1-1-1986

The Financial Condition and Insurance Policy Limits of a Joint Tortfeasor Wishing to Settle in Good Faith: Problems of Discovery and Confidentiality

Florrie Young Roberts

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol26/iss1/2

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
THE FINANCIAL CONDITION AND INSURANCE POLICY LIMITS OF A JOINT TORTFEASOR WISHING TO SETTLE IN GOOD FAITH: PROBLEMS OF DISCOVERY AND CONFIDENTIALITY

Florrie Young Roberts*

I. INTRODUCTION

The California Supreme Court made a major change in the law governing settlements in multi-party tort cases with its decision in *Tech-Bilt Inc. v. Woodward-Clyde Associates.*¹ That case involved the appropriate definition of a good faith settlement—a device by which one joint tortfeasor can settle with the plaintiff and thereby free himself from claims by his joint tortfeasors for partial indemnity based on comparative fault. Overruling a majority of appellate court decisions on the subject,² the supreme court held that a settlement is in good faith only if the amount of the settlement is within the reasonable range of the settling tortfeasor’s proportionate share of comparative liability for the plaintiff’s injuries.³

In its enumeration of the factors that a trial court should consider in determining whether a settlement falls within the reasonable range, the supreme court identified the financial condition and the insurance policy limits of the settling joint tortfeasor.⁴ Thus, under

---

© 1986 by Florrie Young Roberts

* Professor of Law, Loyola Law School, Los Angeles, California; A.B. 1971, Stanford University; J.D. 1974, University of Southern California.

4. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.
the Tech-Bilt test, the financial resources of the settling tortfeasor are relevant to the issue of the good faith of his settlement.

By including the financial condition and insurance policy limits of the settling tortfeasor among the factors of a good faith settlement, the supreme court has complicated other aspects of the litigation between the parties and has created new areas of uncertainty for the trial judge. This article addresses two threshold procedural problems that will confront a judge even before he can rule on the substantive issue of whether a settlement is in good faith.

The first problem relates to the discovery of the financial condition and insurance policy limits of the settling joint tortfeasor. If a settling tortfeasor claims his proposed settlement is in good faith because of his limited financial resources, the nonsettling joint tortfeasors will legitimately seek to discover the settlor's financial status and insurance policy limits in order to adequately prepare for the hearing on the good faith issue. The settlor, on the other hand, will invoke his constitutionally mandated right of privacy to protect his financial affairs from pretrial discovery. This article suggests the issuance of an appropriate protective order as a solution to this conflict and offers guidelines a trial judge can use in fashioning such an order. These discovery issues are dealt with in Parts III and IV of this article.

The second problem concerns the structure of the good faith settlement hearing itself. If the court finds that the settling tortfeasor is entitled to some sort of protection of his financial information, the trial judge must then establish procedural rules for the good faith settlement hearing so that the confidentiality of the financial information can be maintained without sacrificing the adverse party's rights to a full and fair hearing. Part V of this article addresses these considerations and similarly suggests guidelines for the trial judge.

These problems regarding the discoverability and confidentiality of the settling defendant's financial status were not addressed by the supreme court in Tech-Bilt. In all likelihood, they were not even considered by the court at this initial stage of the development of the new test of good faith.

II. Background

In order to analyze the discovery and confidentiality issues raised by the supreme court's definition of a good faith settlement, it is necessary to understand what a good faith settlement is, how it operates, and how good faith is defined.
A. The Good Faith Settlement in Context—The Comparative Fault Framework

The good faith settlement is a small but important component of the overall scheme in California of comparative fault, joint and several liability, and partial indemnity. In American Motorcycle Association v. Superior Court, the California Supreme Court applied the rule of comparative negligence to multi-tortfeasor situations and thereby established that all tortfeasors responsible for plaintiff's injuries would be obligated to pay in accordance with their percentage of fault.

1. Joint and Several Liability

An integral part of the comparative negligence system in California is the doctrine of joint and several liability. Under the rule of joint and several liability, each joint tortfeasor is personally liable for the total amount of the damages sustained by the plaintiff, even though the independent negligent actions of a number of tortfeasors were each a proximate cause of the plaintiff's single injury. As a result, the plaintiff may recover the entire amount of his damages not attributable to his own fault from any joint tortfeasor found liable, regardless of the percentage of fault of that particular tortfeasor. From whom and in what amounts he chooses to collect his judgment are completely within the discretion of the plaintiff.

For example, if the jury awards plaintiff a $100,000 judgment

5. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
6. Id. at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201. The American Motorcycle Association decision was an extension of the court's prior decision in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), which established California's comparative negligence system by replacing the doctrine of contributory negligence with a comparative negligence scheme in two party cases.
7. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 590-91, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.
9. 20 Cal. 3d at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187. Liability attaches to a concurrent tortfeasor not because he is responsible for the acts of other independent tortfeasors who may also cause the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. Id. at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188. Therefore, even though comparative negligence assigns some percentage figure to the relative culpability of one negligent defendant as compared to another, this does not suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury. Id. at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.
10. Id. at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187.
against co-defendants A and B, and finds defendant A ten percent at fault and defendant B ninety percent at fault, the plaintiff may recover the entire $100,000 or any portion thereof from defendant A, even though A's proportionate share of the liability is actually only $10,000.11 Defendant A could then attempt to apportion the loss among himself and defendant B,12 but this would not concern the plaintiff who had exercised the right to be totally compensated from defendant A.

The purpose of the joint and several liability rule is to provide adequate compensation to plaintiffs.13 This rule allows an injured plaintiff to obtain full recovery for his injuries even when one of the responsible parties does not have the financial resources to cover his liability.14 Thus, the risk of one joint tortfeasor's inability to pay his share of the damages is imposed on the remaining defendants, not on the plaintiff.15

2. Partial Indemnity

Although the court in American Motorcycle allowed a plaintiff to collect the entire amount of his judgment from his choice of negligent defendants, the court opened an avenue of relief for the joint tortfeasor who had been called upon to pay more than his proportionate share of damages. He could pursue an action for partial indemnity16 against his fellow tortfeasors on a comparative fault basis.17 As the name implies, the purpose of the action for partial

11. Plaintiff could have also chosen to sue only defendant A and then collect the entire judgment from him, even though B was also at fault.
12. This apportionment would be accomplished by a suit for partial indemnity. See infra text accompanying notes 16-21.
13. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. The alternative to the joint and several liability rule is the rule of several liability which would limit a joint tortfeasor's liability to his allocable share of fault. In other words, in the above hypothetical, this alternative would mean that the plaintiff could collect only $10,000 from A and $90,000 from B. The supreme court rejected this alternative in American Motorcycle principally because of the "serious and unwarranted deleterious effect" it would have on the "practical ability of negligently injured persons to receive adequate compensation for their injuries." Id.
14. Id. The supreme court referred to this as "one of the principal by-products of the joint and several liability rule." Id.
16. The term "partial indemnity" is used in American Motorcycle and will be used in this article. Other terms used to describe the same principle are "equitable indemnity" and "comparative indemnity."
17. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 591, 578 P.2d at 907,
indemnity is to allow an equitable balancing among those liable for the injury. Through such a lawsuit, a tortfeasor who has paid more than the amount warranted by his percentage of negligence can obtain reimbursement from the other tortfeasors in proportion to the fault attributable to each.\textsuperscript{18} This right may be asserted by a defendant against any joint tortfeasor, whether named by the plaintiff in the original action or not,\textsuperscript{19} and may be asserted either by cross-complaint\textsuperscript{20} or independent action.\textsuperscript{21}

As an example, consider the above hypothetical in which plaintiff obtained full payment of his $100,000 judgment from defendant A who was only ten percent at fault. After such payment, A could assert a claim for partial indemnity against defendant B and could recover the amount of the judgment that A paid in excess of A's percentage of fault. Accordingly, A could recover $90,000 from B because B was ninety percent at fault. Thus, the eventual result is that each tortfeasor pays an amount equivalent to his percentage of fault.

B. \textit{The Good Faith Settlement}

1. \textit{The Ramifications of a Finding of Good Faith}

One important roadblock exists for the joint tortfeasor who has paid more than his proportionate share of plaintiff's damages and seeks to reapportion the loss among the other tortfeasors by a suit for partial indemnity. This hurdle is the good faith settlement. If one joint tortfeasor settles with the plaintiff prior to trial, and that settlement is found to be in good faith, the other joint tortfeasors are prohibited from seeking partial indemnity from the settling joint tortfeasor.\textsuperscript{22} Instead, the dollar amount of the settlement is deducted

\begin{enumerate}
\item \textsuperscript{18} Id. at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.
\item \textsuperscript{19} American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 606, 578 P.2d at 917, 146 Cal. Rptr. at 200.
\item \textsuperscript{20} Id. at 607, 578 P.2d at 907, 146 Cal. Rptr. at 200.
\item \textsuperscript{21} E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978).
\item \textsuperscript{22} CAL. CiV. PRoc. CODE § 877 (West 1980); CAL. CiV. PRoc. CODE § 877.6(c) (West Supp. 1985); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. The California statutes providing for a good faith settlement were specifically incorporated by the supreme court in \textit{American Motorcycle} into the context of partial indemnity. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 599, 578 P.2d at 912, 146 Cal. Rptr. at 195.
\end{enumerate}
from the amount the plaintiff may recover from the nonsettling joint tortfeasors, and the nonsettling joint tortfeasors must pay the balance of the plaintiff's judgment without any right to partial indemnity from the settling tortfeasor.

The facts set forth above provide an example. Assume again that plaintiff received injuries entitling him to damages in the amount of $100,000 from defendant A who was ten percent at fault and defendant B who was ninety percent at fault. Assume further that before trial, defendant B settled with the plaintiff for $5,000. If that settlement is found to be in good faith and the jury entered the same judgment of $100,000 in the trial against nonsettling defendant A, the $5,000 settlement would be subtracted from the amount that plaintiff could recover from A. Under the rule of joint and several liability, A would be required to pay the entire remaining $95,000 to the plaintiff. However, A would have no claims for partial indemnity to redistribute the loss back to B. Therefore, even though A was only ten percent at fault, because of B's good faith settlement with the plaintiff, A would end up paying $95,000 or ninety-five percent of plaintiff's judgment and B would escape by paying only his settlement amount of $5,000.

The calculation becomes a little more difficult if more than one nonsettling joint tortfeasor is involved. In that situation, the shortfall

Section 877 provides:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort:

(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal 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).

Section 877.6(c) provides:

A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

CAL. CIV. PROC. CODE § 877.6(c) (West 1980).

23. CAL. CIV. PROC. CODE § 877 (West 1980); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

24. Usually the tortfeasors cross-complain against each other for partial indemnity in the original action. When one tortfeasor settles and his settlement is determined to be in good faith, he then files motions for summary judgment to dismiss the partial indemnity cross-complaints against him. If a tortfeasor has been sued by another tortfeasor for partial indemnity in a separate action, he will similarly file a motion for summary judgment to dismiss that action.
caused by a good faith settling joint tortfeasor must be shared among the nonsettling joint tortfeasors in direct proportion to their respective degrees of fault.26

The computation can be illustrated as follows. Assume that plaintiff suffered $100,000 in damages as a result of the actions of joint tortfeasors A, B and C, and that A was fifty percent at fault, B was forty percent at fault and C was ten percent at fault. Assume further that before trial, plaintiff settled with A for $40,000 and that at a pretrial hearing the court found this to be a good faith settlement. Plaintiff then proceeded to trial against B and C and obtained a judgment against both for $100,000.26 The amount of A’s good faith settlement would be subtracted from plaintiff’s judgment so that plaintiff could recover only $60,000 from B or C. Assume he collected it from B. B could not redistribute any of the loss back to A because A’s good faith settlement has released A from any claims for partial indemnity. However, B could maintain a suit for partial indemnity against C.

The issue then becomes how to allocate ultimate responsibility as between B and C. Under the rule set forth above, each must bear the loss according to his respective percentage of fault. Because B was forty percent at fault and C was ten percent at fault their ratio of fault is four-to-one or eighty percent to twenty percent. Therefore, they share liability for the $60,000 paid to plaintiff according to this same ratio. Accordingly, B would be ultimately responsible for eighty percent of $60,000 or $48,000. Thus, in B’s suit for partial indemnity against C, B is entitled to recover $12,000.27

25. Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d 353, 358, 195 Cal. Rptr. 116, 118 (1983). This method achieves the same result as if the settling tortfeasor had not been involved in the accident.

26. The same rules would apply if plaintiff sued only B or only C and then either B or C paid a portion of the judgment that was greater than his allocable share.

27. Another way to perform the computation is to look at the shortfall caused by the settling defendant A. Under this method, one looks at plaintiff’s total damage before subtraction of the settlement amount and computes the percentage attributable to each defendant. On these facts, $50,000 is attributable to defendant A, $40,000 is attributable to defendant B, and $10,000 is attributable to defendant C. However, defendant A paid $40,000 in settlement and has been released for claims for partial indemnity. Therefore, his shortfall is $10,000. Thus, defendants B and C share that shortfall in relation to their percentage of fault, or in a ratio of 4-to-1 or 80% to 20%. Defendant B is, therefore, liable for $8,000 of the shortfall and defendant C is liable for $2,000 of the shortfall. Accordingly, the total amount attributable to defendant B is $48,000 ($40,000 attributable to his own percentage of fault and $8,000 attributable to his percentage of A’s shortfall). Similarly, defendant C’s total share is $12,000 ($10,000 attributable to his own percentage of fault and $2,000 attributable to defendant A’s shortfall). In his suit for partial indemnity, B can recover $12,000 from C.

No amount of the settling tortfeasor’s shortfall is redistributed back to a negligent plain-
In summary, whenever a prejudgment settlement by one joint tortfeasor is found to be in good faith, it increases the ultimate expense that must be borne by each nonsettling joint tortfeasor. Absent a settlement, all defendants are liable in direct proportion to their respective degrees of fault. By settling before judgment, one tortfeasor may discharge his entire liability by contributing less than his proportionate share, leaving the other joint tortfeasors saddled with the entire judgment reduced only by the amount of the settlement.

Therefore, whenever a plaintiff attempts to enter into a good faith settlement with fewer than all of the joint tortfeasors, the settling and nonsettling tortfeasors are clearly adverse parties. As illustrated above, this results from the fact that the lower the amount of the settlement, the higher the amount that must ultimately be paid by the nonsettling joint tortfeasors. The nonsettling tortfeasors, therefore, have a definite financial interest in both whether the settlement is found to be in good faith and the amount of that settlement.

2. The Good Faith Settlement Hearing

The issue of good faith is usually decided in a pretrial hearing pursuant to California Code of Civil Procedure section 877.6 which allows a party to seek a court order to determine whether a settlement or proposed settlement is in good faith. The hearing is normally requested by a co-defendant who wishes to settle with the plaintiff, although the plaintiff is sometimes the moving party. Understandably, the defendant seeks this determination so that he can be assured that if he settles, he will be totally free from the litigation by being released not only from plaintiff's claims but from claims for partial indemnity by the other joint tortfeasors as well. Usually, the defendant makes the finding that his proposed settlement is in good faith a condition to his final execution of the settlement agreement, and will not enter into the settlement absent this finding. Without it,

tiff. Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d at 358, 195 Cal. Rptr. at 118. Such a rule seems to make sense. Assume a plaintiff suffers damages in the amount of $100,000 and a jury would find him to be 50% at fault, defendant A 40% at fault, and defendant B 10% at fault. If plaintiff did not settle, he could recover $50,000 from either A or B. Under the present law, if he settled with defendant A before trial for $20,000, and that settlement was found to be in good faith, he could still recover $30,000 from defendant B, giving plaintiff a total recovery of $50,000. However, if a portion of the $20,000 shortfall attributable to the settlement with defendant A could be reallocated back to the plaintiff, plaintiff would lose every incentive to settle.

29. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1985).
his settlement would not accomplish the desired purpose of terminating his exposure because he would still be liable for partial indemnity.

The nonsettling joint tortfeasors will object to the finding of good faith if they think that the settlement amount is too low. The nonsettling co-defendants do not want the settling defendant released from liability for partial indemnity for a settlement price that is below the settling defendant's "fair share" of proportionate liability for plaintiff's harm, because the co-defendants are then liable for the remaining amount of the plaintiff's damages without reimbursement from the settlor.

Section 877.6 specifically provides for the determination of good faith at a pretrial hearing. In order that the issue can be resolved as early in the litigation as possible, any petition for a writ of mandate to review the trial court's decision is to be given expedited treatment. Other portions of the statute provide that the hearing shall be held on at least twenty days notice, that the hearing shall be held upon affidavits and counteraffidavits, or that the court may receive evidence in its discretion, and that the burden of proof on the issue of good faith is on the party who asserts the lack of good faith.

3. The Test of Good Faith

Because only a settlement that a court finds to be in good faith will alter the amounts ultimately borne by the nonsettling joint tortfeasors, the decision as to whether the settlement is in good faith is crucial. It is this finding that triggers the release of the settling tortfeasor from subsequent liability to his joint tortfeasors for partial indemnity.

As will be shown below, prior to the Tech-Bilt decision, the appellate courts disagreed about the proper definition of good faith. This difference of opinion stemmed from a basic argument concerning which of two conflicting policies behind the good faith settlement rule was more important: 1) the policy of encouragement of settlements, or 2) the policy of equitable apportionment of loss among

30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. For a complete discussion of the evolution of the definition of good faith and the various tests used by the courts, see Roberts, supra note 17, at 853-81.
joint tortfeasors. These two policies conflict with each other in the good faith settlement context.

The goal of encouraging settlement is best accomplished by defining good faith in such a manner as to uphold the greatest number of settlements between a willing plaintiff and a willing settling defendant. A defendant's desire for settlement is increased in relation to how low he perceives the settlement figure to be as compared to the amount for which he would be responsible if he did not settle. If a defendant's proposed settlement with the plaintiff is not found to be in good faith, he will be very reluctant to settle with the plaintiff because that settlement will not completely remove him from the case. Therefore, settlements are encouraged by finding that an even

36. The policy considerations that must be considered in formulating a definition of a good faith settlement are discussed in Roberts, supra note 17, at 882-98. For a discussion of the way courts have dealt with these policies, see id. at 899-904.

37. Roberts, supra note 17, at 896.

38. The court in Torres v. Union Pac. R.R. Co., 157 Cal. App. 3d 499, 505 n.2, 203 Cal. Rptr. 825, 829 n.2 (1984), opined that this point has been overemphasized.

A settling defendant undoubtedly desires to 'close his books on a case' and may well fear subsequent liability to his nonsettling co-defendants. We doubt, however, that this fear will often cause the defendant to eschew a favorable settlement with the plaintiff. After all, the plaintiff's claim poses the greatest and most immediate threat to the defendant; liability to co-defendants is more remote and contingent. Most defendants will be eager to rid themselves of the immediate threat from plaintiff, even if this threat is thereby replaced with the less likely prospect of liability to a co-defendant.

Id.

The position of the Torres court seems somewhat unrealistic. While liability to a co-defendant may be more remote and contingent than liability to a plaintiff, most rational defendants will not be willing to pay a substantial sum of money to settle a case with the plaintiff, only to have to face liability later to a co-defendant who is seeking to apportion damages. This would place a settling defendant in a very precarious position because he must choose whether to appear in the initial trial of the plaintiff's claims against the remaining co-defendants in order to protect his position on the issues pertaining to plaintiff's total damages and the various parties' negligence, or to simply sit back and attempt to defend his position on a co-defendant's claim for partial indemnity. In either event, his litigation expenses will be the same as if he had not settled with the plaintiff, and his risk of liability may not have diminished much.

Of course, a very real possibility exists that the case will never go to trial against the remaining co-defendants because they will subsequently settle with the plaintiff. Even so, unless the settlement between the plaintiff and the first settling defendant is found to be in good faith, the subsequently settling co-defendants can sue the first defendant for partial indemnity and force him to pay the percentage of the total settlement that is in accordance with his percentage of fault. See Mill Valley Refuse Co. v. Superior Court, 108 Cal. App. 3d 707, 166 Cal. Rptr. 687 (1980); American Bankers Ins. Co. v. Avco-Lycoming Div., 97 Cal. App. 3d 732, 159 Cal. Rptr. 70 (1979); Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

Therefore, practically speaking, a defendant will not settle with the plaintiff unless his settlement has been found to be in good faith.
disproportionately low settlement is in good faith.\textsuperscript{30}

On the other hand, the second goal, that of equitable distribution of loss among tortfeasors, is defeated when a disproportionately low settlement is found to be in good faith, and thereby leaves the nonsettling tortfeasors to pay the remaining portion of plaintiff's damages. Accordingly, in order to foster the policy of equitable distribution of loss according to fault, a definition of good faith should be formulated so as to find in good faith only those settlements which approximate the amount of the settlor's proportionate share of the loss.\textsuperscript{40}

Therefore, the closer the definition of good faith moves toward requiring the settlement to reflect the proportionality of the settlor's fault, the more the policy of equitable apportionment of loss will be fostered. However, correspondingly, the policy of encouragement of at least initial settlements will be de-emphasized. Conversely, the farther the definition of good faith moves away from requiring proportionality, the more the policy of encouraging initial settlements will be fostered. However, the policy of equitable apportionment of loss will be correspondingly frustrated.\textsuperscript{41}

\textbf{a. The Tortious Conduct Test}

Most California appellate courts prior to the supreme court decision in \textit{Tech-Bilt, Inc. v. Woodward-Clyde & Associates}\textsuperscript{42} used a tortious conduct test to decide whether a settlement was in good faith.\textsuperscript{43} This test resulted from the courts ranking the policy of encouragement of settlements ahead of the policy of equitable apportionment of loss among tortfeasors. Courts applying this test carried this ranking of goals to the extreme, and held that any settlement, no matter how small, was impervious from attack by nonsettling joint tortfeasors as long as it was made without tortious and wrongful

\textsuperscript{39} For an argument that approving a disproportionately low settlement as being in good faith fosters only partial settlement of litigation rather than total settlement, see Roberts, \textit{supra} note 17, at 888-91.

\textsuperscript{40} Roberts, \textit{supra} note 17, at 896.

\textsuperscript{41} Id. at 897.

\textsuperscript{42} 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

intent.\textsuperscript{44}

Under the tortious conduct test, the \textit{amount} of the settlement between the plaintiff and the settling defendant was irrelevant. "Bad faith is not established by showing that a settling defendant paid less that his theoretical proportionate or fair share of the value of plaintiff's case."\textsuperscript{45}

Thus, a settlement so low that it bore no relationship whatsoever to the settling tortfeasor's probable ultimate liability under comparative fault principles did not amount to a bad faith settlement.\textsuperscript{46} Instead, the only inquiry the court made under the tortious conduct test was whether the settling parties engaged in tortious or other wrongful conduct against the nonsettling joint tortfeasors.\textsuperscript{47}

The fact that such a settlement had the \textit{effect} of injuring a non-settling tortfeasor because it caused that party to face an exposure to the plaintiff far in excess of his fair share of liability under comparative fault principles did not make the settlement tortious. In fact, such a result to the nonsettling tortfeasors was recognized.\textsuperscript{48} Under the tortious conduct test, the settling parties were specifically allowed "to further their respective interests without regard to the effect of their settlement upon other defendants."\textsuperscript{49}

\begin{footnotes}
\item[45] Dompeling v. Superior Court, 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44; \textit{see also} Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d at 946, 187 Cal. Rptr. at 378.
\item[48] "A settlement always removes the settling defendant from the action; this necessarily results in a possibility that the remaining defendants will suffer judgment greater in amount than if there had been no settlement." Dompeling v. Superior Court, 117 Cal. App. 3d at 809, 173 Cal. Rptr. at 44.
\item[49] \textit{Id.} at 809-10, 173 Cal. Rptr. at 44. An example of how the tortious conduct test works in practice can be found in the case of Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981). In that case, the plaintiffs were the widow and seven children of a man who died during open heart surgery. The plaintiffs sued the hospital, several doctors, and Cardio, who was the distributor and manufacturer of the heart lung pump machine that was a factor in the patient's death. The hospital filed a cross-complaint for partial indemnity against Cardio. Before trial, the plaintiffs and Cardio entered into a settlement whereby plaintiffs dismissed the complaint against Cardio with prejudice in exchange for Cardio's waiver of costs. The hospital was forced to settle for an amount in excess of its proportionate share of liability and then sought indemnity from Cardio. Cardio defended against the hospital's cross-complaint for partial indemnity on the grounds that it had entered into a good faith settlement and therefore was released from partial indemnity claims. The appellate court agreed and held Cardio was released from liability on the cross-complaint.
\end{footnotes}
A plaintiff and defendant would rarely, if ever, settle for the purpose of injuring a nonsettling joint tortfeasor, and only one court has found such a situation. Thus, the tortious conduct test resulted in virtually all settlements being found to be in good faith.

All parties benefitted from this settlement except the nonsettling joint tortfeasor. The plaintiffs benefited as a matter of trial tactics. The plaintiffs' attorney testified that while he felt there was a substantial case against Cardio, he had a straightforward uncomplicated case against the hospital for the negligent act or omission of its employees in operating the heart lung machine. Because the hospital had sufficient assets and sufficient insurance to pay the judgment, he did not want to complicate a simple medical malpractice case when there was clear liability by bringing in a complex products liability cause of action. Id. at 884-85, 176 Cal. Rptr. at 256-57. Clearly, Cardio also benefitted from this settlement. While plaintiff had a substantial products liability action against Cardio, it was released from all liability for only a waiver of costs. Under no circumstances was Cardio's waiver of costs reasonably proportionate to Cardio's potential liability to the plaintiffs.

The party that was adversely affected by this settlement was, of course, the nonsettling co-defendant hospital. Because Cardio and the plaintiff had acted consistently with the tortious conduct test that a settlement is in good faith if the settling parties are merely acting to further their own self interests, the settlement was found to be in good faith. Accordingly, the hospital had no claim for partial indemnity against Cardio. The hospital, therefore, had to pay the full amount of its settlement with the plaintiff without any claim for reimbursement at all against Cardio even though Cardio was probably at least as much at fault as the hospital. For a discussion of the appellate court's unhappiness with the Cardio decision see Roberts, supra note 17, at 871.

An example of what constitutes collusion under the tortious conduct test can be found in Henderson v. Superior Court, 162 Cal. App. 3d 297, 208 Cal. Rptr. 484 (1984). In that case, the court found lack of good faith because the only possible motive for the settlement was to insulate the settling tortfeasors from possible liability to the nonsettling defendant on a cross-complaint. Id. at 300, 208 Cal. Rptr. at 486. In that case, plaintiff brought a personal injury action arising out of an incident involving two gangs, and claimed that defendant injured him with his automobile. The defendant, a member of one gang, cross-complained against two members of the other gang who were the sister and close personal friend of the plaintiff. Subsequently, the plaintiff agreed to settle with these cross-defendants for a total payment of $18,000. The cross-defendants then instituted proceedings to find that their settlement had been made in good faith, thus relieving them from any liability on the cross-complaint for partial indemnity. The appellate court found collusion based on the relationship of the settling parties and their animosity toward the nonsettling defendant, a member of a rival gang. Because plaintiff had never suggested that he had any claim for damages against either cross-defendant and did not name either of them as defendants, the only possible motive for the settlement was to insulate these defendants from possible liability to the nonsettling defendant on the cross-complaint. Thus, the court found the settlement was collusive and not in good faith, thereby leaving the parties to litigate the issue of liability among themselves pursuant to the nonsettling defendant's cross-complaint for partial indemnity.

Only three California appellate court cases have judged the good faith of a settlement by a test other than the tortious conduct test. Two of the cases were the first two cases to consider the meaning of a good faith settlement and were decided before the tortious conduct test was established; River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972); and Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975). The River Garden Farms court expressly rejected the absence of collusion as the sole criterion of good faith. River Garden Farms, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 505-06. Instead, under its test, a settlement would be in good faith if it fell within a reasonable range of the settlor's fair share of the ultimate verdict to be received by the plaintiff.
b. The Supreme Court Decision in Tech-Bilt

In *Tech-Bilt v. Woodward-Clyde & Associates*, the California Supreme Court laid down new rules for a good faith settlement and disapproved the tortious conduct test under which the inquiry into good faith was limited to whether the settlement was collusive, fraudulent or dishonest. Under the new *Tech-Bilt* test, the price of the settlement became an important factor. Good faith is now to be determined by, among other things, whether the settling defendant is paying his proportionate share of liability in the case.

i. The Role of the Good Faith Factor

The supreme court rejected the view of those courts applying the tortious conduct test that the policy of encouragement of settlements is primary and the policy of equitable apportionment of loss must be sacrificed in order that settlements be encouraged. This ap-

Under this test, the price of the settlement was relevant. If the amount was too low and was not within the reasonable range of the settlor's fair share of the plaintiff's predicted recovery, the settlement would not be in good faith.

After *River Garden Farms and Lareau*, every appellate decision dealing with the definition of a good faith settlement adopted the tortious conduct test, with one notable exception, *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). To meet the test of good faith, the *Torres* court held that the settlement figure could not be "grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Id.* at 509, 203 Cal. Rptr. at 832. The *Torres* court reasoned that the more flexible standard "should discourage fraudulent or sham settlements, as well as settlements which are unfair because they are simply 'too cheap,'" and, "should encourage defendants, who really do wish to 'close the book' on a matter, to arrive at a settlement figure which bears some relationship to what is fair." *Id.* at 509, 203 Cal. Rptr. at 832.

52. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). The facts of *Tech-Bilt* are as follows: The plaintiffs, owners of a residential property, brought an action against the developer (Tech-Bilt Construction Corporation), the soils engineers (Woodward-Clyde and Associates), and others on various theories to recover for structural defects in their residence. During the early stages of the litigation it became apparent that plaintiffs' action against Woodward-Clyde was barred by the applicable statute of limitations. Woodward-Clyde's counsel told plaintiffs' counsel that he would file a motion for summary judgment based on the statute of limitations. Pursuant to this motion, Woodward-Clyde's counsel filed a motion for summary judgment based on the statute of limitations. Pursuant to this motion, Woodward-Clyde's counsel would have been able to recover as costs its answer fee of $55. However, before the motion was filed, plaintiffs agreed to dismiss the suit against Woodward-Clyde with prejudice in exchange for a waiver of costs. Thereafter, Tech-Bilt, the nonsettling defendant, filed an amended cross-complaint for partial indemnity and declaratory relief against Woodward-Clyde. Woodward-Clyde defended against this action by seeking an order under *Cal. Civ. Proc. Code* § 877.6 to confirm its agreement with the plaintiff as a good faith settlement, and thus entitling it to summary judgment on Tech-Bilt's cross-complaint. After a hearing, the trial court found the settlement to be in good faith and entered summary judgment dismissing Tech-Bilt's cross-complaint against Woodward-Clyde. Tech-Bilt appealed and the court of appeals affirmed the trial court's decision that the settlement was in good faith because the plaintiff and Woodward-Clyde had not intended to tortiously injure Tech-Bilt by entering into their settlement.
proach was too narrow because it completely abrogated the policy of equitable apportionment of loss among joint tortfeasors. Instead, the supreme court held that the requirement that a settlement be in good faith should be applied to further both the policies of encouragement of settlements and equitable allocation of loss among multiple tortfeasors. Thus, the good faith requirement should be viewed as a means to accommodate these competing but equally important policies.\textsuperscript{53}

\textit{ii. The Reasonable Range Test}

Armed with this view of the role of the good faith factor, the supreme court adopted a test of a good faith settlement which, for purposes of this article, will be referred to as the reasonable range test. This test requires some amount of proportionality in order to find a settlement to be in good faith. "A more appropriate definition of 'good faith,' in keeping with the policies of American Motorcycle and the statute, would enable the trial court to inquire, among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for plaintiff's injuries."\textsuperscript{54} The court identified eight separate factors that should be taken into account in determining the good faith of a settlement:\textsuperscript{55}

1. A rough approximation of plaintiff's total recovery.
2. 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 condition of the settling defendant.
7. The insurance policy limits of the settling defendant.
8. The existence of collusion, fraud or tortious conduct aimed to injure the interests of nonsettling defendants.\textsuperscript{56}

The details of the reasonable range test are not clear. Beyond the quotation and the factors set forth above, the supreme court did not explain the test further. Most of the court's opinion concerned its

\textsuperscript{53} Roberts, \textit{supra} note 17, at 902-03.
\textsuperscript{54} Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263-64. This test was proposed in Roberts, \textit{supra} note 17, at 917.
\textsuperscript{55} These factors are numbered for purposes of analysis in this article but were not numbered by the court.
\textsuperscript{56} Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d at 499-500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.
reasons for adopting the reasonable range test, and it did not elabo-
rate on the specifics of the approach.

Some guidance as to the meaning of the reasonable range test can be obtained from the case of River Garden Farms v. Superior Court and a law review article entitled "The 'Good Faith' Settlement: an Accommodation of Competing Goals." In adopting the reasonable range test, the court relied extensively on both. Factors 1, 2, 3, and 5 above, derived from supreme court's opinion in Tech-Bilt, are the same factors identified by the law review commentator and the court in River Garden Farms as the factors to be utilized in determining the reasonable range of a settlor's fair share of liability for plaintiff's injuries.

The reasonable range test envisioned by those authorities did not require strict proportionality, but rather that the settlement amount be within a range of the settlor's proportionate share of plaintiff's damages. This range is to be established by the trial judge's analysis of certain factors according to his expertise. The analysis should operate with the trial judge: a) making a rough approximation of the amount plaintiff would recover after a trial; b) approximating the amount of the settlor's proportionate liability under comparative fault principles and thereby determining the settlor's proportionate share of plaintiff's damages; c) reducing that figure by some amount as a recognition that a settlor should pay less in settlement in advance of trial than he would if he were found liable after trial; and d) comparing that resulting number to the amount of the settlement. If the trial judge, in his discretion, finds that it is close enough, then the settlement will be found to be in good faith. The reasonable range test asks not for precise numbers, but for an approximation. As stated by the court in River Garden Farms, only a rough assessment of value would be possible. Thus, a court does not attempt to determine the precise amount of the parties' liability and plaintiff's injuries, but rather makes rough approximations.

This type of reasonable range test which looks only to factors 1,

58. Roberts, supra note 17.
59. River Garden Farms v. Superior Court, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506; Roberts, supra note 17, at 917.
60. See Roberts, supra note 17, at 919-24.
61. Like the California Supreme Court, this author does not dare speculate on what "close enough" would be. Such an unanswerable question can be carefully avoided by directing the matter to the "sound discretion of the trial judge."
2, 3, and 5 of the *Tech-Bilt* test will be referred to as a "pure" reasonable range test. Under this type of analysis, the policy of equitable apportionment of loss is given true equal footing with the policy of encouragement of settlements because only those settlements objectively falling within a certain range qualify as a good faith settlement. The peculiarities of the particular settling tortfeasor, including, most importantly, his financial condition, are given no special consideration and do not enter into the analysis.

4. The Financial Resources of the Settling Defendant as a New Factor of Good Faith

The supreme court in *Tech-Bilt* seemed to back off from a "pure" reasonable range test and instead adopted a reasonable range test in which the financial condition and insurance policy limits of the settling joint tortfeasor are to be considered in determining whether a settlement is in good faith. The court stated:

> This is not to say that bad faith is "established by a showing that a settling defendant paid less than his theoretical proportionate or fair share." (citation omitted) Such a rule would unduly discourage settlement. "For the damages are often speculative, and the probability of legal liability therefor is often uncertain or remote. And even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor."

Among the eight factors listed by the court as bearing on the good faith of a settlement are the financial condition and insurance policy limits of the settling tortfeasor. Thus, the supreme court has mandated that a tortfeasor may enter into a settlement for a lesser amount, and that settlement will be in good faith, if this lower settlement amount seems reasonable in light of his financial condition and

---

63. This was the test espoused by the commentator and relied on by the court. See Roberts, supra note 17, at 917.
64. See Roberts, supra note 17, at 932-35.
insurance policy limits.\(^{67}\)

In fact, as a result of the *Tech-Bilt* case, financial condition may prove to be the key factor in many good faith determinations. It is likely that a tortfeasor wishing to settle will attempt to convince the trial judge that his proposed settlement should be found to be in good faith because it is a reasonable amount given his financial condition.\(^{68}\) Or, perhaps a settling joint tortfeasor will first attempt to convince a judge that his settlement is within the "pure" reasonable range\(^{69}\) of his proportional share of comparative liability for the plaintiff's injuries, and if unsuccessful, will then utilize the argument that the settlement is reasonable because of his financial condition as a fall back position. Therefore, the financial condition of the settling joint tortfeasor will in all likelihood be a factor in many good faith settlement hearings.

III. DISCOVERY OF THE FINANCIAL CONDITION OF THE SETTLING JOINT TORTFEASOR

By including the financial condition of the settling joint tortfeasor as one of the factors to be considered in determining whether a settlement is in good faith, the supreme court has created a new discovery problem—specifically, the discovery of the financial condition of the settling joint tortfeasor.\(^{70}\) This problem was not present under the old tortious conduct test of good faith\(^{71}\) and would not

---

67. The California Supreme Court made no further elaboration on exactly how the financial condition of a settling defendant should affect the court's determination of good faith in a particular case. Although beyond the scope of this article, an important issue which will be faced by the trial courts in applying the *Tech-Bilt* reasonable range test will be to decide to what extent the financial condition and insurance status of a settling defendant should figure in the formula for a good faith settlement.

68. In one of the first appellate decisions after *Tech-Bilt*, the court looked to the financial condition of the settling tortfeasor. "At the time of the settlement, [defendant] had little or no income and was going out of business, so all that he had to salvage was what he had personally." Barth-Wittmore Ins. Co. v. H.R. Murphy Enterprises, Inc., 169 Cal. App. 3d at 134, 214 Cal. Rptr. at 899-900.

69. This article uses the term "pure" reasonable range test to refer to a test in which a settlement is examined without reference to the settlor's financial condition or insurance policy limits. See *supra* text accompanying notes 59-64.

70. *Tech-Bilt*, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). No unique discovery problems are created by the other criteria for a good faith settlement set forth in *Tech-Bilt*. The other factors, such as the estimate of plaintiff's damages and the estimate of the settlor's percentage of fault, involve information that is routinely discoverable as part of the underlying lawsuit itself.

be present under a "pure" reasonable range test of good faith because under those tests the financial condition of the settlor is not a relevant factor. However, now that the settlor's financial condition is relevant to the issue of good faith, the other parties will seek this information through discovery.

The purpose of this section of the article is two-fold. First, it points out the discovery dilemma created by the supreme court test which makes the financial condition of a settlor a factor of good faith. Second, this section suggests a resolution to this problem.

Because most cases regarding good faith settlements under California law have and will take place in California state courts rather than in federal courts, this article addresses itself primarily to California procedural rules. The pertinent considerations would be the same under the Federal Rules of Civil Procedure, and reference will be made to the appropriate federal cases and rules in the footnotes.

A. General Rules Regarding Discovery of Another's Financial Affairs

1. The Scope of Discovery

California's civil discovery act provides for a broad range of discovery. Discovery in civil litigation is permissible if the informa-

---

72. See infra text accompanying note 152. For a discussion of the "pure" reasonable range test of good faith, see supra, text accompanying notes 63-64.

73. The Federal Rules of Civil Procedure would be applicable if the underlying action was a diversity case in which the court was applying substantive California law on the issue of the good faith of a settlement. Even though the state substantive law is applicable, the Federal Rules of Civil Procedure would govern discovery disputes in federal court. McNeil Constr. Co. v. Livingston State Bank, 185 F. Supp. 197, 201 (D. Mont. 1960), aff'd, 300 F.2d 88 (1962).

For an example of two cases that preceded Tech-Bilt in which the federal courts in a diversity action applied California law on the issue of a good faith settlement, see Owen v. United States, 713 F.2d 1461 (9th Cir. 1983); Commercial Union Ins. Co. v. Ford Motor Co., 640 F.2d 210 (9th Cir. 1981), cert. denied, 454 U.S. 858 (1981).

74. In fact, California courts quite often rely on federal precedent when construing the California discovery provisions. California courts have ruled that, in enacting the discovery statutes, the legislature must have intended that they should have the same meaning, force, and effect as have been given the federal rules by the federal courts. Crummer v. Beeler, 185 Cal. App. 2d 851, 8 Cal. Rptr. 698 (1960); Gorman Rupp Indus., Inc. v. Superior Court, 20 Cal. App. 3d 28, 97 Cal. Rptr. 377 (1971). Continuing Education of the Bar, Discovery Practice 56 (1975). For example, in Danzig v. Superior Court, 87 Cal. App. 3d 604, 151 Cal. Rptr. 185 (1978), the court looked to federal precedent to determine the circumstances in which interrogatories may be propounded to unnamed class members. See also Deyo v. Kilbourne, 84 Cal. App. 3d 771, 149 Cal. Rptr. 499 (1978), in which the court referred extensively to federal precedent. Continuing Education of the Bar, California Civil Discovery Practice 2-3 (Supp. 1985).

75. CAL. CIV. PROC. CODE §§ 2016-2037.9 (West 1983).

tion sought: a) is not privileged; and b) is either relevant to the subject matter of the action, or is reasonably calculated to lead to the discovery of admissible evidence. This standard is applied liberally and discovery statutes are broadly construed with all doubts resolved in favor of allowing discovery. Information is generally discoverable if it relates to a claim or assertion being made by the person from whom the information is sought.

The principle of broad discovery is based on public policy considerations. The public purpose served is that of effective judicial dispute resolution and "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings."

2. Relevancy of Financial Condition Under the Discovery Statutes

In the ordinary action for compensatory damages, the plaintiff is not entitled to discovery of the defendant's financial condition. Evidence regarding the defendant's financial status is generally not inadmissible, but such information is also not relevant to the


The scope of discovery is the same under the Federal Rules of Civil Procedure. CAL. CIV. PROC. CODE § 2016(b) is identical to FED. R. CIV. P. 26(b) (West Supp. 1985) as far as the scope of discovery is concerned.


subject matter of the action and is not likely to lead to the discovery of admissible evidence. Thus, in the ordinary case when the only possible relevance of a defendant's finances is to his ability to respond in damages, the defendant's personal finances, as opposed to the existence and amount of his liability insurance, is not discoverable. 84

However, once a party's financial condition becomes relevant to an issue in the underlying lawsuit, his financial information is discoverable. 85 The most common example is a case in which punitive damages are claimed. Because the extent of a defendant's assets is relevant to the amount of punitive damages, if the court is convinced punitive damages can be appropriate, the plaintiff can conduct discovery into the net worth of the defendant. 86

Financial condition can become relevant in other types of cases as well. For example, in a proceeding to increase monthly child support payments, a court held that discovery was proper which sought information as to whether the defendant had sources of income other than those already disclosed and whether he was presently entitled to draw upon those sources of income. 87 Because the questions were pertinent to the issue of his ability to pay increased child support, the questions were relevant to the subject matter of the proceeding. 88

Another example of the type of case in which information regarding a party's financial affairs was discoverable is found in Mos-

84. Dompeling v. Superior Court, 117 Cal. App. 3d at 804, 173 Cal. Rptr. at 41; Doak v. Superior Court, 257 Cal. App. 2d at 832-33, 65 Cal. Rptr. at 197-98.
86. Coy v. Superior Court, 58 Cal. 2d at 222-23, 373 P.2d at 463, 23 Cal. Rptr. at 399. When punitive damages are alleged, no pretrial discovery is permitted by the plaintiff into the defendant's financial condition unless the court first enters an order so allowing. The court will issue such an order if plaintiff establishes that there is a substantial probability that it will prevail on the claim for punitive damages. CAL. CIV. CODE § 3295(c) (West Supp. 1985).
88. Id. at 394, 11 Cal. Rptr. at 159. Similarly, in a proceeding to be relieved from the payment of child support, a divorced husband was permitted to discover financial information concerning the nature and extent of his prior wife's property. Chapin v. Superior Court, 239 Cal. App. 2d 851, 855-56, 49 Cal. Rptr. 199, 201-02 (1966). There, the husband was permitted to make inquiry by discovery proceedings concerning both the separate and community property of his prior wife arising from her second marriage.
There, plaintiff sued defendants for legal malpractice and alleged that as a result of the malpractice, a judgment was entered against him and he was unable to obtain a bond or stay execution pending appeal from the judgment. Plaintiff asserted that as a matter of financial survival and under threat of execution against his assets he was compelled to pay a large settlement in satisfaction of the judgment. Because plaintiff "put in issue" his financial condition by asserting that he had insufficient financial resources to stay execution of the judgment entered against him, discovery of his financial condition was proper.

3. The Right of Privacy as a Limitation on Discovery of Financial Information

A competing consideration regarding the discovery of another's financial affairs is that person's right of privacy. In 1974, the right of privacy became an "inalienable right" under the California Constitution. This elevated to a state constitutional dimension the right of privacy which had been enunciated in several prior decisions. The

90. Id. at 317-18, 187 Cal. Rptr. at 7-8. In Moskowitz, the plaintiff did not seek to restrict the scope of discovery nor did he deny that the defendants were entitled to discover the details of his financial affairs. Rather, plaintiff sought to prevent disclosure of his personal financial information to persons who had no legitimate interest in its use for purposes of the litigation. Id. at 316, 187 Cal. Rptr. at 6-7.
91. CAL. CONST. art. I, § 1, provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Id.
92. The right of privacy was given its first major judicial formulation by the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). The court found the right of privacy within the "penumbras" or "emanations" of the rights enumerated in the Bill of Rights. Smith, The Right of Privacy as a Restriction on Discovery, 5 CIV. LIT. R. 117 (1983).

Even before the California constitutional amendment, the California Supreme Court found the right of privacy barred compelled disclosure of a public official's personal investments, City of Carmel by the Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. (1970), and the psychiatric history of a party, In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). Smith, supra note 92, at 117.


right of privacy is a "fundamental interest" of our society, "[e]ssential to [those] rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the United States Constitution." As stated by one court of appeal:

The right of privacy now incorporated expressly in article I, section 1 of the California Constitution exists to prevent governmental 'snooping,' to inhibit the overly broad collection and retention of unnecessary personal information, the improper use of information properly obtained for a specific purpose, and to avoid the evils incident to lack of a reasonable check on the accuracy of existing records.

Among the classes of information entitled to protection under the right of privacy is personal financial information. Thus, the

---

Supreme Court in Seattle Times Co. stated that discovery may seriously implicate privacy interests of litigants and third parties. Although Fed. R. Civ. P. 26(c) contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule. Seattle Times Co., 104 S. Ct. 2199, 2208 n.21.

93. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130, 610 P.2d 436, 439, 164 Cal. Rptr. 539, 542 (1980); White v. Davis, 13 Cal. 3d at 774-75, 533 P.2d at 234, 120 Cal. Rptr. at 105-06; Board of Trustees of Leland Stanford Junior University v. Superior Court, 119 Cal. App. 3d at 524-25, 174 Cal. Rptr. at 163-64.


95. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d at 656, 542 P.2d at 979, 125 Cal. Rptr. at 555; Moskowitz v. Superior Court, 137 Cal. App. 3d at 315, 187 Cal. Rptr. at 6; Cobb v. Superior Court, 99 Cal. App. 3d at 549, 160 Cal. Rptr. at 565; Richards v. Superior Court, 36 Cal. App. 3d at 273, 150 Cal. Rptr. at 81.


It is not clear whether the financial information of business or corporations is protected by the right of privacy. In GT, Inc. v. Superior Court, 36 Cal. 3d 748, 198 Cal. Rptr. 892 (1984), the court issued a protective order to safeguard the financial information of a business entity. In Cobb v. Superior Court, the court did not deem it necessary to consider this issue. 99 Cal. App. 3d at 547 n.3, 160 Cal. Rptr. at 564 n.3. However, as stated in that case, if a business or corporation is claiming that it does not have sufficient assets to pay for its share of plaintiff's damages, then, in all likelihood, allegations of piercing the corporate veil and alter ego will be made which may result in the necessity of delving into the defendant's personal financial information.


Among the other classes of information which have been held to be protected by the right of privacy are: Britt v. Superior Court, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978) (medical history not "directly relevant" to the injury at issue); In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (psychiatric history); Britt v. Superior Court,
right of privacy entitles a party to be protected from harassment and intrusion into his financial affairs.96

4. Balancing The Interests Through Protective Orders

With respect to the discovery of personal financial information, a conflict exists between the two above-mentioned public policies: a) the policy of broad discovery to facilitate the ascertainment of truth; and b) the policy of protecting the right of privacy of the person from whom the discovery is sought.97 The court has basically three choices in dealing with this conflict.98

The first option is to deny discovery altogether because any forced disclosure of financial information infringes on the right of privacy. However, while a complete ban on discovery would protect the one party’s confidentiality, it also deprives his adversary of information necessary to the preparation of his case. Such an approach exacts a severe price for the protection of privacy and undermines the policy of liberal discovery when the requested information is relevant to the subject matter of the action. When possible, the courts prefer to impose partial restrictions rather than an outright denial of discovery.99

Therefore, the courts have not chosen this option of completely precluding the discovery of the financial information. Rather, they have held that the constitutional right of privacy is not absolute and may be abridged to accommodate a compelling public interest.100 One such interest is the previously mentioned important state interest of facilitating the ascertainment of truth in connection with legal

---

99. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d at 657-58, 542 P.2d at 979-80, 125 Cal. Rptr. at 555-56; Greyhound Corp. v. Superior Court, 56 Cal. 2d at 383, 364 P.2d at 280, 15 Cal. Rptr. at 104.
proceedings which is evidenced by California’s broad discovery statutes. Thus, even though personal financial information falls within the zone of privacy protected by article 1, section 1 of the California Constitution, discovery of such information cannot be completely denied if the information sought is relevant to the subject matter in issue, i.e., it is otherwise discoverable.

The court’s second alternative is to allow unrestrained discovery of financial information. It could order the discovery without any limitation and thereby allow the discovering party to use the discovered information as he wishes. This could harm the producing party if the discovering party disseminates the information or uses it for some purpose other than discovery. Such an approach is also harsh because while the information gathering purpose of discovery is effectuated, the unrestrained use of the information is not necessary to achieve that purpose. The right of privacy, while not absolute, requires certain restrictions on the discovery of financial information. Accordingly, the courts have also rejected this alternative.

Instead, the courts have adopted a middle position which seeks to accommodate the competing interests of the individual’s right of privacy of his financial affairs and the public’s need for discovery in litigation. This is accomplished by the issuance of an appropriate protective order in each case. Thus, the court will allow the requested discovery, thereby satisfying the policy of truth ascertainment. However, the court will also fashion a protective order to min-

101. Britt v. Superior Court, 20 Cal. 3d at 857, 574 P.2d at 774, 143 Cal. Rptr. at 703.
104. See infra text accompanying note 171.
105. See infra text accompanying notes 109-111.
106. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d at 657, 342 P.2d at 979, 125 Cal. Rptr. at 555; Moskovitz v. Superior Court, 137 Cal. App. 3d at 316, 187 Cal. Rptr. at 6; Cobb v. Superior Court, 99 Cal. App. 3d at 549, 160 Cal. Rptr. at 565.
imize the harm to the producing party from the use or release of the confidential information. In this way, the inevitable invasion of privacy can be kept within constitutionally permissible limits. The compelled disclosure must be permitted only to the extent necessary for a fair resolution of the lawsuit. "The scope of disclosure [must] be narrowly circumscribed" and the protective order must be carefully crafted "with narrow specificity."

Protective orders, which are authorized by statute for both state and federal procedure, seem to be the best alternative in

111. Britt v. Superior Court, 20 Cal. 3d at 856, 574 P.2d at 773, 143 Cal. Rptr. at 702 (citing Vogel v. City of Los Angeles, 68 Cal. 2d 18, 22, 434 P.2d 961, 963, 64 Cal. Rptr. 409, 411 (1967)); Moskowitz v. Superior Court, 137 Cal. App. 3d at 316, 187 Cal. Rptr. at 6; City and county of San Francisco v. Superior Court, 125 Cal. App. 3d at 883, 178 Cal. Rptr. at 437.
112. CAL. CIV. PROC. CODE § 2019(b)(1) (West 1983) provides that on noticed motion, or on the court's own motion with opportunity for counsel to be heard, and in either case for good cause shown, the court may make any of the following orders:
(a) "that the deposition shall not be taken";
(b) "that it may be taken only at some designated time or place other than stated in the notice";
(c) "that the deposition may be taken beyond the ordinary distance limitations";
(d) "that it shall not be taken except by allowing written interrogatories by one or more parties";
(e) "that certain matters shall not be inquired into";
(f) "that the scope of the examination shall be limited to certain matters";
(g) "that the examination shall be held with no one present except the parties to the action and their officers or counsel";
(h) "that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court";
(i) "any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

Id.

The enumerated orders set forth in CAL. CIV. PROC. CODE § 2019(b)(1) include most contingencies requiring protection which are apt to occur. Nevertheless, this section, substantially like its federal counterpart, provides generally that the court "may make any order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." See Louisell, Discovery Today, 45 CAL. L. REV. 486, 512 (1957).

CAL. CIV. PROC. CODE § 2019(b)(1), by its terms, deals only with the taking of oral depositions, but it is specifically made applicable to other types of discovery such as written interrogatories (CAL. CIV. PROC. CODE § 2030(b) (West 1983)); depositions upon written interrogatories (CAL. CIV. PROC. CODE § 2020(d) (West 1983)); and requests for admissions
this discovery dilemma. Such orders are in fact frequently used by both state and federal courts to facilitate discovery while protecting the confidentiality of the information obtained.\textsuperscript{114}

a. Common Types of Protective Orders Under Which Financial Information is Sought

The courts have in the past fashioned certain types of protective orders to accommodate considerations of both disclosure and confidentiality. For example, \textit{Richards v. Superior Court},\textsuperscript{115} \textit{Cobb v. Superior Court},\textsuperscript{116} and \textit{Martin v. Superior Court}\textsuperscript{117} involved lawsuits

\begin{itemize}
  \item [(CAL. CIV. PROC. CODE § 2033(a) (West 1983)). While not specifically applicable to inspection of documents and things (CAL. CIV. PROC. CODE § 2031(a) (West 1983)), § 2019(b)(1) is relevant to these proceedings because the relevancy provisions of CAL. CIV. PROC CODE § 2019(b) apply in determining the scope of discovery under CAL. CIV. PROC. CODE § 2031, and CAL. CIV. PROC. CODE § 2019(b) applies in determining the scope of discovery permissible under § 2016(b). Without discussing the issue, the court in \textit{GT, Inc. v. Superior Court}, 151 Cal. App. 3d 748, 198 Cal. Rptr. 892 (1984) applied CAL. CIV. PROC. CODE § 2019(b) to a request for production of documents. The discovery provision dealing with physical and mental examinations, (CAL. CIV. PROC. CODE § 2032 (West 1983)), while not incorporating § 2019(b), provides that the court shall specify the "time, place, manner, conditions and scope" of the examination.
  \item [(CAL. CIV. PROC. CODE § 2019(b) (West 1983)), § 2019(b) applies in determining the scope of discovery under § 2016(b). Without discussing the issue, the court in \textit{GT, Inc. v. Superior Court}, 151 Cal. App. 3d 748, 198 Cal. Rptr. 892 (1984) applied CAL. CIV. PROC. CODE § 2019(b) to a request for production of documents. The discovery provision dealing with physical and mental examinations, (CAL. CIV. PROC. CODE § 2032 (West 1983)), while not incorporating § 2019(b), provides that the court shall specify the "time, place, manner, conditions and scope" of the examination.

113. Protective orders are authorized under the Federal Rules of Civil P. FED. R. CIV. P. 26(c) allows the court, for good reason, to make any order which justice requires to protect against annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
\begin{enumerate}
  \item that the discovery not be had:
  \item that the discovery may be had only on specified terms and conditions, including a designation of the time or place:
  \item that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery:
  \item that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
  \item that discovery be conducted with no one present except persons designated by the court;
  \item that a deposition after being sealed be opened only by order of the court;
  \item that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
  \item that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
\end{enumerate}

FED. R. CIV. P. 26(c).

This list of eight types of protective orders is not exclusive. A court may fashion other appropriate orders to achieve the purposes of the rule. 8 C. WRIGHT & A. MILLER, \textit{FEDERAL PRACTICE & PROCEDURE: CIV. § 2036, at 269 (1970).


in which punitive damages were alleged. The courts of appeal acknowledged the relevance of the defendants' financial condition to the issue of punitive damages but fashioned protective orders to protect the defendants' right of privacy as much as possible.\textsuperscript{118} In Richards, the plaintiff sought documents pertaining to the personal earnings and net worth of law partners who were being sued for malpractice. The court of appeal ordered the disclosure but issued a protective order which limited disclosure of the financial information to counsel for the plaintiff or to that counsel's representative, and not to plaintiff himself.\textsuperscript{119} The court also prohibited the use of the information for purposes other than the lawsuit.\textsuperscript{120}

In Cobb, the court stated that the Richards-type protective or-

\begin{footnotesize}
\begin{enumerate}
\item In 1980, the legislature added CAL. CIV. CODE § 3295(c) preventing pretrial discovery of financial condition on the issue of punitive damages without a court order. See supra note 86. If the court does grant such discovery, a protective order such as those set forth by the courts in Richards v. Superior Court and related cases and described infra text accompanying notes 115-130, would still be appropriate. DeMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE ¶ 5.11(12).


\item Richards v. Superior Court, 86 Cal. App. 3d at 272, 150 Cal. Rptr. at 81. The court in Richards specifically held that:

[W]here a party is compelled in civil discovery to reveal financial information because the information is relevant to the subject matter of a claim for punitive damages, that party is upon his motion, presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to the counsel's representative, and that once so revealed, the information may be used only for purposes of the lawsuit. The burden is upon the opposing party to establish a substantial reason why the order should be denied. That reason must be related to the lawsuit.

\textit{Id.} The federal courts have also held that a party's interest in nondisclosure can be protected by limiting the adverse party's use of the discovered information and prohibiting disclosure of the information beyond the confines of the case. Vollert v. Summa Corp., 389 F. Supp. 1348, 1352 (D. Hawaii 1975). A court may issue a protective order limiting the disclosure of the requested information under FED. R. CIV. PROC. 26(c). The provisions of this rule give the court broad power to control the use of the discovery process, and the exercise of this power is in the sound discretion of the court. Corbett v. Free Press Ass'n, 50 F.R.D. 179, 181 (D. Vt. 1970); Textured Yarn Co. v. Burkart-Schier Chem. Co., 41 F.R.D. 158 (E.D. Tenn. 1966); Colonial Capital Co. v. General Motors Corp., 29 F.R.D. 514 (D. Conn. 1961); Rose Silk Mills v. Insurance Co. of North America, 29 F. Supp. 504, (S.D.N.Y. 1939). For a discussion of possible first amendment problems associated with such an order, see infra note 128.

\end{enumerate}
\end{footnotesize}
der was not the only method to achieve the necessary protection, and suggested certain illustrative guidelines to be considered in balancing financial disclosure demands against an objection based on the right of privacy. Among the factors listed by the court in Cobb were delaying the timing of the discovery, sealing the information, and restrictions on the access to the information once disclosed. Specifically, the court indicated that it was not necessary for the litigant to have access to the information, but that access by his attorney would be sufficient. As far as timing was concerned, the Cobb court held that in the punitive damages context it is seldom necessary for a court to permit discovery into a defendant's financial affairs before discovery on the merits of the underlying cause of action, and suggested delaying disclosure until near trial.

In Martin, the attempted discovery of financial information via interrogatories, and the trial court issued a protective order that the financial information be sealed upon filing with the court, that the information be used only in connection with the present litigation, and that the information could be disseminated only to the parties and their counsel. The court of appeal held this protective order was not adequate in that the order allowed dissemination of the financial information to the parties, as opposed to their counsel only. The court, therefore, issued a writ of mandate directing the trial court to enter a new order limiting access to counsel only.

122. Id. The court emphasized that these guidelines were suggestions intended to illustrate the types of variables the court should consider in trying to achieve a balance of interests. Id. at 551-52, 160 Cal. Rptr. at 566-67.
123. Id. at 551, 160 Cal. Rptr. at 566.
124. Id. at 550-51, 160 Cal. Rptr. at 566.
125. Id. The postponement of discovery until near the trial date in order that the relevancy of the information sought can be seen more clearly is also present in the federal system. See Note, Protective Orders Restricting Disclosure of Discovery in Federal Civil Proceedings 56 CHICAGO KENT L. REV. 943, 957 n.110 (1980).
127. Id. at 394, 167 Cal. Rptr. at 812.
128. Id. at 395, 167 Cal. Rptr. at 813.

In the past, litigants have argued that a protective order limiting the dissemination of information gained in discovery violated the discovering party's first amendment rights. Although most courts found no constitutional problems with the granting of a protective order forbidding the publicizing of information obtained through discovery, Rodgers v. United States Steel Corp., 536 F.2d 1001 (3rd Cir. 1976); International Prod. Corp. v. Koons, 325 F.2d 403 (2nd Cir. 1963), at least one court recognized a litigant's first amendment right to disclose such information. In re Halkin, 598 F.2d 176 (D.C. Cir. 1979).

However, this issue now seems to have been laid to rest by the U. S. Supreme Court in Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). There, the Supreme Court upheld a Washington state trial court's order preventing defendants from publicly disseminating certain
While illustrative, these types of protective orders are not exclusive. Ingenious courts and counsel may develop other approaches, and the trial judge has broad discretion in formulating an appropriate protective order.

b. Burden of Proof in Protective Order Proceedings

The appellate courts disagree about who has the burden of proof in a proceeding to obtain a protective order in which the financial information sought is relevant to the merits of the underlying information derived from discovery. The state court reasoned that such an order reasonably protects a legitimate interest in privacy and does not offend the first amendment. In that case, the defendant newspaper sought and obtained financial and membership data about a religious sect of which plaintiff was the leader. Although the case involved a Washington state statute, that statute is similar to both Fed. R. Civ. P. 26(c) and Cal. Civ. Proc. Code § 2019(b)(1).

With respect to California state court practice, no California court has found any first amendment problems with a protective order limiting the dissemination of discovery information. In fact, the first amendment argument was made and rejected in Moskowitz v. Superior Court, 137 Cal. App. 3d at 319, 187 Cal. Rptr. at 9.

Real parties argue that the order of respondent court denying petitioner’s motion for a protective order is supported by the principle that First Amendment rights extend to the fruits of discovery. In re Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979); Koster v. Chase Manhattan Bank, 83 F.R.D. 471, 475 (S.D.N.Y. 1982). The contention lacks merit. As the court acknowledges in Halkin, supra, 'the First Amendment is not an absolute [citation omitted], and the protection afforded the exercise of First Amendment rights may be limited in certain narrow circumstances.' (598 F.2d at p. 190) . . . In any event, it has been held that while the First Amendment precludes restriction of the use of information obtained independently of court processes, there is no such constitutional prohibition against an order which forbids the publicization of information obtained through the discovery process.

Id. See also Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006-1007 (3d Cir. 1976).

129. Valley Bank of Nevada v. Superior Court, 15 Cal.3d at 658, 542 P.2d at 980, 125 Cal.Rptr. at 556.


The U.S. Supreme Court has reaffirmed the trial judge’s broad discretion in issuing a protective order. Citing Judge Friendly in International Prod. Co. v. Koons, 325 F.2d 403, 407-08 (2nd Cir. 1963), the Court stated:

"[W]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to [issue it] under the inherent 'equitable powers of courts of law over their own process to prevent abuses, oppression, and injustices.' The unique character of the discovery process allowing liberal pretrial discovery requires that the trial court have substantial latitude to fashion protective orders.

Seattle Times Co. v. Rhinehart, 104 S. Ct. at 2208.

cause of action asserted in the litigation as opposed to a claim for punitive damages. In Richards, a punitive damages case, the court held that the defendants were "presumptively entitled" to the type of protective order given in that case. The burden of proof is on the party seeking the financial information to establish a reason, related to the lawsuit, for denial of the protective order.

The court in Moskowitz v. Superior Court took this holding one step further and applied the same presumption in favor of a protective order to a non-punitive damages case. In Moskowitz, the financial information sought related to the main cause of action itself, and the party seeking the protective order was a plaintiff, not a defendant. The plaintiff was suing his former attorney for malpractice, and alleged he was damaged because he was unable to obtain a bond to stay execution of judgment pending appeal and was therefore compelled to pay $1.75 million to settle the case. The parties agreed that the plaintiff's financial condition was discoverable and that the only issue involved was plaintiff's entitlement to a protective order limiting the disclosure of the information by the defendant's attorneys. The court of appeal held that under Richards, the plaintiff was presumptively entitled to a protective order and that the defendant had failed to rebut the presumption. The court concluded that the presumption of entitlement to a protective order applies even when plaintiff himself put his financial condition in issue.

However in GT, Inc. v. Superior Court, another non-punitive damages case, the court disapproved of Moskowitz and distinguished Richards and Cobb. The court stated that when the financial information directly relates to the cause of action itself (as opposed to a claim for punitive damages) there will often be a legiti-

131. 86 Cal. App. 3d at 272, 150 Cal. Rptr. at 81.
132. Id. at 272. The same rule was adopted in Martin v. Superior Court, 110 Cal. App. 3d at 395, 167 Cal. Rptr. at 813.
133. 137 Cal. App. 3d at 318, 187 Cal. Rptr. at 8.
134. Id. at 317-18, 187 Cal. Rptr. at 7-8.
135. Id. at 318, 187 Cal. Rptr. at 8.
137. GT involved an action between two publishers on issues of antitrust and unfair competition arising from alleged underpriced advertising by defendant. Plaintiff sought discovery of certain documents of defendant containing financial information relating to the cause of action. The specific discovery question involved a request from plaintiff to defendant to identify each financial statement, profit and loss statement, balance sheet, financial projection document, and general ledger for the past five years for both the newspaper and the direct-mail shopper. The trial court imposed a protective order which specified that the documents obtained be produced to plaintiff's counsel and accountants only and not to plaintiff himself. The appellate court upheld the protective order granted by the trial court because it found there was good cause for the protective order because of the animosity between the parties. Id.
mate need for the information to be disclosed to the opposing party himself rather than only to his attorney in order that the litigant can help prepare his case. This is to be distinguished from the punitive damages situation in which the client has little need to know of the information when preparing his case on the liability question. Therefore, the GT court held that Moskowitz notwithstanding, the presumption in favor of the issuance of a protective order does not apply to the situation where the financial information goes to the heart of the cause of action itself rather than to a claim for punitive damages. Instead, the party seeking the protective order is required to meet the usual burden of showing “good cause” under Code of Civil Procedure section 2019(b)(1). GT’s holding that there is no presumptive right to a protective order has been criticized on the grounds that the constitutional right of privacy should take precedence over the requirement of showing “good cause” under Code of Civil Procedure section 2019(b)(1).

B. Applying The Discovery Rules to The Good Faith Settlement Context

The discoverability of the settling defendant’s financial information for purposes of a good faith settlement hearing is a novel issue resulting from the California Supreme Court’s decision in Tech-

---

138. GT, Inc. v. Superior Court, 151 Cal. App. 3d at 754, 198 Cal. Rptr. at 896.
139. In commenting on Moskowitz, the court in GT, Inc. v. Superior Court said that whether Moskowitz was a warranted extension of Richards was impossible to assess because the Moskowitz court failed to specify what kind of protective order was sought. The GT court noted that if the protective order in Moskowitz sought only to limit disclosure to those involved in the lawsuit, a presumption in plaintiff’s favor would seem appropriate. However, if the order sought to prevent defendants themselves from examining the financial information, application of the Richards presumption may have been improper. Id. at 754, 198 Cal. Rptr. at 895-96.
140. Id.
141. CAL. CIV. PROC. CODE § 2019(b)(1) (West 1983) provides, inter alia that a court may “for good cause shown” make any order “which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.”
142. CIV. LIT. R. 80-81 (CEB 1984). The author argued that, As for the GT court’s insistence on a finding of ‘good cause’ for a right-of-privacy protective order, there seems no more reason to require such a showing in civil discovery of personal financial data than there would be to require a ‘good cause’ finding to bar from a criminal proceeding evidence obtained by an illegal search or by coercion. Both the right of privacy and the prohibitions against unreasonable searches and self-incrimination are of constitutional dimension, require no legislative implementation, and spring from common citizen concerns. In sum, the reasoning of the court in GT seems unsound.

Id. at 81.
The courts have never before dealt with this discovery issue under a test of good faith which includes the financial condition of the settling defendant as a relevant factor.\(^{144}\)

1. Discoverability Under Tests of Good Faith Other Than That Set Forth in Tech-Bilt

a. Discovery of Financial Condition Under the Tortsious Conduct Test

The tortious conduct test created no problems as far as discovery of the net worth of the settling tortfeasor was concerned. Because the amount of a settlement was irrelevant under the tortious conduct test,\(^{145}\) it followed that the financial condition of the settling joint tortfeasor was also irrelevant.

In fact, one appellate court was instrumental in adopting the tortious conduct test for the very purpose of prohibiting discovery into the financial condition of the settling defendant. In *Dompeling v. Superior Court*,\(^{146}\) the nonsettling defendant took the deposition of the settlor and inquired exhaustively into his personal and business assets. The settlor refused to answer on the grounds that the financial information was not relevant to the issue of the good faith of the settlement or reasonably calculated to lead to the discovery of admissible evidence. The appellate court agreed with this argument,\(^{147}\) reasoning that permitting inquiry by a nonsettlor into a settling defendant's financial condition would discourage those seeking to settle

---

144. *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), involved the discovery of a settling defendant's financial information in the context of a good faith settlement determination, but there the court denied the discovery because it held that the defendant's financial condition was irrelevant to the issue of good faith under the tortious conduct test of a good faith settlement. *See infra* text accompanying notes 145-151.
145. For a complete discussion of the tortious conduct test, *see supra* text accompanying notes 42-51.
146. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981). In this case, a nonsettling defendant cross-complained against a settling defendant for partial indemnity and the settlor defended on the grounds that his settlement had been made in good faith. The trial court ruled that the issue of whether the settlement was entered into in good faith would be decided in a separate trial preceding the trial of the underlying personal injury action. The trial court refused to decide the matter at a pretrial hearing. *Id.* at 802, 173 Cal. Rptr at 40. Presumably, *Cal. Civ. Proc. Code* § 877.6 (West Supp. 1986) had not taken effect at the time of the trial court's ruling because pursuant to that section, the settlor was entitled to a hearing on the issue of good faith upon the filing of a pretrial motion, rather than at a separate trial.
147. *Dompeling*, 117 Cal. App. 3d at 810, 173 Cal. Rptr. at 45. The trial court compelled the discovery, but the court of appeal issued a writ directing the trial court to vacate its order.
personal injury actions.\textsuperscript{149} In essence, the appellate court viewed its task as being to encourage settlements and, therefore, it defined good faith in such a way as to "substantially narrow the scope of the pretrial hearing upon the issue of a good faith settlement"\textsuperscript{149} so that financial status would not be an issue except in the most extreme case. Accordingly, the court adopted the tortious conduct test of good faith\textsuperscript{150} specifically to \textit{limit} discovery into the settlor’s financial status.\textsuperscript{151}

2. \textit{Discoverability of Financial Condition Under The “Pure” Reasonable Range Test}

Like the tortious conduct test, a "pure" reasonable range test of good faith would not create any discovery problems regarding the net worth of the settling joint tortfeasor. Under this "pure" test, the financial condition of the settling party would not be a factor in determining good faith,\textsuperscript{152} so any financial information would be nondisclosable.

3. \textit{Discoverability of the Financial Condition of the Settling Joint Tortfeasor Under the Tech-Bilt Test for Good Faith}

a. \textit{Relevancy of Financial Information to the Issue of Good Faith}

Under certain circumstances, the financial condition of the settling defendant will be relevant to the issue of the good faith of a proposed settlement under the \textit{Tech-Bilt} test. This will occur when the settling joint tortfeasor seeks an order under Code of Civil Procedure section 877.6\textsuperscript{153} that his proposed settlement is in good faith and claims that the settlement amount is sufficient because of his financial condition. Such a settlement will be referred to as a "below

\begin{footnotes}
\item[148] Id. at 809, 173 Cal. Rptr. at 44.
\item[149] Id. at 810, 173 Cal. Rptr. at 45.
\item[150] Id. at 809-810, 173 Cal. Rptr. at 44-45.
\item[151] Id. at 810, 173 Cal. Rptr. at 45. The court specifically left open the question of discoverability of financial information:

\begin{quote}
in a different factual situation and on a different theory of materiality, for example, where a settlement is grossly disproportionate on its face and the information is sought as a step in establishing a corrupt agreement between the settling defendant and the plaintiff.
\end{quote}

\item[152] \textit{Id.}

\end{footnotes}
reasonable range settlement” because the amount would not be con-
sidered to be within the reasonable range of the settlor’s fair share of
liability for plaintiff’s injuries were it not for the settlor’s poor finan-
cial condition.

The court of appeal in Dompeling v. Superior Court\textsuperscript{154} sug-
gested that a settling defendant’s financial condition would be rele-
vant to the subject matter of the good faith of a below reasonable
range settlement and, therefore, discoverable under the test of good
faith adopted by the California Supreme Court in Tech-Bilt.\textsuperscript{155} As
discussed above,\textsuperscript{156} the Dompeling court bent over backwards to es-
tablish the tortious conduct test of good faith under which the finan-
cial condition of the settling defendant would not be relevant to the
subject matter of the action and, therefore, would not be discovera-
ble. Accordingly, the Dompeling decision illustrates that under the
test of good faith established in Tech-Bilt, in which the settler’s fi-
nancial condition is indisputably a factor, the financial condition of
the settling defendant is relevant to the subject matter of the action.
Therefore, under the Tech-Bilt test, discovery into the financial con-
dition of the settling joint tortfeaser is appropriate, unless protected
by a privilege.

b. The Right of Privacy in the Good Faith Settlement
Context

The right of a settling defendant to the privacy of his financial
information should not be afforded any less protection than has been
granted in other contexts. Indeed, the court in Dompeling v. Supe-
rior Court used the defendant’s right of privacy as a rationale for
defining a good faith settlement in such a way so that discovery
would not be permitted.\textsuperscript{157}

However, it could be argued that the concern for the protection

\begin{itemize}
\item \textsuperscript{154} 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).
\item \textsuperscript{155} See supra text accompanying notes 146-151.
\item \textsuperscript{156} If a good faith settlement issue is to be determined in a federal court, the federal
judge would apply the same rules as those laid down by the California Supreme Court in
Tech-Bilt that the financial condition of the settling joint tortfeasors is relevant to the determi-
nation of good faith. As stated by Judge Friendly in Roginsky v. Richardson-Merrell, Inc.,
378 F.2d 832, 841 (2nd Cir. 1967), the federal court does not make state law, but merely
applies it.
\item [The Erie doctrine wisely prevents our engaging in such extensive law-making
on local tort liability, a subject which the people of [the state] have entrusted to
their legislature and, within appropriate limits, to their own courts, not to us.
\textit{Id.}
\item \textsuperscript{157} Dompeling v. Superior Court, 117 Cal. App. 3d at 808-09, 173 Cal. Rptr. at 44.
\end{itemize}
of the joint tortfeasor’s financial privacy should not be so strong in the good faith settlement context as it is for one who has not put his own financial condition in issue, such as a defendant against whom a plaintiff has asserted a claim for punitive damages. After all, it is the settling defendant himself who makes his financial condition a factor in the good faith determination by seeking approval of a below reasonable range settlement. Therefore, perhaps he should not be heard to complain about allowing discovery by the nonsettling joint tortfeasors into his net worth.

However, the bringing of a petition to confirm a good faith settlement on the basis of financial condition would constitute only a partial, and not a total, waiver of the settling defendant’s right of privacy. In an analogous situation, the plaintiff in *Moskowitz v. Superior Court*158 put in issue the question of whether he had sufficient financial resources to stay execution of a judgment. The defendant argued that plaintiff waived his right of privacy by filing the action. The court of appeal held that the commencement of the action did not constitute a total waiver of plaintiff’s right of privacy for all purposes.159 While the filing of a lawsuit may implicitly bring about the partial waiver of one’s constitutional right of privacy, the scope of such a “waiver” must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their financial condition.160 Simi-

---

159. *Id.* at 316, 187 Cal. Rptr. at 6-7.
160. *Id.* at 316-17, 187 Cal. Rptr. at 7. The *Moskowitz* court was quoting language from *Britt v. Superior Court*, 20 Cal. 3d at 859, 574 P.2d at 775, 143 Cal. Rptr. at 704, which spoke in terms of associational privacy rather than privacy of financial affairs.

The Supreme Court in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984), reaffirmed the Washington Supreme Court’s statement emphasizing the importance of insuring that potential litigants have unimpeded access to the courts:

> [A]s the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it resulting in frustration of a right as valuable as that of speech itself.

104 S. Ct at 2209 n.22.

Some courts have accepted this waiver argument in other contexts. For example, in *Independent Prod. Corp. v. Loew’s Inc.*, 22 F.R.D. 266, 276 (S.D.N.Y. 1958) the court stated: 

> "[i]t would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress, and at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense." *Id.* However, a close look at that case shows that the court actually conducted a balancing test as is present in *Moskowitz* and balanced plaintiff’s first amendment rights (which were an issue in that case) against the defendant’s need for disclosure. Steinman, *Privacy of Association: A Burgeoning Privilege in Civil Discovery*, 17 HARV. C.R.-C.L. L. REV. 355, 384 (1982).
lar reasoning can be applied with respect to good faith settlements. A tortfeasor should not be unduly discouraged from settling with the plaintiff and using the established statutory procedure to obtain a court determination that his settlement is in good faith.\footnote{161}

c. The Needs of the Parties to be Balanced

As in other situations regarding discovery of financial condition, in the good faith settlement context there is a conflict between the goals of discovery and the privacy rights of the party from whom discovery is sought. As has been shown, the courts deal with this type of conflict by balancing the interests of the various parties and issuing appropriate protective orders.\footnote{162} This section describes the needs of the various parties in obtaining and preventing disclosure of a settling defendant’s financial information in the good faith settlement context.

i. The Need of the Nonsettling Joint Tortfeasors to Conduct Discovery into a Settlor’s Financial Condition: Preparation for the Hearing and the Ascertainment of Truth

When one tortfeasor attempts to settle in good faith with the plaintiff, he puts himself in an adversarial position with the other defendants.\footnote{163} This is because the lower the amount of a good faith settlement by one joint tortfeasor, the greater the detriment to the nonsettling tortfeasors because they must bear the remainder of the damages if the plaintiff ultimately recovers.\footnote{164} Therefore, when a settling joint tortfeasor attempts to have a below reasonable range settlement declared to be in good faith because of his financial condition, it follows that the adverse parties, that is, the nonsettling joint tortfeasors, will need to verify his alleged financial status to be sure that the proposed settlor is not neglecting to disclose some assets. In order to be able to do this and to prepare rebuttal evidence if appropriate, the nonsettling joint tortfeasors must be able to conduct discovery into the settling defendant’s financial condition.

Of course, one possible solution to the discovery problem would

\footnote{161. For further discussion of the danger of discouraging settlements, see infra text accompanying notes 178-185.}
\footnote{162. See supra text accompanying notes 106-130.}
\footnote{163. Dompeling v. Superior Court, 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 44-45. It is interesting that the Dompeling court made this statement as part of its opinion to limit the test for a good faith settlement to the tortious conduct test so that the financial condition of the settling defendant would not be discoverable.}
\footnote{164. See supra text accompanying notes 178-184.}
be simply to allow no discovery at all. The settling joint tortfeasor could serve a financial declaration under penalty of perjury on the nonsettling parties and could then present this evidence of his financial condition at the hearing. The nonsettling joint tortfeasors could then independently attempt to prove that the settling defendant had greater assets. However, this solution does not seem viable. First, it is not in accordance with the discovery rules, discussed above, which provide that discovery is permissible if the information sought is relevant to the subject matter of the action or is reasonably calculated to lead to the discovery of admissible evidence. Secondly, it is not in accordance with other cases which have established that when net worth is an issue, discovery is allowed. Thirdly, such a rule would be unfair to the nonsettling joint tortfeasors because it would require them, and the court as well, to take the settling defendant’s word for the extent of his financial assets. Such an approach would certainly be aberrational in that there appears to be no other issue for which one party is not permitted pretrial discovery to test the sufficiency of the adverse party’s contentions.

ii. The Needs of the Settling Joint Tortfeasor to Limit Disclosure of his Financial Condition

(a) The Burden of Responding

The forced disclosure of financial information can have adverse effects on a party. First, the task of responding to discovery seeking financial information involves a severe burden. The court in Richards v. Superior Court defined this burden as the time and expense necessary for the compilation of a complex mass of information. The court in Richards explained that discovery seeking financial in-

165. See supra text accompanying notes 75-90.
166. CAL. CIV. PROC. CODE § 2016 (West 1984).
168. See, e.g., De Mayo v. Superior Court, 189 Cal. App. 2d 392, 11 Cal. Rptr. 157 (1961) (the court did not force plaintiff to take defendant’s word as to the amount of his income, but rather permitted the plaintiff to ask questions in discovery directed to uncover whether defendant had other sources of income not previously disclosed). See supra text accompanying notes 87-88.
formation by reason of a claim for punitive damages puts an additional burden on the responding party because the information is unrelated to the substantive claim involved in the lawsuit and is relevant only to an amount of damages which may never be awarded.\textsuperscript{170}

Similarly, in the good faith settlement context, the financial information is not probative of an issue in the underlying action. Therefore, just as in \textit{Richards}, an additional burden is placed on the settling tortfeasor by having to respond to this discovery.

(b) \textit{Adverse Consequences Apart from the Litigation}

Another adverse consequence of allowing discovery of financial information involves the potential for abuse from disclosure of the information outside the parameters of the lawsuit. The court in \textit{Richards} put it this way: "The possibilities run all the way from greater exposure to the not so gentle solicitations of some charitable organizations to the possibility of damage to the discloser in the competitive business arena."\textsuperscript{171}

This consideration would also apply to the joint tortfeasor attempting to settle in good faith. He would not welcome any adverse consequences from that information being made public outside the parameters of the lawsuit.

(c) \textit{The Opportunity for the Opposing Parties to Obtain a Tactical Advantage in the Litigation or a Coercive Settlement}

A third consequence of forced disclosure of financial information concerns the potential effect upon settlement. This possible effect actually results from the first two consequences set forth above. While broad discovery rules were adopted in an effort to remove the game element from the litigation process and thereby encourage settlement based upon mutual knowledge of true facts,\textsuperscript{172} civil discovery has in far too many instances become its own means of substituting a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{170} \textit{Id.} The court, while identifying this burden, stated that because of the broad test for discoverable matter, the burden incident to the compilation of information that may never be of value to anyone, seems built into the process. \textit{Id.} at 272, 150 Cal. Rptr. at 81.
\item \textsuperscript{171} \textit{Id.} at 271, 105 Cal. Rptr. at 80; GT, Inc. v. Superior Court, 151 Cal. App. 3d at 754, 198 Cal. Rptr. at 895; Moskowitz v. Superior Court, 137 Cal. App. 3d at 317-18, 187 Cal. Rptr. at 7-8.
\item \textsuperscript{172} Greyhound Corp. v. Superior Court, 56 Cal. 2d at 376, 364 P.2d at 275, 15 Cal. Rptr. at 99; Richards v. Superior Court, 86 Cal. App. 3d at 270, 150 Cal. Rptr. at 80.
\end{enumerate}
\end{footnotesize}
battle of attrition for a search for truth.\textsuperscript{173} It has become a method by which the volume or nature of information sought and not the probability of success of the claim or defense pressures settlement.\textsuperscript{174}

This concern that discovery could be used to exert pressure to exact an unfair settlement has been expressed by the courts in the traditional cases in which a plaintiff was attempting to obtain financial information from the defendant. The party who can compel discovery from the other can obtain a tactical advantage in settlement negotiations because of the other party's reluctance to disclose his financial information.\textsuperscript{175} The threat of having to place a dollar value on one's assets and to disclose that value to strangers may well serve as a powerful weapon to coerce a settlement which is not warranted by the facts of the case.\textsuperscript{176} Discussing the discovery of financial information related to punitive damages, the court in \textit{Richards v. Superior Court} commented that discovery seeking financial information "is one classic instance of the manner in which civil discovery is used to achieve a litigation advantage never contemplated when [discovery] was introduced into pretrial procedure."\textsuperscript{177}

This concern is equally applicable to the disclosure of financial information for purposes of a good faith settlement hearing. The settling tortfeasor may feel compelled to make concessions to, or to even settle with, the nonsettling joint tortfeasors in order to protect his financial information.

In addition, he could be subject to increased pressure from the plaintiff. When a defendant makes a motion to have his settlement approved by the court, there is no guarantee that the court will find the proposed settlement to be in good faith. The possibility always exists that the court might find that the proposed settlement amount is too low even in light of the defendant's financial condition and not approve the settlement as being in good faith. In such a case, the

\textsuperscript{173} Richards v. Superior Court, 86 Cal. App. 3d at 270, 150 Cal. Rptr. at 80. As noted by the U.S. Supreme Court, it is clear from experience that pretrial discovery by deposition and interrogatories has a significant potential for abuse. Seattle Times Co. v. Rhinehart, 104 S. Ct. at 2208.


\textsuperscript{175} \textit{Id.} at 271, 150 Cal. Rptr. at 81.

\textsuperscript{176} \textit{Id.} at 271, 150 Cal. Rptr. at 80.
defendant would need to remain in the litigation or renegotiate the settlement amount with the plaintiff to pay an amount that would be found to be within the reasonable range. In either event, the defendant who had attempted to settle would be at a disadvantage because now the plaintiff as well as the nonsettling joint tortfeasors would have detailed information about his financial condition. Thus, the defendant would be more vulnerable in settlement negotiations than he was previously.

On the other hand, a forceful argument can be made that in the good faith settlement context, the court need not be too concerned with the possibility of the coercive use of the information. The settling defendant must weigh the risks in deciding on the settlement amount he attempts to have the court order is in good faith. If he settles for an amount which is the most that he is reasonably able to pay in light of his financial condition, the chances are very good that the settlement will be found to be in good faith. Even if the court denies the motion for some unforeseen reason, he will not be susceptible to coercion of more money because the financial discovery will show there is not much more money available. Thus, a settling defendant who is living up to the guidelines of Tech-Bilt, i.e., is paying as much towards his fair share of plaintiff's damages as is warranted by his financial condition, will not be vulnerable to pressure for a greater amount in settlement by disclosure of his financial condition.

However, if the settling defendant is attempting to pay less than the reasonable range of his fair share even taking into account his financial condition, then he may be susceptible to increased demands from the plaintiff if his settlement is disapproved. Accordingly, it can be argued that a defendant who suffers adverse consequences because he unsuccessfully attempts to settle for too low an amount has no one to blame but himself.

(d) The Discouragement of Settlements

The effect of discovery of financial information on the settlement of a case takes on an additional and unique twist in the good faith settlement context. One of the recognized goals behind the rule allowing a tortfeasor to be totally free from the litigation if he enters into a good faith settlement is to encourage settlements. Therefore,

178. Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d at 494, 698 P.2d at 162, 213 Cal. Rptr. at 260; Fisher v. Superior Court, 103 Cal. App. 3d at 443, 163 Cal. Rptr. at 53; River Garden Farms v. Superior Court, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503; Roberts, supra note 17, at 883-91.
another concern, peculiar to the good faith settlement context, is that settlements might be discouraged if a settling defendant is forced to disclose his financial information.

The possibility of discouraging settlements arises because a settling defendant's financial condition would not be discoverable by the plaintiff or the other defendants as far as the underlying cause of action is concerned. Therefore, if financial information is discoverable for a good faith settlement hearing, a defendant who attempts to settle with the plaintiff has opened himself up to an invasion of privacy that would not otherwise be allowed if he did not settle. Such a concern was the motivating factor behind the decision in *Dompeling v. Superior Court* in which the court adopted the tortious conduct test of good faith for the precise purpose of making financial information nondisclosable. The court feared that otherwise settlements would be discouraged. 

Another way that compelling disclosure of a settling defendant's financial condition might discourage settlement is the same concern expressed by the court in *Richards* and described above—once the other parties know the financial condition of a settling defendant, they could use it for coercive purposes. This possibility might discourage a defendant from attempting to enter into a good faith settlement in the first place.

Therefore, even under the good faith settlement rules after *Tech-Bilt*, care must be taken that settlements are not unduly discouraged. It is true that the California Supreme Court's decision in *Tech-Bilt* overturned once and for all the previously prevailing view that the policy of encouragement of settlements is paramount and that, therefore, all settlements regardless of how small should be found to be in good faith. The supreme court gave equal standing to the policy of equitable apportionment of loss by adopting the reasonable range test of good faith which finds to be in good faith, and thereby encourages, those settlements that fall within the reasonable range of the settling defendant's fair share of liability for plaintiff's

179. See supra text accompanying notes 82-84.
180. Dompeling v. Superior Court, 117 Cal. App. 3d at 809; 173 Cal. Rptr. at 44.
181. Id. at 809, 173 Cal. Rptr. at 44.
182. See supra text accompanying notes 172-77.
183. Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.
injuries.\textsuperscript{184}

However, the California Supreme Court in \textit{Tech-Bilt} also pronounced that settlements may be found to be in good faith if the financial condition and the insurance policy limits of the settling defendant so warrant.\textsuperscript{185} In other words, when the settling defendant is unable to pay more, a below reasonable range settlement is to be encouraged by finding that it, too, is in good faith. Therefore, a legitimate concern in considering the scope of discovery of the settling defendant’s financial information is that defendants should not be unduly deterred from attempting to enter into a settlement with the plaintiff by the fear of exposure of their financial condition.

C. \textit{Suggested Guidelines for Limiting Discovery in the Good Faith Settlement Context}

The preceding sections have shown that when the settling defendant attempts to have the court find that because of his financial status a settlement that is not otherwise within the reasonable range of his fair share of liability is in good faith, information regarding his net worth is relevant to the good faith determination, is likely to lead to the discovery of admissible evidence, and is, therefore, discoverable.\textsuperscript{186} Therefore, in this situation, a trial court should not prevent discovery into a settling defendant’s financial condition. The disclosure of the financial information is necessary so that the nonsettling tortfeasors can properly prepare their case to rebut the settling defendant’s claim of a good faith settlement, thereby furthering the public policy of ascertaining the truth.

However, the settling defendant’s right of privacy must also be considered.\textsuperscript{187} The possible adverse consequences of forcing complete disclosure of this information have been shown, and the right of privacy dictates that the compelled disclosure be narrowly drawn to assure maximum protection of the constitutional interests at stake.\textsuperscript{188}

As in other cases in which discovery of relevant information conflicts with a party’s right of privacy, in the good faith settlement context, the court should respond by exercising its discretion in tai-

\begin{itemize}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{See supra} text accompanying notes 153-56.
\item \textsuperscript{187} \textit{See supra} text accompanying notes 157-61.
\item \textsuperscript{188} \textit{See supra} text accompanying notes 169-85.
\item \textsuperscript{189} \textit{See Britt v. Superior Court, 20 Cal. 3d at 859, 574 P.2d at 775, 143 Cal. Rptr. at 704; In re Lifschutz, 2 Cal. 3d at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842; Moskowitz v. Superior Court, 137 Cal. App. 3d at 317, 187 Cal. Rptr. at 7.}
\end{itemize}
loring an appropriate protective order. In so doing, the court should balance the interests of discovery with the privacy interest of the settling defendant.

Therefore, discovery should be allowed but the financial information should be disclosed only to the extent necessary to further the truth ascertainment purpose of discovery. Only when the discovery is so limited is the invasion of the settlor's privacy within constitutionally permissible limits.

The following are suggested guidelines that a trial court can use to fashion protective orders and other discovery orders concerning discovery of a settling defendant's financial information in preparation for a good faith settlement hearing.

1. **No Discovery Until Financial Condition is in Issue**

The first point is obvious. Unless otherwise warranted by the facts of the underlying litigation, no discovery into any defendant's financial condition should be allowed until that defendant has filed a petition under Code of Civil Procedure section 887.6 to have a proposed or completed settlement with the plaintiff be determined to be in good faith.

The court should require the settling defendant to set forth in his petition for a good faith determination whether he contends that the settlement is within the reasonable range of his fair share of liability for plaintiff's injuries without taking into account his financial condition, or whether he contends his (lower) settlement amount is appropriate because of his personal financial condition. In the former case, no pretrial discovery into the settling defendant's financial condition should be allowed whatsoever because his net worth is irrelevant to the subject matter of the good faith determination and is, therefore, not discoverable. It is only when a settling defendant asserts as a sole or alternative ground in his petition that his settlement amount should be found to be in good faith given his financial condition that his net worth becomes relevant and, therefore, discoverable. In this way, the settling defendant is completely protected from discovery of his financial condition until he himself puts it in issue.

Of course, if a defendant fails to allege in his petition for ap-

---


191. See supra text accompanying notes 80-81.

192. See supra text accompanying notes 106-11.

193. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1985).
proval of his settlement that the settlement amount is appropriate because of his financial condition and, therefore, no discovery into his finances is conducted by the nonsettling joint tortfeasors, then he should not be permitted to argue his financial condition at the good faith hearing. In that event, the court would have the discretion either to deny the motion to approve the settlement as being in good faith or to grant a continuance to permit the nonsettling joint tortfeasors to conduct discovery into the financial condition of the settling defendant.  

The following guidelines presume that a settling defendant has filed a petition to have a settlement approved as being in good faith and has asserted in his papers that the settlement amount is reasonable because of his financial condition, among other factors.

2. **Timing of Discovery**

As soon as a motion described in the preceding paragraph is filed, the nonsettling joint tortfeasors should be able to commence discovery into the financial condition of the settling defendant. In all likelihood, this will necessitate a setting of the actual hearing on the good faith settlement for a time far in excess of the twenty day notice requirement provided by Code of Civil Procedure section 877.6.  

In *Cobb v. Superior Court*, in which the financial disclosure was occasioned by a claim for punitive damages, the court suggested that it would seldom be necessary for a court to permit discovery of financial affairs before discovery on the merits of the underlying action. This does not make sense when the financial information sought goes to the issue of a good faith settlement. Because a good faith settlement hearing is a pretrial procedure and because, presumably, one of the reasons the settling defendant wishes to settle is to extricate himself from the litigation at as early a point as possible, by necessity, the discovery of financial information in the good faith context must occur prior to or concurrently with the discovery on the underlying action. Even so, as a practical matter, the parties will not be able to apprise the court of the information relevant to the other factors of a good faith settlement such as the probable percentage of the negligence of the various joint tortfeasors and the probable

---


amount of plaintiff's damages until a great deal of discovery has been conducted on the underlying action. Nevertheless, the trial court should allow discovery of financial affairs for purposes of the good faith settlement hearing to be undertaken without restriction as to its timing in relation to other discovery.

3. Use of the Information for Other Purposes

Another issue a trial court will need to face in a discovery dispute is whether to restrict the use of the information disclosed. As mentioned above, cases dealing with discovery of financial condition in other contexts have held that it is appropriate to grant a protective order to limit the use of the information gained in the discovery process. One common provision of such a protective order is that the information can be used only for purposes of the instant lawsuit. Such reasoning appears equally compelling with respect to discovery in the good faith settlement context. Furthermore, in this context probably an even more restrictive protective order should be provided. Not only should the information obtained be limited to the instant lawsuit, but it should be limited to use for purposes of the good faith settlement hearing only and not utilized for any other purpose in the underlying lawsuit.

4. Access to the Information

a. Limiting Access to Attorneys and Experts Only and Not to Parties

The next issue to be considered along these same lines is who should have access to the financial information obtained. The courts in Richards, Cobb, Martin and Moskowitz held that the party from whom the financial disclosure was obtained was presumptively entitled to a protective order limiting disclosure to the adverse party's attorneys and experts and prohibiting disclosure to the party himself. This is also a common type of protective order in federal practice. ICC v. Mercantile Nat'l Bd. of Chicago, 84 F.R.D. 345 (D.C. Ill. 1979).

198. See supra text accompanying notes 54-62.
199. See supra text accompanying notes 120-28.
ment, it also seems appropriate that the balancing of the need for
discovery with the settling defendant’s right of privacy compels a
protective order limiting disclosure of the information to the attor-
neys and experts for the nonsettling joint tortfeasors.\(^2\)

b. **Burden of Proof on Order Limiting Access**

A preliminary issue that will arise concerns the burden of proof
on such a protective order. While the previously mentioned cases
held that the party was presumptively entitled to this type of order,
the court in *GT, Inc. v. Superior Court* contradicted Moskowitz and
held that where the information sought is relevant to the issues in-
volved at the heart of the underlying litigation, a protective order
limiting access could be given, but the burden would be on the party
from whom the disclosure was sought to establish good cause for
such a protective order.\(^2\)

Whether such a protective order should be presumed so that the
discovering party has the burden of showing it should not be
granted, or whether it should be granted only on a showing of good
cause so that the disclosing party has the burden of showing the pro-
tective order necessary, is open to debate. The financial information
of a settling defendant for the purposes of a good faith settlement
hearing does not fit squarely within the mold of either *Richards*, in
which the financial information went only to a claim for punitive
damages, or *GT*, in which the financial information went “to the
heart of the cause of action itself.”\(^2\)

In the vast majority of cases
where good faith settlements are sought, the underlying causes of
action will be for personal injury or property damage in which case
the financial information of the defendant would not be discoverable
as far as the lawsuit itself is concerned. It is only when a defendant
wishes to enter into a below reasonable range settlement and at-
ttempts to support that low settlement figure with his financial condi-
tion, that the financial condition of the settling defendant becomes
relevant. Therefore, in one respect, the good faith determination
seems to involve a collateral issue.

On the other hand, if the settlement is found to be in good faith,
that finding will terminate the settling defendant’s participation in

---

\(^{2}\) See supra text accompanying notes 135-28.

\(^{2}\) See infra text accompanying note 209.

\(^{3}\) 151 Cal. App. 3d at 754, 198 Cal. Rptr. at 896. For a complete discussion of burden
of proof in other cases, see supra text accompanying notes 131-42.

\(^{4}\) Id. at 754, 198 Cal. Rptr. at 896.
the litigation. Thus, the financial condition of the settling defendant is an issue that goes "to the heart of" the issue of good faith at the good faith settlement hearing. Because a finding of good faith will terminate the settling defendant's participation in the entire litigation including his liability to any other joint tortfeasors, it does not seem that the issue of good faith is the same sort of peripheral issue as is a claim for punitive damages.

It seems, therefore, that the issue of a good faith settlement is somewhere in between the punitive damages situation in which the financial information is related to a peripheral issue and the type of case exemplified by GT in which the financial information goes to the heart of the lawsuit. This distinction may not be crucial because the court in Moskowitz issued a protective order even when the financial information was relevant to an issue in the underlying lawsuit. That case seems to be a better reasoned opinion than GT because limitations on discovery of a constitutional nature such as the right of privacy should take precedence over a showing of good cause for a protective order mandated by California Code of Civil Procedure section 2019.

In any event, technical interpretations of the burden of proof should not be determinative. The important point for a court to consider in deciding the overriding issue of who should have access to the financial information is whether the adverse parties themselves need access to the information. Richards and its progeny declared that seldom would the party, as opposed to his attorneys and experts, need the information to prepare the case. The GT court felt that when the financial condition of a party was interwoven into the merits of the lawsuit, the adverse party would need to know the information to help prepare his case. In the good faith settlement context, there seems to be no reason why the adverse parties, i.e., the nonsettling joint tortfeasors, need access to the settling defendant's financial information. They can help prepare the case as to the merits of the underlying action without the need for the settlor's financial information, which is irrelevant to that action. Their attorneys can present any arguments that are necessary on whether the settlement amount is appropriate in terms of the settlor's financial condition and it does not appear that any detriment will flow to the nonsettlers by not having access to this information.

207. Richards v. Superior Court, 86 Cal. App. 3d at 272, 150 Cal. Rptr. at 81.
208. GT, Inc. v. Superior Court, 151 Cal. App. 3d at 754, 198 Cal. Rptr. at 895-96.
Accordingly, in most cases it would seem appropriate for the trial court presumptively to limit the disclosure of the settling defendant’s financial information to the attorneys and experts (if necessary) for the adverse parties and not to allow access to the parties themselves.

c. Limiting Access To the Attorneys and Experts for the Nonsettling Joint Tortfeasors

A related issue is which attorneys and experts should have access to the financial information. With respect to a good faith settlement, the only attorneys and experts who need access to the settling defendant’s financial information in order to test his allegations as to his financial condition are those for the nonsettling joint tortfeasors. This is because only the nonsettling joint tortfeasor will oppose the finding of good faith. The plaintiff and the settling defendant are on the same side in the good faith hearing because both wish the settlement to be approved as being in good faith. There would be no good faith settlement if the plaintiff had not been willing to accept the settlement amount in the first place. Therefore, it is unnecessary for either the plaintiff or the plaintiff’s attorneys to have access to the settling defendant’s financial information. Furthermore, as demonstrated earlier, if the settlement is not approved by the court as being in good faith, the defendant may then be at a significant strategic disadvantage if either the plaintiff or plaintiff’s attorneys know his financial situation. Thus, the settling joint tortfeasor should be able to obtain a protective order limiting the disclosure of his financial information solely to the attorneys and experts for the nonsettling joint tortfeasors.

5. Mechanisms for Limiting Access

In order to limit access of the information to only those attorneys and experts to whom access was granted, the court would need to make one or more of the following specific types of protective orders.

a. Order of Nondisclosure

The court should order those persons who are entitled to know the financial condition of the settling defendant (presumably only the attorneys and experts for the nonsettling joint tortfeasors) not to dis-
close the financial information to anyone else, including their clients.\textsuperscript{210} Such an order can take any number of forms, including simply "that counsel [and experts] are herewith ordered and directed to maintain the confidentiality of any such information,"\textsuperscript{211} to an order that counsel and experts are "enjoined" from disclosing the information to anyone else,\textsuperscript{212} to a more elaborate order seeking to reduce the risk of loss of confidentiality by limiting the number of copies made of the information by those who are entitled to access.\textsuperscript{213}

Additionally, the court should also order that the information obtained be used for purposes of the instant lawsuit only, as set forth previously.\textsuperscript{214}

b. Sealing the Discovery Documents

In addition, the court could order that all discovery documents containing the settling defendant's financial information be sealed. "Sealing" means that the discovery documents are filed with the court in a sealed envelope to be opened only by further order of the court. The court may seal any type of discovery document including deposition transcripts\textsuperscript{215} and interrogatory answers.\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{210} For a discussion of first amendment considerations in such an order, see supra note 128.
\item \textsuperscript{211} Metal Foil Manufacturing Co. v. Reynolds Metals Co., 16 Fed. R. Serv. 2d 292, 294 (E.D. Va. 1970).
\item \textsuperscript{212} 2 J.N. DeMEO & J.F. DeMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE \S 5.11(46) (1985).
\item \textsuperscript{213} In Liberty Folder v. Curtis Anthony Corp., 90 F.R.D. 80 (S.D. Ohio 1981), the court limited the number of copies of the discovered information that could be circulated among counsel.
\item \textsuperscript{214} See supra text accompanying notes 199-200.
\item \textsuperscript{215} Both CAL. CIV. PROC. CODE \S 2019(b)(1) (West 1983) and FED. R. CIV. P. 26(c)(6) provide that the court may order "that after being sealed the deposition shall be opened only by order of the court."
\item \textsuperscript{216} In Moskowitz v. Superior Court, 137 Cal. App. 3d at 315, 318, 187 Cal. Rptr. at 8, the petitioner requested a protective order, which, among other things, provided for the sealing of the deposition, and the appellate court stated that the burden was on the other side to establish a reason for the denial of the order sought by petitioner. \textit{See also} 2 J.N. DeMEO & J.F. DeMEO, supra note 212, at 5.11(10) (discussing the state court's power to seal discovery).

For orders sealing discovery in federal practice, see International Products Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963) in which a deposition was sealed; American Sec. Co. v. Shutterproof Gears Corp., 20 F.R.D. 196 (D. Del. 1957), recognizing the power of the court to seal a deposition until further order. Similarly in Marshwood Co. v. Jamie Mills, Inc., 10 F.R.D. 386 (D.C. Ohio 1950), \textit{aff'd on rehearing}, 10 F.R.D. 590 (D.C. Ohio 1950), the court ordered the deposition sealed and not opened without court order because of possible disclosure of financial information. The \textit{Marshwood} case is cited as authority for such a protective order in California state courts in CALIFORNIA CIVIL DISCOVERY PRACTICE 63 (CEB 1975). \textit{See also} International Prod. Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963); United States v. International Business Machines Corp., 67 F.R.D. 40 (S.D.N.Y. 1975); Federal Deposit Ins. Corp.
An order sealing discovery seems especially appropriate in the good faith settlement context. Such an order is often issued for the purpose of preventing harm to a party which might result from publicizing the contents of a document when that document contains confidential personal information.\textsuperscript{217} Sealing the discovery documents is one of the options the appellate court in \textit{Cobb} specifically directed a trial court to consider in determining an appropriate protective order for financial information.\textsuperscript{218} Sealing was also suggested by the California Supreme Court in the context of protecting the financial information of third parties.\textsuperscript{219} Accordingly, it seems that an order sealing discovery documents such as deposition transcripts and answers to interrogatories that contain information about the settling defendant’s financial condition should be considered when discovery of a settling joint tortfeasor’s financial condition is undertaken. Of course, any such sealing must take place after, or allow for, the examination of the documents by the attorneys and experts for the non-settling joint tortfeasors.

If the court does not wish to undertake the supervision of the documents necessitated by sealing, the court could simply order that the documents be kept confidential and not be open to inspection.\textsuperscript{220}

c. \textit{Separate Discovery of Financial Information and Exclusion of Persons From the Discovery Proceedings}

The discovery of the settling defendant’s financial information relevant to the good faith hearing should be conducted separately from discovery into the merits of plaintiff’s claims and defendant’s
defenses on the underlying causes of action. While all parties and attorneys must be able to take part in and have access to discovery on the other issues in the lawsuit, only certain persons (i.e., those who are to have access to the information) should take part in the discovery of the defendant's financial affairs.

This is easy to accomplish in the case of discovery by interrogatories. The court could order that the interrogatory answers dealing with the settling defendant's financial condition be served on the counsel for the nonsettling joint tortfeasors only and that those counsel may not reveal the information to their clients or to anyone else. Additionally, the court could order the answers sealed.

The issue becomes more difficult with respect to oral depositions. It seems logical that if a deposition is taken, the court should limit the attendance at the deposition to only those persons who are to have access to the information. Both state and federal courts have the power to exclude from a deposition everyone except the counsel and parties. The interesting issue is whether the parties themselves, that is, the nonsettling joint tortfeasors, may also be excluded.

In federal practice the court could order that the deposition of the settling defendant be taken on the subject of his financial condition with no one present except his attorney and the attorneys for the nonsettling joint tortfeasors. Federal Rule of Civil Procedure 26(c)(5) is phrased to allow the court to order "that discovery be conducted with no one present except persons designated by the court." Thus, the court may even exclude a party from a deposition. This procedure has been used to protect confidential information, and therefore could logically be applied in the good faith settlement context.

221. See supra text accompanying notes 210-14.
222. See supra text accompanying notes 215-19.
223. CAL. CIV. PROC. CODE § 2019(b)(1) (West 1983); FED. R. CIV. P. 26(c)(5).
224. FED. R. CIV. P. 26(c)(5).
226. Metal Foil Prod. Mfg. Co. v. Reynolds Metal Co., 55 F.R.D. 491, 16 Fed. R. Serv. 2d 292, 294 (E.D. Va. 1970). In that case, an antitrust action, the court ordered that only plaintiff's counsel may be present during the depositions of the defendant's officers when the subject of the inquiry was allegedly confidential or privileged. Id. See also 4 J. MOORE, FEDERAL PRACTICE § 26.73 (2d ed. 1975).
227. An order excluding a party from a deposition has also been used in other contexts, such as to prevent harassment or ridicule of a deponent. Galella v. Onassis, 487 F.2d at 997. That case involved an action by a photographer who was allegedly harassing Jacqueline Onassis and her children, against Mrs. Onassis and three secret service agents for false arrest, malicious prosecution, and interference with trade. The court of appeal held that the trial
The answer is not so clear in California and a good argument can be made that under California law a party may not be excluded from a deposition. No California case has dealt with whether a party may be excluded. The argument that parties cannot be excluded because of this provision stems from the interpretation of the analogous Federal Rule of Civil Procedure. Former Rule 30(b) was identical to California Code of Civil Procedure section 2019(b)(1) cited above. In 1970, the Federal Rule was changed to allow discovery with "no one present except persons designated by the court." After this revision occurred, the federal courts held that they were entitled, because of the revision, to exclude even a party. Because the California provision has not followed the federal lead and still contains the reference to "parties," it can be argued that a party may not be excluded under any circumstances.

On the other hand, the counter argument can be made that an order excluding a party from a deposition could be made under certain circumstances. While Code of Civil Procedure section 2019(b)(1) enumerates certain types of protective orders, that list is

court clearly had the power to exclude the plaintiff photographer from Mrs. Onassis' deposition. While upholding the trial court's exclusion order, the appellate court noted that "such an exclusion should be ordered rarely indeed." In that case the order was justified because the court could reasonably have anticipated misconduct during the deposition because the plaintiff had already violated the court's temporary restraining order; this conduct could be deemed to reflect an intent to further harass Mrs. Onassis or disregard for the judicial process. In addition, this type of protective order has been utilized by the federal courts to assure that successive deponents give independent testimony. Beacon v. R.M. Jones Apartment Rentals, 79 F.R.D. at 142 (separation of depositions of defendants in a Title VIII housing discrimination action); Milsen Co. v. Southland Co., 16 Fed. R. Serv. 2d 110 (N.D. Ill. 1972) (in order that defendant could obtain the independent recollection of each plaintiff, the court excluded each plaintiff from the depositions of co-plaintiffs preceding that plaintiff's deposition); Queen City Brewing Co. v. Duncan, 42 F.R.D. 32 (D. Md. 1966); Dunlap v. Reading Co., 30 F.R.D. 129, 5 (E.D. Pa. 1962) (sequestration permitted in pretrial depositions in FELA action).

228. When discussing this rule, the commentators mention the ability to exclude persons other than parties and do not address the issue of whether parties can be excluded under some circumstances. See, e.g., 6 H.M. Grossman & A. Van Alstyne, CALIFORNIA PRACTICE § 194 (West 1972); 2 J.N. DeMio & J.F. DeMio, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE ¶ 5.11(9) (1985).
230. See supra text accompanying note 229.
231. FED. R. CIV. P. 26(c).
by no means exclusive. The section also gives the court the power to "make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." Because the California courts have consistently held that with respect to discovery of financial information a party is entitled to a protective order limiting disclosure of that information to the adverse counsel only and not to the adverse party, it seems logical that the court would have the power to exclude the adverse party from the deposition insofar as the topic of discovery is the defendant's financial information. The holdings prohibiting the disclosure of the information to the adverse parties by their attorneys makes sense only if the parties could be excluded from the deposition itself.

If a California court does not have the power to exclude a party (i.e., the nonsettling tortfeasor) from a deposition inquiring into the financial condition of a settling tortfeasor, the only alternative appears to be for the court to order that the discovery into financial information be done via interrogatories rather than deposition. Of course, written interrogatories are not an effective substitute for an oral deposition during which counsel may employ the techniques of cross-examination on an adverse party.

Because an absolute ban on the taking of a deposition should

233. The possible range of protective orders is quite broad. Section 2019(b)(1) lists a number of examples, but then goes on to allow the court to make any other order which justice requires. 6 H.M. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PRACTICE §188 (West 1972).


235. See supra text accompanying notes 115-28.

236. In fact, Cobb and Moskowitz, in which the courts held a party was presumptively entitled to a protective order limiting access to his financial information to the adverse attorney only, involved discovery in the form of depositions. These courts did not deal with the issue of whether the adverse parties could be excluded from the deposition because presumably the adverse parties had not attempted to attend the depositions in question. Cobb involved both deposition and interrogatories and Moskowitz involved a deposition only. This issue was not faced in Richards and Martin because those cases dealt with discovery by interrogatories, not depositions.

237. This is allowed under CAL. CIV. PROC. CODE § 2019(b)(1) because the court may order that the deposition shall not be taken. (The court may also order that the deposition be taken by written interrogatories, but this is a different procedure). In Richards and Martin, also cases preventing an attorney from disclosing the other party's financial information to his client, interrogatories and not depositions were involved.

238. 6 H.M. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PRACTICE § 192 (West 1972). "[I]t has long been recognized that there are far greater advantages in obtaining the facts and circumstances involved in a confronting examination than in a written one." Goldberg v. Raleigh Manufacturers, Inc., 28 F. Supp. 975, 976 (D. Mass 1939) (upholding a party's right to take a deposition even though the same information might be available by interrogatories.)
only be granted in extreme cases,239 and Richards and its progeny dictate that the opposing party not have access to the adversary’s financial data,240 there seems to be but one logical approach to that dilemma in California. The court should use its power to make “any other order which justice requires to prevent a party from annoyance, embarrassment, or oppression” to exclude everyone from a deposition pertaining to a settling defendant’s financial condition except the attorneys for the nonsettling joint tortfeasors.

By coupling an order limiting attendance at a deposition (or limiting access to interrogatory answers) with an order sealing the discovery documents241 and an order prohibiting disclosure to other persons,242 the court can provide maximum protection for a settling defendant’s financial information.243

6. A Protective Order Must be Requested by the Settlor

Any protective order would be given for the purpose of protecting the settling defendant’s right of privacy of his financial information. Therefore, a protective order should be given only on the application of the settling defendant. If, for some reason, that party did not care whether his financial information was disclosed to the nonsettling joint tortfeasors themselves, to plaintiff’s attorneys, to plaintiff, or to the world at large, then he would not seek a protective order. If a protective order was sought, the trial court would tailor it to meet the specific needs and requests of the settling defendant. For example, if the settling defendant has already disclosed his financial information to plaintiff and plaintiff’s attorneys as part of settlement negotiations, then he would not need a protective order preventing the disclosure of this information to those parties. He may nevertheless desire a protective order sealing the information and preventing its disclosure for purposes outside the litigation.

7. Summary

In short, the interests of the various parties involved in a proceeding to determine the good faith of a proposed settlement must be


240. See supra text accompanying notes 115-28.


242. See supra text accompanying notes 210-14.

243. Cx. 2 J.N. DeMEO & J.F. DeMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE ¶ 5.11(10); 4 J. MOORE, FEDERAL PRACTICE ¶ 26.74.
balanced in order to give the nonsettling tortfeasors access to the information they need to present their case and to protect the privacy of the settling defendant. As with other instances in which financial information is sought to be disclosed, the court can obtain that balance by fashioning an appropriate protective order.

Of course, the settling defendant can always prevent discovery into his financial condition by settling for an amount within the range of his fair share of liability for plaintiff’s injuries without reference to his financial status.

IV. Discovery of the Insurance Policy Limits of the Settling Defendant

Another factor identified by the court in *Tech-Bilt* as relevant to the determination of good faith is the insurance policy limits of the settling defendant.244 The amount of a settlor’s insurance is in actuality simply one element of that party’s financial condition. However, unlike other information regarding the settling defendant’s financial condition in the context of a good faith settlement, discovery of his insurance policy limits does not pose any unique problems. The existence and amount of a defendant’s liability insurance have never been held to be protected by the right of privacy and are discoverable.245

The cases allowing discovery of a defendant’s insurance policy limits have involved discovery by the plaintiff. No case has ever squarely dealt with the issue of discoverability of a defendant’s liability insurance by a co-defendant as opposed to the plaintiff. Under the Federal Rules of Civil Procedure such discovery would be allowed because Rule 26(b)(2) allows *any party* to discover the exis-

---

244. *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.


It being the established public policy in California that provisions of a liability insurance policy are not a matter for the sole knowledge of the [named insured] and the insurance carrier to the exclusion of the injured person, it may well follow that the revelation of the liability limits of such insurance policy will tend to promote the efficacious disposition of negligence litigation by settlement or trial.


Significantly, this rationale has specifically not been applied to permit pretrial discovery with respect to the financial condition of the defendant even though knowledge of the extent and nature of a defendant’s other asset might also tend to promote settlement. *Doak v. Superior Court*, 257 Cal. App. 2d at 830, 65 Cal. Rptr. at 196.
tence and content of an insurance agreement.\textsuperscript{246}

No similar rule exists in California. The California cases allowing discovery have dealt only with the plaintiff’s right to obtain information. Those cases have predicated plaintiff’s right to discovery on the ground that the California Insurance Code\textsuperscript{247} creates a contractual interest between an insurer and someone injured by the insured.\textsuperscript{248} Therefore, the same reasoning would not seem to apply to discovery by a co-defendant.

However, the California courts allowing discovery have also used more general language saying that the existence and amount of an insurance policy is relevant to the subject matter of the action,\textsuperscript{249} and under this broad rationale, the policy limits should be discoverable by any party involved in the action. Furthermore, co-defendants do routinely learn of the amount of another defendant’s insurance. Answers to plaintiff’s interrogatories, in which a defendant would disclose that information, are normally served on all parties to the litigation.\textsuperscript{250} No reported case has ever granted a protective order limiting disclosure of insurance information to the plaintiff only, al-

\textsuperscript{246} \textit{Fed. R. Civ. P. 26(b)(2)} provides:

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

\textit{Id.}


The discoverability of insurance policy limits is based on the fact that under \textit{Cal. Ins. Code} § 11580, a contractual relationship is created between the insurer under a liability policy and a third person who may be negligently injured by the insured. Therefore, the provisions of such a policy are not a matter for the sole knowledge of the named insured to the exclusion of the injured person. The very pendency of an action by the injured person brought in good faith against the named insured gives the former a discoverable interest in the policy. Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 754, 235 P.2d 833, 835-36 (1951); \textit{see also} Doak v. Superior Court, 257 Cal. App. 2d at 829, 65 Cal. Rptr. at 195.

\textsuperscript{249} Pettie v. Superior Court, 178 Cal. App. at 685-87, 3 Cal. Rptr. at 270-71; Laddon v. Superior Court, 167 Cal. App. 2d at 396, 334 P.2d at 640.

\textsuperscript{250} \textit{Cal. Civ. Proc. Code} § 2030 (West 1983) provides in part:

Copies of all interrogatories and of all answers thereto shall be served upon all other parties to the action who have appeared; but the court . . . may waive this requirement if the court determines that enforcement thereof would be unduly expensive, oppressive, or burdensome.

\textit{Id.}
though the court has the power to do so.\textsuperscript{251}

No reason exists why the practice of allowing a co-defendant access to another defendant's insurance information should be any different in the good faith settlement context. Accordingly, unlike situations involving other financial information, no barrier prevents the other parties to the litigation from learning the extent of a settling defendant's liability insurance if the defendant claims that his financial resources are relevant to the good faith of his settlement.

V. PROTECTION OF THE CONFIDENTIALITY OF THE SETTLOR'S FINANCIAL INFORMATION AT THE GOOD FAITH SETTLEMENT HEARING ITSELF AND IN DOCUMENTS FILED WITH THE COURT

The protective orders suggested in Part III are designed to safeguard the privacy of the settling defendant's financial affairs. Although no court has addressed this problem, it seems certain that if protective orders limiting access to or disclosure of a defendant's financial information are required by the right of privacy in the discovery context, then this same protection must be afforded in other phases of the good faith determination. This section of the article suggests mechanisms that should be established to limit access to a settling defendant's financial information: 1) contained in the moving and responding papers filed in preparation for the good faith settlement hearing; and 2) disclosed at the good faith settlement hearing itself.

These mechanisms are necessary because many of the benefits of a discovery protective order will be lost if the information is disclosed in open court at the good faith settlement hearing with all attorneys and parties present, or in documents served and filed pursuant to that hearing. It makes no sense for a court to order that under \textit{Richards}, only the nonsettling joint tortfeasor's attorneys and experts are entitled to know the financial worth of the settling defendant,\textsuperscript{252} only to have the nonsettling joint tortfeasors themselves, plaintiffs, plaintiff's attorneys, and anyone else who is curious listen to the disclosure of this information at the good faith settlement hearing or read about it in court files.

The dangers of neglecting to ensure confidentiality are two-fold. Even if the proposed settlement is found to be in good faith, the settling defendant has still lost the confidentiality the protective order

\textsuperscript{251} \textit{Id.}

\textsuperscript{252} \textit{Richards v. Superior Court, 86 Cal. App. 3d at 272, 150 Cal. Rptr. at 81. See supra text accompanying notes 115-28.}
was meant to ensure because all those present at the good faith hearing would learn of his financial condition if this information is presented orally. The same result would occur if the relevant documents were open to perusal. Even worse, if the proposed settlement is not found to be in good faith, not only is the confidentiality lost, but thereafter that defendant would be subject to the dangers associated with having his adversaries know his financial worth.283

This problem is not present to the same degree in other situations in which financial information is involved, such as claims for punitive damages. By the time plaintiff hears about the defendant's financial information at the trial, the trial is usually almost over. The defendant is not faced with having the plaintiff himself know the information during the pretrial and settlement stages, and a protective order prohibiting the use of and access to the information after the trial seems adequate. For example, in Cobb v. Superior Court, in which discovery of financial information relevant to punitive damages was involved, the court attempted to give maximum protection to the defendant's right of privacy by suggesting that the discovery of the defendant's financial information be delayed to a certain number of days before trial, sufficiently in advance to give an opportunity to the plaintiff to challenge the information if necessary, but sufficiently close to the trial to afford the additional protection to the defendant of limiting the time period during which his adversaries knew this information.284 The rationale for this decision was that it would significantly limit the time during which plaintiff or his attorney would have access to and the use of the information for some sort of advantage unrelated to the actual merits of the litigation.

The good faith settlement hearing, however, presents a unique situation. This approach of limiting the time period during which the adversary parties or their attorneys have knowledge of the settling defendant's financial information is not possible because of the timing of the good faith settlement hearing. Because it is a pretrial proceeding which often takes place well before the actual trial on the underlying litigation, disclosure of the settling defendant's financial information at the hearing would enable his adversaries to have this information for what could be a long period of time until the actual trial.

The reasonable solution to this problem is for the trial court to

253. See supra text accompanying notes 172-77.
use its discretion to structure the good faith settlement hearing in such a way as to provide maximum privacy for the settling defendant's financial affairs while at the same time providing a full and fair hearing. If the settling defendant has requested and the court has granted a discovery protective order limiting the disclosure of the defendant's financial information to certain persons only, then the court can retain this limited access by appropriate orders regarding the good faith hearing itself and the documents filed for the hearing.

The court clearly possesses the power to institute the necessary safeguards. A court has the power to control all proceedings before it. This power exists both as an inherent power of the court and by statute, and can be exercised in order to insure the orderly administration of justice.

Additionally, because the good faith settlement hearing is a pre-trial hearing similar to those conducted in other law and motion matters, the necessary procedures will not be difficult to institute. In a good faith settlement hearing there is no right to a jury trial or in fact to any "trial" at all. Code of Civil Procedure section 877.6(b) specifically authorizes the court to conduct the hearing on

256. While certain of the court's inherent and implied powers have "received legislative definition," the statutes neither created nor circumscribed the powers thus defined. Rosato v. Superior Court, 51 Cal. App. 3d at 206, 124 Cal. Rptr. at 437-38.
257. Id., CAL. CIV. PROC. CODE §§ 128, 187 (West 1982). Section 187 provides:
   When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.
CAL. CIV. PROC. CODE § 187 (West 1980).

Section 128 represents a statutory confirmation of the court's power "[t]o provide for the orderly conduct of proceedings before it" and "[t]o control in furtherance of justice, the conduct . . . of all . . . persons in any manner connected with a judicial proceeding before it, in every manner pertaining thereto." CAL. CIV. PROC. CODE § 128 (West 1982), quoted in Rosato v. Superior Court, 51 Cal. App. 3d at 206-07, 124 Cal. Rptr. at 439.
259. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1985). A good faith settlement hearing is considered a "law and motion" matter under the California Rules of Court. CAL. R. CT. 303(a)(1) defines "law and motion" as any proceeding "on application before trial for an order." The Civil Law and Motion Rules of the California Rules of Court are therefore applicable to a good faith settlement hearing conducted in California state court. Cf. CAL. R. CT. 301.
the basis of affidavits and counteraffidavits. The court may receive other evidence at the hearing in its discretion, but the court need not take any evidence at all.

Nor is the court required to hear oral argument at the hearing. The court could require that all arguments on the issue of the financial condition of the settling defendant that pertain to the good faith of the proposed settlement be submitted in writing. If the court preferred oral argument, argument could take place in chambers or at a closed hearing at which only the adverse attorneys, i.e., those for the settling and nonsettling joint tortfeasors, were pre-

262. Id.
263. Id.; see also Cal. R. Ct. 323 which provides: "Evidence received at a law and motion hearing shall be by declaration and affidavit . . . without testimony or cross-examination, except as allowed in the court's discretion for cause shown or as permitted by local rule."

264. A court may dispense with or limit oral argument in its discretion at a pretrial law and motion matter. In re Marriage of Lemen, 113 Cal. App. 3d 769, 784, 170 Cal. Rptr. 642, 649 (1980); Muller v. Muller, 141 Cal. App. 2d 722, 731, 297 P.2d 789, 794 (1956); R. Weil & J. Brown, California Practice Guide, California Procedure Before Trial ¶ 9.138 (Rutter 1985); see also Gillette v. Gillette, 180 Cal. App. 2d 777, 781, 4 Cal. Rptr. 700, 703 (1960) (court went even further and held there was no right to oral argument in a civil proceeding tried before the court without a jury).

One court has suggested that due process may require adequate oral argument in "those complex law and motion cases in which the decision has an immediate and dramatic impact on the parties." Cal-American Income Property Fund VII v. Brown Development Corp., 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703, 705 n.3 (1982). That case involved the appointment of a receiver or the confirmation or a receiver's sale of property which was the subject of the litigation, but the court did not decide if the trial court's order limiting argument impaired due process rights. The court stated:

Our admonition to the trial court to expend time allowed for oral argument in those complex law and motion cases where the decision has an immediate and dramatic impact upon the parties is no more than a reminder to ourselves that the quality and appearance of justice is always improved when the judge listens before he decides.

Id.

It is unclear whether the determination of the good faith of a settlement would constitute a "complex matter" having an "immediate and dramatic impact on the parties" although a good argument can be made that it is. However, any due process requirement could certainly be met by the proposal in the text which allows oral argument with the adverse attorneys present.

265. The filing of these papers should be under the same conditions set forth in the text following infra note 267.

Most arguments for a law and motion hearing are submitted in writing in the form of a Memorandum of Points and Authorities which contains "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." Cal. R. Ct. 313(b). Such a document is required for the moving party by the California Rules of Court. If one is not submitted, the court may construe the absence as an admission that the motion is not meritorious and the court may thereby find cause for its denial. Cal. R. Ct. 313(a). In practice, responding parties also routinely file their arguments in writing in a Memorandum of Points and Authorities.
If the court in its discretion desired to hear evidence as to the settling defendant's financial condition, this too could take place with 266. In the case of an actual trial, while the court has the power to exclude from the courtroom any witness not currently testifying, the court cannot exclude a party. Cal. Evid. Code § 777(a), (b) (West 1966). However, a good faith settlement hearing is a law and motion matter and not a trial. See supra notes 254-58 and accompanying text. Courts often conduct pretrial procedures in chambers or in camera with no one or no one but designated attorneys present, such as the inspection of allegedly privileged documents by the judge, as part of a discovery hearing. For example, the California Supreme Court suggested the holding of an in camera hearing as a useful procedural device to accommodate considerations of both disclosure and confidentiality when the discovery involved the financial information of bank customers. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.

Also, in In re Lifschutz, 2 Cal. 3d 415, 437 & n.23, 467 P.2d 557, 571 & n.23, 85 Cal. Rptr. 829, 843 & n.23 (1970), the court stated that if the trial judge during a discovery dispute was called upon to rule on the relevancy of information to which the psychiatrist-patient communication privilege was claimed, the judge should take precautions to protect the confidentiality of the communications. For example, he might routinely permit such disclosure to be made ex parte in his chambers. See also Mavroudis v. Superior Court, 102 Cal. App. 3d 594, 607, 162 Cal. Rptr. 724, 734, in which the court ordered certain documents to be provided for its in camera review so it could rule on a claim of privilege; see also Telegram Tribune v. Municipal Court, 166 Cal. App. 1072, 213 Cal. Rptr. 7, 11 (1985) (allowing a hearing on defendant's motion in a criminal case to close his preliminary hearing to the public to be conducted by allowing the defendant to testify as to confidential matters in camera with the submission of written questions by adverse counsel and preservation of the record for later appellate review).

The court in Mavroudis v. Superior Court, 102 Cal. App. 3d at 606, 162 Cal. Rptr. at 733-34, noted that an in camera determination is authorized by Cal. Evid. Code § 915, subdivision (b) when the court is ruling on a claim of privilege of official information, identity of informer or trade secret. The California Supreme Court has suggested that the procedure outlined in that section also be utilized by a court when ruling upon a claim of privilege of psychotherapist-patient communications which depends upon the content of the communication. In re Lifschutz, 2 Cal. 3d 415, 437 n.23, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). By the same reasoning, such a procedure would also seem warranted when other types of confidential information are concerned, such as financial information. Cal. Evid. Code § 915(b) provides:

When a court is ruling on a claim of privilege [of official information, identity of informer, or trade secret] . . . and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

Id.

In camera proceedings are also utilized in the federal courts. In Ronson Corp. v. Liatifin Aktiengellschaft, 370 F. Supp. 597, 600-01 (D.N.J. 1974), aff'd, 493 F.2d 1401, aff'd 497 F.2d 394, cert. denied, 419 U.S. 870, the court held that both parties could submit confidential commercial information to the court in camera pursuant to Fed. R. Civ. P. 26 which provides a remedy to protect any party from financial embarrassment, undue burden, or expense.
only these attorney's present.\textsuperscript{267}

These alternatives provide the attorneys for the opposing parties equal opportunity to present their positions to the judge. Each attorney is allowed to read the other's declarations and arguments regarding the financial condition of the settlor and to submit rebuttal evidence. In addition, each may hear the other's evidence or arguments if the court allows an oral presentation. Therefore, the hearing would not be \textit{ex parte} or \textit{in camera} as those terms are generally used to describe proceedings when only one side is present.\textsuperscript{268}

The solution to the problem of maintaining confidentiality of the settling defendant's financial information contained in the documents filed for the good faith hearing is also not difficult. The court can accomplish the goal of limiting access to the settling defendant's financial information to only the attorneys and experts for the non-settling joint tortfeasors by ordering that any papers containing information regarding the settling defendant's financial condition: a) be filed separately from other documents regarding the good faith issue; b) be sealed; c) be served only on the attorneys for the nonsettling joint tortfeasors; and d) not be disclosed by those attorneys to any other persons except specified experts.

In summary, the court can and should take care to ensure that the discovery protections necessitated by the settling defendant's right of privacy are extended past the discovery stage to the good faith settlement hearing itself.

\section*{VI. Conclusion}

Courts attempting to apply the test for a good faith settlement recently established by the California Supreme Court in \textit{Tech-Bilt} will face numerous unresolved issues. This article has addressed two threshold procedural problems that have been created because the new criteria for good faith include the settling joint tortfeasor's financial condition and insurance policy limits.

The first problem involves the discovery of the financial condi-

\textsuperscript{267} \textit{Id.}

\textsuperscript{268} A significant problem might arise with a court order which grants one litigant an \textit{in camera} hearing while excluding the other when the evidence received was dispositive of the litigation. \textit{See} People v. Sahagun, 89 Cal. App. 3d 1, 25, 152 Cal. Rptr. 233, 249 (1979) (a criminal case in which the court raised, although specifically declined to decide, this issue; the court did reverse the trial court's granting of an \textit{in camera} hearing to the defendant when the information turned out \textit{not to be confidential}, and the People were not thereafter afforded the opportunity to question and explore the accuracy of the information, argue its significance, or offer rebuttal evidence).
tion and insurance policy limits of the settlor by the other parties to the action. The nonsettling joint tortfeasors have a legitimate interest in this information once the settlor claims that his settlement is in good faith by virtue of his financial resources. While there is probably no obstacle to allowing discovery regarding the settlor's insurance, the settlor's constitutionally mandated right of privacy must be considered in determining the scope of discovery of his other financial information. A basic conflict exists between the nonsettlers' need to discover this financial information and the settlor's privacy interest in protecting this information from unnecessary disclosure. The court should resolve this conflict by issuing a protective order appropriately tailored to the facts of each case. This article has suggested certain guidelines a trial court can use in fashioning the necessary protective orders.

Assuming the trial court finds that a protective order is necessary to limit the disclosure of the settling tortfeasor's financial information, another problem the court will face is maintaining the confidentiality of that information at the good faith settlement hearing itself and in papers filed in preparation for that hearing. This article has, therefore, also offered suggestions a trial judge can use to structure the hearing in a manner which will preserve the confidentiality obtained at the discovery stage through a protective order.

These proposed judicial guidelines to control both discovery and the good faith settlement hearing will enable the parties to fully prepare for and litigate the issue of the good faith of a proposed settlement within the parameters of *Tech-Bilt*. In addition, the invasion of the settlor's right of privacy can be kept within constitutionally permissible limits. In this way, the interests of all parties can be accommodated and the trial judge can turn his attention to the ultimate issue of whether or not the proposed settlement is in good faith.