OVERVIEW OF GOOD FAITH SETTLEMENT/OFFSET ISSUES UNDER CODE OF CIVIL PROCEDURE SECTION 877.6

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I. PRE-VERDICT "GOOD FAITH" SETTLEMENTS.

A. Statutory Authority (Code of Civil Procedure, § 877 et seq.)

In California, when an alleged tortfeasor settles in good faith before the jury returns its verdict (or the court renders its decision in a bench trial), the plaintiff's recovery against nonsettling tortfeasors who are claimed to be liable for the same tort is reduced by the amount of the settlement and the nonsettling tortfeasor cannot seek contribution from the settling party. The governing statute, Code of Civil Procedure section 877,[1] 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, . . . it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but *it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater.* [¶] (b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(Emphasis added.) Section 877 applies only to settlements made in good faith. Section 877.6, which provides for the judicial determination of a good faith settlement, states in pertinent part:

> (a)(1) Any party to an action in which it is alleged that two or more parties are joint tortfeasors . . . shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors . . . . [¶] . . . [¶] (b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing. [¶] (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor . . . from any further claims

1. Subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

> against the settling tortfeasor . . . for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. [¶] (d) The party asserting the lack of good faith shall have the burden of proof on that issue.

B. Determining Whether a Settlement Was Made in Good Faith.

To obtain the good faith determination, the settlor must file an application seeking the trial court's determination as to the good faith of the settlement. (§ 877.6.) The good faith settlement determination must be made prior to trial, or before the jury returns its verdict if the settlement is reached after trial has commenced. (§ 877.6, subd. (a)(1) [the trial court is authorized to hear an application for good faith settlement determination on truncated notice "to permit the determination of the issue to be made *before the commencement of the trial* of the action, or before the verdict or judgment if settlement is made after the trial has commenced" (emphasis added)]; see *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 500, fn. 8 (*Tech-Bilt*) ["Under the procedure prescribed by section 877.6, the good faith of a settlement will be determined *before trial*" (emphasis added)]; *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1259 (*Grand Terrace*) [" 'judicial determination of the "good faith" vel non of a settlement . . . should be made "at the earliest possible time," and if at all possible "in advance of the trial of the plaintiff's complaint or of any determination of comparative or partial (equitable) indemnity as between cross-complainant and cross-defendant tortfeasors" ' "].)[2]

Because "the overwhelming majority [of good faith applications] are unopposed . . . . [a] barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case is sufficient." (*Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1261.)

"Once there is a showing made by the settlor of the settlement, the burden of proof on the issue of good faith shifts to the nonsettlor who asserts that the settlement was not made in good

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2. Because the " 'clear policy of section 877.6, subdivision (c) is to encourage settlement by providing finality to litigation for the settling tortfeasor,' " the issue whether a settlement was entered in good faith should be "finally resolved *before the trial* between the remaining litigants." (*Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1135–1136, emphasis added; see *ibid.* ["the Legislature clearly indicated its intention that the trial be postponed until after the trial court's good faith determination was reviewed"].)

faith." (*Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1261; accord, § 877.6, subd. (d); *Tech-Bilt*, *supra*, 38 Cal.3d at p. 499; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 966 (*Cahill*); *Mediplex of California, Inc. v. Superior Court* (1995) 34 Cal.App.4th 748, 751 [burden of proof and production is on party contesting good faith]; *Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1497 ["The burden of attacking the good faith of a settlement falls on the nonsettling codefendants, and it is they who must first make their prima facie case that the settlement is not in good faith"]; *Fisher v. Superior Court* (1980) 103 Cal.App.3d 434, 447.)

To carry its burden of proof, the party opposing the good faith settlement application must file declarations or affidavits showing the settlement was not made in good faith. (*Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1262; see *id.* at p. 1263 ["the trial court's consideration of the settlement agreement and its relationship to the entire litigation in a contested setting must proceed upon a sufficient evidentiary basis to enable the court to consider and evaluate the various aspects of the settlement"].) If the nonsettling party needs additional time to gather the evidence needed to carry its burden of proving the settlement was not made in good faith, that nonsettling party must seek a continuance of the hearing. (*Id.* at p. 1265.)

In *Tech-Bilt*, *supra*, 38 Cal.3d 488, the Supreme Court established comprehensive guidelines for determining whether a settlement was made in good faith. Under *Tech-Bilt*, the factors to be considered include: (1) whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries; (2) a rough approximation of plaintiff's total recovery and the settlor's proportionate liability; (3) the amount paid in settlement; (4) the allocation of settlement proceeds among plaintiffs; (5) a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial; (6) the financial conditions and insurance policy limits of settling defendants; and (7) the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. (*Tech-Bilt,* at pp. 499–500; see *Cahill*, *supra*, 194 Cal.App.4th at pp. 959–960; *L. C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 747–748 (*L. C. Rudd*); *Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1349 (*Mattco*); *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 & fn. 6 (*Toyota*); *Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1260.)

In addition to the *Tech-Bilt* factors, "the trial court's good faith determination must take into account the settling tortfeasor's potential liability for indemnity to a cotortfeasor, as well as the settling tortfeasor's potential liability to the plaintiff." (*Far West Financial Corp. v. D & S*

Co. (1988) 46 Cal.3d 796, 816, fn. 16 (*Far West*); but see *Cahill*, *supra*, 194 Cal.App.4th at pp. 966–967 [settling tortfeasor need not "disclose to a plaintiff all theories supporting its potential liability, or evidence tending to prove its liability," and plaintiff need not "conduct a reasonable investigation and perform reasonable diligence to determine any potential liability of a settling" tortfeasor before agreeing to a good faith settlement].) It follows that the settling tortfeasor's potential ability to secure full indemnity *from* another tortfeasor also must be a factor that the trial court should consider when assessing whether a settlement with the plaintiff was made in good faith. (See *Far West*, at p. 816, fn. 16.) However, a "judge charting the boundaries of good faith of necessity must avoid a rigid application of the factors set forth in *Tech-Bilt*." (*North County Contractor's Assn. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1090 (*North County*).) Rather, the "judge should make an educated guess whether the settlement approximates the settling defendant's apportionment of liability and is not grossly disproportionate to the settlor's fair share of anticipated damages." (*Ibid.*; see *id.* at p. 1095 ["An educated guess is the best a judge can do when deciding whether a settlement is made in good faith"].)

"The fundamental inquiry in a good faith hearing . . . is whether the settling defendant is paying the plaintiff an amount that is so far below defendant's proportionate share of liability as to be completely ' "out of the ball park." ' " (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1284, quoting *Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.)

> By requiring a settling defendant to settle "*in the ballpark*" in order to gain immunity from contribution or comparative indemnity, the good faith requirement of sections 877 and 877.6 assures that . . . the nonsettling defendants' liability to the plaintiff will be reduced by a sum that is *not 'grossly disproportionate*' to the settling defendant's share of liability, thus providing at least some *rough measure* of fair apportionment of loss between the settling and nonsettling defendants.

(*Far West*, *supra*, 46 Cal.3d at p. 815, emphasis added; see *North County*, *supra*, 27 Cal.App.4th at pp. 1090–1091 ["bad faith is not ' "established by a showing that a settling defendant paid less than his theoretical proportionate or fair share." ' . . . In other words, 'a "good faith" settlement does not call for perfect or even nearly perfect apportionment of liability.' . . . All that is necessary is that there be a 'rough approximation' between a settling tortfeasor's offer of settlement and his proportionate liability" (citations omitted)]; *Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1262 ["The ultimate determinant of good faith is whether the settlement is *grossly disproportionate* to what a reasonable person at the time of settlement would estimate the settlor's liability to be"

(emphasis added)].)

Thus, the "settlor's proportionate liability" is a key element in a good faith determination. (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499; *Price Pfister, Inc. v. William Lyon Co.* (1993) 14 Cal.App.4th 1643, 1649; *Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1262 ["Settlor's percentage of liability is the touchstone question to be considered by the trial court in a contested good faith settlement hearing"].) However, the court also must assess the good faith application in light of the uncertainty associated with trying the case and an understanding that "a settlor should pay less in settlement than he would if he were found liable after a trial." (*Tech-Bilt*, at p. 499; accord, *Far West*, *supra*, 46 Cal.3d at p. 816 ["a settlement may be found in good faith even if the settling tortfeasor does not pay a sum precisely commensurate with its proportionate share of liability [citation] and . . . it is appropriate that a settling defendant 'pay less in settlement than he would if he were found liable after a trial' "]; *Gehl Brothers Manufacturing Co. v. Superior Court* (1986) 183 Cal.App.3d 178, 182–183 (*Gehl*).)

"Equity is the aim" of the good faith settlement rules. (*Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal.App.4th 865, 872 (*Long Beach*).) Thus, courts should also consider the impact of a settlement on the nonsettling defendant—namely, whether it is fair to cut off the nonsettling defendant's right to seek indemnity from the settlor. (*Id.* at p. 873; *TSI Seismic Tenant Space, Inc. v. Superior Court* (2007) 149 Cal.App.4th 159, 166–168; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶ 12:773.6 ["the true value of the settlement to the settlor may not be the amount paid plaintiff but rather the value of the shield against such indemnity claims"].)

Moreover, the assessment whether a settlement was made in good faith—in both the trial court and on appeal—must be limited to *facts known at the time of the settlement* and *not* retrospectively based on a jury's later verdict. (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499; *Dole Food Co., Inc. v. Superior Court* (2015) 242 Cal.App.4th 894, 904 (*Dole*) [court's evaluation should "be made 'on the basis of information available at the time of settlement' "]; *Toyota*, *supra*, 220 Cal.App.3d at p. 878, fn. 9; *Grand Terrace*, *supra*, 192 Cal.App.3d at p. 1263.) In other words, the " 'determinant of good faith is not the liability figure ultimately reached at trial, but whether the settlement is grossly disproportionate to what a reasonable person, at the time of the settlement would estimate the settling defendant's liability to be.' " (*North County*, *supra*, 27 Cal.App.4th at p. 1094.)

Finally, a good faith application *cannot* be denied merely because it might deprive a nonsettling tortfeasor of an opportunity to secure full indemnification from the settlor. (*Far West*, *supra*, 46 Cal.3d at p. 816 ["under the *Tech-Bilt* approach a nonsettling tortfeasor may be left to bear some portion of the plaintiff's loss, even in situations in which, if the indemnity claim had gone to trial, the trier of fact might have concluded that the equities supported a total shifting of loss to the more culpable tortfeasor"]; see *id.* at pp. 811, 814.)

In sum, to satisfy its burden of proof "[t]he challenger must prove 'the settlement is so far "out of the ballpark" in relation to these factors as to be inconsistent with the equitable objectives of the statute.' " (*North County*, *supra*, 27 Cal.App.4th at p. 1091.) If the challenger makes no evidentiary showing that the settlement was not made in good faith, the court has no basis for rejecting the application. (Cf. *Mattco*, *supra*, 38 Cal.App.4th at p. 1350, fn. 6.)

Some appellate courts have held that a petition for writ of mandate is the exclusive means of challenging an order approving or denying a good faith settlement determination under section 877.6. (See, e.g., *Oak Springs Villas Homeowners Assn. v. Advanced Truss Systems, Inc.* (2012) 206 Cal.App.4th 1304, 1309 [dismissing appeal from order approving good faith settlement because no writ petition was filed and declining "to treat an improper direct appeal from a section 877.6 merits ruling as a petition for writ of mandate"]); *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 498; *Housing Group v. Superior Court* (1994) 24 Cal.App.4th 549, 552.) Other courts have held that a good faith settlement determination may be reviewed by writ of mandate or in an appeal from the final judgment in the event a prior writ petition was summarily denied. (See, e.g., *Cahill*, *supra*, 194 Cal.App.4th at p. 955–956; *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 634–637; *Maryland Cas. Co. v. Andreini & Co. of Southern California* (2000) 81 Cal.App.4th 1413, 1425.) In August 2022, the California Supreme Court granted review in *Pacific Fertility Cases* (2022) 78 Cal.App.5th 568, 575 (S275134) to address whether a petition for writ of mandate is the exclusive means of challenging an order approving or denying a good faith settlement under section 877.6. However, the Court dismissed the case in October 2023 after the parties settled out of court. Until this issue is settled, it is prudent to first seek writ relief within the 20-day statutory period in order to preserve the potential right to contest a good faith determination on appeal.

Ordinarily, the good faith determination is a matter that is left to the discretion of the trial court. (*Long Beach*, *supra*, 172 Cal.App.4th at p. 873.) However, that discretion is "not unlimited and should be exercised in view of the equitable goals of the statute, in conformity with

the spirit of the law and in a manner that serves the interests of justice." (*Ibid.*) Such a ruling is usually reviewed to determine whether the decision reflects an " 'arbitrary determination, capricious disposition or whimsical thinking.' " (*Toyota*, *supra*, 220 Cal.App.3d at p. 870 ["discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered"].)

When "the exercise of discretion on the basis of the criteria [the *Tech-Bilt* Court] identified as appropriate could yield but one conclusion," the issue can be decided as a matter of law. (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 502; see *Toyota*, *supra*, 220 Cal.App.3d at p. 872 ["where the facts are undisputed, the issue is one of law and the appellate court is free to reach its own legal conclusion from such facts"]; *Gehl*, *supra*, 183 Cal.App.3d at p. 186.)

C. The Impact of a Good Faith Settlement on Indemnity Rights.

Under good faith settlement statutes, when parties to a lawsuit settle "in good faith before verdict or judgment" the settling tortfeasor is released from all liability for any contribution or *equitable* indemnity to any other tortfeasors. (§§ 877, subd. (b), 877.6, subd. (c).) "[A] claim based on an implied contractual indemnity theory is a form of equitable indemnity, and therefore such a claim is barred by a good faith settlement under section 877.6, subdivision (c)." (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1020.) However, a claim for *express* indemnity (e.g., an action to enforce a written indemnity agreement) is *not* barred by a good faith settlement determination. (See *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 ["Where, as here, the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity"].) In other words, the nonsettling defendant may seek express indemnity from a co-defendant that has settled with the plaintiff regardless of any finding that the settlement was made in good faith.

If a pre-trial settlement is *not* found to have been made in good faith, the nonsettling defendant can seek express or equitable/implied indemnity or contribution from the settling tortfeasor in the event the nonsettling party pays more than its share of the plaintiff's damages. (See *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 303–307 (*Leung*) [abrogating the common law release rule in cases where "the settlement is judicially determined not to meet" the requirements of good faith and applying the "setoff-with-contribution approach"].)

D. Offset Rights Stemming from a Good Faith Settlement.

1. Introduction.

When a plaintiff settles with a co-tortfeasor, the nonsettling tortfeasor is entitled to set off the consideration paid by the settling tortfeasor for injuries for which both tortfeasors are jointly and severally liable. (§ 877, subd. (a); *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 813 (*Laurenzi*); *LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 877 (*LAOSD*); *Hackett v. John Crane, Inc.* (2002) 98 Cal.App.4th 1233, 1239 (*Hackett*); *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 62–64, 67.) Determining the amount of the setoff is straightforward when the action is by one plaintiff with an indivisible injury and the settlement is paid in cash. In other, more complex cases, however, issues of valuation or allocation may arise. As one Court of Appeal explained:

> In the typical one-plaintiff, multiple-defendants, personal injury action each tortfeasor is potentially liable for the same injury to the plaintiff. Therefore the full settlement by one defendant will offset a judgment against other tortfeasors; no allocation of the settlement is required. But many lawsuits and many settlements do not fit this pattern. In some, the amount of the offset is uncertain because one settlement covers multiple plaintiffs or causes of action with different damages [citations], or because a sliding scale settlement is used and payments by the settling defendant are contingent upon the degree of plaintiff's success against the remaining defendants [citation]. In others, the amount of the offset is clouded by injection of noncash consideration into the settlement [citations] or . . . by settling claims for separate injuries not all of which would be attributable to conduct of the remaining defendants.

(*Alcal Roofing & Insulation v. Superior Court* (1992) 8 Cal.App.4th 1121, 1124 (*Alcal Roofing*); accord, *Franklin Mint Co. v. Superior Court* (2005) 130 Cal.App.4th 1550, 1557 (*Franklin Mint*).)

Below, we explain how to determine the amount of the setoff in these types of complex actions.

2. Determine Whether the Settling and Nonsettling Tortfeasors Are Liable for the Same Injury.

A setoff is available to a nonsettling tortfeasor who is "claimed to be liable for the same tort" as the settling tortfeasor. (§ 877.) Courts have construed this to mean that the settling and nonsettling tortfeasors' acts or omissions must have combined to cause an indivisible injury.[3] (*May v. Miller* (1991) 228 Cal.App.3d 404, 409 ["The only relevant question in applying section 877 is whether there was one indivisible injury caused by two or more parties"].)

If there is not complete overlap between the injuries allegedly caused by the settling and nonsettling tortfeasors, the settlement must be allocated to the various injuries asserted against the settling tortfeasor. The nonsettling defendant can then claim a setoff for only the portion of the settlement allocated to damages claimed against both the settling and nonsettling tortfeasors. (See *Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 268, 279–282, 287–288 (*Dillingham*); *Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1702–1703 (*Regan*); *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1495–1496 (*Erreca's*); *Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 836 (*Knox*) [any settlement stemming from the "same course of events" as those underlying the verdict must be offset].);

One situation in which settling and nonsettling tortfeasors may not be liable for the same damages is where a lawsuit includes a potential wrongful death claim. In this situation, the nonsettling defendant may not be able to offset the portion of the settlement properly attributable to that claim. As a leading treatise explains:

> [W]here personal injury results in a claim by the victim, a loss of consortium claim by the spouse and potential wrongful death claims by the heirs, a pretrial settlement is properly credited against the judgment only to the extent the judgment awards damages for the same claims embraced by the settlement. If the potential wrongful death claimants joined in or were clearly intended to benefit from

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3 For example, because the alleged tortious conduct contributes to the same injury, a settlement for an automobile accident must be offset from the verdict against a hospital for later treatment stemming from that accident. (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 795–796.) Likewise, a legal malpractice settlement must be offset from a verdict in a related medical malpractice action. (*Lafayette v. County of Los Angeles* (1984) 162 Cal.App.3d 547, 555–556.)

> the settlement, but never recovered a judgment against the nonsettling defendant (e.g., because the victim was still alive), *no credit* against plaintiff's (the prospective decedent's) personal injury judgment can be given for that portion of the settlement properly allocated to the wrongful death claims.

(Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2023) ¶ 4:688, citing *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 860–865 (*Wilson*); see *LAOSD*, *supra*, 28 Cal.App.5th at p. 882 ["Viewed together, *Wilson* and *Hackett* establish that when the heirs are not signatories to a settlement executed by the original plaintiffs, the settling defendant's key safeguard against a subsequent wrongful death action by the heirs is a 'hold harmless' provision in the settlement binding on the original plaintiffs, *unless* the settlement is also binding on the heirs. [Citation.] The latter may occur where the plaintiffs, in negotiating the settlement, act as the heirs' agents, or the heirs actually receive the settlement funds allocated to wrongful death claims. [Citation.] When those situations obtain, a nonsettling defendant is potentially entitled to a section 877 credit in the heirs' wrongful death action because they are bound by the settlement."].)

In the following section, we describe the circumstances under which settlements can be properly allocated to different claims.

3. Determine Whether The Settling Tortfeasor Agreed To Allocate The Settlement Among Various Claims And Whether The Allocation Is In Good Faith.

When the plaintiff asserts multiple claims and seeks damages for divisible injuries, the plaintiff's settlement with one of the alleged tortfeasors must be allocated among the claims being asserted against that tortfeasor. "In a situation where the cash amount of the settlement does not dictate the amount of the offset, the settling parties *must* include an allocation . . . in their agreement." (*Alcal Roofing*, *supra*, 8 Cal.App.4th at pp. 1124–1125, emphasis added; accord, *Erreca's*, *supra*, 19 Cal.App.4th at p. 1489.) "Since the settling parties have the most knowledge of the value of the various claims they are attempting to settle, they are *required* to make an allocation of settlement proceeds among those various claims, subject to court approval of the showing made." (*Regan*, *supra*, 21 Cal.App.4th at p. 1702, emphasis added; accord, *Erreca's*, at p. 1491.) "[T]he settling parties *must* include an allocation or a valuation of the various claims in their settlement agreement in order to obtain a finding of good faith." (*Dillingham, supra,* 64 Cal.App.4th at p. 282, original emphasis; see *id.* at pp. 279–281; *Gouvis Engineering v. Superior*

Court (1995) 37 Cal.App.4th 642, 648 ["The cases dealing with the obligation of the settling parties to allocate the settlement to various claims all impose that *requirement* for the specific purpose of arriving at the proper offset" (emphasis added)].)

"The trial court has wide discretion in allocating portions of a prior settlement to claims not adjudicated at trial." (*Hackett*, *supra*, 98 Cal.App.4th at p. 1242.) "[W]here the settling parties have failed to allocate, the trial court *must* allocate in the manner which is most advantageous to the nonsettling party." (*Dillingham*, *supra*, 64 Cal.App.4th at p. 287, emphasis added; see *id.* at pp. 287–288.) This usually means the entire settlement may be offset from judgment. (*Alcal Roofing*, *supra*, 8 Cal.App.4th at p. 1127 ["If any of [the settling defendants] did not allocate part of its settlement to nonroofing issues, roofer may obtain an offset for the *entire amount* of that defendant's settlement" (emphasis added)]; *Knox*, *supra*, 109 Cal.App.3d at p. 836 ["Absent some good faith agreement between plaintiffs and [the settling defendants] allocating the settlement consideration . . . , defendants were entitled to a setoff of the *entire* settlement figure" (emphasis added)].)

Even where the settling parties have allocated, "[t]he effectiveness of such an allocation depends upon its good faith." (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1491.) "The statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude any portion of the settlement from the setoff." (*Knox*, *supra*, 109 Cal.App.3d at p. 837; accord, *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1321 (*Ehret*); *Regan*, *supra*, 21 Cal.App.4th at p. 1701; see *Dillingham*, *supra*, 64 Cal.App.4th at pp. 279–282.)

The good faith of the allocation should be determined at the same time as the good faith of the overall settlement amount. (*Regan*, *supra*, 21 Cal.App.4th at p. 1703 ["the credit or offset to be accorded a nonsettling defendant should normally be fixed at the time that the settlement is reached, since the issue of the credit is part of the overall good faith determination"]; *Erreca's*, *supra*, 19 Cal.App.4th at p. 1500, fn. 7 ["Determination of the credit issue to the extent possible cannot be deferred until after any eventual jury verdict, because the entire settlement must be determined to be in good faith as to both settling and nonsettling defendants"].)

The nonsettling tortfeasor bears the burden of proving the allocation is *not* in good faith. (§ 877.6, subd. (d); *Dillingham*, *supra*, 64 Cal.App.4th at pp. 280–281 & fn. 10; *Alcal Roofing*, *supra*, 8 Cal.App.4th at p. 1125.) *This burden does not arise*, however, until a party seeking

confirmation of the settlement (1) explains to the court and to all other parties, by declaration or other written form, how the settlement is allocated and the evidentiary basis for the allocation, and (2) demonstrates that the allocation was reached in a sufficiently adversarial manner to justify a presumption of good faith. (*Franklin Mint*, *supra*, 130 Cal.App.4th at p. 1558; *Ehret*, *supra*, 73 Cal.App.4th at pp. 1320–1322; *Dillingham*, at pp. 279–281; *L. C. Rudd*, *supra*, 52 Cal.App.4th at p. 750; *Regan*, *supra*, 21 Cal.App.4th at pp. 1700–1704; *Erreca's*, *supra*, 19 Cal.App.4th at pp. 1491–1496; *Alcal Roofing*, at pp. 1124–1125, 1129.)

An allocation is reached in a sufficiently adversarial manner to justify a presumption of good faith only if the settling parties have " 'truly adverse interests in the allocation.' " (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1493.) "Collusion exists where only one of the parties cares how proceeds are allocated." (*Dillingham*, *supra*, 64 Cal.App.4th at p. 286.) "[I]f the allocation appears to be the result of collusion between parties, the trial court *must* find that the settlement, or at least the allocation, was not in good faith as a matter of law." (*Ibid.*, emphasis added.)

The ultimate test for determining the good faith of an allocation is whether it is " 'in the ballpark,' " i.e., provides a setoff that is "not 'grossly disproportionate' to the settling defendant's share of liability, thus providing at least some rough measure of fair apportionment of loss between the settling and nonsettling defendants." (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 874 (*Abbott Ford*).) "The parameters of the 'ballpark' for the purpose of allocating the settlement proceeds between discrete claims is limited by evidence of the relation of the claims to the whole of the settlement amount." (*L. C. Rudd*, *supra*, 52 Cal.App.4th at p. 753 [in construction defect suit, where soils and foundation claims constituted approximately 55.1 to 61.1 percent of total cost of repairs, "[t]his is the 'ballpark' for purposes of allocation. . . . [T]he allocation [to the soils and foundation category] must come within these figures"]; see *Dillingham*, *supra*, 64 Cal.App.4th at p. 287, fn. 11; see also Part B, *ante*.)

4. Determine Whether The Settling Parties Placed A Monetary Value On Any Contingent Or Noncash Consideration And Whether The Value Is In Good Faith.

"Section 877 does not require the direct payment of money nor does it impose any requirement as to how and when the consideration is paid. [Citations.] [¶] In *Abbott Ford*, the Supreme Court explained the procedure to be followed in the context of a contingent payment settlement. The Supreme Court placed the burden of determining the value of the settlement agreement on the settling parties, and stressed that this should be done at the time the settlement

agreement is confirmed so that the trial court can evaluate whether there has been a good faith settlement." (*Arbuthnot v. Relocation Realty Service Corp.* (1991) 227 Cal.App.3d 682, 689.) "[T]he procedures set forth in *Abbott Ford* . . . apply in instances . . . where payment is contingent or where value other than cash is given." (*Id.* at p. 690.) Examples of settlements that must include valuations are sliding scale/Mary Carter agreements (*Abbott Ford*, *supra*, 43 Cal.3d at p. 879), and agreements that assign indemnity rights (*Alcal Roofing*, *supra*, 8 Cal.App.4th at pp. 1124–1125, 1128–1129).

"Whatever methods of evaluation [of noncash components of the settlement] are selected, they must be based on competent evidence and not on mere speculation." (*Brehm Communities v. Superior Court* (2001) 88 Cal.App.4th 730, 735–737; accord, *Franklin Mint*, *supra*, 130 Cal.App.4th at p. 1559 ["the amount of *consideration* paid within the meaning of section 877, subdivision (a) is not necessarily the amount of *money* paid"]; *United Services Auto. Ass'n v. Superior Court* (2001) 93 Cal.App.4th 633, 644 ["the valuation of the settlement agreement must include the valuation of the contingent consideration paid to the settling plaintiff, supported by specific evidence, declaration, or [expert] opinion"].)

"In evaluating the appropriateness of the parties' valuation . . . . the trial court should examine whether there is an adequate evidentiary basis for the valuation and whether it was reached in an atmosphere of such adverseness as to give rise to the presumption that a reasonable valuation was made. [Citation.] The trial court will then apply its discretion in determining whether the parties' showing is adequate." (*Regan*, *supra*, 21 Cal.App.4th at p. 1714.)

Valuation is an inexact science; perfect valuation is not required. For example, when assessing the value of sliding scale agreements, "the court may not be able to do more than simply make its best estimate, taking into account the size of the guaranty figure and the likelihood that the settling defendant will actually have to pay out either that amount or some lesser sum." (*Abbott Ford*, *supra*, 43 Cal.3d at p. 879, fn. 23.) Likewise, when the trial court is called on to assess the good faith of the settling parties' valuation of an assignment of the settling tortfeasor's indemnity rights to the plaintiff: "Considering the maximum entitlement to indemnity that the assignment represents, the parties may then assign a discount to that maximum entitlement based on the cost to prosecute the claims, the probability of prevailing on them, and the likelihood of collecting on a judgment on them. . . . The extent of the assignor's potential comparative fault might serve to reduce the value of the assignment. It could also be considered whether the assignees had any intention of actually pursuing such indemnity right, or whether they preferred

to pursue only their own direct rights." (*Regan*, *supra*, 21 Cal.App.4th at p. 1714.) Additionally, "the nonsettling defendant's right to challenge the valuation of the settlement should not . . . be interpreted as giving that defendant a right to a mini-trial on the valuation issue." (*Franklin Mint*, *supra*, 130 Cal.App.4th at p. 1558.)

5. Allocate The Settlement Between Economic And Noneconomic Damages.

"Liability for noneconomic damages is several only, so that defendants pay in proportion to their share of fault." (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 720 (*Rashidi*); see *Schreiber v. Lee* (2020) 47 Cal.App.5th 745, 759 ["when a defendant entitled to the full benefit of Proposition 51 settles, he or she is resolving, with respect to noneconomic damages, only his or her *own* share of those damages. [Citation.] And nonsettling defendants cannot look to that payment as resolving, in whole or in part, *their* proportional shares of those damages."]; *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1838 (*Poire*) ["[E]ach defendant is solely responsible for its share of noneconomic damages under Civil Code section 1431.2 [Proposition 51]. Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages."]; accord, *Hellam v. Crane Co.* (2015) 239 Cal.App.4th 851, 863; *Wilson*, *supra*, 81 Cal.App.4th at pp. 863–864; *Ehret*, *supra*, 73 Cal.App.4th at p. 1319.)

To determine what portion of a preverdict settlement is *economic* damages subject to setoff, generally use the same percentage of economic damages as the jury's verdict.[4] Thus, if the verdict is 75 percent economic damages, the settlement is 75 percent economic damages. (*Rashidi*, *supra*, 60 Cal.4th at p. 722 ["The percentage of the jury's award attributable to economic damages is calculated and applied to the settlement, yielding the amount that the nonsettling defendant is entitled to offset"]; *Wilson*, *supra*, 81 Cal.App.4th at p. 864; *Poire*, *supra*, 39 Cal.App.4th at pp. 1838–1839, 1841; *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 838.) "When prior recoveries have not previously been allocated in a manner found by the court to be in good faith, the posttrial allocation of prior settlements should mirror the jury's apportionment of economic and non-economic damages." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1006.)

4 As explained in Part II, *post*, for a *postverdict* settlement, the settling tortfeasor is presumed to have paid in full its liability to the plaintiff for noneconomic damages. (*Torres*, *supra*, 49 Cal.App.4th at pp. 40–42.) Therefore, a postverdict settlement is allocated *first* to noneconomic damages, up to the settling tortfeasor's liability for such damages, and then the remainder of the settlement (if any) is allocated to economic damages. (*Ibid.*)

However, it remains an open question whether the parties' allocation of the settlement between economic and noneconomic damages may be used instead of the jury's verdict when the trial court *has* ruled that parties' allocation was made in good faith. (See *Dole*, *supra*, 242 Cal.App.4th at p. 918 & fn. 13; *Ehret*, *supra*, 73 Cal.App.4th at pp. 1320–1321; *Greathouse*, at pp. 840–841; *Espinoza v. Machonga* (1992) 9 Cal.App.4th at p. 277 & fn. 9 (*Espinoza*).)

II. POST-VERDICT SETTLEMENTS.

"Section 877 . . . applies only to a settlement entered into . . .before a verdict or judgment." (*Jhaveri v. Teitelbaum* (2009) 176 Cal.App.4th 740, 750; see *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 39 (*Torres*) ["authorities applicable to good faith settlements do not apply to settlements which occur after damages have been awarded"].)

In *Leung*, *supra*, 55 Cal.4th at page 302, the Supreme Court abrogated the common law release rule and announced a new approach for apportioning liability among joint tortfeasors where "one tortfeasor's settlement, resulting in a release of liability, was determined by the trial court not to have been made in 'good faith,' thus rendering inapplicable the apportionment scheme" of section 877. The Court explained that the common law release rule was based on the "unjustified" assumption that "the amount paid in settlement to a plaintiff in return for releasing one joint tortfeasor from liability always provides full compensation for all of the plaintiff's injuries, and that therefore anything recovered by the plaintiff beyond that amount constitutes a double or excess recovery." (*Ibid*.) The Court adopted a "setoff-with-contribution approach," because it supports public policy favoring settlement, and ensures that the plaintiff "recovers the total economic damages amount" in two parts: the settlement, and the nonsettling tortfeasors' contribution. (*Id.*, at p. 305)

Nonsettling defendants are still entitled to a set off for the economic damages portion of the settlement. (See *Laurenzi*, *supra*, 25 Cal.2d at p. 813; see also *Espinoza*, *supra*, 9 Cal.App.4th at p. 276 [under Proposition 51, "each defendant is solely responsible for his or her share of the noneconomic damages. Thus, that portion of the settlement attributable to noneconomic damages is not subject to setoff."]; accord, *McComber v. Wells* (1999) 72 Cal.App.4th 512, 517–518.) To determine what portion of a *postverdict* settlement is economic damages subject to setoff, the law presumes the settling tortfeasor paid in full its liability to the plaintiff for noneconomic damages. (*Torres*, *supra*, 49 Cal.App.4th at pp. 40–42.) The settlement, therefore, is allocated first to noneconomic damages, up to the settling tortfeasor's liability for such damages, and then the remainder of the settlement (if any) is allocated to economic damages. (*Ibid.*)