

TORTS

TECH-BILT, INC. v. WOODWARD-CLYDE & ASSOC.: A NEW DIRECTION FOR THE GOOD FAITH REQUIREMENT IN JOINT TORT SETTLEMENTS

The Arizona legislature recently enacted the Uniform Contribution Among Tortfeasors Act.¹ The Act created a right of contribution² among joint tortfeasors³ and abolished the Arizona common law rule prohibiting contribution among joint tortfeasors.⁴ The statute provides that a settlement made in "good faith" extinguishes the settling tortfeasor's liability for contribution.⁵ The settlement does not discharge any other joint tortfeasor from liability; however, it does reduce the claim against the nonsettling tortfeasor⁶ *pro tanto*.⁷

The statute provides an important exception to the contribution rule. If the parties have not made a good faith settlement, the settlement does not discharge the settling tortfeasor from liability for contribution.⁸ Accord-

1. ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509 (1984).

2. Contribution is the right of one who has discharged a common liability to recover from another also liable, that portion of the liability which the latter ought to bear. PROSSER & KEETON ON THE LAW OF TORTS § 51, at 341 (W. Keeton 5th ed. 1984).

3. Two or more persons are joint tortfeasors when there is concert of action, *Salt River Valley Users' Ass'n v. Cornum*, 49 Ariz. 1, 63 P.2d 639 (1937), concurrent effect of two separate wrongful acts, *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949), breach of a common duty, *Simmons v. Everson*, 124 N.Y. 319, 26 N.E. 911 (1891), or a single indivisible injury caused to the plaintiff, *Holtz v. Holder*, 101 Ariz. 247, 251, 418 P.2d 584, 586 (1966). See generally Note, *Independent Tortfeasors Jointly and Severally Liable for Separate Acts of Negligence Where Harm is Indivisible*, 9 ARIZ. L. REV. 129 (1966).

4. *Holmes v. Hoemako Hospital*, 117 Ariz. 403, 405, 573 P.2d 477, 479 (Ct. App. 1977).

5. ARIZ. REV. STAT. ANN. § 12-2504 (1984).

6. ARIZ. REV. STAT. ANN. § 12-2504 (1984) states:

If a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death both of the following apply:

1. It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant or in the amount of the consideration paid for it, whichever is the greater.

2. It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

7. The *pro tanto* rule reduces the plaintiff's recovery by the dollar amount the settling defendant pays the tortfeasor. D. DOBBS, TORTS AND COMPENSATION 642 n.1 (1985). In Arizona, this rule applies when the settlement by one tortfeasor partially satisfies the plaintiff's damage. ARIZ. REV. STAT. ANN. § 12-2504 (1984). Contrast the *pro rata* reduction rule, which credits the nonsettling tortfeasor's judgment with the settling tortfeasor's percentage share of liability. D. DOBBS, *supra*, at 642. In Arizona, this rule applies when the settlement fully satisfies the plaintiff's damage. ARIZ. REV. STAT. ANN. § 12-2501 (1984). Most settlements by one joint tortfeasor represent a partial satisfaction of the plaintiff's damage.

8. ARIZ. REV. STAT. ANN. § 12-2504 (1984). See *supra* note 6.

ingly, the meaning of good faith settlement is crucial to the operation of the exception.

Since the Arizona Contribution Act does not define good faith settlement, courts may adopt a standard consistent with legislative objectives.⁹ A commentary to Arizona's Contribution Act suggests four general legislative purposes:¹⁰ first, to promote fairness in the tort system for both plaintiffs and defendants;¹¹ second, to encourage settlement of complex, multi-party tort litigation;¹² third, to improve judicial efficiency in tort cases;¹³ and fourth, to prevent the use of "Gallagher covenants"¹⁴ against the government and other deep pocket defendants.¹⁵

For judicial interpretation of good faith settlement, Arizona courts would profit from an examination of California law in light of these legislative objectives. This Comment will examine the two principal ways California courts have interpreted good faith settlement, focusing on each interpretation's ability to further Arizona's legislative objectives. The Comment determines that the reasonable range rule, adopted by the California Supreme Court in *Tech Bilt, Inc. v. Woodward-Clyde & Associates*,¹⁶ best advances those objectives.

THE TECH-BILT DECISION AND THE REASONABLE RANGE RULE

In *Tech Bilt v. Woodward-Clyde & Associates*,¹⁷ the California Supreme Court stated that a settlement within a reasonable range of the settling tortfeasor's fair share of liability satisfies the contribution statute's good faith

9. *Adams v. Bolin*, 74 Ariz. 269, 275-76, 247 P.2d 617, 621 (1952).

10. Butler and Gage, *Comparative Negligence and Uniform Contribution: New Arizona Law*, 20 ARIZ. BAR J. 16 (1984).

11. *Id.* at 16. The fairness concept translates into equitable loss sharing among joint tortfeasors for plaintiff's injuries.

12. *Id.* at 16-17.

13. *Id.*

14. *Id.* at 16. The term "Gallagher Covenant" comes from *City of Tucson v. Gallagher*, 108 Ariz. 140, 493 P.2d 1197 (1972), and is the Arizona equivalent of the "Mary Carter Agreement" in the majority of jurisdictions. See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967); MARICOPA COUNTY BAR ASSOC. AND PHOENIX ASSOC. OF DEFENSE COUNSEL, AN EXPERT'S GUIDE TO COMPARATIVE NEGLIGENCE AND CONTRIBUTION AMONG TORTFEASORS 88 (1984).

The Gallagher Covenant contemplates the following scenario. For tactical reasons, the plaintiff may wish the jury to believe that he has not settled with a defendant when, in fact, he has. To realize this goal, plaintiff may contract for an option at a specified settlement amount. In return, the plaintiff must dismiss the settling defendant. Until the option is exercised, the settling defendant must remain in the case as a purported co-defendant. The plaintiff promises that if the judgment against the nonsettling defendant is greater than the contract amount, plaintiff will not collect anything from the settling defendant. If, however, the judgment against the nonsettling defendant is less than the contract amount, the settling defendant must make up the difference. *Gallagher*, 108 Ariz. 140, 142, 493 P.2d 1197, 1199 (1972).

15. Butler and Gage, *supra* note 10, at 17. One commentator suggests that the good faith settlement requirement will prevent the use of Mary Carter agreements. See Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1407 (1974). This issue is beyond the scope of this Comment.

16. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985), disapproving *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981) (a good faith settlement is one where the settling parties have refrained from tortious conduct toward the nonsettling defendant); *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981); *Burlington Northern R.R. Co. v. Superior Court*, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982).

17. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

requirement.¹⁸ A good faith settlement discharges the settling tortfeasor from contribution liability to the nonsettling tortfeasor.¹⁹

In *Tech-Bilt*, Woodward-Clyde, a co-defendant in the underlying action, notified plaintiffs of its intent to move for summary judgment based on the statute of limitations defense. As an alternative to the motion, Woodward-Clyde offered to waive its claim for costs against plaintiffs if plaintiffs dismissed it from the case. Plaintiffs assented to defendant's suggestion.²⁰ Tech-Bilt, a co-defendant,²¹ objected on the grounds that the settling parties had not made a good faith settlement.²²

To determine whether the parties settled in good faith, the California Court of Appeal applied the tortious conduct test.²³ This standard allows the settling parties to further their respective interests despite any adverse effect on the nonsettling tortfeasor.²⁴ The tortious conduct test requires only that the settling parties refrain from tortious conduct toward the nonsettling defendant.²⁵ Since Woodward-Clyde and the plaintiffs had not engaged in tortious conduct the court of appeal held the parties had made a good faith settlement.²⁶ This determination precluded Tech-Bilt from seeking contribution from Woodward-Clyde.²⁷

The California Supreme Court rejected the tortious conduct test, adopting in its stead the "reasonable range" rule.²⁸ Under this standard, the court

18. *Id.* at 500, 698 P.2d at 166, 213 Cal. Rptr. at 263.

19. CAL. CIV. PROC. CODE § 877 (West 1980). The California statute is nearly identical to ARIZ. REV. STAT. ANN. § 12-2504 (1984), *supra* note 5.

Subsequent to adoption of its contribution statute, California added a procedural amendment that provided for court determination of the good faith settlement issue, CAL. CIV. PROC. CODE § 877.6 (West Supp. 1984). California's amendment is similar to Arizona Rule of Civil Procedure 16.1, Ariz. Legis. Serv. A-81 (West 1986), which states:

(a) *Petition.* In any action where it is alleged that two or more parties are joint tortfeasors, and a settlement is entered into by any of the parties to the action, the court, upon petition of any party, shall make a formal determination whether the settlement is made in good faith. Any petition shall be accompanied by affidavits. If the petition is filed by the parties to the settlement, such affidavits shall set forth the terms of the settlement and the circumstances establishing the good faith of the settlement.

(b) *Objection to Petition.* Within ten days after a petition has been filed, any other party may file an objection to the petition, supported by accompanying affidavits. Replies to the objection shall be filed within ten days of service of the objection. The foregoing time periods may be shortened or enlarged by the court or by agreement of the parties.

(c) *Hearing.* Upon timely request of any party, the court shall set a time for hearing of the objection. If no request is made, the court may, in its discretion, set a time for such hearing, or rule without a hearing. If a hearing is set, the court shall consider the circumstances and evidence set forth in the parties' affidavits, and shall receive other evidence as presented.

20. *Tech-Bilt, Inc.*, 38 Cal. 3d at 493, 698 P.2d at 161, 213 Cal. Rptr. at 258.

21. Tech-Bilt and Woodward-Clyde were co-defendants and joint tortfeasors. A co-defendant may seek contribution from the other co-defendant only if the two also share a joint tortfeasor relationship. See *supra* notes 2 and 3 and accompanying text.

22. *Tech-Bilt, Inc.*, 38 Cal. 3d at 493, 698 P.2d at 161, 213 Cal. Rptr. at 258.

23. *Id.*

24. *Dompeling*, 117 Cal. App. 3d 798, 811, 173 Cal. Rptr. 38, 45 (1981).

25. *Id.* The *Dompeling* court described, as an example of conduct that violated the duty to refrain from tortious conduct, an agreement between the settling parties that the settling tortfeasor aid plaintiff's case against the other tortfeasor by committing perjury in return for a disproportionately low settlement figure. *Id.* at 810 n.7, 173 Cal. Rptr. at 45.

26. *Tech-Bilt, Inc.*, 38 Cal. 3d at 493, 698 P.2d at 161-62, 213 Cal. Rptr. at 258-59.

27. *Id.*

28. *Id.* at 500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

had to invalidate the settlement if it was not within a reasonable range of the settling tortfeasor's fair share of liability for plaintiffs' injuries.²⁹

The court considered several factors in order to determine whether the settlement met the reasonable range standard: (1) the settlement amount in relation to the settling tortfeasor's potential liability, (2) the allocation of settlement proceeds among plaintiffs, (3) the recognition that a settling tortfeasor should pay less in settlement than he would if a court found him liable after trial, and (4) the financial condition and insurance coverage limits of the settling tortfeasor.³⁰ The court also looked for collusion, fraud or other tortious conduct aimed to injure the nonsettling tortfeasor.³¹ The *Tech-Bilt* court noted that the principal goal of the reasonable range rule was to ensure a balance between the goals of encouraging settlement and providing equitable loss sharing among joint tortfeasors.³²

Using the reasonable range rule, the supreme court determined that the parties had not made a good faith settlement when the plaintiffs dismissed Woodward-Clyde in exchange for Woodward-Clyde's waiver of costs.³³ If the court had ruled otherwise, the settlement for costs would have left the parties in the same financial position as if no suit had been brought against Woodward-Clyde. Yet, the settlement would bar a contribution claim against Woodward-Clyde.³⁴ Under these circumstances the *Tech-Bilt* court believed that immunizing Woodward-Clyde from contribution through a finding that the settlement was in good faith would frustrate the goals of encouraging settlement and equitable loss sharing.³⁵

Prior California Law and the Tortious Conduct Test

The *Tech-Bilt* court relied primarily on the first California appellate decision that defined good faith settlement, *River Garden Farms, Inc. v. Superior Court*.³⁶ In that case, the California Court of Appeal refused to find that lack of good faith meant simply lack of collusion.³⁷ The court, instead, ar-

29. *Id.* at 500, 698 P.2d at 166, 213 Cal. Rptr. at 263.

30. *Id.* at 500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263.

31. *Id.* at 500, 698 P.2d at 167, 213 Cal. Rptr. at 263. See *supra* note 25.

32. *Tech-Bilt, Inc.*, 38 Cal. 3d at 500, 698 P.2d at 166, 213 Cal. Rptr. at 263.

33. *Id.* at 503, 698 P.2d at 168, 213 Cal. Rptr. at 265.

34. The settlement with Woodward-Clyde was essentially zero. The *pro tanto* rule, used in both California and Arizona for partial settlements, credits the judgment against the nonsettling tortfeasor for the amount the settling tortfeasor paid or the amount stipulated in the release, whichever is greater. *Tech-Bilt*, therefore, would have been liable for the judgment amount less zero if the court had found that Woodward-Clyde and plaintiffs had made a good faith settlement. See *supra* notes 6-7.

35. *Tech-Bilt, Inc.*, 38 Cal. 3d at 502-03, 698 P.2d at 168, 213 Cal. Rptr. at 265.

36. 267 Cal. App. 3d 956, 103 Cal. Rptr. 498 (1972). In *River Garden Farms* the nonsettling tortfeasor charged only the plaintiffs with lack of good faith. The complaining party alleged that plaintiffs had allocated disproportionately large shares of the settlements to the smaller wrongful death claims. The nonsettling tortfeasor, thus, was the sole target for the potentially large personal injury judgments. The settlements would decrease the personal injury judgments only by the relatively minor share of the settlements allocated to them. This left the nonsettling tortfeasor liable for a disproportionately large share of the personal injury judgments with no right of contribution. *Id.* at 992, 103 Cal. Rptr. at 502.

37. *Id.* at 997-98, 103 Cal. Rptr. at 505-06. The Uniform Commissioner's Comment to § 4 of the Uniform Contribution Among Tortfeasors Act explains that the good faith clause gives the court

culated the reasonable range rule, later adopted by the *Tech-Bilt* court.³⁸

The *River Garden Farms* court recognized that the conflicting objectives of equitable loss sharing among tortfeasors and encouraging settlement³⁹ must be accommodated equally.⁴⁰ According to *River Garden Farms*, if the goal of encouraging settlement were permitted to overcome the goal of equitable loss sharing, the settling parties could use unfair tactics with impunity.⁴¹ On the other hand, if equitable loss sharing were permitted to outweigh the goal of encouraging settlement, defendants would rarely settle.⁴² The *River Garden Farms*' definition of good faith sought to ensure that neither statutory goal defeated the other.⁴³

Subsequent appellate decisions rejected *River Garden Farms*' reasonable range good faith rule.⁴⁴ Instead, those courts adopted the tortious conduct test.⁴⁵ Under the tortious conduct test, the courts found every settlement to be in good faith, regardless of the amount of the settlement, so long as a desire to injure the nonsettling tortfeasor did not motivate the settlement.⁴⁶

The courts that adopted the tortious conduct test did so to encourage settlement and enhance judicial efficiency.⁴⁷ The tortious conduct rule cer-

occasion to determine whether the settlement was collusive. If collusive, the settlement will not immunize the settling defendant from contribution. *Id.* at 995, 103 Cal. Rptr. at 505.

The *River Gardens Farms* court, in an oft-quoted passage, stated:

Although the Uniform Law Commissioners pointed to collusion as the prime motivator of the good faith clause, the language of the clause is far broader. Lack of good faith encompasses many kinds of behavior. It may characterize one or both sides to a settlement. When profit is involved, the ingenuity of man spawns limitless varieties of unfairness. Thus, formulation of a precise definition of good faith is neither possible nor practicable. The legislature has here incorporated by reference the general equitable principle of contribution law which frowns on unfair settlements, including those which are so poorly related to the value of the case as to impose a potentially disproportionate cost on the defendant ultimately selected for suit.

Id. at 995, 103 Cal. Rptr. at 505-06.

38. *Id.* at 995, 103 Cal. Rptr. at 506.

39. The conflict arises because true equitable loss sharing requires a court to uphold a settlement only when it precisely equals the settling tortfeasor's proportionate share of plaintiff's loss. However, such a requirement would unduly frustrate settlement. Settlement is best encouraged by upholding every consensual settlement, regardless of the settlement amount. Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 492 (1966).

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

41. *Id.*

42. Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 897 (1984). A prime motivation for settling is the settling tortfeasor's belief that he is paying less than he would pay if he lost at trial. Requiring the settling tortfeasor to pay an amount equal to his fair share of the liability robs him of most of the perceived benefit of settling. *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 810, 173 Cal. Rptr. 38, 44 (1981).

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

44. See, e.g., *Cardio Systems, Inc. v. Superior Court*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981). Prior to *Tech-Bilt* the federal courts in California refused to apply the tortious conduct test. They adopted a rule which they believed the California Supreme Court would advocate in similar circumstances: a good faith settlement is a good faith determination of relative liabilities. *Commercial U. Ins. Co. v. Ford Motor Co.*, 640 F.2d 210, 213 (9th Cir. 1981); *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983). It is notable that, unlike the California appellate cases where the courts found every settlement to be in good faith, both the *Commercial* and *Owen* courts held the settlements in question lacking good faith. For discussion of these cases see Roberts, *supra* note 42, at 877.

45. See e.g., *Cardio, Inc.*, 122 Cal. App. 3d at 880, 176 Cal. Rptr. at 260.

46. *Dompeling*, 117 Cal. App. 3d 798, 809-10, 173 Cal. Rptr. 38, 45 (1981).

47. *Id.* at 810-11, 173 Cal. Rptr. at 44-45.

tainly achieved both objectives.⁴⁸ California courts that applied the tortious conduct standard for good faith found virtually all settlements in good faith⁴⁹ because parties generally settle to benefit themselves rather than to injure the other tortfeasor.⁵⁰ The tortious conduct test virtually gave parties free reign regarding the terms of the settlement. Thus, very little stood in the way of settlement.⁵¹

The tortious conduct test was also efficient. The court's inquiry went no further than to ask whether the settling parties desired to injure the non-settling tortfeasor. This narrow scope of review used little court time.⁵²

As the *Tech-Bilt* court observed, however, the tortious conduct approach for determining good faith often produced inequitable results.⁵³ For example, in *Cardio Systems, Inc. v. Superior Court*,⁵⁴ plaintiffs dismissed their claim against Cardio, a co-defendant and joint tortfeasor, in return for a waiver of costs. The plaintiffs' attorney testified that the decision to dismiss was purely tactical.⁵⁵ The *Cardio* court of appeal ruled the dismissal was a good faith settlement, but noted the unfairness resulting from their decision. The tortious conduct rule immunized a joint tortfeasor from contribution where its settlement with the plaintiff was merely a tactical consideration and the amount bore little relation to that tortfeasor's liability. Despite its decision, the *Cardio* majority thought this result was "fundamentally unfair" and not "what the legislature had intended."⁵⁶ Courts that used the tortious conduct test encouraged settlement at the expense of equitable loss sharing.⁵⁷

Objectives Advanced and Deterred by the Reasonable Range Rule and the Tortious Conduct Test

a. Fairness to Parties

The reasonable range rule promotes equitable loss sharing more effectively than the tortious conduct test.⁵⁸ Under the reasonable range rule the settling tortfeasor must pay an amount somewhat commensurate with his fault, although probably somewhat less. The nonsettling tortfeasor must also pay an amount approximating his fair share, although probably somewhat more.⁵⁹

Since the tortious conduct test looks only to the parties motivation for

48. Roberts, *supra* note 42, at 905-06. See also *Dompeling*, 117 Cal. App. 3d at 811, 173 Cal. Rptr. at 45. See *infra* text accompanying notes 70-77.

49. See *supra* note 44.

50. Roberts, *supra* note 42, at 905-06.

51. *Id.* at 905-06.

52. *Dompeling*, 117 Cal. App. 3d at 811, 173 Cal. Rptr. at 45.

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

54. 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

55. *Id.* at 885-86, 176 Cal. Rptr. at 256-57.

56. *Id.* at 891-92, 176 Cal. Rptr. at 260.

57. Roberts, *supra* note 42, at 908.

58. *Tech-Bilt, Inc.*, 38 Cal. 3d at 500-01, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

59. In general, the settling tortfeasor will probably pay an amount somewhat less than his fair share and the nonsettling tortfeasor somewhat more than his fair share, because a principal motivation for settling is the settling tortfeasor's belief that he is paying less in settlement than what he would pay in judgment. *Dompeling*, 117 Cal. App. 3d at 798, 173 Cal. Rptr. at 44.

settling and not the settlement amount, the tortious conduct test ignores the objective of equitable loss sharing.⁶⁰

b. *Encouraging Complete Settlement and Discouraging Partial Settlement*

The *Tech-Bilt* majority believed the reasonable range rule will not discourage the parties from settling.⁶¹ According to the *Tech-Bilt* majority plaintiffs will have at least the same incentive to settle as they had under the tortious conduct test. Because the settling tortfeasor must offer a greater amount to bring the settlement within the reasonable range requirement, plaintiffs may even have more reason to settle.⁶² Since the reasonable range rule gives the settling parties considerable freedom in determining the settlement amount, the court noted that the rule will not discourage tortfeasors from settling either.⁶³ The *Tech-Bilt* majority stated that the court reviewing the settlement should find that parties have not made a good faith settlement only when the settlement is "out of the ballpark" of the settling tortfeasor's fair share of the liability.⁶⁴

Chief Justice Bird, in dissent, argued that the prospect of an expensive and extended hearing on the good faith issue will dissuade parties from settling.⁶⁵ Citing commentators and courts, Justice Bird noted that a tortfeasor will settle only when he knows the settlement is final so that it will shield him from further liability.⁶⁶ Since the reasonable range rule's standard for good faith is more rigid than the tortious conduct test's standard, the dissent claimed the reasonable range rule promotes uncertainty.⁶⁷ Thus, Justice Bird believes the reasonable range rule will discourage the defendant from settling.⁶⁸ The tortious conduct test, on the other hand, encouraged parties to settle by giving finality to the settlement.⁶⁹

The *Tech-Bilt* majority and commentators, however, question the utility of encouraging the type of settlement engendered by the tortious conduct standard.⁷⁰ They believe the tortious conduct test combined with the *pro tanto* reduction rule⁷¹ encourages an unreasonably cheap settlement by one

60. Roberts, *supra* note 42, at 908.

61. The majority acknowledged that experience will be the ultimate arbiter. *Tech-Bilt, Inc.*, 38 Cal. 3d at 501, 698 P.2d at 167, 213 Cal. Rptr. at 264.

62. *Id.*

63. *Id.*

64. *Id.* The burden of proving lack of good faith rests with the opponent to the settlement. See CAL. CIV. PROC. CODE § 877.6(d).

65. *Tech-Bilt, Inc.*, 38 Cal. 3d at 507, 698 P.2d at 171, 213 Cal. Rptr. at 268 (Bird, C.J., dissenting).

66. See *River Garden Farms*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 498; Commr's Comment to § 4(b) of the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. at 99-100 (1975); Fleming, Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with *American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1464, 1494 (1979); Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 488-89 (1966).

67. *Tech-Bilt, Inc.*, 38 Cal. 3d at 508, 698 P.2d at 172, 213 Cal. Rptr. at 268-69 (Bird, C.J., dissenting).

68. *Id.*

69. See *supra* notes 44-51 and accompanying text.

70. See *Tech-Bilt, Inc.*, 38 Cal. 3d at 508, 698 P.2d at 167, 213 Cal. Rptr. at 264. See e.g., Roberts, *supra* note 42, at 889.

71. See *supra* note 7.

tortfeasor at the expense of the nonsettling tortfeasor.⁷² This is so because the *pro tanto* rule protects the plaintiff's right to recover all of the damages since the plaintiff may settle with one tortfeasor for a disproportionately low amount and still recover the remainder of his damages from the nonsettling tortfeasor.⁷³ Therefore, the plaintiff will readily settle for a low amount with one tortfeasor so long as another tortfeasor remains in the suit to pay the rest of the damages.⁷⁴ Since the tortious conduct test will uphold these cheap settlements, the remaining tortfeasor will face disproportionate liability with no recourse against the settling tortfeasor.⁷⁵ Under these circumstances, the plaintiff will not settle with the remaining tortfeasor for less than the excess amount of the damages; the remaining tortfeasor will take his chances at trial rather than settle for this disproportionately high amount.⁷⁶ The *Tech-Bilt* majority and commentators believe little social benefit results from removing one tortfeasor from the litigation at the expense of the other. Instead, removing the entire suit from the judicial process best serves society and the judicial system.⁷⁷

72. MARICOPA COUNTY BAR ASSOC. AND THE PHOENIX ASSOC. OF DEFENSE COUNSEL, AN EXPERTS GUIDE TO COMPARATIVE NEGLIGENCE AND CONTRIBUTION AMONG TORTFEASORS 83 (Nov. 3, 1984).

73. Plaintiffs may recover the full damages amount because the *pro tanto* rule credits the nonsettling tortfeasor's judgment only by the amount that the settling tortfeasor has paid. D. DOBBS, TORTS AND COMPENSATION 642 n.1 (1985).

74. Plaintiffs may settle with one tortfeasor to avoid complicating the case, as in *Cardio Systems, Inc.*, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254, to avoid a strong defense by that tortfeasor, as in *Tech-Bilt, Inc.*, 38 Cal. 3d at 488, 698 P.2d at 159, 213 Cal. Rptr. at 256, or to avoid the high priced expert witnesses that tortfeasor could produce, as in *Commercial U. Ins. Co. v. Ford Motor Co.*, 640 F.2d 210 (9th Cir. 1981).

75. See ARIZ. REV. STAT. ANN. § 12-2504, *supra* note 6.

76. Roberts, *supra* note 42, at 906.

Several jurisdictions including New Jersey, District of Columbia, Louisiana, and Texas employ *pro rata* reduction in their contribution schemes. See, e.g. *Theobald v. Angelos*, 44 N.J. 228, 208 A.2d 129 (1965); *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962); *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. Ct. App. 1964); *Palestine Contractors v. Perkins*, 386 S.W.2d 764 (Tex. 1964). *Pro rata* reduction helps eliminate the conflict that the *pro tanto* reduction rule creates among the goals of settlement, judicial efficiency, and equitable loss sharing. Under *pro rata* reduction, the nonsettling tortfeasor need never seek contribution from the settling tortfeasor, since he is liable only for his relative fault or *pro rata* share. The plaintiff is discouraged from settling with one tortfeasor for a disproportionately low amount because the claim against the nonsettling tortfeasor will be reduced by a *pro rata* or relative fault amount. The remaining tortfeasor, therefore, will not suffer liability grossly disproportionate to his fault.

The *pro rata* rule encourages complete settlement of the case because the plaintiff gains no advantage from bargaining with one tortfeasor to the exclusion of the other. This is so because the plaintiff loses the proportionate share of damages allocated to the settling tortfeasor if the plaintiff makes a poor settlement. The *pro rata* rule encourages defendants to settle because the rule assures them they need not pay contribution at some future date. See, Note, *Settlement in Joint Tort Cases*, *supra* note 39, at 493.

Although this solution appears harsh to plaintiffs, there are several justifications for the result. The plaintiff chooses with whom to settle and for how much. The plaintiff will realize the benefit if the settlement turns out to be higher than the settling tortfeasor's fair share, and the detriment if the settlement turns out to be less than the settlor's fair share. This gives the plaintiff incentive to settle with one tortfeasor for a reasonable amount and protects the remaining tortfeasor from an inadequate or collusive settlement. Fleming, *supra* note 66, at 1496.

77. *Tech-Bilt, Inc.*, 38 Cal. 3d at 501, 698 P.2d at 167, 213 Cal. Rptr. at 264; Fleming, *supra* note 66, at 1495. The Commissioner's Comments do suggest that partial settlement is a desirable goal. UNIFORM CONTRIBUTION AMONG TORTFEASOR'S ACT, § 4(b), 12 U.L.A. 99-100 (Master ed. 1975). The Commissioner's Comments are relevant because Arizona adopted the Uniform Act practically verbatim and California closely followed the 1955 version of the Uniform Act when drafting

The reasonable range standard does promote settlement of the entire case by requiring the first settlor to settle within the reasonable range of his potential liability. Since the second tortfeasor is not faced with a disproportionate amount of damages,⁷⁸ that tortfeasor may settle for an amount reasonably related to his proportionate fault.⁷⁹

c. *Efficient Trial and Judicial Administration*

The *Tech-Bilt* majority asserted the reasonable range standard will not unduly burden trial courts or parties.⁸⁰ By relying on expert evidence and limiting judicial review to affidavits, with minimal effort the parties and the courts can respectively predict and decide whether the settlement is in good faith.⁸¹

Restricting proof to affidavits, however, undermines one objective the majority sought to achieve—equitable loss sharing. Affidavits will not accommodate the many factors a court must consider to determine the settling tortfeasor's fair share of the damages.⁸² Courts must consider full testimony by interested parties to the settlement to truly accomplish equitable loss sharing.⁸³ Chief Justice Bird charges that full testimony will transform the good faith hearing into a lengthy and expensive trial.⁸⁴

The reasonable range test will undoubtedly complicate the good faith review.⁸⁵ However, courts should not promote judicial efficiency to the complete expense of the goal of the equitable loss sharing among joint tortfeasors.⁸⁶ Absolute furtherance of both policies cannot successfully be accomplished. By striking a balance through the reasonable range analysis,

their contribution statute. See ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509; *River Garden Farms, Inc.*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 498.

78. *Tech-Bilt, Inc.*, 38 Cal. 3d at 500-01, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

79. Roberts, *supra* note 42, at 929.

80. *Tech-Bilt, Inc.*, Cal. 3d at 501, 698 P.2d at 167, 213 Cal. Rptr. at 264.

81. *Id.*

82. The *Tech-Bilt* dissent listed relevant factors for the good faith determination: (1) the strength of the plaintiff's claim; (2) the defendant's defenses; (3) the serious nature of the injury; (4) the out of pocket expenses; (5) the question of whether the trial will be by judge or jury; (6) an evaluation of potential jury verdicts in the jurisdiction; (7) subjective evaluation of the parties, witnesses and attorneys; (8) the comparative fault of the settling tortfeasor; and (9) the settling tortfeasor's financial condition. *Tech-Bilt, Inc.*, 38 Cal. 3d at 506-07, 698 P.2d at 171, 213 Cal. Rptr. at 268, (Bird, C.J., dissenting) (quoting Roberts, *supra* note 42, at 922).

83. The judiciary's attitude regarding affidavits as the basis for summary judgments in negligence cases provides a useful analogy. In negligence cases, where the issue is whether the conduct was reasonable, courts generally acknowledge that affidavits are an insufficient basis for a summary judgment. Courts believe the jury, as the voice of the community, is the best arbiter of what constitutes reasonable conduct. See, e.g., *State v. Montano*, 136 Ariz. 605, 667 P.2d 1320 (1983); *Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 667 P.2d 750 (Ct. App. 1983); *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 652 P.2d 1040 (1982). Similarly, the central concern under the reasonable range rule is whether the settlement was reasonable. Presumably here also the jury could best make this determination.

84. *Tech-Bilt, Inc.*, 38 Cal. 3d at 507, 698 P.2d at 171, 213 Cal. Rptr. at 268 (Bird, C.J., dissenting). An analysis of good faith/bad faith first party insurance cases shows Bird's dissent is without merit. For years courts have used the reasonable range approach to good faith settlement determination extensively and successfully in good faith/bad faith insurance cases. MARICOPA COUNTY BAR ASSOC. AND THE PHOENIX ASSOC. OF DEFENSE COUNSEL, *supra* note 72, at 84-85.

85. See *Dompeling v. Superior Court*, 117 Cal. App. 3d at 811, 173 Cal. Rptr. at 45.

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

courts need not forfeit either goal.⁸⁷

CONCLUSION

Despite the inadequacies of the reasonable range rule, the standard at least recognizes the role of the good faith settlement requirement as an accommodation among competing objectives and allows it to serve this function.

The reasonable range test goes far toward achieving equitable loss sharing among joint tortfeasors. The tortious conduct test, in comparison, disregards entirely the settlement's effect on equitable loss sharing. Unlike the tortious conduct test, the reasonable range rule discourages cheap partial settlements. Even though some judicial efficiency may be sacrificed, the reasonable range rule will probably encourage settlement of the entire lawsuit better than the tortious conduct test. Given the clear advantages of the reasonable range rule over the tortious conduct test the Arizona courts should follow California's lead and require that a good faith settlement be within a reasonable range of the settling tortfeasor's fair share of liability for plaintiff's damages.

Leisha A. Self

87. *River Garden Farms, Inc.*, 26 Cal. App. 3d at 999, 103 Cal. Rptr. at 506.