

The Specter Of Sliding Scale Settlements In Multi-Party Litigation: Strategies For Protecting The Non-Settling Defendant

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In formulating California’s approach to evaluating the good faith of piece-meal settlements, the California Supreme Court famously stated: “When profit is involved, the ingenuity of man spawns limitless varieties of unfairness.” (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 494-495 quoting *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 993). As set forth below, a sliding scale settlement certainly falls within this paradigm. Although California allows such settlements, there are statutory protections and defense strategies which should be implemented to mitigate the prejudice inherent in such settlements.

1. Recognition of the Sliding Scale Settlement

Your insured is a defendant in complex multi-party litigation.

The plaintiff settles around your insured, leaving your insured as the sole defendant at trial and potentially obligated to pay the full judgment without any right of comparative indemnity or contribution from the settling defendant. If you find yourself in this scenario, it is important to recognize the possibility of a sliding scale settlement. There are countless variables of such a settlement arrangement, but the key defining feature is the settling defendant’s ultimate liability to the plaintiff is contingent upon the amount recovered from the non-settling defendant at trial. These types of settlements are commonly known as “Mary Carter” agreements after the Florida District Court of Appeal Case *Booth v. Mary Carter Paint Co.*, (1967) 202 So. 2d 8.

Other jurisdictions such as Nevada, have outlawed such settlements as violating public policy and the canons of professional conduct. (*See Lum v. Stinett* (1971) 87 Nev. 42). In California, courts have struggled to reconcile such settlement arrangements with the twin policy goals of encouraging settlements and fair allocation of fault. In *Abbott-Ford v. Superior Court*, the California Supreme Court addressed how the *Tech-Bilt* good faith standard applies to controversial sliding scale settlements. (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal. 3d 858, 875-876). The difficult issue confronting the *Abbott-Ford* Court was how to reconcile an

agreement wherein a plaintiff’s recovery is contingent on the amount plaintiff ultimately recovers from the non-settling defendant with the statutory goal of equitable apportionment amongst tortfeasors when the necessary effect of such an agreement is to improperly shift the settling defendants’ share of liability onto the non-settling defendant. (*Ibid.*).

2. Disclosure

Because sliding scale settlement arrangements are typically negotiated under a shroud of secrecy, the legislature enacted Code of Civil Procedure Section 877.5. The statute requires the parties to such an agreement to promptly notify the court of the existence of the agreement and its terms. (877.5 (a)(1)). In addition, no sliding scale settlement is effective, unless a notice of intent to enter into such an agreement is served on the non-settling defendant at least 72 hours before the agreement is entered into. (877.5(c)). If the agreement is not properly disclosed, raise the issue at the good faith stage as evidence of collusion and grounds for denying good faith.

3. Settlement Credit

In *Abbott Ford*, the court identified the principal difficulty with sliding scale settlements is arriving at an accurate price or consideration paid by the settling defendant(s) to be applied as an equitable offset or credit in favor of the non-settling defendant

against the ultimate judgment. (*Abbott-Ford*, 43 Cal. 3d at 878-879). Accordingly, to achieve the statutory objective of fair apportionment of fault, the *Abbott-Ford* Court held the non-settling defendant is entitled a credit in the amount of the **full consideration paid by the settling defendant**. (*Id.* at 886). However, California courts and judges are divided as to when settlement credit should be set.

At least one appellate court has held the credit or offset afforded to a non-settling defendant should be fixed at the time of settlement because the issue of credit is part of the overall good faith determination. (*Regan Roofing Co. v. Superior Court*, 21 Cal. App. 4th at 1703). If the settlement consideration or the amount of the recovery guaranteed to the plaintiff is within the *Tech-Bilt* ballpark, meaning it is reasonable in relation to the settling defendant's proportional share of liability, then the non-settling defendant should ask the trial court to set the settlement credit at the time of the good faith hearing. Some judges are not well versed in the policies informing the good faith and credit statutes and simply view a good faith hearing as an adequacy hearing to determine if the amount of the settlement is fair to the *plaintiff*, even though the intended policy is to protect the interests of the *non-settling defendant*. Even so, the issue of settlement credit should be raised at the good faith stage anyway to educate the court regarding the issue in advance of subsequent pre-trial motions.

If the court defers settlement credit at the good faith stage, a motion in limine should be filed again asking the court to grant the non-settling defendant full settlement credit. If the court refuses to set the settlement credit pre-trial, it is critical for the non-settling defendant to request a special jury verdict asking the jury to allocate damages to economic and non-economic damages because the settlement agreement likely does not do so. This is so, because there is case law holding the right to settlement credit may be waived entirely. (See *Conrad v. Ball* (1994) 24 Cal. App. 4th 439 [Court refused to make an allocation in place of the jury and non-settling defendant lost the opportunity for offset].

4. Use The Settlement Agreement At Trial to Show Bias

In addition to disclosure and full settlement credit, another protection afforded the non-settling defendant is use of the settlement agreement at trial to show bias. California Civil Jury Instruction No. 222 allows the settlement agreement to be shown to the jury so they may properly evaluate the potential bias and credibility of witnesses against the non-settling defendant. (California Civil Jury Instruction No. 222). At trial, the settlement agreement may be disclosed to the jury for the purpose of evaluating the potential bias of settling defendant witnesses: "The court must give this instruction on the motion of any party unless it finds that disclosure will create

substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

5. Conclusion

While it is a challenging position to be a non-settling defendant, the defense should avail itself of all statutory and legal protections so as to mitigate the inherent prejudice which results in this situation. The first step is to be persistent in finding out the terms of the settlement to which you are not a party. Be on the alert for a sliding scale settlement and scrutinize the settlement terms and conditions when opposing the inevitable motion for determination of good faith. In opposing the settlement, alert the court to the collusive nature of the settlement including non-disclosure, particularly if the recovery amount paid by the settling defendant is disproportionately low. If on the other hand, the settlement amount is reasonable, ask the court to give the non-settling defendant full settlement credit at the good faith stage. If the court refuses to do so and punts the issue, file a motion in limine again asking for full settlement credit. If the court denies the in limine motion, then be sure to ask for a special jury verdict allocating the settlement between economic and non-economic damages so as to not lose out on receiving credit altogether. A motion in limine should also be filed asking the court to allow the settlement agreement to be shown to the jury for the purposes of evaluating bias and the credibility of settling defendant witnesses. The corresponding jury

instruction should also be submitted to the court.

Implementation of these defense strategies will go a long way to mitigating the prejudicial impact of sliding scale settlements on non-settling defendants who acting in good faith refuse to be compelled to settle.

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