Attorneys for Defendant and Cross-Complainant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF GRANITE

ACME HEALTH SERVICES, INC., Plaintiff, vs. CHARLES APPEL, and DOES 1 through 25, Defendants.	Case No. 654321 CROSS-COMPLAINANT CHARLES APPEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRERS
CHARLES APPEL, Cross-Complainant, vs. ACME HEALTH SERVICES, INC.; ALICE GREEN; JOSEPH GREEN; DOCTORS, INC.; and ROES 1 through 30, inclusive, Cross-Defendants.	

Cross-defendants Alice and Joseph Green and Doctors, Inc. make a critical error in their demurrers to the cross-complaint. They argue that equitable indemnity can only arise between joint tortfeasors. But equitable indemnity does not necessarily arise just between parties that have committed a tort. It can also arise when one of the parties is liable in contract.

FACTS[1]

Plaintiff Acme Health Services, Inc. filed this action on April 18, 2004. Its complaint alleges that it employed defendant and cross-complainant Charles Appel as its office manager on October 1, 2___. In January 2___, Acme learned that Appel had embezzled its funds, failed to bill certain clients, applied money received from some clients to other clients' accounts, issued checks for the wrong clients, falsified billing records, waived insurance deductibles without authorization, billed incorrectly, stolen billing and medical records, billed insurers incorrectly, entered false invoices, falsified contracts, and withheld letters and messages to plaintiff's executive director. The complaint states causes of action for breach of contract, conversion of its medical records, intentional and negligent misrepresentations, fraudulent concealment, breach of fiduciary duty, and breach of his implied covenant of good faith and fair dealing.

On June 2, 2___, Appel cross-complained for indemnity against several parties, including Alice and Joseph Green and Doctors, Inc. of California. The cross-complaint alleges that Doctors, Inc. had a contract with the Greens that obligated it to pay for the healthcare services Acme provided to Joseph Green. Acme did provide health care to Mr. Green, but Doctors, Inc. did not pay Acme for those services. The Greens, meanwhile, agreed to pay for the services Acme rendered to Green. The Greens, too, failed to pay Acme for those services.

[1] In the interests of brevity, all citations to the factual record have been deleted from this sample document.

ARGUMENT

1. Acme's and the Greens' contracts render them liable in equitable indemnity to Appel.

The doctrine of comparative equitable indemnity is designed to do equity among defendants. *Gem Developers v. Hallcraft Homes* (1989) 213 Cal.App.3d 419, 426. Under the doctrine, defendants may seek to apportion loss between the wrongdoers according to their relative fault so that there will be "'equitable sharing of loss between multiple tortfeasors.'" *Ibid.*, quoting *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 595, 597-598. The purpose is to avoid the unfairness, under joint and several liability theory, of holding one defendant liable for the plaintiff's entire loss while allowing another one to escape "scot free." *Ibid.*

These cases use the term "tortfeasor" because the doctrine arose as an extension of comparative fault in tort. *Gem Developers v. Hallcraft Homes*, 213 Cal.App.3d at 427, citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1197. But the indemnitor and indemnitee need not both be liable in tort. See *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 769-771. For example, a defendant sued for breach of contract may have a right of implied indemnity against a third person whose tort caused the defendant's breach. *Id.* at 769.

Considine v. *Shadle, Hunt* held that a defendant liable to the plaintiff in contract may seek indemnity from one liable to the plaintiff in tort. See *id.*, 187 Cal.App.3d at 770-771. The plaintiff, a shopping-center owner, had leased space to one Moulios for a restaurant. The lease required the construction of an outdoor enclosed eating area. Another tenant, an ice cream parlor, objected to the outdoor eating area and sought a preliminary injunction. Considine hired Shadle, Hunt to represent both it and Moulios. The court awarded an injunction but required a $5,000 bond. Shadle, Hunt told Considine but did not tell Moulios directly about the court's action. It told neither party that the ice cream parlor was much more interested in settling than posting the bond.

When Moulios stopped paying rent, Considine sued for unlawful detainer, and

Moulios sued for breach of contract; it also sought damages from Shadle, Hunt for malpractice. Considine then sought indemnity from Shadle, Hunt. The court pointed out that Moulios sought damages in both tort and contract but held that Considine could obtain damages from Shadle, Hunt even if it was only liable to Moulios in contract. 187 Cal.App.3d at 770-771.

> When indemnity is based, not on breach of a promise, but upon breach of a duty of care, the principles of comparative fault . . . must be considered. When indemnity is founded upon the absence of due care, it is not unexpected or unfair to consider the degree to which the indemnitee's own lack of due care contributed to a particular loss.
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> *Id.* at 771.

The *Considine* court did note that Shadle, Hunt had a duty to Considine as well as to Moulios. 187 Cal.App.3d at 768. But the court's discussion arose not to explain why Shadle, Hunt should indemnify Considine, but why the rule of *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 942-946, did not render the law firm immune from indemnification. *Commercial Standard* held that the defendant could not seek indemnification from the plaintiff's attorney. In the context of that case, they were not truly joint tortfeasors; in fact, their liability was mutually exclusive. 92 Cal.App.3d at 942. In addition, the title company's conduct was in the nature of an unforeseeable independent intervening force. *Id.* at 943-944. Finally, public policy allowing a party to sue its adversary's lawyers would create a conflict of interest for the attorneys. *Id.* at 944-946. But the *Considine* court held that these considerations do not apply when the attorney had represented the plaintiff and the defendant jointly. 187 Cal.App.3d at 768.

This case is just the flip side of *Considine*. Instead of a defendant being sued for breach of contract seeking indemnity from one who committed a tort against the plaintiff, here Appel, being sued in tort, seeks indemnity from parties liable to plaintiff for breach of contract. Whatever Appel did or did not do, Doctors, Inc. and the Greens remain liable on their contract with Acme. Even if Appel had done nothing wrong, Doctors, Inc. would still have to pay under its contract with the Greens and with Acme, and the Greens would still

be obligated to pay for the services they received.

BFGC Planners, Inc. v. Forcum/Mackey Construction, Inc. (2004) 119 Cal.App.4th 848, upon which Doctors, Inc. relies, simply misstated the law. It deduced that the indemnitor must have committed a tort from language in earlier cases that applied the doctrine to joint tortfeasors. 119 Cal.App.4th at 852, citing *Yamaha Motor Corp. v. Paseman* (1990) 219 Cal.App.3d 958, 964 and *Munoz v. Davis* (1983) 141 Cal.App.3d 420, 425. But neither of the cases on which it relied discussed whether a defendant liable in tort could seek indemnity from a cross-defendant liable in contract. *Munoz* held that an attorney sued for malpractice for missing a statute of limitations in a personal-injury action could not seek indemnity from the original tortfeasor; *Yamaha* asked whether a tortfeasor could seek indemnity from the plaintiff's parents for negligent supervision.

In both *Munoz* and *Yamaha*, the indemnitee asserted tort liability against the indemnitor, so that they did not consider whether to limit the doctrine to joint tortfeasors or to indemnitors liable in tort. Cases are not authority for propositions not considered. *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153. *BFGC Architects Planners* erred by relying on them for that rule. In fact, *Considine Co. v. Shadle, Hunt* demonstrates that the principles of equitable indemnity may apply even though one of the liable parties breached a contract rather than committed a tort.

2. The Employee Retirement Income Security Act preempts Health and Safety Code § 1379 to the extent that Doctors, Inc. is an employee benefit plan.

The Greens claim that § 1379 protects them from being liable to Acme. That statute is part of the Knox-Keene Health Care Service Plan Act of 1975. Health & Saf. Code § 1340; *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2006) 136 Cal.App.4th 1155, 1164. The Act provides a comprehensive system for licensing and regulating health care service plans. *Ibid.* All aspects of the regulation of health care plans are covered, including financial stability, organization, advertising, and capability to

provide health services. *Ibid.*

Section 1379(a) requires that every contract between a plan and a provider of health care services must state that, if the plan fails to pay for health care services as set forth in the subscriber contract, the subscriber or enrollee shall not be liable to the provider for any sums owed by the plan. The statute then states that, even if the contract between the plan and the provider fails to comply with section (a), the contracting provider shall not collect or attempt to collect from the subscriber or enrollee sums owed by the plan. *Id.*, subd. (b). Finally, no contracting provider may maintain any action at law against a subscriber or enrollee to collect sums owed by the plan. *Id.*, subd. (c). But the Ninth Circuit Court of Appeals has held that the Employee Retirement Income Security Act (29 U.S.C. § 1001, *et seq.*) pre-empts the Knox-Keene Act to the extent that the state act regulates employee benefit plans. *Hewlett-Packard Co. v. Barnes* (9th Cir. 1978) 571 F.2d 502, 504, cert. denied (1978) 439 U.S. 831, citing 29 U.S.C. § 1144 (attached as Exh. 1).

CONCLUSION

Even had Appel acted with all care and done what he should have, the Greens and Doctors, Inc. would be liable to Acme under their contract with it. The equitable approach in this case is to require them to indemnify Appel for the damages they caused Acme. This court should therefore overrule Doctors, Inc.'s demurrer. It should sustain the Greens' demurrer with leave to amend so that Appel may plead that the Greens' contract with Doctors, Inc. is part of an employee welfare plan and therefore not subject to Health and Safety Code § 1379.

Dated:

Respectfully submitted,

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Attorneys for Defendant and Cross-complainant