

NO. A09-1963

State of Minnesota
In Supreme Court

Timothy B. Allen,

Appellant,

vs.

Burnet Realty, LLC,
d/b/a Coldwell Banker Burnet,

Respondent.

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Introduction

Respondent's Brief and Appendix ("CB Burnet Br.") contains three principal arguments as to why the Legal Administration Program (the "LA Program") does not violate Minn. St. § 60K.47 (2010) and is not insurance. Initially, Burnet Realty, LLC d/b/a Coldwell Banker Burnet ("CB Burnet"), contends that Section 60K.47 is violated only if a third party sells a policy of an unauthorized insurer. CB Burnet's reading of Section 60K.47 departs from the statute's plain meaning, and adopting CB Burnet's construction would lead to the absurd result of prohibiting an unauthorized insurer from selling through intermediaries, while permitting it to make direct sales.

CB Burnet's next principal argument is that the LA Program does not transfer and distribute any risk, because CB Burnet is merely agreeing to assume a liability that it already possesses absent the LA Program — its potential vicarious liability for third-party claims arising out of its sales associates' conduct. According to CB Burnet, all that the LA Program accomplishes is to establish a cost-sharing arrangement between it and its thousands of sales associates for claims that expose CB Burnet to derivative liability. In arriving at its position, CB Burnet disregards the express purpose of the LA Program: to "limit your [sales associate's] personal liability exposure in the event you are involved in a dispute or lawsuit . . . relating to your [sales associate's] actions which are contemplated within the scope of The Company's [CB Burnet's] Independent Contractor Agreement." (Emphasis supplied). Appellant Timothy B. Allen's ("Allen") Appendix ("Allen App.") 60, 64, 68, 72, 76. CB Burnet does not dispute that, absent the LA Program, when a sales associate is sued by a third party, the associate would have to bear his or her own defense costs, for which CB Burnet is not vicariously liable, as well as pay

any personal judgment rendered and enforced against him or her. In consideration for the sales associates' annual payments (that collectively are in excess of \$1,000,000), the LA Program completely transfers to CB Burnet the associates' personal obligations to pay defense and potential liability costs for third-party claims, subject only to the associate's payment of a maximum \$1,500 deductible. Contrary to CB Burnet's and Amicus Curiae Edina Realty, Inc.'s ("Edina") position, the LA Program's annual collection of payments from thousands of sales associates in consideration for the transfer and distribution of risk to CB Burnet distinguishes it from standard bilateral indemnification agreements.

Finally, CB Burnet endorses the Court of Appeals' adoption of the so-called "principal object and purpose" test on the basis that the LA Program is incidental to the broker-sales associate relationship, and thus is not insurance. Eschewing any analysis of Minnesota law, which has impliedly rejected the "principal object and purpose" test, CB Burnet relies upon sister state authority that has allegedly adopted it. That authority is inconsistent with certain opinions of this Court, as well as legislative enactments, and thus the "principal object and purpose" test should not be adopted.

Argument

I. Minn. St. § 60K.47 (2010) is violated when an unauthorized insurer sells its own policies.

CB Burnet contends that a violation of Minn. St. § 60K.47 occurs only if a third-party producer sells the policy of an unauthorized insurer. CB Burnet Br. at 18-21.

CB Burnet's argument is specious. Section 60K.47 provides, in part:

Any person, whether or not licensed as an insurance producer, who participates in any manner in the sale of any insurance policy or certificate, or any other contract providing benefits, for or on behalf of any company that is required to be, but

that is not authorized to engage in the business of insurance in this state . . . is personally liable for all premiums, whether earned or unearned, paid by the insured, and the premiums may be recovered by the insured

As a threshold matter, CB Burnet neglects to note that Minn. St. § 60K.31, subd. 13 (2010), defines “person” as “an individual or a business entity,” and Minn. St. § 60K.31, subd. 2 (2010), defines “[b]usiness entity” as “a corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity.” Accordingly, the definition of “person” contemplates that any type of business entity can be liable for the sale of an unauthorized insurance policy, which the Court of Appeals recognized. *See Allen v. Burnet Realty, LLC*, 784 N.W.2d 84, 87 (Minn. App. 2010).¹

CB Burnet does not contest that a “sale” occurred within the meaning of Section 60K.47. It focuses on the phrase “for or on behalf of any company that is not authorized to engage in the business of insurance in this state” and argues that it necessarily applies only to a third-party producer or agent who makes a sale, rather than to the unauthorized insurer selling policies on its own behalf. This construction is contrary to the plain meaning of Section 60K.47, which does not preclude liability when an unauthorized insurer sells a policy on its own behalf. In common parlance entities perform acts “on behalf” of themselves. *See, e.g., O’Donnell Shoe Co. v. Benson Co-Op Mercantile Co.*, 175 Minn. 382, 382, 221 N.W. 426, 427 (1928) (plaintiff corporation filed action “on behalf of itself” and others). Moreover, in connection with the sale of a product, it is commonplace that companies have their own sales divisions. Accordingly, the plain

¹ In light of this definition, Allen did not have to sue the actual individuals at CB Burnet who effected the sale of the LA Program to him, because such individuals were employed by CB Burnet which is liable as a “person” under Section 60K.47.

meaning of Section 60K.47 is that an unauthorized insurer can effect the sale of a policy “for or on behalf of” itself.²

Moreover, adopting CB Burnet’s construction would lead to the absurd result that an unauthorized company could avoid private enforcement under Section 60K.47 merely by effecting the sale of a policy through its own in-house sales division, and would be subject to that statute only if it used an outside sales producer. *See, e.g., Bedow v. Watkins*, 539 N.W.2d 414, 417 (Minn. App. 1995), *rev’d. on other grds.*, 552 N.W.2d 543 (Minn. 1996) (rejecting Commissioner’s construction of Minn. St. § 645.17(1) that would have permitted recourse to the Real Estate Education, Research and Recovery Act for those claimants “whose real estate sales agents acted in collusion with their broker” but would have denied relief to “claimants whose realtors acted alone.”)³

II. The Court of Appeals erred in holding that the LA Program was not insurance.

A. The LA Program meets the definition of insurance in Minn. St. § 60A.02, subd. 3(a) (2010).

1. The LA Program involves a substantial transfer and distribution of risk from the sales associates to CB Burnet.

² CB Burnet’s argument that its reading of Section 60K.47 would still prevent abuse by unauthorized insurers due to the availability of regulatory actions (CB Burnet Br. at 20) is unpersuasive. Such governmental actions are limited to prospective injunctive relief. *See*, Minn. St. § 72A.42, subd. 1 (2010) (enforcement limited to injunctive relief), Minn. St. § 72A.33 (2010) (enforcement of violation of deceptive insurance advertising act through unfair trade practices act), and Minn. St. § 72A.25, subds. 2 and 3 (2010) (enforcement under unfair trade practices act limited to injunctive relief) — and do not provide the salutary benefits of full statutory restitution that Section 60K.47 makes available to private parties such as Allen.

³ CB Burnet is further incorrect that “all of his [Allen’s] claims rest on his allegation that Burnet violated Minnesota Statute § 60K.47.” CB Burnet Br. at 18. Allen’s claims under Minn. St. § 325F.69 (2010) and unjust enrichment are predicated upon the positions that the LA Program is insurance and that CB Burnet is an unauthorized insurer, but do not require Allen to meet the technical requirements of Section 60K.47.

In contrast to the Court of Appeals, CB Burnet initially contends that any analysis as to whether the LA Program meets the definition of insurance under § 60A.02, subd. 3(a) is inappropriate, because it would be inconsistent with the incorporated definition of “insurance” in Minn. St. § 60K.31, subd. 5 (2010) that merely references the “lines of authority in [Minn. St. §] 60A.06.” CB Burnet Br. at 24-25. Contrary to CB Burnet’s position, recourse to § 60A.02, subd. 3(a), would not render the definition in § 60A.31, subd. 5, “superfluous”; rather, it informs that definition. Because each of the “lines of authority,” with the exception of one that is not pertinent to this case, begins with the words “[t]o insure,” recourse to § 60A.02, subd. 3(a), which defines “insurance,” is necessary to understand what constitutes “lines of authority” within the meaning of Section 60A.06.

Alternatively, CB Burnet argues that it does not “indemnify” sales associates within the meaning of Section 60A.02, subd. 3(a), because it contends there is no transfer of any risk. CB Burnet Br. at 29. CB Burnet asserts there is no “transfer of risk or liability . . . under the LA Program, because it “is fully liable *as a matter of law* to the same persons and to the same extent as its sales associate,” citing Minn. St. §82.63, subd. 3, and *Handy v. Garmaker*, 324 N.W.2d 168, 172 (Minn. 1982). CB Burnet Br. at 29; *see also*, CB Burnet Br. at 6 (“[i]n most cases Burnet would be legally entitled to indemnification by a sales associate for liability that it incurred,” because CB Burnet “has only a derivative or vicarious liability. . .” (cit. omitted).⁴

⁴ CB Burnet repeatedly mischaracterizes its vicarious liability as “joint and several.” CB Burnet Br. at 5, 30, 33. This Court has explained that while joint tortfeasors are independently liable, vicarious liability is only derivative. *See Booth v. Gades*, 788

Allen's Brief ("Allen Br.") at 25-31 carefully delineates the transfer and distribution of risk under the LA Program in connection with the two central aspects of that Program shared by E&O policies; namely, the duty to defend and the duty to indemnify. By allowing the sales associates to purchase third-party E&O insurance as an alternative to participating in the LA Program (as long as the insurance has coverage comparable to that provided by the LA Program), CB Burnet acknowledges that the third-party insurance is the functional equivalent of the LA Program, for the purpose of "effectively limit[ing] your sales associate's personal liability exposure in the event you are involved in a dispute or lawsuit." Allen App. 60, 64, 68, 72, 76. To this end, CB Burnet admonishes its sales associates as follows: "[i]t is important, with rising litigation, legal and administrative costs, that you have the security that this program or outside coverage provides." *Id.*

As to the duty to defend, CB Burnet never denies that absent the LA Program it would have no derivative or other liability ever to pay the costs of defending the associate. Yet, under the LA Program it agrees to incur these defense costs, which are a substantial obligation that is assumed by CB Burnet.⁵

Similarly, as to the duty to indemnify for any loss incurred by a sales associate arising out of the associate's acts ("Covered Disputes," as defined in the LA Program),

N.W.2d 701, 708 (Minn. 2010). Underlying the concept of vicarious or derivative liability that enables persons to obtain indemnity against parties whose acts give rise to such derivative liability is that the indemnitees "are without personal fault." *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 366 (Minn. 1977).

⁵ CB Burnet's position that it has no obligation to defend under the LA Program but has the discretion to retain counsel to resolve disputes is pure sophistry. CB Burnet Br. at 31-2. Once a lawsuit is filed against a sales associate, only an attorney can represent that person in court. See Minn. St. § 481.02, subd. 1 (2010).

the stated purpose of the LA Program is to transfer that personal liability risk to CB Burnet.⁶ While CB Burnet does have vicarious liability for such claims, CB Burnet never attempts to discuss, much less distinguish, the persuasive authority that the LA Program is insurance because it transfers to CB Burnet the primary liability of the sales associates. Allen Br. at 29-30, discussing *Grand Rent A Car Corp. v. 20th Century Ins. Co.*, 25 Cal. App.4th 1242, 1252, n. 6, 31 Cal. Rptr. 2d 88 (1994, review denied).⁷

CB Burnet advances two other arguments as to why there is no purported transfer of risk to CB Burnet: (i) the only transfer of risk is to the sales associates in connection with his or her payment of the maximum \$1,500 deductible, and (ii) the payment of the \$450 annual premium merely reflects a cost-sharing arrangement in connection with CB Burnet's indemnification of claims against the sales associates. CB Burnet Br. at 26-27, 30. Both of these positions are untenable.

As noted above and as acknowledged by CB Burnet, absent the LA Program, the sales associates would face personal liability exposure to pay potentially unlimited defense costs and judgments in connection with Covered Disputes. Under the LA

⁶ This risk of loss is illustrated by one of the cases upon which CB Burnet relies. See *Dietz-Britton v. Smythe, Cramer Co.*, 139 Ohio App. 3d 337, 334, 743 N.E.2d 960, 965 (2000) (sales associate paid judgment against her).

⁷ CB Burnet's reference to Allen's testimony that the LA Program provides no indemnification of sales associates (CB Burnet Br. at 14) invokes a layman's legal conclusion, and is also inappropriate under the parol evidence rule. See, e.g., *Hruska v. Chandler Associates, Inc.* 372 N.W.2d 709, 713 (Minn. 1985) (parol evidence not admissible where agreement was unambiguous or to vary, contradict or alter terms of the agreement); *Anchor Casualty Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 145, 82 N.W.2d 48, 54 (1957) (parol evidence is a rule of substantive law and not one of evidence). Equally objectionable under the parol evidence rule is CB Burnet's reliance on the testimony of Allen that the LA Program is not errors and omissions insurance. CB Burnet Br. at 14. The district court did not rely upon Allen's testimony in the Summary Judgment Order drafted by CB Burnet.

Program, the maximum \$1,500 liability for defense or liability costs in the form of a deductible merely reflects, as every E&O policy does, that the sales associate retains a small portion of the liability that he or she already possessed absent the Program. Accordingly, the payment of the deductible cannot reflect the transfer of any risk.⁸

CB Burnet further argues that the LA Program involves a non-insurance cost-sharing arrangement, because absent that Program CB Burnet would have indemnification claims against the sales associate arising out of his or her acts that expose CB Burnet to liability, and the sales associate's payment of its annual \$450 premium resolves those claims. CB Burnet's position places the proverbial cart before the horse. CB Burnet's waiver of indemnification against its sales associate under the LA Program is functionally no different than the preclusion of an insurer to pursue subrogation against its insured for causing the loss which the insurer has paid. CB Burnet does not even attempt to address, much less distinguish, Allen's authority on this point. Allen Br. at 29,

⁸ CB Burnet's statement that "absent the LA Program" a sales associate who was ultimately not at fault in connection with a third-party claim would not be responsible for any payment to defend such claims is incorrect. CB Burnet Br. at 26-27. Absent the LA Program, a sales associate who prevailed in connection with a third-party claim would have no recourse against CB Burnet to recover attorneys' fees that he or she incurred to defend the claim. *See, e.g., Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 97, 179 N.W.2d 64, 73 (1970) (no right of party seeking indemnity to recover attorneys' fees incurred to defend against allegations of "its own wrongful conduct" even if the indemnitee prevails in lawsuit); *Wurst v. Friendshuh*, 517 N.W.2d 53, 57-58 (Minn. App. 1994) (same). CB Burnet's further suggestion that there are instances when CB Burnet is sued for the sales associate's conduct, and the sales associate is not (CB Burnet Br. at 30), and thus under the LA Program the sales associate may have to pay up to \$1,500 that he or she would not have to pay absent the LA Program is hypothetically possible, but there is no evidentiary record reflecting that this has actually occurred. Accordingly, this argument is pure speculation. *See, e.g., Great Northern Oil Co. v. St. Paul Fire And Marine Ins. Co.*, 291 Minn. 97, 104, 189 N.W.2d 404, 409 (1971) (rejecting insurer's argument that a greater premium would have been charged if a particular risk was covered as pure speculation, in light of the absence of any record).

n.19 (discussing *St. Paul Companies v. Van Beek*, 609 N.W.2d 256, 257 (Minn. App. 2000), and *U. S. Fire Ins. Co. v. Ammala*, 334 N.W.2d 631, 634 (Minn. 1983)). Like an insurer, since CB Burnet under the LA Program agrees to defend and indemnify the sales associate for Covered Disputes, it cannot pursue claims against the sales associate to recover for the very losses that it has agreed to pay, whether in the form of subrogation or indemnification.

2. CB Burnet misapplies this Court's opinions regarding the transfer of risk.

CB Burnet attempts to reconcile its position with the *dicta* in *Anstine v. Lake Darling Ranch*, 305 Minn. 243, 233 N.W.2d 723 (1975), *overruled on other grounds*, *Farmington Plumbing & Heating Co. v. Fischer*, 281 N.W.2d 838 (Minn. 1979), concerning the distinction between “indemnity for hire,” which is insurance, and “equitable indemnity,” which is not insurance.⁹ CB Burnet focuses on a prior statement in the *Anstine* opinion to the same effect: “losses with which the indemnitor had no connection and over which it had no control would be a contract of insurance.” *Anstine*, 305 Minn. at 251, 233 N.W.2d at 728. Conversely, if the indemnitor has a connection to and control over such losses, then it would be “equitable indemnity” and not insurance.

Applying the above statements from *Anstine* to the instant case is difficult, because *Anstine* contemplates the application of the above test in connection with a concrete loss arising out of specific facts. Here, the gravamen of Allen's claim is a challenge to the LA Program as a whole. CB Burnet, however, does not dispute that the

⁹ “A contract which permits indemnity where the indemnitor's conduct bears no relationship to the loss provides for indemnity for hire, rather than equitable indemnity, and seems to be a commercial insurance contract subject to the laws regulating the insurance business.” *Anstine*, 305 Minn. at 251-2, 233 N.W.2d at 729.

hallmark of equitable indemnity, as opposed to indemnity for hire, is the absence of a transfer and distribution of risk. Accordingly, the concept of risk transfer must inform the analysis of whether CB Burnet has a “connection” to and “control” over the losses that are subject to the LA Program; i.e., Covered Disputes, which by definition all arise out of the sale associate’s conduct.

CB Burnet contends that it has a “connection” to all Covered Disputes by virtue of its vicarious liability under Minn. St. §82.63, subd. 3, and the common law. CB Burnet Br. at 33. As noted above, however, CB Burnet has no vicarious liability for a sales associate’s loss in the form of incurring the cost to defend Covered Disputes, which risk is transferred to CB Burnet in the LA Program. Thus, by its own analysis, CB Burnet has no “connection” to that particular significant loss. Even as to the losses for which CB Burnet has vicarious liability, as discussed above, the LA Program effects a substantial transfer and distribution of risk of the sales associate’s personal liability for third-party claims to CB Burnet. Accordingly, CB Burnet’s vicarious liability does not establish a “connection” to the sales associate’s loss for Covered Disputes, whether in the form of defense costs or liability, necessary for equitable indemnity instead of indemnity for hire.

As to the concept of “control,” CB Burnet asserts that in connection with Covered Disputes, “Burnet exercises control over the conduct that could lead to such losses.” CB Burnet Br. at 36. CB Burnet contends that such control is evidenced by the requirement in the Independent Contractor Agreements (“ICAs”) that a sales associate must comply with CB Burnet’s “Sales Associate Policy Manual, Burnet’s standards for use of the company trademark and trade name, Burnet’s conflict-of-interest rules, and all applicable

laws, statutes and ethical codes.” CB Burnet Br. at 34.¹⁰ The threshold flaw with this position is that CB Burnet did not place in evidence its Policy Manual or Conflict Rules. As a result, the Court cannot ascertain whether those documents have anything to do with sales associate conduct that gives rise to Covered Disputes, or whether those policies merely restate the requirements of Minnesota law, to which the sales associates would have to adhere regardless of any CB Burnet policy.¹¹ The record only establishes that the sales associates are independent contractors.¹² Accordingly, this Court should reject as mere speculation CB Burnet’s assertions that its policies create a substantial connection to the conduct of sales associates that could give rise to Covered Disputes. *See, Great Northern Oil Co.*, 291 Minn. at 104, 189 N.W. 2d at 409.

CB Burnet has not identified any other provision of the ICAs that allegedly establishes a right of control over the sales associates’ conduct, and has presented no

¹⁰ A sales associate’s adherence to CB Burnet’s trademarks does not have anything remotely to do with losses arising out of Covered Disputes under the LA Program. Moreover, a sales associate’s duty to adhere to all applicable laws, statutes and ethical codes is not created by CB Burnet. Accordingly, only the Sales Associate Policy Manual (the “Policy Manual”) and CB Burnet’s conflict of interest rules (the “Conflict Rules”) could hypothetically have some connection to a sales associates’ conduct that gives rise to Covered Disputes.

¹¹ The only evidence in the summary judgment record regarding any provisions of the Policy Manual is one page which merely paraphrases the LA Program (Allen App. 80) and testimony regarding several other pages that merely paraphrase federal law regarding the Civil Rights Act of 1968, antitrust, and the Real Estate Settlement Procedures Act, and state law regarding usury. Allen App. 107-09.

¹² CB Burnet attempts to rewrite the summary judgment record by contending that Allen and other sales associates were independent contractors for tax purposes only. See CB Burnet Br. at 5, n.3. Not only does this statement improperly paraphrase the testimony of CB Burnet’s corporate representative (Allen App. 89 at 26:7-18), it is inconsistent with the terms of the ICAs themselves which provide that, “Independent Contractor will not be treated as an employee with respect to the service provided pursuant to this Agreement for federal tax or other purposes.” (Allen App. 62, 66, 70, 74, 78 at ¶ 10) (emphasis supplied), CB Burnet’s Answer (Allen App. 16 at ¶ 6), and with the Summary Judgment Order that CB Burnet’s counsel drafted and was entered by the district court.

evidence of any kind that it has exercised actual control over sales associates' conduct that gives rise to Covered Disputes. The lack of an evidentiary record on this point renders inapposite CB Burnet's discussion of the law relating to "independent contractor agents" and principal and agent generally (CB Burnet Br. at 35).

Apart from this dispositive evidentiary omission, CB Burnet's position that it controls the conduct of sales associates giving rise to Covered Disputes contradicts its repeated position that it is merely vicariously liable for the acts of the sales associates and would have the right of indemnification against them absent the LA Program. If CB Burnet actually controlled the conduct of its sales associates, then CB Burnet would lack the essential element of being "without personal fault" that gives rise to vicarious liability and the right of indemnification against the sales associate. *See Tolbert*, 255 N.W.2d at 366; *Booth*, 788 N.W.2d at 708. Moreover, if CB Burnet actually did control the conduct of its sales associates that gives rise to Covered Disputes, then those sales associates would have the right to indemnification against CB Burnet, absent the LA Program, because the sales associates' acts would be "at the direction, in the interest of and in reliance upon" CB Burnet. *Tolbert*, 255 N.W.2d at 366. In turn, this would render the LA Program void for lack of consideration, because CB Burnet would merely be assuming an obligation it already possessed. Accordingly, within the meaning of *Anstine's* dictum, because CB Burnet neither has a "connection" to nor has "control" over the conduct of sales associates that gives rise to Covered Disputes, the LA Program is "indemnity for hire" (i.e., insurance) and not "equitable indemnity."

CB Burnet further quotes this Court's holding in *Hunt by Hunt v. Sherman*, 345 N.W.2d 750, 753 (Minn. 1984) (CB Burnet Br. at 28) that a self-funded employee benefit

plan established by a collective bargaining agreement is not insurance. Apart from the fact that the United States Supreme Court subsequently held that such plans were excluded by Congress from state insurance regulation, *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 US 724, 735, n.14, 105 S. Ct. 2380, 2387, n.14 (1985), such plans bear little resemblance to the LA Program. Among other things, in *Hunt*, the plan involved only employees, did not require employees to make payments to participate, and was created as a single aspect of a negotiated collective bargaining agreement. In contrast to those facts, the LA Program involves independent contractors, requires the sales associates to pay to participate, is operated on a for-profit basis,¹³ and is not part of a negotiated contract. For these reasons, *Hunt* is inapposite.

3. The LA Program provides indemnification to a “specified amount against loss or damage.”

CB Burnet contends that the LA Program does not satisfy the “specified amount against loss or damage” element required for insurance under § 60A.02, subd. 3(a). CB Burnet Br. at 31. CB Burnet, however, ignores the summary judgment evidence that the entire function of the LA Program is to handle claims within the \$1,000,000 retention amount of the NRT High-Retention E&O Policies (Allen App. 116, 101 at 89:3-24), which even the Court of Appeals found to be the case. *See Allen*, 784 N.W.2d at 86.

4. The LA Program constitutes an undertaking to “do some act of value to the assured in case of such loss or damage.”

In accordance with *State v. Bean*, 193 Minn. 113, 114, 258 N.W.18 (1934), CB Burnet’s obligation under the LA Program to provide a defense to the sales associates

¹³ While CB Burnet disputes the amount of profit that it generates from the LA Program (CB Burnet Br. at 12), it does not contend that the LA Program is operated on a non-profit basis.

when they are sued constitutes “some act of value to the assured in case of such loss or damage.” CB Burnet’s sole argument as to why the LA Program does not satisfy this standard is that it has the mere option to provide a defense. CB Burnet Br. at 31-2. As noted above, this position is specious and should be rejected.

B. The LA Program meets the definition of insurance under Minn. St. § 60K.31, subd. 5 (2010), and Minn. St. § 60A.06, subd. 1 (13), (15) (2010).

As further noted above, the definition of “insurance” for purposes of Minn. St. § 60K.47 is found in Minn. St. § 60K.31, subd. 5, which provides that, “‘Insurance’ means any of the lines of authority in section 60A.06.” Allen has identified two lines of authority that apply to the LA Program: Minn. St. § 60A.06, subd.1 (13) (2010) (liability insurance) and Minn. St. § 60A.06, subd.1 (15) (2010) (legal expense insurance). CB Burnet does not specifically dispute that the LA Program falls within both of these “lines of authority.”¹⁴

¹⁴ CB Burnet’s contention that its right to settle disputes does not bear a resemblance to commercial insurance policies (CB Burnet Br.at 32) is incorrect. *See, e.g., Stan Koch & Sons Trucking, Inc. v. Great West Cas. Co.*, 517 F.3d. 1032, 1043 (8th Cir. 2008) (insurer had the right to settle “as we consider appropriate.”)

III. The Court of Appeals erred in adopting the “principal object and purpose” test.

CB Burnet urges that this Court should adopt a “principal object and purpose” test to limit the reach of Minnesota’s regulation of insurance only to entities that are organized as insurance companies and sell insurance to the general public. CB Burnet Br. at 36-44. Such a position is inconsistent with Minnesota law.

A. The Minnesota Legislature and this Court have impliedly rejected the “principal object and purpose” test.

Allen Br. at 36-39 analyzes the significance of the Legislature’s 1980 amendment to Minn. St. § 60A.02 subd. 3(a) (excluding from the definition of insurance only self-insurance plans of political subdivisions), and the long-standing enactments that regulate as insurance various self-insurance plans, such as Minn. St. § 60F.01 (2010), et seq. and Minn. St. § 62H.01 (2010) et seq. Allen maintains that because an employer-employee self-insurance plan by definition is necessarily ancillary to an underlying employment relationship, the Legislature has impliedly rejected the “principal object and purpose” test. Without attempting to specifically address Allen’s analysis or provide any explanation for either the 1980 statutory amendment or the Legislature’s regulation of certain self-insurance plans as insurance, CB Burnet merely concludes that “Allen’s reasoning simply is not credible.” CB Burnet Br. at 45. CB Burnet’s mere denial of Allen’s argument provides no basis to reject Allen’s reasoning.

Similarly unpersuasive is CB Burnet’s attempt to distinguish this Court’s holding in *State v. Beardesley*, 88 Minn. 20, 92 N.W. 472 (1902). CB Burnet Br. at 46. The facts of that case clearly indicate that the debt cancellation insurance was issued by the lender concurrently with the making of the loan to its borrower, which is functionally no

different than Allen and the other sales associates entering into the LA Program concurrently with their execution of the ICAs. Accordingly, this Court in *Beardsley* impliedly rejected CB Burnet's contention that an arrangement cannot be insurance when it is part of and incidental to an underlying business relationship between private parties.

B. CB Burnet's sister state authority is contrary to Minnesota law.

Finding no support in Minnesota law, CB Burnet resorts to sister state authority that allegedly adopts the "principal object and purpose" test. CB Burnet Br. at 38-42. None of these cases are apposite.

- *Jordan v. Group Health Ass'n.*, 107 F.2d 239, 245-247(C.D.C. 1939) (non-profit health association plan was not insurance, because the association did not assume any risk to assure that doctors participating in the plan rendered services for which the participants paid).¹⁵

- *State ex rel. Londerholm v. Anderson*, 195 Kan. 649, 663-64, 408 P.2d 864, 875-76 (Kan. 1965) (the court held that a "family protection agreement" that cancelled any outstanding debt for the purchase of a cemetery lot upon the death of the purchaser

¹⁵ Allen has distinguished this case on numerous grounds, including that the holding in *Jordan* has been rejected by the Minnesota Legislature, because non-profit health plans under Minn. St. § 62C.01 (2010) et seq, such as the one in *Jordan*, are regulated as insurance programs. Allen Br. at 35. CB Burnet responds by inexcusably truncating Minn. St. § 62C.01, subd. 3 (2010) to make it appear that such plans are not regulated as insurance. CB Burnet Br. at 43. In fact, § 62C.01, subd. 3 states such health plans "shall not be subject to the laws of this state relating to insurance except . . . as otherwise specifically provided." (Emphasis supplied). These specific Minnesota statutes provide that such companies must obtain a certificate of authority (§ 62C.08), must establish actuarial reserves (§ 62C.09), must file annual statements and are subject to examination by the Commissioner (§ 62C.11), all of which requirements are applicable to insurance companies.

was not insurance because it was incidental to the principal business of the issuer which was the sale of cemetery lots).¹⁶

- *Barberton Rescue Mission v. Insurance Division of Iowa Dept. of Comm.*, 586 N.W.2d 352, 356 (Iowa 1998) (the court held that a non-profit organization's program to pay medical expenses for its members was not insurance, because the organization had no obligation to make any payments for such expenses but relied on the voluntary payments by its members).¹⁷

- *Dietz-Britton*, 139 Ohio App.3d at 354, 743 N.E.2d at 973 (in *dicta* and without setting forth the terms of the legal defense program, the court noted that "our holding here is not a definitive ruling on the issue." The court further stated that the program was not "the primary business" of the real estate broker and that the plaintiff had presented "no evidence" as to how the real estate broker "benefits from the legal defense program in a monetary fashion").¹⁸

¹⁶ Apparently, CB Burnet neglected to read the *Londerholm* dissent, which noted that "the majority rule appears to be that a contract providing for the cancellation of indebtedness on the death of the obligor is a contract of insurance" and cited, among other things, an A.L.R. article featuring this Court's opinion in *Beardsley*. *Id.*, 195 Kan. at 664, 408 P.2d at 876 (citing 35 A.L.R.1039).

¹⁷ The holding of this case is inconsistent with this Court's opinion in *State v. Spalding*, 166 Minn. 167, 171, 207 N.W. 317, 319 (1926), in which the Court held that there was a sale of insurance issued by a non-profit organization, even though that entity had no obligation to pay claims arising out of automobile accidents, but relied on the voluntary contributions of its members.

¹⁸ Allen presented substantial summary judgment evidence of how CB Burnet "benefits ... in a monetary fashion" from the LA Program. Allen Br. at 10. Also, contrary to CB Burnet's position (CB Burnet Br. at 47), this *dicta* in *Dietz* does not reflect an overruling of the highest Ohio court's opinion in *State of Ohio ex rel. Duffy v. Western Auto Supply Co.*, 134 Ohio 163, 170-71, 16 N.E.2d 256, 259 (1938), which rejected the principal object and purpose test, because the *Dietz* appellate court did not even discuss this higher court holding that, of course, it had no authority to overrule.

- *Claver v. Coldwell Banker Residential Brokerage Co.*, Civil No. 08 cv 817-L, 2008 WL 5195969 (S.D. Cal. Dec. 21, 2009) (the court held on a motion to dismiss that a Coldwell Banker legal assistance program was not insurance under California law, because the program was incidental to the broker-sales person relationship).¹⁹
- *Kinkaid v. John Morrell & Co.*, 321 F. Supp.2d 1090, 1100 (N.D. Iowa 2004) (the court held that an undertaking by a hog slaughterer to a hog seller that the slaughterer would still pay the full purchase price if the hogs died in transit was not insurance, because such a provision was authorized by the Iowa Uniform Commercial Code).²⁰
- *Boyle v. Orkin Exterminating Co.*, 578 So.2d 786, 788 (Fl. App. 1991) (exterminator’s contract providing a lifetime termite guarantee was not insurance but a “warranty of its service both as to the product itself and the method of application”) and *GAF Corp. v. County School Board of Washington Co.*, 629 F.2d 981, 983-84 (4th Cir. 1980) (guarantee that roofing supplier would repair all roof leaks caused by defects in its

¹⁹ CB Burnet inexcusably neglects to inform this Court that in two opinions issued by the state courts of California—one in Orange County and the other in San Francisco County—the identical issue as in *Claver* was raised on a motion to dismiss (which is called a “demurrer” in California) and that both of those courts overruled the demurrer and held that the plaintiffs had stated a viable claim that the legal assistance program was insurance in California. *See* Supplemental Appendix attached hereto, *Griffith v. Coldwell Banker Residential Brokerage Co.*, Case No. 30-2008-00093810, Notice of Ruling at 1-3 (Orange Co. Cal. Sup. Ct., February 10, 2009) (overruling demurrer on the issue that the legal assistance program was not insurance); *Griffith*, Notice of Ruling (Orange Co. Cal. Sup. Ct., December 3, 2009) (overruling the demurrer on defendant’s alternate grounds); *Meyeraan v. Valley of California, Inc.*, Case No. CGC 08-478905, Order Re: Demurrers to Third Amended Complaint (San Francisco Cal. Sup. Ct., December 15, 2009) (overruling demurrer on all of defendant’s grounds).

²⁰ On its face, this case is inapposite. There is no UCC provision or any other statutory exemption that governs the issuance or sale of the LA Program.

products and workmanship was in the nature of “a warranty agreement accompanying the sale of goods” and not insurance).²¹

IV. Public policy favors the regulation of the LA Program as insurance.

CB Burnet’s and Edina’s discussions of public policy, which allegedly disfavors treating the LA Program as unauthorized insurance, are unpersuasive. Contrary to their position, the invalidation of the LA Program will not undo commercial indemnification or exculpatory agreements. None of the cases cited by CB Burnet or Edina involve, as the LA Program does, the annual payment by thousands of similarly situated indemnitees (sales associates) to an indemnitor (CB Burnet) which distributes the risk to defend and indemnify third-party claims arising solely out of those indemnitee’s acts that CB Burnet assumes. Rather, the cases cited by Edina involve contracts entered into by two discrete parties in which there is neither payment by the indemnitee nor the distribution of risk by the indemnitor who indemnifies third-party claims in its role as a lessee (*see, Bogzatzki v. Hoffman*, 430 N.W.2d 841 (Minn. App. 1988) and *Potvin v. John Hancock Mutual Ins. Co.*, No. C0-00-35, 2000 WL 979138 (Minn. App. July 18, 2000), or a medical device manufacturer (*see, Osgood v. Medical, Inc.*, 415 N.W.2d 896 (Minn. App. 1987, review denied). Moreover, in these cases, the losses which are the subject of the indemnity are connected to the business activities of the indemnitors (lessors and manufacturer), while in the LA Program the losses are connected solely to the conduct of the indemnitees (the sales associates). As to exculpatory agreements, Allen has never taken the position that such waivers or releases of claims effect a transfer and distribution of risk giving rise to insurance.

²¹ The distinction between a warranty and indemnity is irrelevant to the instant case.

The LA Program falls squarely within the letter and spirit of the Minnesota statutes that govern insurance. Thus, to regulate this Program as insurance furthers public policy by protecting Minnesota residents who are consumers of policies issued by unauthorized insurers. CB Burnet, as well as Edina, can comply with Minnesota insurance regulations by simply purchasing third-party E&O insurance and charging their associates for the premiums, or by forming an affiliated insurance company.

Conclusion

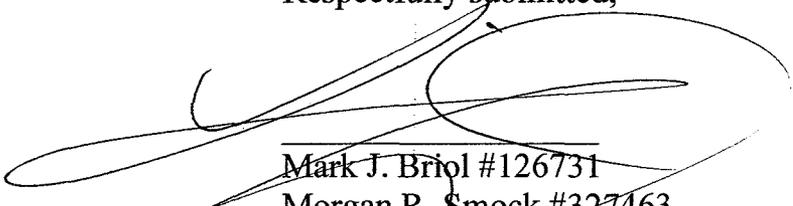
The Summary Judgment should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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