This amount will be in excess of that mandated by his small percentage of fault, and will also result in inequitable allocation of loss.

The farther the settlement amount between the plaintiff and settling defendant *A* is from the amount *A* would have to pay after a judgment establishing his proportionate share of liability, the more *B* will have to pay and the less equitable will be the distribution of loss among the tortfeasors. Conversely, the higher the settlement and the more it reflects *A's* actual proportion of responsibility, the more equitable the distribution of loss. Accordingly, in order to foster the policy of equitable distribution of loss according to fault, a definition of a "good faith" settlement should be formulated so as to find in "good faith" only those settlements which approximate in amount the settlor's proportional share of the loss.

However, such a definition of "good faith" will frustrate the goal of encouragement of settlements, at least in so far as the initial settlement between the plaintiff and one tortfeasor is concerned. That goal is best accomplished by defining "good faith" in such a manner as to uphold the greatest number of settlements between a willing plaintiff and a willing settling defendant. A defendant's desire for settlement is increased in relation to how low he perceives the settlement figure to be compared with the amount for which he would be responsible if he did not settle. Even though attorney's fees and costs of trial are significant, a defendant is not likely to settle for an amount that is no less than he would be liable for after a judgment.[232] From the plaintiff's standpoint, because he can obtain a judgment and full satisfaction of his claim above the settlement figure from a remaining defendant, he will not be discouraged from settling for a lower amount with one joint

232. H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT 110-11 (1973).

tortfeasor.[233] In fact, if the plaintiff needs funds to finance his litigation, such a settlement may provide the necessary relief without prejudicing his ability to collect the remaining amounts later from the nonsettling defendants. Initial settlements are thus encouraged by defining "good faith" in such a way as to uphold consensual settlements between plaintiffs and defendants regardless of the relationship of the amount of the settlement to the settling defendant's potential liability.

Therefore, the closer the definition of "good faith" moves toward requiring the settlement to reflect the proportionality of the settlor's fault, the greater will be the fostering of the policy of equitable apportionment of loss, but the policy of encouragement of settlements will be frustrated to a greater extent.[234] Conversely, the farther the definition of "good faith" moves from requiring proportionality, the greater will be the fostering of the policy of encouraging initial settlements, but the policy of equitable apportionment of loss will be frustrated. Therein lies the crucial conflict between the goals of encouragement of settlements and equitable apportionment of loss—a conflict that must be dealt with in formulating any definition of a "good faith" settlement.

Another conflict to be considered is that between the goal of efficiency of the "good faith" hearing and the goal of equitable apportionment of loss among joint tortfeasors. The more the definition of a "good faith" settlement approximates a requirement of pure proportionality, the more the "good faith" hearing must concern itself with exact determinations of liability, damages and apportionment of fault, and the more complicated it will become.

The effect of the definition of a "good faith" settlement on the goal of maximizing the plaintiff's recovery is not clear. It varies with the circumstances. Returning to the example where the plaintiff had suffered injuries of $100,000 from defendant *A* who was 80% at fault and defendant *B* who was 20% at fault, if the plaintiff settled with *A* in "good faith" before trial for $10,000 and prevailed at the trial against *B*, then *B* would pay the plaintiff $90,000. Similarly, if the settlement with *A* was in the amount of $50,000, then *B* would pay $50,000. The plaintiff would have been fully satisfied in either event. Therefore, as-

233. This is evidenced by the conduct of the plaintiffs in all of the cases discussed. For example, in *Cardio* the plaintiff released one defendant because it would be easier to proceed against the other. 122 Cal. App. 3d at 886, 176 Cal. Rptr. at 257. In *Ford Motor Co. v. Schultz*, the plaintiff settled with Schultz for a low amount because he could recover the full judgment against Ford. 147 Cal. App. 3d at 945-46, 195 Cal. Rptr. at 472.

234. This is true at least in the initial settlement. For a discussion of the effect of a possible definition of "good faith" on the overall settlement of the litigation, see *infra* notes 266-67, 361-62 and accompanying text.

suming the plaintiff prevails at the trial against a remaining solvent defendant, the amount of the plaintiff's settlement with the first defendant, or indeed whether there had been any settlement at all, does not affect the amount of the plaintiff's eventual recovery. However, presumably the plaintiff would prefer to obtain the greatest amount of money in advance of the trial. Also, if because of the risks associated with trial, the plaintiff did not prevail against *B* in the trial after settling with *A*, then, of course, the plaintiff's recovery would be maximized by whatever definition of "good faith" would have encouraged *A* to settle for the most money, because that settlement figure would be the only amount that the plaintiff obtained. What definition of "good faith" would have compelled *A* to settle for more money cannot be determined. If a settlement must approximate proportional liability in order to be deemed in "good faith," would *A* have settled for more than $10,000 or not have settled at all? If the definition of "good faith" is such that a $10,000 settlement would be found to be in "good faith," is this all that *A* would have paid plaintiff or would *A* have been willing to pay more because he faced liability for 80% of the judgment? Such considerations would differ from case to case and from party to party. Accordingly, the goal of maximizing the recovery of the plaintiff will be considered a neutral goal that does not conflict with other goals so far as a definition of "good faith" is concerned. This is consistent with the cases discussing "good faith" settlements because none of them consider this policy in determining whether a settlement has been found to be in "good faith." However, in analyzing a recommended definition of a "good faith" settlement, this article will discuss the effect of the current and proposed definitions on this goal.[235]

In conclusion, there are two major, competing goals which must be considered in formulating a definition of a "good faith" settlement. These competing goals of equitable apportionment of loss and encouragement of settlement are discussed by all of the "good faith" cases and will be examined below with respect to each possible interpretation of "good faith." Another conflict, although not as significant, is between the goals of equitable apportionment of loss and efficiency of the "good faith" hearing. This conflict is also considered below.

235. *See infra* text accompanying notes 277-79 (tortious conduct test) and 366-68 (reasonable range test).

C. *Dealing with the Competing Policy Considerations: To Rank Them or to Balance Them*

Once the conflict between the goals of equitable apportionment of loss and encouragement of settlements is recognized, the interrelationship of these two goals becomes crucial to the definition of "good faith." Some courts and commentators have ranked the goals. As will be demonstrated, as soon as a ranking occurs, the definition of "good faith" varies dramatically according to the ranking, with the result that the policy ranked as secondary is given no effect at all.[236] Other cases have attempted to accommodate the goals. This is the more sensible approach.

1. Ranking of goals

The California Supreme Court has expressed no opinion on the relative importance of the goals of encouragement of settlement and equitable distribution of loss. In *American Motorcycle Association v. Superior Court*, the court did incorporate the principle of Code of Civil Procedure section 877 into the partial indemnity theory and held that a "good faith" settlement would release the settling tortfeasor from claims for partial indemnity.[237] The court did quote the language of *Stambaugh* regarding the importance of encouragement of settlements, but it did not put the goal of settlement ahead of the system of comparative fault it was establishing. The requirement of the "good faith" of the settlement remained, but the court did not define this term.

The decisions of the California appellate courts beginning with *Stambaugh* have not followed this approach. They have thrust the policy of encouragement of settlements to the forefront and relegated the goal of equitable apportionment of loss to a secondary position. The case of *Sears, Roebuck and Co. v. International Harvester Co.* established an actual "hierarchy" of interests and ranked the goals in the following order: (1) maximization of recovery to the injured party for the amount of his injuries to the extent the fault of others has contributed to it, (2) encouragement of settlement of the injured party's claim, and (3) the equitable apportionment of liability among the tortfeasors.[238]

The hierarchy established in *Sears* made sense in that case. *Sears*

236. *See infra* text accompanying notes 247-48.

237. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

238. 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264. *See also* American Bankers Ins. Co. v. Avco-Lycoming Div., 97 Cal. App. 3d 732, 736, 159 Cal. Rptr. 70, 73 (1979); International Harvester Co. v. Superior Court, 95 Cal. App. 3d 652, 660, 157 Cal. Rptr. 324, 328-29 (1979).

involved a *settling* defendant's right to seek partial indemnity from a nonsettling defendant. It did not deal with the issue of a "good faith" settlement at all. The court established the hierarchy in reaching its decision to allow a settling tortfeasor to seek partial indemnity after he had settled. The decision was consistent with all the policies ranked in the hierarchy and the court could have reached the same decision regardless of the order in which the policies were ranked.[239]

Such is not the case with defining a "good faith" settlement because in that context the policies conflict with each other. The meaning of "good faith" changes according to whichever policy is given priority. Nevertheless, all but the early California cases dealing with "good faith" settlements have specifically adopted the *Sears* hierarchy and have considered encouragement of settlements as the foremost goal.[240]

On the other hand, other cases and commentators assert that the opposite order should be given to the conflicting goals of equitable apportionment and encouragement of settlements. For example, in advocating a change from the system of joint and several liability, one commentator stated that "the principle of liability in proportion to fault should control over the mere policy of encouraging settlements whenever the two necessarily conflict."[241] Similarly, the court in *River Garden Farms* identified the policies underlying the contribution statutes including section 877 as *first*, equitable sharing of costs among the parties at fault, and *second*, encouragement of settlements.[242]

The Ninth Circuit adopted this same order of priority. The two Ninth Circuit cases, *Commercial Union Insurance Co. v. Ford Motor Co.*[243] and *Owen v. United States*,[244] speak in terms of furthering both policies. However, as is most evident in the *Owen* case, the court

239. Permitting assertion by the settling defendant of his right of partial indemnity did not infringe upon the maximization of recovery to the injured person. He had already received his money. It actually encouraged settlement because if a claim for indemnity were barred after settlement, a named defendant would be inhibited from settling to rid himself of the expense of litigation if he felt that he had a valid right of indemnity against a solvent joint tortfeasor. The allowance of this right by the settling defendant also effectuated the policy of equitable apportionment of loss among the tortfeasors. *Sears*, 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264.

240. *E.g., Fisher*, 103 Cal. App. 3d at 446-47, 163 Cal. Rptr. at 55-56; *Cardio*, 122 Cal. App. 3d at 888, 176 Cal. Rptr. at 259; *Burlington*, 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 378, Ford Motor Co. v. Schultz, 147 Cal. App. 3d at 950, 195 Cal. Rptr. at 475.

241. Comment, *Comparative Fault and Settlement in Joint Tortfeasor Cases: A Plea for Principle Over Policy*, 16 SAN DIEGO L. REV. 833, 834 (1979).

242. 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503 (emphasis added) (footnote omitted).

243. 640 F.2d 210 (9th Cir.) *cert denied*, 455 U.S. 858 (1981).

244. 713 F.2d 1461 (9th Cir. 1983).

seemed to be concerned mostly with equity and fairness.[245] The dissenting judge in the *Tech-Bilt* case stated, "[t]he Ninth Circuit . . . interprets the correct order of the policies served by section 877 as being 'equity and the settlement of cases prior to trial' [citation omitted] . . . . [I]t seems unlikely that a system of justice would regard the settling of cases as more important than an equitable result."[246]

As has been shown, opinions differ on the proper ranking of the competing policies of encouragement of settlements and equitable apportionment of loss. This only serves to reinforce the theory that in the context of a "good faith" settlement where these two important policies conflict, a ranking of the policies is not the proper approach. Ranking is too simple an analysis and does not lead to a reasonable solution. Once one policy is given precedence over the other in formulating a definition, the other policy is frustrated. This is evident by the decided cases. For example, the California appellate decisions after *River Garden Farms* and *Lareau* have articulated the encouragement of settlements as the primary policy consideration.[247] Once this is done, virtually any settlement must be found to be in "good faith," because such a finding encourages at least that particular settlement. This has led to the inequitable results found in *Cardio* and *Tech-Bilt* where a plaintiff's unilateral decision to dismiss a party in exchange only for a waiver of costs was held in each case to be a "good faith" settlement. On the other extreme, one finds the federal cases that place equitable considerations first. Thus, the *Owen* court found a settlement not to be in "good faith" where its only fault seemed to be that it reached an inequitable result vis-a-vis the Government which had made an improvident settlement for too much money.[248]

Furthermore, a ranking of the goals in defining "good faith" will result in a definition which always yields the same results. It is interesting to note that the California appellate courts that rank the policy of encouragement of settlements first have always found the settlements in question to be in "good faith." In the two, and only, federal cases which stress equitable apportionment, the Ninth Circuit Court of Appeals has found both the settlements under consideration *not* to be in "good faith."

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245. *See supra* note 165 and accompanying text.

246. 146 Cal. App. 3d at 1163-64, 194 Cal. Rptr. at 740 (Lewis, J., dissenting), *hearing granted*, Nov. 10, 1983 (L.A. 31826).

247. *See supra* text accompanying notes 85-95, 103-14, 124-53.

248. *See supra* note 165 and accompanying text.

2. The "good faith" requirement as an accommodating factor between competing policies

In defining a "good faith" settlement, the competing policies of equitable apportionment of loss and encouragement of settlements should not be ranked because ranking has the effect of frustrating the policy not ranked first. Rather, a definition should be used which effectuates both policies because both are important considerations in the law. The requirement that a settlement be in "good faith" should be viewed as a means to accommodate these competing goals.

The role of the "good faith" requirement as an accommodating factor complies with the principle of statutory construction mentioned earlier that a statute should be construed with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.[249] An examination of the entire contribution and comparative fault schemes reveals *two* policy considerations relevant in the "good faith" settlement context—encouragement of settlements and equitable apportionment of loss. The California appellate courts that have ranked the policies and have given prominence to the policy of encouragement of settlements in their tortious conduct test for "good faith" have misconstrued this role of the "good faith" clause and have misinterpreted the policies sought to be achieved by the "good faith" requirement. It is true that sections 877 and 877.6 had the purpose of encouraging settlements, and that a similar purpose was expressed in *American Motorcycle*.[250] However, that purpose was sought to be achieved by providing a mechanism for the settlor to be released from claims by joint tortfeasors in order to give that settlement finality.[251] The further condition that the settlement be in "good faith" is a separate requirement, limiting those settlements that are to be encouraged by providing a release. These statutes and the discussion in *American Motorcycle* do not mandate that the "good faith" requirement itself be interpreted solely to encourage settlements to the complete frustration of other policies. If this were the case, the "good faith" factor would have no meaning. The equally relevant policy consideration of equitable apportionment of loss that is actually the dominant theme behind the contribution statutes, of which section 877 is a part, and the *American Motorcycle* partial indemnity doctrine, to which section 877.6 refers,[252] must not be ignored. Thus, the "good faith"

249. *See supra* note 168 and accompanying text.
250. *See supra* text accompanying notes 175-96.
251. *See supra* text accompanying notes 177-96.
252. *See supra* text accompanying notes 210-23.

clause should be viewed as a means to accommodate competing but equally important policies.

The role of the "good faith" requirement as an accommodating factor rather than as a means simply to encourage settlements is also supported by the legislative history of the "good faith" clause of Code of Civil Procedure section 877. As first introduced, the California bill[253] did not include the "good faith" provision, which was later inserted into section 877 by a committee amendment.[254] As amended, section 877 was almost identical to a 1955 revision of the Uniform Contribution Among Tortfeasors Act.[255] Although there is no documentation to establish section 4 of the draft prepared by the Commissioners on Uniform Laws as the immediate progenitor of the legislative committee amendment which added the "good faith requirement" to section 877, the court in *River Garden Farms* concluded that the parallelism of language between section 877 and section 4 established an inference that the California Legislature sought to accomplish the same goal as the Uniform Law Commissioners.[256] That goal was "that the plaintiff should not be permitted to release one tortfeasor from his fair share of liability and mulct another instead, from motives of sympathy or spite, or because it might be easier to collect from one than from the other."[257] The court in *River Garden Farms* concluded that even though in California under the contribution statutes a plaintiff could still attack his antagonists one by one, he would at least be compelled to abide by the moral standards signified by the demand for a "good faith" release.[258] Therefore, the demand for a release in "good faith" found in section 877 sought to establish a standard of equitable conduct embracing other defendants as well as the immediate parties to the settlement.[259] Thus, while the purpose of section 877 was to encourage settlements, the purpose of the "good faith" requirement of section 877 was to impose equitable conditions on those settlements which would be encouraged.[260]

This is what seems to have been also mandated by the California

253. S. 1510, Reg. Sess. (1957).

254. 3 Assembly J. 4716 (1957 Reg. Sess.).

255. UNIF. CONTRIB. AMONG TORTFEASORS ACT § 4, 12 U.L.A. 98 (1975).

256. 26 Cal. App. 3d at 995-96, 103 Cal. Rptr. at 504-05.

257. *Id.* at 995-96, 103 Cal. Rptr. at 505 (quoting UNIF. CONTRIB. AMONG TORTFEASORS ACT § 4 comment, 12 U.L.A. 99 (1975)).

258. 26 Cal. App. 3d at 996, 103 Cal. Rptr. at 505.

259. *Id.* at 995, 103 Cal. Rptr. at 504.

260. California Code of Civil Procedure § 877.6 adopted the "good faith" requirement of § 877. There is no legislative history on this aspect of the statute except a general statement that it adopted present law, namely § 877.

Supreme Court in the *American Motorcycle* decision. In developing its rule of partial indemnity, the court was clearly promulgating the policy of equitable apportionment of loss among joint tortfeasors. However, the court also acknowledged the importance of the policy of encouraging settlements, and being aware that the ability of one defendant to seek partial indemnity from another could defeat the incentive to settle, it held that a tortfeasor who has entered into a settlement should be released from liability for partial indemnity if that settlement was in "good faith."[261] The court did not hold that every settlement operates as a discharge from partial indemnity, but only a "good faith" settlement. The court found that the two policies were not mutually exclusive, but could be accommodated through the definition of the term "good faith."

A similar sentiment was expressed in *River Garden Farms* several years earlier in the context of a "good faith" settlement under the contribution statutes. That court stated:

> [I]f 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. If the statute is to work well, the demand for good faith settlement should find its role as an accommodating factor between undesirable extremes.
>
> [The good faith requirement should be] [a]pplied to strike a balance between the dual statutory objectives . . . .[262]

V. An Examination of Possible Definitions of "Good Faith"

This section will examine four possible interpretations of what constitutes a settlement made in "good faith" for purposes of releasing the settling tortfeasor from claims for partial indemnity: (1) the tortious conduct test, (2) the strict proportionality test, (3) the tactical maneuver test, and (4) the reasonable range of proportionality test. These four alternatives have been suggested by various appellate decisions. Each alternative will be examined to see if it can serve to accommodate the competing policies identified in Part IV. The examination of the alternatives will be made within the confines of the rules set forth by the relevant code sections and the *American Motorcycle* decision regarding the effect of a settlement found to be in "good faith."

It will be shown that the last alternative, the reasonable range of

261. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.
262. 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506.

proportionality test, provides the best accommodation of the competing values relevant to the "good faith" determination. Therefore, this article recommends that the courts adopt the following definition of a "good faith" settlement: A settlement is in "good faith" when it falls within the reasonable range of the settling tortfeasor's liability to the other parties in the litigation. This proposed reasonable range test will eliminate the inequitable results of the present tortious conduct test of "good faith" without discouraging the settlement of litigation. It will be demonstrated that the tortious conduct test completely ignores the policy of equitable apportionment of loss in favor of the policy of encouragement of settlement. Furthermore, while putting a premium on encouraging settlement, it is not even clear that the tortious conduct test fosters settlement of the entire case.

A. The Tortious Conduct Test

The current approach being applied by the California courts of appeal is the tortious conduct test. Under this test, any settlement will be found to be in "good faith" *regardless of its monetary value* as long as it is made without an intent to injure the interests of nonsettling tortfeasors.[263] The amount of the settlement is irrelevant, and it need bear no proportional relationship whatsoever to the settlor's anticipated liability.

1. Policy considerations and the tortious conduct test

a. the policy of encouragement of settlements

The California cases utilizing the tortious conduct test do so for the stated purpose that it fosters the important policy of encouragement of settlement.[264] This test for "good faith" will result in virtually all settlements made between plaintiffs and defendants being found to be in "good faith" because most settlements are made because the parties feel they benefit, not because they intend to injure the nonsettling defendant. The *Burlington* court went so far as to articulate the goal of settlement relevant to the determination of "good faith" as the goal of encouraging settlement between the plaintiff and the settling defendant.[265] If this is the interpretation of the goal, the tortious conduct test certainly does achieve it.

263. *E.g.*, Ford Motor Co. v. Schultz, 147 Cal. App. 3d at 949, 195 Cal. Rptr. at 475. *See supra* notes 111, 107, 127-28, 138, 153 and accompanying text.

264. *See supra* notes 90-91, 106, 110-14, 136-37 and accompanying text.

265. 137 Cal. App. 3d at 945, 187 Cal. Rptr, at 378.

The type of settlement encouraged by this test is an early, cheap settlement with one tortfeasor. In a situation where both defendants are solvent and able to pay (as was present in the *Cardio* case) the plaintiff will be able to obtain a full recovery regardless of with whom he settles first. The plaintiff may be willing to settle for a low sum with one defendant to finance his litigation. Thus, the defendants will race to effectuate an early and cheap settlement with the plaintiff because, under the tortious conduct test, the cheap settlement will be found to be in "good faith." The first settlor will be released from claims for partial indemnity, leaving the remaining defendant to pick up the lion's share of the loss.

While the tortious conduct test does encourage settlements between the plaintiff and one defendant, it is interesting to hypothesize about its effect on the overall settlement of the litigation. An argument can be made that the policy of the total settlement of litigation will be promoted by the tortious conduct test which allows a cheap, nonproportional settlement to be in "good faith." Once the first defendant has settled cheaply, the second defendant is put at a severe tactical disadvantage because his exposure has changed dramatically. Instead of risking his proportionate share of an adverse judgment, a nonsettling tortfeasor risks the entire burden of the judgment, offset only by the amount of the settlement. He may well feel compelled to settle the case, even for an amount well in excess of his proportional share of fault, in order to avoid the risk of bearing virtually the entire judgment alone.[266]

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266. For an illustration of this concept, see the discussion of the reasonable range test, *infra* text accompanying notes 361-62.

The psychology of settlement was discussed by Justice Clark in his dissent in *American Motorcycle* where he criticized the majority's rule that " 'plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a "good faith" settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury.' " 20 Cal. 3d at 609, 518 P.2d at 919, 146 Cal. Rptr. at 202 (quoting the majority opinion at 20 Cal. 3d 604, 578 P.2d at 916, 146 Cal. Rptr. at 199). He set up the following hypothetical:

Assume that there is a situation where the plaintiff is 30% at fault, one defendant is 60% at fault and another defendant is 10% at fault, and that both defendants are solvent.

> [T]he plaintiff is ordinarily eager to settle quickly to avoid the long delay incident to trial. Further, he will be willing to settle with either defendant because under the majority's suggested rules, he may then pursue the remaining defendant for the balance of the recoverable loss (70 percent) irrespective [of] whether the remaining defendant was 10 percent at fault or 60 percent at fault. The defendants' settlement postures will differ substantially. Realizing the plaintiff is eager for quick recovery and is capable of pursuing the codefendant, the defendant 60 percent liable for the loss will be prompted to offer a sum substantially below his share of fault, probably paying 20 to 40 percent of the loss. The defendant only 10 percent at fault will be opposed to such settlement, wishing to limit his liability. To com-

Conversely, it can be argued that the policy of total settlement will not be furthered by the tortious conduct test. Because the plaintiff's settlement with the first defendant was low, the plaintiff will have to demand more from the second defendant in order to be compensated for his injuries. However, the second defendant may be willing to settle for an amount reflecting no more than his proportional share. He may rather take a chance at trial than pay the higher amount that is in excess of his fair share. Thus, a stalemate may result and the case against the second defendant may go to trial.[267]

Thus, while a test of a "good faith" settlement that requires only

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pete with his codefendant in settlement offers he will be required to offer substantially in excess of his 10 percent share of the loss, again frustrating the *Li* principle that the extent of liability should be governed by the extent of fault. Should he fail to settle, the 10 percent at fault defendant runs the risk that his codefendant will settle early for perhaps half of his own liability, while the lesser negligent person must eventually pay the remainder, not only frustrating the *Li* principle but turning it upside down. In any event, it is extremely unlikely he can settle for his 10 percent share.

20 Cal. 3d at 610, 578 P.2d at 902, 146 Cal. Rptr. at 203 (Clark, J., dissenting).

267. An interesting examination of the policy of encouraging settlements was dealt with in Mill Valley Refuse Co. v. Superior Court, 108 Cal. App. 3d 707, 166 Cal. Rptr. 687 (1980). There, the court was confronted with two joint tortfeasors each of whom settled in "good faith" with the plaintiff in the underlying action before judgment. The issue as to the "good faith" of either settlement was not raised by either party. The question presented to the court was whether Code of Civil Procedure § 877(b) protected each tortfeasor from claims for partial indemnity by the other tortfeasor. The court held that because both tortfeasors had settled in "good faith," both were released from claims by the other.

In reaching this decision, the court looked to the policy behind § 877 which it identified as the encouragement of settlements. *Id.* at 711, 166 Cal. Rptr. at 689 (citing *Stambaugh*, 62 Cal. App. 3d at 236, 132 Cal. Rptr. at 846). The court in *Mill Valley* concluded that the policy favoring settlement of litigation would not be enhanced by limiting the release in § 877(b) to cases where the other party had not settled. The court stated: "Such a limitation would put a premium on settling quickly but its encouraging effect would begin dissipating after the first defendant had settled and would continue dissipating until the last defendant who would receive no encouragement toward settlement from the statute." 108 Cal. App. 3d at 711, 166 Cal. Rptr. at 689-90.

An argument can be made that this is precisely the situation present under the court's current analysis of the "good faith" requirement. By holding that a proportionately low settlement will be in "good faith" as long as there is no corrupt motive, a premium is put on quick settlement. However, the effect of encouraging settlement begins dissipating after the first defendant settles for a low amount, and continues dissipating until the last defendant is left facing a huge liability reduced only by the disproportionately small settlements of preceding settlors. Thus, while this interpretation encourages early, cheap settlements, it does not provide much encouragement to the defendant that is left as the target of the plaintiff's suit.

In *In re* Waverly Accident of Feb. 22-24, 1978, 502 F. Supp. 1, 5 (M.D. Tenn. 1979), the court stated that settlement arrangements that would "encourage tortfeasors to race to a plaintiff to enter an agreement . . . would not advance the broader policy of encouraging plaintiffs to settle their entire claims with all tortfeasors, to reduce litigation, and to ease the burden on the courts."

lack of tortious conduct will encourage early and cheap settlements by defendants who wish to pay less than their pro rata share, it is debatable whether such a rule will promote the policy of the overall settlement of litigation.

b. the policy of equitable apportionment of loss

It is without question that the tortious conduct test of "good faith" in no way promotes the policy of equitable apportionment of loss among joint tortfeasors.[268] This policy is completely ignored under this test. The amount of the settlement is not important; all that is important are the motives of the settling parties.

Whether the second defendant chooses to go to trial or settle, the tortious conduct test which releases the first settlor from partial indemnity claims for a cheap, albeit nontortious, settlement will lead to inequitable apportionment of loss. Thus, where defendant *A* is 80% at fault and settles with the plaintiff for $1,000 prior to trial, defendant *B* is 20% at fault but is unable to settle with the plaintiff prior to trial, and the jury returns a verdict for the plaintiff in the amount of $100,000, defendant *B* must bear $99,000 of that judgment and defendant *A* gets off with only paying the $1,000 in settlement.[269] Alternatively, defendant *B*, faced with the possibility of a $99,000 unapportionable judgment that is completely disproportionate to his degree of fault, might well settle for a figure that is higher than his proportionate share.[270] That either result violates the policy of equitable apportionment of loss according to fault cannot be disputed and has been conceded by the courts utilizing the tortious conduct test. As stated by the court in *Cardio*, "[t]he trial court obviously recognized the serious complications in the present law [and] . . . reasoned that to immunize [the settling defendant] would frustrate the entire purpose of the comparative fault cases . . . ."[271] Justice Clark has said of such a result that it not only violates *Li* but turns it upside down.[272]

Quite apart from considerations of apportionment of loss according to fault, the principles of basic equity and fairness embodied in that policy cut against the tortious conduct test. Certain unfairness results

268. The test does promote the general policy of equity and fairness to the extent that if collusion with the intent to injure the nonsettling defendants is found, the settlement will not be in "good faith."

269. *See supra* text accompanying notes 7-15.

270. *See supra* note 266 and accompanying text.

271. 122 Cal. App. 3d at 888, 176 Cal. Rptr. at 259.

272. *American Motorcycle*, 20 Cal. 3d at 610, 578 P.2d at 919, 146 Cal. Rptr. at 203 (Clark, J., dissenting).

from allowing the plaintiff to so significantly affect the liability of the parties. Arguments against the use of coercion by a plaintiff to force a defendant to settle have been made in other contexts. For example, Fleming observed that "a plaintiff should not have the unrestricted power unilaterally to decide how the loss should be allocated among several tortfeasors and thus to prevent, if he so wishes, any distribution among them. [The distribution of the loss among tortfeasors should] be made by the law, not the plaintiff . . . ."[273] Speaking of the "good faith" settlement provision in the contribution statutes, the court in *River Garden Farms* stated:

> The . . . legislation empowers a plaintiff, armed with a strong and lucrative claim, to settle with his antagonists one by one, preserving for the jury the opponent with the most money and the least sympathy. . . . In a multi-party case the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial pressure bordering on extortion.[274]

The California Supreme Court has proclaimed that the theory of partial indemnity established by the *American Motorcycle* decision was adopted because "the plaintiff enjoys no right to single out only one or a few of the tortfeasors to bear all of the loss."[275]

The same policy considerations of equity and fairness apply with respect to a "good faith" settlement. A definition of "good faith" should not be drawn in such a fashion as to give the plaintiff the unilateral right to select which defendant will pay virtually all of the loss. This is precisely what plaintiffs were allowed to do in the appellate decisions such as *Cardio, Ford, Burlington*, and *Tech-Bilt*. This inequity will be perpetuated if the tortious conduct rule continues to be applied. A rule that sacrifices justice should not prevail.[276]

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273. Fleming, *supra* note 6, at 1489 (arguing against the joint judgment rule for contribution). Another commentator has argued that it was unfair, before the contribution statutes were passed, to allow a plaintiff to use a rule denying contribution as a bludgeon to force a tortfeasor to settle for more than his pro rata share of the damages. *Settlement in Joint Tort Cases, supra* note 177, at 490.

274. 26 Cal. App. 3d at 994, 103 Cal. Rptr. at 503 (footnote omitted).

275. People *ex rel.* Dept. of Transp. v. Superior Court, 26 Cal. 3d 744, 747, 608 P.2d 673, 675, 163 Cal. Rptr. 585, 587 (1980).

276. Goldenberg & Nicholas, *supra* note 34, at 31 (citing Bielski v. Schulze, 16 Wis. 2d 1, 10, 114 N.W.2d 105, 109 (1962) ("Law and justice are not necessarily synonymous. The function of law is to attain and maintain justice.")).

c. the policy of maximizing plaintiff's recovery

The policy of maximizing the plaintiff's recovery and the effect of a definition of "good faith" on the furtherance of this policy were previously discussed.[277] Because various definitions of "good faith" can achieve the same recovery for the plaintiff, with only the allocation among tortfeasors being different, this is a neutral goal.

The tortious conduct test may help a plaintiff to the extent he needs some quick money to finance the lawsuit against the remaining defendants. Also, to the extent that a plaintiff may be able to force a remaining defendant into a larger settlement after a cheap settlement with the first defendant,[278] the tortious conduct test may appeal to plaintiffs. However, whether or not the total settlement will be larger than if each defendant settled for an amount approximating his proportional share is unclear. In fact, it has been argued that the potential for raising enough settlement money to compensate plaintiffs is not served by letting one defendant off cheaply, but rather by keeping all parties participating in a realistic settlement.[279]

d. practical considerations regarding the "good faith" hearing and the protection of the defendant's financial information

The tortious conduct test provides for an efficient and uncomplicated "good faith" hearing. Because the only issue with respect to whether a settlement is made in "good faith" is whether the parties acted in a tortious manner toward the nonsettling defendants, the nonsettling tortfeasors who wish to dispute the finding of "good faith" will not have much evidence to present at the hearing. This was the precise purpose of the *Dompeling* decision; namely, to limit the scope of "good faith" sufficiently so that the only issue involved would be a very narrow one—an examination into tortious conduct.[280] Similarly, *Dompeling's* concern with the protection of defendant's financial information is accomplished under this test because financial status is irrelevant to whether the conduct was tortious.[281]

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277. *See supra* text preceding note 235.

278. *See supra* text accompanying note 266.

279. *Tech-Bilt*, 146 Cal. App. 3d at 1163, 194 Cal. Rptr. at 740 (Lewis, J., dissenting), *hearing granted*, Nov. 10, 1983 (L.A. 31826).

This reasoning was set forth by Judge Lewis for the proposition that plaintiffs' recovery was not maximized by a finding that plaintiffs' dismissal of the party against whom the statute of limitations had run (but against whom another tortfeasor had a right to claim partial indemnity) constituted a "good faith" settlement.

280. 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 44-45.

281. One additional policy is worth noting with respect to the tortious conduct test. Sev-

2. The tortious conduct test should be abandoned

Several levels of analysis reveal that the tortious conduct test is unsupportable and should be abandoned. First, this test is based on the false premise that the goal of encouragement of settlements is primary and that other policy considerations should be subordinated to that goal in defining a "good faith" settlement. While encouragement of settlements is an important policy and cannot be ignored, in the context of the definition of a "good faith" settlement under the present law this policy does not deserve the dominance it has been given. Code of Civil Procedure sections 877 and 877.6 and the *American Motorcycle* decision do indeed express the important policy that settlements should be encouraged, but the way they seek to encourage settlements for defendants is to provide finality by discharging the tortfeasor who settles in "good faith" from liability to his joint tortfeasors.[282] Plaintiffs are encouraged to settle by reducing plaintiffs' judgment against remaining tortfeasors pro tanto and not pro rata.[283] Even the early cases articulating the strong policy in favor of settlements did so because the procedural rules then in effect deprived the settlement, even if made in

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eral courts utilizing this test have commented by way of dicta that the settlements involved were in "good faith" because they were for the full amount of the tortfeasor's insurance policy limits. *See Stambaugh*, 62 Cal. App. 3d at 238-39, 132 Cal. Rptr. at 848; *Fisher*, 103 Cal. App. 3d at 445, 163 Cal. Rptr. at 55. The trial court in *Ford Motor Co. v. Schultz* held that as a matter of law a settlement for the full amount of the settling defendant's insurance policy limits is a "good faith" settlement, but the court of appeal reversed this portion of the decision. 147 Cal. App. 3d at 949 & n.4, 195 Cal. Rptr. at 474-75 & n.4.

A rule that would mandate that the payment of insurance policy limits constitutes a "good faith" settlement regardless of the amount of the insurance would have, in addition to the other effects of the tortious conduct test already discussed, the additional effect of rewarding a defendant who carried inadequate liability insurance. For example, assume that the plaintiff decided to pursue two tortfeasors, each with the same financial ability to pay a judgment over and above the amount of his insurance. Assume defendant *A* had insurance coverage of $20,000 and defendant *B* had insurance coverage of $200,000. A result that would allow plaintiff to take the $20,000 policy from defendant *A* to finance his lawsuit, collect the rest of the judgment from defendant *B*, and have the settlement with *A* found to be in "good faith" merely because it represented the full amount of *A*'s insurance coverage thereby preventing *B* from claiming partial indemnity against *A*, would be unfair and would reward *A* for being under-insured.

It should also be noted that even if a settlement for full policy limits is not found to be a "good faith" settlement, the insurer might have to tender the full amount of the policy limits in any event if that would be necessary to protect the insured from a potentially higher verdict in excess of the policy limits. *See* Comment, *supra* note 241, at 841; Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976); Johansen v. California State Auto Ass'n Inter-Ins. Bureau, 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1975); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 476 P.2d 173, 58 Cal. Rptr. 13 (1967).

282. *See supra* text accompanying notes 100, 186-87.

283. *See supra* text accompanying notes 100, 102, 186-87.

"good faith," of finality in that the settling defendant would not be able to free himself from litigation.[284] By virtue of these procedural rules, settlements were discouraged. However, under present procedures, the finality of a settlement can be ascertained in advance.[285] Without reference to these considerations, the recent cases involving "good faith" settlements have simply quoted language from prior cases stating that settlements should be encouraged, and have utilized the tortious conduct test which carries this policy to an extreme.

This approach ignores the role of the "good faith" clause as a means to accommodate competing policy considerations. The statutes and *American Motorcycle* do not mandate that all settlements must be encouraged, only "good faith" settlements. Thus, the "good faith" requirement is a limiting factor on those settlements that are favored. The broader policy objectives of the statutory schemes and the California Supreme Court decisions must be kept in mind. Section 877 was but one part of an entire statutory scheme to provide for equal contribution among joint tortfeasors. Similarly, the court in *American Motorcycle* provided for a discharge from partial indemnity for a "good faith" settlor as one aspect of its broader scheme of establishing a system of equitable apportionment of loss among joint tortfeasors. The California appellate courts' tortious conduct test of a "good faith" settlement has allowed the exception to swallow the rule. It is an unsupportable leap in logic to say that because certain portions of the rules are meant to encourage settlements, the "good faith" requirement itself should be defined in such a way as to completely frustrate the broader policy of equitable apportionment of loss.

On a second level of analysis, it is not even clear that the tortious conduct test for "good faith" actually encourages settlement of litigation. While allowing to be in "good faith" (and, therefore, encouraging) a settlement with one tortfeasor that is in an amount far less than his proportional share of fault, an argument can be made that this will actually force the remaining tortfeasor into trial, thus frustrating the policy of the complete settlement of litigation.[286]

A third but more basic argument against the tortious conduct test is that it effectuates results that are unfair. It gives an inordinate amount of power to the plaintiff to pick his target and decide how the loss will be allocated. This is a tremendous weapon and can be used to

284. *See supra* notes 184-85, 187-92 and accompanying text.

285. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1984). *See supra* text accompanying notes 193-95.

286. *See supra* note 267 and accompanying text.

coerce disproportionant settlements or obtain other advantage. The appellate courts that have applied the tortious conduct test have themselves found it to be unsatisfactory. In *Cardio* the court said, "The result is fundamentally unfair, and cannot be what the Legislature intended."[287] The *Burlington* court said, "The fairness of such a result seems highly debatable. . . ."[288]

Finally, no statutory or case law requires the continued use of this test. The appellate courts in their more recent opinions have bemoaned the fact that they were compelled by precedent to follow the tortious conduct test. However, no binding precedent to this effect actually exists. Neither the statutes nor the California Supreme Court have defined a "good faith" settlement, and as has been demonstrated, an analysis of these authorities reveals that they suggest a different result. Also, the appellate cases first setting forth this test did so in dicta which is no more binding than the dicta in *River Garden Farms* which established a more reasonable test. Therefore, the appellate courts could, if they desired, return to the *River Garden Farms* formulation. Of course, the supreme court may adopt whichever test it thinks is most appropriate.

In conclusion, the tortious conduct test does not necessarily achieve the settlement goal it is meant to foster, provides inequitable results, and flies in the face of the comparative fault scheme. It should be abandoned in favor of a different test for a "good faith" settlement.

B. The Test of Strict Proportionality

Another possible test of a "good faith" settlement would be to require that a settlement be absolutely proportional to the settling defendant's liability in order to be in "good faith." Although no case has specifically adopted such a rule, several have rejected it.[289]

This test is mentioned briefly to show that it is not a viable alternative. Such a test definitely would promote the public policy of equitable apportionment of loss among joint tortfeasors. However, it would completely frustrate the policies of encouragement of settlements and efficiency of the "good faith" settlement hearing. First of all, it is rare that a tortfeasor will be encouraged to settle for an amount which is the same as he would be required to pay if he completed a trial. Secondly, a tortfeasor would not even save trial expenses through such a settle-

287. 122 Cal. App. 3d at 891, 176 Cal. Rptr. at 260.

288. 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 379.

289. *Dompeling*, 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44; *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

ment because, in order for that settlement to be determined to be in "good faith," all of the issues involved in the trial such as the exact amount of the plaintiff's damage and the relative liability of the joint tortfeasors would need to be determined. The "good faith" hearing would become the trial itself.[290]

Also, this test would negate the provision of Code of Civil Procedure section 877[291] and the supreme court's statement in *American Motorcycle* that the plaintiff's judgment against other tortfeasors will not be reduced by the settlor's pro rata share of the judgment, but rather only by the amount of the settlement.[292] If a settlement must be strictly proportional to be in "good faith," the reduction will, in fact, be pro rata.[293]

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290. This is inconsistent with the notion of a pretrial hearing on the issue of "good faith." *See supra* text accompanying notes 224-27.

291. CAL. CIV. PROC. CODE § 877(a) (West 1980).

292. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 199.

Absent from § 877.6 is a clause comparable to § 877(a) providing the extent to which a settlement with one tortfeasor reduces the plaintiff's judgment. Section 877(a) specifically provides that the plaintiff's claims against the other tortfeasors will be reduced "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." Section 877.6 is silent as to this issue. Nothing in the legislative history indicates an intention on behalf of the legislature to provide a different result with respect to settlements obtained in the partial or comparative indemnity context. Therefore, no argument can be made that, by omitting a reference to a pro tanto reduction, the legislature left the door open for a pro rata reduction. Presumably, the *American Motorcycle* language (albeit dicta) that the amount of the settlement shall reduce the plaintiff's judgment pro tanto and not pro rata is still controlling after Code of Civil Procedure § 877.6. For a discussion of pro rata and pro tanto reduction, *see supra* note 102.

293. The pro rata reduction rule, i.e., the rule that a nonsettling defendant's share of a judgment should be reduced not by the dollar amount of the judgment, but rather by the settling defendant's proportionate share of fault, would reach the same result as requiring strict proportionality. This rule would completely eliminate the "good faith" requirement because the "good faith" of the settlement would be irrelevant to a nonsettlor's liability. Under this approach, a plaintiff would be penalized for making a cheap settlement and would also benefit from making a good settlement. This would give the plaintiff the incentive to drive the hardest bargain he could with the settling defendant and not prejudice remaining tortfeasors with a settlement that is either collusive, deliberately discriminatory, or unintentionally inadequate.

The National Conference of Commissioners on Uniform State Laws has adopted this approach of pro rata reduction as part of the Uniform Comparative Fault Act. UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 44 (Supp. 1983).

This rule has also been urged by numerous commentators. *See* C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 78 (1936); G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 416 (1951); Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 257-58 (1976); Goldenberg & Nicholas, *supra* note 29, at 53; Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264 (1977); Fleming, *supra* note 6, at 1495. The California Legislature, however, rejected this approach on several occasions. Bills introduced on March 28, 1978 (S. 1959 (1978-79 Reg. Sess.)), April 9, 1979 (A.B. 1783 (1979-80 Reg. Sess.)), March 13,

C. *The Tactical Maneuver Test*

Some judges have suggested a test that would define a "good faith" settlement as one that does not result from tactical maneuvering by the plaintiff but rather results from some consideration by the settling parties of the merits of their case. In *Commercial Union v. Ford Motor Co.*, the Ninth Circuit found that a "good faith" settlement had not occurred because the dismissal of defendant Ford was motivated by the plaintiff's attorney's desire to remove a deep-pocket defendant from the case because of the experts it could produce and the skilled trial attorneys it could retain.[294] This was not a true settlement, but was rather a "tactical maneuver" by the plaintiff,[295] and in such a case the other defendants should not be prevented from seeking partial indemnity from the dismissed party.[296] After discussing *Commercial Union* with approval, the dissenting judge in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* suggested a similar test whereby a settlement would be in "good faith" if it reflected "at least in some degree a judgment by the settling parties of the relative merits and values of their cases against each other" but not if it was motivated by "a reason unrelated to the potential merits of the plaintiff's claim," such as a decision by

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1980 (A.B. 3344 (1979-80 Reg. Sess.)), and December 3, 1980 (A.B. 85 (1981-82 Reg. Sess.)) provided that a plaintiff's claim be discharged as against the other nonsettling defendants by the amount of the released tortfeasor's equitable share based on his fault. None of the bills was passed.

Division 2 of the Fourth District, California Court of Appeal, agreed with the rule of pro rata reduction and held that the plaintiff's recovery against a nonsettling defendant was reduced not by the dollar amount received from the released tortfeasor, but rather by the released tortfeasor's proportionate share of the loss. Baget v. Shepard, 128 Cal. App. 3d 433, 180 Cal. Rptr. 396, *hearing denied*, April 1, 1982 (opinion ordered not to be officially published). The majority argued that this approach was not precluded by Code of Civil Procedure § 877, or by the language to the contrary in *American Motorcycle*, because that language was dicta. Apparently, the California Supreme Court disagreed by ordering the opinion not be officially published.

The proposal for a pro rata reduction is not considered in this article because the article deals with defining "good faith" within the parameters of the existing statutes and the guidelines of the California Supreme Court. Both §§ 877 and 877.6 of the Code of Civil Procedure contain the concept that a settling tortfeasor is released upon a "good faith" settlement, and eliminating that requirement (as the pro rata reduction rule would do) would need legislative approval. Also, both the California Supreme Court in *American Motorcycle* and Code of Civil Procedure § 877 have provided that the amount of plaintiff's judgment against the nonsettling tortfeasors will be reduced not by the plaintiff's pro rata share, but rather by the amount of the settlement. Thus, while the pro rata reduction rule is a good proposal, it cannot be achieved within the present confines of the requirement of a "good faith" settlement as established by the California Supreme Court and the current statutes.

294. 640 F.2d at 213. *See supra* text accompanying notes 156-59.

295. *Id.*

296. *Id.* at 214. *See also Owen*, 713 F.2d at 1464.

plaintiff to simplify his case.[297]

What the courts mean by the tactical advantage test is unclear. If the plan is for the court to examine the relative liability of the parties in order to determine whether a settlement was a true settlement as opposed to a tactical maneuver, then this test is nothing more than a measure of proportionality of the settlement. That being the case, the reasonable range test described below is a better approach.

If, however, the focus is to be on the intent of the settling parties and whether they gave "some consideration"[298] to the merits of their case, then the test is impossible to administer. The difference between attempting to achieve a tactical advantage and giving some consideration to the relative merits of the case is a difficult line to draw. For example, suppose the plaintiff thinks that the case against one defendant is very close on the issue of liability and is further complicated because that defendant is sympathetic, while the case against another less sympathetic defendant is clear cut. Is a settlement with the sympathetic defendant a tactical maneuver or an evaluation of liability?

This test will enable a court to find a lack of "good faith" in the obvious situations as were present in *Cardio* and *Commercial Union* where the plaintiffs' attorneys admitted that their decision to dismiss one of the defendants was made for a tactical purpose. However, if a rule was established that a tactical settlement would not be found to be in "good faith," there is no doubt that clever lawyers would construct a settlement in which they gave at least some consideration to the merits of their case. In an article offering hints for practicing attorneys it was stated: "For defendants contemplating settlements, the message of *Commercial Union* is clear: let there be plenty of arm's-length bargaining between the defendant and the plaintiff. Leave a well-marked trail of letters and memoranda documenting the give-and-take of the negotiations culminating in settlement."[299]

Also, at some price even a settlement made as a tactical maneuver

297. *Tech-Bilt*, 146 Cal. App. 3d at 1159, 194 Cal. Rptr. at 737 (Lewis, J., dissenting), *hearing granted*, Nov. 10, 1983 (L.A. 31826).

Similarly, the appellate court in *Cardio*, feeling compelled by precedent to find that a dismissal of a party by the plaintiff for the purpose of simplifying plaintiff's case against the other defendant was a "good faith" settlement, criticized the result because it permitted a plaintiff to insulate a defendant from partial indemnity claims where the dismissal was "motivated by the plaintiff's tactical consideration having little relationship to the potential liability of [the settling defendant]." 122 Cal. App. 3d at 890, 176 Cal. Rptr. at 260.

298. *Tech-Bilt*, 146 Cal. App. 3d at 1159, 194 Cal. Rptr. at 737 (Lewis, J., dissenting), *hearing granted*, Nov. 10, 1983 (L.A. 31826).

299. Lewin, *Making Codefendants Pay Their Fair Share*, CAL. LAW., July 1983, 13, 14.

should be found to be in "good faith" because at some point the price of the settlement will be such that the goal of achieving equitable apportionment of loss between joint tortfeasors is reached. As mentioned above, once a court begins to examine the relative liability of the parties rather than the settling parties' thought processes, the reasonable range test described below is the best method to define "good faith."

While there can be no dispute that a dismissal by the plaintiff of one defendant for virtually no consideration simply as a tactical maneuver should not protect that dismissed defendant from a claim for partial indemnity, a test of "good faith" focusing on this aspect of the settlement will be unworkable. The reasonable range test will adequately guard against this occurrence.

D. The Reasonable Range Test

It is the thesis of this article that the "good faith" of a settlement for the purpose of releasing the settling tortfeasor from future liability to his joint tortfeasors for partial indemnity should be judged by the reasonable range test. Under this test, a settlement would be in "good faith" if the settlor pays an amount that falls within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries. As will be explained in more detail below, in determining the reasonable range, the court would need to make a rough approximation of the plaintiff's potential recovery and the settlor's proportionate liability and take into account that a settlor should pay less in settlement than he would if he were found liable after a trial. In certain cases the solvency of the settling tortfeasor would also be relevant.

1. Judicial precedent for this test

A test of "good faith" that measures the reasonable range of the settlor's proportional share of relative liability is not a stranger to the law. Several cases have either specifically espoused this test or utilized it without acknowledging the fact. This test originated in *River Garden Farms*, the first case that attempted to define a "good faith" settlement in the context of Code of Civil Procedure section 877 and the contribution statutes. There, the court stated: "Applied to strike a balance between the dual statutory objectives, the good faith clause should not invalidate a settlement within a reasonable range of the settlor's fair share."[300] Although not specifically utilizing the test it described, the

300. 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506. *See supra* text accompanying notes 78-

River Garden Farms court did set forth some guidelines which will be discussed below. The test recommended in this article is basically the *River Garden Farms* test with some elaboration.

Also, the courts in *Kohn v. Superior Court*[301] and *Wysong, Miles & Co. v. Western Industrial Movers*,[302] while paying lip service to the tortious conduct test for "good faith," actually engaged in a reasonable range type of analysis in order to uphold the settlements involved in those cases as being made in "good faith."[303]

In a very recent case, *Widson v. International Harvester Co.*,[304] the court also used this approach of examining the amount of the settlement in relation to the settlor's potential liability.[305] Even the court in *Dompeling*, perhaps the most fervent advocate of the tortious conduct test, engaged in a reasonable range type of analysis.[306]

The Ninth Circuit in *Owen v. United States* alluded to the approach by holding that the settlement must reflect a "good faith" deter-

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80. *See also* Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 794-98, 118 Cal. Rptr. at 837, 843-46, citing *River Garden Farms* with approval.

301. 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983).

302. 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983).

303. In *Wysong*, the appellate court cited *Dompeling* with approval, concluding that the purpose of § 877.6 was to encourage settlement by providing finality to the lawsuit for the settling tortfeasor, and specifically rejected *River Garden Farms*. 143 Cal. App. 3d at 288-89, 191 Cal. Rptr. at 679. Having said this, the court did not simply point to the *Dompeling* language and find that since there was no tortious conduct with respect to the settlement, there was "good faith." Instead, the court examined the evidence presented at the hearing of the "good faith" issue. It concluded that the settling party had a viable defense to the action, and, therefore, the settlor and plaintiffs were justified in entering into a $65,000 settlement even though the settlement was disproportionate to the claims made by the plaintiff's complaint of $7,000,000. *Id.* at 290, 191 Cal. Rptr. at 680. What the trial court did in the *Wysong* case that was sustained on appeal was to examine the amount of settlement in relation to the evidence of the degree of liability of the settling party. The court, in essence, found that a $65,000 settlement was within the reasonable range of the defendant's potential liability. Thus, the trial court in *Wysong* reached its decision using the analysis of *River Garden Farms*, not the analysis of *Dompeling*. Yet, in its opinion the appellate court expressly rejected *River Garden Farms* in favor of *Dompeling*. 143 Cal. App. 3d at 289-90, 191 Cal. Rptr. at 679-80. *See infra* text accompanying notes 350-53.

Similarly, in *Kohn*, the court concluded that the settlement was in "good faith" because "the sums paid [in settlement] . . . are not out of proportion to what the trial court might have considered the probable recovery of plaintiffs should they prove their case." 142 Cal. App. 3d at 327-28, 191 Cal. Rptr. at 81-82 (footnote omitted). *See infra* text accompanying notes 346-49.

304. 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984).

305. *See infra* notes 354-56 and accompanying text.

306. In *Dompeling*, the court looked at the amount of the settlement, compared it with plaintiff's total settlement request, made an evaluation of liability, and concluded the settlement was not an "unreasonably cheap settlement." 117 Cal. App. 3d at 807, 173 Cal. Rptr. at 43. *See infra* text accompanying notes 339-40.

mination of the relative liabilities between the parties.[307] Although what is meant by the term "relative" is unclear, the Ninth Circuit in *Owen* stated it was following the test originally laid down by the Ninth Circuit in *Commercial Union* which cited *River Garden Farms* with approval.[308]

Finally, an argument can be made that some of the California appellate decisions that adopted the tortious conduct test while specifically disavowing any requirement that the settlement be proportionally related to the liability of the settlor, in actuality, would not have been troubled by the reasonable range type of analysis discussed here. Rather, they were rejecting a strict proportionality approach or an analysis that did not reduce the settlor's share by some amount reflecting his decision to settle rather than litigate. For example, the court in *Dompeling* stated that "[b]ad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share of the value of the plaintiff's case."[309] Also, the courts in *Kohn* and *Wysong* in arguing against a proportionate approach stated that it did not matter that the amount of the settlement was disproportionate to the sums *prayed for* in the complaint.[310] They did not say that it was irrelevant that the sums were disproportionate to the reasonable range of the settlor's proportional share and, in fact, actually did analyze the amounts of the settlements in question to see if they did fall within the range of the amount the plaintiff could recover from the settling defendants.[311]

2. Factors to be considered in determining the reasonable range

In order to determine whether the settlement is within the reasonable range of the settlor's proportionate share of plaintiff's damage, the court will need to consider certain factors. The problem of how the court can make the necessary evaluations will be dealt with in the next section.

First among the factors that should be examined by the court is the amount of damages the plaintiff will likely recover after a trial. The determinative factor is not the amount of the plaintiff's prayer[312] be-

307. 713 F.2d at 1464.

308. 640 F.2d at 213.

309. 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44.

310. *Kohn*, 142 Cal. App. 3d at 328, 191 Cal. Rptr. at 82; *Wysong*, 143 Cal. App. 3d at 290, 191 Cal. Rptr. at 680.

311. *See supra* note 303.

312. *See Kohn*, 142 Cal. App. 3d at 327, 191 Cal. Rptr. at 81; *Wysong*, 143 Cal. App. 3d at 290, 191 Cal. Rptr. at 680.

cause the amount of the prayer usually has little relationship to the ultimate amount of the award.[313]

Secondly, the court should estimate the proportional liability of the settling defendant for the plaintiff's harm *to all parties*. Thus, the court should not look merely to the settlor's liability to the plaintiff, but also to the settlor's liability to his fellow joint tortfeasors under a partial indemnity theory had there been no settlement. This rule is necessary to promote the goals of fairness and equitable distribution of loss among the parties at fault. For example, in *Tech-Bilt*,[314] the plaintiff sued a subcontractor against whom the statute of limitations had run as well as a general contractor against whom the statute had not run. Even though the plaintiff had no claim against the subcontractor, the subcontractor was liable to the general contractor for partial indemnity. The plaintiff settled with the subcontractor for $55.[315] If the only determinative factor would be the amount of the settlor's potential liability *to the plaintiff*, then this settlement would be in "good faith" because the subcontractor's liability to the plaintiff was zero.[316] However, such a settlement does not reflect the settlor's potential liability to other tortfeasors for partial indemnity, a factor that must be considered in order for the test of "good faith" to have meaning.

After estimating what would be the settling tortfeasor's proportional share of liability to all parties for the plaintiff's damage, the court should then reduce this figure by some amount to take into account the fact that it represents a settlement. By settling in advance of trial, a party expects to pay less than he would be required to pay if after trial the verdict were not in his favor.[317] This factor is dealt with in more

313. C. BADWAY & N. SHAYNE, EVALUATION AND SETTLEMENT OF PERSONAL INJURY CASES 75 (1976) [hereinafter cited as EVALUATION].

314. 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729, *hearing granted*, Nov. 10, 1983 (L.A. 31826).

315. *See supra* text accompanying notes 140-45.

316. Similarly, in the case of *People ex rel. Dept. of Transp. v. Superior Court*, the California Supreme Court held that even though the plaintiff could not join the State of California as a defendant in the action, the named defendants were not prevented from cross-complaining against the state to seek partial indemnity. Taking the facts of this case a bit further, the state should not be able to cut off these partial indemnity claims by a low settlement with plaintiff. While such a settlement would be within the reasonable range of the state's liability to plaintiff because the plaintiff could recover nothing from the state because a timely claim had not been filed, it would not reflect the reasonable range of the state's liability on the partial indemnity claims.

317. *Dompeling*, 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44. This factor encourages settlements, thereby providing both "peace and quiet" to defendant and needed relief without delay to an injured plaintiff. *Id.*

detail in the next section.[318] In certain situations, the court may consider the financial status of the settling defendant. This special problem is dealt with in Part V-D-6.[319]

3. Evaluating the various factors

This section provides guidelines a court can use to evaluate the factors listed above in order to determine whether a settlement falls within the reasonable range of the settlor's proportional share of liability. Guidance on how the court can make this determination can be obtained from the cases, commentators and common sense.

The first two factors involved in the reasonable range analysis are the amount of damage plaintiff is likely to recover after a trial and the proportional liability of the settling defendant to all parties for plaintiff's harm. In evaluating these two factors, the major consideration must be that the "good faith" hearing is a pretrial proceeding that is not meant to, and should not, take the place of a trial. In a pretrial proceeding the court cannot be expected to make a precise determination of the amount of the plaintiff's recovery after trial and the proportionate amount of the settling tortfeasor's fault. As was pointed out in the discussion of a strict proportionality test,[320] such an exact determination could occur only after a full trial on the merits of the action, and this would defeat the purpose of section 877.6 which is to have an early determination of "good faith" in a pretrial proceeding.

The evaluation of these factors must, therefore, necessarily be a rough and imprecise one. Because this definition of a "good faith" settlement speaks to the reasonable range of the settlor's share, the test asks not for precise numbers, but for an approximation. In describing the reasonable range analysis, the court in *River Garden Farms* explained that before a verdict, only a *rough assessment of value* would be possible.[321]

Making the rough evaluation of factors such as the probable amount of the plaintiff's recovery and the percentage of the settling tortfeasor's fault for purposes of the reasonable range test is a manageable task. As stated by the court in *River Garden Farms*, "The price levels are not as unpredictable as one might suppose."[322] The reasonable range of the settlor's fair share is not unpredictable, although it

318. *See infra* text accompanying note 330-33.
319. *See infra* text accompanying notes 370-78.
320. *See supra* text accompanying notes 289-93.
321. 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506.
322. *Id.* at 998, 103 Cal. Rptr. at 506.

does involve uncertainties.[323] Generalized evaluation criteria are recognized by the personal injury bar, insurance claims departments, and pretrial settlements courts. The *River Garden Farms* court gave examples of publications that could be looked to to value potential claims by plaintiffs.[324] When testing the "good faith" of a settlement figure, the judge should use his own personal experience and expertise and should also look to experts in the field.[325] In this way, knowledgeable counsel and settlement negotiators can predict with some assurance whether a settlement is within the reasonable range permitted by the criterion of "good faith."[326] 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.[327] Thus, the directive of *River Garden Farms* is for judges to use their experience and expertise to make a rough assessment of whether the settlement falls within the reasonable range of the settlor's proportionate liability.

Specific factors bearing on the potential amount of the plaintiff's recovery can be identified. For example, relevant to this inquiry are the strengths of the plaintiff's liability claim and defendant's defenses, the seriousness of the injury (be it a personal injury action or an action in a commercial context), the out-of-pocket expenses incurred by the plaintiff as a result of the injury, whether the case will be tried by a judge or a jury and if by a jury, whether juries from that location are more apt to render high or low verdicts, and a subjective evaluation of the parties, their witnesses and their attorneys.[328] This list is by no means exclusive.

Through their experience, judges can make rough estimates of these factors and estimate the plaintiff's probable recovery and the percentage of fault among the parties. Both the plaintiffs' bar and the defendants' bar have been making informed guesses as to the percentage of responsibility and the probable amount of plaintiffs' damages for years.[329]

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323. *Id.*

324. The *River Garden Farms* court pointed to the PERSONAL INJURY VALUATION HANDBOOKS (Jury Verdict Research, Inc. Cal. ed.); JURY VERDICTS WEEKLY (E.N. Raymond & Assocs.); AID (Accident/Injury/Damages) (Lawyers Co-op Publishing Co.). 26 Cal. App. 3d at 998, n.9, 103 Cal. Rptr. at 506 n.9.

325. 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506.

326. *Id.*, 103 Cal. Rptr. at 506-07.

327. *Id.*, 103 Cal. Rptr. at 507.

328. H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT, 63-73 (1973) [hereinafter cited as HOW TO PREPARE AND NEGOTIATE CASES].

329. Adams, *Settlements After* Li: *But is it "Fair"*?, 10 PAC. L.J. 729, 747 (1979).

Another factor listed above that the judge should evaluate in determining what is the reasonable range for a settlement in a given case is the fact that an amount paid in settlement should be less than an amount paid after an adverse judgment. A discount for a settlement makes sense for two reasons. First of all, a settlement can be looked upon as a compromise,[330] or alternatively, as a means to avoid a potentially higher adverse judgment. As stated by a spokesman for an insurance company, a settlement is "that amount of money which we are willing to pay . . . in order to avoid a potential runaway verdict in astronomical numbers . . . . Depending upon our expectations [of winning], we may choose to offer in settlement anywhere between 5% and 30% of what would be our estimated full value of the case should we go to a verdict and lose it."[331] A second reason that a settlement would be less than an amount received after a verdict is that money is being given to the plaintiff at an earlier time.[332] In examining the amount of the settlement, the judge and the parties should be cognizant of when, in the course of the proceedings, the settlement is being made. The plaintiff will be willing to accept less in settlement in order to have the use of the money sooner. A given sum offered in settlement four years before an anticipated trial date will be worth more than the same sum offered two weeks prior to the trial. No precise amount of "discount" for a settlement should be computed.[333] Rather, this is another variable the judge should consider in making a rough assessment as to whether the settlement falls within the reasonable range.

Judges will not be making these rough evaluations of the various factors by themselves. The settling defendant, wishing his proposed settlement with the plaintiff to be determined by the court to be in "good faith," will present whatever evidence he has that the proposed settlement is within the reasonable range of his share of liability. Conversely, the nonsettling defendants who do not wish to have the settlement found to be in "good faith" will provide the judge with whatever evidence they have to the contrary.

As the dissenting judge in the *Tech-Bilt* case stated, "It may be that the existence of a settlement in good faith is one of those things

330. Even assuming the parties can agree on the optimum value of the case, that is, the sustainable limits of plaintiff's award, the amount agreed to should not be the settlement figure. That amount must be discounted to allow for various factors, such as the early payment of the money and the uncertainty of trial. HOW TO PREPARE AND NEGOTIATE CASES, *supra* note 328, at 110-11.

331. EVALUATION, *supra* note 313, at 66.

332. HOW TO PREPARE AND NEGOTIATE CASES, *supra* note 328, at 110-11.

333. *Id.* at 111.

easier to recognize than describe, and it may be easier to describe those things that are not settlements in good faith."[334] Thus, perhaps it is simpler to think of the judge's role at the "good faith" hearing in the reverse. His focus will be not on whether the settlement falls within the reasonable range but whether it does not. Remembering that the burden of proof is on the party asserting the lack of good faith,[335] the judge will find the settlement to be a "good faith" settlement unless the objecting party proves that the settlement does not fall within the reasonable range of the settler's potential liability, or as stated by the court in *River Garden Farms*, that the amount in settlement is "so poorly related to the value of the case as to impose a potentially disproportionate cost on the defendant ultimately selected for suit."[336] If the decision is a close one, then the court should find the amount of the settlement to be within the reasonable range of the settling tortfeasor's proportional amount of liability. This analysis will give the trial judge leeway to find that a disproportionately low settlement is not within the definition of a "good faith" settlement.

4. The test in operation

The reasonable range test is meant to allow a flexible analysis. An argument might be made that the guidelines are too vague to be put into practice.[337] However, the reported appellate decisions reveal that several courts, both at the trial and appellate levels, have actually performed this reasonable range type of analysis based on evidence presented in a pretrial setting to determine whether a settlement is a "good faith" settlement.[338] The results reached by the courts seem to be correct. Therefore, it will be helpful to examine these cases to see the test in operation and to explore the types of evidence looked to by these courts in performing the reasonable range analysis.

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334. 146 Cal. App. 3d at 1163, 194 Cal. Rptr. at 740 (Lewis, J., dissenting), *hearing granted*, Nov. 10, 1983 (L.A. 31826).

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

336. *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506. *See also Tech-Bilt*, 146 Cal. App. 3d at 1163, 194 Cal.Rptr. at 740 (Lewis, J., dissenting), *hearing granted*, Nov. 10, 1983 (L.A. 31826).

337. No court has made this argument. The courts that adopted the tortious conduct test did so for the stated purpose of encouraging settlement, not because the reasonable range analysis of *River Garden Farms* was unworkable.

338. *Widson*, 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984); *Kohn*, 142 Cal. App. 3d 323, 191 Cal. Rptr. at 78 (1983); *Wysong*, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983); *Cardio*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981); *Dompeling*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981). These decisions were reached by the appellate courts supposedly applying the tortious conduct test.

In *Dompeling*,[339] the appellate court did a very simple analysis. It looked at the amount of the settlement, the amount of a total settlement request made by the plaintiff to all parties, and the evidence in the record as to the liability of the parties. The court found that a $100,000 settlement was not an "unreasonably cheap settlement" as that term was used by the *River Garden Farms* court because the plaintiff's total settlement request was $325,000 and the evidence indicated that the liability was not attributable solely to the settling party.[340]

The trial court in *Cardio*[341] also utilized this type of test. To briefly recap the facts, the heirs of the decedent sued a hospital for negligent operation of a heart/lung machine and Cardio, the distributor of the defective machine that caused the death. The plaintiff settled with Cardio for nothing more than a waiver of costs in order not to complicate the simple case against the hospital.[342] As a first step in determining the issue of "good faith," the trial court considered evidence as to the liability of the parties. For example, it heard testimony of a hospital technician who operated the heart/lung machine during the surgery who admitted incorrectly attaching the tubing which caused the patient's death. The hospital's expert testified to the contrary claiming that the machine was defective, and the hospital's counsel made an offer of proof as to what other experts would testify to if called as witnesses at the trial.[343] Also considered by the trial court was testimony from plaintiff's former counsel as to his evaluation of the case who stated that the case against Cardio was substantial.[344] After evaluating these factors, the trial court concluded that "[t]here being some potential liability on the part of [Cardio], the dismissal for a waiver of costs could not have been reasonably proportionate to the potential liability [of Cardio] to plaintiffs."[345]

The case of *Kohn v. Superior Court*[346] was an appellate review of a trial court's determination at a pretrial hearing pursuant to section 877.6 that two settlements had been made in "good faith." The *Kohn* case involved a suit for fraud by purchasers of a residence against the sellers, the real estate brokers, the construction company that had re-

339. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).

340. *Id.* at 807, 173 Cal. Rptr. at 43. For a more detailed discussion of *Dompeling*, see *supra* text accompanying notes 108-14.

341. 122 Cal. App. 3d 880, 176 Cal. Rptr. 254.

342. *See supra* text accompanying notes 124-25.

343. *Id.* at 883-84, 176 Cal. Rptr. at 256.

344. *Id.* at 884, 176 Cal. Rptr. at 256.

345. *Id.* at 886, 176 Cal. Rptr. at 257.

346. 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983).

paired fire damage, and a pest control company. The construction company and the pest control company each settled with plaintiff for $6,000. The complaint sought $500,000 against all defendants. The trial court analyzed the "good faith" of the settlements by considering affidavits submitted by the parties at the "good faith" hearing as to their estimates of the value of the case and their liability. The declaration by the attorney for the pest control company stated that the company paid the $6,000 only to avoid the cost of trial and that it was his position that there was no evidence of any negligence on its part or any conspiracy to defraud the plaintiffs. Counsel for the construction company submitted a similar, although less detailed, declaration. The nonsettling defendants, namely the real estate brokers, who had the burden of proof on estabishing lack of "good faith," submitted a declaration by counsel stating his opinion that a trial would result in a judgment against the settling defendants at least equal to that against his clients. They also submitted a declaration by the seller that at the time of the sale he thought all of the damage about which the plaintiff was complaining had been repaired by the settling defendants. The plaintiffs submitted no evidence regarding their reasons for settling.[347]

The appellate court concurred in the trial court's finding of "good faith" based on this evidence. In its opinion it adopted the trial court's approach and reviewed the evidence, the legal theories pursued, and the damages claimed.[348] Thus, both the trial judge and the appellate judges used their experience in valuing lawsuits and decided that a total settlement of $12,000 for these particular defendants for damage to a $60,500 residence was reasonable.[349]

Discovery devices were used by the attorneys at the section 877.6 "good faith" hearing in *Wysong-Miles & Co. v. Western Industrial Movers*.[350] In that action, the plaintiff was injured in an industrial accident

347. *Id.* at 327-28, 191 Cal. Rptr. 81-82.

348. It noted that the plaintiffs had sued for emotional distress and other claimed consequences of the physical deficiencies of the residence. Only in unusual circumstances would they be able to recover on these grounds. *Id.* at 328, 191 Cal. Rptr. at 82. Also, the court noted that the punitive damages claimed could be recovered only against the nonsettling parties and not against the settling defendants. *Id.* at 328 & n.2, 191 Cal. Rptr. at 82 & n.2.

349. The appellate court commented that the trial court was not required to ignore its own experience in valuing lawsuits and accept a prayer by plaintiffs as the comparison point for evaluating the settlement. *Id.* at 328, 191 Cal. Rptr. at 82.

A similar analysis was conducted at the "good faith" settlement hearing at the trial level in *Owen*, 713 F.2d 1461, 1466-67 (9th Cir. 1983). Counsel for the plaintiff and the settling defendant submitted affidavits stating on what bases they reached the settlement and pointing out why they thought the settling defendant's state court exposure was minimal.

350. 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983).

while working on a machine that had been manufactured by defendant Wysong and moved to the plaintiff's employer's shop by defendant Movers. The plaintiff settled with Movers for $65,000. The plaintiff's total claims against all defendants were over $7,000,000. At the hearing on the "good faith" of the settlement, the trial judge took evidence in the form of declarations. Counsel for the settling defendant, Movers, submitted a detailed declaration setting forth the allegations of the complaint against Movers and summarizing deposition testimony from one of the plaintiff's co-workers which cast doubt on Movers' liability.[351] In a later hearing on the same issue, Movers' counsel attached a portion of this deposition transcript to his declaration in which the co-worker gave evidence tending to reduce the potential for liability on the part of Movers. Wysong's counsel, who opposed the finding of "good faith," also referred to other deposition testimony and utilized the plaintiff's responses to a certain interrogatory to illustrate to the court the plaintiff's legal theories for liability.[352] At one point during the "good faith" proceedings, the appellate court in a writ proceeding stated that if the lower court needed additional evidence to rule on the issue of "good faith" the court could continue the hearing for a reasonable period of time.[353] This presumably would have allowed the parties to conduct any necessary additional discovery that would be needed to bear on the "good faith" issue. Thus, in *Wysong*, the trial court made its "good faith" determination by referring to declarations of counsel, excerpts from discovery, and its own judgment. It evaluated the potential liability of the settling defendant and concluded that Movers had a viable defense to the action. On this basis, the court decided that the settlement was in "good faith." The appellate court upheld this determination and conducted the same type of analysis.

In the case of *Widson v. International Harvester Co.*,[354] both the trial court and appellate court seemed to perform the exact type of analysis recommended by this article.[355] In so doing, these courts looked to the attorneys' evaluation of the range of the settlor's potential liability (zero to 10%) and the plaintiff's probable recovery ($200,000 to $750,000). In light of these figures, both courts concluded the amount of the settlement ($30,000) was not unreasonable.[356]

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351. *Id.* at 281-82, 191 Cal. Rptr. at 673-74.

352. *Id.* at 282-83, 191 Cal. Rptr. at 674-75.

353. *Id.* at 283, 191 Cal. Rptr. at 675.

354. 153 Cal. App. 3d 45, 200 Cal. Rptr. 136 (1984).

355. The case involved various issues and the appellate court's discussion of the "good faith" analysis comprised only one short paragraph of the opinion.

356. Specifically, the court stated:

These reported cases illustrate that the reasonable range analysis, because it requires only a rough approximation of value, is a workable approach. The reasonable range of a settlement is a question of fact in each case[357] to be determined by the judge based on evidence presented to him by the parties at the hearing and his own experience. Unless the party opposing the finding of "good faith" carries the burden of proving the amount is outside the reasonable range of the settlor's fair share, the settlement will be approved.

5. Policy considerations and the "reasonable range" definition of "good faith"

a. the policy of encouragement of settlement of litigation

The reasonable range test does encourage both partial and complete settlement of litigation, although not in the same way as does the tortious conduct test. It has been shown that a test of a "good faith" settlement such as the tortious conduct test that requires no relationship whatsoever between the settlement amount and the settling defendant's proportional liability will provide tremendous encouragement for an initial, cheap settlement.[358] The effect that this first, cheap settlement will have on settlement by other defendants is unclear.[359]

The reasonable range definition of "good faith," requiring that the settlement must at least approximate the settlor's proportional liability, will not provide the same incentive for defendants to attempt to enter into a quick, cheap, disproportionate settlement. Because a disproportionate settlement will not be found to be in "good faith" under this test and will not shield the settlor from liability for partial indemnity, the incentive to settle for an amount not within the reasonable range will disappear.

Nevertheless, the reasonable range test of "good faith" will provide an incentive to settlement because the settlor may still extricate himself from the litigation for a reduced amount. This is because this test does not require exact proportionality of the settlement to the tortfeasor's fair share, but rather looks to see if the settlement is within

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> Evaluation of [the settlor's] potential liability ranged from zero to 10 per cent of plaintiff's recovery. Counsel for [the settlor] expressed the view that in the worst case [the settlor's] exposure would tally 25 per cent. Evaluations of plaintiff's total recovery ranged from $200,000 to $750,000. In such a factual context, it cannot be said the $30,000 paid by [the settlor] was unreasonable.

158 Cal. App. 3d at 58, 200 Cal. Rptr. at 145.

357. *River Garden Farms*, 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 507.

358. *See supra* text following note 265.

359. *See supra* notes 266-67 and accompanying text.

a range of proportionality. Also, it takes into account the fact that a settlement by definition is a lesser amount than the parties feel would be awarded by a jury. Therefore, under this test a settling defendant can settle in "good faith" for an amount less than what he expects will be his ultimate proportionate share of liability to the other parties. He still may buy his peace from both the plaintiff and his joint tortfeasors for a reduced sum, thereby providing a strong incentive to settle.

Also, there will be an incentive for defendants to settle early. Under the reasonable range test as proposed, the earlier the settlement, the smaller it need be because in determining the reasonable range, the trial court will consider when the plaintiff obtained the use of the money.[360] Another incentive to early settlement is provided because this test gives the advantage to the first defendant to settle. Since the amount of settlement can be below a settlor's strict proportional share and still be in "good faith," the nonsettling defendants will have to account for any shortfall. This is the same result as under the tortious conduct test, but the shortfall will not be so extreme because the first settlement must at least be within the reasonable range of the settlor's proportionate share.

In addition to encouraging an early settlement with one tortfeasor, the reasonable range test will probably also promote the policy of settlement of the entire litigation. Because the first settling defendant settled within his reasonable range of liability, the second defendant will not be facing a huge disproportionate judgment as could be the case under the tortious conduct test of "good faith."[361] The potential judgment against the remaining defendant and the plaintiff's monetary demands upon him will be reasonably related to his amount of fault, and, therefore, it is more likely that the second defendant will be willing to enter into a realistic settlement. Again, whether this will occur will depend on the various parties, their evaluation of the plaintiff's potential for recovery, and other factors peculiar to each case.

By way of example, a comparison between the tortious conduct test and the reasonable range test for "good faith" as far as the encouragement of the settlement of the entire litigation is concerned can be made as follows. Assume the plaintiff has been damaged in the amount of $100,000 and sues *A* who is 80% at fault and *B* who is 20% at fault. If the plaintiff settles with *A* for $5,000, under the tortious conduct test this settlement would be found to be in "good faith" absent

360. *See supra* text accompanying notes 300-02.

361. *See supra* notes 266-67 and accompanying text.

any proof of tortious conduct, and defendant *B* would face potential liability of $95,000 even though he was only 20% at fault. As was shown in Part V-A,[362] it is unclear whether this potential verdict completely unrelated to the amount of fault would force *B* into a settlement in excess of his percentage of fault or whether it would compel *B* to take his chances at the trial. However, under the reasonable range test, such a settlement would not be found to be in "good faith" so defendant *A* would not want to enter into it because he would still be liable on the cross-complaints. If the court utilized the reasonable range test, *A's* settlement would have to be more in line with his anticipated proportionate share. Because he cannot buy an unreasonably cheap settlement, assume *A* decides to settle for $60,000 (still, a bargain) and the court finds that this amount is within the reasonable range of *A's* potential liability to all parties. *B* is still facing more than his proportionate share of liability, but the amount is not nearly so disproportionate as before. The plaintiff need not seek as much in settlement from *B* in order to be compensated for his injuries because he received more from *A*. Because the plaintiff can be satisfied with a lesser amount from *B*, and because *B's* potential liability is more in keeping with his percentage of fault, it is probably more likely that the plaintiff and defendant *B* will be able to reach a settlement and end the entire litigation.

In summary, because a settling defendant may settle for less than his strict proportional share and still have his settlement found to be made in "good faith," the reasonable range analysis promotes early settlement of litigation and gives the advantage to the first defendant to settle. Furthermore, this definition of "good faith" will promote settlement of the entire litigation because the remainder of the plaintiff's damages should not be so grossly disproportionate to the remaining defendant's proportionate share of liability as to discourage settlement with that party. Also, the very fact that Code of Civil Procedure section 877.6 puts the burden of proof at the hearing on the party claiming lack of "good faith," in and of itself, will always tip the balance in favor of the approval of a settlement no matter which interpretation of "good faith" is adopted.

b. the policy of equitable apportionment of loss among joint tortfeasors

The main benefit of the reasonable range test over the tortious conduct test is that it gives effect to the goal of equitable apportionment

362. *Id.*

of loss among the tortfeasors. To be in "good faith" and discharge the settlor from claims for partial indemnity a settlement must be within the reasonable range of the settlor's fair share. Thus, the settlor will pay an amount commensurate with his comparative fault, although probably somewhat less.[363] Correspondingly, the offset a nonsettling tortfeasor will obtain against an eventual judgment will be within the reasonable range of the settlor's fair share, leaving the nonsettlor an amount to pay within the reasonable range of his proportional share, although probably somewhat more.[364] Also, if the second defendant chooses to settle, he will probably be able to settle for an amount approximating the reasonable range of his proportionate share.[365]

Therefore, the reasonable range test for determining the "good faith" of a settlement will further the policy of equitable apportionment of loss according to fault to a large extent but not totally. While the only test of "good faith" settlement that will render precise equitable apportionment of loss among tortfeasors is one releasing the settlor from partial indemnity only if his settlement is strictly proportional to his ultimately determined liability, the reasonable range test provides much greater equitable apportionment of loss than does the tortious conduct test whereby a settlement can be in "good faith" regardless of its amount.

c. the policy of maximization of the plaintiff's recovery

The effect of the reasonable range test on the public policy of maximization of the plaintiff's recovery cannot be quantified. However, it has been shown that under this test an initial and early settlement with a defendant is encouraged.[366] It has also been hypothesized that under this test the settlements with the remaining defendants and the eventual settlement of the entire litigation are encouraged more than they would be under the tortious conduct test.[367] Therefore, perhaps if courts utilized the reasonable range test to determine the "good faith" of a settlement, plaintiffs would end up being compensated for their injuries by receiving at least one early, roughly proportionate settlement followed by other realistic settlements. However, as has been demonstrated above, if the plaintiff proceeds to trial and is successful against at least one solvent defendant, it does not matter which definition of "good

363. *See supra* text accompanying notes 359-62.
364. *Id.*
365. *See supra* text accompanying and following notes 361-62.
366. *See supra* text accompanying notes 359-60.
367. *See supra* text accompanying and following notes 361-62.

faith" is adopted as far as the plaintiff's total recovery is concerned.[368] The definition of "good faith" only makes a difference as to the allocation of the judgment between the joint tortfeasors.

d. practical considerations relating to the "good faith" hearing

There is no doubt that the utilization of a reasonable range test will complicate the "good faith" settlement hearing. However, as was shown, the reasonable range analysis is workable. The appellate decisions reveal that several trial courts have considered the necessary criteria to conduct the analysis and have done so successfully.[369] True, this type of "good faith" hearing takes longer to hear, takes more preparation by counsel, and is more complex than a hearing solely into the tortious conduct of the parties. However, the policies of equitable apportionment of loss among tortfeasors and fairness should not be sacrificed merely for judicial expediency. Judges are accustomed to considering complicated pretrial motions, such as motions for summary judgment, when necessary. Because of the importance of the "good faith" determination to the settling parties and to the nonsettling tortfeasors, the definition of "good faith" adopted by the courts should not be determined according to the ease with which it can be administered if other policy considerations are sacrificed.

6. The special problem of the relatively insolvent tortfeasor

The preceding discussion of the reasonable range test for "good faith" has assumed that the settling tortfeasor is financially able to pay his proportionate share of the plaintiff's judgment. However, a tortfeasor who is not able to pay this amount may wish to settle if that settlement will be found to be in "good faith" so as to discharge him from claims for partial indemnity. Thus, a court may be called upon to decide whether a settlement that would otherwise not fall within the reasonable range of a settlor's proportional responsibility should nevertheless be found to be in "good faith" because the settlor is financially unable to pay more.

The cases suggest the relevancy of a settling party's financial status to the determination of "good faith." For instance, the court in *River Garden Farms* defined the "good faith" clause as a demand for settlements which have a reasonable relation to the value of the plaintiff's case, to the strengths and weaknesses of the parties, and the financial

368. *See supra* text preceding note 235.

369. *See supra* notes 337-56 and accompanying text.

ability of the settlor.[370] In *Stambaugh* it was stated that "even where the claimant's damages are obviously great, and the liability therefore certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured or underinsured, joint tortfeasor."[371] Similarly, the court in *Fisher* specifically mentioned the wealth of a settling defendant as evidence that may be admissible on the trial of the "good faith" issue.[372]

A rule allowing a relatively insolvent[373] tortfeasor's financial status to reduce the amount required for his settlement to be "good faith" makes sense if the proposed settlement is for basically the full amount he would be able to contribute to plaintiff's recovery, i.e., the amount that could actually be collected from him after a judgment. If the settlement is in this amount, a finding that this lower settlement is in "good faith" will not result in any additional detriment to the other tortfeasors. Under the present law the inability of one joint tortfeasor to pay his share of a judgment does not alter the plaintiff's recovery; the plaintiff can collect the entire amount of the judgment from the other joint tortfeasors.[374] However, the insolvency of one tortfeasor will increase the payments by the other tortfeasors because the relatively insolvent tortfeasor's shortfall must then be shared proportionately by the solvent tortfeasors as though the insolvent person had not participated in the action.[375] This is the same result that occurs where one tortfeasor's shortfall is caused not by financial inability to pay, but

370. 26 Cal. App. 3d at 994, 103 Cal. Rptr. at 504.

371. 62 Cal. App. 3d at 238, 132 Cal. Rptr. at 848.

372. 103 Cal. App. 3d 434, 163 Cal. Rptr. 47.

373. For purposes of this discussion, the term "relatively insolvent" tortfeasor will be used to describe a tortfeasor with insufficient assets (including insurance) to pay the full amount of his proportionate share of plaintiff's judgment.

374. *American Motorcycle*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

375. Paradise Valley Hosp. v. Schlossman, 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531, 536 (1983). In that case, there was no negligence found on the part of the plaintiff. Presumably, under the rules of joint and several liability, if the plaintiff were also at fault, he would not share in the shortfall occasioned by one tortfeasor's insolvency, but rather could collect the difference from the other joint tortfeasors. This result has been criticized. *See* Zavos, *supra* note 214, at 817; Fleming, *Foreword: Comparative Negligence At Last—By Judicial Choice*, 64 CAL. L. REV. 239, 251-52 (1976).

The appellate court in Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d 353, 358, 195 Cal. Rptr. 116, 119 (1983), expressly rejected an argument that a comparatively negligent plaintiff share in the allocation of that portion of the judgment attributable to a tortfeasor settling in "good faith." The court held that the amount of the settling tortfeasor's share should be allocated among the nonsettling defendants according to their percentage of fault, and no portion of it should be allocated back to a comparatively negligent plaintiff. The court analogized this to the situation of an insolvent defendant.

rather because his settlement has been found to be in "good faith."[376] Therefore, given that a relatively insolvent tortfeasor only has so much money to contribute either to the plaintiff or to the other tortfeasors, it does not matter to the other tortfeasors whether his payment of this amount to the plaintiff is found to be a "good faith" settlement because the remaining tortfeasors will end up paying the shortfall.

Under these facts, the policy of equitable apportionment of loss according to fault will be frustrated in any event. Accordingly, in this situation it seems logical to take the financial condition of the relatively insolvent tortfeasor into account in determining the reasonable range of his settlement. By finding his settlement to be in "good faith," he will be encouraged to settle, the plaintiff will get this amount of money at an earlier time, and no additional detriment will result to the nonsettling tortfeasors.[377]

However, a tortfeasor's desire to settle for something less than the collectable amount of his assets so that he will have other assets remaining does not justify an exception allowing his settlement to be in a lower amount. A contrary result would be unfair to the nonsettling tortfeasors and would not promote equitable apportionment of loss. It would encourage the settlement with that relatively insolvent tortfeasor, but that does not outweigh the inequities of depriving nonsettling tortfeasors of their claims for partial indemnity as discussed previously in this article.

The rules set forth above with respect to the applicability of the solvency of the settling defendant to a reasonable range analysis would further the policy of protecting a defendant from discovery into his financial affairs expressed by the *Dompeling* court.[378] As long as a settling defendant comes forward with a settlement that he claims is within the reasonable range of his fair share, his financial condition is irrelevant to the "good faith" issue and cannot be discovered. However, once he claims that his acceptable settlement amount should be lowered because he is relatively insolvent, then his financial status will become relevant. Since he is the one who put the matter in issue, it is

376. *Lyly*, 147 Cal. App. 3d at 355, 195 Cal. Rptr. at 117.

377. If the courts ultimately determine that a plaintiff who is comparatively negligent must share in the shortfall of an insolvent defendant, the rule of *Lyly & Sons, supra* note 375, should also be changed to the extent that a finding of "good faith" has been based on the relative insolvency of a tortfeasor. Otherwise, a plaintiff could shift his portion of the burden for the insolvent defendant's shortfall to the nonsettling tortfeasors by settling with this defendant for a small amount and having that settlement found to be in "good faith" because the defendant is relatively insolvent.

378. *See supra* text accompanying notes 228-29.

not unreasonable to require him to allow the other party to discover whether his assertions regarding his financial condition are true. Of course, the "good faith" hearing will be further complicated to the extent the court must examine the solvency of the settling defendant.

E. Recommendation: The Reasonable Range Test Should Be Adopted

The reasonable range test of whether a settlement is in "good faith" recognizes the role of the "good faith" requirement as an accommodating factor among competing policy considerations. This definition fosters both the policies of encouragement of settlement and equitable apportionment of loss as mandated by the comparative negligence cases. By providing a settling defendant with a release from partial indemnity claims if the amount of his settlement falls within the reasonable range of the settlor's proportionate liability to the other parties, settlements will still be encouraged. The initial settlement will remain attractive because it can be for less than an exact proportionate share.[379] Settlements by remaining tortfeasors will also be encouraged, leading to settlement of the entire case.[380] The goal of equitable apportionment of loss is also achieved by this test, although not perfectly. Because the settlor's share must fall within the reasonable range of his proportionate liability, the shares left to be paid by the remaining tortfeasors by definition will be within the reasonable range of their proportionate shares.[381] The goal of compensating injured plaintiffs will not be jeopardized by this test, and an argument can be made that plaintiffs may actually benefit from such a rule.[382] Also, it has been shown that the test is workable and can be administered in the context of a pretrial hearing pursuant to Code of Civil Procedure section 877.6.[383]

The "good faith" requirement is the mechanism by which important but competing policy considerations can be balanced. The reasonable range test allows it to serve this function.

VI. CONCLUSION

The California Supreme Court has directed that the comparative negligence rationale should be applied to unsettled questions in a prac-

379. *See supra* text following notes 359-60.
380. *See supra* text accompanying notes 361-62.
381. *See supra* text accompanying notes 359-64.
382. *See supra* text accompanying notes 366-68.
383. *See supra* notes 337-56 and accompanying text.

tical manner.[384] Development of the law in the multi-party tort area should proceed in a flexible fashion to reach a just and equitable result for all parties.[385] One area of tort law ripe for further development is that of "good faith" settlements. The tortious conduct test being applied now by the California appellate courts is at odds with the overall comparative negligence scheme and should be but "a temporary stop on the path of California law."[386] A definition of a "good faith" settlement requiring that the amount of the settlement be within the reasonable range of the settlor's proportionate liability will serve to further the evolution of comparative fault concepts without sacrificing other important policy considerations.

384. *Li*, 13 Cal. 3d at 823-27, 532 P.2d at 1240-42, 119 Cal. Rptr. at 872-74.

385. Daly v. General Motors, 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978).

386. *Owen*, 713 F.2d at 1465.