

DEPARTMENT 11 LAW AND MOTION RULINGS

Case Number: 21STCV22374 **Hearing Date:** January 7, 2022 **Dept:** 11

Tentative Ruling Re: Demurrer Re: 21STCV22374 (Snow)

Date: 1-7-22

Time: 10:00 am

Moving Party: Temecula Valley Emergency Physicians, Inc. (“Defendant” or “TVEP”)

Opposing Party: Lisa Snow (“Plaintiff”)

Department 11: Judge David S. Cunningham III

TENTATIVE RULING

TVEP’s request for judicial notice is granted. The Court judicially notices the website’s existence but not the truth of its contents.

TVEP’s demurrer is overruled as to the unlawful prong.

TVEP’s demurrer is moot as to the unfair prong.

BACKGROUND

This is a putative class action. Plaintiff alleges that she made three trips to TVEP’s emergency room. For two of the trips, Plaintiff claims TVEP balance billed her – i.e., billed her directly “for the difference between the bill[s] submitted and the payment[s] received” from her insurer. (Complaint, ¶ 2.) Plaintiff contends the alleged balance billing violated the Knox-Keene Act (“KKA”) and Business & Professions Code section 17200, the Unfair Competition Law (“UCL”).

At issue is TVEP’s demurrer to the UCL cause of action.

DISCUSSION

Law

Demurrer

When considering demurrers, courts read the allegations liberally and in context, and “treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (Serrano v. Priest (1971) 5 Cal.3d 584, 591.) “A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed. The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.” (Hahn v. Mirda (2007) 147 Cal.App.4th 740, 747.) It is error “to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967.)

UCL

Plaintiff’s UCL cause of action is based on alleged violations of the unlawful and unfair prongs.

“[T]he UCL permits a cause of action to be brought if a practice violates some other law. In effect, the ‘unlawful’ prong of § 17200 makes a violation of the underlying law a *per se* violation of § 17200.” (Stern, Business & Professions Code Section 17200 Practice (The Rutter Group March 2021 Update) ¶ 3:53.)

“Virtually any law or regulation — federal or state, statutory or common law — can serve as predicate for a § 17200 ‘unlawful’ violation. Thus, if a ‘business practice’ violates any law — literally — it also violates § 17200 and may be redressed under that section. [Citation.] As the California Supreme Court has said, § 17200 ‘borrows’ violations of other laws and treats them as unlawful practices independently actionable under § 17200.” (Id. at ¶ 3:56.)

“The second ‘wrong’ proscribed by § 17200 is ‘unfair’ business practices. Because § 17200’s definition of the five proscribed ‘wrongs’ is set forth in the disjunctive, a business practice can be ‘unfair’ — and violative of § 17200 — even if it is not ‘deceptive’ and even if it is ‘lawful.’” (Id. at ¶ 3:112.)

“The ‘unfair’ standard is intentionally broad, allowing courts maximum discretion to prohibit new schemes to defraud.” (Id. at ¶ 3:113.)

Analysis

The complaint contains one cause of action for violation of the UCL's unlawful and unfair prongs based on violation of the KKA. As noted above, the primary misconduct is TVEP's alleged balance billing. (See Complaint, ¶¶ 58-72.)

The first issue is whether Plaintiff alleges a violation of the unlawful prong.

TVEP contends the answer is no because:

Plaintiff's claim is premised on Prospect Medical Group, Inc. v. Northridge Emergency Medical Group (2009) 45 Cal.4th 497 ("Prospect"), which generally holds that the KKA prohibits balance billing;

Plaintiff's insurer was BlueCross BlueShield of Tennessee ("BCBS of Tennessee"); and

BCBS of Tennessee is not licensed and regulated by the California Department of Managed Health Care ("DMHC"), so the KKA and Prospect do not apply. (See, e.g., Demurrer, pp. 4, 7-9; see also Reply, p. 2 [arguing that the KKA and Prospect do not apply because "Plaintiff's 'insurer' is not a health care service plan regulated under the KKA"].)

Plaintiff contends the answer is yes because Prospect expressly bars balance billing in the context here, namely, where the emergency room patient's insurer declines to pay the full bill. Plaintiff appears to argue that Prospect extends beyond the KKA's jurisdiction and should be applied in every circumstance where an insurer attempts to bill a patient for emergency costs. (See, e.g., Opposition, pp. 1, 8-12.)

The first sentence of Prospect's discussion section states that the KKA "governs this case." (Prospect, supra, 45 Cal.4th at 504 [noting that the KKA "is a comprehensive system of licensing and regulation under the jurisdiction of the [DMHC]"].) It seems clear that the California Supreme Court intended to limit the analysis to matters within the KKA's reach.

Nevertheless, the Court finds TVEP's showing inadequate.

TVEP cites Health & Safety Code section 1349 for the proposition that a health care service plan must secure a license from the DMHC before operating in California. TVEP contends BCBS of Tennessee is an out-of-state insurance company and undisputedly "is not licensed under the [KKA]." (Demurrer, p. 8.) As support,

TVEP cites the DMHC's website, asserting that BCBS of Tennessee does not appear on the list of regulated health plans. (See *id.* at pp. 8-9.)

The Court disagrees because:

TVEP's counsel lacks personal knowledge to authenticate the website;

even assuming authentication, judicial notice is only appropriate as to the website's existence, not the truth of its contents; and

even if the Court considered the website for its truth, the present list does not constitute proof that BCBS of Tennessee was unlicensed at time of the alleged billing disputes in late 2020 and early 2021.

Consequently, the demurrer must be overruled as to the unlawful prong because the applicability of the KKA and Prospect cannot be determined from the website and the face of the complaint. Factual questions exist.

The next issue – whether Plaintiffs allege a violation of the unfair prong – is moot for at least two reasons. One, the UCL cause of action survives under the unlawful prong, and California does not allow partial demurrers. Two, TVEP's moving brief does not address the unfair prong, and it is improper to address it for the first time in reply.
