Good Faith Settlements: The Inequitable Result of the Evolving Definition of "Equity"

Christopher W. Todd
INTRODUCTION

The current year is 1986, but from the look of things in California tort law, it might as well be 1956. The bold yet logical steps taken by California’s lawmakers and judges during the last thirty years to ensure that no defendant bears more than his fair share of an injured plaintiff’s damages have apparently been for naught. The recent decision of Tech-Bilt, Inc. v. Woodward-Clyde & Associates attempts to alleviate the unfair results that have occurred, yet, as will be discussed, Tech-Bilt may serve only to compound the problem.

Thirty years ago, California was in a quandary over the inequity and unfairness of one part of its tort compensation system. In a lawsuit involving several defendants claimed to be responsible for the same injury, the system allowed a plaintiff to choose the unlucky defendant who would be required to satisfy his judgment. The defendant forced to pay was not given the right to receive any contributions from his co-wrongdoers by the law. Sweeping changes occurred in the next twenty-five years, beginning with the enactment of California Code of Civil Procedure sections 875-80 [hereinafter referred to as the Contribution Statutes]. The changes were designed to distribute more equitably the responsibility for a plaintiff’s losses, and ultimately evolved into our current system of apportioning liability in direct relation to each party’s proportionate fault.

Yet today, even after the Tech-Bilt decision, and perhaps because
the California Supreme Court acted too quickly in adopting a joint tort system based on comparative negligence, a plaintiff can choose among joint tortfeasors and decide which one will be entitled to the benefit of a “good faith settlement” with him.6 Once the settling defendant has received his dismissal from the plaintiff, the remaining defendants are not able to determine the proportionate share of their ex-codefendant’s fault.7 With the settling defendant thus absent, the plaintiff may then pursue his claim against the remaining defendants who, under the doctrine of joint and several liability, must satisfy the plaintiff’s entire judgment when found liable—even if only one percent liable—for the plaintiff’s damages.8 Thus, the inequitable results which were so much a part of our earlier tort law—and for which the majority of the bar at that time expressed great distaste—are still with us.

Certainly, the policy considerations of equitable apportionment of fault, expressed clearly in the landmark California decisions of Li v. Yellow Cab Co.9 and American Motorcycle Association v. Superior Court10 were not stated by California’s supreme court justices just to be ignored. How then could the tort system evolving after those decisions require a defendant, only one percent at fault, to bear the burden of plaintiff’s judgment in its entirety?

The primary answer which this Comment will examine lies in the Li and American Motorcycle decisions themselves; for in adopting by judicial decision the doctrine of comparative negligence and comparative partial indemnity, the supreme court may not have realized the potential for unfairness these doctrines might have when applied in California’s already existing statutory contribution sys-

6. Clearly, the decision to adopt comparative negligence and do away with the all-or-nothing contributory negligence rule was a logical and needed change in California. See discussion of Li, infra notes 34-37 and accompanying text. However, it does not seem as though the court was able to reflect on the ramifications of applying Li to a joint tortfeasor situation with enough lucidity in the three short years that elapsed before American Motorcycle was decided. See discussion of American Motorcycle, infra notes 38-49 and accompanying text. A “good faith settlement” is a settlement reached under CAL. CIV. PROC. CODE §§ 877 & 877.6, which shields the settling defendant from liability for claims of contribution, comparative contribution, and comparative partial indemnity. See discussion of the Contribution Statutes, infra notes 19-32 and accompanying text.

7. The determination cannot be made because the settlor is no longer a party to the lawsuit. See infra notes 19-32 and accompanying text.

8. See discussion of common law, infra notes 13-18 and accompanying text. The doctrine of joint and several liability has seen much criticism recently, since it enables a plaintiff to sue defendants with deep pockets (such as municipalities or parties who are well-insured) and recover large amounts from them, although their share of the fault may be minimal.

9. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858.
10. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.
The resulting inconsistency seen in "good faith settlement" cases decided after *Li* and *American Motorcycle* exemplifies the incompatibility of the policy of those decisions with the policy of the Contribution Statutes, and highlights the changing definition of "equity" in the joint tort context.\(^\text{12}\)

This Comment will discuss the developments in California joint tortfeasor law over the past thirty years, will explore the effect that the commingled developments have had on joint tortfeasors, and will specifically focus on the problems associated with "good faith settlements." This Comment will then encourage statutory reform of the current joint tortfeasor system, including repeal of the Contribution Statutes and enactment of a new code section which will be more in line with the *Li* and *American Motorcycle* policy objectives.

I. DEVELOPMENT OF CALIFORNIA JOINT TORTFEASOR LAW

A. Common Law

At common law and today, each tortfeasor whose act combines indivisibly with another's to harm a plaintiff is jointly and severally liable for the plaintiff's damages.\(^\text{13}\) If the plaintiff is awarded a judgment against two joint tortfeasors, he can collect the entire judgment from either of the two. The rationale behind this rule is that an injured plaintiff should not bear the risk of having been injured by a judgment-proof defendant. If the plaintiff cannot recover the damages to which he is entitled from one defendant, the other defendant, also at fault, must pick up the slack. Of critical importance in the development of the joint and several liability rule, was that all defendants be equally at fault.

Also at common law, no right of contribution existed between two joint tortfeasors.\(^\text{14}\) If one defendant satisfied a plaintiff's judgment in its entirety, he could not recover from his codefendant any of the amount he paid to the plaintiff. The policy reason of this rule was that the law should not aid a tortfeasor. The same policy supported the rule that a plaintiff who was contributorily negligent was

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11. See discussion of *Li* and *American Motorcycle* infra, notes 34-49 and accompanying text.

12. See discussion of problems in settlement law infra, notes 65-88 and accompanying text.

13. The imposition of joint and several liability allows a plaintiff to enforce judgment against any of a number of multiple tortfeasors whose negligent acts were the proximate cause of plaintiff's indivisible injury. *See* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 47, at 328 (5th ed. 1984). *See also* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 37, at 2335 (1974).

completely barred from recovering damages from those he had sued.15

Finally, the release of one defendant from a case meant the release of all defendants under joint tortfeasor law.16 The policy of this overly technical rule apparently was that if one of two joint tortfeasors was not thought by the plaintiff to be at fault for his damages, how could the other defendant still be responsible when the act causing the injury was indivisible.17

These strict common law rules worked highly inequitable results.18 Defendants subject to the joint and several liability and no contribution rules were sometimes required to pay more from their own pockets than that for which they were directly responsible. Plaintiffs and defendants alike could not benefit from the time and money saving advantages of pretrial settlement, due to the inability of a plaintiff to make an independent settlement with one of his alleged tortfeasors without releasing them all. In response to complaints about the unfairness of the common law rules, the legislature enacted the Contribution Statutes in 1957.19

15. Li, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.
16. Tech-Bilt, 38 Cal. 3d at 493, 698 P.2d at 163, 213 Cal. Rptr. at 259. See also W. PROSSER, LAW OF TORTS § 47, at 301 (4th ed. 1971).
17. W. PROSSER, supra note 16, § 47, at 301.
18. Several doctrines arose to ease the rigidity of the common law rules. For example, since no right of contribution existed, the doctrine of equitable indemnity arose to allow a “passively negligent” joint tortfeasor to shift the entire liability to his “actively negligent” co-tortfeasor. American Motorcycle, 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 184. The doctrine of last clear chance developed to soften the harshness of the contributory negligence rule. See W. PROSSER, supra note 16, § 66, at 427-33. Covenant not to sue and covenant not to enforce judgment were devised to mitigate the harshness of the “release of one releases all” rule. See C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 4.230, at 13 (rev. ed. 1978).
19. The Contribution Statutes, supra note 1, as originally enacted in 1957, provided:

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.
(b) Such right of contribution shall be administered in accordance with the principles of equity.
(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.
(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.
(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.
(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another, there shall be no right of contribution between them.
(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor.
B. The Contribution Statutes

The primary goal of the Contribution Statutes was to statutorily affirm the existence of the right of a defendant to contribution.20 These California Code of Civil Procedure sections provide that once a money judgment has been rendered against two or more defend-

CAL. CIV. PROC. CODE § 875 (West 1980).
(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.
(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them.

CAL. CIV. PROC. CODE § 876 (West 1980).
Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort-
(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

CAL. CIV. PROC. CODE § 877 (West 1980).
Judgment for contribution may be entered by one tortfeasor judgment debtor against other tortfeasor judgment debtors by motion upon notice. Notice of such motion shall be given to all parties in the action, including the plaintiff or plaintiffs, at least ten days before the hearing thereon. Such notice shall be accompanied by an affidavit setting forth any information which the moving party may have as to the assets of defendants available for satisfaction of the judgment or claim for contribution.

CAL. CIV. PROC. CODE § 878 (West 1980).
If any provision of this title or the application thereof to any person is held invalid, such invalidity shall not affect other provisions or applications of the title which can be given effect without the invalid provision or application and to this end the provisions of this title are declared to be severable.

CAL. CIV. PROC. CODE § 879 (West 1980).
This title shall become effective as to causes of action accruing on or after January 1, 1958.

CAL. CIV. PROC. CODE § 880 (West 1980).
20. A full, although somewhat inaccurate, discussion of the adoption of the Contribution Statutes, supra note 1, is given in Tech-Bilt, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256, as well as in River Garden, 26 Cal. App. 3d at 993-96, 103 Cal. Rptr. at 503-05. The Tech-Bilt and River Garden courts noted that the Contribution Statutes were quite similar to the 1955 revision of the Uniform Contribution Among Tortfeasors Act, and quite likely were modeled on that act. However, a close reading of the comments to the Uniform Contribution Among Tortfeasors Act shows that the courts may have misconstrued the significance of the requirement of “good faith” under the Contribution Statutes. The commissioners who drafted the Uniform Contribution Among Tortfeasors Act were concerned only with limiting collusion between a settling plaintiff and defendant. Also, the California Legislature, at the time it adopted the Contribution Statutes, had no way of foreseeing the expansion of the multiple tortfeasor system which came with Li and American Motorcycle. Tech-Bilt and River Garden go well beyond those limited purposes, deciding that the “good faith” requirement mandates that a settlement be within a reasonable range of the defendant’s fair share of fault. See Tech-Bilt, 38 Cal. 3d at 502-05, 698 P.2d at 169-71, 213 Cal. Rptr. at 266-68 (Bird, C.J., dissenting).
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ants for a joint tort, the right of contribution exists. The right may be enforced only after one defendant has completely discharged, or at least paid, more than his fair share of the judgment. The amount of contribution available from any codefendant is limited to the excess one has paid over his pro rata share. The pro rata share of each defendant is determined by dividing the judgment in equal parts between each.

Though no tortfeasor is required under the Contribution Statutes to make contribution beyond his own pro rata share, the joint and several liability rule still applies to protect the plaintiff from the danger of not getting complete recovery. Thus, one of the joint tortfeasors can still be required to satisfy the entire judgment if his codefendant is insolvent or judgment proof.

A second goal of the Contribution Statutes was to encourage at least partial settlement of cases before trial. To encourage a plaintiff to settle, section 877 provides that a release, dismissal, covenant not to sue, or covenant not to enforce judgment, given in “good faith” to one defendant, will not discharge any other defendant from the lawsuit. The plaintiff can make a partial settlement with the confidence of being able to be completely compensated for his damages, because his claims against the remaining defendants are reduced only in the amount stipulated by the release or actually paid by the settling defendant. The defendant is encouraged to settle because the “good faith settlement” discharges him from any potential liability for contribution to his codefendants. Thus, once the defendant settles, he can close his books on the case.

It is clear that the Contribution Statutes do not encourage equitable apportionment of fault, nor were they so intended. The primary reason for their enactment was to mitigate the harsh common law rules present beforehand. The statutes allow the burden of a judgment rendered against joint tortfeasors to be shared equally among all parties responsible, rather than allow a plaintiff to hand pick the unfortunate soul against whom to proceed.

Secondarily, the statutes encourage pre-trial disposition of lawsuits where no encouragement, in fact, only punishment for doing so, was present beforehand. The danger of contravening the pri-
mary goal of the statutes is lessened by requiring a settlement to be made in good faith; in other words, without collusion between a settling plaintiff and defendant. The good faith requirement is thus designed to limit the opportunity for an unscrupulous plaintiff to hand pick the best defendant to proceed against—the one whose deep pockets will satisfy his judgment or whose evil disposition will ensure a sympathetic judgment at trial—by dismissing the other defendants from the case.

The Contribution Statutes provided a greatly needed—albeit temporary—solution to a tort compensation system that was governed by strict, inequitable common law rules. They provided a system where responsibility for damages could be borne in even shares by those at fault. In essence, the statutes provided the following definition of “equity”: When there is more than one tortfeasor allegedly liable for a plaintiff’s injuries, “equity” means that those tortfeasors should make equal contributions to the plaintiff’s recovery.

The Contribution Statutes also opened the door for the continued advancement of our fault-sharing system, which came with the landmark decisions of Li and American Motorcycle. However, with those two decisions behind us, it is clear that the Contribution Statutes no longer have a logical place in our tort recovery system. In fact, since the Li and American Motorcycle decisions, the Contribution Statutes have hindered, rather than advanced, the evolving concept of “equity.” For today, “equity” has an entirely different meaning within the joint tort context than it did thirty years ago.

C. Adoption of Comparative Fault System

Li v. Yellow Cab Co. was a simple two party lawsuit that did away with the harsh, all-or-nothing common law rule preventing a plaintiff from recovering any damages that were caused in part, no matter how small, by himself. In its place, the California Supreme Court adopted the doctrine of pure comparative negligence.

31. See supra note 20.
33. Contribution Statutes, supra note 1.
34. Li, 13 Cal. 3d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.
35. Id. Comparative negligence generally can be one of three types. Pure comparative negligence allows a plaintiff to recover, even if its negligence is greater than the negligence of the adverse tortfeasor. The plaintiff’s recovery is diminished by his degree of contributory negligence. C.R. Heft & C.J. Heft, supra note 18, § 1.50 at 13. Modified comparative negligence allows a plaintiff to recover if his negligence is less than one-half of the total. He is barred from recovery if his share of fault is 50 percent or more. As in pure comparative negligence, the plaintiff’s recovery is diminished by his degree of contributory negligence. Id., § 1.40 at 8-9. The third type of comparative negligence, known as slight-gross, allows a plaintiff to recover if the defendant’s negligence is gross and his own negligence slight. His damages will be reduced in accordance
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Under this system, a plaintiff’s contributory negligence does not bar him from recovery; rather, any damages awarded are to be diminished in proportion to the amount of negligence attributable to him.

In reaching its decision in *Li*, the court recognized the possibility of problems in “the administration of a rule of comparative negligence in cases involving multiple parties,” including problems of contribution and indemnity. These problems were addressed three years later in the *American Motorcycle* decision.

*American Motorcycle Association v. Superior Court* picked up where *Li* left off and expanded the comparative negligence doctrine to lawsuits involving multiple parties. The court held “that the California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.”

Prior to *American Motorcycle*, the doctrine of equitable indemnity could be applied in multiple tortfeasor lawsuits where one defendant, who was secondarily or passively negligent, was able to pass his entire liability off to another defendant who was primarily or actively negligent. The greater culpability of the latter compelled the equitable rule requiring him to satisfy plaintiff's claim. *American Motorcycle* expanded the indemnity doctrine in order to alleviate its all-or-nothing effect, just as *Li* abrogated the all-or-nothing effect of the contributory negligence rule. Under the new doctrine of comparative partial indemnity, a negligent defendant, even if only secondarily or passively negligent, is required to answer for his proportionate fault. As long as his acts or omissions com-

with the negligence attributable to him. However, if plaintiff’s negligence is more than slight, he is barred from recovery. *Id.*, § 1.30 at 7.

36. *Li*, 13 Cal. 3d at 823, 532 P.2d at 1239-40, 119 Cal. Rptr. at 871-72. 37. *Id.* 38. *American Motorcycle*, 12 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182. 39. *Id.* at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190. Within the “good faith settlement” context, the right to obtain comparative contribution, as well as comparative partial indemnity, has been recognized. See CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986). The difference between the two would be that in order to recover comparative contribution, it would be necessary to have satisfied plaintiff’s judgment in full before bringing the claim, while comparative partial indemnity would shift the proportionate fault of the defendant before judgment.


41. *American Motorcycle*, 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185. 42. *Id.* 43. *Id.* at 591-98, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95.
bine with another’s to cause injury to a plaintiff, then he cannot shift the entire liability to his co-wrongdoer. 44

The practical effect of American Motorcycle is to render the Contribution Statutes ineffectual, since the dividing of shares in a contribution system is done equally, with no consideration of relative degrees of fault. 45 What would compel a joint tortfeasor to pay off a full judgment debt, then seek pro rata contribution from his joint judgment debtors? Of course, no tortfeasor in his right mind would do this after American Motorcycle, when he can file a cross-complaint against his codefendant and at trial determine the actual responsibility of each party. 46 Each party will then pay only its proportionate share of plaintiff’s judgment.

Yet strangely, one entire section of the American Motorcycle majority opinion is used to show how the Contribution Statutes not only can coexist in the new comparative fault system, but that the statutes virtually compelled the adoption of the new doctrine. 47 The court stated, “[T]he equitable nature of the comparative indemnity doctrine does not thwart, but enhances, the basic objective of the contribution statute, furthering an equitable distribution of loss among multiple tortfeasors.” 48

Most would agree that comparative indemnity does enhance equitable distribution of loss. 49 But the plain fact is that contribution and comparative indemnity are not the same thing. “Equity” in the contribution system means the equal sharing of plaintiff’s damages, regardless of degree of fault. But under a comparative fault system, “equity” is given an entirely different meaning: the sharing of damages in proportion to actual fault. California can choose to recognize a joint tortfeasor’s right to contribution. On the other hand, it can adopt a system which ap-

44. Id.
45. See supra notes 30-32 and accompanying text. See also C.R. Heft & C.J. Heft, supra note 18, § 4A.90 at 8.
46. It is conceivable that a defendant still would seek comparative contribution if for some reason he had to satisfy the plaintiff’s full claim. However, it would be much simpler for him to merely seek comparative partial indemnity. See supra note 39 and accompanying text.
48. Id. at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185.
49. As the court noted in American Motorcycle, the Contribution Statutes are to be applied in accordance with the principles of equity. Id. at 602-03, 578 P.2d at 915, 146 Cal. Rptr. at 198. See Cal. Civ. Proc. Code § 875(b) (West 1980). Thus, according to the California Supreme Court, it is logical to move from a contribution system to a comparative negligence system, and this can be done within the Contribution Statutes. The court however, probably could not foresee the inequitable results that would develop as a result of its judicially created system. “Equity,” in 1957, had a much different meaning than did “equity” in 1978. See generally infra notes 50-88 and accompanying text.
portions fault on a comparative negligence basis. The one thing it should not do is try to apply comparative negligence to an already existing contribution system. As the good faith settlement cases have shown and will continue to show, the Contribution Statutes have become outmoded and are rendered useless by the evolving definition of "equity" in California’s joint tort system.

II. SETTLEMENT PROBLEMS IN CALIFORNIA JOINT TORTFEASOR LAW

A. Policy of Encouraging Settlement Advanced by Section 877

California Code of Civil Procedure section 877 provides that a defendant who makes a good faith settlement and is subsequently released from the lawsuit by the plaintiff is forever shielded from claims for contribution by his codefendants. 50 In American Motorcycle, the protection afforded the settling defendant was extended to discharge "any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor." 51 In 1980, the legislature unfortunately followed the lead of the American Motorcycle court and amended the Contribution Statutes to provide that a good faith settlement "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." 52

Shielding the settling defendant from further claims has the obvi-
ous effect of encouraging him to settle as soon and at as low an amount as possible. To that end, the policy of settlement is encouraged.

Section 877 provides other elements that advance the policy of settlement. Allowing a plaintiff to make a settlement with, and ultimately dismiss, one of several tortfeasors without prejudicing his claim against the other remaining defendants encourages settlement for both parties. It has been said that "[t]he advantage to both plaintiff and the settling tortfeasors of being permitted to make an independent settlement is sufficiently obvious."

Additionally, a plaintiff is encouraged to settle by reducing his recovery at trial only by the amount he has actually received in settlement. The plaintiff need not be too concerned about settling for an amount that is less than the true share of the settling defendant’s liability, because he can merely recover it from the other defendants at trial. Under the joint and several liability doctrine, the remaining defendants must provide full compensation for the plaintiff’s damages.

The danger presented by the encouragements to settle provided in section 877, juxtaposed with the competing policies of equitable ap-

\[\text{CAL. CIv. PROC. CODE § 877.6 (West Supp. 1986).}\]

It is unfortunate that the legislature acted with such haste in codifying American Motorcycle. Obviously, this was due in part to the need to develop procedural methods of determining “good faith.” However, a longer period of reflection on the subject may have been worth the wait, had the legislature realized the danger of affirming American Motorcycle’s commingling of the contribution and comparative fault systems.

54. The plaintiff’s recovery also could be reduced by the “amount stipulated,” whichever is greater, but it would be highly illogical for a plaintiff to voluntarily diminish his recovery by so doing.
55. See supra note 13 and accompanying text.
portion of fault, should now be evident. Defendant is eager to settle; eager to escape potential liability to his codefendants, especially if he is the primary cause of the plaintiff’s injuries. Plaintiff could care less if one defendant settles, so long as the remaining defendants have deep, dollar-lined pockets. The problem lies in the situation where the remaining defendants’ shares of fault are relatively minimal when compared to their now settled-out codefendant. The remaining defendants are required to bear both the burden of the responsibility that their codefendant has shirked, and more importantly, the plaintiff’s judgment.

B. Definition of “Good Faith Settlement”

One approach to solving this problem has centered around the requirement that a settlement, in order to bring on section 877’s benefits, must be made in “good faith.” Prior to the recent Tech-Bilt decision, the view of one court was that the “good faith” provision required the parties contemplating settlement to make a determination of the settling defendant’s relative share of fault for the plaintiff’s damages. The Ninth Circuit Court of Appeals, applying California law as it correctly predicted the California Supreme Court would, held in Owen v. United States and Commercial Union Ins. Co. v. Ford Motor Co., that if the settlement in issue clearly did not take relative fault into consideration, then it was not in good faith and thus did not bar claims for comparative partial indemnity. Tech-Bilt has essentially followed the Ninth Circuit rationale.

The primary California authority relied on to support the California Supreme Court and Ninth Circuit views is River Garden Farms, Inc. v. Superior Court. River Garden was the first case to discuss the issue of good faith settlements and now, even though it has sought to reach an accommodation between the two competing goals of equitable financial sharing and encouraging settlements, it has proven to be a thorn in the side of the policy of equitable apportionment of fault. Because it was decided in 1972, prior to the adoption of the comparative negligence system, the issue of “good faith” arose in River Garden within the statutorily enacted system of contribution. Notwithstanding that fact, language from River

57. Owen, 713 F.2d at 1466.
58. Commercial Union, 640 F.2d at 214.
60. Id. at 997-98, 103 Cal. Rptr. at 506-07.
61. That fact alone should have compelled courts looking at “good faith” within
Garden sounds very persuasive when applied by courts trying to get a handle on “good faith” under our current hybrid contribution/comparative fault system. For example, the following statement about “good faith” was given in River Garden: “Viewed as a demand for settlements which have a reasonable relation to the value of the plaintiff’s case, to the strengths and weaknesses of the parties and the financial ability of the settlor, the good faith clause aids the statutory goal of equitable sharing.”

A passage such as this, though written while contribution was the procedure for equitable financial sharing, lends itself very easily to application in a decision defining “good faith” within the framework of a comparative fault system, which focuses on equitable fault sharing. And, since the courts first defining “good faith” after American Motorcycle were forced to bring the comparative fault and contribution systems together, they were more than happy to borrow from this earlier precedent.

More recent opinions, decided prior to Tech-Bilt, struggled with different notions of “good faith,” trying to achieve results that would be satisfactory and fair to both settling and non-settling defendants alike. The decisions attempted to strike a balance between the competing policies of equitable apportionment of fault and encouragement of settlement, all the while focusing on the question, “what is good faith?” Deciding what “good faith” is, however, only begs the question. Unfortunately, River Garden has deceived subsequent courts trying to define “good faith” into believing that some magic definition of the words would solve the problem of balancing the two juxtaposed policies.

However, with each decision rendered, it became increasingly clear that the two policies could not coexist within the hybrid contribution/comparative fault system. Thus, the attempts to balance the comparative fault system, such as the Tech-Bilt, Owen and Commercial Union courts, to give little credence to the River Garden decision. Chief Justice Bird’s dissent in Tech-Bilt recognized the inappropriate use of River Garden as precedent for the proposition that “good faith” means a settlement reasonably related to the settlor’s share of fault. Tech-Bilt, 38 Cal. 3d at 502-05, 698 P.2d at 169-71, 213 Cal. Rptr. at 266-68 (Bird, C.J., dissenting).

62. River Garden, 26 Cal. App. 3d at 994, 103 Cal. Rptr. at 504. The court of appeals did not pick up on the fact that “equitable sharing” meant equal sharing and not sharing according to fault.


the two policies were largely self-defeating, and one of the two policies emerged victorious. In California's hybrid system, the policy of encouraging settlements won out and, therefore, a most narrow view of "good faith" gained the weight of authority before the supreme court stepped into the fray with *Tech-Bilt*.

C. Policy of Encouraging Settlement Worked Inequitable Results

The courts found it impossible to advance both policies at the same time, so instead, they allowed the encouragement of settlements to gain the upper hand. The decisions of *Dompeling v. Superior Court* and *Cardio Systems, Inc. v. Superior Court* are illustrative. The *Dompeling* court held that "[t]he settling parties owe the non-settling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." The *Dompeling* decision, the definition of good faith became considerably narrower than it previously had been. In the context of the *Dompeling* case itself, no apparent hardship to the nonsettling defendants was caused by the narrowed definition, since the settlement there was not "an 'unreasonably cheap settlement' on its face."68

Thus, with the *Dompeling* decision, the definition of good faith became considerably narrower than it previously had been. In the context of the *Dompeling* case itself, no apparent hardship to the nonsettling defendants was caused by the narrowed definition, since the settlement there was not "an 'unreasonably cheap settlement' on its face."69

However, in *Cardio Systems*, an inequitable result did occur when the plaintiffs dismissed defendant Cardio Systems, the distributor of an allegedly defective heart-lung machine, for a waiver of defense

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68. *Dompeling*, 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 45. The *Dompeling* definition of "good faith" is much like the definition envisioned by the drafters of the Uniform Contribution Among Tortfeasors Act. See supra note 20. The incompatibility of the two joint tortfeasor systems together is illustrated by the inequitable results reached when this definition is used.

costs. The machine had malfunctioned while plaintiffs' decedent underwent open heart surgery. The dismissal was given to Cardio Systems only because of a tactical decision made by plaintiffs' attorney. As he himself put it, "I had no desire . . . to complicate a clear liability, relatively simple medical malpractice case by bringing in a products case."

The trial court, though finding no collusion between plaintiffs and Cardio Systems, did not find the dismissal to be in good faith. However, the court of appeals reversed, holding that Cardio Systems acted consistently with the principles set forth in Dompling; that a settling defendant owes no duty to a nonsettling codefendant except to refrain from tortious or wrongful conduct. Thus, the codefendant hospital was barred from recovering from Cardio Systems even one dollar of the one million dollars it had paid to satisfy plaintiffs' judgment.

The court was not happy with the decision it felt compelled to reach, stating:

The result is unsatisfactory. The rule permits a plaintiff to insulate a defendant (Cardio) from being liable to a codefendant (Hospital) for comparative indemnity by dismissing against Cardio in consideration of a waiver of costs where the dismissal is motivated by plaintiffs' tactical considerations having little relationship to the potential liability of Cardio . . . . The result is fundamentally unfair, and cannot be what the Legislature intended.

Of course, it was not what the legislature had intended, since it had no idea in 1957 that a comparative fault system would one day uncomfortably coexist with the cost sharing contribution scheme it enacted.

The Cardio Systems court, like others, called for help from the legislature. Another asked for guidance from the supreme court. The latter got their wish first. A good faith settlement case, Tech-Bilt, Inc. v. Woodward-Clyde & Associates, was argued

70. Cardio Systems, 122 Cal. App. 3d at 882, 176 Cal. Rptr. at 255.
71. Id. at 883, 176 Cal. Rptr. at 256.
72. Id. at 884-85, 176 Cal. Rptr. at 256.
73. Id. at 883, 176 Cal. Rptr. at 255.
74. Id. at 890, 176 Cal. Rptr. at 260.
75. Id. at 882, 176 Cal. Rptr. at 255.
76. Id. at 890-91, 176 Cal. Rptr. at 260.
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before the California Supreme Court in 1984, putting “good faith” squarely at issue before the justices for the first time.

In Tech-Bilt, the court was faced with a dilemma similar to the one faced by the Cardio Systems court. Plaintiffs brought suit for damages to their residential property, naming everyone involved in the construction of the house as defendants.80 Believing one of the claims to be barred by the statute of limitations, and for no other reason, plaintiffs dismissed Woodward-Clyde for a waiver of defense costs.81 One of the other defendants, Tech-Bilt, still had a live claim against Woodward-Clyde and thus filed a cross-complaint against Woodward-Clyde for indemnity and declaratory relief.82 Woodward-Clyde moved for an order confirming the dismissal given by plaintiffs as a good faith settlement.83

The trial court’s decision that the dismissal was a good faith settlement was appealed by Tech-Bilt to the supreme court. The supreme court reversed.84 It considered the Dompling and Cardio Systems viewpoint of good faith, but rejected it.85 Instead, the court continued down the path it had begun in American Motorcycle, holding that in order for a settlement to be found in good faith, it must be “within the reasonable range of the settling tortfeasor’s proportional share of comparative liability for the plaintiff’s injuries.”86

On the surface, the Tech-Bilt decision sounds logical and well-reasoned. It attempts to strike a balance between the competing policies of encouraging settlement and apportioning liability in relation to fault. However, in attempting to strike that balance, the supreme court has overlooked the new meaning that the word “equity” has come to have, just as it overlooked the meaning in American Motorcycle. The court once again has adhered to the notion that the “equity” envisioned by the Contribution Statutes can become the new “equity” of a post-American Motorcycle comparative fault system, without repealing the Contribution Statutes themselves. What the court fails to see is that the comparative negligence system cannot and should not coexist with a contribution system.

The Contribution Statutes were a much needed and helpful re-

80. Id. at 491, 698 P.2d at 161, 213 Cal. Rptr. at 258.
81. Id. at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258. The waiver of defense costs in effect amounted to a “settlement” for $55.00. Id. at 492 n.2, 698 P.2d at 161 n.2, 213 Cal. Rptr. at 258 n.2.
82. Id. at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258.
83. Id.
84. Id. at 502, 698 P.2d at 168, 213 Cal. Rptr. at 265.
85. Id. at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263.
86. Id. at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.
form of a common law joint tort system that was causing highly inequitable results. But now, we have come almost full circle from our pre- Contribution Statute days. Back in the 1950's a plaintiff could pick out a lone, unlucky defendant and require him to satisfy his entire tort judgment. The bar balked at the unfairness of such a system and change was implemented. Today, even with the *Tech-Bilt* decision, which attempts to encourage only those settlements which reflect a reasonable share of the settling defendant's fault, the plaintiff can still control the litigation. The policy of encouraging settlement is still clearly at the forefront and the policy of equitable apportionment is apparently only given lip service when the court says that the non-settling defendant "should be permitted to demonstrate, if he can, that the settlement is so far 'out of the ballpark' . . . as to be inconsistent with the equitable objectives of the statute."87 Since the "equitable objectives" have in truth changed quite a bit since the enactment of the statutes, no one can say just how big or small the "ballpark" is. Thus, no one can say whether or not the policy of equitable apportionment of fault will ever really be advanced.

It seems the more things change in California joint tortfeasor law, the more they stay the same. Even so, the state cannot continue with its head in the sand, hoping that somehow it will reach the goal of dividing responsibility in relation to proportionate fault. To the contrary, action must be taken to create a more fair system. Perhaps California jumped into a comparative negligence system a little too fast with judge-made law, without the thorough investigation that a legislature could have provided. By adopting the system in the heat of the courtroom, perhaps all potential difficulties in applying the new system could not be examined.88

In any event, the *Li* and *American Motorcycle* decisions are behind us, and we have seen that their application in our already existing joint tortfeasor system has been anything but smooth. Consequently, we now must effect changes that will increase the likelihood of each and every joint tortfeasor bearing only his fair share of fault.

III. PROPOSED REFORM OF CALIFORNIA JOINT TORTFEASOR LAW

A. Method of Change

Basically, there are two routes which may be taken to achieve the desired change in our joint tortfeasor law--judicial decision or legis-

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87. *Id.* at 499-500, 698 P.2d at 167, 213 Cal. Rptr. at 264 (emphasis added).
88. *See supra* notes 6 and 20 and accompanying text.
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lative change. The journey on the first of these routes has already started, but unfortunately, it will likely prove to be ineffective. The California Supreme Court’s decision in *Tech-Bilt* is nothing but an acceptance of *River Garden* and *American Motorcycle*, and does little, if anything, to advance the goal of distributing responsibility in relation to proportionate shares of fault.

Granted, the supreme court has attempted to balance the competing policies as best as it can.\(^8^9\) But the roots of the problem lie in the court’s misconception that the “equity” envisioned by the Contribution Statutes can evolve smoothly into a new “equity” in a comparative fault system. Thus, the second of the two routes, legislative change, is best suited to halt the inequities with which California is now struggling.

**B. Repeal of Existing Contribution Statutes**

What sort of change can bring the desired result? The initial step is to get rid of California’s anachronistic Contribution Statutes. They are clearly out of place in a comparative fault system. The National Conference of Commissioners on Uniform State Laws supports this change.\(^9^0\)

In approving its Uniform Comparative Fault Act [hereinafter referred to as the UCFA] in 1977, the commissioners stated that a statutory contribution system would be inappropriate in a jurisdiction that adopted the UCFA.\(^9^1\) Though California has not adopted the UCFA, the state’s judicially adopted comparative fault system is quite similar to the one proposed by the commissioners.\(^9^2\) The commissioners’ prefatory note to the UCFA explains the general policy considerations of a comparative fault system and distinguishes it from the older contribution system. In so doing, it states that, “an act which provides for pro rata contribution may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.”\(^9^3\)

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\(^8^9\) After all, the court is unable to repeal the Contribution Statutes on its own. At the most, it can make a strong plea to the legislature to do so.


\(^9^1\) *Id.*

\(^9^2\) Both comparative fault systems are of the pure type. Additionally, both allow for the pressing of comparative partial indemnity claims.

\(^9^3\) *UNIFORM COMPARATIVE FAULT ACT* commissioners’ prefatory note (1977), 12 U.L.A. 39-40 (Supp. 1985). Specifically, the commissioners were referring to the 1939 and 1959 Uniform Contribution Among Tortfeasors Acts. As was noted at *supra* note 20, California’s Contribution Statutes are closely modeled on the 1955 Uniform Contribution Among Tortfeasors Act.
The reasons for this are clear. The right to pro rata contribution is relatively insignificant to a joint tortfeasor who can have his degree of fault measured before he ever must pay a penny to his judgment debtor. Moreover, under a comparative fault system, the joint tortfeasors should never have to satisfy the plaintiff’s entire judgment (absent a finding that the alleged joint tortfeasor is 100 percent at fault or that his cotortfeasor is judgment-proof). Rather, he should only pay a sum directly proportional to his share of actual fault. Thus, the joint tortfeasor would derive no recognizable benefit from satisfying the plaintiff’s judgment and then seeking pro rata contribution.


The second step in tailoring our joint tortfeasor law to achieve the policy objectives of Li and American Motorcycle would be to enact new code provisions. Before discussing this proposal, however, it may be wise to examine California’s comparative fault system, absent the Contribution Statutes, to see its deficiencies without the proposed additions.

Basically, the non-Contribution Statutes system would be quite alien to our traditional view of joint tort justice, although it would be the ideal vehicle for equitable cost sharing. Hopefully, the equitable benefits have been presented clearly enough in other portions of this Comment, and do not need further emphasis here. Suffice it to say that in such a “free market system,” without constraints or controls, defendants would not need to be worried about paying more than their proportionate share.

However, protective devices to ensure the injured plaintiff recovers what is owed him and the prior benefits available to induce the parties into pretrial settlement, are conspicuously missing. Immediately apparent is the absence of a procedural safeguard allowing a harmed plaintiff to recover all of the damages to which he is entitled.

Specifically, without the joint and several liability rule, the plaintiff would be required to shoulder the danger of one of his several tortfeasors being judgment proof. The law should not encourage the possibility of this occurrence, especially when the defendants who are able to pay have proximately caused the plaintiff’s injuries. In other words, the plaintiff’s overall injury would not have occurred without each tortfeasor contributing in some way to it; thus, it is more equitable to place the burden of a judgment proof code-

94. See supra note 46 and accompanying text.
95. See, e.g., the discussion of Li and American Motorcycle supra at notes 34-43 and accompanying text.
fendant on the remaining defendants, whose conduct is more culpable than the injured plaintiff’s.

This argument loses some of its vitality when the plaintiff’s own conduct has contributed to his injuries. However, its logic is still retained when we consider the relative positions of the plaintiff and his alleged tortfeasors. The plaintiff is still less culpable than the defendant, since he has only failed to act with due regard for his own safety; the defendants on the other hand, have acted without regard for another’s safety.96 Thus, the proposed revision calls for retention of the joint and several liability rule.

The second ill effect of our comparative fault system without the Contribution Statutes is the loss of incentives to settle. As was set forth previously,97 the incentives provided to a plaintiff under the Contribution Statutes were: (1) the ability to make independent settlements, and (2) the pecuniary benefits of having his judgment offset only pro tanto by any settlement entered into. A defendant’s incentives to settle were: (1) like plaintiff, the ability to make an independent settlement, and (2) the discharge from liability for contribution, and subsequently, comparative partial indemnity.

Without these incentives, it would be less appealing to plaintiffs and defendants alike to negotiate any pretrial disposition of plaintiff’s claim. But would a system lacking these incentives still provide any reason for either of the sides to settle? Assuming logically that the right to make independent settlement is retained, it would.

For example, a plaintiff might settle a claim with one of the defendants to acquire cash needed to continue his litigation against the other parties. Also, a plaintiff might settle with a defendant, such as the distributor of the heart-lung machine in Cardio Systems, in order to simplify his case. Finally, in order to avoid litigation completely, a plaintiff might make a settlement with all the defendants in the case.

However, the reasons that a plaintiff might still settle a claim do little for the guys on the other side of the table, the defendants.

96. The argument especially loses vitality when the plaintiff is more at fault than any of the defendants individually or together. When that is the case, the imposition of joint and several liability on the defendants can work a highly inequitable result. For example, imagine the case where a skier, cavalierly avoiding warning signs and barriers, skis off the marked trails at a ski area. He suffers a horrible fall and sues both the ski area and the municipality where the fall occurred, on the grounds that the warnings were ineffective. Though plaintiff is found primarily at fault, some fault is attributed to both the ski area and the municipality. Plaintiff’s injuries are severe and he has incurred enormous hospital bills. Should either the municipality or the ski area be required to pay plaintiff in this case? A strong argument is presented by this fact situation to make a rule whereby joint and several liability should not be imposed when plaintiff is more than 50% at fault for his own injuries.

97. See supra notes 26-29 and accompanying text.
Unless all defendants settled with the plaintiff, thereby bringing the lawsuit to an end, they would have little, if any, reason to reach a settlement agreement. A lone defendant would find little utility in settling with the plaintiff by himself, since he could not close his books on the case. Until the litigation had drawn to a close, the settling defendant would remain vulnerable to claims for comparative indemnity brought by his codefendants. Thus, the benefits provided by settling, such as putting a halt to time and money-consuming litigation, would not accrue to the lone settling defendant.

Furthermore, a defendant would not want to settle with the plaintiff if he felt he had a valid cross-claim against the plaintiff himself. If there was an issue with respect to the contributory negligence of the plaintiff, or if the defendant himself was injured in the same occurrence that the plaintiff was, then the defendant would not want to sacrifice that claim.

Therefore, while sufficient reasons remain for the plaintiff to settle in the non-Contribution Statutes system, it would seem prudent to provide the defendant with an incentive to get him to the bargaining table. Consequently, the proposed revision calls for retention of the settlement incentive designed with the defendant in mind, while modifying the incentive provided for plaintiff.

Framed by the foregoing considerations, it is proposed by this Comment that, in addition to repeal of the Contribution Statutes, the legislature consider enacting a new section of the California Code of Civil Procedure that will advance the policy of equitable apportionment of fault, as well as the goals of full recovery for plaintiff and encouragement of settlement.98

First, it is suggested that the doctrine of joint and several liability be retained in the new section.99 Clearly, we must ensure that a plaintiff has the opportunity to be fully compensated for the harm caused him by others.100 Giving him the right to satisfy his judgment against any of the culpable tortfeasors is the best guarantee that the plaintiff will recover what is rightfully his.

Additionally, no detriment other than a temporary absence of the money a judgment-satisfier has paid will be worked on the tortfeasors. Their rights to comparative partial indemnity and comparative contribution will ensure that each defendant pay no more than his fair share.

Second, it is suggested that the new section include a provision

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98. Schemes like the one proposed have been implemented in other states and have been recommended by other commentators. See infra notes 101-02.
99. See supra notes 3, 13, 25, and 55 and accompanying text.
100. Subject, of course, to the limitations set forth in supra note 96.
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which allows a settling defendant to be released from claims for comparative partial indemnity and comparative contribution brought against him by his codefendants.\footnote{101} With this provision, an incentive is provided to encourage a defendant to sit down with the plaintiff and seriously negotiate a settlement agreement. The deep-pocket defendant will be particularly interested in effecting a rapid compromise so that he can alleviate the threat of having to satisfy both his share and a judgment-proof defendant’s share, under the doctrine of joint and several liability.

Turning the deep-pocket/judgment-proof defendant scenario around, it might be contended that a plaintiff would be hesitant to make an early settlement with the deep-pocket defendant, knowing there was no chance of recovery from the judgment-proof defendant. However, it is submitted that the slight chilling effect on settlements which might be produced is outweighed by the advantages that the plaintiff, as well as the settling defendant, receive by ending their litigation out of court.

Finally, it is suggested that the new section include a provision that a settlement reduce the plaintiff’s recovery at trial by an amount reflecting the settling defendant’s fair share of fault rather than by the actual dollar amount of the settlement.\footnote{102} The equitable principles enunciated in \textit{Li} and \textit{American Motorcycle} will thus be advanced in three ways.

First, the parties to the settlement will be required to give some serious thought to the value of the part of the lawsuit to be settled. If the parties are sincerely interested in reaching a settlement, they will realize that puffing of demands or understating of offers will do no good. Following this reasoning, and second, the plaintiff will no longer be encouraged to choose a defendant that will be able to benefit from his benevolence in making a ridiculously low “good faith settlement.” Third, the remaining nonsettling defendants will not be forced to bear the burden of their settling codefendant’s fault. If the settlor is more at fault than the remaining tortfeasors, the amount of the settlement should reflect that fact. Then, when the


reduction in plaintiff's recovery is made at trial, each party will have borne their respective fair shares and plaintiff will have recovered all of his damages.

The proposals set forth obviously will not be an end-all to problems that arise in joint tort litigation. However, they will help alleviate the inequity that is currently existing as a result of "good faith settlements" and will improve California's fault distribution system.

CONCLUSION

As the California Supreme Court noted in American Motorcycle, quoting Dean Prosser, "'[t]here is obvious lack of sense and justice in a rule which permits the entire burden of loss, for which two defendants were . . . unintentionally responsible, to be shouldered onto one alone . . . while the latter goes scot free.'"103 Applying a comparative fault system in an already existing contribution system has created "good faith settlement" problems lacking sense and justice. Entire burdens have been shouldered by one defendant, while his codefendant is allowed to go scot free.

The inequity of this result compels the repeal of the Contribution Statutes. In their place, the legislature should enact a new California Code of Civil Procedure section retaining the joint and several liability doctrine as well as the rule allowing a settling joint tortfeasor to be shielded from claims brought by his codefendants for comparative partial indemnity and comparative contribution. The new code section should also modify the rule reducing a plaintiff's recovery by the amount of consideration actually paid, instead of reducing such recovery by an amount which reflects the settling defendant's fair share of liability.

These proposals will effectively limit the possibility of a plaintiff selectively granting one of several defendants the benefit of a good faith settlement and, more importantly, will give meaning and effect to the policy considerations of the Li and American Motorcycle decisions. Acceptance of these suggestions will bring California joint tortfeasor law out of the 1950's and back into 1986.

Christopher W. Todd

103. American Motorcycle, 20 Cal. 3d at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201.