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THE RELATIVELY INSOLVENT JOINT TORTFEASOR AND THE GOOD FAITH SETTLEMENT

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I. INTRODUCTION

The good faith settlement is an important component of the overall scheme of comparative negligence whereby liability for a plaintiff's loss is apportioned among joint tortfeasors according to their degrees of fault. By entering into a good faith settlement with the plaintiff, a joint tortfeasor can free himself from liability to his joint tortfeasors for partial indemnity on a comparative fault basis. The California Supreme Court set forth new rules for good faith settlements in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates.*[1] Overruling a majority of appellate court decisions on the subject,[2] the supreme court redefined the term and held that a settlement is in good faith only if the amount of the settlement is within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries.[3]

In establishing its reasonable range test for a good faith settlement,

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

2. The following decisions held that the sole test for determining whether a settlement was made in good faith was whether there was tortious or collusive conduct aimed at the nonsettling tortfeasors between the plaintiff and the settling tortfeasor(s). These cases were expressly disapproved by the California Supreme Court in *Tech-Bilt*: Burlington N.R.R. v. Superior Court, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985). Other cases that were impliedly disapproved insofar as they utilized or referred to the disapproved test for good faith are: Abbott Ford, Inc. v. Superior Court, 166 Cal. App. 3d 280, 212 Cal. Rptr. 389 (1985) (*review granted on other grounds and opinion ordered citable*); Anderson v. International Harvester Co., 165 Cal. App. 3d 100, 211 Cal. Rptr. 253 (1985) (*review denied and ordered depublished*); Henderson v. Superior Court, 162 Cal. App. 3d 297, 208 Cal. Rptr. 484 (1984); 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); Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980).

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

the supreme court listed two factors which may prove to be the exceptions that almost swallow the rule. Those factors are the financial condition and insurance policy limits of the settling joint tortfeasor.[4] The court stated, "even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured joint tortfeasor."[5] Thus, under the *Tech-Bilt* test, the financial resources of the settling tortfeasor are relevant to the issue of the good faith of his settlement.

In fact, as a result of the *Tech-Bilt* case, financial condition may prove to be the key factor in many good faith determinations. It is likely that a tortfeasor wishing to settle will attempt to convince the trial judge that his proposed settlement is in good faith because, given his financial condition, it is reasonable in amount.[6] Or, perhaps a settling joint tortfeasor will first attempt to convince a judge that his settlement is within the "pure" reasonable range[7] of his proportional share of comparative liability for the plaintiff's injuries. If his argument is unsuccessful, he will then argue as a fallback position that the settlement is reasonable because of his financial condition. Therefore, the financial condition of the settling joint tortfeasor will in all likelihood be a factor in many good faith settlement hearings.

Accordingly, an important issue facing a trial judge in applying the *Tech-Bilt* reasonable range test is how to integrate the financial condition and insurance status of a settling defendant into the formula for a good faith settlement. This article offers guidelines to assist trial judges in applying the financial condition and insurance factors to the determination of good faith. The method and the solution offered best accommodate the policies underlying a good faith settlement.

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4. *Id.*

5. *Id.* (citing Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 847-48 (1976)).

6. In one of the first appellate decisions after *Tech-Bilt*, the court looked to the financial condition of the settling tortfeasor. "[A]t the time of the settlement, [defendant] had little or no income and was going out of business, so all that he had to salvage was what he had personally." Barth-Wittmore Ins. Co. v. H.R. Murphy Enters., Inc., 169 Cal. App. 3d 124, 134, 214 Cal. Rptr. 894, 899 (1985). See also Sagadin v. Ripper, 175 Cal. App. 3d 1141, 221 Cal. Rptr. 675 (1985), in which the appellate court upheld a trial court's finding of good faith where "[t]he amounts in which they settled in no way reflects their culpability in the accident .... However, balanced against these considerations is the overriding fact that the trial court found the defendants were insolvent but for the insurance policies, a relevant factor." *Id.* at 1177, 221 Cal. Rptr. at 698-99.

7. This article uses the term "pure" reasonable range test to refer to a test in which a settlement is examined without reference to the settling tortfeasor's financial condition or insurance policy limits. *See infra* text accompanying notes 79-86.

II. BACKGROUND

An understanding of the principles of comparative negligence, joint and several liability, and partial indemnity is necessary in order to analyze the effect that a settling tortfeasor's state of relative insolvency[8] has on the issue of good faith. This section explains these concepts and discusses the components of a good faith settlement and how they fit into the comparative fault system.[9]

A. The Good Faith Settlement in Context — The Comparative Fault Framework

In *American Motorcycle Association v. Superior Court*,[10] the California Supreme Court applied the rule of comparative negligence to multi-tortfeasor situations. In doing so, it established that all tortfeasors responsible for plaintiff's injuries would be obligated to pay in accordance with their percentages of fault.[11]

1. Joint and several liability

An integral part of this comparative negligence system in both two party[12] and multi-party[13] cases is the doctrine of joint and several liability.[14] This doctrine mandates that each joint tortfeasor[15] is personally liable for the total amount of the damages sustained by the plaintiff, even though the independent negligent actions of a number of tortfeasors were each a proximate cause of plaintiff's single injury.[16] As a result, the

8. The term "relative insolvency" is used to describe a tortfeasor who has insufficient collectible assets to cover his allocable share of plaintiff's damages.

9. This "Background" section is taken in part from Roberts, *The Financial Condition and Insurance Policy Limits of a Joint Tortfeasor Wishing to Settle in Good Faith: Problems of Discovery and Confidentiality*, 26 SANTA CLARA L. REV. 63 (1986).

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

11. *Id.* at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201. The *American Motorcycle* decision was an extension of the court's prior decision in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), which established California's comparative negligence system by replacing the doctrine of contributory negligence with a comparative negligence scheme in two-party cases.

12. *Li*, 13 Cal. 3d at 804, 532 P.2d at 1226, 119 Cal. Rptr. at 858.

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

14. *Id.* at 590-91, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

15. The term "joint tortfeasor" applies both to tortfeasors acting in concert and to concurrent tortfeasors who, although acting independently, cause an indivisible injury. Turcon Constr., Inc., v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 282-83, 188 Cal. Rptr. 580, 581-82 (1983).

16. *American Motorcycle*, 20 Cal. 3d at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187. Liability attaches to a concurrent tortfeasor not because he is responsible for the acts of other independent tortfeasors who may also cause the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. *Id.* at 589, 578 P.2d at 905, 146

plaintiff may recover the entire amount of his damages not attributable to his own fault from any joint tortfeasor found liable, regardless of the percentage of fault of that particular tortfeasor.[17] From whom and in what amounts he chooses to collect his judgment are completely within the discretion of the plaintiff.

For example, if the jury awards plaintiff a $100,000 judgment against co-defendants *A* and *B*, and finds defendant *A* 10% at fault and defendant *B* 90% at fault, the plaintiff may recover the entire $100,000 or any portion thereof from defendant *A*, even though *A*'s proportionate share of the liability is actually only $10,000.[18] Defendant *A* could then attempt to apportion the loss among himself and defendant *B*,[19] but this would not concern the plaintiff who had already exercised the right to be totally compensated from defendant *A*.

The purpose of the joint and several liability rule is to provide adequate compensation for plaintiffs.[20] This rule allows an injured plaintiff to obtain full recovery for his injuries even when one of the responsible parties does not have the financial resources to cover his liability.[21] Thus, the risk of one joint tortfeasor's inability to pay his share of the damages is imposed on the remaining defendants, not on the plaintiff.[22]

2. Partial indemnity

Although the court in *American Motorcycle* allowed a plaintiff to collect the entire amount of his judgment from his choice of several negligent defendants, the court opened an avenue of relief for the joint

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Cal. Rptr. at 188. Therefore, even though principles of comparative negligence make it possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another, this does not suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury. *Id.*

17. *Id.* at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187.

18. Plaintiff could have chosen to sue only defendant *A* and then collect the entire judgment from him, even though *B* was also at fault.

19. This apportionment would be accomplished by a suit for partial indemnity. *See infra* text accompanying notes 23-28.

20. *American Motorcycle*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. The alternative to the joint and several liability rule is the rule of several liability which would limit a joint tortfeasor's liability to his allocable share of fault. In other words, in the above hypothetical, this would mean that the plaintiff could collect only $10,000 from *A* and $90,000 from *B*. The supreme court rejected this alternative in *American Motorcycle* principally because of the "unwarranted dilatorious effect" it would have on the "practical ability of negligently injured persons to receive adequate compensation for their injuries." *Id.*

21. *Id.* The supreme court referred to this as "one of the principal by-products of the joint and several liability rule." *Id.*

22. 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, 1483 (1979).

tortfeasor who had been called upon to pay more than his proportionate share of damages. He could pursue an action for partial indemnity[23] against his fellow tortfeasors on a comparative fault basis.[24] As the name implies, the purpose of the action for partial indemnity is to allow an equitable balancing of the books among those liable for the injury. Through such a lawsuit, a joint tortfeasor who pays more than the amount warranted by his percentage of negligence can obtain reimbursement from the other tortfeasors in proportion to the fault attributable to each.[25] This right may be asserted by a defendant against any joint tortfeasor, whether named by the plaintiff in the original action or not,[26] and may be asserted either by cross-complaint[27] or independent action.[28]

As an example, consider the above hypothetical in which plaintiff obtained full payment of his $100,000 judgment from defendant *A* who was only 10% at fault. After such payment, *A* could assert a claim for partial indemnity against *B* and could recover the amount of the judgment that *A* paid in excess of *A*'s percentage of fault. Accordingly, *A* could recover $90,000 from *B* because *B* was 90% at fault. Thus, the net result is that each tortfeasor pays an amount equivalent to his percentage of fault.

3. The insolvent joint tortfeasor

Even though the insolvency of one joint tortfeasor will not alter the plaintiff's recovery if the other tortfeasors have the assets to pay the entire judgment, it does alter the amounts that ultimately will be borne by the other joint tortfeasors. While they must initially pay all of plaintiff's judgment, they will not be able to apportion the loss back to the insolvent joint tortfeasor by a suit for partial indemnity because he will not have assets upon which they can collect.

When one tortfeasor is relatively insolvent and two or more solvent joint tortfeasors are involved, the share that should be borne by the rela-

23. 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."

24. *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190. For a more detailed discussion of the origins of the doctrine of partial indemnity, see Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 846-51 (1984).

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

26. *Id.* at 606-07, 578 P.2d at 917, 146 Cal. Rptr. at 200.

27. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.

28. E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978).

tively insolvent tortfeasor must be shared proportionately by the solvent tortfeasors as though the insolvent person had not participated in the action.[29] In other words, the insolvent tortfeasor's shortfall is shared between the remaining joint tortfeasors in the ratio relative to their proportionate fault.

For example, in *Paradise Valley Hospital v. Schlossman*,[30] plaintiffs brought a negligence action against a hospital and doctors *A* and *B*. Plaintiffs were awarded $1.5 million by the jury and responsibility was apportioned at 10% for the hospital, 50% for *A* and 40% for *B*. The hospital paid $500,000 and *B* paid $1 million to satisfy the judgment. *A* filed a petition for bankruptcy. The hospital then cross-complained for partial indemnity against *A* and *B*, and *B* cross-complained against *A* for partial indemnity.[31] Rejecting *B*'s proposal that *A*'s $750,000 shortfall should be shared equally by the solvent defendants, the court held that the shortfall must be shared by the solvent defendants according to their relative proportionate fault.[32] The hospital and *B* were found liable in the ratio of 1 to 4 (hospital 10%, *B* 40%, or 20% to 80%). Because *A* was insolvent, the hospital should, therefore, ultimately bear 20% of the total judgment and *B* should bear 80% of the total judgment. The hospital's share of the judgment was, therefore, 20% of $1.5 million, or $300,000. Because the hospital had paid $500,000, it was entitled to a $200,000 judgment against *B* on its cross-complaint.[33]

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29. Bracket v. State, 180 Cal. App. 3d 1171, 1176, 226 Cal. Rptr. 1, 3 (1986); Paradise Valley Hosp. v. Schlossman, 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983).

30. 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983).

31. *Id.* at 89, 191 Cal. Rptr. at 533.

32. *Id.* at 93, 191 Cal. Rptr. at 536.

33. *Id.* at 94, 191 Cal. Rptr. at 536. Because *A* was completely insolvent and contributed nothing toward plaintiff's judgment, the court spoke of the solvent defendants being liable for the *total* judgment in keeping with their 1 to 4 ratio of comparative liability when it computed the actual amounts due from defendant *B* to the hospital. The court noted that the hospital's share would be 20% of the total judgment of $1.5 million or $300,000. Since the hospital paid $500,000, it was entitled to a money judgment against *B* for $200,000.

Another way of looking at this is to say that each solvent defendant is liable for the shortfall of the insolvent defendant in proportion to his relative liability. This method achieves the same result, and is the way the amounts must be calculated if the insolvent defendant is able to contribute something towards plaintiff's judgment. In *Paradise Valley* the calculation would go as follows: *A*'s share of the judgment was 50% of $1.5 million or $750,000. He was completely insolvent and was able to contribute nothing, so his shortfall was $750,000. The solvent defendants should share that shortfall in the proportion of their comparative liability of 4 to 1 or 20% to 80%. Therefore, the hospital would be liable for 20% of the $750,000 shortfall, or $150,000. The hospital is also responsible for 10% of the $1.5 million judgment because it was found 10% at fault. Adding these two amounts together, the hospital's share should be $300,000. Since it paid $500,000, it is entitled to a judgment against *B* for $200,000.

For another example of a computation of the apportionment of a shortfall, see *Bracket*, 180 Cal. App. 3d at 1177 n.2, 226 Cal. Rptr. at 4 n.2.

The same rule is applicable even when the plaintiff shares some of the fault. To illustrate the point, let us alter somewhat the facts of *Paradise Valley Hospital*. Assume the plaintiff's damages were found to be $1.5 million with the responsibility apportioned at 10% for the hospital, 40% for *B*, 25% for *A* and 25% for the plaintiff. Again, assume *A* is insolvent. On these facts, plaintiff would be able to recover from either solvent defendant 75% of $1.5 million or $1,125,000. The solvent defendants would then share the shortfall of the insolvent defendant in direct proportion to their respective fault, or in the ratio of 1 to 4. The plaintiff, even though more at fault than the hospital defendant, would not be required to participate in the shortfall.[34]

B. The Good Faith Settlement

1. The ramifications of a finding of good faith

As mentioned earlier, the joint tortfeasor who has paid more than his proportionate share of a plaintiff's injuries can reapportion the loss among the other tortfeasors by a suit for partial indemnity. However, the good faith settlement acts as a roadblock for the tortfeasor who attempts to achieve this result. If one joint tortfeasor settles with the plaintiff prior to trial, and that settlement is found to be in good faith, the other joint tortfeasors are prohibited from seeking partial indemnity from the settling tortfeasor.[35] Instead, the dollar amount of the settlement is deducted from the amount the plaintiff may recover from the other joint

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34. *Paradise Valley,* 143 Cal. App. 3d at 93, 191 Cal. Rptr. at 536.

35. CAL. CIV. PROC. CODE § 877 (West 1980); CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986); American Motorcyle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 915-16, 146 Cal. Rptr. 182, 198-99 (1978). The California statutes providing for a good faith settlement were specifically incorporated by the supreme court in *American Motorcyle* into the context of partial indemnity. *Id.* at 599, 578 P.2d at 912, 146 Cal. Rptr. at 195. Section 877 provides:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort:
>
> (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and
>
> (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

CAL. CIV. PROC. CODE § 877 (West 1980). Section 877.6(c) provides: "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." CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986).

tortfeasors,[36] and the nonsettling joint tortfeasors must pay the balance of the plaintiff's judgment without any right to partial indemnity from the settling tortfeasor.[37]

The facts set forth above provide an example. Assume again that plaintiff suffered injuries entitling him to damages in the amount of $100,000 from defendant *A* who was 10% at fault and defendant *B* who was 90% at fault. Assume further that before trial defendant *B* settled with the plaintiff for $5000. If that settlement is found to be in good faith, the $5000 settlement would be subtracted from the amount that plaintiff could recover from *A*. Under the rule of joint and several liability, *A* would be required to pay the entire remaining $95,000 to the plaintiff. However, *A* would have no claim for partial indemnity to redistribute the loss back to *B*. Therefore, even though *A* was only 10% at fault, because of *B*'s good faith settlement with the plaintiff, *A* would end up paying $95,000, or 95% of plaintiff's judgment. *B* would escape by paying only his settlement amount of $5000.

The calculation becomes more difficult when more than one nonsettling joint tortfeasor is involved. The appellate court in *Lyly & Sons Trucking Co. v. State*[38] decided this issue by analogizing the good faith settlement situation to that of an insolvent tortfeasor.[39] The court held that the shortfall caused by a good faith settling joint tortfeasor must be shared among the nonsettling joint tortfeasors in direct proportion to their respective degrees of fault. This computation should be made as though the settling tortfeasor had not been involved in the accident.[40]

This computation can be illustrated as follows. Assume that plaintiff suffered $100,000 in damages as a result of the actions of joint tortfeasors *A*, *B* and *C*, and that *A* was 50% at fault, *B* was 40% at fault, and *C* was 10% at fault. Assume further that before trial, plaintiff settled with *A* for $40,000 and that at a pretrial hearing the court approved this as a good faith settlement. Plaintiff then proceeded to trial against *B* and

36. CAL. CIV. PROC. CODE § 877 (West Supp. 1986); *American Motorcycle*, 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

37. Usually the tortfeasors cross-complain against each other for partial indemnity in the original action. When one tortfeasor settles and his settlement is determined to be in good faith, he then files motions for summary judgment to dismiss the partial indemnity cross-complaints against him. If a tortfeasor has been sued by another tortfeasor for partial indemnity in a separate action, he will similarly file a motion for summary judgment to dismiss that action.

38. 147 Cal. App. 3d 353, 195 Cal. Rptr. 116 (1983).

39. The court cited and relied on Paradise Valley Hosp. v. Schlossman, 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983). *See supra* notes 30-34 and accompanying text.

40. Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d 353, 358, 195 Cal. Rptr. 116, 118 (1983). Following the rule of *Lyly & Sons* is Sagadin v. Ripper, 175 Cal. App. 3d 1141, 1173-74, 221 Cal. Rptr. 675, 695-96 (1985).

C and obtained a judgment against both for $100,000.[41] The amount of *A*'s good faith settlement would be subtracted from plaintiff's judgment so that plaintiff could recover only $60,000 from *B* or *C*. Assume he collected it from *B*. *B* could not redistribute any of the loss back to *A* because *A*'s good faith settlement released *A* from any claims for partial indemnity. However *B* could maintain a suit for partial indemnity against *C*.

The issue then becomes how to allocate ultimate responsibility as between *B* and *C*. Under the *Lyly & Sons* rule, each must bear the loss according to his respective percentage of fault. Because *B* was 40% at fault and *C* was 10% at fault, their ratio of fault is 4 to 1 or 80% to 20%. Therefore, they share liability for the $60,000 paid to the plaintiff according to this same ratio. Therefore, *B* would be ultimately responsible for 80% of $60,000 or $48,000 and *C* would be ultimately responsible for 20% of $60,000 or $12,000. Thus, in *B*'s suit for partial indemnity against *C*, *B* is entitled to recover $12,000.[42]

As illustrated above, the shortfall caused by the good faith settlement of one joint tortfeasor is allocated among the other joint tortfeasors in the same manner as if the shortfall had been caused by the insolvency of a joint tortfeasor. However, one important difference exists from the standpoint of the nonsettling joint tortfeasors between a situation involving an insolvent defendant and a situation involving a defendant who has settled in good faith. The difference lies in the finality of the allocation of the shortfall. While remaining joint tortfeasors must initially make up any shortfall caused by either the insolvency of another tortfeasor or that tortfeasor's good faith settlement, the ultimate responsibility may vary. In the case of an insolvent defendant, the tortfeasors who were initially

41. The same rules would apply if plaintiff sued only *B* or only *C* and then either *B* or *C* paid a portion of the judgment that was greater than his allocable share.

42. Another way to perform the computation is to look at the shortfall caused by settling defendant *A*. Under this method, one looks at plaintiff's total damage before subtraction of the settlement amount and computes the percentage attributable to each defendant. On these facts, $50,000 is attributable to defendant *A*, $40,000 is attributable to defendant *B*, and $10,000 is attributable to defendant *C*. However, defendant *A* paid $40,000 in settlement and has been released for claims for partial indemnity. Therefore, his shortfall is $10,000. Thus, defendants *B* and *C* share that shortfall in relation to their percentage of fault, or in a ratio of 4 to 1 or 80% to 20%. Defendant *B* is therefore liable for $8000 of the shortfall and defendant *C* is liable for $2000 of the shortfall. Accordingly, the total amount attributable to defendant *B* is $48,000 ($40,000 attributable to his own percentage of fault and $8000 attributable to his percentage of *A*'s shortfall). Similarly, defendant *C*'s total share is $12,000 ($10,000 attributable to his own percentage of fault and $2000 attributable to defendant *A*'s shortfall). In his suit for partial indemnity, *B* can recover $12,000 from *C*. No amount of the settling tortfeasor's shortfall is redistributed back to a negligent plaintiff. *Lyly & Sons*, 147 Cal. App. 3d at 358, 195 Cal. Rptr. at 118-19.

forced to pay for that insolvent defendant's shortfall are able to obtain a judgment against him which they can collect in the same way as any other money judgment.[43] Therefore, if the insolvent defendant later acquires property, or is working, the solvent joint tortfeasors can recover some or all of the sums they were required to pay by virtue of his insolvency.

However, a good faith settlement achieves a permanent reallocation of liability. A finding of good faith *releases* the settling joint tortfeasor from any claims for partial indemnity.[44] Therefore, the nonsettling tortfeasors must bear any shortfall caused by the good faith settlement without any future recourse against the settling defendant.

In summary, whenever a prejudgment settlement by one joint tortfeasor is found to be in good faith, the ultimate expense that must be borne by each nonsettling joint tortfeasor is increased. Absent a settlement, all defendants are liable in direct proportion to their respective degrees of fault. By settling before judgment, one tortfeasor may discharge his entire liability by contributing less than his proportionate share, leaving the other joint tortfeasors saddled with the entire judgment reduced only by the amount of the settlement.

Therefore, whenever a plaintiff attempts to enter into a good faith settlement with fewer than all of the joint tortfeasors, the settling and nonsettling tortfeasors are clearly adverse parties.[45] As illustrated above, this results from the fact that the lower the amount of the settlement, the higher the amount that must ultimately be paid by the nonsettling joint tortfeasors. The nonsettling tortfeasors, therefore, have a definite financial interest in whether the settlement is found to be in good faith and the amount of that settlement.

2. The good faith settlement hearing

The issue of good faith is usually decided in a pretrial hearing pursuant to California Code of Civil Procedure section 877.6.[46] Section 877.6 allows a party to seek a court order approving the good faith of a settlement or proposed settlement. The hearing is normally requested by a codefendant who wishes to settle with the plaintiff, although the plaintiff sometimes is the moving party. Understandably, the defendant seeks this

43. *See infra* text accompanying notes 127-29.
44. CAL. CIV. PROC. CODE § 877 (West 1980).
45. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 809, 173 Cal. Rptr. 38, 44 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 267 n.7 (1985).
46. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986).

determination for the assurance that if he settles, he will be totally free from the litigation by being released not only from plaintiff's claims but also from claims for partial indemnity by the other joint tortfeasors.[47] Usually, the defendant conditions his final execution of the settlement agreement on the court's determination that his proposed settlement is in good faith and will not enter into the settlement absent this finding. Without it, his settlement would not accomplish the desired purpose of terminating his exposure because he would still be liable for partial indemnity.

The nonsettling joint tortfeasors will object to the finding of good faith if they believe the settlement is too low. 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 the plaintiff's harm because the co-defendants are liable for the remaining amount of the plaintiff's damages without reimbursement from the settling defendant.

Section 877.6 specifically provides for the determination of good faith at a pretrial hearing.[48] In order that the issue can be resolved as early in the litigation as possible, any petition for a writ of mandate to review the trial court's decision receives expedited treatment.[49] Other portions of the statute provide that the hearing shall be held on at least twenty days notice,[50] that the hearing shall be held upon affidavits and counteraffidavits, or that the court may receive evidence in its discretion.[51] The burden of proof on the issue of good faith is on the party asserting the lack of good faith.[52]

3. The test of good faith

Because only a settlement that a court finds to be in good faith will alter the amounts ultimately borne by the nonsettling joint tortfeasors, the decision as to whether the settlement was made in good faith is crucial. It is this finding that triggers the release of the settling tortfeasor

47. The trial court is not empowered by § 877.6 to dismiss a cross-complaint for partial indemnity against the settling defendant. The court may simply determine the settlement is in good faith. This has the effect of barring the cross-complaint for partial indemnity. The settling tortfeasor must then follow up the good faith finding with a motion for summary judgment or motion for judgment on the pleadings which results in the dismissal of the cross-complaint. IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 103 n.6, 224 Cal. Rptr. 438, 442 n.6 (1986).

48. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1986).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

from subsequent liability to his joint tortfeasors for partial indemnity.[53]

As will be shown below, prior to the *Tech-Bilt* decision, the appellate courts disagreed regarding the proper definition of good faith. This difference of opinion stemmed from a basic argument concerning which of two conflicting policies behind the good faith settlement rule was more important: (1) the policy of encouraging settlements, or (2) the policy of equitable apportionment of loss among joint tortfeasors.[54] These two policies conflict in the good faith settlement context.[55]

The goal of encouraging settlements is best accomplished by defining good faith so as to uphold the greatest number of settlements between a willing plaintiff and a settling defendant. A defendant's desire for settlement is increased in relation to how low he perceives the settlement figure to be compared to the amount for which he would be responsible if he did not settle.[56] If a defendant's proposed settlement with the plaintiff is not approved as a good faith settlement, he will be very reluctant to settle with the plaintiff because that settlement will not completely remove him from the case.[57] Therefore, settlements are encouraged by

53. For a complete discussion of the evolution of the definition of good faith and the various tests used by the courts, see Roberts, *supra* note 24, at 896.

54. The policy considerations that must be considered in formulating a definition of a good faith settlement are discussed in Roberts, *supra* note 24, at 882-98. For a discussion of how courts have dealt with these policies, see *id.* at 899-904.

55. Roberts, *supra* note 24, at 822, 895-98; Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 494, 698 P.2d 159, 163, 213 Cal. Rptr. 256, 259-60 (1985); Singer Co. v. Superior Court, 179 Cal. App. 3d 875, 885, 225 Cal. Rptr. 159, 164 (1986); Abbott Ford, Inc. v. Superior Court, 181 Cal. App. 3d 1205, 1211-12, 228 Cal. Rptr. 250, 254 (1985).

56. Roberts, *supra* note 24, at 906.

57. The court in Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 505 n.2, 203 Cal. Rptr. 825, 829 n.2 (1984), opined that this point has been overemphasized:

> A settling defendant undoubtedly desires to "close his books on a case" and may well fear subsequent liability to his nonsettling co-defendants. We doubt, however, that this fear will often cause the defendant to eschew a favorable settlement with the plaintiff. After all, the plaintiff's claim poses the greatest and most immediate threat to the defendant; liability to co-defendants is more remote and contingent. Most defendants will be eager to rid themselves of the immediate threat from plaintiff, even if this threat is thereby replaced with the less likely prospect of liability to a co-defendant. *Id.*

The position of the *Torres* court seems somewhat unrealistic. While liability to a co-defendant may be more remote and contingent than liability to a plaintiff, most rational defendants will not be willing to pay a substantial sum of money to settle a case with the plaintiff, only to have to face liability later to a co-defendant who is seeking to apportion damages. This would place a settling defendant in a very precarious position. He must choose whether to appear in the initial trial of the plaintiff's claims against the remaining co-defendants in order to protect his position on the issues pertaining to plaintiff's total damages and the various parties' negligence. Alternatively, he must choose simply to sit back and attempt to defend his position on a co-defendant's claim for partial indemnity. In either event, his litigation expenses will be the same as if he had not settled with the plaintiff, and his risk of liability may not have diminished much. Of course, a real possibility exists that the case will never go to

finding an even disproportionately low settlement to be in good faith.[58]

On the other hand, the second goal, equitable distribution of loss among tortfeasors, is defeated when a disproportionately low settlement is found to be in good faith, thereby leaving the nonsettling tortfeasors saddled with the remaining portion of plaintiff's damages. Accordingly, in order to foster the policy of equitable distribution of loss according to fault, a settlement should be found to be in good faith only if it approximates the amount of the settling defendant's proportionate share of the loss.[59]

Therefore, the closer the definition of good faith moves toward requiring the settlement to reflect the settling defendant's proportionate fault, the more the policy of equitable apportionment of loss will be fostered. However, the policy of encouraging initial settlements will be deemphasized. Conversely, the farther the definition of good faith moves away from requiring proportionality, the more the policy of encouraging initial settlements will be fostered. Yet, the policy of equitable apportionment of loss will be correspondingly frustrated.[60]

a. the tortious conduct test

Prior to the supreme court decision in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[61] most California appellate courts employed a tortious conduct test to decide whether a settlement was in good faith.[62]

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trial against the remaining co-defendants because they will subsequently settle with the plaintiff. Even so, unless the settlement between the plaintiff and the first settling tortfeasor is found to be in good faith, the subsequently settling co-defendants can sue the first defendant for partial indemnity and force him to pay the percentage of the total settlement that is in accordance with his percentage of fault. *See* Mill Valley Refuse Co. v. Superior Court, 108 Cal. App. 3d 707, 166 Cal. Rptr. 687 (1980); American Bankers Ins. Co. v. Avco-Lycoming Div., 97 Cal. App. 3d 732, 159 Cal. Rptr. 70 (1979); Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978). Therefore, practically speaking, a defendant will not settle with the plaintiff unless his settlement has been found to be in good faith.

58. For an argument that approving a disproportionately low settlement as being in good faith fosters only partial settlement of litigation rather than total settlement, see Roberts, *supra* note 24, at 888-91.

59. Roberts, *supra* note 24, at 896.

60. *Id.* at 897.

61. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

62. *See, e.g.*, Henderson v. Superior Court, 162 Cal. App. 3d 297, 208 Cal. Rptr. 485 (1984), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Wysong & Miles Co. v. Western Indus. Movers, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985);

This test resulted from the courts ranking the policy of encouragement of settlements above the policy of equitable apportionment of loss among tortfeasors. Carrying this ranking to the extreme, courts applying this test held that any settlement, no matter how small in amount, was impervious to attack by nonsettling joint tortfeasors as long as it was made without tortious and wrongful intent.[63] Under the tortious conduct test, the *amount* of the settlement between the plaintiff and the settling defendant was irrelevant.[64] A settlement so low that it bore no relationship whatsoever to the settling defendant's probable ultimate liability under comparative fault principles did not create a bad faith settlement.[65] Instead, the only inquiry was whether the settling parties engaged in tortious or other wrongful conduct against the nonsettling joint tortfeasors.[66]

The fact that a settlement test had the *effect* of injuring a nonsettling tortfeasor because it forced him to face an exposure to the plaintiff for an amount far in excess of his fair share of liability under comparative fault principles did not make the settlement tortious. In fact, such a result to the nonsettling tortfeasors was recognized.[67] Under the tortious conduct

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Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

63. Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

64. In *Dompeling*, the court stated "[b]ad faith is not established by showing that a settling defendant paid less than his theoretical proportionate or fair share of the value of plaintiff's case." *Dompeling*, 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44. *See also Burlington Northern*, 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 378.

65. Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 847-48 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

66. *Wysong*, 143 Cal. App. 3d at 288-89, 191 Cal. Rptr. at 679; Kohn v. Superior Court, 142 Cal. App. 3d 323, 327, 191 Cal. Rptr. 78, 81 (1983); *Burlington Northern*, 137 Cal. App. 3d at 945-46, 187 Cal. Rptr. at 378; *Cardio*, 122 Cal. App. 3d at 890, 176 Cal. Rptr. at 260; *Dompeling*, 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 44-45.

67. The *Dompeling* court stated:

> Bad faith is not established by a showing that a settling defendant paid less than his

test, the settling parties were specifically allowed "to further their respective interests without regard to the effect of their settlement upon other defendants."[68]

> 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.

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

68. *Id.* at 809-10, 173 Cal. Rptr. at 45. "The settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." *Id.*

The tortious conduct test is exemplified in Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985). 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 which was a factor in the patient's death. The hospital filed a cross-complaint for partial indemnity against Cardio. Before trial, the plaintiffs and Cardio entered into a settlement whereby plaintiffs dismissed the complaint against Cardio with prejudice in exchange for a waiver of costs. The hospital was forced to settle for an amount in excess of its proportionate share of liability and then sought indemnity from Cardio. Cardio defended against the hospital's cross-complaint for partial indemnity on the ground that it had entered into a good faith settlement and, therefore, was released from partial indemnity claims. The appellate court agreed, holding that Cardio was released from liability on the cross-complaint.

All parties benefitted from this settlement except the nonsettling joint tortfeasor. The plaintiffs benefitted as a matter of trial strategy. The plaintiffs' attorney testified that while he felt 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 heart lung machine. Because the hospital had sufficient assets and sufficient insurance to pay the judgment, he did not wish to complicate a simple medical malpractice case where there was clear liability by bringing in a complicated products liability cause of action. *Id.* at 884-85, 176 Cal. Rptr. at 256-57. Clearly, Cardio also benefitted from this settlement. While plaintiff had a substantial products liability action against Cardio, it was released from all liability for only a waiver of costs. Cardio's waiver of costs was obviously not proportionate to Cardio's potential liability to the plaintiffs.

The party adversely affected by this settlement was, of course, the nonsettling co-defendant, the hospital. Because Cardio and the plaintiff had complied with the tortious conduct test, the settlement was found to be in good faith. Accordingly, the hospital had no claim for partial indemnity against Cardio. The hospital, therefore, had to pay the full amount of its settlement with the plaintiff without any claim for reimbursement against Cardio (which probably was at least as much at fault as the hospital). For a discussion of the appellate court's criticism of its own decision, see Roberts, *supra* note 24, at 871.

As illustrated by the *Cardio* case, everyone benefitted from the tortious conduct test of good faith except the nonsettling joint tortfeasors. This test furthered the interests of the plaintiff and the settling defendant because it made an early relatively low settlement possible. Even if the settlement was disproportionately low in terms of the settling defendant's fair share of liability, the plaintiff and the settling defendant were helped by the settlement. The plaintiff's interests were furthered because plaintiff, or his attorneys, received cash early in the litigation that could be used to pay living, medical, and litigation expenses. Assuming there was a solvent co-defendant against whom plaintiff had a reasonable case, plaintiff was not harmed by

A plaintiff and defendant would rarely, if ever, settle with the purpose of injuring a nonsettling joint tortfeasor. Only one court has found such a situation.[69] Thus, the tortious conduct test resulted in virtually all settlements being found to be in good faith.[70]

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settling with one of the joint tortfeasors because he could recover the full amount of a subsequently obtained judgment from that remaining co-defendant.

The settling defendant's interests were also furthered because he was able to settle the litigation for a reduced amount. Because the tortious conduct test mandated that a disproportionately low settlement could be in good faith, the settling defendant was completely free from the litigation and exposure to a judgment because the settlement cut off any claims for partial indemnity.

The tortious conduct test also helped the courts because it made the good faith determination simple. A court need not examine the merits of the underlying action. Because the parties asserting the lack of good faith had the burden of proof on the issue, CAL. CIV. PROC. CODE § 877.6(d) (West Supp. 1986), unless the objectors could prove the settlement was entered into for a tortious purpose, the settlement would be in good faith.

Thus, the only parties whose interests were adversely affected by the tortious conduct test, which allowed disproportionately low settlements to be in good faith, were the nonsettling joint tortfeasors. Because the good faith settlement barred any claim for partial indemnity by the nonsettling tortfeasors against the settling defendant, the nonsettling party became obligated to pay much more than his fair share for plaintiff's injuries.

69. An example of what constituted collusion under the tortious conduct test can be found in Henderson v. Superior Court, 162 Cal. App. 3d 297, 208 Cal. Rptr. 485 (1984). In *Henderson*, the court found lack of good faith on the basis that the only possible motive for the settlement was plaintiff's desire to insulate the settling tortfeasors from possible liability to the nonsettling defendant on a cross-complaint. *Id.* at 300, 208 Cal. Rptr. at 486. In that case, plaintiff brought a personal injury action arising out of an incident involving two gangs, and claimed that defendant injured him with his automobile. The defendant, a member of one gang, cross-complained against two members of the other gang who were the sister and close personal friend of the plaintiff. Subsequently, the plaintiff agreed to settle with these cross-defendants for a total payment of $18,000. The cross-defendants then instituted proceedings to find that their settlement had been made in good faith in order to relieve them from any liability on the cross-complaint for partial indemnity. The appellate court found collusion based on the relationship of the settling parties and their animosity toward the nonsettling defendant, a member of a rival gang. *Id.* Because plaintiff had never suggested that he had any claim for damages against either cross-defendant and did not name either of them as defendants, the only possible motive for the settlement was to insulate them from possible liability to the nonsettling defendant on the cross-complaint. Thus, the court found the settlement was collusive and not in good faith, thereby leaving the parties to litigate the issue of liability among themselves pursuant to the nonsettling defendant's cross-complaint for partial indemnity.

70. Only three California cases have judged the good faith of a settlement by a test other than the tortious conduct test. Two of the cases were the earliest to consider the meaning of a good faith settlement and were decided before the tortious conduct test was established: River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972); Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975). The *River Garden Farms* court expressly rejected the absence of collusion as the sole criterion of good faith. *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 505-06. Instead, under its test, a settlement would be in good faith if it fell within a reasonable range of the settling defendant's fair share of the ultimate recovery to be received by the plaintiff. Under this test, the price of the settlement was relevant. If the amount was too low and was not within the

Although almost universally adopted, the tortious conduct test was not universally praised. Attorneys for nonsettling joint tortfeasors, commentators,[71] and judges[72] criticized the test as working an undue hardship on nonsettling parties and ignoring the policy of liability in proportion to fault.

b. the supreme court decision in Tech-Bilt

In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates,*[73] the California Supreme Court laid down new rules governing good faith settlements and disapproved the tortious conduct test. Under the new *Tech-Bilt* test, the price of the settlement became an important factor. Good faith

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reasonable range of the settling defendant's fair share of the plaintiff's predicted recovery, then the settlement would not be in good faith.

After *River Garden Farms* and *Lareau,* every appellate decision dealing with the definition of a good faith settlement adopted the tortious conduct test, with one notable exception, Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). To meet the test of good faith, the *Torres* court held that the settlement figure could not be "grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Id.* at 509, 203 Cal. Rptr. at 832. The *Torres* court reasoned that the more flexible standard "should discourage fraudulent or sham settlements, as well as settlements which are unfair because they are simply 'too cheap,' " and, "should encourage defendants, who really do wish to 'close the book' on a matter, to arrive at a settlement figure which bears some relationship to what is fair." *Id.*

71. Roberts, *supra* note 24, at 911-13.

72. Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *disapproved,* Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

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

The facts of *Tech-Bilt* are as follows: The plaintiffs, owners of a residential property, brought an action against the developer (Tech-Bilt Construction Corporation), the soils engineers (Woodward-Clyde and Associates), and others on various theories to recover for structural defects in their residence. During the early stages of the litigation it became apparent that plaintiffs' action against Woodward-Clyde was barred by the applicable statute of limitations. Woodward-Clyde's counsel told plaintiffs' counsel that he would file a motion for summary judgment based on the statute of limitations. Pursuant to this motion, Woodward-Clyde would have been able to recover as costs its answer fee of $55. However, before the motion was filed, plaintiffs agreed to dismiss the suit against Woodward-Clyde with prejudice in exchange for a waiver of costs. Thereafter, Tech-Bilt, the nonsettling defendant, filed an amended cross-complaint for partial indemnity and declaratory relief against Woodward-Clyde. Woodward-Clyde defended against this action by seeking an order under Code of Civil Procedure § 877.6 to confirm its agreement with the plaintiff as a good faith settlement, thus entitling it to summary judgment on Tech-Bilt's cross-complaint. 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 and the court of appeals affirmed the trial court's decision that the settlement was in good faith because the plaintiff and Woodward-Clyde had not intended to tortiously injure Tech-Bilt by entering into their settlement. *Id.* at 491-92, 698 P.2d at 161-62, 213 Cal. Rptr. at 258.

is now determined by, among other things, whether the settling defendant is contributing in accordance with his proportionate share of liability in the case.

(i) the role of the good faith factor

The supreme court rejected the view of those courts applying the tortious conduct test that the policy of encouragement of settlements is primary and the policy of equitable apportionment of loss must be sacrificed in order that settlements be encouraged. Because it completely abrogated the policy of equitable apportionment of loss among joint tortfeasors, this approach was too narrow. Instead, the supreme court held that the requirement that a settlement be in good faith should be applied to further *both* the policies of encouragement of settlements and equitable allocation of loss among multiple tortfeasors. Thus, the good faith requirement should be viewed as a means to accommodate these competing but equally important policies.[74]

(ii) the reasonable range test

Armed with this view of the role of the good faith factor, the supreme court adopted a good faith test[75] which, for purposes of this article, will be referred to as the reasonable range test. This test requires some degree of proportionality between the settling defendant's payment and his potential liability in order to have a settlement deemed to be in good faith. "A more appropriate definition of 'good faith,' in keeping with the policies of *American Motorcycle* and the statute, would enable the trial court to inquire, among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries."[76] The court identified eight separate factors that should be taken into account in determining the good faith of a settlement.[77]

1. A rough approximation of plaintiff's total recovery.
2. The settlor's proportionate liability.
3. The amount paid in settlement.
4. The allocation of settlement proceeds among plaintiffs.
5. A recognition that a settlor should pay less in settlement than he would if he were found liable after a trial.

74. Roberts, *supra* note 24, at 902-03.

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

76. *Id.* This was the test proposed in Roberts, *supra* note 24, at 902-03.

77. These factors are numbered for purposes of analysis in this article but were not numbered by the court.

6. The financial condition of the settling defendant.
7. The insurance policy limits of the settling defendant.
8. The existence of collusion, fraud or tortious conduct aimed to injure the interests of nonsettling defendants.[78]

The details of the reasonable range test are not clear. Beyond the quotation and the factors set forth above, the supreme court did not explain the test further. Most of the court's opinion concerned its reasons for adopting the reasonable range test. It did not elaborate on the specifics of the approach.

Some guidance as to the specifics of the reasonable range test is provided by the case of *River Garden Farms, Inc. v. Superior Court*[79] and a law review article.[80] In adopting the test, the court relied extensively on both. Factors 1, 2, 3, and 5 set forth by the supreme court in *Tech-Bilt* are the same factors identified by the court in *River Garden Farms* and the law review commentator as the factors to be utilized in determining the reasonable range of a settling tortfeasor's fair share of liability for a plaintiff's injuries.

The reasonable range test envisioned by those authorities did not require strict proportionality, but rather that the settlement amount be within a range of the settlor's proportionate share of plaintiff's damages.[81] This range is to be established by the trial judge's analysis of certain factors according to his expertise. The analysis should operate with the trial judge: (a) making a rough approximation of the amount plaintiff would recover after a trial; (b) approximating the amount of the settling defendant's proportionate liability under comparative fault principles, thereby determining the settling defendant's proportionate share of plaintiff's damages; (c) reducing that figure by some amount as a recognition that a settling party should pay less in settlement in advance of trial than he would if he were found liable after trial; and (d) comparing that resulting number to the amount of the settlement.[82] If the trial judge, in his discretion, finds that it is close enough, then the settlement will be found to be in good faith.[83] The reasonable range test asks not for precise numbers, but for an approximation. As stated by the court in

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

79. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

80. Roberts, *supra* note 24, at 917, 919-24.

81. *River Garden Farms*, 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506; Roberts, *supra* note 24, at 917.

82. *See* Roberts, *supra* note 24, at 919-24.

83. Like the California Supreme Court, this author does not dare speculate on what "close enough" would be. Such an unanswerable question can be carefully avoided by directing the matter to the "sound discretion of the trial judge."

River Garden Farms, only a rough assessment of value would be possible.[84] Thus, the court does not attempt to determine the precise amount of the parties' liability and plaintiff's injuries, but rather makes rough approximations.

The type of reasonable range test that looks only to factors 1, 2, 3, and 5 will be referred to as a "pure" reasonable range test.[85] Under this analysis, the policy of equitable apportionment of loss is given true equal footing with the policy of encouragement of settlements because only those settlements *objectively* falling within a certain range qualify as good faith settlements. The peculiarities of the particular settling tortfeasor, such as his financial condition, are given no special consideration and do not enter into the analysis.[86]

III. THE FINANCIAL CONDITION OF THE SETTLING DEFENDANT AS A FACTOR OF GOOD FAITH

The supreme court in *Tech-Bilt* seemed to retreat from a "pure" reasonable range test and instead adopted a modified reasonable range test. Under this test, the financial condition and insurance policy limits of the settling joint tortfeasor are considered in determining whether a settlement is in good faith.[87] The court stated:

> This is not to say that bad faith is "established by a showing that a settling defendant paid less than his theoretical proportionate or fair share." Such a rule would unduly discourage settlements. "For the damages are often speculative, and the probability of legal liability therefor is often uncertain or remote. And even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor."[88]

Thus, the supreme court has mandated that a tortfeasor may enter into a

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

85. This was the test espoused by the Law Review article relied on by the court. *See* Roberts, *supra* note 24.

86. *See* Roberts, *supra* note 24, at 932-35.

87. Tech-Bilt, Inc., v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499, 698 P.2d 159, 166, 213 Cal. Rptr. 256, 263 (1985); *see also* Barth-Wittmore Ins. Co. v. H.R. Murphy Enters., 169 Cal. App. 3d 124, 134, 214 Cal. Rptr. 894, 899 (1985) (reaffirming that "*Tech-Bilt* instructs the trial court to consider the financial condition and insurance policy limits of the settling defendant"). *Id.*

88. *Tech-Bilt,* 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (quoting Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 847-48 (1976)).

settlement for a lesser amount and the settlement will be in good faith if the amount seems reasonable in light of the tortfeasor's financial condition and insurance policy limits.

The supreme court did not elaborate further on exactly how the financial condition of a settling defendant should affect the court's determination of good faith in a particular case. Therefore, a crucial issue which trial courts will face in applying the *Tech-Bilt* reasonable range test is the extent to which the financial condition and insurance status of a settling defendant should figure in the formula for a good faith settlement. This issue is considered in the following sections of this Article.[89]

A. The Merits of Utilizing Financial Condition as a Factor in Determining Good Faith

The supreme court's directive to consider the financial condition and insurance policy limits of a settling tortfeasor as part of the reasonable range test of good faith departs from the "pure" reasonable range test advocated by the authorities relied upon by the court in *Tech-Bilt.* By including these two factors in the test, the supreme court undertook a task similar to mixing oil and water, a difficult process. Just as oil and water quickly separate, we may be left with two separate tests for good faith—a reasonable range test that applies only to defendants with assets well in excess of their fair share of liability for plaintiff's injuries, and some different test for those who claim their settlement is reasonable based on their financial condition.

Arguments can be made both for and against this "financial condition exception."[90] The primary negative argument is that the inclusion of financial condition as a factor of good faith undercuts the core rationale of the reasonable range test: to put the policy of equitable apportionment of loss among tortfeasors on an equal footing with the policy of encouragement of settlements.[91] When a low settlement amount is permitted due to a defendant's financial condition, the nonsettling parties are forced to pay an increased amount of plaintiff's judgment. Such an exception based on financial condition, therefore, elevates the policy of encouragement of settlements above the policy of equitable apportion-

89. *See infra* text accompanying notes 106-44 and 171-79.

90. The term "financial condition exception" is used in this article as a shorthand way to refer to the situation where the settling joint tortfeasor's settlement is found to be in good faith because of his financial condition, but otherwise would not be within the reasonable range of his liability for plaintiff's damages.

91. *See supra* text accompanying note 74.

ment of loss where a relatively insolvent[92] joint tortfeasor is involved.

Furthermore, judicial precedent for the financial condition exception is shaky at best. The supreme court in *Tech-Bilt* relied upon language taken out of context from appellate court decisions which contained dicta concerning a settling defendant's financial status. These appellate decisions discussed financial condition in the context of the tortious conduct test.[93] Significantly, under that test the financial status of the settlor was not relevant. The trial judge was required to look solely to whether there was tortious conduct toward a nonsettling tortfeasor.[94] If none was found, the settlement would be in good faith, and the court need not consider the amount of the settlement or the financial condition of the settling defendant. For example, in *Dompeling v. Superior Court*,[95] the court found there was no tortious conduct, and therefore the financial condition of the settling defendant was irrelevant.[96]

In creating the financial condition exception, the supreme court inappropriately relied on dicta from *Stambaugh v. Superior Court*[97] stating that "a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor."[98] Because the tortious conduct test required no degree of proportionality at all, it was completely logical for the appellate court in *Stambaugh* to say this. By this language, the *Stambaugh* court was merely explaining that the disproportionately low settlement in that case was motivated by financial considerations, not inappropriate tortious conduct.

However, in *Tech-Bilt*, the supreme court specifically rejected the tortious conduct test in favor of the reasonable range test. Yet, the court

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92. The term "relatively insolvent" 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.

93. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (citing Dompeling v. Superior Court, 117 Cal. App. 3d 798, 809, 173 Cal. Rptr. 38, 44 (1981)), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985); Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 847-48 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

94. *See supra* notes 61-70 and accompanying text.

95. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

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

97. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

98. *Id.* at 238, 132 Cal. Rtpr. at 847-48.

adopted and quoted the *Stambaugh* dicta which discussed the "reasonableness" of a settlement in terms of the settlor's financial condition.[99] This reliance on *Stambaugh* was misplaced because the *Stambaugh* court was discussing the criteria for the dissimilar tortious conduct test.

On the other hand, one very important reason exists to allow a relatively insolvent tortfeasor's settlement to be in good faith even when not proportional to his share of damages. This reason is based on the policy of encouragement of settlements, one of the major policies to be balanced in defining good faith.[100] Although not expressly articulated by the *Tech-Bilt* court, a primary underpinning of the reasonable range test is to encourage a rational and solvent defendant not only to settle[101] but also

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

100. *See supra* text accompanying notes 54-58 and *infra* note 103.

101. The reasonable range test provides an incentive to settle because the settlor may extricate himself from the litigation for a reduced amount. This is because the test does not require the settlement to be exactly proportional to what would be the tortfeasor's fair share of damages after a trial, but rather looks to see if the settlement is within a range of proportionality. Also, it considers 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 the trial court will consider when the plaintiff obtained the use of the money in determining the reasonable range. Another incentive to early settlement is provided because this test gives the advantage to the first defendant to settle. Because the amount of settlement can be below a settling defendant's strict proportional share and still be in good faith, the nonsettling defendants will have to account for any shortfall.

In addition to encouraging an early settlement with one tortfeasor, the reasonable range test also promotes 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. 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 negotiate a realistic settlement. Again, whether this will occur depends 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 $5000, under the tortious conduct test this settlement would be found to be in good faith absent any proof of tortious conduct. Defendant *B* would face potential liability of $95,000 even though he was only 20% at fault. It is unclear whether this potential verdict, completely unrelated to his degree 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 approved by the court. Thus, defendant *A* would not want to enter into the settlement because he would still be liable on the cross-complaints for partial indemnity. Under the reasonable range test, *A's* settlement would have

to settle for an amount within a reasonable range of his fair share of plaintiff's damages.[102] Although the policy of encouraging settlements is extremely important in the context of a good faith settlement,[103] it does not mean that we want to encourage all settlements, regardless of their price. An equally important policy behind the reasonable range test is that of equitable apportionment of loss.[104] Unlike the tortious conduct test, the reasonable range test does not allow a joint tortfeasor to settle unreasonably cheaply. The desired result is that the plaintiff and the settling defendant will *renegotiate* the settlement price upwards until it reaches a point the court finds is within the reasonable range of the settling defendant's fair share of liability and therefore in good faith. Thus,

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to better reflect his anticipated proportionate share of liability. Because he cannot obtain approval of 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* still faces more than his proportionate share of liability, but the exposure is not nearly as 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 since *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. *See* Roberts, *supra* note 24, at 929-30.

102. *See supra* text accompanying note 74.

103. *Tech-Bilt*, 38 Cal. 3d at 499-500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263.

Perhaps the principal policy relevant to the issue of a "good faith" settlement is the policy of encouragement of settlements. This policy has been identified by all cases discussing good faith settlements. Roberts, *supra* note 24, at 883. As stated by the court in *Stambaugh*,

> "The law wisely favors settlements. . . ." "[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." Settlement agreements "are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation." Indeed, it has been said that a major goal of section 877 is the "encouragement of settlements."

Stambaugh, 62 Cal. App. 3d at 236, 132 Cal. Rptr. at 846 (citations omitted). *See, e.g.*, Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 504, 203 Cal. Rptr. 825, 829 (1984); River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972).

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).

104. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264; Roberts, *supra* note 24, at 891-93. The importance of the policy of equitable apportionment of loss is clear from Li v. Yellow Cab Co., 13 Cal. 3d 804, 829-30, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975) (abrogating the rule of contributory negligence and adopting a system of comparative negligence), and American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 907, 146 Cal. Rptr. 182, 190 (1978) (establishing that the loss among multiple tortfeasors should be borne according to their percentage of fault). *See also Torres*, 157 Cal. App. 3d at 504, 203 Cal. Rptr. at 828-29; *River Garden Farms*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503.

the good faith reasonable range test does not seek to encourage all settlements but rather seeks to encourage somewhat proportional settlements by nudging them up to the reasonable range area.[105]

However, the potential for upward renegotiation is not present with a relatively insolvent defendant. A defendant with limited assets will be able or willing to pay only a limited amount. In other words, he can be nudged only so far. At some point he will be unwilling to part with assets needed to meet the expenses of daily living. For example, if defendant *A* had a net worth of $200,000, it would be easier to nudge him into settling with plaintiff for $30,000 than if defendant *A* had a net worth of only $35,000. Taking this argument to its conclusion, one could assert that since the relatively insolvent tortfeasor at some point will be unable or unwilling to settle for an amount within the reasonable range of his fair share of liability, the court might as well encourage the settlement to go forward by finding it to be in good faith.

Of course, the other side of this argument is that it allows an unreasonably cheap settlement at the expense of the policy of equitable apportionment of loss.

B. Dealing with the Financial Condition Exception

Regardless of whether one agrees that there should be an exception from the reasonable range test for a relatively insolvent, uninsured, or underinsured joint tortfeasor, the supreme court embraced the exception in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates.*[106] Therefore, the next question is how to implement this exception at a good faith settlement hearing. The following section of this Article focuses on this issue.

For purposes of this analysis, we will assume that a proposed settlement amount does not fall within the pure reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. In other words, we will assume that the court has applied the first three relevant factors of its good faith test, namely, a rough approximation of plaintiff's total recovery, a rough approximation of the settlor's proportionate liability, and a recognition that the settlor should pay less in settlement than if found liable after a trial, and the court has determined that the settlement amount does not fall within this

105. *See Torres,* 157 Cal. App. 3d at 506, 203 Cal. Rptr. at 830.

106. 38 Cal. 3d 448, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). The appellate decisions interpreting *Tech-Bilt* have certainly so determined. Standard Pac. v. A.A. Baxter Corp., 176 Cal. App. 3d 577, 582, 222 Cal. Rptr. 106, 108-09.(1986); Sagadin v. Ripper, 175 Cal. App. 3d 1141, 1177, 221 Cal. Rptr. 675, 698-99 (1985); Barth-Wittmore Ins. Co. v. H.R. Murphy Enters., Inc., 169 Cal. App. 3d 124, 134, 214 Cal. Rptr. 894, 899-900 (1985).

range. Thus, the settlement would not be in good faith were it not for the settlor's financial condition.

1. The problem

Because *Tech-Bilt* carves out an exception for a relatively insolvent, uninsured, or underinsured joint tortfeasor, a trial court must determine what settlement amount will be in good faith given this particular settling defendant's financial condition. To do this, a judge will probably use the following method. First, the judge will perform the reasonable range analysis; that is, make a rough approximation of plaintiff's total recovery and the settlor's proportionate liability, and discount this figure by some amount because the settlor should pay less in settlement than he would if he were found liable after a trial. For the remainder of this Article, this initial reduction will be referred to as the "settlement reduction." The judge can thereby establish the lower end of the settlement range, i.e., the lowest amount the judge would find to be in good faith were it not for the settlor's financial condition. This figure will be referred to as "the reasonable range floor." The judge must then determine how far below the reasonable range floor the settlement price can fall because of the financial condition of this settling defendant. This additional reduction will be referred to as the "insolvency reduction."

The judge may be faced with many different situations. The following hypothetical reveals some of the possible variations. Assume again that plaintiff has been injured by joint tortfeasors *A*, *B*, and *C*. By making rough approximations, the judge would determine that the plaintiff's damages are $100,000, that defendant *A* was 50% at fault, that defendant *B* was 40% at fault, that defendant *C* was 10% at fault and that the plaintiff was not at fault. Thus, *A*'s fair share of plaintiff's damages would be $50,000, *B*'s would be $40,000 and *C*'s would be $10,000. Assume also that if *A* wished to settle, the court would find *A*'s reasonable range floor to be $30,000. *A*'s settlement reduction would, therefore, be $20,000 (the difference between *A*'s fair share of the damages and his reasonable range floor).

Variation One: In this situation, defendant *A* is relatively insolvent. His total assets consist of a bank account in the amount of $10,000.[107] *A* is an honorable man and, under this possible although highly unlikely scenario, *A* wishes to clear his conscience and get on with his life. He is, therefore, willing to offer the entire $10,000 in settlement. However, he

107. If *A* were totally insolvent, having no assets, then this issue would never arise because plaintiff would have no incentive to settle with him.

wants to leave the lawsuit completely behind him and, accordingly, wants the settlement to be found to be in good faith so he will not later have to face additional claims by the other joint tortfeasors. The issue then becomes whether this $10,000 settlement which is below *A*'s reasonable range floor is in good faith because of *A*'s financial condition. If it is found to be in good faith, and the jury reaches a verdict identical to the parameters set forth above, then *A*'s $40,000 shortfall will be absorbed by *B* and *C* in the ratio of 4 to 1. Thus, *B* will be paying $32,000 more for a total of $72,000 and *C* will pay $8000 more for a total of $18,000.

In this situation, where a proposed settlement amount equals the full amount that the settling defendant would be able to contribute to plaintiff's recovery, i.e., the amount that could actually be collected from him after a judgment, one can argue that it makes sense to approve the settlement even though it is below the reasonable range floor. By approving this as a good faith settlement, and, therefore, relieving the settlor from further liability on cross-complaints, no additional detriment will result to the nonsettling joint tortfeasors. They would be liable for his shortfall in any event. Whenever an insolvent defendant causes a co-defendant to pay his shortfall, the policy of equitable apportionment of loss according to fault is, by necessity, frustrated. Therefore, the policy of equitable apportionment of loss will not suffer any additional frustration by a finding that this type of settlement is in good faith.

Furthermore, a finding that such a settlement is in good faith will encourage the insolvent defendant to enter into the settlement with the plaintiff and thereby the policy of encouragement of settlements will be furthered. Thus, by finding the settlement to be in good faith, the relatively insolvent tortfeasor will be encouraged to settle, the plaintiff will get this amount of money at an earlier time, and no appreciable additional detriment will result to the nonsettling tortfeasors. Therefore, there is little fault with a rule that allows a below reasonable range floor settlement to be in good faith when the settlement amount basically exhausts the tortfeasor's collectible assets.

On the other hand, the nonsettlors would argue that the settlement should not be found to be in good faith because they will indeed be harmed by such a result. They would prefer to be able to obtain the judgment against *A* for partial indemnity otherwise precluded by a good faith determination. Even though in this situation they will initially have to bear *A*'s shortfall, if they obtain a judgment against *A*, they can recover some of this shortfall in the future if *A* acquires additional property. Accordingly, they are not indifferent but are actually better off if the settlement is not found to be in good faith.

Of course, this strategy could backfire on the nonsettlors. Without a good faith finding, *A* might not settle. Due to litigation or other expenses, *A* might have less money at the time of trial to contribute to plaintiff and would never acquire more money. Therefore, the nonsettlors would be worse off if the settlement did not go through. A solution addressing all of these concerns is offered in Parts 3-5 of this Article.[108]

Variation Two: In this situation, the settling tortfeasor still does not have the financial resources to make a settlement within the reasonable range, but wishes to settle for an amount that is less than his collectable assets. For example, consider our same hypothetical, but this time assume that joint tortfeasor *A* has $25,000 in assets. He is a more typical person than defendant *A* in variation one, and is not willing to donate his entire $25,000 toward the settlement.[109] Instead, he proposes a settlement in the amount of $10,000 which plaintiff is willing to accept. Should this settlement be approved under the financial condition exception of *Tech-Bilt*?

Unlike variation one, there is no dispute that a finding of good faith would harm the nonsettling joint tortfeasors.[110] If the settlement was rejected by the court and defendant *A* did not settle, assuming a judgment for plaintiff along the parameters suggested above, *A*'s $25,000 would be susceptible to execution either by plaintiff on the original judgment, or by *B* and *C* after a judgment for partial indemnity. *A* would lose his entire $25,000 (to the extent that his property is not exempt from execution) and his shortfall would be $25,000 (his $50,000 fair share minus the $25,000 collected). This shortfall would ultimately be borne by defendants *B* and *C* in proportion to their percentage of fault (a 4 to 1 ratio or 80% to 20%). Therefore, defendant *B* would end up paying $20,000 of the shortfall, for a total payment of $60,000, and *C* would end up paying $5000 of the shortfall, for a total payment of $15,000. The same result would occur if *A* settles in spite of the lack of a good faith finding and *B* and *C* obtain a judgment against him for partial indemnity.

However, if this settlement was found to be in good faith, then *A*'s

108. *See infra* text accompanying notes 111-44.

109. This will usually be the case because it is a rare defendant who will be willing to settle in advance of trial for no less than could be collected from him after trial.

110. An argument could be made that it is impossible to determine whether defendants *B* and *C* would be worse off if the settlement were found to be made in good faith. For example, one could argue that if the settlement were not found to be in good faith, and *A* did not settle with the plaintiff, *A* would need to continue with the litigation. Perhaps the $15,000 of the assets he was attempting to retain would be consumed by litigation expenses. Should a judgement be rendered, it is impossible to determine how much money *A* would be able to contribute either to plaintiff or to *B* and *C*.

shortfall would not be $25,000, but rather $40,000. As we have seen in variation one, under such a calculation defendant *B* would pay $72,000 while defendant *C* paid $18,000. Also, as in variation one, an additional detriment to the nonsettlors is the inability to collect after-acquired assets from *A*. Thus, a good faith finding in this type of situation would definitely hurt the nonsettling joint tortfeasors.

Variation Three: In this situation the settling tortfeasor does have sufficient assets to pay a settlement within the reasonable range of his fair share of liability, but wants to settle for an amount below the reasonable range floor. Assume the same facts as in variation two, except instead of having assets of only $25,000, *A* has assets of $35,000. *A* does not want to settle for the reasonable range floor ($30,000) because he would be left with only $5000 to meet his day to day living expenses. Instead, understandably, he wishes to settle for a lesser amount, say $20,000, and wants to have this approved as a good faith settlement to shield him from liability to his joint tortfeasors. To justify such a finding, he will attempt to utilize the financial condition exception of the *Tech-Bilt* decision. As demonstrated above, a finding that such a settlement is in good faith will work to the detriment of the nonsettling joint tortfeasors.

Unlike variation two, here the defendant *A* is not relatively insolvent in the sense that he has insufficient assets to pay an amount within the reasonable range of his fair share. However, it does not seem to be a sensible distinction to require a defendant who has barely enough assets to pay a price within the reasonable range to do so in order to have a good faith finding (variation three), while at the same time, allow a defendant who does not have enough assets to pay the reasonable range floor escape with a much lower settlement (variation two).

2. Possible solutions

The above three variations illustrate different types of situations where a trial judge will be asked to apply the financial condition exception of *Tech-Bilt*. How the trial judge can possibly make such distinctions is difficult to imagine.

One possible alternative is for the judge to use a rule of thumb approach. Several possibilities are available. For example, he might decide how much he thinks a defendant should retain after a settlement, and use this as a measurement in all cases. For instance, a judge might determine that in order for the settlement to be in good faith even though it is not above the reasonable range floor, a settling defendant should be left with only $10,000. Utilizing this approach, in variation two, defendant *A* who had a net worth of $25,000 would not be able to settle in good faith for

$10,000, but would need to contribute $15,000 in settlement. In variation three, defendant *A* with a net worth of $35,000 would be required to contribute $25,000 in settlement. Alternatively, judges might choose to use a percentage rule of thumb and say that a good faith settlement for less than the reasonable range floor must constitute a certain percentage, perhaps 80%, of the settlor's total net worth. While certainly easy to apply, both of these approaches seem far too inflexible to take into account the specific financial concerns of each individual defendant.

3. Proposed solution — Step I

A more flexible and therefore more workable approach would be to implement a reasonable person standard.[111] The court could determine the amount for which a reasonable person *in the financial condition of this settling defendant* should be willing to settle. In this way, the court can take into account the peculiar financial condition of the particular settling defendant, such as the amount, form, and liquidity of his assets; his monthly income; whether he is employed; the number of his dependents; the nature of his other obligations; and similar items. The requirement of reasonableness prevents the settling defendant from arbitrarily dictating the amount that he is able to pay.

To calculate a settlement amount for a reasonable person in the financial condition of the settling defendant, the judge by necessity will be viewing the problem from the perspective of how much in assets a settling defendant should retain. In this regard, courts should consider the statutory exemptions allowed against execution of money judgments. The California exemptions are among the most generous in the United States.[112] In general, the exemption provisions are intended to protect an

111. The *Torres* court employed a reasonable person approach in a different context. In defining a good faith settlement, the court stated that "a defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 509, 203 Cal. Rptr. 825, 832 (1984). This language from *Torres* was quoted by the supreme court in *Tech-Bilt*, 38 Cal. 3d at 488, 698 P.2d at 159, 213 Cal. Rptr. at 256.

112. 15 CAL. L. REVISION COMM'N REPORTS 2023, 2075-76 (1980). California exempts certain property from enforcement of a money judgment. These exemptions are codified in the California Code of Civil Procedure as follows:

a. Certain motor vehicles including equity and proceeds of sale or insurance. CAL. CIV. PROC. CODE § 704.010 (West Supp. 1986).

b. Household furnishings, appliances, and particular personal effects. CAL. CIV. PROC. CODE § 704.020 (West Supp. 1986).

c. Materials purchased in good faith for the repair and improvement of a residence (the value of the materials not to exceed $1,000). CAL. CIV. PROC. CODE § 704.030 (West Supp. 1986).

d. Jewelry, heirlooms and works of art with an aggregate value not to exceed $2,500. CAL. CIV. PROC. CODE § 704.040 (West Supp. 1986).

amount of property sufficient to support the judgment debtor and his family, and to facilitate his financial rehabilitation.[113] For example, a judgment debtor can obtain an exemption from wage garnishments for the amount of his earnings necessary to support himself and his dependent spouse and family.[114] Also, to a certain extent, his home, automobiles and household furnishings are exempt,[115] again for the pur-

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e. Certain health aids, i.e., wheelchairs and similar devices. CAL. CIV. PROC. CODE § 704.050 (West Supp. 1986).
f. Personal property used for business, trade, or profession. CAL. CIV. PROC. CODE § 704.060 (West Supp. 1986).
g. Certain paid earnings. CAL. CIV. PROC. CODE § 704.070 (West Supp. 1986).
h. Portions of a deposit account to which the United States Government directly deposits payments authorized by the Social Security Administration. CAL. CIV. PROC. CODE § 704.080 (West Supp. 1986).
i. A $1,000 minimum for prison inmates trust funds. CAL. CIV. PROC. CODE § 704.090 (West Supp. 1986).
j. Certain exemptions for life insurance, endowments and annuities. CAL. CIV. PROC. CODE § 704.100 (West Supp. 1986).
k. Certain public retirement benefits. CAL. CIV. PROC. CODE § 704.110 (West Supp. 1986).
l. Public employee vacation credits. CAL. CIV. PROC. CODE § 704.113 (West Supp. 1986).
m. Certain private retirement benefits. CAL. CIV. PROC. CODE § 704.115 (West Supp. 1986).
n. Unemployment and strike benefits. CAL. CIV. PROC. CODE § 704.120 (West Supp. 1986).
o. Disability or health insurance benefits. CAL. CIV. PROC. CODE § 704.130 (West Supp. 1986).
p. Certain damages or settlements for personal injury causes of action, CAL. CIV. PROC. CODE § 704.140 (West Supp. 1986); and/or wrongful death causes of action. CAL. CIV. PROC. CODE § 704.150 (West Supp. 1986).
q. Workers compensation claim or award. CAL. CIV. PROC. CODE § 704.160 (West Supp. 1986).
r. Certain social services aid or aid provided by charitable or fraternal benefit societies. CAL. CIV. PROC. CODE § 704.170 (West Supp. 1986).
s. Certain relocation benefits paid by the government for displacement from a dwelling. CAL. CIV. PROC. CODE § 704.180 (West Supp. 1986).
t. Certain financial aid to students attending an institution of higher education. CAL. CIV. PROC. CODE § 704.190 (West Supp. 1986).
u. Family and cemetery plots. CAL. CIV. PROC. CODE § 704.200 (West Supp. 1986).
v. Certain homestead exemptions. CAL. CIV. PROC. CODE §§ 704.710-704.850 (West Supp. 1986).

Also, the judgment debtor may claim as exempt the portion of his earnings necessary for his support and the support of his spouse and family. CAL. CIV. PROC. CODE § 706.051 (West Supp. 1986).

113. 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2075; *see also infra* note 117; Bailey v. Superior Court, 215 Cal. 548, 554, 11 P.2d 865, 867 (1932); Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 782-88 (1974). It has also been suggested that early exemptions were enacted to attract settlors in newly admitted states. *See* Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950).

114. CAL. CIV. PROC. CODE § 706.051 (West Supp. 1986).

115. CAL. CIV. PROC. CODE §§ 704.010, 704.020, 704.710-704.850 (West Supp. 1986).

pose of allowing the debtor to maintain his livelihood and a certain standard of living.

The substantive exemption provisions seek to accommodate both the interest of the judgment debtor in maintaining his basic standard of living and the interest of the judgment creditor in satisfying the money judgment.[116] Exemption laws also serve to shift the cost of social welfare for debtors from the community to judgment creditors.[117]

The same principles seem applicable in the good faith settlement context, and can be used to guide the judge in determining whether a settlement below the reasonable range floor is too low to be in good faith. The court should balance the nonsettling joint tortfeasors' interests in having the settling defendant contribute as much in settlement as he is financially able against the settling defendant's interest in retaining enough of his assets to support himself and his family. The court cannot allow the relatively insolvent settling defendant off too cheaply because for every dollar he does not pay towards a good faith settlement, an additional dollar will have to be paid by the nonsettling defendants. However, the court should not set too great a settlement price as a prerequisite for the good faith finding because this would either frustrate the settlement attempt or coerce the settling tortfeasor into a settlement which would leave him inadequate means of support.

By obtaining guidance from the exemption provisions, the trial judge will have some basis for exercising his discretion in deciding just how far below the reasonable range floor a settlement can be and still be in good faith. The judge, of course, is not bound to apply the exemption statutes verbatim. However, he should look to them inasmuch as they reflect a carefully constructed statutory scheme to solve a similar problem of balancing one party's right to payment against the debtor's ability to pay.

As an example, assume the judge is faced with the facts set forth in variation two. The settlor, *A*, has $25,000 in assets, his reasonable range

116. 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2076. *See* Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1497-1502 (1959).

117. 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2075-76; D. COWEN, BANKRUPTCY LAW AND PRACTICE § 589, at 326 (1963); Committee on Debtor and Creditor of the State Bar of California, Modernization of Statutory Exemptions, 42 CAL. ST. B.J. 869, 873 (1967). Although it has been suggested that no property should be exempt and that insolvent debtors should rely on social welfare legislation, this alternative is undesirable because of the cost to the community of providing welfare and the low level of available benefits. Additionally, most creditors are in a position to control their extension of credit. Further, the lack of exemptions will drive greater numbers of debtors into bankruptcy. 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2075 n.218; Comment, *supra* note 116, at 1497-1502.

floor is $30,000,[118] and he asks that a $10,000 settlement be found to be in good faith because of his financial condition. The judge should not simply approve the settlement because *A* is "relatively insolvent." Rather, he needs to screen carefully *A*'s entire financial situation, paying close attention to such things as the amount, form and liquidity of *A*'s assets; the amount of *A*'s equity in encumbered assets; the nature of *A*'s other obligations; his income; his employment situation and future projects; his dependents and their other sources of support; and the nature and extent of *A*'s day to day expenses.[119]

The result at the good faith hearing will vary depending on *A*'s particular situation. For instance, assume *A* lives in a rental apartment, has a secure job and makes enough money to cover his expenses, has no dependents, and has a net worth of $25,000 in the form of a $12,000 bank account and a $13,000 yacht. Taking guidance from the exemption provisions, the judge would realize that neither the bank account nor the yacht are the types of assets the legislature thought worthy of protection in the case of a judgment debtor. Analogously, they should not be afforded protection in the good faith settlement context either. Presumably, under this version of the facts, the judge would find *A*'s proposed $10,000 settlement too low to be in good faith so as to shield him from any additional liability. There is no reason *A* should be allowed to retain the additional $15,000 rather than contribute a substantial portion toward the plaintiff's injuries of which his actual proportional share is $50,000.

On the other hand, the result should be different if *A*'s financial facts are changed. Assume again *A*'s reasonable range floor is $30,000, *A* has $25,000 in assets, and wishes to make a $10,000 settlement. However, under this version of the facts, *A* is self-employed in a small marginally successful business that has peak periods and slow periods. He is the sole support of his spouse, three school age children, and an invalid mother. His $25,000 in assets are in the form of $10,000 in equity in the family home, $12,000 in business vehicles and equipment, and $3000 in the bank. Again, studying the exemption provisions, the judge could see that the small equity in the family home and the business vehicles and equipment are the types of assets that the legislature had determined should be

118. *See supra* text accompanying note 107. Note this "floor" already reflects a substantial discount over *A*'s fair share of damages of $50,000. This discount is attributable to such things as the uncertainties of litigation, the fact that one expects to pay less in settlement than if found liable after a trial, and the present value of money.

119. Of course, the amount of *A*'s insurance is also quite relevant. However, this type of analysis only concerns the amount of *A*'s liability for which he has insufficient insurance. For ease of analysis and illustration, it is assumed that *A* has no insurance.

protected in the judgment debtor context. Similar reasons exist for protecting them in the good faith settlement context. Virtually all of *A*'s assets are necessary for *A*'s family's support and maintenance, including the $3000 bank account as a cushion for the business' slow periods. Under these facts, the judge would probably determine that *A*'s $10,000 settlement is reasonable considering his financial condition and, therefore, is in good faith.

Thus, the judge can use the above approach to determine whether the settlement is in an amount for which a reasonable person in the defendant's financial condition would settle. If the judge finds this to be the case, he should rule that the settlement is in good faith.

4. Proposed solution — Step II

Some judges will be tempted to stop their analysis at this point. They will simply enter an order that the settlement is in good faith. However, by so doing, they will forever release the settling tortfeasor from claims for partial indemnity by the nonsettling joint tortfeasors.

a. the problem

Such a solution to the financial condition issue only deals with half of the problem. While it focuses on what the settling tortfeasor can afford to pay at that point in time, it does not attempt to mitigate the basic problem of unfairness to the nonsettling joint tortfeasors. Although a good faith settlement will probably always work to the financial detriment of the nonsettling joint tortfeasors, the harm is multiplied if the settling defendant's good faith finding is predicated upon the financial condition exception. In such a situation, the shortfall that must be borne by the nonsettling tortfeasors is greater than that warranted under a pure reasonable range test. With a solvent joint tortfeasor's good faith settlement, the nonsettlors bear the shortfall caused by the settlement reduction.[120] However, with a relatively insolvent joint tortfeasor's good faith settlement, the nonsettlors must bear not only this amount but also the additional shortfall caused by the insolvency reduction.[121]

A good faith finding, without more, gives the defendant who can establish a poor financial condition at the time of the good faith hearing a definite windfall that would unduly harm the nonsettlors in the situation where the settling defendant acquired other assets after the good faith order was entered. A settling defendant could come to court, show poor

120. *See supra* text accompanying notes 35-42.
121. *See supra* text accompanying note 92.

financial condition, have his settlement approved as being in good faith even though it was well below the reasonable range floor, and be forever released from further responsibility. Thereafter, even if he acquired significant other assets, the good faith finding would prevent the nonsettlors from obtaining reimbursement for any of the settling defendant's shortfall that they initially had to bear.

b. a proposed approach

The proposed solution is based on the premise that a settling defendant claiming the financial condition exception should be treated the same as any other insolvent judgment debtor. An insolvent judgment debtor is not completely absolved of responsibility for that portion of his debt that he is unable to pay at the time of judgment. His after-acquired property can be utilized by the judgment creditor to satisfy the judgment.[122] A judgment remains enforceable for ten years,[123] and that ten year period can be expanded by either filing a new action on the unsatisfied amount of the judgment,[124] or filing an application for renewal of the judgment.[125] Thus, the judgment creditor may enforce his judgment on any nonexempt property acquired by the judgment debtor during the period that the judgment is enforceable.[126]

122. For example, a judgment lien may be obtained on real property acquired by the judgment debtor after the creation of the lien. In such a case, the lien attaches at the time the property is acquired. Hertweck v. Fearon, 180 Cal. 71, 73, 179 P. 190, 190-91 (1919); CAL. CIV. PROC. CODE § 674(a) (West 1980); 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2045.

Similarly, a judgment lien on personal property may be obtained by filing a notice of judgment lien in the office of the Secretary of State. *See* CAL. COM. CODE §§ 9401, 9403 (West 1964); 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2046. This judgment lien extends to after-acquired property of the type to which the judgment lien initially attaches. 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2047.

123. CAL. CIV. PROC. CODE § 683.020 (West Supp. 1986).

124. CAL. CIV. PROC. CODE § 337.5 (West 1982).

125. CAL. CIV. PROC. CODE § 683.120 (West Supp. 1986).

126. As a general rule, all non-exempt property of the judgment debtor is subject to enforcement procedures to satisfy a money judgment. 15 CAL. L. REVISION COMM'N REPORTS, *supra* note 112, at 2035. A number of enforcement procedures are available for collection of a money judgment, the simplest and most common being execution. *Id.* at 2051. With certain exceptions, all of the judgment debtor's nonexempt property, tangible and intangible, may be levied upon under a writ of execution. In general, the property levied upon is sold if the property is tangible and is either collected or sold if the property is a debt. *Id.* at 2051-52. Additionally, the judgment creditor may garnish the wages of the judgment debtor as they are earned in order to satisfy the judgment. CAL. CIV. PROC. CODE §§ 706.010-706.154 (West Supp. 1986).

The judgment creditor may periodically examine the debtor, or a third person who possesses property of or is indebted to the judgment debtor, in order to discover property and apply it to the satisfaction of the money judgment. CAL. CIV. PROC. CODE § 708.110 (West

Similarly, in the multi-tortfeasor situation, an insolvent joint tortfeasor remains liable to his joint tortfeasors for the excess they paid the plaintiff due to his insolvency. The tortfeasors can obtain judgments against each other, including an insolvent joint tortfeasor, for partial indemnity. Such a judgment can be collected in the same way as any other money judgment,[127] and thus extends to after-acquired property.

In *Paradise Valley Hospital v. Schlossman*,[128] the court actually apportioned the insolvent defendant's shortfall among the solvent defendants. It held that the solvent defendants must bear the burden of the shortfall caused by the insolvency of a co-defendant in direct proportion to their respective degrees of culpability. However, in apportioning liability among the solvent defendants, the court concluded that the trial court should also "fashion enforceable orders which will implement the basic objective of making available to the solvent parties any asset of [the insolvent defendant] lawfully subject to seizure."[129] Thus, the insolvent joint tortfeasor was not freed from future liability for that portion of his debt that had to be paid by the settling joint tortfeasors. Instead, even though the court ordered that the solvent parties had to pay the plaintiff for the insolvent's share, the solvent parties were given an order against the insolvent tortfeasor for the amount so paid which could be enforced in the same manner as any other money judgment.

This approach can be used to form the basis of a solution to the problem of a good faith settlement in the case of the relatively insolvent

Supp. 1986). Examination proceedings are initiated by an application for an order that a judgment debtor or third person appear and answer questions concerning the judgment debtor's property. A judgment debtor may be examined once every 120 days or more frequently where a writ of execution has been issued and the judgment creditor shows that there is property that the judgment debtor "unjustly refuses" to apply toward the satisfaction of the judgment. CAL. CIV. PROC. CODE § 708.110 (West Supp. 1986).

Also, the judgment creditor may serve interrogatories upon the judgment debtor to discover any property in the possession of the judgment debtor. CAL. CIV. PROC. CODE § 708.020 (West Supp. 1986). The form of, answers to, and enforcement of the interrogatories is identical to that provided for interrogatories in a civil action. CAL. CIV. PROC. CODE § 708.020(c) (West Supp. 1986). Generally, interrogatories may be served every four months. The precise language of the statute provides that interrogatories may not be served if within the preceding 120 days the judgment debtor has responded to past judgment interrogatories or an examination has been conducted. CAL. CIV. PROC. CODE § 708.020(b) (West Supp. 1986); *see* J. LEVITT & D. NAFTALIN, CALIFORNIA DEBT COLLECTION MANUAL §§ 9.1, 9.3, 9.8A (Cal. Continuing Educ. of the Bar, Supp. 1986).

127. *See supra* notes 122-26 and accompanying text.

128. 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983).

129. *Id.* at 94, 191 Cal. Rptr. at 536-37. The court noted that an excellent discussion of the details of such an order could be found in 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, 827-31 (1981).

settling joint tortfeasor. The proposed solution will accomplish three purposes: (1) it will encourage the relatively insolvent joint tortfeasor to settle by giving him the benefit of an early settlement; (2) it will minimize the corresponding harm to the nonsettling joint tortfeasors; (3) it will provide a workable solution for the trial judge.

This solution would involve a three step process. First, the court would determine the reasonable range floor, i.e., assuming the settlor were solvent, what amount of settlement would be the lowest amount that the court would find to be in good faith. Second, the court would use the reasonable person test described above[130] to determine whether the settlement amount is what a reasonable person, in the financial condition of the settling defendant, would pay. If the amount satisfies these criteria, the court would enter an order that the settlement is in good faith. Third, the court would order that in the event that a remaining defendant is forced to pay the plaintiff an amount in excess of that remaining defendant's share of liability, then the settling defendant must pay a certain amount to the remaining defendant. The amount would be the *lesser* of (a) the difference between the reasonable range floor and the amount of the good faith settlement, i.e., the insolvency reduction;[131] and (b) the amount actually paid by the remaining defendant to the plaintiff.[132]

Under this solution, a good faith finding would have the usual result that the nonsettling joint tortfeasors would be liable for the entire amount of the plaintiff's judgment reduced only by the settlement. However, while the nonsettling joint tortfeasors would initially have to pay for the shortfall caused by the insolvency reduction, they could ultimately recover this amount when and if the insolvent settling joint tortfeasor obtained assets. It is important to note that the remaining defendants are not allowed to recover any of the shortfall they pay as a

130. *See supra* text accompanying notes 111-19.

131. For a definition of this term, see *supra* text accompanying note 107.

132. Since partial indemnity is an equitable doctrine created by the court in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591-98, 578 P.2d 899, 907-12, 146 Cal. Rptr. 182, 190-95 (1978), the court could also fashion enforceable orders which would implement this proposal.

The correct implementation is by way of an order. Money collection procedures in California Code of Civil Procedure §§ 681-724 are provided for judgment creditors. CAL. CIV. PROC. CODE §§ 681-724 (West 1980 & Supp. 1986). However, California Code of Civil Procedure § 1007 provides that an order for the payment of money may be enforced by execution, the same as judgments. Under that section, parties to an order should have the same remedies as a judgment creditor. CAL. CIV. PROC. CODE § 1007 (West 1980); Zavos, *supra* note 129, at 828. The mechanics of a similar type of order can be found in Zavos, *supra* note 129, at 828-31.

result of the settling defendant's settlement reduction.[133]

The way this solution would work can be illustrated by our example. Assume a plaintiff has suffered approximately $100,000 in damages and a jury would find defendant *A* to be 50% at fault, defendant *B* to be 40% at fault, and defendant *C* to be 10% at fault. Defendant *A* wishes to settle prior to trial, and the judge determines that the reasonable range floor of a settlement based on his approximate liability for plaintiff's injuries is $30,000, i.e., if *A* were completely solvent, the judge would not find a settlement for less than $30,000 to be in good faith. However, defendant *A* claims he can not pay $30,000 because he is relatively insolvent, having only $25,000 in assets. His proposed settlement is $10,000. The judge would then consider *A*'s financial condition and decide whether a reasonable person in *A*'s shoes would settle for $10,000. If he would, then the judge should find the settlement to be in good faith. However, the judge would also issue an order holding *A* liable to *B* and *C* for the insolvency reduction, i.e., the difference between the settlement amount ($10,000) and the reasonable range floor ($30,000), or $20,000, in the event that *B* or *C* are required to pay the plaintiff this amount because of *A*'s shortfall.

This proposed approach has several factors to recommend it. First, it fits within the *Tech-Bilt* mandate because it takes the settling defendant's financial condition into account in determining whether a settlement is in good faith. Second, within these parameters, the approach works to the benefit of all concerned.

The relatively insolvent settling joint tortfeasor is helped by this solution in several ways. The most important is that it allows him to settle, thereby enabling him to obtain the benefits of a good faith settlement even though he cannot afford to pay an amount equal to the reasonable range floor. In our example, if a settlement amount equalling the reasonable range floor ($30,000) were required for a good faith settlement regardless of defendant *A's* financial condition, and *A* could not afford to pay this much, he would not be able to effectuate a good faith settlement and would not be able to extricate himself from the litigation.

This approach retains the incentive for a relatively insolvent joint tortfeasor to settle. This is because the settling tortfeasor is completely absolved of responsibility for the amount of the settlement reduction, just as a solvent settling defendant would be. In our hypothetical, if defendant *A* did not settle and plaintiff was successful at trial, *A* would ultimately incur a liability of $50,000, the full share of his proportionate

133. For a definition of this term, see *supra* text accompanying note 107.

responsibility for plaintiff's injuries.[134] In contrast, under the proposed approach, *A*'s maximum total exposure is \$30,000, the amount of the reasonable range floor. He would pay plaintiff \$10,000 in settlement and would be liable to the joint tortfeasors for \$20,000. Even though the proposal requires the court to issue an order making him liable to the nonsettling joint tortfeasors, the amount will be no more than the difference between the reasonable range floor and his settlement (the insolvency reduction). He still reduces his potential total exposure by the \$20,000 settlement reduction. Also, because his settlement in an amount less than the reasonable range floor will be in good faith, he avoids further involvement in the case and further litigation expenses. Thus, the relatively insolvent joint tortfeasor will have the same incentives to settle as a solvent joint tortfeasor. He still obtains all the advantages of an early settlement provided by the reasonable range test.[135]

He also gets additional benefits because the amount of the insolvency reduction does not have to be paid to the plaintiff as part of the settlement in order for the settlement to be found in good faith. Rather, it becomes a debt he owes to the nonsettling joint tortfeasors which becomes collectable only if the plaintiff eventually obtains the settling defendant's shortfall from the other joint tortfeasors. Furthermore, this debt can only be collected in the same manner as any money judgment can be enforced. The settling defendant will be entitled to all of the protections from execution provided by law.[136]

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134. He would actually be jointly and severally liable for \$100,000, the full amount of plaintiff's injuries. However, assuming that through suits for partial indemnity responsibility was ultimately apportioned among *A*, *B*, and *C* according to their percentages of fault, *A*, who was 50% at fault, would eventually bear \$50,000 of the loss.

135. As mentioned earlier, the reasonable range test of good faith does provide an incentive to settlement because a settling defendant may extricate himself from the litigation for a reduced amount. This is because this test does not require *exact* proportionality but rather focuses on whether a settlement is within a range of proportionality. Also, the test 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 may still buy his peace from both the plaintiff and the joint tortfeasors for a reduced sum, thereby providing a strong incentive to settle. Moreover, there will be an incentive for defendants to settle early. The earlier the settlement, the smaller it need be because in determining the reasonable range, the court should consider when the plaintiff obtained the use of the money.

Another incentive to early settlement is provided because this test gives the advantage to the first defendant to settle. Because the amount of settlement can be below a settling defendant's strict proportional share and still be in good faith, the first defendant to settle will be able to cut off claims for partial indemnity for a reduced amount. *See supra* note 101 and accompanying text.

136. *See supra* note 112.

Of course the insolvent settling tortfeasor would prefer to have his $10,000 settlement amount found to be in good faith and incur no obligation to repay the nonsettlors for any of the insolvency reduction. However, this would be a windfall to the insolvent settling party because he would obtain a benefit unavailable to any other insolvent judgment debtor. This windfall is not necessary to accomplish the purposes of a good faith settlement and would unduly harm the nonsettling joint tortfeasors.

This suggested approach also benefits the nonsettling joint tortfeasors. It minimizes their potential harm because they at least have a chance to recoup the shortfall occasioned by the settling defendant's poor financial condition at the time of the settlement. Taking our above example, assume *A* was solvent and settled for an amount equal to the reasonable range floor and this was found to be a good faith settlement. Then *B* and *C* would have to make up the shortfall caused by *A*'s settlement (the settlement reduction); i.e., $20,000 computed by subtracting the reasonable range floor of $30,000 from *A*'s share of liability of $50,000. In our example, where *A* is insolvent and seeks to settle for $10,000 because of his financial condition, if a court merely found that settlement to be in good faith, without more, then the shortfall that would have to be paid by the joint tortfeasors would be $40,000 without chance of reimbursement. Under the suggested approach, while *B* and *C* initially would have to pay *A*'s total $40,000 shortfall, their financial harm is minimized to the extent that they will at least have a chance to recoup the amount of the shortfall caused by *A*'s poor financial condition (the insolvency reduction), here $20,000.

Another party to be considered in analyzing the suggested approach is the plaintiff. The proposal will cause the plaintiff no detriment. Plaintiff's total recovery is not diminished because he can obtain the full amount of his judgment from the solvent tortfeasors. The proposal's impact, then, is with respect to the allocation of loss among the joint tortfeasors. It will have no impact on the plaintiff's total recovery. Furthermore, assuming that plaintiffs are benefited by a rule that encourages settlements, the suggested approach actually assists plaintiffs because it gives an incentive to the relatively insolvent joint tortfeasor to settle.[137] The approach encourages settlement more than a rule applying a pure reasonable range test in which the financial condition of the settling defendant is not considered. However, it probably does not encourage an insolvent tortfeasor to settle as much as would a rule simply providing

137. *See supra* text accompanying note 135.

that a low settlement is in good faith.[138] Whether this latter type of rule would actually encourage settlement of the entire litigation is open to debate.[139]

Finally, the suggested approach must be considered from the standpoint of the trial judge. Although it has both advantages and disadvantages, it generally appears to be the most workable solution. Whenever a settling defendant claims he is relatively insolvent, the parties and the court will need to analyze comprehensively the settling defendant's financial condition to determine whether a settlement below the reasonable range floor is in good faith. The settling defendant will attempt to minimize[140] and the nonsettling joint tortfeasors will attempt to maximize[141] the amount the settling defendant should pay. Without this proposed solution, the court's conclusion is crucial. For every dollar not paid by the settling defendant because of his insolvency, an additional nonrecoverable dollar will be paid by the nonsettlors. To perform any sort of meaningful calculation, the court would need to ascertain in great detail the total financial situation of the settling defendant.

However, under the proposed solution, the need for such a detailed examination is mitigated. The court will first establish the reasonable range floor of the settling defendant. Once the court finds that the defendant's financial condition warrants a lower settlement, it need only make a less precise determination that the settlement amount is what a reasonable person, in the defendant's financial condition, would be willing to pay in settlement. The parties will not become embroiled in a bitter battle over every potential settlement dollar. The nonsettlors will be able to recover the amount of the insolvency reduction from the settlor later if they can find, or if he acquires, assets subject to execution.

138. Of course the insolvent defendant would be happier with a rule which did not have the extra effect of holding him liable to the nonsettlors for the insolvency reduction. Plaintiff's attorneys have repeatedly argued that plaintiffs are helped by any rule which allows a settlement to be in good faith, regardless of its amount.

139. Roberts, *supra* note 24, at 932-35.

140. The way the settling defendant will attempt to minimize the amount he should pay is by entering into as low a settlement as he can with the plaintiff. He will then attempt at the good faith hearing to convince the court that in light of his poor financial condition, the low settlement he entered into with the plaintiff should be found to be in good faith.

141. The nonsettlors will attempt to maximize the amount the settling tortfeasor should pay by arguing at the good faith hearing that the settling tortfeasor's financial condition allows him to contribute more, i.e., that the proposed settlement is too far below the reasonable range floor. They will contend that, therefore, this settlement should not be found to be in good faith. If the court agrees, the settling tortfeasor can then settle for this amount anyway, thereby remaining liable to claims for partial indemnity by the nonsettlors; or, he can agree to pay the plaintiff more, come back into court, and attempt to have the increased settlement amount found to be in good faith.

This eliminates the pressure on the trial judge to make a precise analysis of the exact amount the settling defendant can afford to pay.

Of course, this approach imposes upon the trial judge the task of setting a specific amount for the reasonable range floor. Fixing such an exact figure is not necessary in applying the reasonable range test with a solvent joint tortfeasor. There, the court is not required to specify a reasonable range, but rather need only see whether the settlement falls within the reasonable range. The *Tech-Bilt* court explained this as determining whether the settlement is in "the ballpark."[142] In this circumstance, the court need not deal in specifics, only rough approximations. Thus, one can argue that this proposed solution for insolvent tortfeasors imposes an additional and substantial burden on the trial judge.

However, this burden is not substantial, and it may not even be in addition to that encountered with a solvent settling defendant. Establishing the reasonable range floor can also be done by a rough approximation.[143] Furthermore, practically speaking, even with a solvent joint tortfeasor a judge will need to approximate the reasonable range floor before he can determine whether a settlement is within the reasonable range. Finally, it will not be difficult for the trial judge to set the reasonable range floor. It is a figure more capable of evaluation using the expertise of a judge than would be the burden of having to be more fastidious in examining a settlement in relation to the financial condition of a joint tortfeasor.

5. Summary

The suggested approach is one solution to the problem of applying the financial condition factor to a good faith settlement determination. As far as the settling and nonsettling joint tortfeasors are concerned, this approach is a compromise between two alternatives, each of which would have a significantly greater impact on one of the parties. Under the first alternative, the financial condition of the settling tortfeasor is not taken into account and he is held to the same reasonable range standard as a solvent joint tortfeasor. To the extent that a tortfeasor could not afford a settlement within the reasonable range, he would not be able to effectuate a good faith settlement and would remain liable for the full percentage of

142. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263. *See also* Singer v. Superior Court, 179 Cal. App. 3d 875, 894, 225 Cal. Rptr. 159, 178 (1986).

143. *See Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263; Roberts, *supra* note 24, at 921-23.

his fault after judgment.[144] This approach hurts the tortfeasor attempting to settle more than does the suggested approach, under which he remains liable to the joint tortfeasors for only the insolvency reduction, i.e., the difference between the reasonable range floor and the amount of his settlement. The other alternative is to simply find that a settlement below the reasonable range is in good faith if that settlement amount is reasonable in light of the settling defendant's financial condition. While this would help insolvent defendants wishing to settle, it would hurt the nonsettling joint tortfeasors who would be required to make up for the shortfall caused by the settling tortfeasor's insolvency. The suggested approach treats a settling insolvent the same as an insolvent who did not settle in good faith in that after-acquired assets would be subject to execution by those who had to bear his insolvency shortfall in the first place. Furthermore, this approach will not harm, and may even benefit, the plaintiff and provides a workable solution for the trial judge.

IV. THE INSURANCE POLICY LIMITS OF THE SETTLING DEFENDANT AS A FACTOR OF GOOD FAITH

Another good faith factor discussed by the court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*[145] is the amount of insurance of the settling defendant. Quoting *Stambaugh v. Superior Court*,[146] the *Tech-Bilt* court stated: "[A] disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor."[147] Included in the list of factors enumerated by the supreme court to determine good faith is the "insurance policy limits of settling defendant."[148] Therefore, another issue that trial judges must address in applying the reasonable range test is what effect, if any, the insurance coverage of the settling defendant should have in the determination of good faith.

The most important issue that arises is whether a settlement should be found to be in good faith solely because it is for the total amount of a defendant's insurance policy limits. No appellate court, even using the tortious conduct test, has directly held that the sole fact that an insurance carrier has paid its policy limits to plaintiff constitutes a good faith

144. Thus, the nonsettling joint tortfeasors would be able to collect their full percentage share from him to the extent that he acquired assets.

145. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

146. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference*, 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 259, 264 n.7 (1985).

147. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (quoting Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 848 (1976)).

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

settlement as a matter of law. In *Ford Motor Co. v. Schultz*,[149] the trial court made such a finding,[150] but the court of appeal reversed this portion of the decision stating that such a rule is without support from any authority.[151] However, before *Tech-Bilt* was decided, several California appellate courts applying the tortious conduct test commented in dicta that the settlement involved was in good faith because it was for the full amount of the settling tortfeasor's insurance coverage. The court in *Stambaugh* stated, "[w]e opine that it would be a rare case indeed, where, as here, a joint tortfeasor who . . . settles for the full amount of his insurance coverage, may reasonably be charged with lack of good faith under section 877."[152] Similarly, the court in *Fisher v. Superior Court*[153] declared, "[w]hen the insurance company for a settling defendant pays its total available policy limits, that is very strong evidence of a 'good faith' settlement, absent evidence of collusion or grossly inappropriate allocation or apportionment of the settlement proceeds to injure the nonsettling alleged tortfeasors."[154]

However, this language from cases involving insurance policy limits must be considered in the context of the tortious conduct test. Under that test, a settlement would be rejected only if the court found evidence of some sort of intent to injure the nonsettling joint tortfeasors. Therefore, the courts looked on a settlement for full policy limits as evidence that the motivation for this settlement price was not tortious. As the court stated in *Fisher*,

> It would be extremely difficult to envision a set of circumstances in which an insurance company would pay out its entire substantial policy limits (as was apparently done in the case at

149. 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983). One insurance carrier of the defendant paid the full policy limits of $100,000 and the plaintiff agreed to exonerate that defendant from any further liability. However, the plaintiff retained the right to pursue possible additional insurance funds from another carrier of the defendant.

150. *Id.* at 949 & n.3, 195 Cal. Rptr. at 474 & n.3.

151. *Id.* at 949-50 & n.4, 195 Cal. Rptr. 474-75 & n.4.

152. *Stambaugh*, 62 Cal. App. 3d at 238-39, 132 Cal. Rptr. at 848. Similarly, in Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 259, 264 n.7 (1985), the settlement, which was held to be in good faith, provided for payment by the settling defendant's insurance carrier of the policy limit of $100,000. The agreement also provided for possible payment by that defendant up to $10,000 above the $100,000 on a sliding scale depending upon plaintiff's recovery from the nonsettling defendant. *Dompeling*, 117 Cal. App. 3d at 802, 173 Cal. Rptr. at 40.

153. 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 259, 264 n.7 (1985).

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

> bench) simply to injure another codefendant. Experience teaches us that insurance companies usually and ordinarily pay their policy limits only to have their insured and themselves discharged from all liability in any given case.[155]

This same rationale for finding a settlement for insurance policy limits to be in good faith does not apply now that the supreme court has rejected the tortious conduct test and has instead adopted the reasonable range test. The court must now look beyond the question of tortious conduct and determine whether the *amount* of the settlement is sufficient in light of the settlor's potential liability.

There are several reasons why a court should not interpret the supreme court's language in *Tech-Bilt* as a direction to find that any settlement for insurance policy limits constitutes a good faith settlement even if the amount of the insurance does not put the settlement within the reasonable range of the settling defendant's fair share of responsibility. First, as shown by the discussion of the financial condition exception, such a result would produce inequitable results.[156] Second, such a rule would have the detrimental effect of rewarding a defendant with inadequate liability insurance.[157] 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. Defendant *A* has insurance coverage of $20,000 and defendant *B* has insurance coverage of $200,000. A result that allows the plaintiff to take the $20,000 policy from defendant *A* to finance his lawsuit, collect the rest of the judgment from defendant *B*, have the settlement with *A* found to be in good faith merely because it represented the full value of *A*'s insurance coverage, and thereby prevent *B* from claiming partial indemnity against *A* would reward *A* for being underinsured. Thus, some of the incentive to carry adequate liability insurance would be lost.

Several sources have commented that a rule other than one allowing a policy limits payment to constitute a good faith settlement as a matter of law would put insurance companies in a dilemma. For example, it has been suggested that if a carrier were to pay an appropriate policy limits demand, it might "merely be throwing its money away," since such a payment might be deemed not to have been made pursuant

155. *Id.*

156. *See supra* text accompanying notes 91-92.

157. On the other hand, this benefit of underinsurance would be achieved only in multiple tortfeasor cases. In a standard two-party plaintiff/defendant case, an uninsured or underinsured defendant would have to bear all responsibility above the amounts of his insurance policy limits alone. Therefore, this possibility may lessen any incentive to carry minimum insurance because of the possible benefits in multi-party cases.

to a good faith settlement. This would leave the insured defendant still personally exposed to liability on cross-complaints for partial indemnity in spite of the policy limits payment. On the other hand, if the carrier did not pay the policy limits demand, it might be guilty of breach of the covenant of good faith and fair dealing to its own insured.[158] This argument is fallacious because no additional burden or dilemma is placed on an insurance carrier in the good faith settlement context. The insurance company has a duty to its insured to settle for the full policy limits if that would be necessary to protect the insured from a potentially higher verdict in excess of the policy limits.[159] If the plaintiff accepts this amount in settlement, then the insured is freed from additional claims by the plaintiff, and the insurer does not face a claim for refusal to settle in bad faith. If the insured is still liable on cross-complaints for partial indemnity because his insurance policy limits were not enough to constitute a good faith settlement due to inadequate insurance coverage, then so be it. The insurance company is in no different position than in a two party case where its insured is the only tortfeasor and he did not carry enough insurance to fully settle or pay plaintiff's claim.[160]

A similar argument was made by the court in *Imperial Spa, Inc. v. Superior Court*,[161] a case that has no force and effect because it was ordered depublished by the California Supreme Court. There, the court, in

158. Brief for Appellant at 20-21, Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983).

159. 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, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). *See* Comment, *Comparative Fault and Settlement in Joint Tortfeasor Cases: A Plea for Principle Over Policy*, 16 SAN DIEGO L. REV. 833, 841 (1979).

160. *See* Comment, *supra* note 159, at 841-43 which predated the passage of Code of Civil Procedure § 877.6. That Comment stated that the *American Motorcycle* decision created a delicate situation for an insurance company's defense counsel because of the insurer's duty to the insured to accept a reasonable settlement offer. The article hypothesized that if the insurance company accepted a settlement offer from the plaintiff that turned out to be for less than the insured's fair share of liability for comparative fault, the primary insurance carrier could be found liable to the nonsettling defendant for a "bad faith" settlement because of the discrepancy between the settlement and the amount of the settling defendant's fair share of relative fault. However, this nightmare has not materialized. Now, with the pretrial determination made available by § 877.6, the trial judge determines at the time of the settlement whether it is in good faith. There is no cause of action by a nonsettling defendant against a settling defendant for "bad faith." If the settlement was in good faith, then the settling defendant is released from claims for partial indemnity. If the settlement was not in good faith, then the settling defendant is not released from claims by the nonsettling defendant.

161. Imperial Spa, Inc. v. Superior Court, 158 Cal. App. 3d 1185, 205 Cal. Rptr. 337 (1984) (ordered depublished by the California Supreme Court).

adopting the tortious conduct test and rejecting the reasonable range test, argued that

> an insurance company should be, and is, allowed to settle a claim against its own insured by giving consideration to its insured's interest to the total exclusion of the other defendant's interest so long as in so doing it does not engage in tortious conduct toward that second defendant. Were that rule to be otherwise, an insurance company could be caught on the horns of an impossible dilemma—that is between its good faith duty to its own insured not to wrongfully refuse a settlement offer of a plaintiff and its supposed duty to adverse concurrent tortfeasors.[162]

Again, this argument is incorrect because the reasonable range test and a rule refusing to make the payment of insurance proceeds a good faith settlement *per se* does not impose any new duty on an insurance company to adverse joint tortfeasors.

However, a rule that the payment of policy limits does not automatically constitute a good faith settlement may have an unpleasant effect on an insurance company. This situation will involve the insurance company's duty to defend the insured.[163] The insurance company may not

162. *Id.* at 1204, 205 Cal. Rptr. at 349.

163. California cases provide without exception that an insurer owes a duty of defense to the insured in addition to the duty to indemnify up to the limits of the insurance policy. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). Since the seminal case of *Gray*, California courts have held that an insurer's duty to defend is broader than the duty to indemnify and, in many cases, the duty to defend will arise even though there is no duty to indemnify. Revere, *Insurer's Duty to Defend*, 13 PAC. L.J. 889 (1982). Further, insurers are generally bound to defend against claims not covered by the policy if they are included with claims potentially covered by the policy. Hogan v. Midland Nat'l Ins. Co., 3 Cal. 3d 553, 476 P.2d 825, 91 Cal. Rptr. 153 (1970). An insurer's duty to defend was further expanded under following contract principles, by interpreting ambiguities in policy language against the insurer and in favor of the insured. In this way, an insured's reasonable expectations of a defense are protected and the implied in law covenant of good faith and fair dealing is preserved in all insurance contracts. Revere, *supra*, at 898. Finally, where a conflict of interest exists between the insured and the insurer, and where the interests of the insured could be prejudiced by the insurer's defense of a particular cause of action or claim within a suit, the insurer is obligated to pay the fees of the insured's independent counsel who must represent the insured as to that claim. (For example, where a policy provides no coverage for intentional torts committed by the insured, the insurer is still obligated to defend the entire suit, including the intentional tort claim). Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026 (9th Cir. 1981); Nike, Inc. v. Atlantic Mut. Ins. Co., 578 F. Supp. 948 (N.D. Cal. 1983); Executive Aviation, Inc. v. National Ins. Underwriters, 16 Cal. App. 3d 799, 94 Cal. Rptr. 347 (1971).

Generally, an insurance carrier is liable for any judgment rendered against the insured plus costs (even if the judgment exceeds policy limits) if the insurer refuses to settle, or refuses to consider settlement, within the policy limits. Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). However, if an insurer fails to defend, it is responsible only

be able to extricate itself from the litigation and from the financial consequences of its duty to defend its insured by merely paying the policy limits. If the insurance company's offer to pay the policy limits was found to fail the test of good faith because the policy limits were too low, the insurance company could choose to either pay the policy limits to plaintiff anyway, even though the settlement would not be found to be in good faith, or decline to go ahead with the settlement. In either case, the insured would remain in the litigation because in the first situation he would still be liable on cross-complaints for partial indemnity, and in the second situation he would still be liable to the plaintiff. In both situations, the insurance company would still have a duty to defend the insured, which is separate from any duty to pay the policy limits. In the case of an underinsured tortfeasor, the insurance company's obligation under its duty to defend can far exceed its monetary obligation for the policy limits.

However, this problem cannot be blamed on the test of a good faith settlement. It is no different than the situation in a two party case where the defendant's insurance policy limits are insufficient settlement incentive for the plaintiff. Whether an insurer can terminate its duty to defend by simply tendering the insurance policy limits is unclear in California.[164] The question of whether an insurer must continue to defend claims that are proper under the substantive provisions of the policy after the monetary limits of the policy have been reached has not been answered by any California appellate decision. The out-of-state cases are split.[165] However, regardless of the eventual outcome of this issue in Cal-

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for the amount of the judgment up to the policy limits and costs of defense, unless its refusal was not in good faith. If the insurer's refusal is in bad faith, it is liable for the entire amount of the judgment, regardless of policy limits. Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (1980).

164. Aetna Casualty & Sur. Co. v. Certain Underwriters, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976).

The law in California is unclear regarding the effect the exhaustion of policy limits has on the duty of an insurer to defend, absent language in the policy specifically making such duty coextensive with the policy limits. Although California law is unclear on this point, a recent decision acknowledges California's policy of extending the duty of the insurer to that of pursuing an appeal on behalf of the insured (where there are reasonable grounds for appeal). Cathay Mortuary (Wah Sang), Inc. v. United Pac. Ins. Co., 582 F. Supp. 650 (N.D. Cal. 1984).

165. Insurance policies prior to 1955 contained general language regarding the insurer's duty to indemnify and defend. The insurance contracts basically provided that the insurer would "defend any suit" brought against the insured. The courts were divided over whether the duty to defend was solely coextensive with the policy limits. DesChamps, *The Obligation of the Insurer to Defend Under Casualty Insurance Policy Contracts*, 26 INS. COUNS. J. 580 (1959); *see also* Annotation, *Liability Insurer's Duty to Defend Action Against An Insured After Insurer's Full Performance of its Payment Obligations Under Policy*, 27 A.L.R. 3D 1057 (1969 & Supp. 1984). In 1955, the language used in insurance policies was changed by the National

ifornia, it is not an issue unique to multi-party situations involving good

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Bureau of Casualty Underwriters specifically limiting the duty to "defend any suit." Beginning at that time, the language "with respect to such insurance as is provided by [the] policy," was added to standard liability policies. DesChamps, *supra*, at 582; Annotation, 27 A.L.R. 3D at 1059. This modification to standard insurance policies was intended to clarify that the insurer's obligation to defend was subordinate to the primary indemnification clause of the policy and the limitations of coverage contained within. DesChamps, *supra*, at 583. The courts, however, still disagreed over the insurer's duty to defend under this amended language. In 1966, a more precise revision was incorporated into the standard policy language of some insurers to provide that "[the insurer] shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of [the insurer's] liability has been exhausted by payment of judgments or settlements." Keene Corp. v. Insurance Co. of N. Am., 597 F. Supp. 946, 948 (D.D.C. 1984). The language of the 1966 changes was deemed by some courts to limit the insurer's duty to defend only to the policy limits in cases where full payment is made toward judgments or settlements. The duty to defend was not terminated, however, where the insurance company attempted to pay the policy limits into court and subsequently withdrew from defending the insured, thereby leaving the insured to fend for himself. *Id.* at 953 n.7; Conway v. Country Casualty Ins. Co., 92 Ill. 2d 388, 442 N.E.2d 245 (1982).

Courts have reached varying results regarding an insurer's duty to defend once the policy limits have been exhausted. Some jurisdictions follow the seminal case, Lumbermen's Mut. Casualty Co. v. McCarthy, 90 N.H. 320, 8 A.2d 750 (1939). That case held that the insurer's duty to defend ended with payment of the policy limits, assuming the insured's interest was not prejudiced. In *Lumbermen's*, the court did not require the insurer to defend an action brought by the father of the child for losses caused by the child's injuries, once the insurer had satisfied a judgment against the insured to the extent of the policy limits for injuries to the child arising out of an automobile accident.

Lumbermen's and its progeny rely principally on the idea that the insurer's primary obligation is to pay damages and that the duty to defend is coextensive with that obligation and ceases once the primary obligation is fulfilled. *See, e.g.*, Travelers Indem. Co. v. New England Box Co., 102 N.H. 380, 157 A.2d 765 (1960) (holding that once the insurer had made payments on settlements of claims to the policy limits, it was relieved of its duty to defend).

In an important case involving damages arising out of a hotel fire, the court relied on the rationale from *Lumbermen's*. Denham v. La Salle-Madison Hotel Co., 168 F.2d 576 (7th Cir. 1948). In *Denham*, the court held that once the insurer had tendered the policy limits, the insurer was not obligated to defend the insured hotel against the 250 guests' property damage claims in excess of the policy limits. A number of courts have reached similar conclusions. *See* Oda v. Highway Ins. Co., 44 Ill. App. 2d 235, 194 N.E.2d 489 (1963) (in a personal injury action where the judgments exceeded the policy limits, the insurer was not required to further defend against claims once the payment of the policy limits had been made to other claimants). Other courts have also found no continuing duty to defend on the part of the insurer once the policy limits have been exhausted. *See generally* Keene Corp. v. Insurance Co. of N. Am., 597 F. Supp. 946 (D.D.C. 1985) (in case involving millions of dollars of asbestos-related claims, court found the language of the contract unambiguous and held that once the insurer had paid the limits of its liability, it had satisfied its duty to defend under its pre-1966 policies); Allstate Ins. Co. v. Montgomery Trucking, 328 F. Supp. 415 (N.D. Ga. 1971) (auto liability insurer's duty to defend extended to limits of policy coverage, after which the obligation to defend remaining suits fell on excess carrier and insured himself); Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860 (S.D. Ind. 1964) (the insurer's duty to defend terminated upon payment of the policy limits even though additional claims remained pending); Liberty Mut. Ins. Co. v. Mead Corp., 219 Ga. 6, 131 S.E.2d 534 (1963) (in multiple suits arising from one auto accident, insured could not recover costs and attorney fees from insurer which insured incurred after insurer had paid policy limits in settlement of some claims); National Union

faith settlements. Therefore, the court should not adopt a rule mandat-

Ins. Co. v. Phoenix Assurance Co., 301 A.2d 222 (D.C. 1973) (no obligation on part of primary insurer to reimburse excess insurers for expenses incurred in defense once primary insurer had paid its total liability under the policy limits).

Other jurisdictions do not follow *Lumbermen's* and instead follow the holding in American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 131 N.Y.S.2d 393 (1954), where the court found that absent contractual language making defense provisions dependent upon exhaustion of specified coverage, the insurer was required to defend irrespective of its payment of the total amount of the policy limits. This line of cases stands for the proposition that a duty to defend is separate from and/or broader than a duty to pay. The insurer is therefore not exonerated from its duty to defend once the insurer pays the extent of the policy limits. The courts base their holdings on several contract principles, including construing ambiguous language in favor of the insured (in situations where pre-1966 policies are at issue, or policies which do not contain the 1966 revised language), the reasonable expectations of the insured, and the insurer's implied covenant of good faith and fair dealing. The cases preclude an insurer from paying the policy limits into court and abandoning the defense. *See, e.g.*, Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949) (insurer had duty to defend and pay expenses incurred by insured beyond policy limits, absent language in the contract to the contrary); Simmons v. Jeffords, 260 F. Supp. 641 (E.D. Pa. 1966) (since duty to indemnify and defend were separate and independent, the court rejected insurer's offer to pay full policy limits and withdraw from defense); *see also* National Casualty Co. v. Insurance Co. of N. Am., 230 F. Supp. 617 (N.D. Ohio 1964); Travelers Indem. Co. v. East, 240 So. 2d 277 (Miss. 1970).

Other courts have gone further than holding that the insurer cannot avoid its duty to defend by paying the policy limits into court. These courts required the insurers to continue defenses which were under way when the liability limits were exhausted or required the insurers to defend suits brought after exhaustion of the policy limits. St. Paul Fire & Marine Ins. Co. v. Thompson, 150 Mont. 182, 433 P.2d 795 (1967) (insurer's duty to defend insured even though tortfeasor's policy limit had been paid to plaintiff as result of a judgment); Kosce v. Liberty Mut. Ins. Co., 159 N.J. Super. 340, 387 A.2d 1259 (1978) (absent language in policy clearly limiting duty to defend, primary carrier obliged to continue defending suit although it paid policy limits as result of settlement); American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 131 N.Y.S.2d 393 (1954) (where policy limits amounted to $300,000 maximum and 46 wrongful death claims were valued at several million dollars, exhaustion of policy limits would not terminate insurer's duty to continue to defend any pending actions or any subsequent new actions); *see also* American Casualty Co. v. Howard, 187 F.2d 322 (4th Cir. 1951) (holding that insurers had to defend subsequent suit irrespective of payment of policy limits pursuant to a judgment); 7 C. APPLEMAN, INSURANCE LAW AND PRACTICE § 4685 (1979 & 1986 Supp.); 1 LONG, THE LAW OF LIABILITY INSURANCE § 5.12 (1986). The court in *Goble Aircraft* also stated that the insurer was obligated to pursue other available post-trial remedies on behalf of the insured as well, even if that worked to the detriment of the insurer. In that case, the court found that the insurance contract language was ambiguous and therefore construed the contract terms in favor of the insured. Other jurisdictions have adopted positions similar to those embraced in *Goble Aircraft. See, e.g.*, Ursprung v. Safeco Ins. Co. of Am., 497 S.W.2d 726 (Ky. 1973) (payment of the policy limits did not excuse insurer from its duty to defend the insured in good faith, including a duty to appeal the adverse judgment if such an appeal were warranted); Palmer v. Pacific Indem. Co., 74 Mich. App. 259, 254 N.W.2d 52 (1977) (duty of taking appeal from a judgment which was in excess of the policy limits where contract language was ambiguous); Travelers Indem. Co. v. East, 240 So. 2d 277 (Miss. 1970) (insurer required to defend appeal taken from directed verdict in favor of insureds and was liable for reasonable attorneys' fees incurred by insureds in the appeal even though insurer had previously paid full amount of policy pursuant to other judg-

ing that a settlement for full policy limits constitutes a good faith settlement as a matter of law merely as a means to cut an insurance company's possible losses on its duty to defend in this particular type of case.

It has been argued that a rule stating that policy limits settlements are in good faith does not actually harm the nonsettling joint tortfeasors.[166] The thrust of these arguments is that even if the parties had not settled, the plaintiff would not have been likely to have collected more than the policy limits from the settling defendant after a trial, regardless of the amount and percentage of the defendant's fault. Thus, although the policy limits might not reflect the settling defendant's fair share of plaintiff's damages, the remaining defendants would have been compelled to pay the shortfall whether or not the settlement had taken place. Therefore, any lost right of the nonsettling defendants to obtain partial indemnity against the insolvent settling defendant would be valueless.[167]

Of course, this argument only makes sense if the settling defendant has no assets over and above his insurance. If a settling defendant has additional assets, the nonsettling joint tortfeasors would then be hurt by a finding that a settlement not within the reasonable range of a settling defendant's fair share of liability was in good faith simply because it was for the policy limits. This was the rationale in *Fuquay v. General Motors, Corp.*,[168] where the court held that a policy limits settlement was in good faith because the nonsettling joint tortfeasors could recover no more than that amount from the settling defendant in contribution because the set-

ments rendered against insured; *see also* Brassil v. Maryland Casualty Co., 210 N.Y.S. 235, 104 N.E. 622 (1914) (holding that after electing to defend a suit, the insurer could not, after an adverse judgment was rendered, tender the limits and cast the burden of further defense on the insured). *But cf.* General Casualty Co. v. Whipple, 328 F.2d 353 (7th Cir. 1964) (pursuant to the express terms of the contract insurer's duty to defend insureds on appeal ceased once it paid into the court the full amount of its policy limits plus all costs and interest).

Even where courts followed the rationale of *Lumbermen's* and held that the insurer's duty to defend expired upon payment of the policy limits, most courts have implied that a different rule would apply in certain circumstances. The insurer cannot attempt initially to pay the policy limits and place the full burden of defense on the insured from the beginning. Nor can an insurer abandon its defense of an insured mid-proceedings under circumstances prejudicial to the insured. *Lumbermen's*, 90 N.H. at 322, 8 A.2d at 752; *see also* Keene Corp. v. Insurance Co. of N. Am., 597 F. Supp. 946 (D.D.C. 1984); Liberty Mutual Ins. Co. v. Mead Corp., 219 Ga. 6, 131 S.E.2d 534 (1963); Conway v. Country Casualty Ins. Co., 92 Ill. 2d 388, 442 N.E.2d 245 (1982). *Contra* Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860 (S.D. Ind. 1964).

166. Kaplin, *From Contribution to Good Faith Settlements: Equity Where Are You?*, 49 J. AIR L. & COM. 771, 794 (1984); Fuquay v. General Motors Corp., 518 F. Supp. 1065, 1068 (M.D. Fla. 1981).

167. Kaplin, *supra* note 166, at 794.

168. 518 F. Supp. 1065 (M.D. Fla. 1981).

tling defendant was otherwise without assets. The court concluded that, therefore, the nonsettling co-defendant was not injured by a finding of good faith.[169]

The California Supreme Court in *Tech-Bilt* did not address the issue of whether a policy limits settlement should, *per se*, be found to be in good faith. However, a reading of the entire opinion leads to the conclusion that this should not be the rule because the amount of the insurance policy limits is simply listed as one of many factors that should be considered in determining whether a settlement should be approved as one in good faith.[170]

Therefore, the most logical solution is to adopt the same approach recommended above for relatively insolvent defendants[171] and include insurance limits in the list of assets the defendant is capable of contributing to the settlement. This conclusion is supported by the *Stambaugh* language that was incorporated into the *Tech-Bilt* decision.[172] Quoting *Stambaugh*, the *Tech-Bilt* court stated that a "disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, *and* uninsured, or underinsured joint tortfeasor."[173] The *Stambaugh* court focused on a tortfeasor who was relatively insolvent and who lacked sufficient insurance to cover his proportionate share of liability.

Several other cases dealing with insurance policy limits and good faith settlements have examined the potential settling defendant's other assets in addition to insurance coverage. For example in *Fuquay*, the court looked to other assets of the settling defendant.[174] The court also examined the assets above and beyond the insurance coverage in *Ford Motor Co. v. Schultz*.[175] Similarly, in *Dompeling v. Superior Court*,[176] the settlement amount the court found to be in good faith was the policy limits of $100,000, plus a possible additional payment by the settling

169. *Id.* at 1068-69.

170. Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499, 698 P.2d 159, 166, 213 Cal. Rptr. at 256, 263 (1985).

171. *See supra* text accompanying notes 123-27.

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

173. *Id.* (quoting Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 848 (1976) (emphasis added)).

174. Finding no other assets, the court approved the settlement. *Fuquay*, 518 F. Supp. at 1068-69.

175. 147 Cal. App. 3d 941, 945-46, 195 Cal. Rptr. 470, 471-72 (1983).

176. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 259, 264 n.7 (1985).

defendant.[177]

In summary, in determining whether a settlement amount is in good faith, a court should not make any special exceptions from the reasonable range test for a settlement that is for the defendant's insurance policy limits. Rather, the amount of insurance should be but one factor in determining the financial worth of the settlement defendant. The analysis should proceed in the same manner as suggested above with respect to a relatively insolvent joint tortfeasor. That is, a settlement should be found to be in good faith when it equals or exceeds the amount the court determines a reasonable person with the financial condition, including insurance, of the settling defendant would pay.[178] Accompanying a court order finding a good faith settlement should be an order as recommended in Part 4 requiring the settling joint tortfeasor to pay to the nonsettling joint tortfeasors the difference between the settlement amount and the reasonable range floor.[179]

V. CONCLUSION

This Article has offered guidance to a trial judge who is grappling with the problem of applying the *Tech-Bilt* reasonable range test for a good faith settlement to the relatively insolvent settling tortfeasor. Under the *Tech-Bilt* criteria, the financial condition and insurance policy limits of the settling defendant are relevant to the good faith of his settlement. However, care must be taken not to abrogate completely the policy of equitable apportionment of fault that is a major cornerstone of the reasonable range test. Accordingly, this Article proposes that a settling insolvent defendant be treated the same as an insolvent who does not settle in that after-acquired property would be subject to execution by those who had to initially bear his insolvency shortfall.

The proposed solution involves a three-step process. First, the court would determine the reasonable range floor, i.e., assuming the settlor were solvent, what amount of settlement would be the lowest amount that the court would find to be in good faith. Second, the court would determine whether the settlement amount is what a reasonable person, in the financial condition of the settling defendant, would pay. The insurance policy limits of the settlor are treated the same as any other asset in making this determination. If the court finds the settlement amount to

177. The additional payment was $10,000 above the $100,000 on a sliding scale. *Dompeling*, 117 Cal. App. 3d at 802, 173 Cal. Rptr. at 40.

178. This is the same analysis that would apply to a relatively insolvent joint tortfeasor. *See supra* text accompanying notes 111-19.

179. *See supra* text accompanying notes 120-33.

be reasonable, then the court would enter an order that the settlement is in good faith. Third, in the event that a remaining defendant is forced to pay the plaintiff an amount in excess of that remaining defendant's proportionate share of damages, then the court would order that the settling defendant remain liable to the remaining defendant for a certain amount of the judgment paid by the remaining defendant. The amount would be the *lesser* of: (a) the difference between the reasonable range floor and the amount of the good faith settlement, i.e., the insolvency reduction; and (b) the amount actually paid by the remaining defendant to the plaintiff.

Under this solution, a finding of good faith would carry with it the usual result that the nonsettling joint tortfeasors would be liable for the entire amount of the plaintiff's judgment reduced only by the settlement. However, while the nonsettling joint tortfeasors would initially have to pay for the shortfall caused by the insolvency reduction, they could ultimately recover this amount when and if the relatively insolvent settling tortfeasor obtained additional assets. The remaining defendants would not be allowed to recover any of the shortfall they paid as a result of the settling defendant's settlement reduction.

Three purposes are accomplished by this proposal: (1) it encourages a relatively insolvent joint tortfeasor to settle by giving him the benefit of an early settlement; (2) it minimizes the corresponding harm to the nonsettling joint tortfeasors; and (3) it provides a workable solution for the trial judge.