Expanding the *Tech-Bilt* Ballpark: A Proposal for Liberally Interpreting *Abbott Ford v. Superior Court*

INTRODUCTION

The common law prohibited contribution among tortfeasors.[1] In 1957 California parted from the common law by enacting tort contribution legislation.[2] This legislation specifies that a joint tortfeasor paying more than her pro rata share of a joint judgment can obtain contribution from her codefendants.[3] It also specifies that a good faith settlement discharges the settling tortfeasor from all liability for contribution.[4] Further, a good faith settlement reduces the plaintiff's claims against the remaining defendants by the amount of the settlement.[5]

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[1] Contribution "distribut[es] loss among tortfeasors by requiring others each to pay a proportionate share to one who has discharged their 'joint' liability . . . ." W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 341 (1984) [hereafter W. PROSSER]; *see infra* notes 51-54 and accompanying text; *see also* Comment, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 494 (1969) (describing the bar against contribution as a "firm rule"). The prohibition against contribution among joint tortfeasors dates back to Merryweather v. Nixan, 8 Term. Rep. 1896, 101 Eng. Rep. 1337 (K.B. 1799). *Merryweather* involved two intentional tortfeasors acting with a common design. *Id.* Lord Kenyon gave no rationale for his decision, but subsequent commentators believe that the court did not want to apportion liability among parties engaging in intentional torts. Comment, *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HASTINGS L.J. 180, 182 (1958) [hereafter Comment, *Joint Tortfeasors*]; *see infra* note 54 and accompanying text.

[2] CAL. CIV. PROC. CODE §§ 875-880 (Deering Supp. 1988) [unless otherwise noted, all section references are to the Code of Civil Procedure]; *see infra* note 57 and accompanying text.

[3] Section 875(a) provides that "[when] a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided." CAL. CIV. PROC. CODE § 875(a) (Deering 1973); *see infra* notes 59-60 and accompanying text.

[4] CAL. CIV. PROC. CODE § 877(b) (Deering Supp. 1988). "Settlement" includes releases, dismissals, and covenants not to sue. *See id.* § 877(a).

[5] *Id.* § 877(a). Although the statute speaks in terms of a reduction of claims, courts interpret the statute as calling for a reduction of the judgment against the nonsettling

However, the legislature did not define good faith settlement.[6] Because of this ambiguity two rival judicial tests for good faith emerged.[7] The first, the "reasonable range" test, specified that the amount of a settlement is the primary indication of its good or bad faith.[8] The second, the "tortious conduct" test, specified that the amount of a settlement was irrelevant in determining its good faith; lack of good faith meant only collusive action or "bad faith."[9]

The California Supreme Court resolved this split in 1985, upholding the reasonable range test in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.[10] The court explained that a defendant must settle for an amount "in the ballpark"[11] of her projected liability at the time of

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defendant by the amount of consideration paid by the settling defendant. *See* Knox v. Los Angeles County, 109 Cal. App. 3d 825, 832, 167 Cal. Rptr. 463, 467 (1980).

[6] *See* Comment, *Sliding Scale Settlements: The Need for a Minimum Contribution to Comply with the Reasonable Range Test for Good Faith*, 19 LOY. L.A.L. REV. 995, 999 (1986) (noting that "[b]ecause the statute [§ 875] did not define the [good faith] concept specifically, the good faith controversy was born").

[7] *See infra* notes 68-82 and accompanying text.

[8] The Third District Court of Appeals formulated the "reasonable range" test in River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498, 506-07 (1972); *see infra* notes 68-75 and accompanying text.

[9] *See* Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 847-48 (1972) (stating that the good faith of a settlement is not to be "determined by the proportion [that the settling defendant's] settlement bears to the damages of the claimant"). *Stambaugh* also held that "[e]xcept in rare cases of collusion or bad faith . . . a joint tortfeasor should be permitted to negotiate settlement of an adverse claim according to his own best interests . . . ." *Id.* at 238, 132 Cal. Rptr. at 847. "Bad faith," as used in *Stambaugh*, means more than the opposite of "good faith." It means "generally implying or involving actual or constructive fraud." BLACK'S LAW DICTIONARY 127 (5th ed. 1979); *see infra* notes 77-82 and accompanying text.

[10] 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); *see infra* notes 96-108 and accompanying text.

[11] *Id.* at 499, 698 P.2d at 167, 213 Cal. Rptr. at 263. The California Supreme Court continues to use the ballpark metaphor. *See* Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 874, 741 P.2d 124, 134, 239 Cal. Rptr. 626, 636 (1987) (noting that defendants must settle for amounts "in the ballpark" of their fair liability). Justice Mosk derided the use of the ballpark metaphor in his dissent in *Abbott*. *See id.* at 902 n.3, 741 P.2d at 153 n.3, 239 Cal. Rptr. at 656 n.3 (Mosk, J., dissenting) (stating that "reasonable range" would be "more readily understood than the sport-page idiom employed by the opinions in [*Abbott*]"). Nonetheless, commentators use the metaphor. *See, e.g.*, Comment, *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823, 839 (1986) (stating that "[k]ey words such as . . . 'ballpark' have replaced the concept of tortious or collusive conduct"). Out of deference to the majority of the supreme court and our national pastime, this Comment will use the ballpark metaphor.

settlement.[12]

The court's ballpark is huge. The *Tech-Bilt* court instructed lower courts to reject settlements only if they are "grossly disproportionate" to a settlor's fair share of projected liability.[13] The court reached this standard by balancing the two goals of the 1957 tort contribution legislation — fair apportionment of cost among parties at fault and promotion of settlement.[14] The court reasoned that a tougher standard for good faith would deter settlements.[15] As long as a settlement falls within the reasonable range, and the plaintiff's recovery from nonsettlors is reduced by the amount of settlement, then fair apportionment is not sacrificed.[16]

Ingenious defendants responded to *Tech-Bilt* by entering into sliding scale agreements.[17] In a sliding scale agreement, the settling defendant guarantees the plaintiff a certain recovery (usually the full amount of claimed damages), but only has to pay if the plaintiff does not recover that amount from the remaining defendants.[18] These agreements enable

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[12] *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 167, 213 Cal. Rptr. at 263 (stating that "practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement").

[13] *Id.* (stating that defendants must not settle for amounts "grossly disproportionate to what a reasonable person, at the time of settlement, would estimate the settling defendant's liability to be" (quoting Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 509, 203 Cal. Rptr. 825, 834 (1984)).

[14] *Id.* at 494, 698 P.2d at 163, 213 Cal. Rptr. at 259-60 (quoting River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 505 (1972)).

[15] *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (stating that if bad faith could be established solely by showing a disproportionately low settlement, "[s]uch a rule would unduly discourage settlements").

[16] *Abbott*, 43 Cal. 3d at 874, 741 P.2d at 134, 239 Cal. Rptr. at 636 (1987) (discussing *Tech-Bilt*, and noting that reducing plaintiffs' claims against nonsettlors by the amount of the good faith settlement achieves at least "some rough measure of fair apportionment of loss between the settling and nonsettling defendants").

[17] *See* Comment, *California's Sliding Scale Settlement Agreements — Finality Instead of Fairness*, 23 SAN DIEGO L. REV. 227, 239 (1986) (noting increasing popularity of sliding scale agreements).

[18] Section 877.5(b) defines a sliding scale agreement as:

> [A]n agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, which limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants.

CAL. CIV. PROC. CODE § 877.5(b) (Deering Supp. 1988). Sliding scale agreements are commonly known as "Mary Carter" agreements. The name comes from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Ct. App. 1967). In Arizona, these agreements are called "Gallagher" covenants. *See generally* Note, *Are Gallagher Covenants Unethi-*

defendants to secure a good faith determination while possibly escaping liability altogether.[19] However, courts encounter difficulty in determining the good faith of sliding scale agreements.[20] Unlike straight settlements which have a fixed settlement value, sliding scale agreements are hard to value because the settlor could ultimately pay anything from zero to the guaranteed amount.[21]

Sliding scale agreements may also contain "veto provisions" that prohibit plaintiffs from settling with the remaining defendants for less than the guaranteed amount.[22] Otherwise, plaintiffs can settle with the remaining defendants for a small amount and force the settlor to pay the difference between the subsequent settlement and the guaranteed amount.[23]

In *Abbott Ford, Inc. v. Superior Court*, the California Supreme Court applied the *Tech-Bilt* good faith standard to a sliding scale agreement.[24] The court recognized the trouble with judicial valuation of these agreements.[25] It attempted to solve the problem by placing the initial burden of valuation on the settling parties.[26]

After *Abbott*, a nonsettling defendant can attack the parties' attributed value in one of two ways.[27] First, she can argue that the parties'

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cal?: An Analysis Under the Code of Professional Responsibility, 19 ARIZ. L. REV. 863 (1977).

[19] No California appellate court has ever held a sliding scale agreement to be "bad faith." Comment, *supra* note 17, at 229, 239; *see id.* at 236 (observing that "the probability of [the settlor] paying less than [the guaranteed] amount or even nothing is significant").

[20] *See* Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 878, 741 P.2d 124, 137, 239 Cal. Rptr. 626, 639 (1987) (stating that sliding scale agreements cause "considerable confusion").

[21] *See id.* (attributing confusion to the "contingent nature" of sliding scale agreements).

[22] *See, e.g., id.* at 882-83, 741 P.2d at 140, 239 Cal. Rptr. at 642 (quoting from the agreement, " '[plaintiffs] shall not settle all or any portion of this litigation with defendants Ford and Sears Roebuck for less than the amount of [their] guarant[eed recovery], *without the express written consent of [Abbott's insurer].*' (Italics added.)").

[23] *See id.* at 883, 741 P.2d at 140, 239 Cal. Rptr. at 642 (stating that settling defendant " 'has an obvious and legitimate interest in ensuring that the plaintiff diligently prosecutes its claims against remaining defendants' " (quoting Pollak, *Sliding Scale Recovery Agreements After Tech-Bilt*, 8 CIV. LITIG. REP. 121, 127 (1986))). *See generally* Comment, *supra* note 6, at 1008.

[24] *Abbott*, 43 Cal. 3d at 878, 741 P.2d at 137, 239 Cal. Rptr. at 639 (discussing the valuation of sliding scale agreements in order to determine good faith).

[25] *Id.*

[26] *See infra* notes 156 & 158 and accompanying text.

[27] *Abbott*, 43 Cal. 3d at 879, 741 P.2d at 138, 239 Cal. Rptr. at 640.

attributed value is outside the settlor's ballpark, and therefore, that the settlement is not in good faith.[28] Second, she can prove that the parties' attributed value is too low.[29]

Because the *Tech-Bilt* ballpark is so large, the first choice is doomed from the outset.[30] Thus, nonsettling defendants will argue that the settlement's value is greater than that which the parties themselves assigned.[31] Ironically, to resolve this dispute, courts will have to determine what release and relief from contribution is worth to the settling defendant.[32] Thus, the *Abbott* decision defeats its own objective of party valuation.[33] However, because parties will wish to avoid possibly adverse determinations, they will engage in meaningful valuation analysis.[34]

The *Abbott* court also acknowledged that veto provisions impede full settlement of litigation and may result in unnecessary trials.[35] The settling defendant has an incentive to veto almost any subsequent settlement between the plaintiff and the remaining defendants; if they settle she must make up the difference between the amount of the subsequent settlement and the guaranteed amount.[36] By forcing the remaining par-

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> Once the parties to the agreement have declared its value, a nonsettling defendant either (1) can accept that value and attempt to show that the settlement is not in good faith because the assigned value is not within the settling defendant's *Tech-Bilt* ballpark, or (2) can attempt to prove that the parties' assigned value is too low and that a greater reduction in plaintiff's claims against the remaining defendants is actually warranted.

Id.

[28] *Id.*

[29] *Id.*

[30] Nonsettling defendants face two obstacles. First, they must deal with the expansive nature of the ballpark. *See* Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499-500, 698 P.2d 158, 167, 213 Cal. Rptr. 256, 263-64 (1985) (noting that a lack of good faith will be shown only if the settlement is *so far "out of the ballpark"* as to defeat the statute's equitable objectives (emphasis added)). Second, nonsettling defendants must acknowledge that, due to the dynamic, *see* text accompanying *infra* notes 160-67, the settlors' valuation of their agreement is likely to be within the "ballpark."

[31] *See infra* note 173 and accompanying text.

[32] Chief Justice Bird anticipated this problem in her *Tech-Bilt* dissent. She predicted that the *Tech-Bilt* standard would "place an intolerable burden on . . . trial courts." *Tech-Bilt*, 38 Cal. 3d at 502, 698 P.2d at 169, 213 Cal. Rptr. at 265 (Bird, C.J., dissenting).

[33] *See infra* text accompanying notes 157-83.

[34] *Id.*

[35] *Abbott*, 43 Cal. 3d at 883, 741 P.2d at 140, 239 Cal. Rptr. at 642-43.

[36] *See* Pollak, *supra* note 23, at 127 (observing settling defendant's "obvious and legitimate interest in ensuring that the plaintiff diligently prosecutes its claims against the remaining defendants").

ties to trial, the settling defendant can hope that the remaining defendants will be subject to liability equal to or greater than the guaranteed amount. This would allow the settling defendant to escape without liability.[37] To address these problems, the *Abbott* court held that veto provisions can be used only to prevent the original settlor from ultimately bearing an unreasonably high proportion of the damages.[38]

Abbott was the first California Supreme Court case to examine sliding scale agreements and the good faith settlement requirement.[39] No California appellate court has ever held a sliding scale agreement to be bad faith.[40] After *Abbott*, courts will be even less likely to find a sliding scale agreement to be bad faith.[41]

This Comment proposes a liberal interpretation of *Abbott* consistent with that court's concern for fairness to nonsettling defendants. Part I of this Comment discusses common-law apportionment of liability between tortfeasors. Part II discusses California statutory developments. Part III discusses the development of good faith jurisprudence. Part IV discusses *Tech-Bilt*. Finally, Part V analyzes *Abbott* and proposes that courts liberally interpret the high end of a settlor's reasonable range of liability. Also, strictly limiting the use of veto provisions would force settling defendants to insist on a reasonable guaranteed amount.[42] Part V concludes that the *Abbott* decision will have two unintended effects. First, it will pressure settling parties to construct reasonable sliding scale agreements. Second, it will encourage settling parties to engage in meaningful valuation analysis of their agreements.

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[37] *See* Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 233, 234 (1980) (describing sliding scale agreements as "sub rosa deals in which the plaintiff obtains the tacit cooperation of the agreeing defense lawyer in foisting liability on the other defendants").

[38] *See Abbott*, 43 Cal. 3d at 883, 741 P.2d at 140, 239 Cal. Rptr. at 643 (requiring that "to be valid and enforceable, such a veto provision must, by its terms, be confined only to those subsequent settlements that will require the earlier settling defendant to bear more than its fair 'ballpark' share of damages").

[39] *Id.* at 863, 741 P.2d at 126, 239 Cal. Rptr. at 629.

[40] Comment, *supra* note 17, at 229, 239.

[41] *Abbott* firmly established that sliding scale agreements can be deemed "good faith" even without a noncontingent component. *See Abbott*, 43 Cal. 3d at 883, 741 P.2d at 140, 239 Cal. Rptr. at 643. Further, although *Abbott* restricted the use of veto provisions, an unreasonable veto provision does not taint the sliding scale agreement as a whole. *Id.* Rather, *Abbott* instructs courts to strike only the veto provision. *See id.*

[42] For example, suppose that a major tortfeasor enters into a sliding scale agreement, guaranteeing plaintiff $2 million. A judge could strike any veto provision if she felt that $2 million was not out of the ballpark. A plaintiff could settle with the remaining defendants for a relatively low amount and the original settlor would be liable for the difference. It seems reasonable to assume that such a development would affect the amount at which parties set the guaranteed amount.

I. COMMON-LAW APPORTIONMENT OF LIABILITY BETWEEN TORTFEASORS

A. Joint and Several Liability

Under California common law, persons committing a tort together were jointly and severally liable.[43] Each tortfeasor was liable for the entire damage, regardless of her degree of culpability.[44] The injured party could choose to sue all tortfeasors jointly, or one alone.[45] Further, once she obtained a judgment against multiple tortfeasors, the injured party could selectively enforce the judgment against any or all tortfeasors.[46] However, the common law limited her to only one recovery for her cause of action.[47] Release of one tortfeasor meant release of all.[48]

B. The Prohibition Against Contribution

The common-law rule forbidding contribution among joint tortfeasors exacerbated the potential unfairness inherent in selective suit and enforcement.[49] The rule encouraged collusive behavior because the plaintiff could decide against whom to enforce a judgment, with those defendants not selected escaping liability altogether.[50] As originally developed, the rule barred contribution among intentional tortfeasors.[51] However, courts later applied the rule to cases involving negligent tortfeasors.[52] By the twentieth century, California courts were denying

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[43] *See, e.g.*, Fowden v. Pacific Coast S.S. Co., 149 Cal. 151, 157, 86 P. 178, 180 (1906).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* Comment, *Joint Tortfeasors*, *supra* note 1, at 182.

[49] *See* W. PROSSER, *supra* note 1, at 341.

[50] *See* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 137 (1932) (noting that "frequent attempts to influence creditors in their selection of the unfortunate defendants will be inevitable," and in fact, "occur constantly in personal injury cases involving joint tortfeasors, though affirmative record of them seldom appears in the reported decisions").

[51] For a discussion of the rule's origin, see *supra* note 1; *see also* Comment, *Joint Tortfeasors*, *supra* note 1, at 180-81.

[52] Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiation*, 12 PAC. L.J. 121, 126 (1980).

claims for contribution or indemnity[53] among negligent tortfeasors as well.[54]

II. STATUTORY DEVELOPMENTS

A. Contribution Permitted

In 1957 California enacted legislation[55] designed to rectify the unfairness of the doctrine prohibiting contribution among joint tortfeasors.[56] Section 875 of the California Code of Civil Procedure established a right of contribution among judgment defendants.[57] A judgment defendant can enforce her right of contribution only after she: (a) pays the entire judgment; or (b) pays more than her pro rata share.[58] She can then demand from her codefendants the amount she paid in

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[53] Indemnity requires one to reimburse in full another who has discharged a common liability. Leflar, *supra* note 50, at 146. As such, Judge Learned Hand dubbed it "only an extreme form of contribution." Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951). Until recently, California only recognized the right to indemnity springing from an express contract. Molinari, *Tort Indemnity in California*, 8 SANTA CLARA LAW. 159, 159 (1968).

[54] *See* Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 139, 121 P. 379, 380-81 (1912) (stating that no right of contribution exists among joint tortfeasors); Forsythe v. Los Angeles Ry., 149 Cal. 569, 573, 87 P. 24, 28 (1906) (reiterating the "well-established general rule" of no contribution among joint tortfeasors in a negligence action); Fowden v. Pacific Coast S.S. Co., 149 Cal. 151, 157, 86 P. 178, 180 (1906) (holding no right of contribution between defendants held liable for negligent maintenance and operation of a steamship). One commentator notes two rationales. Leflar, *supra* note 50, at 132-34. First, the rule against contribution encourages careful behavior. *Id.* Second, courts are unwilling to aid persons whose conduct does not meet legal standards. *Id.* Leflar also notes two flaws in the rationales. First, it is unlikely that the no contribution rule makes careless people careful. *Id.* Second, no justification exists for refusing to adjudicate matters between tortfeasors, aside from saving courts time. *Id.*

[55] CAL. CIV. PROC. CODE §§ 875-880 (Deering 1973 & Supp. 1988).

[56] *Tech-Bilt*, 38 Cal. 3d at 495, 698 P.2d at 164, 213 Cal. Rptr. at 260 (stating that the legislation was designed to "lessen the harshness" of the common law prohibition against contribution (quoting American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 601, 578 P.2d 899, 914, 146 Cal. Rptr. 182, 197 (1978))).

[57] Section 875(a) provides that "[when] a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided." CAL. CIV. PROC. CODE § 875(a) (Deering 1973).

[58] *Id.* § 875(c) (Deering Supp. 1988). Section 876(a) mandates that the pro rata share of each tortfeasor judgment defendant shall be determined by dividing the entire judgment equally among them. *Id.* § 876(a).

excess of her pro rata share.[59] Section 875(d) expressly denies intentional tortfeasors a right of contribution.[60]

The 1957 tort contribution legislation also specifies that a good faith settlement[61] discharges the settling tortfeasor from all liability for contribution.[62] The amount of the settlement then reduces the claims against the remaining defendants.[63]

B. Pre-Trial Good Faith Settlement Hearings

While the 1957 legislation introduced the concept of "good faith settlements," it failed to define that concept.[64] Moreover, it established no judicial procedures for formally recognizing such settlements.[65] Finally, in 1980, the legislature decreed that courts should use pre-trial hearings to determine whether or not a settlement was the product of good faith.[66] However, the legislature again neglected to delineate the substantive elements of good faith settlements.[67]

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[59] *Id.* § 875(c). Section 877.6 permits a concurrent tortfeasor to seek partial indemnity from another concurrent tortfeasor on a comparative fault basis. *Id.* § 877.6.

[60] *Id.* § 875(d) (Deering 1973).

[61] *See supra* note 4.

[62] CAL. CIV. PROC. CODE § 877(b) (Deering Supp. 1988).

[63] *Id.* § 877(a); *see supra* note 5.

[64] *See* Comment, *supra* note 6, at 999 (noting that "[b]ecause the statute did not define the ['good faith'] concept specifically, the 'good faith' controversy was born").

[65] *See* Comment, *supra* note 17, at 231 (stating that "[p]rior to section 877.6, the legislature had not determined when the issue of 'good faith' was to be decided").

[66] Section 877.6(a) provides in part:

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

CAL. CIV. PROC. CODE § 877.6(a) (Deering Supp. 1988).

[67] *See* Comment, *supra* note 17, at 231 (stating that "[d]espite the legislature's clearly expressed goals of maximizing plaintiff recovery, equitable apportionment of liability, and encouragement of settlement, they failed to rank these goals or to define 'good faith' in section 877.6").

III. The Development of "Good Faith" Jurisprudence: Setting the Stage for *Tech-Bilt*

A. The Reasonable Range Test

In *River Garden Farms, Inc. v. Superior Court*,[68] the Third District Court of Appeals interpreted the good faith clause of section 877.[69] The court identified two goals of the 1957 tort contribution legislation — equitable sharing of costs among the parties at fault and encouragement of settlements.[70] It noted that these goals were equally important.[71]

To balance these dual objectives, the court held that settlements within a reasonable range of the settlor's proportionate liability should be upheld under the good faith clause.[72] Conversely, disproportionately low settlements could be held to be in bad faith.[73] Therefore, the decision furthered equitable apportionment of costs.[74] The court also encouraged settlement by holding that a later jury verdict was irrelevant in determining good faith.[75] Despite initial support,[76] the *River Garden*

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[68] 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

[69] *Id.* at 989, 103 Cal. Rptr. at 500 (stating that the court was interpreting the previously untested good faith clause of § 877).

[70] *Id.* at 993, 103 Cal. Rptr. at 503.

[71] *Id.* at 998, 103 Cal. Rptr. at 506 (stating that "[n]either statutory goal should be applied to defeat the other").

[72] *Id.* (using the phrase "reasonable range of the settlor's fair share"). This pronouncement served as a test and as a definition of good faith.

[73] *Id.*, 103 Cal. Rptr. at 507.

[74] *See* Comment, *supra* note 6, at 1003 (stating that "[t]he policy of equitable sharing of costs was satisfied only by a good faith analysis which considered the price of the settlement"). If a low settlement is held to be in good faith, then only that small sum is subtracted from the plaintiff's recovery against the remaining defendants. Nonsettling defendants then bear an unreasonable portion of the liability.

[75] River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (1972) (holding that "[i]f the good faith clause demands equitable sharing as fixed by a jury verdict which has not yet taken place, the parties cannot negotiate safely, [and] cannot accomplish settlement with a fair assurance of finality"); *see* Comment, *supra* note 11, at 831 (noting that "[t]he court reiterated that any settlement in good faith would be final, even if a jury later returns a verdict that would make the settlement figure appear disproportionate, thus appeasing the policy of encouragement of settlement").

[76] *See* Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975) (applying the *River Garden* reasonable range test in finding that bad faith could not be ruled out as a matter of law). The *Lareau* court followed *River Garden*'s premise that "[t]he price of a settlement is the prime badge of its good or bad faith." *Id.* at 795, 118 Cal. Rptr. at 844.

reasonable range test held sway for only a few years.

B. The Tortious Conduct Test

Stambaugh v. Superior Court[77] offered an alternative way to test the good faith nature of settlements under sections 877 and 877.6 — the tortious conduct test. The First District Court of Appeals held that generally, the amount of a settlement would not determine its good faith.[78] Rather, the court required a showing of collusion or bad faith on the part of the settlor to prove lack of good faith.[79] The court did not disapprove of *River Garden* and its limited progeny; it merely misread them.[80] *Stambaugh* focused on the factual settings in *River Garden* and *Lareau v. Southern Pacific Transportation Co.*[81] rather than on how those courts used their facts to fashion their holdings.[82] California appellate courts adhered to the tortious conduct test for eight years. Some did so grudgingly.[83]

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[77] 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

[78] *Id.* at 238, 132 Cal. Rptr. at 847-48.

[79] *Id.*, 132 Cal. Rptr. at 847.

[80] *See id.* (opining that the policy of favoring settlement dictated that settlements be deemed good faith "[e]xcept in rare cases of collusion or bad faith such as were claimed in *River Garden* . . . and *Lareau*"). Given the *River Garden* court's assertion, and the *Lareau* court's concurrence, that "[a]lthough many kinds of collusive injury are possible, the most obvious and frequent is that created by an unreasonably cheap settlement," *River Garden Farms*, 26 Cal. App. 3d at 996, 103 Cal. Rptr. at 505, it is difficult to perceive the *Stambaugh* court as intellectually honest. Under the *River Garden* and *Lareau* formulation, an unreasonably cheap settlement, aimed to injure the interests of an absent tortfeasor, is not only collusive, it is the epitome of collusive injury. *Id.*

[81] 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975).

[82] *Id.*

[83] *See* Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d 942, 946, 187 Cal. Rptr. 376, 379 (1982) (noting that courts have regularly upheld settlements found free of tortious conduct, irrespective of their fairness, and commenting that though debatably unfair, the question of public policy is solely a legislative matter); *see also* Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 890-91, 176 Cal. Rptr. 254, 260 (1981) (stating that the tortious conduct test is "unsatisfactory" and "fundamentally unfair," and urging the legislature to re-examine California Code of Civil Procedure § 877). The above language indicates that these courts felt compelled to apply the tortious conduct test. *See Tech-Bilt*, 38 Cal. 3d at 498, 698 P.2d at 166, 213 Cal. Rptr. at 263 (observing that "the [*Cardio*] court felt obliged to follow the definition of good faith which it had earlier articulated in *Dompeling*").

C. The Resurrection of the Reasonable Range Test

The Second District Court of Appeal rejected the tortious conduct test and resurrected the reasonable range test in *Torres v. Union Pacific Railroad*.[84] This court cited three reasons for rejecting the tortious conduct test.[85] First, the tortious conduct test promotes settlement with no regard for equitable apportionment by making patently unfair settlements impervious to attack by nonsettlors under section 877.[86] Second, earlier cases (*i.e.*, *River Garden* and *Lareau*) dealing with section 877 do not support the tortious conduct test.[87] These earlier cases hold that settling defendants owe a duty of good faith to nonsettlors similar to that owed by insurers to their insureds.[88] Finally, the court noted that if the legislature had intended to approve all nontortious settlements, it would have required that settlements merely be "lawful," not "good faith."[89]

Without the California Supreme Court's guidance, the Ninth Circuit had to define good faith settlement as it thought the supreme court would.[90] In *Commercial Union Insurance Co. v. Ford Motor Co.*,[91] the Ninth Circuit held that to further both policies behind section 877,[92] a "dismissal must represent a settlement which is a good faith determination of relative liabilities."[93] In a later case, the Ninth Circuit predicted that the California Supreme Court would reject the tortious conduct test as too restrictive.[94] Thus, it held that based on the goals of equity

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[84] 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). In *Torres*, the court referred to "[e]arlier and better-reasoned cases," *i.e.*, *River Garden* and *Lareau*, *id.* at 506, 203 Cal. Rptr. at 830, in holding 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." *Id.* at 509, 203 Cal. Rptr. at 832.

[85] *Id.* at 507, 203 Cal. Rptr. at 831.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See* Comment, *supra* note 11, at 830 n.38 (commenting that "[t]he Ninth Circuit, because the California Supreme Court had not yet spoken, was free to speculate as to how the California Supreme Court would resolve the issues presented").

[91] 640 F.2d 210 (9th Cir. 1981), *cert. denied*, 454 U.S. 858 (1983).

[92] See *supra* notes 71-72 and accompanying text.

[93] *Commercial Union*, 640 F.2d at 213.

[94] Owen v. United States, 713 F.2d 1461, 1465 (9th Cir. 1983) (stating that "the unduly restrictive [tortious conduct] test [was] but a temporary stop on the path of California law"). The tortious conduct test is "restrictive" since conduct short of collusion does not qualify as bad faith. *Id.* The reasonable range test is "expansive" since it bars unfairly low settlements. *Id.*

and promotion of settlements as enunciated in *River Garden*, *Commercial Union* authoritatively interpreted section 877.[95]

IV. *Tech-Bilt*: The Supreme Court Resolves The Good Faith Controversy

A. *Tortious Conduct Test Rejected*

In *Tech-Bilt*, the California Supreme Court substantiated the Ninth Circuit's prediction by rejecting the tortious conduct test.[96] It noted that prior to *American Motorcycle Association v. Superior Court*,[97] the tort contribution statutes applied only to joint tortfeasors against whom a judgment had been jointly rendered.[98] In *American Motorcycle*, the court held that a concurrent tortfeasor could seek partial indemnity from those concurrent tortfeasors who were not judgment defendants.[99]

The *Tech-Bilt* court's statutory construction can be stated as a syllogism. Section 877.6, which states that a good faith settlement bars claims for partial or comparative indemnity, codified *American Motorcycle*.[100] *American Motorcycle* cited *River Garden* to explain the meaning of good faith settlement under section 877.[101] Therefore, the *Tech-Bilt* court declared that in section 877.6 the legislature intended to codify good faith as defined in *American Motorcycle* and *River Garden*.[102]

B. *The* Tech-Bilt *Good Faith Standard*

According to *Tech-Bilt*, good faith has many meanings. A settlement must be within the reasonable range of a settlor's projected liability.[103] This requirement does not mean that showing that a settling defendant paid less than her fair share establishes a lack of good faith.[104] Such a rule would discourage settlements.[105]

The *Tech-Bilt* court also stated that the amount of the settlement is

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[95] *Id.*
[96] *Tech-Bilt*, 38 Cal. 3d at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263.
[97] 20 Cal. 3d 578, 601, 578 P.2d 899, 921, 146 Cal. Rptr. 182, 203 (1978).
[98] *Tech-Bilt*, 38 Cal. 3d at 495, 698 P.2d at 163, 213 Cal. Rptr. at 260.
[99] *American Motorcycle*, 20 Cal. 3d at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201.
[100] *Tech-Bilt*, 38 Cal. at 496, 698 P.2d at 164, 213 Cal. Rptr. at 261.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.
[104] *Id.*
[105] *Id.*

only one of several factors courts should consider in determining a challenged settlement's good faith.[106] In light of these factors, a settlement may appear greatly out of the ballpark.[107] Under these circumstances, a nonsettlor may introduce evidence to establish that a proposed settlement was not a good faith settlement within the terms of section 877.6.[108]

V. *Abbott Ford*: THE *Tech-Bilt* GOOD FAITH STANDARD AND SLIDING SCALE AGREEMENTS

This Part will review the facts of *Abbott* and discuss how the supreme court applied the *Tech-Bilt* standard to the sliding scale agreement in *Abbott*. It will discuss the *Abbott* court's analysis of the relationship between sliding scale agreements and the goals of promoting settlement and equitable apportionment of costs among parties at fault. Finally, it will argue that the court's decision to restrict veto provisions and to require the settling parties to value their own sliding scale provisions will have two unintended yet desirable consequences. The *Abbott* decision will pressure settling parties to construct reasonable sliding scale agreements and to engage in meaningful valuation analysis of their agreements.

In *Abbott*, Ramsey Sneed purchased a used 1979 Ford Econoline van with mag wheels from Abbott Ford, Inc.[109] On September 10, 1981, the left rear wheel came off while Sneed was driving.[110] The wheel crashed into the windshield of an oncoming 1965 Mercury station wagon driven by Phyllis Smith.[111] The windshield shattered and Smith suffered serious injuries, including the loss of her sight and sense of smell.[112]

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[106] *Id.* Other factors include

> a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, . . . the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement.

Id. at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263 (citation omitted).

[107] *Id.* at 499-500, 698 P.2d at 167, 213 Cal. Rptr. at 263.

[108] *Id.*

[109] *Abbott Ford*, 43 Cal. 3d at 864, 741 P.2d at 127, 239 Cal. Rptr. at 629.

[110] *Id.*

[111] *Id.*

[112] *Id.*

Smith[113] sued Sneed,[114] Abbott,[115] Ford Motor Company,[116] and Sears, Roebuck & Co.[117]

On March 14, 1984, Abbott, Ford, and Sears met to discuss settlement.[118] At the mandatory settlement conference two weeks later, Abbott announced that it had agreed to enter into a sliding scale agreement guaranteeing plaintiffs $3 million.[119] Abbott subsequently moved,

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[113] Mr. Smith sued the same defendants, alleging loss of consortium. *Id.* at 864 n.3, 741 P.2d at 127 n.3, 239 Cal. Rptr. at 629 n.3.

[114] *Id.* Smith alleged that Sneed negligently maintained and operated the van, and that he continued to drive the vehicle after hearing sounds indicating trouble. *Id.*

[115] *Id.* Smith sought recovery on both negligence and strict liability theories. *Id.* Abbott purchased the van and replaced the original wheels and tires with deep dish mag wheels and oversized tires despite a warning in the owner's manual regarding such action. *Id.* Abbott did not give Sneed the owner's manual or advise Sneed to periodically tighten the lug nuts on the after market wheel assemblies. *Id.*

[116] *Id.* Ford manufactured both vehicles involved in the accident. *Id.* at 865, 741 P.2d at 127, 239 Cal. Rptr. at 629. With respect to the van, Smith claimed strict liability and negligence, arguing that Ford could have foreseen that someone would ignore its warning. *Id.* With respect to the station wagon, Smith claimed that the windshield was defective. *Id.*

[117] *Id.* Sears serviced the van three months before the accident. *Id.* at 865, 741 P.2d at 127, 239 Cal. Rptr. at 629-30. Smith claimed that Sears either negligently replaced the wheels or negligently failed to inspect the lug nuts. *Id.*

[118] *Id.* at 866, 741 P.2d at 128, 239 Cal. Rptr. at 630. At a meeting twelve days before the settlement conference, counsel for Abbott stated that he believed $2.5 million was a reasonable settlement value for the case. *Id.* at 866-67, 741 P.2d at 128, 239 Cal. Rptr. at 630. Abbott was willing to pay seventy percent of the $2.5 million settlement. *Id.* at 867, 741 P.2d at 128, 239 Cal. Rptr. at 630. Counsel for Ford and Sears both believed that their clients' contribution should be far less than the remaining thirty percent. *Id.*

[119] *Id.* at 866, 741 P.2d at 128, 239 Cal. Rptr. at 630. The agreement had three primary provisions. *Id.* at 866, 741 P.2d at 128, 239 Cal. Rptr. at 630-31. First, Abbott's insurer guaranteed Phyllis Smith $2.9 million and her husband $100,000. *Id.* at 866-67, 741 P.2d at 128-29, 239 Cal. Rptr. at 631. Any amounts later recovered from Ford and Sears would directly reduce this guaranteed amount. *Id.* at 866, 741 P.2d at 128, 239 Cal. Rptr. at 631. Second, Abbott agreed to provide no-interest loans to plaintiffs and their attorneys to fund the litigation. *Id.* at 867, 741 P.2d at 129, 239 Cal. Rptr. at 631. If plaintiffs' actions were not terminated by July 1, 1987, Abbott's insurer agreed to provide the full $3 million in the form of a loan. *Id.* The loan payments were to serve as credits against the insurer's obligations under the guarantee provision. *Id.* Third, Abbott's insurer agreed to pay the full $3 million if the agreement was held to be invalid or not in good faith. *Id.* Plaintiffs in turn agreed to dismiss all of their claims against Abbott and to continue to prosecute their action against Ford and Sears. *Id.* at 867, 741 P.2d at 128-29, 239 Cal. Rptr. at 631. Plaintiffs also agreed not to settle with Ford or Sears for less than the guaranteed amount without the express written consent of Abbott's insurer. *Id.* at 867, 741 P.2d at 129, 239 Cal. Rptr. at 631. In their mandatory settlement conference statement, plaintiffs estimated their total

pursuant to section 877.6(a),[120] for an order declaring the agreement to be in good faith and dismissing all claims against Abbott for contribution.[121] The trial court denied the motion.[122] The court reasoned that sliding scale agreements amount to "gambling transaction[s]," not good faith settlements.[123] The appellate court issued an alternative writ declaring the settlement to be in good faith as a matter of law.[124]

Because the California Supreme Court had not yet decided *Tech-Bilt*, the court of appeal in *Abbott* applied the tortious conduct test.[125] The supreme court granted a hearing and retained the matter while it adjudicated *Tech-Bilt*.[126] It then remanded *Abbott* for consideration of the principles enunciated in *Tech-Bilt*.[127]

Tech-Bilt left two questions unresolved: (1) whether the good faith reasonable range standard applies to sliding scale agreements; and (2) if so, how courts should apply the standard.[128] On remand, the court of appeal held that the *Tech-Bilt* good faith reasonable range standard applied to sliding scale agreements.[129] It further held that the agreement in *Abbott* was a good faith settlement.[130] The California Supreme Court again granted review to consider these same issues.[131]

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damages at not less than $3 million. *Id.* at 866, 741 P.2d at 128, 239 Cal. Rptr. at 630. Prior to the agreement between plaintiffs and Abbott, both Ford and Sears declined to enter into similar agreements guaranteeing plaintiffs $1.5 million. *Id.*

[120] *Id.* Section 877.6(e) authorizes an appeal from a good faith settlement decision. CAL. CIV. PROC. CODE § 877.6(e) (Deering Supp. 1988).

[121] *Abbott*, 43 Cal. 3d at 867-68, 741 P.2d at 129, 239 Cal. Rptr. at 631. Ford and Sears opposed the motion, arguing that sliding scale agreements per se violate the good faith standard. *Id.* at 867, 741 P.2d at 129, 239 Cal. Rptr. at 631. They also argued that the settlement at issue was not in good faith because the settlement price was grossly disproportionate to Abbott's fair share of damages. *Id.*

[122] *Id.* at 868, 741 P.2d at 129, 239 Cal. Rptr. at 631.

[123] *Id.*, 741 P.2d at 129, 239 Cal. Rptr. at 631-32.

[124] *Id.* Section 877.6(e) authorizes an appeal from a good faith settlement decision. CAL. CIV. PROC. CODE § 877.6(e) (Deering Supp. 1988).

[125] *Abbott*, 43 Cal. 3d at 868, 741 P.2d at 129, 239 Cal. Rptr. at 632.

[126] *Id.*

[127] *Id.*

[128] Comment, *supra* note 6, at 1007.

[129] *Abbott*, 43 Cal. 3d at 868, 741 P.2d at 130, 239 Cal. Rptr. at 632.

[130] *Id.* For a discussion of the agreement, see *supra* note 118.

[131] *Id.*

A. The Tech-Bilt *Reasonable Range Standard of Good Faith Applies to Sliding Scale Agreements*

The threshold issue for the supreme court was whether the *Tech-Bilt* reasonable range standard of good faith applied to sliding scale agreements. The parties in *Abbott*, and the supreme court, treated this as a given.[132] The court noted that since sections 877 and 877.6 do not specifically exempt sliding scale agreements, the good faith requirement of these sections must apply.[133] This makes sense. The arguments for applying the good faith requirement to ordinary multiparty settlements apply with greater force to sliding scale agreements because the nonsettling party or parties could face total liability.[134] The court also noted that the legislative history of section 877.5, which requires the parties to inform the court of sliding scale agreements, contemplated that the *River Garden* good faith standard would apply to such agreements.[135] With this question discarded, the court next considered the crucial issue: how should the *Tech-Bilt* good faith standard apply to sliding scale agreements?[136]

B. How Tech-Bilt *Good Faith Reasonable Range Standard Applies to Sliding Scale Agreements*

In *Abbott* nonsettling defendants Ford and Sears asked the court to hold that sliding scale agreements can never meet the *Tech-Bilt* standard of good faith in settlement.[137] The court refused,[138] noting the difficulty of defining "sliding scale agreement."[139] The *Abbott* court con-

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[132] "Abbott has not challenged that conclusion [that the good faith standard articulated in *Tech-Bilt* applies to sliding scale agreements] here and, in any event, we agree with the Court of Appeal's conclusion on this point." *Id.* at 875, 741 P.2d at 134-35, 239 Cal. Rptr. at 637.

[133] *Id.*, 741 P.2d at 135, 239 Cal. Rptr. at 637.

[134] Comment, *supra* note 52, at 123.

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

[136] *Id.*

[137] *Id.* at 869, 741 P.2d at 131, 239 Cal. Rptr. at 633.

[138] "The majority of out-of-state decisions have, however, declined either to condemn or condone such agreements categorically and, for a number of reasons, we believe such a cautious approach to the problems posed by sliding scale agreements is appropriate." *Id.* at 870, 741 P.2d at 131, 239 Cal. Rptr. at 633 (citation omitted).

[139] One commentator solves the definitional problem by proposing that legislatures declare that agreements in which (1) the settling defendant must participate in the trial and (2) the settling defendant will benefit financially from a judgment against nonsettling defendants, are illegal and unenforceable. *See* Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779, 785 (1978). *But see* Comment, *The*

cluded that, due to variances in the shape, form, content, effect, and factual background among sliding scale agreements, a declaration of per se invalidity was overly broad.[140] The court next answered Ford and Sears' contention that sliding scale agreements invariably conflict with the twin goals of fair apportionment of cost and promotion of settlement.[141]

C. *Sliding Scale Agreements and the Goal of Fair Apportionment in Settlement*

The court cited two cases to demonstrate that sliding scale agreements do not invariably conflict with the goal of fair apportionment.[142] In *Dompeling v. Superior Court*[143] the parties' settlement required a $100,000 noncontingent payment and had a $10,000 sliding scale provision.[144] The *Dompeling* court held that any inequities caused by the sliding scale provision would be de minimus due to the amount of the sliding scale provision.[145] In *Rogers & Wells v. Superior Court*,[146] the agreement contained a sliding scale provision, but the settlor was a minor tortfeasor.[147] If the settling tortfeasor ultimately paid nothing it would not be as egregious as if a major tortfeasor escaped liability altogether.[148] The *Abbott* court used these cases to show that sliding scale

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Mary Carter Agreement — Solving the Problems of Collusive Settlements in Joint Tort Actions, 47 S. CAL. L. REV. 1393, 1409 (1974) (arguing that prohibiting sliding scale agreements as illegal per se would require defining sliding scale agreements either by their component parts, which could be evaded by careful drafting, or by the terms of the result produced, which is an area of disagreement). Another commentator suggests that sliding scale agreements be made illegal per se, and that the definition to be used should be that contained in California Civil Code § 877.5. Comment, *supra* note 17, at 247.

[140] *Abbott*, 43 Cal. 3d at 870-71, 741 P.2d at 131, 239 Cal. Rptr. at 633-34.

[141] *Id.* at 876, 741 P.2d at 135, 239 Cal. Rptr. at 637-38.

[142] *Id.*, 741 P.2d at 136, 239 Cal. Rptr. at 638. The two cases the court cited were Rogers & Wells v. Superior Court, 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985), and Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).

[143] 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).

[144] *Id.* at 802, 173 Cal. Rptr. at 40.

[145] *Id.* at 807, 173 Cal. Rptr. at 43 (observing that since the parties' settlement required a $100,000 noncontingent payment, and plaintiff's total settlement request was $325,000, it was not "unreasonably cheap" on its face).

[146] 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985).

[147] *Id.* at 553, 220 Cal. Rptr. at 772.

[148] *Id.* (discussing the settling defendant's small likelihood of liability). These cases illustrate the only instances when sliding scale agreements were equitable prior to *Abbott*. However, the *Abbott* court could have gone beyond merely citing *Dompeling* and *Rogers & Wells* for the proposition that sliding scale agreements can sometimes be

agreements can sometimes be equitable, and then proceeded to apply the reasonable range standard to these agreements.

The court announced that if a settlement is in the ballpark of the settlor's anticipated liability, and the amount collectible from nonsettlors is reduced by a commensurate amount, then this should satisfy the goal of fair apportionment.[149] The valuation helps determine whether the parties made a settlement in good faith and is the amount subtracted from the sum plaintiff can recover from nonsettling defendants.[150] The problem in applying the reasonable range standard to sliding scale agreements lies in valuing the settlement.[151]

Ford and Sears argued that the settlement's value should be the amount of any noncontingent payment.[152] Abbott argued that the settlement's value should be the guaranteed amount.[153] The court could also have valued the settlement at the amount of the loans advanced by Abbott.[154] The court also might have solved the valuation problem by requiring a minimum noncontingent component of the settlement that would be within the reasonable range of the settlor's liability.[155] Instead, the court placed the burden on the parties to the settlement to determine a valuation for their own agreement.[156]

The court's valuation method offers the advantage of administrative convenience. However, the court's contention that such a joint valuation

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equitable. The court could have held: (1) In interpreting the good faith standard neither statutory goal should be applied to the exclusion of the other; (2) there are only two instances when sliding scale agreements do not undermine the goal of fair apportionment — when the sliding scale component is a small portion of the settlement, or when the settlor is a minor tortfeasor; (3) therefore, sliding scale agreements violate the good faith in settlement requirement unless they fall within one of the two exceptions. Instead, the court strained to apply the reasonable range standard to sliding scale agreements.

[149] *Abbott Ford*, 43 Cal. 3d at 877, 741 P.2d at 136, 239 Cal. Rptr. at 638.

[150] *See id.*

[151] *See id.*

[152] *Id.* at 878, 741 P.2d at 137, 239 Cal. Rptr. at 639. For a discussion supporting this theory, see Comment, *supra* note 52, at 144-45 (arguing that lowest amount settling defendant might end up paying must be in the "ballpark").

[153] *Abbott*, 43 Cal. 3d at 878, 741 P.2d at 137, 239 Cal. Rptr. at 639.

[154] In rejecting this option, the court cited several decisions valuing settlements at the amount of loans: Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953); Cullen v. Atchison, T. & S.F. Ry., 211 Kan. 368, 507 P.2d 353 (1973); Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 537 P.2d 825 (1975). *Abbott*, 43 Cal. 3d at 878 n.21, 741 P.2d at 136-37 n.21, 239 Cal. Rptr. at 639 n.21.

[155] *See* Comment, *supra* note 6, at 1032-35, 1044.

[156] *Abbott*, 43 Cal. 3d at 879, 741 P.2d at 137, 239 Cal. Rptr. at 639-40. The court acknowledged that its source of inspiration was Comment, *supra* note 11, at 857. *Id.*

will generally be reasonable is questionable. The court observed that a sliding scale agreement's value lies somewhere between its two extremes.[157] Noting this, the court decided that the parties to the agreement should establish the agreement's monetary value.[158] The court relied on the parties' divergent interests to keep valuations "reasonable."[159] An evaluation of the parties' interests demonstrates that the court's reliance is misplaced.

The *Abbott* court said that a plaintiff would want a low valuation because her claims against remaining defendants will be reduced by only that small amount.[160] The court further opined that the defendant would want the valuation high enough for the settlement to be declared good faith.[161] Under this analysis, the plaintiff's incentive to argue for a low valuation is very strong, while the defendant's motivation to bargain for a high valuation is comparatively weak due to the ease of acquiring a good faith determination. This is only true, however, if the plaintiff cannot recover the offset amount from the settling defendant.

Assume that the plaintiff settles with a defendant using a sliding scale agreement with a guarantee figure of $3 million, and an attributed value of $1 million. Assume that the jury returns a judgment against the remaining defendants for $3 million. Section 877(a) requires that courts subtract that $1 million from the plaintiff's judgment against the defendants.[162] Plaintiffs want low settlement valuations to minimize the amount of this reduction — unless the settling defendant has to make up the difference.

Under *Abbott*'s construction of sliding scale agreements, the settling parties' valuation motives are actually the opposite of those attributed by the *Abbott* court. *Abbott* establishes that after trial the settling defendant owes the plaintiff the guaranteed amount less the judgment, reduced by the value of the settlement.[163] When this formula is applied

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[157] *Abbott*, 43 Cal. 3d at 878-79, 741 P.2d at 137, 239 Cal. Rptr. at 639.

[158] *Id.* at 879, 741 P.2d at 137, 239 Cal. Rptr. at 639-40 (holding that "the parties to such an agreement, since they are in the best position to place a monetary figure on its value, should have the burden of establishing the monetary value of the sliding scale agreement").

[159] *Id.*, 741 P.2d at 137, 239 Cal. Rptr. at 640.

[160] *Id.*

[161] *Id.*

[162] CAL. CIV. PROC. CODE § 877(a) (Deering Supp. 1988).

[163] *Abbott*, 43 Cal. 3d at 885 n.27, 741 P.2d at 142 n.27, 239 Cal. Rptr. at 644 n.27 (stating that "after trial, the obligation of the settling defendant to the plaintiff under the sliding scale agreement [equals] . . . the difference, if any, between the amount of total damages awarded against a nonsettling defendant, reduced by the valuation of the sliding scale agreement, and the guaranteed amount"). This formula is more easily

with constant guarantee and judgment amounts but with varying settlement valuations, two things become clear.[164] First, the plaintiff recovers the same amount when the settlement value is increased, but does so by collecting more from the original settlors and less from the judgment defendants.[165] Second, the defendant has a strong motivation to lobby for a low valuation, because she may bear a greater proportion of liability as the settlement valuation is increased.[166]

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understood when applied to a hypothetical with a series of variations. A sues B, C and D. A and B enter into a sliding scale agreement, with B guaranteeing A a recovery of $3 million dollars. This agreement is valued at $1 million dollars for purposes of determining good faith and reducing A's claims against C and D.

(1) Judgment against C and D of $4 million
$3 million guarantee
-$3 million ($4 million judgment - $1 million value)
B owes A zero

(2) Judgment against C and D of $3 million
$3 million guarantee
-$2 million ($3 million judgment - $1 million value)
B owes A $1 million

(3) Judgment against C and D of $1 million
$3 million guarantee
-$0 ($1 million judgment - $1 million value)
B owes A $ 3 million

(4) Judgment of no liability for C and D
$3 million guarantee
-zero judgment
B owes A $3 million

[164] Assume that the settlement valuation in the above hypothetical is $2 million instead of $1 million.

(1) $3 million guarantee
-$2 million ($4 million judgment - $2 million value)
B owes A $1 million instead of zero

(2) $3 million guarantee
-$1 million ($3 million judgment - $2 million value)
B owes A $2 million instead of $1 million

(3) $3 million guarantee
-$0 ($1 million judgment less than the value)
B owes A $3 million. Same result.

(4) $3 million guarantee
-zero judgment
B owes A $3 million. Same result.

[165] *See supra* note 163.

[166] *Id.*

The defendant's motivation to secure a low valuation, coupled with the plaintiff's ambivalence, will produce relatively low valuations. Therefore, nonsettling defendants will have to make up the difference.[167]

The court's plan does, however, provide nonsettling defendants with a venue in which to argue that a valuation is too low. Once the settling parties value their agreement, a nonsettling defendant can attack that agreement in one of two ways.[168] First, she can argue that the parties' attributed value falls outside the settlor's ballpark, and therefore, that the settlement is not in good faith.[169] Second, she can prove that the parties' attributed value is too low.[170]

One commentator suggests that nonsettling defendants would do better to select the second option.[171] A nonsettling defendant who accepts the parties' attributed value but who attacks the settlement as made in bad faith because it is not within the settling defendant's *Tech-Bilt* ballpark, will likely lose due to the ballpark's size.[172] Thus, nonsettling defendants will choose the safer route of attacking the parties' attributed value.[173] Ironically, this route will necessitate a judicial determination of the value of the sliding scale agreement[174] — the very undertaking which the court sought to avoid by adopting this method.

One solution to this problem would be to eliminate the second option. Nonsettling defendants could then argue only that, given the parties' valuation, the settlement must be deemed not in good faith. Justice Broussard argues for this approach in his concurrence in *Abbott*.[175]

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[167] Note that in *supra* notes 163-64 the nonsettling defendants benefit by a higher valuation.

[168] Once the parties to the agreement have declared its value, a nonsettling defendant either (1) can accept that value and attempt to show that the settlement is not in good faith because the assigned value is not within the settling defendant's *Tech-Bilt* ballpark, or (2) can attempt to prove that the parties' assigned value is too low and that a greater reduction in plaintiff's claims against the remaining defendant is actually warranted.

Abbott Ford, 43 Cal. 3d at 879, 741 P.2d at 138, 239 Cal. Rptr. at 640.

[169] *Id.*

[170] *Id.*

[171] *See* Comment, *supra* note 11, at 857.

[172] *See id.* (noting that "[t]his broader challenge is much more risky . . .").

[173] The choice is logical when one notes that "a 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability." *Abbott*, 43 Cal. 3d at 874, 741 P.2d at 134, 239 Cal. Rptr. at 637.

[174] *Id.* at 879 n.23, 741 P.2d at 138 n.23, 239 Cal. Rptr. at 640 n.23 (discussing how trial courts should assess the accuracy of sliding scale agreement valuations).

[175] *Id.* at 887, 741 P.2d at 143, 239 Cal. Rptr. at 646 (Broussard, J., concurring) (stating that he "would prefer to delete the second alternative . . .").

However, the "problem" of judicial valuation may not be in need of a cure.

In a sliding scale agreement, a settling defendant often lends the guaranteed amount to the plaintiff pending final resolution of the case.[176] These loans act as an "insurance policy," but the value of the policy to the plaintiff is hard to quantify.[177] However, what the settling defendant receives, namely release and immunity from the claims of the nonsettling tortfeasors, does not pose a significant valuation problem.[178] Assuming that the exchange is equal in value, we can focus on what the defendant receives in order to determine the value of the agreement to the plaintiff.[179]

However, having the settling parties set the value is no way to accurately determine what release and relief from contribution or indemnity is really worth to the settling defendant.[180] This requires an estimate of the plaintiff's total recovery and the settlor's proportionate liability, compared with the guaranteed amount and the likelihood that the guarantee will be reduced by recovery from nonsettling defendants.[181]

The supreme court's proposal will result in such estimates being made by courts, not by parties to the agreement. This result will occur because nonsettling defendants will exercise the second option, thus forcing the court to value the agreement.[182] This trend will force parties to sliding scale agreements to meet the challenge of nonsettling defendants by engaging in meaningful valuation analysis.[183]

D. The Anti-Settlement Effect of Veto Provisions

In *Abbott* the supreme court also analyzed the relationship between sliding scale agreements and the goal of promoting settlement. It noted that veto provisions pose the greatest impediment to full settlement of

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[176] *See id.* at 867, 741 P.2d at 129, 239 Cal. Rptr. at 631 (observing that "Abbott's insurer was obligated to pay plaintiffs and attorneys the full $3 million — in the form of a loan — by July 1, 1987, if plaintiffs' action had not been terminated by then").

[177] *Id.* at 878, 741 P.2d at 137, 239 Cal. Rptr. at 639 (observing that "the contingent nature of a sliding scale obligation has created considerable confusion as to the proper valuation of such an agreement").

[178] *Id.*

[179] *Id.* (arguing that "the exchange is of equivalents").

[180] *See supra* text accompanying notes 159-66.

[181] *Abbott*, 43 Cal. 3d at 888, 741 P.2d at 144, 239 Cal. Rptr. at 646 (Broussard, J., concurring).

[182] *See supra* notes 171-73.

[183] If the parties do not engage in meaningful valuation analysis, courts will invalidate their valuations, wasting time, money, and prospects of release from liability.

cases involving sliding scale agreements.[184] Settling defendants wish to ensure that plaintiffs will not settle with remaining defendants for a relatively small amount.[185] Such settlements would burden the settling defendant with liability at the high end of the sliding scale.[186] Therefore, the settling defendant will insist on a veto provision prohibiting the plaintiff from settling with any remaining defendants for an amount less than the guaranteed amount.[187] Such open-ended veto provisions impede full settlement of litigation and may result in unnecessary trials.[188] The solution proffered by the *Abbott* court holds that veto provisions can be used only to prevent the original settlor from ultimately bearing an unreasonably high proportion of the damages.[189]

If properly applied, the court's standard should render most veto provisions invalid. Recall that defendants must not settle for amounts grossly disproportionate to their fair liability, projected at the time of settlement.[190] However, defendants can pay less than their proportionate share of damages because it furthers the goal of settlement, and proportionality, though skewed, is not unduly sacrificed.[191] To further the goal of equitable apportionment, the courts should be equally liberal in defining the high end of settling defendants' reasonable liability.

The *Abbott* facts[192] illustrate that most veto provisions should be held

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[184] *Abbott*, 43 Cal. 3d at 883, 741 P.2d at 140, 239 Cal. Rptr. at 642-43.

[185] *See* Comment, *Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements: Unsettling Contributions to Conflict Resolution*, 1977 ARIZ. ST. L.J. 117, 121 n.22 (1977) (discussing the inverse relationship between the amount of a judgment against the remaining defendants, or a settlement with the remaining defendants, and the amount that the original settlor must ultimately pay).

[186] *Id.*

[187] *See Abbott*, 43 Cal. 3d at 882-83, 741 P.2d at 140, 239 Cal. Rptr. at 642. The court, quoting the agreement, stated that plaintiffs " 'shall not settle all or any portion of this litigation with defendants Ford and Sears Roebuck for less than the amount of [their] guarant[eed recovery], *without the express written consent of [Abbott's insurer].*' (Italics added.)" *Id.*

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

[189] *Id.*, 741 P.2d at 140, 239 Cal. Rptr. at 643 (requiring that "to be valid and enforceable, such a veto provision must, by its terms, be confined only to those subsequent settlements that will require the earlier settling defendant to bear more than its fair 'ballpark' share of damages").

[190] *Id.* at 874, 741 P.2d at 134, 239 Cal. Rptr. at 636 (stating that defendants must not settle for amounts "grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be" (quoting Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 509, 203 Cal. Rptr. 825, 834 (1984))).

[191] *Id.*

[192] *See supra* notes 109-23 and accompanying text.

invalid since they cannot be tailored narrowly enough to prevent only subsequent settlements that unfairly burden the settling defendant. Suppose the restriction on veto provisions was in effect when the *Abbott* parties designed their provision. Suppose further that to comply with the rule, they drafted the provision so that plaintiff could not settle with remaining defendants for an amount less than $2 million.[193] This veto provision should be held invalid. During settlement negotiations, Abbott agreed to bear seventy percent of its proposed $2.5 million settlement,[194] and the plaintiff's settlement conference memorandum designated Abbott as the principal tortfeasor.[195] Therefore, having to pay $1 million is within Abbott's ballpark.[196] Further, if courts define the high end of a settlor's reasonable liability as liberally as they do the low end, then any veto provision in *Abbott* would be invalid because $3 million is not a grossly disproportionate sum.[197]

By agreeing to a sliding scale agreement, a settling defendant realizes that she may have to pay an amount equal to the guaranteed figure.[198] Yet she gambles that the nonsettling defendants will be saddled with a greater proportion of liability than circumstances warrant, thus sliding the scale down.[199] The defendant benefits by reaching an agreement that is probably valued at the low end of her proportionate liability.[200] As a matter of fairness, courts should liberally interpret the "settlor's fair ballpark share of damages" when examining veto provisions.[201]

The *Abbott* court noted that the ballpark figure may not be the same

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[193] As opposed to an open-ended veto provision forbidding future settlement for less than the guaranteed amount, $3 million.

[194] *Abbott*, 43 Cal. 3d at 867, 741 P.2d at 128, 239 Cal. Rptr. at 630.

[195] *Id.* at 876 n.20, 741 P.2d at 135 n.20, 239 Cal. Rptr. at 638 n.20.

[196] If plaintiff settles with other defendants for $2 million, then by the terms of the guarantee provision, Abbott would be required to make up the difference up to the guarantee amount. Hence, $3 million - $2 million = $1 million.

[197] Abbott agreed to bear seventy percent of its proposed $2.5 million settlement. *See supra* note 194. The sum of $3 million is not "grossly disproportionate" to even Abbott's own offer — an offer made with its interests in mind.

[198] If a verdict of no liability is reached at trial, then the original settlor must pay the guaranteed amount. *See Abbott*, 43 Cal. 3d at 866, 741 P.2d at 128, 239 Cal. Rptr. at 631 (observing that "if, at the conclusion of the lawsuit, plaintiffs had not collected the guaranteed amounts from the remaining defendants, Abbott's insurer would pay the balance up to the guaranteed sum").

[199] *See* Bodine, *supra* note 37, at 234.

[200] *See supra* text accompanying notes 141-83.

[201] To extend the *Tech-Bilt* ballpark metaphor, if left field represents the low end of a settlor's "reasonable range" of liability, which courts recognize, then courts should recognize an equidistant right field, representing the high end of a settlor's "reasonable range" of liability.

as the value of the sliding scale agreement.[202] Settlements can be deemed to be in good faith even if at the low end of the settlor's reasonable range of liability.[203] The only valid purpose of a veto provision is to prevent the original settlor from ultimately bearing an unreasonably high amount of the damages.[204] Otherwise, the settling defendant can veto any settlement in hopes of a judgment high enough for her to escape paying even her proportionate share of liability.[205] Therefore, the acceptable veto amount should invariably be lower than the relatively low value attributed to the agreement by the parties.[206]

Under the proposed liberal interpretation of the high end of a settlor's reasonable range of liability, courts will often strike veto provisions in cases in which the settling defendant is the major tortfeasor. The plaintiff can then settle with the remaining defendants for a relatively small amount, thus forcing the original settlor to pay a sum close to the guaranteed amount. However, courts should ignore settling defendants' arguments that the guaranteed amount is unreasonably high. After all, the settling parties drafted the agreement. The high guaranteed amount is the price the defendant paid for full release and relief from contribution. The defendant gambles when she enters into a sliding scale agreement. She either believes that it is unlikely that she will have to pay an amount near the high end of the scale (because of joint and several liability), or she calculates that the high end of the scale is necessary to deem the settlement reasonable. Courts should not aid defendants who settle at the expense of other defendants.[207]

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[202] *Abbott*, 43 Cal. 3d at 883 n.25, 741 P.2d at 140 n.25, 239 Cal. Rptr. at 643 n.25.

[203] *See id.* at 874, 741 P.2d at 134, 239 Cal. Rptr. at 637 (stating that " 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability"); *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (showing that defendant paid less than his theoretical fair share does not, in and of itself, prove bad faith).

[204] *Abbott*, 43 Cal. 3d at 883, 741 P.2d at 140, 239 Cal. Rptr. at 643 (requiring that "to be valid and enforceable, such a veto provision, must by its terms, be confined only to those subsequent settlements that will require the earlier settling defendant to bear more than its fair 'ballpark' share of damages").

[205] *See* Bodine, *supra* note 37, at 234.

[206] Picture a personal injury case with a value of $3 million. The primary tortfeasor may enter into a sliding scale agreement valued at $1.5 million. This tortfeasor's projected liability might be $2.2 million, but because of the size of the *Tech-Bilt* ballpark, the valuation might be reasonable. A veto provision that prohibits the plaintiff from settling with remaining defendants for less than $1.5 million would be unfair (because $1.5 million is not clearly out of the ballpark). The acceptable veto amount would be far higher, or there might not be an acceptable veto amount, because settling defendant's projected liability is $2.2 million.

[207] *See Abbott*, 43 Cal. 3d at 877, 741 P.2d at 136, 239 Cal. Rptr. at 638 (opining

CONCLUSION

The California Supreme Court's holding in *Abbott* will pressure settling parties to construct reasonable sliding scale agreements and to engage in meaningful valuation analysis of those agreements. If courts interpret the *Abbott* limitation on veto provisions as liberally as suggested, then settling defendants, faced with the prospect of liability equal to the guaranteed amount, will insist on a reasonable guaranteed amount. The proposed liberal interpretation is consistent with the *Abbott* court's primary concern for fairness to nonsettling defendants.[208] If nonsettling defendants succeed in proving that settling parties' valuations are too low, this will also pressure the settling parties to make a good faith effort to establish a reasonable value for their sliding scale agreements. The *Abbott* decision may thus result in increased fairness to nonsettling defendants. This result would make *Abbott* an equitable chapter in the development of California's good faith settlement requirement.

J. Daniel Holsenback

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that "the ultimate analysis of the effect of the sliding scale agreement resolves itself to a consideration of fairness to the nonsettling defendants").

[208] *Id.*