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Good Faith Settlement Under the Contribution Act: Do Trial Courts Have Too Much Discretion?

Louis J. Perona Honorable
Judge, Circuit Court of Illinois, 13th Judicial Circuit

Claire Perona Murphy
Assoc., Kirkland & Ellis, Chicago, IL

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Honorable Louis J. Perona and Claire Perona Murphy***

I. INTRODUCTION

Illinois courts encourage the settlement of claims as a matter of public policy.[1] Under the Contribution Among Joint Tortfeasors Act (the "Contribution Act"),[2] the only limitation placed upon the right of parties to settle is that the settlement be accomplished in good faith.[3] The first part of this Article discusses the meaning that Illinois courts have given to the term "good faith" settlement and will suggest that, in reality, it is scant if any limitation at all.

A good faith settlement discharges the settling party from liability for contribution to other joint tortfeasors.[4] The settling party, however, may seek contribution from any other joint tortfeasor whose liability was extinguished by the settlement to the extent that the settling defendant's payment exceeded his pro rata share of the total damages.[5] The questions then focus upon the rights of the contributing tortfeasors. May the settling party alone determine the total amount of which the contributing tortfeasors will be forced to pay a proportional share? May a settling tortfeasor immunize himself from contribution liability by receiving a release for either an amount far below his proportional fault or for a nominal sum? Should the contributing tortfeasor be able to challenge the settlement amount? If so, what type of challenge should be permitted?

The second part of this Article reviews the procedures approved

* Judge, Circuit Court of Illinois, 13th Judicial Circuit; J.D., 1951, De Paul University College of Law.

** Associate, Kirkland & Ellis, Chicago, Illinois; B.A., 1982, University of Notre Dame; J.D., 1989, Loyola University of Chicago.

1. *See infra* notes 39-47, 179-82, 216 and accompanying text.
2. ILL. REV. STAT. ch. 70, paras. 301-305 (1987).
3. ILL. REV. STAT. ch. 70, para. 302(c) (1987).
4. ILL. REV. STAT. ch. 70, para. 302(d) (1987). As used throughout this Article, the term "joint tortfeasors" includes both tortfeasors acting in concert (its common meaning), as well as concurrent tortfeasors (tortfeasors who caused the same injury while acting independently).
5. ILL. REV. STAT. ch. 70, paras. 302(a), (b), (e) (1987).

by Illinois courts for contributing tortfeasors to challenge a good faith settlement under the Contribution Act. The third part suggests alternative methods by which these challenges may be allowed and reviewed.

II. THE MEANING OF "GOOD FAITH"

A. Statutory Provisions

The Contribution Act provides that when a release or covenant not to sue is given in good faith by an injured party to a tortfeasor, there are five consequences:

1. Only the tortfeasor receiving the release is discharged from liability;[6]

2. The recovery on any claim against other tortfeasors is reduced by the greater of the amount stated in the instrument or the actual amount given in consideration for it;[7]

3. The settling party is discharged from any liability for contribution to other tortfeasors;[8]

4. The settling tortfeasor is precluded from obtaining contribution from any other party whose liability is not extinguished by the settlement;[9] and

5. The settling party may seek contribution from any tortfeasor whose liability was extinguished by the settlement for any amount the settling party agreed to pay which exceeded his pro rata share of the common liability.[10]

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6. ILL. REV. STAT. ch. 70, para. 302(c) (1987). Section 302(c) provides that:

> When a release of covenant not to sue . . . is given in good faith to one or more persons liable in tort arising out of the same injury . . . it does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

Id.

7. *Id.*

8. ILL. REV. STAT. ch. 70, para. 302(d) (1987). Section 302(d) provides that: "The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor." *Id.*

9. ILL. REV. STAT. ch. 70, para. 302(e) (1987). Section 302(e) provides that: "A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement." *Id.*

10. ILL. REV. STAT. ch. 70, paras. 302(a), (b) (1987). Sections 302(a) and (b) provide that:

> (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property . . .

B. Case Precedent

1. Good Faith Defined

The Contribution Act does not define "good faith," but the meaning of the term is becoming somewhat clearer as Illinois case law develops. Although the language of the Contribution Act states that good faith is a necessary element of a valid settlement, generally, courts have not required that good faith be proven affirmatively.[11] Similarly, courts have found it easier to articulate what good faith is not than what it is.

The Appellate Court for the Fifth District pronounced a definition of good faith by exclusion in *Lowe v. Norfolk & Western Railway.*[12] The *Lowe* court stated that "a settlement will be considered in good faith when no tortious or wrongful conduct on the part of the settling defendant has been shown."[13] This formulation of a good faith settlement reveals both the presumption of good faith that follows from the settlement itself[14] and the standard necessary for lack of good faith. Only tortious or wrongful conduct qualifies to disprove good faith. This standard appears straightforward, but because no Illinois appellate case has held that the standard has been violated, little guidance exists to specify what constitutes "wrongful conduct." However broad the connotations of the term "wrongful" may be in normal parlance, the *Lowe* court, by adopting the standard it understood to be in effect in 1984 in California,[15] chose the more restrictive of the two definitions that now

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there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

Id.

11. The law is settled that resolving a claim through a release or covenant creates a presumption of validity, perhaps because anyone who agrees to pay another any amount of money without legal obligation is acting against his own self-interest. Therefore, once a release is executed, the party challenging the settlement assumes the burden of proving its invalidity. *See infra* notes 179-82 and accompanying text.

12. 124 Ill. App. 3d 80, 463 N.E.2d 792 (5th Dist. 1984).

13. *Id.* at 94, 463 N.E.2d at 803 (referring to California law). The *Lowe* court indicated its intention to adopt this standard by concluding its discussion of the good faith issue as follows: "With no evidence of tortious or wrongful conduct, it does not appear that the settlements were lacking in good faith." *Id.* at 96, 463 N.E.2d at 804.

14. Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 928, 482 N.E.2d 351, 353 (1st Dist. 1985); McComb v. Seestadt, 93 Ill. App. 3d 705, 706, 417 N.E.2d 705, 707 (1st Dist. 1981). *See also infra* notes 179-82 and accompanying text.

15. *See Lowe*, 124 Ill. App. 3d at 94, 463 N.E.2d at 803. The *Lowe* court cited Kohn

have been the subject of years of debate among California judges, legislators, and academicians.[16] That standard, as former Chief Justice Bird of the California Supreme Court interpreted it, requires only that a settlement be "free of corrupt intent" toward the non-settling tortfeasors.[17] Accordingly, "[a] settlement is made in bad faith only if it is collusive, fraudulent, dishonest, or involves tortious conduct."[18] A 1988 Illinois Appellate Court opinion indicated that this restrictive non-tortious conduct definition still guided Illinois courts four years after *Lowe*, when it stated that the "policy of the Contribution Act is to encourage compromise and settlement in the absence of bad faith, fraud, or collusion."[19]

Without explicitly disagreeing with *Lowe*, another Illinois court has opted for a more expansive definition.[20] This broader definition corresponds somewhat with the position of the opposing side in the California debate. According to this formulation, good faith means that the amount paid by the settling tortfeasor to accomplish his release is within the reasonable range of his liability.[21] Thus, a trial court adopting the reasonable range definition of good faith must consider whether the settlement amount is "unreasonably low . . . based upon relative culpability."[22]

Still other Illinois courts, perhaps the majority, blend together these two definitions. Some opinions cite *Lowe* as authority for the meaning of good faith; yet, they note that the amount of settlement is a factor to be considered when resolving the good faith ques-

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v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981); Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

The line of California cases cited in *Lowe* to support its restrictive definition of good faith as requiring only non-tortious conduct were subsequently rejected by the California Supreme Court in favor of the broader "reasonable range" or "ballpark" test. *See* Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 741 P.2d 124, 239 Cal. Rptr. 626 (1987); Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

16. *See generally* Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

17. *Id.* at 502, 698 P.2d at 169, 213 Cal. Rptr. at 265 (Bird, C.J., dissenting).

18. *Id.* (Bird, C.J., dissenting)

19. Mallaney v. Dunaway, 178 Ill. App. 3d 827, 833, 533 N.E.2d 1114, 1117 (3d Dist. 1988). *See also* Bituminous Ins. Cos. v. Ruppenstein, 150 Ill. App. 3d 402, 501 N.E.2d 907 (1st Dist. 1986) (expressly adopted *Lowe*'s formulation of good faith); Doellman v. Warner Swasey Co., 147 Ill. App. 3d 842, 498 N.E.2d 690 (1st Dist. 1986); Barreto v. City of Waukegan, 133 Ill. App. 3d 119, 478 N.E.2d 581 (2d Dist. 1985).

20. Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 928, 482 N.E.2d 351, 353 (1st Dist. 1985).

21. *Id.* at 930, 482 N.E.2d at 354 (citing River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 997-98, 103 Cal. Rptr. 498, 506-07 (1972)).

22. *Id.* at 928, 482 N.E.2d at 353.

tion.[23] Other courts, while insisting upon adherence to the *Lowe* definition, mention that the settlement amount is within reason, or in some other way take into account the amount of the settlement in their analysis.[24] Thus, despite the *Lowe* court's attempted clarification of the issue, little consistency in the use of this definition has followed its decision.

2. Substantive Grounds for Challenging the Good Faith of a Settlement

An examination of the Illinois cases reveals five ways in which a non-settling defendant may challenge the validity of a settlement based on lack of good faith. The non-settling defendant may challenge: (1) the amount of the settlement; (2) the existence of consideration needed to support the settlement; (3) the presumption of noncollusive conduct on the part of the settling parties; (4) the failure of the settling parties to allocate amounts paid for certain claims or types of damages within the total settlement amount; and (5) the plaintiff's favoritism of one defendant due to the plaintiff's own motives of mere tactical gain.

a. Amount of Settlement

One way for a non-settling defendant to challenge the good faith aspect of a settlement is by claiming that the settlement amount was unreasonably low under all the circumstances.[25] Courts have developed three tests to meet such a challenge.[26] Under the first

23. *See, e.g.*, McKanna v. Duo-Fast Corp., 161 Ill. App. 3d 518, 515 N.E.2d 157 (1st Dist. 1987) (court considered evidence of reasonableness of settlement amount despite purporting to adopt the *Lowe* formulation); O'Connor v. Pinto Trucking Serv., 149 Ill. App. 3d 911, 501 N.E.2d 263 (1st Dist. 1986); Perez v. Espinoza, 137 Ill. App. 3d 762, 484 N.E.2d 1232 (1st Dist. 1985).

24. *See, e.g.*, Mallaney v. Dunaway, 178 Ill. App. 3d 827, 833, 533 N.E.2d 1114, 1117 (3d Dist. 1988); Bituminous Ins. Cos. v. Ruppenstein, 150 Ill. App. 3d 402, 405, 501 N.E.2d 907, 909 (1st Dist. 1986). Even the *Lowe* court summarily applied the very test it purported to reject. Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 95, 463 N.E.2d 792, 803 (5th Dist. 1984).

25. A settlement discharges the settling defendant of his pro rata share of the liability. If the settlement extinguishes all of the plaintiff's claims against all of the defendants, there will be no trial on the original claims. If the settlement extinguishes less than all of the claims, a trial will result. The jury verdict on damages then will be reduced by the actual settlement amount, not the settling defendant's pro rata share of the liability. Thus, a non-settling defendant may be forced to pay more than his pro rata share of the liability to make up for the difference between the settling defendant's actual pro rata share and the amount for which he settled the claim. Therefore, a challenge that the settlement amount was too low will arise only in partially settled cases.

26. This discussion excludes the approach developed in some jurisdictions of simply ignoring such a claim. For example, jurisdictions that have adopted the strict tortious

approach, the court compares the amount of the settlement with the verdict ultimately returned at trial. If the settlement amount does not comport with the settling defendant's share of the jury-determined amount, the settlement is considered not to have been made in good faith. Courts have labeled this the ratio or proportionality test.[27] According to this test, good faith may be adjudged only after the jury renders a verdict.

Under the second approach, the court considers the amount of the settlement in relation to estimates of the settling defendant's percent of fault and of the probable range of the plaintiff's total recovery, without relying upon hindsight. If the settlement amount falls into the roughly estimated reasonable range of the settling defendant's liability, then the trial judge labels the release or covenant a good faith settlement. This test has been called the reasonable range or ballpark test.[28]

The third approach is similar to the second. Under this approach, instead of concentrating on obtaining an estimate of the settling defendant's liability, the court focuses upon the amount sought by the plaintiff's complaint[29] and, in view of all the circumstances, compares this amount to the settlement amount.[30]

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activity test fit this mold. In such a jurisdiction, the only relevant inquiry is whether the moving party offered any evidence of tortious activity on the part of the settling parties toward the non-settling parties.

27. *See, e.g., Lowe*, 124 Ill. App. 3d at 94, 463 N.E.2d at 803; Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 913-14 (1984). California sources generally label this test the proportionality test and deny that their courts have ever adopted it. Illinois cases, however, seem to consider this test to be the same as the reasonable range test, which California courts have adopted.

28. *See* Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499-501, 698 P.2d 159, 167-68, 213 Cal. Rptr. 256, 263-65 (1985); Roberts, *supra* note 27, at 854-61, 917-35.

The dissenting opinions in *Tech-Bilt* and in Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 741 P.2d 124, 239 Cal. Rptr. 626 (1987), included persuasive discussions by Chief Justice Bird and Justice Mosk, respectively, of the disadvantages of considering the appropriateness of the amount of the settlement in *all* cases deciding the good faith question. *Tech-Bilt*, 38 Cal. 3d at 502-08, 698 P.2d at 168-73, 213 Cal Rptr. at 265-70; *Abbott Ford*, 43 Cal. 3d at 888-902, 741 P.2d at 144-53, 239 Cal. Rptr. at 646-56. *See also* Comment, *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823, 839-40 (1986) [hereinafter *Ballpark that Tech-Bilt*] (critical view of the reasonable range test). *Contra* Roberts, *supra* note 27 (argued for the adoption by California courts of the reasonable range test).

29. Of course, ILL. REV. STAT. ch. 110, para. 2-604 (1987) bars any complaints filed in Illinois for personal injury actions from containing *ad damnum* clauses except to the extent necessary to comply with circuit court placement rules. *See* ILL. REV. STAT. ch. 110, para. 2-604 (1987). For personal injury cases in Illinois, a court following this third approach would simply look beyond the complaint (*e.g.*, to the demand letter) to garner the amount sought by the plaintiff.

30. Ballweg v. City of Springfield, 114 Ill. 2d 107, 122, 499 N.E.2d 1373, 1380 (1986);

As previously discussed, the Illinois Appellate Court for the Fifth District in *Lowe* appeared to adopt the non-tortious conduct test to determine good faith.[31] In adopting the non-tortious conduct test, the *Lowe* court rejected the ratio test as a means to determine good faith in a settlement.[32] Because the ratio test "necessarily relies upon hindsight," the court reasoned that it is an impossible standard to apply before the actual trial occurs, when the trial court will be expected to decide the matter.[33]

The *Lowe* opinion acknowledged that the Contribution Act serves two policies: (1) to encourage settlement; and (2) to equitably apportion damages.[34] Because the two purposes can conflict,[35] the one perceived to be more important should receive priority.[36] The ratio test favors the equitable apportionment of damages objective.[37] In contrast, the non-tortious activity test prioritizes the encouragement of settlements.[38] The Uniform Contribution Among Joint Tortfeasors Act (the "Uniform Act"),[39] which the Illinois Contribution Act parallels in many respects,[40] initially emphasized the equitable sharing aspect,[41] but upon revision in 1955 (before its adoption by the Illinois Legislature), replaced the pro-

Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989); McKanna v. Duo-Fast, 161 Ill. App. 3d 518, 525-26, 515 N.E.2d 157, 163 (1st Dist. 1987).

31. *See supra* note 13 and accompanying text.

32. Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 94, 463 N.E.2d 792, 803 (5th Dist. 1984).

33. *Id.*

34. *Id.*

35. Generally, settlements are not encouraged by leaving the amount one must pay open-ended because a settling defendant wants finality. *See* Commissioner's Comments to section 4(b) of the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT, 12 U.L.A. 99-100 (Master ed. 1975); Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 488-89 (1966). Until the jury verdict is in, however, the settlor's actual liability is unknown. Therefore, ensuring finality sacrifices equitable apportionment, and waiting until the equitable share is determined to fill in the amount a settling defendant must pay sacrifices finality. For further discussion on the mechanics of this conflict, see Roberts, *supra* note 27, at 895-98. *See also* Gordon & Crowley, *Indemnity Issues in Settlement of Multi-Party Actions in Comparative Negligence Jurisdictions*, 48 INS. COUNS. J. 457 (1981) (advocating the extreme solution of eliminating the good faith requirement, noting that nothing could be more effective in encouraging settlement, the "main goal" of the Contribution Act).

36. *Lowe*, 124 Ill. App. 3d at 94, 463 N.E.2d at 803.

37. *Id.*; Roberts, *supra* note 27, at 913, 930-31.

38. Roberts, *supra* note 27, at 905-08.

39. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1955).

40. *Lowe*, 124 Ill. App. 3d at 94, 463 N.E.2d at 803.

41. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57-59 (1939). The 1939 version of the Uniform Act relieved a settling defendant from liability only if the settling instrument caused a reduction in the plaintiff's damages "to the extent of the *pro rata* share of the released tortfeasor." *Lowe*, 124 Ill. App. 3d at 94-95, 463 N.E.2d at 803.

rata reduction provision with the good faith requirement.[42]

The Illinois Contribution Act, like the Uniform Act, conditions the validity of a settlement only upon its good faith and reduces the plaintiff's recovery by the actual amount paid.[43] So long as the settlement is found to be made in good faith, a settling defendant can be sure that he will never have to pay more concerning his liability than he has agreed to pay. The Contribution Act encourages the plaintiff to settle as well, for it reduces his verdict against the remaining defendants only by the amount he actually received from the settling defendant, permitting him a complete recovery from the other tortfeasors.

The commissioner's comments to the Uniform Act reveal that a recognition of the premier importance of not discouraging settlements prompted the abandonment of the pro rata reduction clause.[44] Moreover, the commissioner's notes explained that the purpose of the good faith clause was merely to give the court "occasion to determine whether the transaction was collusive."[45] According to the commissioner, the previous formulation of the Uniform Act not only discouraged settlements,[46] but also failed to prevent collusion.[47] Thus, the commissioner's comments to the Uniform Contribution Act fully support the *Lowe* court's conclusion that the non-tortious conduct test, rather than the ratio test, is the proper means by which to determine good faith under the Contribution Act.

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42. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. at 100 (1955).

43. ILL. REV. STAT. ch. 70, para. 302(c) (1987).

44. The commissioner's comments stated: "It seems more important not to discourage settlement than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in suit. Accordingly, the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 100 (Master ed. 1975) (commissioner's comments). For further discussion on this issue, see Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 503-04, 698 P.2d 159, 169-70, 213 Cal. Rptr. 256, 266-67 (1985) (Bird, C.J., dissenting); Abbott Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 890-95, 741 P.2d 124, 146-48, 239 Cal. Rptr. 626, 648-51 (1985) (Mosk, J., dissenting).

45. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. at 99 (1939) (commissioner's comments).

46. *Id.* The commissioner's notes reported that the fair share reduction provision "discourage[d] settlements by making it impossible for one tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing the damages . . . because they have no way of knowing what they are giving up." *Id.* For a discussion advocating adoption of the fair share reduction, see Comment, *Compulsory Contribution Claims: Promoting Judicial Efficiency While Sacrificing Standards of Justice*, 20 LOY. U. CHI. L.J. 1091 (1989).

47. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. at 99 (1939) (commissioner's comments).

The *Lowe* court's disdain for a test which relies upon hindsight constitutes a firm rejection of the proportionality test. Additionally, no Illinois case after *Lowe* has embraced this wait-and-see approach. The *Lowe* court also implicitly rejected the California-fashioned reasonable range test.[48] In addition to urging that the disparity between the settlement amount and the settling defendant's proportional share of the actual verdict evidenced a lack of good faith, the non-settling defendant in *Lowe* also had advanced the argument that the settlement amounts failed to reflect the relative degree of fault of the parties.[49] The *Lowe* court somewhat summarily rejected adopting this reasonable range approach, stating that "[a]s with the ratio argument, we know of no way in which relative culpability could be ascertained prior to evidence being taken."[50]

Illinois courts, however, have not entirely foreclosed the possibility that an unreasonably low settlement amount may indicate a lack of good faith. Despite *Lowe*, the predominant approach in Illinois treats the amount of a settlement as one factor in the totality of the circumstances to consider in determining good faith.[51] *McKanna v. Duo-Fast Corp.*[52] and *O'Connor v. Pinto Trucking Service*[53] provide examples of this "one factor" approach.

McKanna involved actions against three defendants based upon the Wrongful Death Act[54] and the Structural Work Act.[55] The plaintiff, through her complaint, asked for over one million dollars

48. Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 95-96, 463 N.E.2d 792, 804 (5th Dist. 1984). *See also* Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989) (Illinois Appellate Court for the First District expressly rejected the California-fashioned reasonable range test as the sole determinant for good faith).

49. *Lowe*, 124 Ill. App. 3d at 95-96, 463 N.E.2d at 804. Because the sole difference between the former and the latter arguments hinges upon whether they rely on hindsight, the two seem to mirror quite well the proportionality test and the reasonable range test, respectively.

50. *Id.*

51. *See supra* notes 23-24 and accompanying text.

52. 161 Ill. App. 3d 518, 515 N.E.2d 157 (1st Dist. 1987).

53. 149 Ill. App. 3d 911, 501 N.E.2d 263 (1st Dist. 1986).

54. ILL. REV. STAT. ch. 70, paras. 1, 2 (1987).

55. ILL. REV. STAT. ch. 48, paras. 60-69 (1987); *McKanna*, 161 Ill. App. 3d at 523, 515 N.E.2d at 161. In *McKanna*, the plaintiff's husband died as a result of falling from a ladder in the boiler room of a plant where he was repairing an air-conditioning system. *McKanna*, 161 Ill. App. 3d at 522-23, 515 N.E.2d at 160-61. The plaintiff brought suit against the owner of the plant, the builder of the plant, and the manufacturer of the ladder. *Id.* at 523, 515 N.E.2d at 161. All of the defendants filed actions for contribution against each other. *Id.* at 523, 515 N.E.2d at 161-62. Subsequently, all three defendants filed third-party actions against the plaintiff's decedent's employer, whom the plaintiff had not named as a defendant. *Id.* at 523-24, 515 N.E.2d at 162. This action was severed from the rest of the actions due to the proximity of the impending trial. *Id.*

in damages.[56] Before the trial, the plaintiff offered to settle for $750,000, and then lowered her offer to $440,000.[57] On the first day of the trial, the plaintiff settled with two of the defendants for $15,000 and $10,000, respectively.[58] The jury rendered a verdict for the plaintiff against the remaining defendant for $550,000.[59]

The non-settling defendant contended on appeal that the trial court erred in dismissing the claims against the other two defendants because their settlement agreements with the plaintiff lacked good faith.[60] In rejecting this argument, the appellate court cautioned that the amount of a jury verdict is "not necessarily a fair measure of the good faith of a settlement."[61] Nevertheless, the court considered the "relationship between the amount of settlement and the damages sought by the complaint" to be "one factor" in the good faith determination.[62] Reasoning that the settling defendants possessed defenses that the non-settling defendant did not share, the court rejected the appellant's argument and affirmed the finding of good faith made by the court below.[63]

The *O'Connor* case provides an even more striking example of a seemingly disproportionate settlement that passed the one factor in the totality of the circumstances test. In *O'Connor*, the plaintiff's decedent died when his car crashed into the rear of a parked semitrailer.[64] The plaintiff brought suit against the semitrailer's manufacturer, owner/lessor, lessee, operator, previous owner, and the city.[65] The complaint sought over $7,000,000 in damages.[66] After extensive negotiations, the plaintiff accepted the manufacturer's offer of $15,000 and settled his claim against the manufacturer.[67]

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56. *McKanna*, 161 Ill. App. 3d at 526, 515 N.E.2d at 163.

57. *Id.*

58. *Id.* at 524, 515 N.E.2d at 162. The settling defendants were the plant's builder and the ladder's manufacturer. *Id.*

59. *Id.* After subtracting the settlement amounts, the plant's owner (the remaining defendant) was responsible for paying $525,000 in damages. *Id.* Of course, this amount was potentially subject to contribution from the plaintiff's employer.

60. *Id.* at 524-25, 515 N.E.2d at 162.

61. *Id.* at 525, 515 N.E.2d at 163.

62. *Id.* The court stated that "the amount of a settlement legitimately may be quite different from the amount of damages sought." *Id.* Therefore, in "weighing the apparent disproportionality of a settlement amount in relation to the *ad damnum* of the complaint, the court must consider both the probable recovery and the possibility of an unexpected result." *Id.*

63. *Id.* at 526, 515 N.E.2d at 163.

64. O'Connor v. Pinto Trucking Serv., 149 Ill. App. 3d 911, 913, 501 N.E.2d 263, 264 (1st Dist. 1986).

65. *Id.* at 914-15, 501 N.E.2d at 265-66.

66. *Id.* at 914-16, 501 N.E.2d at 265, 267.

67. *Id.* The plaintiff first offered to settle for $550,000, out of which just over

The non-settling parties objected to the settlement on the basis that it was unreasonably low and, therefore, lacked good faith.[68] The trial court disagreed.[69] In affirming the finding of the trial court, the appellate court noted that the amount of settlement was "but one factor to consider"; the "court may also consider both the probable recovery and the possibility of an unexpected result."[70]

Thus, although Illinois courts in theory remain open to the possibility that an unreasonably low settlement amount may show a lack of good faith, *McKanna* and *O'Connor* illustrate the tendency of trial courts and courts of review to find any settlement amount reasonable rather than unreasonably low.[71] Even a difference of one million dollars between the *ad damnum* clause and the settlement amount does not necessarily sound the death knell for good faith.[72]

Each of the three approaches to handling a challenge based upon the amount of the settlement has its problems. The first two tests are too restrictive, while the last test is too lenient. The proportionality test's reliance upon hindsight ensures that it will undermine the Contribution Act's primary goal of encouraging settlements.[73] California's reasonable range test is similarly unwieldy. Because it forces the trial court to consider estimates of the settling defendant's relative fault compared to the plaintiff's probable recovery in every case, the reasonable range test leads to unnecessary mini-trials in which all issues relating to the settling defendant must be resolved in advance of the actual trial.[74]

$100,000 was allocated as the manufacturer's liability. *Id.* at 916, 501 N.E.2d at 267. The manufacturer raised the statute of repose as an affirmative defense in its answer and moved to dismiss. *Id.* at 914, 501 N.E.2d at 265. During the pendency of these motions, the plaintiff offered to settle with the manufacturer, the previous owner, and the city for $75,000. *Id.* at 914, 916, 501 N.E.2d at 265, 267. The manufacturer counter-offered to pay $15,000 as its share, which represented $10,000 more than it previously had suggested. *Id.*

68. *Id.* at 914, 501 N.E.2d at 265.

69. *Id.*

70. *Id.* at 916, 501 N.E.2d at 267.

71. *See also* Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 930, 482 N.E.2d 351, 354 (1st Dist. 1985) ($7,000 settlement amount, although disproportionate to the amount sought in the complaint ($75,000), upheld as "not out of proportion to what the trial court could have considered the probable recovery of plaintiff").

72. Divergent settlements have been upheld in other states as well. *See, e.g.*, Wysong & Miles Co. v. Western Indus. Movers, Inc., 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983) (court upheld a settlement that amounted to less than 1.3% of the claimed damages).

73. Roberts, *supra* note 27, at 913-14.

74. *See* Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 506-08, 698 P.2d 159, 171-73, 213 Cal. Rptr. 256, 268-70 (1985); *Ballpark that Tech-Bilt*, *supra* note 28, at

Illinois case law, unlike that in California, does not require a court to perform a certain test for every settlement. Rather, the totality of the circumstances test allows Illinois trial courts the discretion to decide how closely to scrutinize a settlement. In contrast to the California test's faults, the problem with the standard in Illinois is that it is really no standard at all.

Nevertheless, the Illinois discretionary approach, with some modification, is preferable to the reasonable range test used in California. To require a full-blown evidentiary hearing in every case, when the incidence of wrongful conduct on the part of the settling parties is the exception rather than the rule, is an extremely inefficient use of judicial resources. In practice, the *ad damnum* in some pleadings bears more relationship to the enthusiasm of the pleading party than to the realistic value of the case. Therefore, lawyers and judges expect a plaintiff's *ad damnum* clause in his complaint to be disproportionate to the amount for which he will be willing to settle.

The factors that affect a plaintiff's decision to settle are multifarious. Thus, it is impossible to formulate a bright-line test to articulate when the amount of disproportionality indicates bad faith in all cases. It is therefore preferable to allow a trial judge a considerable amount of discretion in deciding what type of evidentiary hearing should be held to produce the facts necessary for the court to decide based upon all the circumstances. Illinois courts, however, must be open to the possibility of holding a full evidentiary hearing (mini-trial) on the good faith issue if warranted by the totality of the circumstances, including a disproportionate *ad damnum*[75] to settlement ratio.

b. Lack of Consideration

Although a failure of consideration independently would invalidate a settlement under contract principles, Illinois courts equate a lack of consideration running from the settling plaintiff to the defendant with the absence of good faith.[76] Therefore, the second

840. *See also* Gordon & Crowley, *supra* note 35, at 457 (the California good-faith trial plus trial will destroy defendant's incentive to settle).

75. *See supra* note 29.

76. The absence of consideration underlying a settlement could indicate collusion on the part of the plaintiff and the settling defendant. Generally, the opinions provide no clues as to the perceived connection between the lack of consideration and the issue of good faith. Nevertheless, at least one Illinois court has suggested that the presence or absence of consideration provides evidence of the intent of the settling parties. O'Connor v. Pinto Trucking Serv., 149 Ill. App. 3d 911, 917, 501 N.E.2d 263, 267 (1st Dist. 1986). As the *O'Connor* court explained:

way in which a non-settling party may attack the good faith aspect of a settlement is by objecting that the settlement lacks consideration.[77]

The basis for the only Illinois appellate decision that held a settlement not to have been made in good faith was lack of consideration.[78] In *LeMaster v. Amsted Industries*,[79] the Appellate Court for the Fifth District held that a settlement made by the plaintiff's employer was not in good faith because the plaintiff-employee had no rights against his employer that he could relinquish in return for the settlement amount.[80] Because the Workers' Compensation Act[81] supplied the employee's sole remedy against his employer, the settlement between the employee and the employer lacked consideration and, therefore, was without good faith.

The *LeMaster* consideration test for good faith, however, was soon rejected by a line of cases beginning with the Illinois Supreme Court's decision in *Doyle v. Rhodes*.[82] In *Doyle*, the defendant's automobile struck the plaintiff's decedent while he was working as a highway flagman.[83] The defendant filed a third-party complaint

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> The compromise of a disputed claim can provide the requisite consideration for a settlement agreement, but where the claim is questionable, its compromise nevertheless will support a settlement agreement asserted in good faith. A disputed claim which is entirely without foundation, however, cannot support a good faith settlement since the claimant knew or should have known that the claim could not prevail.

Id. (citation omitted). The explanation in Doellman v. Warner & Swasey Co., 147 Ill. App. 3d 842, 498 N.E.2d 690 (1st Dist. 1986), is more representative of the approach most Illinois courts take: "Plaintiff's release . . . had value . . . it thus constituted ample consideration to bind the parties to the release, and its acceptance constituted a good-faith settlement as between [the settling defendant] and the plaintiff." *Id.* at 850, 498 N.E.2d at 696.

77. The challenge for failure of consideration mirrors the inadequacy-of-amount argument (discussed above). It focuses upon the consideration running from the settling plaintiff to the settling defendant, while the inadequacy-of-amount challenge concerns the consideration running from the settling defendant to the settling plaintiff. The two objections differ, however, because courts apply normal contract principles to the failure-of-consideration argument, but inquire into the adequacy of the consideration when deciding the inadequacy-of-amount challenge.

78. LeMaster v. Amsted Indus., 110 Ill. App. 3d 729, 442 N.E.2d 1367 (5th Dist. 1982). *But see* Bituminous Ins. Cos. v. Ruppenstein, 150 Ill. App. 3d 402, 405, 501 N.E.2d 907, 909 (1st Dist. 1986) (appellate court reversed the trial court's finding of lack of good faith); Doellman v. Warner Swasey Co., 147 Ill. App. 3d 842, 844, 850, 498 N.E.2d 690, 693 (1st Dist. 1986) (trial court initially found the settlement lacking in good faith, but vacated the order upon a motion for a rehearing, and then after hearing further arguments, pronounced the settlement to have been made in good faith).

79. 110 Ill. App. 3d 729, 442 N.E.2d 1367 (5th Dist. 1982).

80. *Id.* at 736, 442 N.E.2d at 1373.

81. ILL. REV. STAT. ch. 48, paras. 138.1 to 138.30 (1987).

82. 101 Ill. 2d 1, 461 N.E.2d 382 (1984).

83. *Id.* at 4, 461 N.E.2d at 384.

against the plaintiff's decedent's employer, and the employer defended on the grounds that because it was not "subject to liability in tort" to its employee, as the Contribution Act required, any action for contribution arising out of the event must fail.[84] The court held that the potential liability in tort of the third-party defendant-employer to the plaintiff-employee was sufficient to subject the employer to liability for contribution to a settling joint tortfeasor.[85] Subsequent appellate court cases applied the *Doyle* rationale to the settlement scenario, expressly overruling *LeMaster*.[86]

Generally, Illinois courts of appeal uphold settlements under the good faith standard by emphasizing that the purpose of the Contribution Act is to encourage settlement.[87] In *Ballweg v. City of Springfield*,[88] the Illinois Supreme Court upheld the settlement of a claim that was barred by the statute of limitations at the time of the settlement.[89] The court relied on *Doyle* to support its position that there is potential liability for a tortfeasor until the defense of the statute of limitation is actually raised.[90] Therefore, the fact that the settlement was entered into after the statutory period had expired did not necessarily defeat the good faith requirement.[91]

The *Ballweg* decision gives a great deal of discretion to the trial court. Noting that a trial judge must consider all of the circumstances surrounding a settlement to decide the issue of good faith,[92]

84. *Id.* at 4-6, 461 N.E.2d at 384-85.

85. *Id.* at 10-14, 461 N.E.2d at 386-88.

86. *See* Dixon v. Northwestern Publishing Co., 166 Ill. App. 3d 745, 751, 520 N.E.2d 932, 936 (4th Dist. 1988) (settlement between employer and employee upheld as good faith settlement); Doellman v. Warner Swasey Co., 147 Ill. App. 3d 842, 850, 498 N.E.2d 690, 696 (1st Dist. 1986). *See also* Brown v. Torin Corp., 175 Ill. App. 3d 544, 549-50, 529 N.E.2d 1077, 1080-81 (1st Dist. 1988) (non-settling defendant relied upon *LeMaster* to argue that an employee's indirect release of an employer whose liability was limited by the Workers' Compensation Act was not in good faith; the court upheld the settlement, citing *Doellman* and *Dixon*, but holding that *LeMaster* did not apply).

The above cases illustrate that four years after the Illinois Supreme Court in *Doyle* rejected *LeMaster*'s reasoning, attorneys still advance, and appellate courts still address, the issue of whether a settlement made between an employer and an employee can contain the consideration necessary to support a good faith settlement.

87. Most Illinois decisions do not even mention the second policy consideration of equitably apportioning damages.

88. 114 Ill. 2d 107, 499 N.E.2d 1373 (1986).

89. *Id.* at 123, 499 N.E.2d at 1380. The trial court found that the settlement was made in good faith. *Id.* at 111-12, 499 N.E.2d at 1375. The Appellate Court for the Fourth District reversed this finding due to lack of consideration. *Id.* at 112, 499 N.E.2d at 1375.

90. *Id.* at 122, 499 N.E.2d at 1380.

91. *Id.* at 122-23, 499 N.E.2d at 1380.

92. The *Ballweg* court was first to articulate the totality of the circumstances test for good faith settlements.

the court focused on the fact that one judge had supervised the case throughout the entire settlement process, and that the judge believed good faith existed.[93] Therefore, the Illinois Supreme Court reversed the decision of the appellate court that the settlement lacked good faith.[94]

The rationale of *Ballweg* and *Doyle* formed the basis of the decision in *Dixon v. Northwestern Publishing Co.*[95] In *Dixon*, the Appellate Court for the Fourth District held that the potential tort liability of an employer to an employee that existed before the employer raised and proved the affirmative defense of immunity due to the Workers' Compensation Act provided sufficient consideration to support a good faith settlement under the Contribution Act.[96] The court noted that the question of what constitutes good faith, not being addressed in the Contribution Act itself, is "largely left to the discretion of the trial court."[97] The court suggested that because it is the policy in Illinois to encourage settlements, "[e]ngrafting a restriction on the right to settle directly with a plaintiff would restrict this policy."[98]

The *Ballweg* court's strong emphasis on the policy of encouraging settlements also guided the First District in *O'Connor*, when it decided that sufficient consideration existed to support a settlement even though the settling defendant had already raised a valid affirmative defense of the statute of limitations in a motion for sum-

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93. *Id.* The court's exact language is as follows:

> In reaching the conclusion that the settlement was entered into in good faith, we are not wearing blinders. We are mindful that the entire circumstances surrounding a settlement must be taken into account. In the case at bar, the record indicates that the trial judge was involved in the entire settlement process. He was convinced that the settlement was entered into in good faith.

Id.

For a discussion of the pros and cons of mandatory settlement conferences, with judges acting as mediator/arbitrator/adjudicator, see Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?* 21 TRIAL 24, 24-29 (Oct. 1985).

94. 114 Ill. App 3d at 123, 499 N.E.2d at 1380.

95. 166 Ill. App. 3d 745, 520 N.E.2d 932 (4th Dist. 1988).

96. *Id.* at 751, 520 N.E.2d at 936.

97. *Id.* at 751, 520 N.E.2d at 937 (citing Perez v. Espinoza, 137 Ill. App. 3d 762, 484 N.E.2d 1232 (1st Dist. 1985); Barreto v. City of Waukegan, 133 Ill. App. 3d 119, 478 N.E.2d 581 (2d Dist. 1985)).

98. *Id.* at 752, 520 N.E.2d at 937. Other opinions that express this permissive attitude toward the trial court's finding of good faith include Brown v. Torin Corp., 175 Ill. App. 3d 544, 529 N.E.2d 1077 (1st Dist. 1988); Leaman v. Anderson, 172 Ill. App. 3d 62, 526 N.E.2d 639 (3d Dist. 1988); Mallaney v. Dunaway, 178 Ill. App. 3d 827, 533 N.E.2d 1114 (3d Dist. 1988); O'Connor v. Pinto Trucking Serv., 149 Ill. App. 3d 911, 501 N.E.2d 263 (1st Dist. 1986); Bryant v. Perry, 154 Ill. App. 3d 790, 504 N.E.2d 1245 (2d Dist. 1986); Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 482 N.E.2d 351 (1st Dist. 1985).

mary judgment.[99] Because the plaintiff "seriously opposed" this motion, and because the trial court had not yet ruled on the motion, the court concluded that in giving up this disputed claim, the plaintiff supplied the necessary consideration.[100]

The *O'Connor* court made it clear that once parties settle, the burden upon the non-settling defendant is great. Because of the importance of the public policy favoring "peaceful and voluntary resolutions of claims through settlement agreements,"[101] the non-settling defendant must produce clear and convincing evidence of a lack of good faith to invalidate a release or a covenant.[102] This policy governs despite the fact that the non-settling defendant may have little knowledge of the factual details involved in the settlement.

In following the *Ballweg* court's clear directive that settlements should be encouraged, the appellate court in *Ellis v. Bliss*[103] developed a rationale more tenable than the "potential claim" basis for labeling a settlement entered into between an employer and an employee a good faith settlement. The *Ballweg* opinion focused upon the employer's potential liability to his employee, the plaintiff in the original lawsuit.[104] In contrast, the *Ellis* court held that the third-party liability of the employer to the defendant in the original lawsuit filed by the employee was sufficient to invoke the Contribution Act.[105]

The *Ellis* trial court dismissed the employee's claim against her employer after the employer raised the affirmative defense that, as between them, the Workers' Compensation Act provided the sole avenue for redressing the employee's injuries.[106] Subsequently, another defendant, Bliss, filed a third-party claim against the employer.[107] Once again the employer, now as a third-party defendant, negotiated with the plaintiff and reached a settlement agreement.[108] The defendant, Bliss, objected to the settlement, ar-

99. *O'Connor*, 149 Ill. App. 3d at 915-16, 501 N.E.2d at 266.

100. *Id.* at 917, 501 N.E.2d at 267. The court additionally noted that at the time of the settlement, the plaintiff had asserted other counts against the settling defendant that remained invulnerable to any statute of repose the settling defendant could raise. *Id.*

101. *Id.* at 915, 501 N.E.2d at 266.

102. *Id.*

103. 173 Ill. App. 3d 779, 527 N.E.2d 1022 (1st Dist. 1988).

104. Ballweg v. City of Springfield, 114 Ill. 2d 107, 122, 499 N.E.2d 1373, 1380 (1986).

105. *Ellis*, 173 Ill. App. 3d at 782-83, 527 N.E.2d at 1024.

106. *Id.* at 781, 527 N.E.2d at 1023.

107. *Id.*

108. *Id.*

guing that the settlement lacked consideration because the plaintiff did not have a potential tort claim against her employer.[109]

After reasserting the *Doyle* holding, the Illinois Appellate Court for the First District in *Ellis* addressed the employer's predicament as a third-party defendant.[110] The court explained that although the Workers' Compensation Act provides the exclusive remedy for an employee-employer claim, a co-defendant to the original action can again bring the employer back into the case as a third-party defendant, exposing it to potentially unlimited liability.[111] It follows, the court continued, that if the employer is not allowed to settle with the plaintiff, then the employer, unlike any other joint tortfeasor, must remain in the lawsuit as a prisoner to the whims of its former co-defendant.[112] This potential risk to the employer served as adequate consideration for the good faith settlement.

c. Existence of Potentially Collusive Relationship

Bryant v. Perry[113] and *Wasmund v. Metropolitan Sanitary District*[114] are two good faith cases that involved settlements between parties who were related by blood or a close relationship.[115] Although the relationships between the parties suggest a potential for collusion, the opinions in these cases applied the same standards to make the determination of the good faith issue used in other cases where no relationship is present.

In *Bryant*, a mother entered into a settlement between herself as an individual and herself as the representative for her minor child.[116] The defendant challenged the settlement, claiming it was

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109. *Id.*

110. *Id.* at 782, 527 N.E.2d at 1024.

111. *Id.* at 783, 527 N.E.2d at 1024.

112. *Id.* The court stated:

> Denying [the employer] an opportunity to make a fair settlement with the plaintiff would place a third party defendant in an untenable position. On the one hand, despite the exclusive remedy provisions of the Workers Compensation Act, [the defendant] can join [the employer] as a party to the case and expose it to payment of an unlimited amount under the Contribution Act. Yet, on the other hand, adopting [the defendant's] argument, [the employer] could never take advantage of the right to discharge its liability by settling with the plaintiff, a right granted to all other tortfeasors. This not only defeats the policy of encouraging settlements, but would 'allow one litigant to hold the other hostage to its own intransigence.'

Id.

113. 154 Ill. App. 3d 790, 504 N.E.2d 1245 (1st Dist. 1986).

114. 135 Ill. App. 3d 926, 482 N.E.2d 351 (1st Dist. 1985).

115. *See also* Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989) (decedent was grandson of defendant with whom the plaintiffs settled).

116. *Bryant*, 154 Ill. App. 3d at 791, 504 N.E.2d at 1246. The mother had been the

collusive and therefore lacking in good faith.[117] The trial court approved the settlement.[118]

The appellate court minimized the importance of the conflict, noting that the mother's insurance company, not the mother, was responsible for paying the settlement amount.[119] Similarly, the court reflected that the child's status as a minor ensured that any dispersal of insurance funds made by the mother to her child would require court approval.[120] The court concluded that under these circumstances, "it would be mere speculation to assume that [the mother's] motives were not directed in her daughter's best interest."[121]

The *Wasmund* decision involved settling parties who were "friends" before the settlement, and husband and wife thereafter.[122] As in *Bryant*, the potentially collusive settlement in *Wasmund* was effectuated between the driver and passenger of an automobile that crashed.[123] The driver was the boyfriend of the automobile's owner, a passenger in the car.[124] In reply to the nonsettling defendant's contention that the settlement agreement was collusive, the appellate court emphasized that the parties had not been married either at the time of the accident or at the time of the settlement.[125] The court ignored any potentiality for collusion in a relationship leading to marriage, stating that the mere fact that the parties were "friends" was insufficient to "taint the settlement with

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driver of the car in which her daughter was a passenger when it collided with a truck driven by the defendant. *Id.* Both the mother and the daughter sustained injuries, and the mother brought suit on her and her daughter's behalf. *Id.* The defendant subsequently filed a counterclaim seeking contribution from the mother for her role in the accident. *Id.* The mother-daughter settlement released the mother from liability for such contribution for a sum of $20,000. *Id.*

117. *Id.* at 795, 504 N.E.2d at 1248. The defendant also challenged the settlement on the grounds that it lacked consideration because the doctrine of parental immunity would bar a suit brought by the daughter against the mother. *Id.* at 792-95, 504 N.E.2d at 1246-48. The court analogized the doctrine of parental immunity in this case to the statute of limitations in *Ballweg*, and held that the potential liability of mother to daughter supplied adequate consideration to support the settlement. *Id.* at 794-95, 504 N.E.2d at 1248.

118. *Id.* at 791, 504 N.E.2d at 1246.

119. *Id.* at 795-96, 504 N.E.2d at 1248-49. *See also* Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989) (court placed similar emphasis upon insurance companies' payment of the damages).

120. *Bryant*, 154 Ill. App. 3d at 795-96, 504 N.E.2d at 1249.

121. *Id.* at 796, 504 N.E.2d at 1249.

122. Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 927, 930, 482 N.E.2d 351, 352, 354 (1st Dist. 1985).

123. *Id.* at 927, 482 N.E.2d at 352.

124. *Id.*

125. *Id.* at 930, 482 N.E.2d at 354.

an indicia of collusion."[126] Similarly, the court found the fact that the girlfriend's insurer was legally obligated to defend the boyfriend and that it actually paid the settlement amount insufficient to undermine the settlement's good faith.[127]

The existence of the types of relationships involved in *Bryant* and *Wasmund* presents a good reason for courts to approach such settlements more warily than one between non-related parties. To apply a presumption of good faith, which may be rebutted only by clear and convincing evidence,[128] when a relationship exists that could be the basis for collusion is contrary to common sense.

d. Failure to Allocate

Another way in which a non-settling defendant may attack the good faith of a settlement is to argue that the settling parties failed to specify how much of the damage amount corresponded with a particular plaintiff or a particular count of the complaint.[129] Like the absence of consideration argument, a failure-to-allocate challenge addresses concerns other than good faith.[130] Neverthless, recent Illinois cases suggest that the success of a failure to allocate argument hinges upon whether the settlement was made in good faith.[131]

The case of *Leaman v. Anderson*[132] provides an example of the Illinois approach to the failure to allocate challenge. In *Leaman*, the complaint contained both tort and contract claims.[133] The landlord settled with the plaintiff-guest for injuries sustained on premises owned by the landlord, and received a full release for all

126. *Id.*

127. *Id.* at 930-31, 482 N.E.2d at 354.

128. *But see* Bryant v. Perry, 154 Ill. App. 3d 790, 798, 504 N.E.2d 1245, 1251 (1st Dist. 1986) (appellate court indicated that the trial judge had found no collusion even using the preponderance of the evidence standard).

129. This challenge may be used to counter a contribution claim brought by the settling defendant against a non-settling defendant whose liability was extinguished by the settlement.

130. *See, e.g.*, Houser v. Witt, 111 Ill. App. 3d 123, 443 N.E.2d 725 (4th Dist. 1982) (failure to allocate between parties made it impossible for the party seeking contribution to prove he had paid more than his pro rata share, as the Contribution Act requires). Similarly, a failure to allocate between those claims based in tort and those not based in tort makes it impossible to determine what damages are subject to contribution, as the Contribution Act applies only to tort claims.

131. *See* Hall v. Archer-Daniels-Midland Co., 122 Ill. 2d 448, 524 N.E.2d 586 (1986), *rev'd on other grounds*, 122 Ill. 2d 448, 524 N.E.2d 586 (1988); Leaman v. Anderson, 172 Ill. App. 3d 62, 526 N.E.2d 639 (3d Dist. 1988).

132. 172 Ill. App. 3d 62, 526 N.E.2d 639 (3d Dist. 1988).

133. *Id.* at 64, 526 N.E.2d at 639. The contract claim was for the breach of an implied warranty. *Id.*

the defendants.[134] The tenant-joint tortfeasor, against whom the landlord proceeded in an action for contribution, contended that the failure to allocate the settlement between the tort and contract counts prevented recovery because the amount of contribution could not be determined.[135] The trial court held for the tenant and dismissed the landlord's suit for contribution.[136]

The appellate court acknowledged that the settlement did not designate the amounts attributable to the tort and contract claims separately, but rejected the non-settling defendant's challenge.[137] The court noted that it was possible to construe the contract claim as a tort claim and, therefore, solve the allocation problem by subjecting both claims to contribution.[138] The court, however, decided that analyzing the basis of the claim was unnecessary, because the non-settling defendant (the tenant) had failed to show that bad intent had motivated the settling defendant (the landlord) not to allocate the settlement amount between the claims.[139] The appellate court reversed the trial court's holding and held that the non-settling defendant must apply his pro rata share to the entire settlement amount.[140]

Although the court's reasoning is not completely clear, the *Leaman* opinion seems to use the presumption of good faith and the lack of evidence to the contrary as a reason to avoid deciding the allocation question.[141] The *Leaman* case indicates the extent to

134. *Id.* at 63-64, 526 N.E.2d at 639-40.

135. *Id.* at 64, 526 N.E.2d at 640. The defendant based his argument upon Houser v. Witt, 111 Ill. App. 3d 123, 443 N.E.2d 725 (4th Dist. 1982). The *Houser* court, however, did not address the failure to allocate as a challenge to good faith. The court held that the settling parties' failure to allocate between damages attributable to the two plaintiffs abrogated a contribution claim brought by the settling defendant against one of the plaintiffs as a third-party defendant, because the settling defendant had no way of proving that he had paid more than his pro rata share of the liability. *Id.* at 125-27, 443 N.E.2d at 726-27.

136. *Leaman*, 172 Ill. App. 3d at 64, 526 N.E.2d at 640.

137. *Id.* at 66-67, 526 N.E.2d at 641.

138. *Id.* at 66, 526 N.E.2d at 641.

139. *Id.* at 66-67, 526 N.E.2d at 641.

140. *Id.* at 67, 526 N.E.2d at 641. The court stated as follows:

> Here, the settlement agreement did not allocate between the separate claims. One of [the plaintiff's] claims clearly sounded in tort. The defendant claims the second claim was based in contract. Although the second count can also be fairly construed as based on tort theory, we need not address that issue because [the non-settling defendant (tenant)] has not shown that [the settling defendant (landlord)], in bad faith, attempted to pass on his liability for an arguably uncontributable claim by not allocating the settlement amount between the two counts.

Id. at 66-67, 526 N.E.2d at 641.

141. The court stated that its reasoning followed Hall v. Archer-Daniels-Midland

which reviewing courts will go to affirm findings of good faith whether or not the record supports such a finding.[142]

e. *Mere Tactical Motive of Plaintiff*

The final argument a non-settling defendant can advance to challenge the good faith of a settlement is that the settlement represents a mere tactical motive of the plaintiff. Although non-settling defendants continue to raise this objection,[143] and in the rare case a plaintiff's tactical move can indeed create inequity in the allocation of liability,[144] the few Illinois cases that have addressed this issue have rejected the argument summarily.[145]

The Appellate Court for the First District in *Pell v. Victor J. Andrew High School*[146] faced a challenge to the good faith of a settlement based on this strategic move theory.[147] In *Pell*, the

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Co., 122 Ill. 2d 448, 524 N.E.2d 586 (1988). In *Hall*, the Illinois Supreme Court considered whether a settling party, by failing to allocate between compensatory and punitive damages, was trying unfairly to pass onto the non-settling defendant in a contribution claim part of the punitive damages for which only the settling party was liable. *Id.* at 458-61, 524 N.E.2d at 591-92. The court suggested that because the trial court found the settlement to have been made in good faith, the question was resolved. *Id.* at 459-61, 524 N.E.2d at 592. The *Hall* court stated:

> The Contribution Act does not expressly require an allocation of settlement proceeds between alternative theories of recovery asserted by a plaintiff against a defendant . . . . Whether a tortfeasor, by settling with the plaintiff, is unfairly attempting to pass on punitive damages for which he would not otherwise be able to obtain contribution goes to the question of whether the settlement was made in good faith . . . . In the trial court proceedings in this case, both Corrigan and Mid-States moved for dismissal of ADM's contribution actions on the ground that the settlement failed to allocate between the plaintiff's two separate claims against ADM. Corrigan and Mid-States did not attempt to challenge the good faith of the settlement, however, or to present the issue for resolution by either the judge or jury.

Id. at 459-60, 524 N.E.2d at 592. Unlike the situation in *Leaman*, all claims involved in *Hall* were undisputedly tort claims. The punitive damages at issue in *Hall*, however, were not subject to contribution, just as the contract claim in *Leaman* was not covered by the Contribution Act. Nevertheless, by treating the nonallocation issue solely as an element of good faith, the court ignored the fact that the Contribution Act applies only to tort claims. Therefore, a party should be able to challenge an action against him for contribution on the grounds that the settled claim was not a tort claim.

142. Because a holding to the contrary would have absolved the non-settling defendant of all liability, leaving the settling defendant to pay more than his pro rata share, the decision also represents a more general problem: hard cases make bad law.

143. *See* Dixon v. Northwestern Publishing Co., 166 Ill. App. 3d 745, 752, 520 N.E.2d 932, 937 (4th Dist. 1988).

144. *See infra* notes 155-59 and accompanying text.

145. *See Dixon*, 166 Ill. App. 3d at 752, 520 N.E.2d at 937; *Lowe*, 124 Ill. App. 3d at 95, 463 N.E.2d at 804; Pell v. Victor J. Andrew High School, 123 Ill. App. 3d 423, 435, 462 N.E.2d 858, 867 (1st Dist. 1984).

146. 123 Ill App. 3d 423, 462 N.E.2d 858 (1st Dist. 1984).

147. *Id.* at 434-35, 462 N.E.2d at 867. Because the non-settling defendant failed to

plaintiff severed her spine after jumping from a mini-trampoline during gym class.[148] She brought suit against the manufacturer of the trampoline, the school, and the school district,[149] but settled with the school and the school district for $1.6 million prior to trial.[150] The manufacturer, the sole defendant at trial, was held liable for a $5 million jury verdict.[151]

The manufacturer contended on appeal that the settlement had not been entered into in good faith because the plaintiff had settled with the two defendants for less than their pro rata shares and then attempted to make up for the difference by seeking from the manufacturer at trial more than its pro rata share.[152] In rejecting the manufacturer's argument, the court adopted the reasoning of the trial judge: "simply because plaintiff made a good settlement with somebody else and then seeks more money from [the manufacturer] because plaintiff is in a better bargaining position doesn't make it a bad faith settlement."[153] Thus, in Illinois, a settlement that enhances the plaintiff's chances of getting more money from the remaining defendant will not necessarily be considered one lacking in good faith. A subsequent Illinois appellate case indicated that a settlement will not fail to meet the good faith standard "simply because its purpose is to eliminate third party liability."[154]

Perhaps the situation this tactical motive challenge was meant to address has not yet arisen in Illinois. In at least two California cases,[155] plaintiffs dismissed valid claims against certain defendants in exchange for nominal sums in order to simplify the issues before

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file contribution actions against the settling defendants as counterclaims to the original action, the court held that the defendant lacked standing to appeal the dismissal of the settling defendants. Therefore, the court's discussion of the good faith issue is dictum. *Id.* at 435, 462 N.E.2d at 867.

148. *Id.* at 425, 427, 462 N.E.2d at 861.

149. *Id.* at 427, 462 N.E.2d at 861-62. The plaintiff also sued the manufacturer of the mat onto which she had fallen, but withdrew this claim due to insufficient evidence. *Id.*

150. *Id.* at 425, 462 N.E.2d at 861.

151. *Id.* The manufacturer's actual liability amounted to $3.4 million, because the $5 million jury verdict was reduced by the $1.6 million settlement amount. *Id.* at 425-26, 462 N.E.2d at 861.

152. *Id.* at 434, 462 N.E.2d at 867.

153. *Id.* at 435, 462 N.E.2d at 867.

154. Dixon v. Northwestern Publishing Co., 166 Ill. App. 3d 745, 752, 520 N.E.2d 932, 937 (4th Dist. 1988) (citing Foss Alaska Line, Inc. v. Northland Servs., Inc., 724 P.2d 523, 526 (Alaska 1986)).

155. *See* Commercial Union Ins. Co. v. Ford Motor Co., 640 F.2d 210 (9th Cir. 1981); Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981) (California Supreme Court subsequently noted its disapproval of *Cardio Systems* in Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7 213 Cal. Rptr. 256, 264 n.7 (1985)).

the jury and to increase their chances of winning.[156] The strategy worked in both cases, and each plaintiff received a substantial jury verdict, all of which had to be paid by the remaining defendant.[157] One commentator has suggested that allowing such inequitable apportionment of damages places far too much power in the hands of the plaintiff.[158] Had the settlements not occurred, the non-settling defendant could have sought contribution for any amount he paid that constituted more than his pro rata share of the liability. With the execution of nominal sum settlements, however, the non-settling defendant's liability exceeds his pro rata share, because it is reduced only by the nominal sums, and not by the settling defendants' actual fair share of the liability. Nevertheless, the non-settling defendant has no redress against these potential third-party defendants because the nominal sum settlements extinguished their liability.[159]

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156. In *Cardio Systems*, plaintiffs filed an action in medical malpractice and products liability after their decedent died on the operating table. *Cardio Sys.*, 122 Cal. App. 3d at 882-83, 176 Cal. Rptr. at 255-56. The incorrect use of a heart-lung machine caused the death. *Id.* at 883, 176 Cal. Rptr. at 256. Before trial, plaintiffs dismissed the products liability action against Cardio, the distributor of the machine, in return for a waiver of its costs. *Id.* at 882, 885, 176 Cal. Rptr. at 255, 257. As the plaintiffs' attorney explained, the reason for the dismissal was strictly tactical: "I had no desire . . . to complicate a clear liability, relatively simple medical malpractice case by bringing in a products case." *Id.* at 884-85, 176 Cal. Rptr. at 256.

In *Commercial Union Insurance Co.*, the plaintiff brought suit for injuries allegedly caused by a defective Ford automobile. The plaintiff dismissed Ford Motor Company ("Ford") for tactical reasons (to avoid Ford's expert witnesses), and proceeded against the retail dealer alone. The trial court equated a good faith dismissal with a good faith settlement, and failed to consider whether the decision to dismiss reflected the "cooperative decision-making between the parties which is the earmark of settlement." *Commercial Union Ins. Co.*, 640 F.2d at 213-14.

157. In *Cardio Systems*, the hospital bore the responsibility for the verdict. *Cardio Sys.*, 122 Cal. App. 3d at 890-91, 176 Cal. Rptr. at 260. In *Commercial Union Insurance Co.*, the verdict against the car dealer was $3,250,000. *Commercial Union Ins. Co.*, 640 F.2d at 213-14. The Ninth Circuit Court of Appeals reversed the finding of good faith of the court below. *Id.*

See also Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). In *Tech-Bilt*, the plaintiff-homeowners brought suit against the developer (Tech-Bilt) and the soils engineers (Woodward-Clyde) for structural defects in their residence. *Tech-Bilt*, 38 Cal. 3d at 491, 698 P.2d at 161, 213 Cal. Rptr. at 258. Realizing that their suit against Woodward-Clyde would be time barred as soon as the defendant raised the statute of limitations, the plaintiffs agreed to dismiss this action with prejudice in exchange for Woodward-Clyde's waiver of any claim against the plaintiffs for costs incurred in defending the action. *Id.* Woodward-Clyde thereby immunized itself from liability for any contribution claim Tech-Bilt could bring against it for a mere $55. *Id.* The California Supreme Court, however, reversed the dismissal of Woodward-Clyde on the grounds that the settlement lacked good faith. *Id.* at 502, 698 P.2d at 168, 213 Cal. Rptr. at 265.

158. *See* Roberts, *supra* note 27, at 869-74, 915.

159. *Id.* at 872.

Illinois courts must be prepared to address the issue of the nominal sum settlement for tactical motives. Thus, trial courts should carefully scrutinize settlement proceedings and remain open to conducting an evidentiary hearing to determine if the plaintiff's strategic acts prompted a nominal sum settlement, unfairly depriving a defendant of the statutory right to contribution.

C. Discussion

The *Lowe v. Norfolk & Western Railway* decision stands alone in Illinois as an attempt to define good faith. Subsequent cases, although never explicitly altering the *Lowe* definition, clearly diverge from *Lowe*'s restrictive non-tortious conduct test. Illinois courts have adopted an approach that allows trial courts to consider all of the circumstances they deem relevant to a settlement in determining if good faith exists. Although some courts and commentators may disapprove of the Illinois approach as a muddling of standards, broadening the non-tortious conduct test to allow for the consideration of evidence of an unreasonably low settlement amount does not necessarily defy logic. Certainly, an unreasonably low settlement amount may be indicative of collusion or unfair dealing. This is true as well with the lack of consideration and the existence of a close relationship. It would seem sensible for a trial court to be on guard for any type of evidence that may suggest wrongful conduct by the plaintiff or collusion between the plaintiff and the settling defendant. Illinois law allows a trial court the flexibility to hear or view such evidence without mandating that the judge conduct a mini-trial on the subject in every case, as California law requires.

The fact-bound nature of the Illinois test makes defining good faith difficult. The difficulty is magnified by the lack of complete factual records of the trial courts' good faith proceedings. In many of the Illinois appellate cases on the subject, the courts appear to have decided the good faith issue without reference to the facts presented to the trial court. Therefore, it is difficult to ascertain just which elements must be present to sustain a finding of good faith. In the authors' opinion, a good faith settlement is one that is not substantially unfair to any other joint tortfeasor. Insisting on a more specific definition would place unnecessary and unwise restraints upon trial judges, and may lead to the mandatory mini-trials that have become prevalent in California.

However Illinois courts come to define good faith, complete factual records of the good faith hearing conducted in response to

either a motion or a request for an evidentiary hearing would help frame the good faith discussion at both the trial and appellate levels. Without such a record, the presumption of good faith becomes impossible to rebut on appeal. The failure of the trial court in close cases to require that a complete factual record be made makes it very difficult for the reviewing court to decide whether the trial judge has or has not abused her discretion in deciding the good faith question. Similarly, it is only with the help of a complete factual record that attorneys and other courts not directly involved in the proceeding can discover what a court considered to be a settlement made in good faith. Without the salient details of a settlement recorded, the labels "good faith" or "bad faith" are nearly worthless. We will know what constitutes good faith in Illinois only after more cases are decided in which a complete factual record is made in the trial court.

III. Approved Methods for Challenging the Good Faith of a Settlement

The Contribution Act does not set forth a specific procedure that must be followed in making the good faith determination. The cases that considered the question have reposed wide discretion in the trial court.

A. Case Precedent

1. Type of Procedure Used to Determine Good Faith

The court in *Lowe v. Norfolk & Western Railway* was first to address the procedural issue.[160] As with the good faith question, the *Lowe* opinion derived guidance from California law.[161] Unlike the Illinois Contribution Act, the California Contribution Act specifically provides that a court may hold a hearing on the issue of good faith in which affidavits are presented or factual evidence is taken.[162] Adopting the spirit of the California Contribution Act, the *Lowe* court pronounced that when faced with a request for a

160. Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 96, 463 N.E.2d 792, 804 (5th Dist. 1984). This part of the court's decision, however, is dictum because the non-settling defendant had failed to request a hearing in the trial court or raise the issue in a post-trial motion. *Id.*

161. *Id.*

162. Cal. Civ. Proc. Code § 877.6(b) (West Supp. 1989). The California Contribution Act provides in pertinent part that: "The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing." *Id.*

hearing on the good faith question, "the trial court is required to hold one."[163] The court added that the nature of the evidence allowed for the hearing, however, should be within the court's discretion, as the California Contribution Act provides.[164]

Subsequent cases have tempered the *Lowe* court's strong language regarding the necessity of providing a hearing, and have emphasized the need for discretion in the trial court in determining what type of hearing, if any, to conduct. In *Barreto v. City of Waukegan*,[165] the non-settling defendant argued for the reversal of the trial court's good faith finding because the judge conducted neither a bench nor a jury trial to determine this issue, and he failed to review affidavits or testimony showing the facts pertinent to the settlement.[166] In rejecting the defendant's position, the Illinois Appellate Court for the Second District noted that *Lowe* was unclear on whether a mandatory hearing upon request necessarily required an evidentiary hearing.[167] The *Barreto* court stated that *Lowe* did not determine the preliminary showing a party must make to obtain such a hearing.[168] The *Barreto* court concluded that a decision regarding the type of hearing should be left to the trial court.[169] Because the trial judge is in the best position to determine what information is needed to decide the issue of good faith, the trial court may choose from the full range of options, including but not limited to the evidentiary hearing.[170] The *Barreto* court held that the non-settling defendant was not entitled to

163. *Lowe*, 124 Ill. App. 3d at 96, 463 N.E.2d at 804. *See also* Dixon v. Northwestern Publishing Co., 166 Ill. App. 3d 745, 752, 520 N.E.2d 932, 937 (4th Dist. 1988).

164. *Lowe*, 124 Ill. App. 3d at 96, 463 N.E.2d at 804. The court's need for discretion is well illustrated by the *Lowe* case itself, which was a complex lawsuit arising out of a chemical spill, and which consolidated the cases of forty-seven plaintiffs against four major companies. *Id.* at 85, 463 N.E.2d at 792, 797. As is usually the case with complex litigation, the trial court had reviewed "mountains of depositions and other discovery materials" by the time it decided the good faith question and, therefore, could be assumed to be knowledgeable regarding the facts and legal issues involved. *Id.* at 96, 463 N.E.2d at 804.

Requiring the trial judge in *Lowe* to conduct a full scale evidentiary hearing to determine the issue of good faith would have been counter-productive. Providing a trial judge in such a situation with discretion to determine what types of additional materials she needs to decide the question is the preferable course. The judge, however, should be required to identify clearly for the record all of the materials that she reviewed in coming to her decision.

165. 133 Ill. App. 3d 119, 478 N.E.2d 581 (2d Dist. 1985).

166. *Id.* at 127, 478 N.E.2d at 587.

167. *Id.* at 128, 478 N.E.2d at 587.

168. *Id.*

169. *Id.* at 128, 478 N.E.2d at 587-88.

170. *Id.*

an evidentiary hearing.[171] Furthermore, the court held that because the Contribution Act does not provide for the right to trial by jury, and the right to contribution was unknown at common law, no right to a jury trial on the good faith issue exists under the Illinois Constitution.[172]

In view of the foregoing, the law in Illinois is that trial courts may, but under no circumstances are required to, conduct an evidentiary hearing to determine the good faith issue. The Illinois trial judge may base her decision upon a full evidentiary hearing (trial), a non-testimonial evidentiary hearing (affidavits, depositions, or other discovery materials of record, as well as argument of counsel),[173] the pleadings alone, argument of counsel alone, or, presumably, her unaided knowledge of the settlement proceedings.

2. Proper Time to Challenge Good Faith

The cases suggest that one of the main impediments to a party's obtaining an evidentiary hearing on the issue of good faith is counsel's failure to request one at the proper time.[174] In the usual scenario, the non-settling defendant's counsel objects to the finding of good faith when the trial judge approves the settlement, but does not request an evidentiary hearing. Then, once the non-settling defendant loses at trial, counsel raises the objection as part of his post-trial motion. The first time counsel requests any type of hearing is usually on appeal when he submits that the trial court's failure to conduct such a hearing was error.

The few Illinois appellate cases that have addressed the issue agree that the proper time to request a hearing on the good faith

171. *Id.* at 129, 478 N.E.2d at 588. Cases decided after *Barreto* have treated the issue similarly. The trial court in McKanna v. Duo-Fast Corp., 161 Ill. App. 3d 518, 515 N.E.2d 157 (1st Dist. 1987), heard arguments of counsel and found the settlement at issue to be in good faith. *Id.* at 526, 515 N.E.2d at 163. The defendant asserted on appeal that it was entitled to an evidentiary hearing on the issue of good faith. *Id.* The appellate court held that the trial court was "authorized to determine the good faith of a settlement based solely upon the arguments of counsel." *Id. See also* Perez v. Espinoza, 137 Ill. App. 3d 762, 765-66, 484 N.E.2d 1232, 1235 (1st Dist. 1985); Pell v. Victor J. Andrew High School, 123 Ill. App. 3d 423, 435, 462 N.E.2d 858, 867 (1st Dist. 1984).

The court in Lorenz v. Air Illinois, Inc., 168 Ill. App. 3d 1060, 522 N.E.2d 1352 (1st Dist. 1988), further limited *Lowe*'s required hearing when it held that the "defendant was not entitled to the hearing it seeks as a matter of law." *Id.* at 1064, 522 N.E.2d at 1355.

172. *Barreto*, 133 Ill. App. 3d at 129, 478 N.E.2d at 588.

173. *Id.* at 128, 478 N.E.2d at 587-88; Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 96, 463 N.E.2d 792, 804 (5th Dist. 1984).

174. *See, e.g., McKanna*, 161 Ill. App. 3d at 526, 515 N.E.2d at 163; *Lowe*, 124 Ill. App. 3d at 96, 463 N.E.2d at 804.

question is before trial.[175] Good practice would indicate that the settling parties should raise the issue when they come before the court to have their settlement approved. Several cases suggest, however, that depending upon the circumstances,[176] courts may allow the issue to be tried as part of the main trial[177] or may even consider an offer of proof made on a post-trial motion.[178]

3. Burdens of Proof

According to the overwhelming majority of cases in Illinois, resolution of a claim through release or covenant creates a presumption of validity.[179] Therefore, once the parties reach a settlement agreement, the party challenging the release assumes the burden of proving any assertion of invalidity.[180] Furthermore, because public policy so values the peaceful resolution of claims, the challenging

175. *See Barreto*, 133 Ill. App. 3d at 129 n.1, 478 N.E.2d at 588 n.1; Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 929, 482 N.E.2d 351, 353 (1st Dist. 1985). *See also* Vertecs v. Fiberchem, Inc., 669 P.2d 958, 960 (Alaska 1983) (adjudication of the good faith issue ordinarily should take place before the tort suit); Fisher v. Superior Court, 103 Cal. App. 3d 434, 438-39, 163 Cal. Rptr. 47, 51 (1980) (issue of good faith should be tried separately and in advance of the trial of the tort issues).

176. For a review of the various contexts in which the issue has been addressed in Illinois, see Bituminous Insurance Companies v. Ruppenstein, 150 Ill. App. 3d 402, 404-05, 501 N.E.2d 907, 909 (1st Dist. 1986).

177. *See* Hall v. Archer-Daniels-Midland Co., 142 Ill. App. 3d 200, 211-12, 491 N.E.2d 879, 886 (4th Dist. 1986), *rev'd on other grounds*, 122 Ill. 2d 448, 524 N.E.2d 586 (1988).

178. *See McKanna*, 161 Ill. App. 3d at 526, 515 N.E.2d at 163; *Hall*, 142 Ill. App. 3d at 212, 491 N.E.2d at 886.

179. Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989); Brown v. Torins Corp., 175 Ill. App. 3d 544, 550, 529 N.E.2d 1077, 1081 (1st Dist. 1988); Mallaney v. Dunaway, 178 Ill. App. 3d 827, 833, 533 N.E.2d 1114, 1117 (3d Dist. 1988); *Bituminous Ins. Cos.*, 150 Ill. App. 3d at 405, 501 N.E.2d at 909; *Wasmund*, 135 Ill. App. 3d at 928, 482 N.E.2d at 353. In Hall v. Archer-Daniels-Midland Co., 122 Ill. 2d 448, 524 N.E.2d 586 (1988), the Illinois Supreme Court expressed the rationale underlying the presumption of good faith as it applied to a settlement made by one defendant that extinguished the liability of all the defendants. The court stated that: "In settling with the plaintiff and extinguishing the potential tort liability of the others[, the settling defendant] undertook the collective liability of the parties for the injuries at issue here, subject only to whatever success it might later have in its contribution actions against [the non-settling defendants]." *Id.* at 461, 524 N.E.2d at 592.

Although the reason for the presumption is less apparent in the case of a defendant who by settling extinguishes only his own liability, courts do not distinguish between the two situations. The courts apply the presumption in both instances. The sole rationale expressed by Illinois courts to support the presumption in the latter case consists of the perceived need to reduce the volume of litigation by encouraging settlement. *See, e.g.*, McComb v. Seestadt, 93 Ill. App. 3d 705, 708, 417 N.E.2d 705, 708 (1st Dist. 1981). The presumption encourages settlement by favoring the settling party and thereby making it more difficult for an opponent to successfully challenge a settlement.

180. *Bituminous Ins. Cos.*, 150 Ill. App. 3d at 405, 501 N.E.2d at 909; *Wasmund*, 135 Ill. App. 3d at 928, 482 N.E.2d at 353.

party must prove her assertion by clear and convincing evidence.[181]

Illinois courts do not require settling parties to present a preliminary showing of good faith in order to have a valid good faith settlement. The presumption of good faith should prevail absent any objections.[182] The appellate court in *Bituminous Insurance Cos. v. Ruppenstein*,[183] however, left a small opening for the argument that some preliminary showing must be made. The trial judge in *Bituminous Insurance* held that the settling plaintiff had failed to present the requisite showing of good faith.[184] The trial court's finding, however, was reversed on appeal.[185] The Appellate Court for the First District, in rejecting the finding, cited *Wasmund* for the proposition that the act of settling itself creates a presumption of good faith.[186] As an alternative basis for its decision, the court stated: "Assuming *arguendo* that the law requires a preliminary showing of good faith as [the non-settling defendant] contends . . . we find that the trial court erred in holding such showing had not been made."[187] Thus, the *Bituminous Insurance* court suggested an argument that may receive consideration in the future.[188]

The requirement that a party challenging good faith must prove his assertion by clear and convincing evidence, although never directly refuted, has been advanced in only a few opinions.[189] Never-

181. Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989); *Brown*, 175 Ill. App. 3d at 550, 529 N.E.2d at 1081; O'Connor v. Pinto Trucking Serv., 149 Ill. App. 3d 911, 915, 501 N.E.2d 263, 266 (1st Dist. 1986); *Wasmund*, 135 Ill. App. 3d at 928, 482 N.E.2d at 353; Martin v. Po-Jo, Inc., 104 Ill. App. 2d 462, 467-68, 244 N.E.2d 851, 854 (2d Dist. 1969).

182. Mallaney v. Dunaway, 178 Ill. App. 3d 827, 833, 533 N.E.2d 1114, 1117 (3d Dist. 1988).

183. 150 Ill. App. 3d 402, 501 N.E.2d 907 (1st Dist. 1986).

184. *Id.* at 405, 501 N.E.2d at 909. *Bituminous Insurance* is the only reported instance of an Illinois trial court explicitly finding a settlement lacking in good faith. In Leaman v. Anderson, 172 Ill. App. 3d 62, 526 N.E.2d 639 (3d Dist. 1988), the trial court dismissed a complaint seeking contribution, but did not specify lack of good faith as the grounds. *Id.* at 64, 526 N.E.2d at 640. The appellate court, however, noted that the primary reason for the dismissal was failure to allocate damages between claims in the settlement, which Illinois courts now consider to be a good faith inquiry. *See supra* notes 130-42 and accompanying text. In Doellman v. Warner & Swasey Co., 147 Ill. App. 3d 842, 498 N.E.2d 690 (1st Dist. 1986), the trial court initially found the settlement agreement lacking in good faith, but subsequently vacated its order and issued a finding of good faith. *Id.* at 844, 498 N.E.2d at 693.

185. *Bituminous Ins. Cos.*, 150 Ill. App. 3d at 405, 501 N.E.2d at 909.

186. *Id.*

187. *Id.*

188. *See also* 535 N. Mich. Condominium Ass'n v. BJF Dev., Inc., 143 Ill. App. 3d 749, 493 N.E.2d 111 (1st Dist. 1986) (Quinlan, J., specially concurring) (to recover in contribution claim, party must affirmatively establish that the settlement was entered into in good faith).

189. *See* O'Connor v. Pinto Trucking Serv., 149 Ill. App. 3d 911, 915, 501 N.E.2d

theless, the simple fact that no appellate decision since 1982 has found a lack of good faith suggests that the requisite standard for such a challenge, although not necessarily amounting to clear and convincing proof, demands at least substantial evidence.

4. Type of Record Required

The issue of whether a person acted in good faith is ordinarily a question of fact.[190] Thus, a complete record of the facts is necessary for the trial court to decide the issue and for an appellate court to review the trial judge's finding. Nevertheless, at present, the trial court is not required to give an objecting party the opportunity to present the facts. If a trial judge refuses to allow evidence to be presented, there will be no factual record to which the appellate court may refer. In such a case, even if the presiding judge had personal knowledge of the facts involved in the settlement but neglected to record the facts upon which he relied, an appellate court could have no basis for affirming the judge's conclusion. Review is simply not possible.

Despite the logical impossibility of review without a factual record, Illinois appellate courts have not remanded any cases for lack of a factual record. Instead, the courts have affirmed the conclusions of the trial judge, relying upon the trial judge's unstated knowledge of the facts of the settlement. For example, in *Perez v. Espinoza*,[191] the Illinois Appellate Court for the First District held that the trial court had complete discretion to decide the good faith issue without an evidentiary hearing.[192] The third-party complaint filed by one joint tortfeasor (Espinoza) against another joint tortfeasor (Hardesty) alleged that the settlement between Hardesty and the plaintiff (Perez) was not in good faith due to inadequacy of

263, 266 (1st Dist. 1986); Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 928, 482 N.E.2d 351, 353 (1st Dist. 1985).

190. Brown v. Torins Corp., 175 Ill. App. 3d 544, 550, 529 N.E.2d 1077, 1081 (1st Dist. 1988); Hall v. Archer-Daniels-Midland Co., 142 Ill. App. 3d 20, 211, 491 N.E.2d 879, 886 (4th Dist. 1986), *rev'd on other grounds*, 122 Ill. 2d 448, 524 N.E.2d 586 (1988); *Bituminous Ins. Cos.*, 150 Ill. App. 3d at 405, 501 N.E.2d at 909; *Wasmund*, 135 Ill. App. 3d at 930, 482 N.E.2d at 354; Morris v. Anderson, 121 Ill. App. 2d 169, 172, 259 N.E.2d 601, 603 (1st Dist. 1970).

Despite the ordinary rule and common sense, some recent opinions treated the question as one of law. *See Brown*, 175 Ill. App. 3d at 549-50, 529 N.E.2d at 1080-81; Lorenz v. Air Ill., Inc., 168 Ill. App. 3d 1060, 1064, 522 N.E.2d 1352, 1355 (1st Dist. 1988); Perez v. Espinoza, 137 Ill. App. 3d 762, 764, 768, 484 N.E.2d 1232, 1234, 1237 (1st Dist. 1985).

191. 137 Ill. App. 3d 762, 484 N.E.2d 1232 (1st Dist. 1985).

192. *Id.* at 765-66, 484 N.E.2d at 1235.

amount[193] and, therefore, failed to discharge Hardesty's liability for contribution.[194] Hardesty filed a motion to dismiss based upon his settlement with the plaintiff.[195] No affidavits were filed.[196] Following a hearing on the motion to dismiss, the trial court dismissed the third-party complaint with prejudice, basing its decision on the record pleadings and the arguments of counsel.[197]

In affirming the settlement, the court noted that the third-party plaintiff failed to file a copy of the transcript of the hearing on the motion to dismiss as a part of the record on appeal,[198] but the appellate court attached no particular significance to its absence. Justice White, in a thoughtful dissenting opinion, remarked that he could find no basis whatsoever in the record on appeal to support the trial court's holding that the settlement was made in good faith.[199]

The dissenting opinion pointed out three flaws in the majority's reasoning. First, although the settling defendant argued that the release constituted an affirmative matter avoiding the legal effect of or defeating the claim for contribution, he failed to support his motion to dismiss with affidavits stating that the settlement was in good faith.[200] In contrast, the non-settling defendant asserted in the complaint for contribution that the release had not been negotiated in good faith.[201] Therefore, Justice White concluded that the

193. For a discussion of this issue in other contexts, see *supra* notes 25-75 and accompanying text.

194. *Perez*, 137 Ill. App. 3d at 763, 484 N.E.2d at 1233-34.

195. *Id.* at 763, 484 N.E.2d at 1233.

196. *Id.* at 768, 484 N.E.2d at 1237.

197. *Id.* at 764, 484 N.E.2d at 1234. The court stated that "[b]ased upon the record pleadings before the court, and the arguments of all counsel, the court concludes as a matter of law that the settlement between the plaintiff and Joseph Hardesty was a good faith settlement." *Id.* A number of cases support the authority of the trial court to decide the issue of good faith after hearing only oral argument. *See, e.g.*, Lorenz v. Air Ill., Inc., 168 Ill. App. 3d 1060, 1064, 522 N.E.2d 1352, 1355 (1st Dist. 1988); McKanna v. Duo-Fast Corp., 161 Ill. App. 3d 518, 526, 515 N.E.2d 157, 163 (1st Dist. 1987); Pell v. Victor J. Andrew High School, 123 Ill. App. 3d 423, 435, 462 N.E.2d 858, 867 (1st Dist. 1984).

198. *Perez*, 137 Ill. App. 3d at 764, 484 N.E.2d at 1234.

199. *Id.* at 767, 484 N.E.2d at 1236 (White, J., dissenting). Justice White continued that even the admirable goals of the Contribution Act fail to compel an appellate court to "accept as true and affirm the critically important trial court conclusion of good faith when there is nothing in the record to support it." *Id.* (White, J., dissenting). The only exhibits accompanying the settling defendant's motion to dismiss the contribution claim against it were a copy of the non-settling defendant's third-party complaint for contribution and a copy of the covenant not to sue the settling defendant, executed by the plaintiff. *Id.* at 768, 484 N.E.2d at 1237 (White, J., dissenting).

200. *Id.* at 767-68, 484 N.E.2d at 1236-37 (White, J., dissenting).

201. *Id.* at 768, 484 N.E.2d at 1236-37 (White, J., dissenting).

motion to dismiss must fail on procedural grounds.[202]

Second, Justice White observed that the majority relied upon the often noted premise that the trial judge's superior knowledge of the pretrial proceedings justified placing near-absolute trust in his good faith determination.[203] Justice White explained that on a motion to dismiss, a "judge's familiarity with the case cannot cure a fatal defect in Hardesty's [the settling defendant's position on the] motion: the failure to assert the existence of an affirmative matter defeating Espinoza's [the non-settling defendant's] claims for contribution."[204]

Justice White added that the third problem with the majority opinion was its reliance upon a proposition commonly applied in good faith cases, but inapplicable to the facts at hand: the majority had stated that the non-settling defendant carried the burden of disproving the good faith aspect of the settlement.[205] Justice White responded that the non-settling defendant had no opportunity to do so; "[y]et the trial court, without a hearing, concluded *as a matter of law* that there was a good faith settlement."[206] In answer to the settling defendant's assertion that proof of good faith existed in the record, Justice White stated that "pleadings and answers to interrogatories concerning the amount of special damages, by themselves, fail to support the circuit court's conclusion that the settlement between Hardesty and Perez was a good faith settlement as a matter of law."[207]

The dissent took the position that because good faith was put at issue by the third-party complaint, and the settling defendant failed to counteract the charge, some type of evidentiary hearing on the issue of good faith should have taken place before and apart from the hearing on the motion.[208] Such a hearing should be essential for a court of appeal to decide whether the trial court abused its discretion. When no evidentiary hearing is required, the trial judge receives absolute discretion, and the question is not subject to review. The opinion of the Appellate Court for the First District in *Wasmund v. Metropolitan Sanitary District*[209] reveals the extent to which a court of review will defer to the holding of a trial judge on

202. *Id.* at 768, 484 N.E.2d at 1237 (White, J., dissenting).
203. *Id.* (White, J., dissenting).
204. *Id.* (White, J., dissenting).
205. *Id.* at 766, 768, 484 N.E.2d at 1235, 1237 (White, J., dissenting).
206. *Id.* at 768, 484 N.E.2d at 1237 (White, J., dissenting) (emphasis in original).
207. *Id.* at 769, 484 N.E.2d at 1237 (White, J., dissenting).
208. *Id.* at 768-69, 484 N.E.2d at 1236-37 (White, J., dissenting).
209. 135 Ill. App. 3d 926, 482 N.E.2d 351 (1st Dist. 1985).

the good faith issue. The appellate court in *Wasmund*, without benefit of a factual record,[210] surmised as to what the trial court might have found, and then affirmed based on those suppositions.[211] Although it is unlikely that courts of review intend to repose unbridled power in the trial court, *Perez* and *Wasmund* illustrate that the decisions are leaning in that direction.

Of course, all Illinois decisions were not decided in the absence of factual records. In *Bituminous Insurance Cos. v. Ruppenstein*, the appellate court reversed the trial court's finding of a lack of good faith based on the facts presented in the record.[212] The record included the "time, place, and circumstances of the accident"; the amount of money the settling defendant paid for the settlement; an affidavit of the plaintiff's lawyer stating that the settlement was reasonable; and an affidavit of the settling defendant's insurance adjuster stating that he had given the non-settling defendant notice of the settlement negotiations.[213] In support of the non-settling defendant's assertion of lack of good faith, the record contained a letter from the plaintiff's attorney itemizing his special damages, which were considerably lower than the total settlement amount.[214] It is not surprising that the only post-1982 case in which an appellate court reversed a trial judge's finding was one in which the factual record was available for the court's perusal.

B. Discussion

In all of the reported Illinois cases since *LeMaster v. Amsted Industries*, the appellate courts have held that the settlement was made in good faith. In addition, no court of review has indicated that any of the varied factual situations presented in the many cases decided since 1982 required the trial court to afford the parties an evidentiary hearing or even an opportunity to file affidavits. Consequently, there is a dearth of evidence to support the many determinations of good faith trial courts have made.[215]

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210. The trial court did not conduct a hearing specifically on the issue of good faith. *Id.* at 929, 482 N.E.2d at 353.

211. *Id.* at 930, 482 N.E.2d at 354.

212. 150 Ill. App. 3d 402, 405, 501 N.E.2d 907, 909 (1st Dist. 1986).

213. *Id. See also* Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989) (court upheld settlement based upon record containing the pleadings, motions, and affidavits of the parties, noting that the trial court had decided the good faith question only after hearing "extensive" oral arguments on the issue).

214. *Bituminous Ins. Cos.*, 150 Ill. App. 3d at 405, 501 N.E.2d at 909. The plaintiff's special damages totalled $1,515.20. *Id.* The settlement amount was $10,000. *Id.*

215. *See id. See supra* notes 212-14 and accompanying text.

The current state of the procedural law in regard to settlement under the Contribution Act can be summarized as follows:

1. Public policy favors settlement;[216]

2. A settlement is presumed valid, both when the trial court makes the initial determination, and when the appellate court reviews this determination;[217]

3. The burden of proof is on the party questioning the good faith;[218] and

4. Lack of good faith must be established by clear and convincing evidence.[219]

No statutory procedure is mandated by the Contribution Act for dealing with challenges to the good faith of a settlement. Appellate courts have only vaguely defined the procedures to be used by the trial court when a joint tortfeasor challenges a settlement. The guidance appellate courts have thus far contributed may be summarized as follows: there is no right to a jury trial on the issue of good faith[220] or a right to an evidentiary hearing before the trial court;[221] the trial judge may decide the issue on the basis of arguments, without the presentation of evidence or affidavits and without making a record as to the reasons for his finding of good faith;[222] moreover, a trial court need not conduct an evidentiary hearing on the issue of good faith even when the relationship between the parties strongly suggests the possibility of collusion.[223]

At some point, a trial court will be faced with a settlement that is not made in good faith. Given the current trend of creating obstacles to allowing factual consideration of the issue of good faith, it may be impossible for the trial court to find a lack of good faith. The presumption of good faith may not allow the trial judge to find

216. Ballweg v. City of Springfield, 114 Ill. 2d 107, 122, 499 N.E.2d 1373, 1380 (1986); Rakowski v. Lucente, 104 Ill. 2d 317, 325, 472 N.E.2d 791, 795 (1984); Mallaney v. Dunaway, 178 Ill. App. 3d 827, 833, 533 N.E.2d 1114, 1117 (3d Dist. 1988).

217. *See supra* note 179 and accompanying text.

218. *See supra* note 180 and accompanying text.

219. *See supra* note 181 and accompanying text.

220. *See supra* note 172 and accompanying text.

221. *See supra* notes 165-71 and accompanying text.

222. *See supra* notes 165-73, 190-211 and accompanying text.

223. Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989) (decedent was grandson of defendant with whom the plaintiffs settled); Bryant v. Perry, 154 Ill. App. 3d 790, 504 N.E.2d 1245 (2d Dist. 1986) (a mother in her personal capacity settled with herself as representative for her minor daughter); Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 482 N.E.2d 351 (1st Dist. 1985) (settling parties were a man and woman whom the court described as friends before the settlement and who married after the settlement). For further discussion, see *supra* notes 113-28 and accompanying text.

that the challenging party has presented clear and convincing evidence of lack of good faith if the judge limits the hearing to oral argument.

In most instances the desire of each party to protect his own interest, and the cursory supervision of the court, will be sufficient to protect other tortfeasors from settlements that are substantially unfair. Nevertheless, in cases in which some relationship exists between the parties to the settlement or when other facts indicate the possibility of unfair dealing, the trial court should give the parties a fair opportunity to present evidence on the question, and then make an objective decision concerning good faith without presuming its presence.

If the legal profession believes that all types of settlements will be held to have been made in good faith, creative counsel will fashion settlement agreements that will favor the settling parties to the substantial detriment of other joint tortfeasors. How will the courts handle such "good faith" agreements?

In none of the reported cases has the party challenging good faith properly preserved the constitutional objections of lack of due process and equal protection.[224] It may be assumed that an Illinois court will be faced with deciding these issues in the near future. Does current practice comport with the requirements of both due process and equal protection?[225]

IV. Proposed Alternate Procedures for Determining and Reviewing a Good Faith Challenge

From the point of view of a trial judge hearing jury cases, how should a request for a finding of good faith concerning a proposed settlement be handled? The decision of the trial court on the good faith issue is a determination of a question of fact.[226] Requests for a good faith determination usually are presented in the form of a motion, sometimes supported by affidavits and sometimes not. More often than not, the settlement is effected at or near the time

224. In Lorenz v. Air Illinois, Inc., 168 Ill. App. 3d 1060, 522 N.E.2d 1352 (1st Dist. 1988), the defendant raised the issues of due process and equal protection on appeal, but the appellate court held the issues waived because they were not raised in the trial court. *Id.* at 1063, 522 N.E.2d at 1354. *See also* Ruffino v. Hinze, 181 Ill. App. 3d 827, 537 N.E.2d 871 (1st Dist. 1989) (court held that the issue of due process, raised only upon appeal, was waived).

225. Although beyond the scope of this Article, this is surely an important issue. Because the Contribution Act does not require a hearing, an argument exists for striking down the Contribution Act on these grounds.

226. *See supra* note 190 and accompanying text.

of trial. Therefore, it is important to decide the question promptly, so as to proceed with a trial involving the remaining parties. The court's desire for efficiency, however, should not take precedence over the need for notice to and a reasonable time to respond for the opposing parties.[227] If there is no objection, the finding of good faith can quickly be approved. If there is an objection, all parties should be given a fair opportunity to file affidavits. If the affidavits present a clear-cut factual situation, free of any hint of collusion or other indications of substantially unfair dealing, a finding of good faith would be in order. If the affidavits indicate that a relationship exists between the settling parties that could be the basis of a collusive settlement, or if the affidavits otherwise present a close case on the good faith issue, an evidentiary hearing should be ordered. This hearing should include direct and cross examination of each witness, even though the trial may have to be delayed. In a proper case the trial judge may want a jury to decide the good faith question.[228]

The good faith cases in which an evidentiary hearing will be actually required are probably few in number. Recognizing the potential necessity for such a hearing, however, should aid in preventing injustice in those cases in which a hearing is needed.

V. CONCLUSION

A review of the law of contribution in Illinois reveals an inconsistency among the courts in developing a definition of good faith. Nevertheless, the courts have remained true to the main goal of the Contribution Act, that of encouraging settlement. The problem is that this one policy goal has, perhaps, too far overshadowed the second objective of equitably apportioning damages to fault.

Because many types of behavior can signal a lack of good faith, a trial court must have a considerable amount of discretion in deciding whether the evidence presented indicates that good faith was absent from a settlement. Certainly, the Illinois discretionary approach is preferable to the California mandatory mini-trial ap-

227. A requirement of notice is present in the California statute which allows contribution. The California Act requires that all parties be given twenty written notice of settlement. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1989). Requiring a specific time period for notice is more befitting a legislative body than the courts. Therefore, the authors recommend only that the time to respond be reasonable, as would be constitutionally required.

228. The appellate court in Hall v. Archer-Daniels-Midland Co., 142 Ill. App. 3d 200, 212, 491 N.E.2d 879, 886 (4th Dist. 1986), *rev'd on other grounds*, 122 Ill. 2d 448, 524 N.E.2d 586 (1988), suggested this alternative.

proach. Illinois courts, however, must become sensitized to the possibility of collusive or wrongful conduct present in the details of the settlements before them.

Illinois courts must also begin allowing evidentiary hearings when the circumstances of a settlement can be interpreted as involving collusive or wrongful conduct. In the authors' opinion, a good faith settlement is one that is not substantially unfair to any other joint tortfeasor. Whatever definition of good faith is finally settled upon by the courts, the question of good faith is always one of fact. Thus, trial courts must receive the factual details of the settlement, and those details must be made part of the record. Only then will courts of review truly be equipped to render a decision affirming or reversing the trial court's conclusions. And only then will all the factors which comprise good faith in Illinois come to light.