

No. A06-1238

STATE OF MINNESOTA

IN COURT OF APPEALS

Arizant Inc., Arizant Healthcare Inc., and
Augustine Medical, Inc.,

Appellants,

vs.

Scott D. Augustine, M.D.,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF MINNESOTA

FREDRICKSON & BYRON, P.A.

David R. Marshall (No. 184457)
Emily E. Duke (No. 249178)
Theresa M. Weber (No. 332847)
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000

ATTORNEYS FOR RESPONDENT

**OPPENHEIMER WOLFF &
DONNELLY LLP**

David B. Potter (No. 121642)
Bret A. Puls (No. 305157)
Adam C. Trampe (No. 0349240)
Suite 3300, Plaza VII Office Tower
45 South Seventh Street
Minneapolis, MN 55402
(612) 607-7000

ATTORNEYS FOR APPELLANTS

MIKE HATCH
Attorney General
State of Minnesota

MICHAEL J. VANSELOW
Deputy Attorney General
Atty. Reg. No. 152754
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 296-9418 (Voice)
(651) 296-1410 (TTY)

**ATTORNEYS FOR AMICUS CURIAE
STATE OF MINNESOTA**

RANDY G. MASSEY
Acting United States Attorney
Southern District of Illinois

MICHAEL ROBINSON
Assistant United States Attorney
Southern District of Illinois
9 Executive Drive
Fairview Heights, IL 62208
(618) 628-3700

JAMES LACKNER (No. 59298)
First Assistant United States Attorney
District of Minnesota
U.S. Courthouse
300 South Fourth Street - Suite 600
Minneapolis, MN 55415
(612) 664-5625

**ATTORNEYS FOR AMICUS
CURIAE UNITED STATES OF
AMERICA**

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STATEMENT OF LEGAL ISSUE

1. Is a Minnesota corporate official who is convicted of a crime of dishonesty -- namely, defrauding the Medicare program under 42 U.S.C. § 1320a-7b(a)(2) -- collaterally estopped from seeking indemnification from the official's corporation on the ground that the official's conduct cannot as a matter of law satisfy the "good faith" requirement for indemnification under Minn. Stat. § 302A.521?

The district court denied Appellants' summary judgment motion based on a collateral estoppel defense and submitted Respondent's indemnification claim to the jury which returned a verdict in Respondent's favor.

Most apposite authorities:

- Minn. Stat. § 302A.521
- Minn. Stat. § 302A.011, subd. 13
- *Bunge Corp. v. Becker*, 519 F.2d 449 (8th Cir.1975)
- *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969)
- *Bansbach v. Zinn*, 801 N.E.2d 395 (N.Y. 2003).

STATEMENT OF THE CASE AND FACTS

Amicus Curiae State of Minnesota (“the State”)¹ adopts the Statement of the Case and Statement of Facts of Appellants Arizant Inc., Arizant Healthcare Inc., and Augustine Medical, Inc. (collectively “Arizant”). For purposes of the State’s arguments in this brief, the single salient and ultimately dispositive fact in this matter is Respondent Dr. Scott D. Augustine’s conviction for defrauding the Medicare program under 42 U.S.C. § 1320a-7b(a)(2).

INTEREST OF THE STATE OF MINNESOTA

This case presents important legal issues for civil and criminal law enforcement officers concerning Minnesota’s corporate indemnification statute, Minn. Stat. § 302A.521. The State has a strong public interest in the proper interpretation of the corporate indemnification statute, the purpose of which is to protect from financial injury those persons who have conducted themselves in an honest manner. *See* Minn. Stat. § 302A.521 General Comments. Here, Respondent sought indemnification from Arizant under this statute for his personal criminal liability for committing fraud on the Medicare program. The district court denied summary judgment for Arizant with respect to Respondent’s indemnification claim and submitted his claim to the jury.

¹ The State has been granted leave to file an amicus curiae brief in support of Appellants’ position. Pursuant to Minn. R. Civ. App. P. 129.03, the State certifies that no counsel for any party in this matter authored any portion of this brief and that no person or entity other than the State made any monetary contribution to the preparation or submission of this brief.

The State has a strong public interest in the resolution of this issue insofar as the State frequently brings civil or criminal fraud claims against individuals. The ability of these individuals to pass along their personal liability to Minnesota corporations would seriously undermine the State's prosecution of these cases. It would also harm the shareholders and employees of these corporations by unlawfully siphoning off corporate resources. The State has a compelling interest in ensuring that those found to have engaged in willful dishonest behavior are held personally accountable for their actions.

In this amicus brief, the State only addresses the issue of Respondent's indemnification claim. It also does not address the issues of the district court's jury instruction or exclusion of evidence regarding this issue because of its position that indemnification claims like the one in this case should never go to a jury.

STANDARD OF REVIEW

The issue in this case involves the construction of a statute which is a pure question of law. This Court, therefore, is not bound by the district court's interpretation of Minn. Stat. § 302A.521. *See Sherek v. Independent Sch. Dist. No. 699*, 449 N.W.2d 434, 436 (Minn. 1990).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING SUMMARY JUDGMENT FOR ARIZANT IN REGARD TO RESPONDENT'S INDEMNIFICATION CLAIM UNDER MINN. STAT. § 302A.521 BECAUSE RESPONDENT'S CONVICTION OF A FEDERAL CRIME OF DISHONESTY DISQUALIFIES HIM FROM ANY INDEMNIFICATION RIGHT UNDER THAT STATUTE AS A MATTER OF LAW.

Minn. Stat. § 302A.521, which is part of the Minnesota Business Corporation Act, sets forth the circumstances under which a corporate official is entitled to indemnification from the corporation.² This Section states that a corporation will indemnify a person if, *inter alia*, the person “acted in good faith.” *Id.* at subd. 2(2). This Section further provides that in the case of a criminal proceeding, the person had to have “no reasonable cause to believe the conduct was unlawful.” *Id.* at subd. 2(5).

Neither this Court nor the Minnesota Supreme Court have specifically considered the issue of whether conviction of a crime of dishonesty, like the Medicare fraud offense for which Respondent was convicted,³ bars an indemnification claim under

² Minnesota used to have a “permissive” corporate indemnification statute. Minn. Stat. § 301.095. With the enactment of Section 302A.521, indemnification is now “mandatory” if the person meets the five criteria under Subdivision 2(a). General Comments. *See also Barry v. Barry*, 824 F. Supp. 178, 183 (D. Minn. 1993) (same).

³ There is no question that Respondent was convicted of dishonest conduct. He was convicted under 42 U.S.C. § 1320a-7b(a)(2) which prohibits a person from “knowingly and willingly” withholding a material fact for use in determining rights to benefits and payments under a federal health care program. Appellants’ Appendix at A165. While his conviction for this crime is enough to establish that he is guilty of each element of the offense, Respondent also expressly admitted to violating this statute in his change of plea hearing and in a Stipulation of Facts used in his sentencing. *Id.* at A90-91, A143.

Section 302A.521.⁴ Because such a conviction is, by definition, conclusive evidence of an act of dishonesty, it precludes the requisite showing of “good faith” to establish a right to indemnification. Accordingly, because Respondent was convicted of a crime of dishonesty, he was collaterally estopped from pursuing his indemnification claim in this case. The district court, therefore, erred in denying Arizant’s motion for summary judgment and submitting this claim to the jury.

A. This Court Should Construe Section 302A.521 To Prohibit Indemnification When A Corporate Official Has Been Convicted Of A Crime Of Dishonesty.

There are many reasons why this Court should construe Minn. Stat. § 302A.521 to preclude indemnification of a corporate official convicted of a crime of dishonesty. First and foremost, the plain language of the statute precludes indemnification given that dishonesty cannot be good faith. Courts in other jurisdictions also follow this legal principle. There are also a host of strong public policy reasons to bar indemnification in these circumstances. Finally, any contrary rule would seriously undermine the State’s law enforcement efforts.

1. Dishonest Conduct Cannot be “Good Faith” Under The Plain Language of Section 302A.521.

The core issue in this case can be resolved by a simple analysis of the plain language of the applicable statute. As discussed below, the equation is strikingly

⁴ There is little Minnesota appellate case law construing the Business Corporation Act in general or Section 302A.521 in particular. See Bryn Vaaler, *Scrap the Minnesota Business Corporation Act*, 28 Wm. Mitchell L. Rev. 1365, 1369 n.8 (2002) (“There is little authority interpreting Minnesota’s indemnification provisions.”).

elementary: A conviction for intentional Medicare fraud equals dishonesty which cannot equal good faith. End of inquiry.

a. “Good faith” under Section 302A.521 requires honest conduct.

Minn. Stat. § 302A.011, subd. 13 defines the term “good faith,” as that term is used in Chapter 302A, including Section 302A.521, as “honesty in fact in the conduct of the transaction concerned.” The General Comments to this Section note that the source of this definition is Minn. Stat. § 336.1-201(19). The Minnesota Code Comment to that section of the Uniform Commercial Code states that “A thing is done ‘in good faith’ within the meaning of this chapter when it is done *honestly*, whether it be done negligently or not.” (emphasis added). Beyond this Comment, there is apparently no other legislative history that suggests that the concept of “good faith” in Chapter 302A generally and Section 302A.521 specifically means anything other than honesty.⁵

The General Comments to Section 302A.521 underscore the point that only honest behavior is protected by indemnification. As the Reporter noted:

The philosophy behind this section is one of reward and protection. The section rewards and protects from financial injury those persons who have conducted themselves in an *honest manner* with respect to their dealings with the corporation. If those persons meet the standard set forth in this section, indemnification should be mandatory; the corporation should not be able to choose to indemnify some persons and not others. This certainty of protection is an added incentive to act in an *honest and forthright manner*. Similarly, the requirement that the person must meet specific, stringent criteria associated

⁵ Minnesota’s indemnification statute is arguably more favorable for corporate officials seeking indemnification than the comparable statutes in some states. For example, Delaware prohibits indemnification of officials who engage in “intentional misconduct” without regard to whether such conduct involves dishonesty or fraud. 8 Del. C. § 145.

with the standard of conduct before indemnification will be permitted certainly forecloses a reward for bad conduct.

(emphasis added). The Reporter further stated unequivocally that “[o]nly honest behavior is protected by indemnification.”⁶

b. The Minnesota Legislature has equated good faith with honesty in many other state statutes.

The Minnesota Legislature has, in fact, equated the concept of “good faith” with “honesty in fact” in many other state statutes. For example, Minnesota’s Nonprofit Corporation Act, Chapter 317A, defines good faith in exactly the same way in the context of nonprofit corporations. Minn. Stat. § 317A.011, subd. 10. The plain language of other Minnesota statutes also expressly equates good faith with honesty. *See, e.g.*, Minn. Stat. § 520.01, subd. 6 (Uniform Fiduciaries Act); Minn. Stat. § 336.5-102(a)(7) (Letters of Credit); Minn. Stat. § 336.1-201(a)(20) (Uniform Commercial Code); Minn. Stat. § 332B.03, subd. 21 (Limited Liability Corporations); Minn. Stat. § 80E.03, subd. 9 (Motor Vehicle Sale and Distribution).

2. Other courts have consistently construed fraud to be inconsistent with the concept of good faith.

Arizant’s brief cites many cases from other jurisdictions supporting the proposition that fraudulent acts by a corporate official constitute bad faith as a matter of law. Arizant Br. at 22-24. In the interest of brevity, the State will not repeat these

⁶ The general statute providing indemnification for Minnesota employees not covered by statutes like Section 302A.521 similarly provides for employer indemnification of employees who are not guilty of intentional misconduct, neglect of duties “or bad faith.” Minn. Stat. § 181.970, subd. 1(2). No Minnesota appellate court case has construed the meaning of bad faith in this statute.

citations here. The State merely notes that these other jurisdictions are all in accord with the construction of Section 302A.521 that the State is advocating here.

3. Minn. Stat. § 302A.521, subd. 2(b) does not call for a different result.

Minn. Stat. § 302A.521, subd. 2(b) does not call for a different analysis or result. That Subdivision simply states that the termination of a proceeding by, inter alia, a conviction “does not, of itself, establish that the person did not meet the criteria [for a right to indemnification] set forth in this subdivision.” This provision merely reflects the logical and appropriate principle that not all criminal convictions disqualify a corporate official from indemnification. This is because not all crimes involve dishonesty. For example, a corporate official convicted of state crimes such as harassment, public nuisance, or obstructing the legal process may have a plausible argument that a conviction for these crimes is not an adjudication that the official did not act in good faith. Likewise, a conviction under a strict liability crime, such as certain federal environmental crimes, might not constitute dishonesty precluding indemnification.⁷

There may be other situations in which it is less clear from the nature of the offense whether the official acted in good faith in which the official should be permitted to present that question to the jury.⁸ The fact that some crimes do not, or arguably do not,

⁷ Because one can be convicted of such a strict liability for unintentional violations, such convictions are not conclusive proof of dishonesty which would preclude the good faith necessary under Section 302A.521.

⁸ A corporate official found liable for negligent fraud, on the other hand, would likely be able to seek indemnification by arguing that such an adjudication is not necessarily an adjudication of dishonesty since liability for negligent misrepresentation may lie for (Footnote Continued on Next Page)

entail dishonesty does not, of course, mean that indemnification cannot be summarily denied where the crime unquestionably does involve dishonesty.⁹

4. Section 302A.521 would also preclude indemnification for fraudulent conduct that is not criminal.

While this case involves an indemnification request from a corporate official convicted of a crime, the analysis set forth above should apply equally to conduct that is not criminal, but nevertheless dishonest. That is, a corporate official who is adjudged to have engaged in intentional fraud in a civil case, could also not receive indemnification under Section 302A.521 because such an official's dishonest conduct, even though not criminal, could not satisfy the statute's good faith requirement. Nowhere does the statute state that only criminal conduct can disqualify one from indemnification. In fact, to the contrary, the statute clearly envisions civil proceedings, terminated by a "judgment, order, settlement," may disqualify the corporate official. Ultimately, this Court need not reach the issue of disqualification based on civil adjudications of dishonest conduct.

5. There are strong public policy reasons for construing Section 302A.521 as the State advocates

There are a host of strong public policy reasons why someone convicted of a crime of dishonesty should not be entitled to indemnification under Section 302A.521. One

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wholly unintentional, albeit careless, false statements. *See Note, Indemnification of Directors: The Problems Posed by Federal Securities and Antitrust Legislation*, 76 Harv. L. Rev. 1403, 1417 (mere negligence would not show an absence of "good faith" for purposes of indemnification).

⁹ There are certain state crimes, such as perjury, forgery, and bribery, and other federal crimes, such as tax and bankruptcy fraud and violations of the Federal False Claims Act, that are necessarily acts of dishonesty that are inconsistent with good faith.

legal commentator outlined several such policy reasons in a thoughtful analysis of the issue of indemnification of corporate criminals. See Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 Ind. L. Rev. 279 (1991). First, as Professor Bucy aptly explains, indemnification directly undermines the goal of deterrence in the criminal justice system:

[T]he major objective of criminal liability is deterrence. Our criminal justice system is based upon the belief that by public condemnation, sufficiently harsh penalties and loss of privileges, a defendant and all others who observe his conviction and sentence will be discouraged from engaging in the proscribed behavior. Indemnification and D&O insurance never serve this goal of deterrence; rather, they allow a private party (either a corporation or an insurer) to neutralize, if not defeat it.

Id. at 344 (footnotes omitted). See also *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1159 (D. Minn. 1997) (refusing in civil context to allow company to seek indemnification from penalties for violation of Clean Air Act from city noting that indemnification would remove incentive for company to comply with environmental laws).

Second, Bucy goes on to explain that indemnification not only sends the wrong message, but also creates a dual system of criminal justice:

By paying a convicted corporate executive for fines, penalties and costs incurred in his criminal case, and often by doing so after explicitly finding that this executive acted in good faith and had no reason to believe his conduct was unlawful, corporations and insurers are sending a message to corporate executives. They are telling these employees that pursuit of corporate goals justifies breaking the law and that they will reward those who do so. Moreover, this indemnification separates corporate executives from other criminal defendants. With someone else paying their litigation expenses and fines or penalties, corporate executives do not feel the pain or stigma of a criminal verdict and sentence as do other criminal defendants. Thus,

indemnification and insurance not only contribute to a corporate culture that encourages corporate crime but also perpetuate two levels of justice.

Id. at 342.¹⁰ This dual justice system is another strong policy reason for denying indemnification in cases like the instant case.¹¹

Third, indemnification of dishonest criminals not only creates a dual justice system, but it also undermines the basic integrity of that system. Indemnification in these circumstances would inappropriately allow corporate boards to nullify not only acts of Congress or the Minnesota Legislature criminalizing certain conduct, but also acts of prosecutors, judges and juries who enforce those criminal laws. Moreover, indemnification also especially undermines the integrity of the criminal justice system when, as in this case, the prosecution's recommended sentence and the court's actual sentence is expressly and directly predicated on the defendant's professed acceptance of "personal responsibility" for his unlawful conduct.¹² Suffice it to say, this Court should be loathe to reward those corporate officials, like Respondent here, who profess to accept "personal responsibility" for their crimes in order to get the most lenient sentence and

¹⁰ As Bucy recognizes, society has an interest not only in specific deterrence -- deterring the one convicted from committing further crimes -- but also general deterrence -- deterring others from committing similar crimes. Indemnification for dishonest criminal behavior seriously undermines both of these interests.

¹¹ Bucy actually favors the denial of indemnification for corporate officials convicted of *any* crime. Her comments are, therefore, all the more forceful here given that Minnesota's statute only bars indemnification of those convicted of crimes of dishonesty.

¹² In this case, the prosecution recommended that Respondent's sentence be reduced because he had accepted personal responsibility for his criminal conduct. Appellants' App. at A84-90, A692. Likewise, the court in sentencing Respondent expressly acknowledged he had "demonstrated recognition and affirmative acceptance of personal responsibility for his conduct." *Id.* at A160.

who then seek to completely dodge their personal responsibility by demanding that their corporations pay their personal fines. Such deception directed toward the court not only undermines the criminal justice process, but also compounds the original underlying crime of dishonesty.

Fourth, by requiring an affirmative showing of good faith to qualify for indemnification under Section 302A.521, the Minnesota Legislature appropriately recognized that dishonesty is a special and more culpable breed of misconduct such that it makes sense to preclude corporate indemnification for those who are convicted of crimes of dishonesty. This is consistent with the State's recognition of the severity of dishonest conduct in other contexts. For example, Minnesota law recognizes a crime fraud exception to the otherwise sacrosanct attorney-client privilege. The Minnesota Supreme Court also does not hesitate to impose more severe discipline "when a lawyer demonstrates a lack of truthfulness and candor." *In re Disciplinary Action Against John G. Ganley*, 549 N.W.2d 368, 370 (Minn. 1996).¹³ These principles reflect the special nature and treatment of acts of dishonesty. As such, it makes sense to treat crimes of dishonesty as a special form of criminal activity that disqualifies corporate officials from indemnification.

¹³Similarly, Minn. R. Evid. 609 permits the introduction in evidence for impeachment purposes a conviction of a crime punishable by imprisonment of more than one year and then only if the court determines that the probative value of the conviction outweighs its prejudicial effect. Convictions of crimes involving dishonesty or false statement, on the other hand, are admissible regardless of the punishment for the offense or any probative value/prejudice balancing.

Fifth, the State's construction of Section 302A.521 would avoid costly and wholly inappropriate satellite litigation over the underlying issue of the convicted corporate official's guilt. The State advocates a very straightforward and workable construction of Section 302A.521. That is, the corporation or, if necessary, the district court can simply look to the elements of the crime for which the official was convicted and determine whether that conduct entails dishonesty. If it does, the indemnification request should be denied. As such, the corporation or court need not, and should not, inquire into, or participate in satellite litigation over, the underlying facts constituting the crime or the credibility of the official's post-conviction proclamations of innocence. Any other approach is fraught with uncertainty and would arguably require a jury trial any time corporate officials claimed that they acted for noble motives notwithstanding their criminal convictions. There is no reason to encourage such improper and costly satellite litigation.

Sixth, allowing dishonest convicted corporate officials to obtain indemnification from their corporations would also directly thwart the ability of corporations to recover the losses these officials caused the corporations.¹⁴ If these corporate officials can

¹⁴ It is "well settled that an employer is entitled to recover from the employee damages which the employer was compelled to pay because of the employee's negligence." *Schneider v. Buckman*, 433 N.W.2d 98, 102 (Minn. 1988). If employers can recover against their own employees for damages caused by negligence, they can certainly recover against their employees for damages caused by their employees' intentional criminal acts.

compel their corporations to indemnify them for any civil liability, this may effectively extinguish any possible claims the corporations have against the dishonest officials.¹⁵

Seventh, it is wholly inappropriate for Minnesota taxpayers and employees to be saddled with the financial punishment imposed on dishonest corporate officials. Inappropriate indemnification can, as in this case, result in a multi-million dollar liability for a corporation. This is a complete and improper waste of valuable corporate assets.

Finally, a prohibition on indemnification of dishonest convicted corporate officials would also not conflict with the public policy underlying indemnification embodied in Section 302A.521. As noted in the General Comments to Section 302A.521, indemnification is intended to “induce responsible business men to accept the post of directors” which they might otherwise have to forego because of the risk of incurring personal financial liability for their own conduct. The Comments conclude that “[t]his right of reimbursement has its foundation in the maintenance of a sound public policy favorable to the development of sound corporate management as a prerequisite for responsible corporate action.” The denial of indemnification to those convicted of crimes of dishonesty is entirely consistent with this policy since the policy is premised on the interest in inducing “responsible” individuals to assume corporate leadership positions and in fostering “responsible” corporate action. There is nothing “responsible” about

¹⁵ This is precisely what happened in *St. Paul Fire & Marine Ins. Co. v. Perl*, 415 N.W.2d 663 (Minn. 1987), in which the Supreme Court held that an indemnification agreement between an attorney and his law firm in the corporate by-laws extinguished the firm’s insurer’s subrogation right against the attorney. *Id.* at 665-67. As the Court reasoned, it is difficult to argue that the firm could sue its own attorney while it is simultaneously obligated to indemnify and compensate him for his own damages. *Id.*

defrauding the Medicare program or the commission of other crimes of dishonesty. Section 302A.521 is intended to authorize indemnification of honest corporate officials to encourage honest individuals to assume corporate posts and act in an honest manner.

6. Any contrary rule of law would undermine the law enforcement efforts of the State and other law enforcement agencies.

The possibility that a corporate official convicted of a crime of dishonesty or adjudged to have engaged in civil fraud could be entitled to indemnification is very troubling for the State as well as other law enforcement agencies. The State frequently prosecutes or sues individual corporate officials for dishonest conduct, including, for example, consumer fraud, false advertising, deceptive trade practices, etc. The State often resolves these cases by way of a guilty plea and fine or a settlement and consent judgment imposing civil penalties. As noted above, these conditions are intended to serve a deterrent effect both on the individual fined or penalized and on others who might be engaged, or considering engaging, in similar dishonest conduct. If dishonest officials could simply pass this sanction onto their companies, this deterrent effect would be greatly undermined.¹⁶

In fact, if the Court were to hold that those convicted of crimes of dishonesty can receive indemnification if they can persuade a jury, the State would have to look at

¹⁶ By way of a relevant current example, numerous corporations are facing civil and criminal investigations arising out of the recent stock option backdating scandal. It is likely that some of the individual corporate executives who participated in this scandal will be prosecuted and/or sued for fraud. It would be the height of absurdity to allow these executives, who already received obscene profits from their corporations for their backdated stock options, to force these already victimized corporations to then pay the criminal and/or civil fines of their dishonest and unjustly enriched executives.

altering its approach to its criminal prosecutions and civil litigation. For example, the State might need to refrain from prosecuting or suing dishonest individuals which would directly undermine the deterrent effect of such prosecutions and suits. The State would also have to speculate as to the likelihood that the dishonest corporate official would be entitled to indemnification regarding any proposed fine or penalty. Accordingly, as some commentators have noted, indemnification, or the risk of indemnification, for this kind of conduct is likely to prompt the State, and other law enforcement agencies, to seek the alternative sanction of imprisonment in lieu of fines that officials will just lateral to their corporations. *See Note*, 76 Harv. L. Rev. at 1416. It is not necessarily in the public interest to compel law enforcement agencies to demand incarceration as a condition of resolving criminal investigations because fines become meaningless sanctions as a result of inappropriate indemnification.

B. The District Court Erred In Submitting The Issue Of Respondent's Indemnification Claim To The Jury.

Based on the above analysis of Section 302A.521, there can be little question that the district court erred in declining to find that Respondent was collaterally estopped from alleging that he acted in good faith. In a very analogous case, involving a very similar state corporate indemnification statute, a corporate officer convicted of a federal election law crime, sought indemnification from his employer after acknowledging under oath that he knowingly committed the offense for which he was charged. *Bansbach v. Zinn*, 801 N.E.2d 395 (N.Y. 2003). New York's Court of Appeals, that state's highest court, determined that the official was not entitled to indemnification because he clearly

did not act in good faith as required under the state's indemnification statute. *Id.* at 403-04.¹⁷ Likewise, here, by admitting under oath to committing intentional fraud and pleading guilty to the federal Medicare fraud statute at issue,¹⁸ Respondent did not, as a matter of law, act in good faith and he should never, therefore, have been allowed to relitigate his guilt before a Ramsey County jury.¹⁹

¹⁷ The Minnesota Supreme Court has also recognized in the insurance context that collateral estoppel is appropriate to preclude convicted persons from trying to profit from their own crimes by invoking indemnification provisions in a policy. *See, e.g., Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 532-34 (Minn. 2003). The same logic applies where, as here, Respondent is collaterally estopped from trying to profit from his own crime by seeking indemnification from Arizant under Section 302A.521.

¹⁸ This case does not involve a *nolo contendere* plea in which the defendant pleads guilty but does not actually admit culpability. While such a plea should arguably be treated exactly the same, the Court need not decide this issue in this case.

¹⁹ It is utterly incongruous that Respondent was allowed to testify and argue to the state court jury that he acted honestly and in good faith notwithstanding his prior federal court admission that he intentionally defrauded the Medicare program and his resultant conviction and fine for this fraud. Finally, even if this Court accepted Respondent's implausible claim that he did not have reasonable cause to believe his conduct was unlawful, he would still not be entitled to indemnification under Section 302A.521 because his conduct was unquestionably dishonest *even if* he did not think it was unlawful. Respondent's argument that he did not appreciate that his admittedly dishonest conduct was actually unlawful is simply inconsequential. Respondent's dishonest conduct negates any possible argument that he acted in good faith -- a requirement under Section 302A.521. Because no reasonable jury could have concluded that Respondent acted honestly, and therefore in good faith, in intentionally defrauding the Medicare program, Arizant was entitled to summary judgment as to Respondent's indemnification claim.

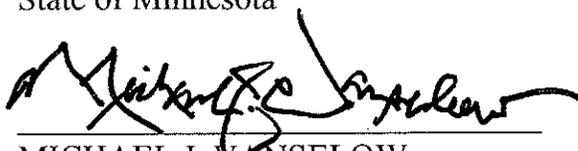
CONCLUSION

For the reasons stated above, Amicus Curiae State of Minnesota urges this Court to reverse the district court's decision and direct the entry of judgment in favor of Arizant as to Respondent's indemnification claim.

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Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota



MICHAEL J. VANSELOW
Deputy Attorney General
Atty. Reg. No. 152754

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 296-9418 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR AMICUS CURIAE
STATE OF MINNESOTA