# CALIFORNIA'S SLIDING SCALE SETTLEMENT AGREEMENTS—FINALITY INSTEAD OF FAIRNESS

*In any civil tort action, a defendant that chooses to settle with the plaintiff must do so in "good faith." The "good faith" requirement is intended to avoid collusion between the settling parties to the detriment of the non-settling defendants. The California Supreme Court's recent decision in* Tech-Bilt v. Woodward-Clyde *went further, requiring more than mere non-collusion for a settlement to be in "good faith." Stressing economic fairness toward all non-settling defendants, the court required that a settlement bear some relation to the settling defendant's potential liability. This Comment examines sliding scale agreements in light of* Tech-Bilt. *Despite unfairness to non-settling defendants these agreements continue to be used, contrary to the policy objectives delineated in* Tech-Bilt. *The Comment concludes with proposals for alleviating these inequities.*

## INTRODUCTION

"When profit is involved, the ingenuity of man spawns limitless varieties of unfairness."[1]

During the daylight hours of November 21, 1977, Aloma Anderson was driving her International Harvester truck at normal speeds on a California highway. After entering a curve, the truck failed to make the turn and crashed into a steep embankment. No evidence existed of her failure to operate the truck safely. Aloma was blinded and received other serious injuries that kept her from testifying at trial.[2]

1. River Garden Farms v. Superior Ct., 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (1972).

2. Anderson v. International Harvester, 165 Cal. App. 3d 100, 105, 211 Cal. Rptr. 253, 256 (1985) (decertified). The California Supreme Court denied a hearing in May 1985 and decertified the opinion of the lower court. This case, therefore, is not authority for any propositions presented in the case. The facts of the case are used for

Experts disclosed that the steering wheel on the truck "locked" when a loose screw from the turn signal assembly lodged in the steering column. General Motors (GM) designed, manufactured, and assembled the steering column. International Harvester (IH) purchased the steering column from GM and attached the turn signal assembly to it.[3]

Aloma Anderson brought suit against both GM and IH. Prior to trial, IH entered into a settlement agreement with the plaintiff wherein IH guaranteed the plaintiff a $900,000 recovery in her suit against GM. If the judgment was less than $900,000, IH would pay the difference between $900,000 and the amount of the judgment. If the plaintiff received a judgment against GM for $900,000 or more, IH would pay the plaintiff nothing. In return for this guarantee, the plaintiff relieved IH from further liability, although IH remained a defendant in the suit. This type of arrangement is known as a sliding scale agreement.[4]

Prior to trial, the court determined the settlement was made in "good faith." Under California law,[5] a "good faith" determination protects a settling tortfeasor in two ways. First, the settling tortfeasor's liability is limited to the settlement amount.[6] Second, the settling tortfeasor is protected against claims for contribution or indemnity by non-settling tortfeasors.[7] The intent of such protective legislation is to encourage settlement.[8]

The jury rendered a general verdict jointly and severally against GM and IH for $1.75 million. Because the law immunizes the settling tortfeasor, GM was obligated to pay the entire amount of the

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illustrative purposes only.

3. *Id.*

4. Sliding scale agreements are known in other states as Mary Carter agreements, Gallagher covenants, or guaranteed verdict agreements. *See generally* Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 232 (1980).

5. CAL. CIV. PROC. CODE §§ 875-880 (West 1980).

6. CAL. CIV. PROC. CODE § 877(b) (West 1980). Section 877(b) provides that the settlement "shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasor."

7. The common law doctrine of "contribution" requires all joint tortfeasors to contribute in proportion to their respective liability. For example, if there are three joint tortfeasors in a case, each must contribute one third of the judgment. "Indemnity" requires full reimbursement of a judgment paid by one from another who was actually responsible for the injury. The tortfeasor who has paid the judgment in full has a claim for contribution or indemnity against other joint tortfeasors in the case. The term "tortfeasor" as used in this Comment refers to more than one tortfeasor acting *in concert* to cause injury to the plaintiff, and to "concurrent tortfeasors," who, though acting independently, caused a single injury to the plaintiff. For simplicity, the examples in this Comment utilize two tortfeasors, the settling defendant and the non-settling defendant. However, the same principles apply to cases where more than two joint tortfeasors are involved.

8. American Motorcycle Ass'n v. Superior Ct., 20 Cal. 3d 578, 603, 578 P.2d 899, 915, 146 Cal. Rptr. 182, 198 (1978).

judgment under the principle of joint and several liability. IH, a culpable defendant capable of paying its fair share of the judgment, paid nothing. IH's counsel had structured a settlement that would pass the court's "good faith" test, yet, with substantial certainty, allow IH to escape liability.

Recently, the California Supreme Court in *Tech-Bilt Inc. v. Woodward-Clyde*[9] revised the standard used to determine "good faith" in settlements. Before *Tech-Bilt*, "good faith" meant simply that there was no collusion, fraud, or other "tortious conduct" between the settling tortfeasor and the plaintiff, intended to undermine the interests of any non-settling tortfeasor.[10] Under *Tech-Bilt*, the court now requires the settlement amount to be "in the ball park" of what the settling joint tortfeasor would expect to pay if adjudged at trial.[11] This revision was the court's attempt to minimize the unjust impact on non-settling tortfeasors where one of several joint tortfeasors "settle out" of the case.[12] *Tech-Bilt* established a duty of economic fairness to the non-settling tortfeasor. It did not, however, directly address the use of sliding scale settlement agreements.[13] The settlement contested in *Tech-Bilt* was an "unconditional settlement"[14] whereby the settling tortfeasor paid an unconditional lump sum to the plaintiff, rather than, as in a sliding scale agreement, merely guaranteeing a recovery against other non-settling tortfeasors.

Confusion and unfairness remains where sliding scale agreements are used. To date, no California court of appeal has found a sliding scale agreement to be in "bad faith."[15] Indeed, the standard of "good faith" applied to sliding scale agreements has yet to be clearly articulated or identified. This Comment examines the history of California's "good faith" settlement law and the sliding scale agreement. It suggests that the California courts apply the standard established in *Tech-Bilt* to sliding scale settlement agreements. In

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9. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).
10. *Id.* at 498, 698 P.2d at 165, 213 Cal. Rptr. at 262.
11. *Id.* at 499, 698 P.2d at 167, 213 Cal. Rptr. at 264.
12. *Id.* at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263.
13. The settlement in issue in *Tech-Bilt* was not a sliding scale agreement, but a dismissal for cost. *See infra* text accompanying notes 36 & 39.
14. A conventional "unconditional" settlement is the more common variety of settlement in which the settling tortfeasor agrees to pay the plaintiff a specified amount with no conditions attached which would vary the amount specified. This conventional "unconditional" settlement is referred to throughout this Comment as a conventional settlement.
15. *See infra* text accompanying note 60.

addition, the Comment analyzes the goals and policies underlying settlements by joint tortfeasors, and shows the minimal value of sliding scale agreements in our legal system. Finally, legislative recommendations are proposed to maximize economic fairness to non-settling tortfeasors while encouraging equitable settlements.

## The History of "Good Faith" Settlements in California

### *Goals of the Legislature*

In 1957, the California legislature passed legislation governing indemnity and contribution in tort law.[16] Three goals were achieved by this legislation. First, the legislature maintained their policy of maximizing recovery to the plaintiff by retaining the concept of joint and several liability.[17] Second, greater fairness to joint tortfeasors by equitable apportionment of liability was accomplished by removing the punitive effect of the common law "no contribution" rule among joint tortfeasors.[18] Third, the policy of promoting settlements was established by granting immunity to joint tortfeasors who settle in "good faith."[19] Section 877 of the California Code of Civil Procedure provides that a settling tortfeasor is immune from any claim for contribution from another joint tortfeasor if he settles in "good faith." The California Supreme Court later extended this immunity to partial indemnity.[20] Section 877 motivates plaintiffs to settle; it guarantees the plaintiff some recovery through the settlement, while reducing any judgment received by the plaintiff against a non-settling tortfeasor only by the amount actually received in settlement, rather than an amount based on the proportionate fault of the settling tortfeasor.[21]

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16. Cal. Civ. Proc. Code §§ 875-880 (West 1980).

17. Cal. Civ. Proc. Code § 875(g) (West 1980). Section 875(g) provides: "This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor."

18. *Tech-Bilt*, 38 Cal. 3d at 494, 698 P.2d at 162, 213 Cal. Rptr. at 259.

19. Cal. Civ. Proc. Code § 877 (West 1980). Section 877 provides:

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

20. *American Motorcycle*, 20 Cal. 3d at 578, 578 P.2d at 899, 146 Cal. Rptr. at 182.

21. As an example, the plaintiff is injured by joint tortfeasors *D1*, who is 70% at fault, and *D2* who is 30% at fault. If the plaintiff settles with *D2* for $10,000 and receives a subsequent judgment against *D1* for $100,000, the plaintiff collects $90,000 from *D1*. The judgment is reduced by the amount of the settlement regardless of fault.

In 1980, the legislature added section 877.6,[22] which provided for a pre-trial hearing to determine whether a settlement was made in "good faith." This section further promotes settlement by "finalizing" the settlement, granting to the settling tortfeasor full immunity from further liability. Prior to section 877.6, the legislature had not determined when the issue of "good faith" was to be decided. Consequently, a settling tortfeasor had been forced to participate in the entire litigation process, even after settling, in case the settlement was later overturned by the court.[23]

Despite 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. Hence both of these issues were left to the discretion of the courts. Absent an express standard by which courts could determine "good faith" in settlement agreements, it was no surprise that "good faith" determinations demonstrated little consistency.

### *Interpretation of "Good Faith" by the Courts*

In identifying and applying a standard of "good faith," courts were inconsistent in incorporating the three legislative goals.[24] The courts have always emphasized maximizing plaintiff recovery as the primary purpose of tort law.[25] However, the remaining two goals,

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However, if proportional fault were to be considered, the plaintiff would only collect $70,000 from *D1* (70% of the $100,000 judgment).

22. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1984). Section 877.6 provides, in pertinent part:

> (a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors shall be entitled to a hearing on the issue of the good faith of the settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors . . . .
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> (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.
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> . . . .
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> (d) The party asserting the lack of good faith shall have the burden of proof on that issue.

23. Consider this example: *D1* and *D2* are joint tortfeasors. *D1* settles with the plaintiff prior to trial. *D1*, to further protect his interest, must remain in the case even though he has settled. If the trial court later overturns the settlement as a "bad faith" settlement, *D2* would have an indemnity claim against *D1* for *D1*'s share of the judgment based on fault percentage. Thus *D1* still must defend to ensure the judgment is as low as possible so that any potential indemnity claim would also be as low as possible.

24. *See supra* text accompanying notes 17-19.

25. *See, e.g.*, Roberts, *The "Good Faith" Settlement: An Accommodation of*

encouraging settlement and equitably apportioning liability, tend to oppose each other. Encouraging settlement by granting immunity to the settling tortfeasor happens at the expense of the non-settling tortfeasor who must then pay the full amount of judgment without indemnity from the settling joint tortfeasor. Reflecting this irony, two tests to determine "good faith" emerged from the courts; the "reasonable range" test, recognizing the goal of equitable apportionment of liability,[26] and the "tortious conduct" test, favoring settlement promotion.[27]

Early decisions, using the "reasonable range" test, demonstrated the courts' attempt to balance the two competing goals of equitably apportioning liability and encouraging settlement. In *River Garden Farms v. Superior Court*,[28] a 1972 decision, the court warned of the potential for harsh inequities in our joint tortfeasor settlement cases.[29] The *River Garden Farms* court avoided a narrow definition of a "good faith" settlement, perhaps to prevent the "ingenuity of man"[30] from circumventing the duty of fairness intended by the courts. The *River Garden Farms* court ranked the goal of equitable apportionment of liability equally with encouragement of settlement by requiring that the settlement not be "so poorly related to the value of the case as to impose a potentially disproportionate cost on the [non-settling] defendant."[31] This standard became known as the "reasonable range" test.

Other circuit courts refused to follow the *River Garden Farms* "reasonable range" test, adopting instead a "tortious conduct" test to determine the "good faith" of a settlement.[32] Under the "tortious conduct" test, barring evidence of tortious or wrongful conduct intended to injure the interests of non-settling tortfeasors, the settling parties were free to further their own interests.[33] The amount of the settlement was irrelevant. As a result of the "tortious conduct" test, the goal of fairness to the non-settling defendant and equitable apportionment of liability fell by the wayside. Due, perhaps, to overcrowded court dockets, criticism of growing legal costs, and the ease with which the "tortious conduct" test could be administered, settlement promotion became the primary goal. The lower courts, how-

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*Competing Goals*, 17 LOYOLA L.A. L. REV. 841, 883 (1984).

26. *See infra* text accompanying note 31.
27. *See infra* text accompanying note 33.
28. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).
29. *See supra* text accompanying note 1.
30. *Id.*
31. *River Garden Farms*, 26 Cal. App. 3d at 998, 103 Cal. Rptr. at 506.
32. *See, e.g.*, Stambaugh v. Superior Ct., 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); Fisher v. Superior Ct., 103 Cal. App. 3d 433, 163 Cal. Rptr. 47 (1980); Dompeling v. Superior Ct., 177 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).
33. *Dompeling*, 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 45.

ever, observing the blatantly unfair settlements that often resulted, were uncomfortable applying the "tortious conduct" test.[34] Further, they erroneously believed they were compelled to apply the "tortious conduct" test until either the legislature or the California Supreme Court decided otherwise.[35]

Tech-Bilt v. Woodward-Clyde—*The California Supreme Court Redefines "Good Faith"*

In 1985, the California Supreme Court finally rejected the "tortious conduct" test, placing the goal of fairness to non-settling tortfeasors on equal footing with the goal of settlement promotion. In *Tech-Bilt v. Woodward-Clyde*,[36] the plaintiff, owner of a residential property, sued Tech-Bilt, the developer, and Woodward-Clyde, the soil engineer, to recover damages for structural defects in the residence. The plaintiff could not proceed against Woodward-Clyde because the statute of limitations had run. Instead of moving for summary judgment, Woodward-Clyde's attorney convinced plaintiff's counsel to settle with Woodward-Clyde. The plaintiff dismissed Woodward-Clyde, with prejudice, in exchange for a waiver of court costs of approximately fifty-five dollars.

Tech-Bilt had a cause of action not barred by the statute of limitations, against Woodward-Clyde for partial indemnity. Because of the settlement, however, Tech-Bilt's cross-complaint against Woodward-Clyde was dismissed. The appellate court upheld this dismissal, finding that since no tortious conduct was involved, the settlement between Woodward-Clyde and the plaintiff was in "good faith." Had Woodward-Clyde obtained a summary judgment against the plaintiff based upon the statute of limitations defense, Tech-Bilt's cross-complaint for indemnity would have proceeded; no "good faith" settlement would have existed to invoke the protection clauses of section 877. Applying the "tortious conduct" test to section 877 allowed the plaintiff to manipulate the non-settling tortfeasor's right to partial indemnity.

Recognizing the inequities caused by the "tortious conduct" test, the California Supreme Court reversed the appellate court and

34. Cardio Systems v. Superior Ct., 122 Cal. App. 3d 880, 891, 176 Cal. Rptr. 254, 260 (1981); Burlington N. R.R. v. Superior Ct., 137 Cal. App. 3d at 946, 187 Cal. Rptr. 376, 379 (1982).

35. *Cardio Systems*, 122 Cal. App. 3d at 891, 176 Cal. Rptr. at 260; *Burlington*, 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 379.

36. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

adopted a version of the *River Garden Farms* "reasonable range" test. The Supreme Court decided the amount of the settlement *was* relevant in determining "good faith," noting:

> [T]he intent and policies underlying sec. 877.6 require that a number of factors be taken into account including a rough approximation of the plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, 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 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 non-settling defendants.[37]

Under *Tech-Bilt*, the duty of economic fairness to non-settling tortfeasors is finally on equal footing with encouraging settlement where "unconditional" settlements are concerned. A tortfeasor, choosing to go to trial, may be confident that liability will be equitably distributed among all tortfeasors capable of paying their fair share.[38] *Tech-Bilt*, however, did not directly address the issue of the sliding scale settlement agreement.[39]

In 1977, the legislature enacted section 877.5,[40] which specifically

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37. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

38. A tortfeasor certainly has a right to go to trial, especially if he or she believes they are not culpable. Yet, prior to *Tech-Bilt*, many tortfeasors could conceivably be coerced into forgoing that right and settling in fear that they would be saddled with a large judgment because the most culpable of the tortfeasors had settled for a disproportionately low amount.

39. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264. Although the settlement in *Tech-Bilt* was not a sliding scale agreement, the court, in a footnote, stated its disapproval of *Dompeling* and *Burlington*. Both of these cases involved sliding scale agreements. *Id.* n.7.

40. CAL. CIV. PROC. CODE § 877.5 (West 1980). Section 877.5 provides:

> (a) Where an agreement or covenant is made which provides for a sliding scale recovery agreement between one or more, but not all, alleged defendant tortfeasors and the plaintiff or plaintiffs:
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> (1) The parties entering into any such agreement or covenant shall promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions; and
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> (2) If the action is tried before a jury, and a defendant party to the agreement is a witness, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that such a disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.
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> The jury disclosure herein required shall be no more than necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.
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> (b) As used in this section a "sliding scale recovery agreement" means an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, where the agreement limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants. This includes, but is not limited to, agreements within the scope of Section 877, and agreements in the form of a

addressed the use of sliding scale agreements. The *Tech-Bilt* decision, which applies the "reasonable range" test to unconditional settlements, does not eliminate the inequities found in the use of sliding scale agreements. A legislative act is necessary to insure the elimination of these inequities. The remainder of this Comment addresses sliding scale agreements, the unfairness that results to non-settling tortfeasors, and suggests proposals to the legislature to abolish these inequities.

## SLIDING SCALE AGREEMENTS

### *Description*

Sliding scale settlement agreements limit the settling tortfeasor's liability to a guaranteed amount. What the tortfeasor ultimately pays depends upon the amount the plaintiff recovers from non-settling tortfeasors at trial. For example, where the settling tortfeasor guarantees the plaintiff a one million dollar recovery, and the plaintiff receives a $750,000 judgment, the settling tortfeasor must pay the plaintiff the $250,000 difference to fulfill the guarantee of one million dollars. If the plaintiff receives a judgment of one million dollars or greater, the settling tortfeasor pays nothing, regardless of his degree of fault.

If the court accepts the settlement as one made in "good faith," the settling tortfeasor receives immunity from the non-settling tortfeasor's claim for indemnity under section 877.6. The entire judgment must be paid by the non-settling tortfeasor. Other inequitable provisions typically found in sliding scale agreements are those which prohibit the plaintiff from settling with other tortfeasors,[41] or require the plaintiff to appeal a case if the judgment is less than the guaranteed amount.[42] Some provide for loans from the settling tortfeasor to the plaintiff, to be repaid from the subsequent judgment,[43] and allow the settling tortfeasor to remain a party to the

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loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant.

41. *Burlington*, 137 Cal. App. 3d at 942, 187 Cal. Rptr. at 378.

42. Abbott Ford v. Superior Ct., 166 Cal. App. 3d 280, 212 Cal. Rptr. 389, *h'g granted, cause retransferred for reconsideration in light of Tech-Bilt*, 701 P.2d 1172, 215 Cal. Rptr. 854, *aff'd*, 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *h'g granted*, No. 85-181 (Dec. 19, 1985). For a discussion of this case and its subsequent history, see *infra* note 71 and accompanying text.

43. *Abbot Ford*, 166 Cal. App. 3d at 280, 212 Cal. Rptr. at 389.

litigation.[44] The unfairness of such agreements is obviously increased when the settling tortfeasor's liability exceeds that of non-settling tortfeasors. The ultimate effect of such an agreement is to give the plaintiff and settling tortfeasor substantial power to manipulate joint and several liability, at the expense of non-settling tortfeasors.

*The Development of Sliding Scale Agreements*

Sliding scale agreements became popular across the country in the early 1970's. The reason for their popularity is obvious in light of the benefits to the plaintiff and the settling tortfeasor. The plaintiff is guaranteed a recovery, and has nothing to lose by proceeding against non-settling tortfeasors. Loans to the plaintiff by the settling tortfeasor do not "offset" the potential liability of non-settling tortfeasors; moreover, they help finance the plaintiff's case. The adversarial relationship between the plaintiff and the settling tortfeasor vanishes, allowing the plaintiff to concentrate on the case against the non-settling tortfeasors.[45]

Benefits to the settling tortfeasor are equally attractive. The settling tortfeasor joins forces with the plaintiff against the non-settling tortfeasor. This increases the probability of a judgment in excess of the guaranteed amount.[46] The settling tortfeasor also minimizes his own exposure by guaranteeing a specific amount; the probability of paying less than that amount or even nothing is significant. Moreover, the settling tortfeasor eliminates liability for contribution or indemnity. Consequently, the sliding scale agreement is most attractive to the most blameworthy of joint tortfeasors.[47]

In 1977, the California legislature, recognizing the potential for collusion between the plaintiff and the settling tortfeasor, enacted section 877.5 to set guidelines for the use of sliding scale agreements.[48] Section 877.5 requires that the court be informed of any sliding scale agreement.[49] This disclosure is intended to eliminate collusion between the plaintiff and a settling tortfeasor. The court then has the discretion to disclose elements of the agreement to the jury. This serves to make the jury aware of the potential for bias in the settling tortfeasor's testimony. The amount of the guarantee,

44. Anderson v. International Harvester, 165 Cal. App. 3d 100, 106, 211 Cal. Rptr. 253, 256 (1985) (decertified). *See supra* note 2.

45. Wesierski, *Mary Carter Agreements and Good Faith Settlements—Are They Both Possible in California?*, 48 INS. COUNSEL J. 639 (1981).

46. Thornton & Wick, *Loan Receipt Agreements; Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, 43 INS. COUNS. J. 226, 228 (1976).

47. *Id.*

48. Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiation*, 12 PAC. L.J. 121, 123 (1980).

49. CAL. CIV. PROC. CODE § 877.5(a)(1) (West 1980). *See supra* note 40.

however, cannot be disclosed to the jury.[50]

Despite these precautions, the settling tortfeasor enjoys a tremendous advantage. The prejudice which section 877.5 attempts to eliminate can be circumvented by the settling tortfeasor remaining in the case. Counsel for the settling tortfeasor may aid in picking a biased jury, or present opening and closing statements which will prejudice the non-settling tortfeasor's defense. The settling tortfeasor's counsel has the ability to cross-examine and lead friendly witnesses.[51] The settling tortfeasor may abandon defenses asserted earlier, removing from the jury's consideration issues potentially adverse to the plaintiff's case. Such tactics help insure a larger verdict[52] —the ultimate goal of the settling tortfeasor who has entered into a sliding scale agreement.

Even where the settling tortfeasor is dismissed from the case, difficulties remain for the non-settling tortfeasor. Because the jury may be informed of the agreement, but not informed of the guaranteed amount,[53] a jury unfamiliar with sliding scale agreements may think they must render a large verdict against the non-settling tortfeasor. The jury may blame the non-settling tortfeasor for not settling. The existence of the agreement itself may signify to the jury that at least one of the joint tortfeasors believes the plaintiff's lawsuit has merit. The jurors may develop the erroneous belief that the non-settling tortfeasor is unreasonable because he did not settle, leading them to impute liability by default.[54]

If a tortfeasor is not the first to settle, virtually any chance to settle is lost. Most sliding scale agreements contain clauses giving the settling tortfeasor the power to veto settlements with remaining tortfeasors.[55] Thus, unless a non-settling tortfeasor agrees to an amount in excess of the guarantee, the settling tortfeasor can be expected to veto the settlement. The plaintiff has little incentive to settle with remaining tortfeasors, having been guaranteed a significant recovery. Further, when a loan from the settling tortfeasor is involved, the plaintiff cannot afford to settle; the plaintiff must proceed to judgment to repay the loan.

Of the most significance, perhaps, is that the non-settling

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50. CAL. CIV. PROC. CODE § 877.5(a)(2) (West 1980). *See supra* note 40.
51. Wesierski, *supra* note 45, at 644.
52. Grant, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1398 (1974).
53. *See supra* text accompanying note 50.
54. Bodine, *supra* note 4, at 246.
55. *See supra* text accompanying note 41.

tortfeasor receives no credit for the settlement. Under section 877, in the case of unconditional settlements, any judgment against a non-settling tortfeasor is offset by the amount paid in settlement by the settling tortfeasor.[56] If a plaintiff unconditionally settles with one tortfeasor for $25,000 then receives a judgment against a non-settling tortfeasor for $100,000, the non-settling tortfeasor pays only $75,000. A credit is applied for the amount received in settlement. In sliding scale settlement agreements, however, the plaintiff receives only a guarantee from the settling tortfeasor rather than an actual payment. The non-settling tortfeasor receives no credit against any subsequent judgment. It is the settling tortfeasor who receives credit for the judgment.[57] The intent of section 877[58] is thus undermined through the use of the sliding scale settlement. In sliding scale agreement cases, non-settling tortfeasors are treated differently under the statutory scheme of section 877.5 than are non-settling tortfeasors in unconditional settlement cases. This scheme might be challenged as unconstitutional; it may deny non-settling tortfeasors equal protection under the due process clauses of the California and federal constitutions.[59]

Section 877.5 represents a gallant effort to look into the future and provide a method of avoiding potential prejudice caused by sliding scale agreements. However, the ten year history of sliding scale agreements and section 877.5 reveals that these legislative efforts were insufficient to avoid gross unfairness to non-settling tortfeasors. Under the recent *Tech-Bilt* decision, the court has placed renewed emphasis on economic fairness towards non-settling tortfeasors and equitable apportionment of liability. Based upon the inequities found in sliding scale agreement cases since the enactment of section 877.5 and the renewed emphasis on economic fairness under *Tech-Bilt*, further legislation is necessary.

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56. *See supra* note 19.

57. Using the same example, assume the plaintiff entered into a sliding scale agreement instead of a conventional settlement with *D1* where *D1* guaranteed the plaintiff a $25,000 recovery instead of actually paying the plaintiff the $25,000. If the plaintiff then receives the same $100,000 judgment against *D2*, *D2* must now pay the entire judgment instead of $75,000. *D2* receives no credit for the settlement between the plaintiff and *D1*. *D1* pays the plaintiff nothing because the judgment was greater than the $25,000 guaranteed.

58. *See supra* text accompanying note 18.

59. Equal protection requires that a law treat all individuals in the same manner unless the legislation is rationally related to a legitimate state purpose. *See* Cooper v. Bray, 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978). The only possible legitimate state interest would be encouraging settlements. This Comment suggests, however, that this is not a rationally related state interest.

*Recent California Cases*

The sliding scale agreement is becoming increasingly popular. Since the *River Garden Farms* case in 1972, only thirteen appellate cases in California have questioned the "good faith" requirement of sliding scale agreements. However, seven of these cases have been heard in the last year.[60] No appellate court has ever held a sliding scale agreement to be in "bad faith."

The "good faith" requirement of the sliding scale agreement has been analyzed by the courts via four different methods. Under the first method, courts have applied a lesser standard of "good faith" to sliding scale agreements than to unconditional settlements.[61] Under a second method, the "tortious conduct" test has been applied, producing a finding that no tortious conduct was involved.[62] Under a third method, courts have found the amount guaranteed, although never paid by the settling tortfeasor, within a reasonable range of the settling tortfeasor's proportional share of liability.[63] Finally, under a fourth method, courts have found that a minimum amount actually paid by the settling tortfeasor was within the "reasonable range" of the settling tortfeasor's proportional share of liability.[64]

The *Tech-Bilt* decision, while defining "good faith" in unconditional settlements, does not conclusively determine whether sliding scale agreements meet the "good faith" requirement. The remainder of this section analyzes the four methods of analyzing the "good faith" requirement, and discusses how the courts might apply these

60. *See River Garden Farms*, 26 Cal. App. 3d at 986, 103 Cal. Rptr. at 498; Pease v. Beach Aircraft, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); Young v. Lane Realty, 96 Cal. App. 3d 294, 158 Cal. Rptr. 71 (1979) (decertified); *Dompeling*, 117 Cal. App. 3d at 798, 173 Cal. Rptr. at 38; Baget v. Shepard, 128 Cal. App. 3d 433, 180 Cal. Rptr. 396 (1982) (decertified); *Burlington*, 137 Cal. App. 3d at 942, 187 Cal. Rptr. at 376; Torres v. Union Pacific, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); Imperial Spa v. Superior Ct., 158 Cal. App. 3d 1185, 205 Cal. Rptr. 332 (1984) (decertified); City of Los Angeles v. Superior Ct., 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984) *h'g granted*, (Nov. 21, 1984), *retransferred for reconsideration in light of Tech-Bilt* (July 18, 1985), *remanded to trial court*, Civil No. B005694 (Jan. 21, 1986); Moreno v. Sayre, 162 Cal. App. 3d 116, 208 Cal. Rptr. 444 (1984); Anderson v. International Harvester, 165 Cal. App. 3d 100, 211 Cal. Rptr. 253 (1985) (decertified); Abbott Ford v. Superior Ct., 166 Cal. App. 3d 280, 212 Cal. Rptr. 389, *h'g granted, cause retransferred for reconsideration in light of Tech-Bilt*, 701 P.2d 1172, 215 Cal. Rptr. 854, *aff'd*, 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *h'g granted*, No. 85-181 (Dec. 19, 1985); Riverside Steel Construction Co. v. William H. Simpson Construction Co., 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, *h'g granted*, No. 85-182 (Dec. 19, 1985).

61. *See infra* text accompanying notes 65 & 67.

62. *See infra* text accompanying note 71.

63. *See infra* text accompanying notes 76 & 77.

64. *See infra* text accompanying note 78.

methods in light of *Tech-Bilt.*

Applying a Lesser Standard of "Good Faith"

In 1975, the Third District Court of Appeal, in *Young v. Lane Realty*, held that in enacting section 877.5 the legislature wholeheartedly endorsed sliding scale agreements. Therefore the "good faith" requirement of unconditional settlements did not apply to the sliding scale agreement.[65] Although *Young* has been decertified, the case illustrates the potential danger of unfairness to non-settling tortfeasors. The legislative history of section 877.5 does *not* suggest that the legislature intended a lesser standard be applied to sliding scale agreements.[66] Yet, more recent cases do suggest that a lesser standard or even no standard be applied.

In *Burlington Northern Railroad v. Superior Court*,[67] a plaintiff, seriously injured by a falling door of a railroad car, sued Burlington (the railroad) and Paccar (the manufacturer of the door). Burlington entered into a sliding scale agreement with the plaintiff guaranteeing a two million dollar recovery. Burlington reserved the right to reject any settlement between the plaintiff and Paccar for less than the guaranteed amount. Paccar challenged the settlement and the trial court agreed with Paccar, finding that the settlement was not made in "good faith" since it ignored equitable apportionment of liability and failed to promote settlement of litigation.[68] Although the court of appeal recognized the inequities of this result, they reversed the trial court's decision, stating that "given the legislative approval of sliding scale agreements, . . . the trial court's finding of unfairness cannot support a conclusion that the settlement was not made in 'good faith'."[69] This analysis ignores the policy underlying the *Tech-Bilt* decision, and makes all sliding scale agreements *per se* in "good faith" even when evidence of tortious conduct exists. The fallacy of the method is apparent; the legislature did not intend a lesser stan-

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65. Young v. Lane Realty, 96 Cal. App. 3d. 294, 158 Cal. Rptr. 71, 73 (1979) (decertified). A decertified case is of no precedential value.

66. Nothing in the available evidence regarding the legislative intent of § 877.5 suggests that the "good faith" requirement of § 877 was not to be applied to sliding scale agreements. The wording of the statute itself only addresses the quasi-evidentiary concern of disclosure of the agreement to the court and never discusses the issue of "good faith." *See* Comment, *supra* note 48, at 139.

There is also evidence that the legislature enacted § 877.5 not to further encourage settlement but in response to growing concern over the appropriateness of sliding scale agreements. The legislature was attempting to prevent abuse of such agreements. With such an intent, the legislature certainly was not suggesting that a lesser standard of "good faith" be applied to sliding scale agreements. *See Review of Selected 1977 California Legislation*, 9 PAC. L.J. 362, 363 (1977).

67. 137 Cal. App. 3d 945, 187 Cal. Rptr. 376 (1982).

68. *Id.* at 945, 187 Cal. Rptr. at 378.

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

dard of "good faith" to be applied in sliding scale agreements.[70]

Applying the "Tortious Conduct" Test

Prior to *Tech-Bilt*, most courts applied the "tortious conduct" test to sliding scale agreements. In *Abbot Ford v. Superior Court*,[71] the most recent case prior to *Tech-Bilt*, the wheel of a passing vehicle flew into the plaintiff's windshield. The plaintiff, permanently blinded, sued Ford Motor Company, Abbott Ford, and Sears Roebuck on various theories of negligence, products liability, and breach of warranty. Under a sliding scale agreement, Abbott's insurer guaranteed the plaintiff a recovery of $2.9 million. The agreement also provided for periodic interest free loans to the plaintiff. The plaintiff agreed not to settle with Ford or Sears without Abbott's consent. If the plaintiff failed to recover the guaranteed amount from Ford and/or Sears, the plaintiff was obligated to move for a new trial or to appeal the case. The trial court denied Abbott's motion to declare the agreement in "good faith," calling the agreement a "gambling transaction" rather than a settlement agreement.[72] Once again the court of appeal reversed, finding no tortious conduct or motive by the settling parties.[73]

The "tortious conduct" test made it very easy for the courts to avoid rocking the legislative boat. They would not have to confront the seemingly unrestricted endorsement of sliding scale agreements by the legislature if they could characterize the agreements as ones made in "good faith." However, applying the "tortious conduct" test to sliding scale agreements arguably might result in determination of "bad faith" in every case. Through the use of a sliding scale agreement, a settling tortfeasor has not only the potential, but the *incentive* to injure his fellow non-settling tortfeasors. Even if a settling

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70. *See supra* note 66 and accompanying text.

71. 166 Cal. App. 3d 280, 212 Cal. Rptr. 389, *h'g granted, cause retransferred for consideration in light of Tech-Bilt*, 701 P.2d 1172, 215 Cal. Rptr. 854, *aff'd*, 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *h'g granted*, No. 85-181 (Dec. 19, 1985). On July 18, 1985, the California Supreme Court granted a petition for review and retransferred the case back to the court of appeal for reconsideration in light of the principles enunciated in *Tech-Bilt*. The appellate court held that the sliding scale agreement used in this case did not violate the *Tech-Bilt* principles, and affirmed its previous decision that the agreement was made in good faith. On December 19, 1985, the California Supreme Court agreed to review this second decision, as well as Riverside Steel Construction Co. v. William H. Simpson Construction Co., 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, *h'g granted*, No. 85-182 (Dec. 19, 1985). Both cases present issues concerning the standards for determining whether sliding scale agreements are "good faith" settlements.

72. 166 Cal. App. 3d at 286, 212 Cal. Rptr. at 393.

73. *Id.* at 289, 212 Cal. Rptr. at 394.

tortfeasor has the right to make the most advantageous settlement possible, the settling tortfeasor should have no right to make a settlement which shifts all liability to the non-settling tortfeasors.[74]

Chief Justice Bird, in her dissent to *Tech-Bilt*, strongly supported the continued use of the "tortious conduct" test. She proclaimed that a "settlement satisfies the good faith requirements if it is free of corrupt intent, i.e., free of intent to injure the interests of the non-settling tortfeasor."[75] An intent on the part of a settling tortfeasor to injure the interests of non-settling tortfeasors is an inherent by-product of sliding scale agreements. However, as a result of the majority opinion in *Tech-Bilt*, the "tortious conduct" test is no longer used to measure "good faith" in unconditional settlements. Similarly, there is no reason it should be used for sliding scale agreements.

### Applying the "Reasonable Range" Test

Prior to *Tech-Bilt*, the appellate courts occasionally applied a "reasonable range" test to sliding scale agreements. When the test was applied, two different methods were used, each potentially reaching an opposite result.

Under the first method, the courts analyzed whether the amount guaranteed, rather than the amount actually paid by the settling tortfeasor, was within a reasonable range of the settling tortfeasor's proportionate share of liability. The court in *Anderson v. International Harvester*[76] used this approach, finding the guaranteed amount of $900,000 within a reasonable range of International Harvester's potential liability.[77] In their decision, the court merely paid lip service to any thought of fairness to the non-settling tortfeasor. The settling tortfeasor never paid the $900,000, nor was it probable that he would. Where the settling tortfeasor ultimately pays nothing, use of the guaranteed amount to apply the "reasonable range" test is meaningless. Yet without guidelines from either the legislature or the supreme court, the lower courts can easily fall into the trap.

The "reasonable range" test, when applied to the amount actually paid, rather than the amount guaranteed by the settling tortfeasor, appears to be the method most closely in line with the policy underlying *Tech-Bilt.* This test was used in *River Garden Farms* and *Torres v. Union Pacific Railroad.*[78] The plaintiff in *Torres*, an employee of Union Pacific, lost an eye while using a defective jack. He

74. Grant, *supra* note 52, at 1416.
75. *Tech-Bilt*, 38 Cal. 3d at 502, 698 P.2d at 169, 213 Cal. Rptr. at 266 (Bird, C.J., dissenting).
76. 165 Cal. App. 3d 100, 211 Cal. Rptr. 253 (1985) (decertified). *See supra* note 2.
77. *Id.* at 110, 211 Cal. Rptr. at 259.
78. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

brought an action against the railroad and the manufacturer of the jack. The plaintiff settled with Union Pacific for a $200,000 guarantee, $50,000 of which was an outright settlement paid by Union Pacific. The plaintiff then settled with the manufacturer for $300,000. Union Pacific was only liable for the $50,000 payment it had already made since the plaintiff recovered more than the $200,000 guarantee from the manufacturer. The manufacturer sought disapproval of Union Pacific's settlement, but the court, using a "reasonable range" test, stated that "$50,000 was not grossly disproportionate to what a reasonable person, at the time of settlement, would estimate Union's liability to be."[79] The court did not consider the larger $200,000 guarantee in applying the test; use of this method would result in fewer "good faith" settlements.[80] The *Torres* court, however, justified its decision by stating:

> This holding should discourage fraudulent or sham settlements, as well as settlements which are unfair simply because they are "too cheap." By the same token, this standard 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.[81]

If *Tech-Bilt*'s theme of "fairness" is to be applied to sliding scale agreements, courts must consider the amount unconditionally paid by the settling tortfeasor rather than the amount guaranteed or the amount loaned, to determine if the agreement is in "good faith." This alternative is the only way courts can temper the inequitable impact sliding scale agreements have on non-settling tortfeasors, at least until the legislature responds.

## THE NEED FOR LEGISLATIVE RESPONSE

Despite the attempt to define "good faith" in *Tech-Bilt*, much confusion still exists over the "good faith" standard to be applied to sliding scale agreements. Because most of the confusion surrounds the intent behind section 877.5, the legislature must clarify this issue. The legislature should either repeal section 877.5 and enact further legislation prohibiting the use of sliding scale agreements, or amend section 877.5 to correct inequities between the non-settling and settling tortfeasors. Sliding scale agreements neither encourage settlement nor maximize the plaintiff's recovery, two of the major

79. *Id.* at 509, 203 Cal. Rptr. at 832.
80. *Id.* at 508, 203 Cal. Rptr. at 832.
81. *Id.* at 509, 203 Cal. Rptr. at 832.

goals underlying California's tort contribution legislation.[82] Additionally, the third goal, equitable apportionment of liability, is totally ignored by sliding scale agreements.

*Maximizing Plaintiff Recovery*

Maximizing recovery for the plaintiff was the major goal underlying the California Supreme Court decision to adopt the doctrine of comparative negligence in *Li v. Yellow Cab Co.*[83] In *Li*, the court eliminated the contributory negligence doctrine which completely barred recovery of damages whenever the victim had negligently contributed to cause his own injury. By contrast, under the comparative negligence doctrine, recovery is diminished only by the victim's proportionate share of fault. This goal of maximizing recovery was bolstered in *American Motorcyle v. Superior Court.*[84] The supreme court, in *American Motorcycle*, retained joint and several liability despite the adoption of comparative negligence in *Li*. The court reasoned that even where one tortfeasor cannot pay the full amount of the judgment because of insolvency, fairness dictates that the plaintiff should not be deprived of a full recovery.[85] Consequently, the remaining tortfeasor must pay this deficiency in addition to his own fair share.

The circumstances of the typical sliding scale agreement, however, are unique when compared to the unconditional settlement. The nature of the agreement dictates that the settling tortfeasor is always solvent. The settling tortfeasor must be capable of paying the amount guaranteed, or the settlement is fraudulent on its face. Further, the non-settling tortfeasor must also be capable of paying the guaranteed amount, or the settling tortfeasor would not have entered into the agreement.

The goal of maximizing recovery to the plaintiff through the use of sliding scale agreements is a fiction. While many sliding scale agreements offer additional benefits to the plaintiff, such as the peace of mind of a guaranteed recovery, and often, financing of the remaining litigation through interest free loans from the settling tortfeasor, these are merely fringe benefits. Sliding scale agreements do not further the goal of maximizing plaintiff recovery which evolved from *Li* and *American Motorcycle*. In those cases, the California Supreme Court sought to protect the plaintiff from insolvent tortfeasors. Where a sliding scale agreement is used, however, the insolvent tortfeasor problem is non-existent.

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82. *See infra* text accompanying notes 83-93.
83. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
84. 20 Cal. 3d 578, 574 P.2d 899, 146 Cal. Rptr. 182 (1978).
85. *Id.* at 590, 574 P.2d at 906, 146 Cal. Rptr. at 189.

*Encouragement of Settlements*

Settlement of claims is encouraged to promote peace and goodwill, limit the expense of litigation,[86] and reduce the crowded dockets in our court system.[87] Tortfeasors are encouraged to settle in two ways. First, a tortfeasor generally settles for less than what he believes his ultimate liability would have been had the case proceeded to trial. Second, the settlement ends the settling tortfeasor's involvement in the litigation.[88] However, encouraging settlement with one joint tortfeasor often discourages settlement with the remaining joint tortfeasors. It is difficult to imagine that the legislature did not intend to encourage settlement of the entire case.[89] But, sliding scale agreements virtually insure that settlement of the entire case will never happen. Clauses giving the settling tortfeasor veto power over settlements with remaining tortfeasors add to this problem. Even absent such a "veto" provision, the plaintiff's bargaining position may so improve that little if any possibility exists of a settlement with the remaining tortfeasors.[90] The plaintiff has nothing to lose and everything to gain by proceeding to trial, especially when financed by a loan from the settling tortfeasor.

Partial settlement of a case is an acceptable goal only when used to facilitate, rather than frustrate, eventual total settlement. In a sliding scale agreement, however, total settlement is the rare exception to the rule.[91] No advantage is obtained by removing one of the tortfeasors with no chance of removing others. The reduction in court costs by removing one joint tortfeasor through settlement is minimal.[92] In some sliding scale agreement cases, the settling joint tortfeasor chooses to remain in the case, rather than be dismissed.[93] Thus, although the attractiveness of the sliding scale agreement encourages partial settlement, reduced court costs, a major benefit of settlement, never materializes. Indeed, loans by the settling tortfeasor to finance the plaintiff's case may very well extend the litigation, increase court costs, and add to crowded dockets.

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86. Roberts, *supra* note 25, at 889.
87. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264.
88. Roberts, *supra* note 25, at 888.
89. *Id.*
90. Comment, *Coexistence of Loan Receipt Agreements and Contribution in Illinois*, 12 LOY. U. CHI. L.J. 751 (1981).
91. Thornton & Wick, *supra* note 46, at 228.
92. Roberts, *supra* note 25, at 889.
93. *See, e.g., Anderson*, 165 Cal. App. 3d at 100, 211 Cal. Rptr. at 253 (decertified). *See supra* note 2.

A flaw also exists in the reasoning behind the incentives that encourage settlement. Defendants are encouraged to settle knowing the settlement ends their involvement in the litigation and liability is limited to a favorably negotiated amount. This finality is guaranteed by section 877 which eliminates all claims for indemnity against the settling tortfeasor by non-settling tortfeasors.

The joint tortfeasor settling under a sliding scale agreement, however, voluntarily waives such finality, opting to gamble on the outcome of the final judgment. Finality is certainly waived when the settling tortfeasor chooses to remain in the litigation. Why then should a tortfeasor be entitled to section 877 immunity from indemnity claims, having given, in consideration, an often fictional and meaningless guarantee?

*Equitable Apportionment of Liability*

The goals of equitable apportionment of liability and encouraging settlement are in conflict when settlement is accomplished through a sliding scale agreement. The goal of encouraging a partial settlement completely overshadows equitable apportionment. In its *Tech-Bilt* decision, the California Supreme Court, quoting the *River Garden Farms* court, stated: "If the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied. Neither statutory goal should be applied to defeat the other."[94] Equitable apportionment is totally defeated when a joint tortfeasor chooses to settle through a sliding scale settlement. The non-settling tortfeasor might pay the entire judgment regardless of fault allocations and receive no credit for the settlement as required, under section 877, in unconditional settlements. The legislature must respond to overcome this complete defeat of equitable apportionment.

*Recommendations to the Legislature*

Two options are open to the legislature to balance the articulated goals. First, it could enact legislation to completely prohibit sliding scale settlement agreements, discounting the minimal value associated with such agreements. Second, it could amend sections 877.5 and 877.6 to prohibit the most prejudicial characteristics of sliding scale agreements. The second alternative, however, simply converts the sliding scale agreement into an unconditional settlement.

94. *Tech-Bilt*, 38 Cal. 3d at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260 (quoting River Garden Farms, Inc. v. Superior Ct., 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972)).

Repeal Section 877.5 and Enact Legislation Prohibiting Sliding Scale Agreements

Legal commentators have established the following guidelines to recognize an activity as illegal: 1) the activity is lacking in value or is of little value relative to the danger it presents to those interests sought to be protected; 2) distinguishing cases in which the illegal activity is justified from cases where the activity is without value is so difficult that certainty of application, deterrence of potential offenders, and ease of administration favor making the activity illegal under all circumstances.[95]

Sliding scale agreements fit within these guidelines. Their only value, encouragement of partial settlement, is supported by little if any public policy.[96] Thus, sliding scale agreements are of little value relative to the danger presented to the interests of non-settling tortfeasors, interests now legally recognized in and protected by the court under *Tech-Bilt*. Second, because the settling tortfeasor is always solvent and capable of negotiating an unconditional settlement within his "reasonable range" of anticipated liability,[97] distinguishing cases in which sliding scale agreements are justified is very difficult. Additionally, sliding scale agreements fail to deter the settling tortfeasor from injuring again, as such a tortfeasor typically pays only a fraction of his proportionate share of liability, if anything at all. Viewed in this light, sliding scale agreements fit within the established guidelines of an illegal activity and should be prohibited by the legislature.

Legal commentators have stated that sliding scale agreements cannot be made illegal *per se* based only upon the difficulty in defining such agreements.[98] These comments, however, were made more than ten years ago, well before a substantial history of the use of sliding scale agreements was available for consideration. Furthermore, the statutory definition of the sliding scale agreement found in section 877.5 includes all of its vital elements.[99] Using this definition in a statute prohibiting sliding scale agreements would promote equitable apportionment of liability without sacrificing other goals or policies.

95. Grant, *supra* note 52, at 1408.
96. *See supra* text accompanying notes 86-93.
97. *See supra* text accompanying note 85.
98. Grant, *supra* note 52, at 1408.
99. *See* CAL. CIV. PROC. CODE § 877.5 (West 1980). *See supra* note 40.

Because sliding scale agreements promote partial settlements, a weaker argument might be made to maintain rather than to prohibit them. Amendments to sections 877.5 and 877.6 would then be required to promote the goal of fairness to non-settling tortfeasors recognized in *Tech-Bilt*. The definition of "good faith" was left to the courts. The legislature was incapable of defining the term; the facts of each case required individual evaluation.[100] However, the California Supreme Court in *Tech-Bilt* has now provided a workable definition, one that developed after years of inconsistency by the appellate courts. To avoid potential wavering by the courts, and to make the intent of the legislature explicit, the *Tech-Bilt* definition should be codified within section 877.6.

If the legislature chooses to retain sliding scale agreements, the following proposed modifications to section 877.5 would eliminate the major inequities between the settling and non-settling tortfeasors when sliding scale agreements are used:

1) Require the dismissal of the settling tortfeasor. Dismissal would eliminate possible action by the settling tortfeasor to prejudice the proceedings against non-settling tortfeasors.[101]

2) Prohibit clauses that grant the settling tortfeasor veto power over subsequent settlements between the plaintiff and remaining tortfeasors, and clauses that require the plaintiff to appeal the case if the judgment is less than the guarantee. Such restrictions would promote the settlement of *entire* cases rather than *partial* settlements.[102]

3) Allow the non-settling tortfeasor to seek indemnity from a settling tortfeasor when a sliding scale agreement is used. The settling tortfeasor using a sliding scale agreement has waived his right to finality by choosing to gamble on the outcome of a verdict.[103] The benefits of section 877 should require consideration beyond that of an illusory guarantee. The courts have previously ruled that a "good faith" settling tortfeasor is not immune from claims of total indemnity from non-settling tortfeasors who are vicariously liable.[104] This exception was designed to promote fairness to vicariously liable non-settling tortfeasors.[105] The same goal of fairness dictates that the exception be expanded to include joint tortfeasors choosing to settle through a sliding scale agreement.

4) Require an unconditional payment by the settling tortfeasor to

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100. Comment, *supra* note 48, at 131.
101. *See supra* text accompanying note 51.
102. *See supra* text accompanying notes 82-87.
103. *See supra* p. 245-46.
104. Angelus Assoc. Corp. v. Neonex Leisure, 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985).
105. *Id.* at 410, 167 Cal. App. 3d at 542.

the plaintiff that passes the *Tech-Bilt* "reasonable range" test. Although the courts are presently capable of enforcing such a requirement,[106] the requirement should be codified to avoid confusion and inconsistency by the courts. Where a settling tortfeasor's unconditional settlement amount is made with an additional sliding scale guarantee, the guarantee should be merely another factor in considering whether the unconditional amount is made in "good faith."[107]

5) Apply any loans made to the plaintiff by the settling tortfeasor to offset the judgment against non-settling tortfeasors. Interest free loans are often included in a sliding scale agreement and are allowed under section 877.5(b).[108] Section 877(a) provides that a settlement "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 greater*."[109] Certainly, an interest free loan made to the plaintiff is of some value, and was bargained for as part of the consideration for the settlement. Thus, although the parties do not stipulate a value for the interest free loan in the agreement, the loan has a value equal to at least the amount of interest charged under conventional financing agreements. No court yet has considered placing such a value on the loan, to be used as an offset against any judgment paid by the non-settling defendant, even though section 877(a) expressly allows for such an offset.[110]

6) Reduce the plaintiff's claim against non-settling tortfeasors by the amount of the settling tortfeasor's share of liability. This recommendation was presented by Professor John Fleming in his report to the Joint Committee of the California Legislature.[111] Fleming recommended that this pro-rata reduction[112] be used for all types of

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106. *See supra* text accompanying notes 76-81.

107. In other words, the unconditional settlement amount might be justified at a lower amount when accompanied by a sliding scale guarantee.

108. *See supra* note 40.

109. *See supra* note 19 (emphasis added).

110. As an example, assume *P*, the plaintiff, enters into a sliding scale agreement with defendant *D1*. *D1* guarantees *P* a $100,000 recovery and also gives *P* a $100,000 interest free loan until *P* receives a judgment. Two years after the settlement *P* receives a $120,000 judgment against *D2*. If the current rate of interest is 15% per year, *D2* should receive a credit against the $120,000 judgment of $30,000 (15% of $100,000 x two years). *D2* should then pay *P* $90,000. Under the sliding scale agreement, *D1* should then pay *P* an additional $10,000 so that the guarantee of $100,000 is satisfied.

111. Fleming, *Report to the Joint Committee of the California Legislature on the Problems Associated with* American Motorcycle v. Superior Court, 30 HASTINGS L.J. 1464, 1498 (1979).

112. A "pro-rata" reduction is a reduction based on the settling tortfeasor's percentage of fault. California uses a "pro-tanto" reduction which is to simply deduct the amount of the settlement from the judgment.

settlements. This proposal would tend to reduce the amount ultimately recovered by the plaintiff. However, Fleming argues, the plaintiff remains the sole arbiter in deciding whether to settle, and if so, the settlement amount. If the plaintiff wishes to avoid the risk of an undervalued settlement, he need not settle at all. On the other hand, the plaintiff is given strong incentive to drive the hardest bargain with the settling tortfeasor and not to prejudice the remaining tortfeasors.[113] The legislature has not yet adopted Professor Fleming's recommendation. Public policy may still dictate that such a recommendation is too detrimental to the injured plaintiff. When applied to sliding scale agreements, however, this proposal would minimize the detriment to the plaintiff, yet promote fairness towards non-settling tortfeasors and give the settling tortfeasor incentive to settle.

Consider this example: The plaintiff is seriously injured by *D1* and *D2*. *D1* is ten percent at fault; *D2* is ninety percent at fault. *D2*, the settling tortfeasor, enters into a sliding scale agreement with the plaintiff, guaranteeing a two million dollar recovery against *D1*. The plaintiff obtains a verdict against *D1*, the non-settling tortfeasor, for three million dollars. Applying the recommendation, *D1* pays $300,000, ten percent of the three million dollar judgment. *D2*, who guaranteed two million dollars to the plaintiff, contributes an additional $1.7 million. The plaintiff ends up with a recovery of two million dollars, an amount he was satisfied with prior to trial because he negotiated the guarantee with *D2*. *D1* pays only his fair share, while *D2* still pays less than the amount he guaranteed, and far less than his fair share of the three million dollar verdict.

The same rationale applies when the verdict is less than the guaranteed amount. If the verdict was for one million dollars and the guarantee was for two million dollars, *D1* would pay his fair share, $100,000. *D2* would have to pay the plaintiff two million dollars less *D1*'s payment, or $1.9 million. The plaintiff recovers an amount greater than the verdict and *D2* still pays less than the amount he was willing to guarantee.

Under this arrangement, *D2*, the settling tortfeasor, will always contribute to the plaintiff's recovery. This outcome hardly seems unfair considering the settling tortfeasor was much more at fault than the non-settling tortfeasor.[114] Paraphrasing Professor Fleming, if the settling tortfeasor wishes to avoid the risk of an overvalued settlement, he need not settle at all. On the other hand, however, he is

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113. Fleming, *supra* note 111, at 1496.

114. The recommendation also applies when the settling tortfeasor is less at fault than the non-settling tortfeasor. However, it is difficult to reason why a tortfeasor would guarantee a substantial judgment when its degree of fault is much less than the non-settling tortfeasor's degree of fault.

given a strong incentive to drive the hardest bargain with the plaintiff and to not prejudice the remaining tortfeasors.[115]

## CONCLUSION

The California Supreme Court decision in *Tech-Bilt v. Woodward-Clyde* recognized the duty of economic fairness owed to non-settling joint tortfeasors by the plaintiff and settling joint tortfeasor. This decision enables the courts to reject patently unfair unconditional settlements. However, *Tech-Bilt* did not directly address one of the most unfair settlement tactics in use today, the sliding scale agreement. Two cases involving sliding scale agreements are currently before the California Supreme Court.[116] The court thus has the opportunity to apply the *Tech-Bilt* requirements to sliding scale agreements and find that these agreements are not "good faith" settlements; this opportunity must not be wasted.

Even if the court applies the *Tech-Bilt* requirements, legislative action will be necessary to ensure the protection of non-settling tortfeasors. Because sliding scale agreements are of little value in accomplishing the expressed goals of the legislature, sliding scale agreements should be prohibited. Should the legislature desire to salvage the minimal value associated with sliding scale agreements, however, this Comment has proposed amendments to minimize the economic burden presently borne by non-settling tortfeasors. As Dean Prosser observed, "[T]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were . . . unintentionally responsible, to be shouldered onto one alone, . . . while the latter goes scot free."[117]

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115. Fleming, *supra* note 111, at 1496.
116. Abbot Ford v. Superior Ct., 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *h'g granted*, No. 85-181 (Dec. 19, 1985); Riverside Steel Construction Co. v. William H. Simpson Construction Co., 171 Cal. App. 3d 781, 217 Cal Rptr. 569, *h'g granted*, No. 85-182 (Dec. 19, 1985). For a complete discussion of *Abbot Ford* and its prior history, see *supra* note 71, and text accompanying notes 71-73.
117. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 307 (4th ed. 1971). This observation is retained in the fifth edition of the treatise, edited by Dean Page Keeton. W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 377-78 (5th ed. 1984).