Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?

By Sean Ponist

The law is clear that a party is entitled to seek equitable indemnity where negligence claims are alleged. Similarly, the law is clear that a party is not entitled to indemnity against fraud, intentional torts and other torts for which the application of indemnity would violate public policy. But the law is much less clear as to a party's right to indemnity for negligent misrepresentation, a cause of action that straddles the line between negligence and fraud. Although the issue arises frequently between joint tortfeasors, the appellate courts have yet to address it. In their silence, trial courts have been all over the map.

Equitable indemnity stems from the principle that, as a matter of fairness, joint tortfeasors should share the burden of discharging the legal obligation to the injured party for the damages resulting from their mutual negligence. The principle seeks to avoid the inequity of one tortfeasor having to pay the entirety of the damages while another gets off scot-free. Equitable indemnity forces all tortfeasors to take responsibility for their share of responsibility on a comparative fault basis.

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It is an expansive principle that "can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors." (*BFGC Architects Planners Inc. v. Forcum/Mackey Construction Inc.* (2004) 119 Cal.App.4th 848, 852.) To state a cause of action for equitable indemnity, a defendant need only allege that the harm for which it is being sued is attributable, at least in part, to the cross-defendant. "Rules permitting a joint tortfeasor to cross-complain against another joint tortfeasor for equitable indemnity 'promote the public policy considerations underlying multiparty tort litigation.'" (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1449).

In *Yamaha Motor Corp., U.S.A. v. Paseman*, plaintiff brought suit against Yamaha for injuries that he sustained riding a seven-year old moped owned by his parents, alleging strict liability for the purportedly defective design and manufacture of the moped. (219 Cal.App.3d 958, 962 (1990).) Yamaha, in turn, cross-complained against the parents for equitable indemnity, alleging that they failed to properly maintain and repair the moped. The appellate court held that equitable indemnity principles permit the apportionment of fault between a strict liability defendant, such as Yamaha, and a negligent defendant, such as the parents. The court noted that it is irrelevant for purposes of the application of equitable indemnity that plaintiff could have asserted a negligence cause of action against his parents but chose not to do so. Under the doctrine, "a defendant/indemnitee may in an action for indemnity seek apportionment of the loss on any theory that was available to the plaintiff upon which the plaintiff would have been successful." (*GEM Developers v. Hallcraft Homes of San Diego Inc.* (1989) 213 Cal.App.3d 419, 430.)

As held in *Yamaha Motor*, the theories of liability between the two tortfeasors do not need to be the same in order to apply equitable indemnity principles. Under this expansive application of equitable indemnity, the doctrine would appear to apply to claims for negligent misrepresentation. After all, if a defendant who is strictly liable may seek indemnification from a cross-defendant who is merely negligent, then why should a defendant who is liable for negligent misrepresentation be precluded from seeking indemnity from a cross-defendant who is negligent?

Although the public policy favoring indemnity claims is broad, there are certain contexts where permitting cross-claims for equitable indemnity would be inequitable and against public policy. Because indemnification is an equitable remedy designed to correct injustice, it will not be applied where its application would result in injustice or unjust enrichment. Equitable indemnity "is not available where it would operate against public policy." (*Western Steamship Lines Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 110.)

One instance in which it would be against public policy to allow the use of equitable indemnity is where a party has committed intentional wrongful conduct. (See Code of Civil Procedure Section 875(d) ("[t]here shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person"); *Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 6-7.) Similarly, it is against public policy to provide contractual indemnity where a party has engaged in fraudulent conduct. In fact, Civil Code Section 1668 expressly provides that arrangements which relieve a party of liability for his or her own fraud, whether willful or negligent, are against public policy.

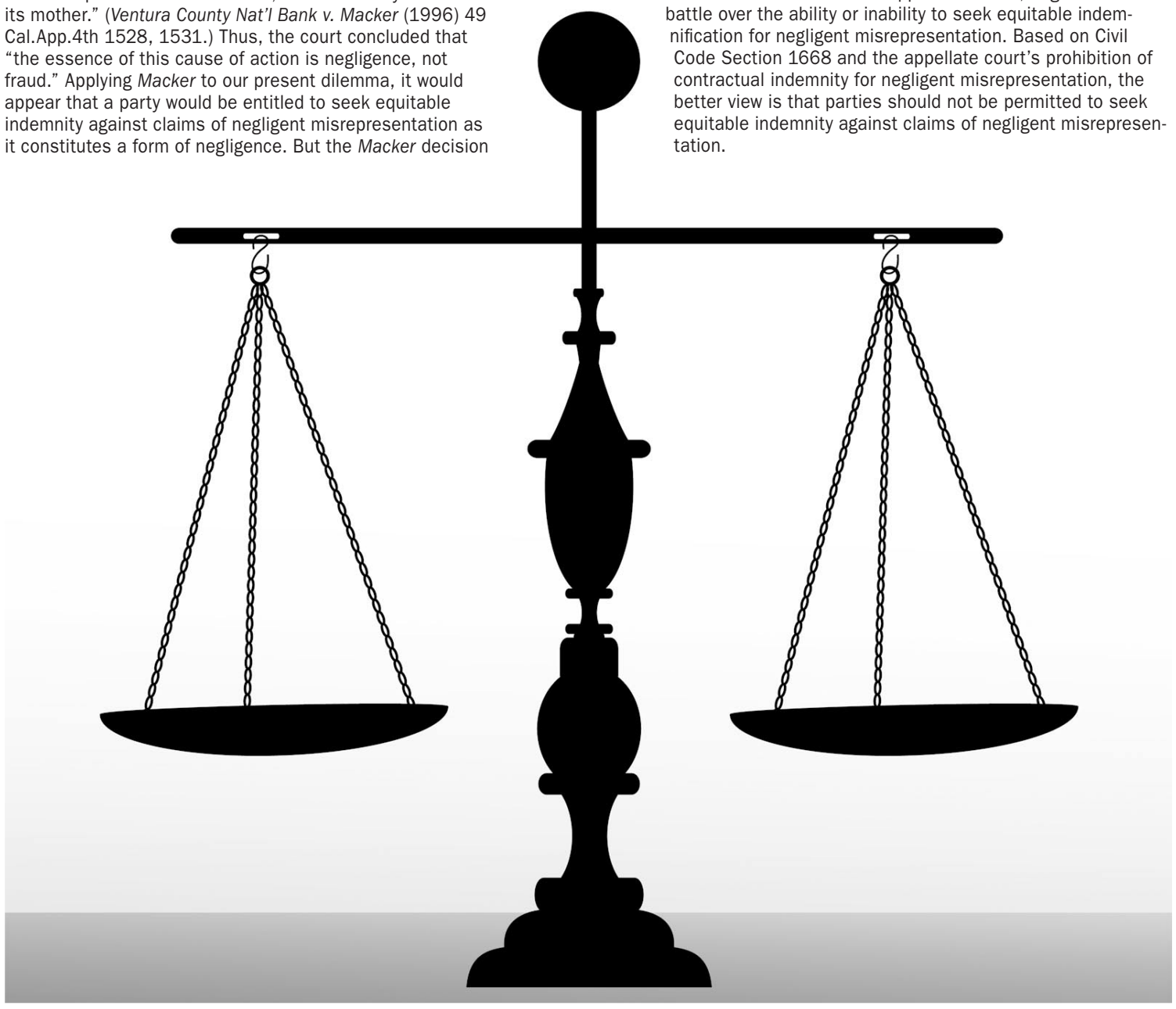
Thus, the right to seek equitable indemnity against allegations of negligent misrepresentation may be resolved by answering the following questions: Is negligent misrepresentation a form of fraud for which contractual indemnification would violate public policy? If a party is not entitled to contractual indemnity for negligent misrepresentation, should it be allowed such a right in equity?

According to at least one court, "Negligent misrepresentation is born of the union of negligence and fraud. If negligence is the mother and misrepresentation the father, it more closely resembles its mother." (*Ventura County Nat'l Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1531.) Thus, the court concluded that "the essence of this cause of action is negligence, not fraud." Applying *Macker* to our present dilemma, it would appear that a party would be entitled to seek equitable indemnity against claims of negligent misrepresentation as it constitutes a form of negligence. But the *Macker* decision reached its conclusion in the context of an analysis of the statute of limitations and did not address whether the application of equitable indemnity to negligent misrepresentation violated public policy. Furthermore, the weight of authority indicates that negligent misrepresentation is a form of fraud not negligence. (See e.g., *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077.) "The case law...is clear that in California negligent misrepresentation is a form of fraud and deceit under sections 1710, subdivision 2, and 1572, subdivision 2." (*Continental Airlines Inc. v. McDonnell Douglas Corp.* (1990) 216 Cal.App.3d 388, 403-404.)

Accordingly, California courts have consistently held that contractual indemnity provisions are unenforceable against claims of negligent misrepresentation. As stated by the Northern District of California, "[u]nder California law, no contractual agreement may indemnify anyone from his own fraud.... Negligent misrepresentation is included with the definition of fraud. Therefore, there can be no insurance coverage for [negligent misrepresentation]...as a matter of law." (*Allstate Ins. Co. v. Hansten* (1991) 765 F.Supp. 614, 616.) Similarly, the court in *Blankenheim v. E.F. Hutton* held that contractual indemnification from liability for any form of misrepresentation, including negligent misrepresentation, "is against the policy of the law." (217 Cal.App.3d 463, 473 (1990).)

Although the authority cited above arises in the context of "contractual indemnity," it resonates even more saliently in the context of equitable indemnity. If parties cannot contractually agree to indemnify one another against claims of fraud because it is against the policy of law, then, *a fortiori*, a party cannot equitably be required to indemnify another for fraud or a fraud based claim. If a joint tortfeasor cannot willingly agree to indemnify a party for its misrepresentations, then it should not be unwillingly compelled to provide indemnity in equity. Moreover, there is no logical basis to provide indemnification rights in one context while denying them in another — a party should either be allowed an apportionment against its fraudulent conduct or it should not.

Until this issue reaches the appellate courts, litigants will battle over the ability or inability to seek equitable indemnification for negligent misrepresentation. Based on Civil Code Section 1668 and the appellate court's prohibition of contractual indemnity for negligent misrepresentation, the better view is that parties should not be permitted to seek equitable indemnity against claims of negligent misrepresentation.



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