Case No. **S178542**

In the Supreme Court
of the
State of California

YANTING ZHANG,
Petitioner,

vs.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,
Respondent,

CALIFORNIA CAPITAL INSURANCE COMPANY,
Real Party in Interest.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two.
Case No. E047207

REPLY TO ANSWER TO PETITION FOR REVIEW

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THE COURT OF APPEAL'S OPINION CONFLICTS WITH *TEXTRON* AND CIRCUMVENTS *MORADI-SHALAL*

Petitioner Zhang agrees that if the Court of Appeal's opinion conflicts with the opinion in *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, then this court should grant review. Answer at 2; see Answer at 6 ["if the Court finds that there is a conflict among the Courts of Appeal, Petitioner submits that review is proper"]. It *does* conflict (see Petition at 6–9; slip op. at 10), so the court *should* grant review.

In addition to creating a conflict, the Court of Appeal's opinion provides a template for litigants seeking to circumvent this court's decision in *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287, which held that only the Insurance Commissioner, not private litigants, can enforce the prohibitions against unfair claims handling in Insurance Code section 790.03(h). Rather than alleging that the insurer unfairly handled a claim, private litigants will henceforth get around Moradi-Shalal by simply alleging that the insurer promised or advertised that it would act fairly and then unfairly handled a claim. Since every insurer implicitly or explicity promises to act fairly, every claims-handling dispute will be recast as "false advertising" or "fraud" under the UCL, based on the erroneous premise that such alleged conduct is not also proscribed under the UIPA.

Zhang's UCL claim is founded upon allegations of "false advertising," which she claims are somehow "separate and apart from claims handling," although the basis and foundation for her UCL claim is a claim-handling dispute To circumvent *Moradi-Shalal*, she argues that her UCL claim is "separate and apart from the conduct constituting violations of the UIPA." Answer at 10. Not true.

Zhang's false-advertising UCL claim is simply her claim-mishandling and amount-of-loss dispute renamed and repackaged:

> Defendant California Capital Insurance Company engaged in unfair, deceptive, untrue, and/or misleading advertising when it advertised its Businessowners policy products, such as the California Capital policy herein. California Capital Insurance Company promises its insureds that it will timely pay proper coverage in the event the insured suffers a covered loss. By this promise, California Capital Insurance Company agrees that if an insured suffers compensable loss, it will pay the true value of that covered claim. However, as its conduct herein demonstrates, California Capital Insurance Company in fact has no intention of properly paying the true value of its insureds' covered claims. App. at 32, ¶ 92.

As pled, Zhang's UCL claim requires her to prove that California Capital "did not pay proper coverage [for] a covered loss," that California Capital advertised in the relevant time period that it would "timely pay proper coverage" in the event of a covered loss[1], and that both are statutory UIPA violations. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 ("Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices."). All of the conduct that Zhang alleges in her UCL claim is specifically proscribed conduct under the UIPA. Zhang's UCL claim and the Court of Appeal's decision that permits it, therefore, both contradict this Court:

> [T]he UIPA does not create a private right of action for violations of its provisions (*Moradi-Shalal* . . .) and that a plaintiff may not "plead around" that limitation by casting a cause of action based on a violation of the UIPA as one brought under the UC[L]. *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 267.

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[1]Zhang improperly refers to an alleged "advertisement" that is not in the record before this Court. Answer at 9.

Zhang's case is about, and has always been about, whether California Capital properly handled her fire claim and paid what was owed under her policy for the claim. To support her garden-variety claims-handling dispute, Zhang's second amended complaint contains allegations that parrot the UIPA—including her false-advertising allegations. Zhang's pleadings in support of her UCL claim are veritable recitations of conduct specifically proscribed by the UIPA. Her UCL claim, therefore, is just a private UIPA claim, which *Moradi-Shalal* prohibits.

Zhang admits that this is a claim-handling case. Zhang alleges that California Capital mishandled her first-party insurance claim. All of Zhang's allegations in her second-amended complaint repeat Insurance Code section 790.03, under which she has no private right of action.

This Court in *Manufacturers Life* holds that "because section 790.03 does not create a private civil cause of action, plaintiff cannot plead around that limitation by relying on conduct which violates only the UIPA as the basis for a UC[L] cause of action." Again, each of Zhang's allegations, including those of "fraud" and "false advertising," are prohibited by the UIPA—although she avoids labeling her allegations as direct claims for UIPA violations in her attempt to plead around Moradi-Shalal. The prohibition against the private right of action cannot be avoided by plaintiff "characterizing the claim[s] . . . under the UC[L]. . . in order to confer private standing to enforce a provision of the UIPA." *Manufacturers Life*, 10 Cal.4th at 283.

The Court of Appeal's decision here expressly permits a private cause of action for violation of Business and Professions Code section 17200 (UCL) arising out of activities proscribed by and intrinsically intertwined with the UIPA—for which there is no private cause of action—in this garden-variety claim-handling case. The Court of Appeal's decision

expressly conflicts with *Textron*, and this Court's decisions in *Moradi-Shalal*, *Rubin*, and *Manufacturers Life*.

II

THE COURT OF APPEAL'S DECISION IS BASED ON THE ERRONEOUS ASSERTION THAT INSURERS GET A "FREE PASS" FOR CLAIM-HANDLING MISCONDUCT

The Court of Appeal is very concerned that *Moradi-Shalal* and *Textron* somehow give insurers a "free pass" from claim-handling misconduct that may violate "the UCL as well as that section [790.03]." Slip Op. at 4 n.1. That concern is misplaced.

The rule that private parties may not recast UIPA violations as UCL claims does not mean insurers "enjoy impunity for" claim-handling misconduct. Answer at 5. Far from it; insurers in California are subject to the Insurance Commissioner's stringent enforcement of a myriad of insurance-code provisions and regulations. The Legislature empowers the Commissioner to police the insurance industry and regulate their practices, levy significant fines for violations, bring direct actions for statutory violations, and impose severe penalties on insurers, including revocation of insurers' licenses to conduct business.

Further, unlike other California industries that provide jobs and pay taxes, insurers are subject to myriad of common-law claims and associated damages, including the unique tort of bad faith. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 685-693 (explaining why only insurers can be liable in tort for bad faith). For California Capital's alleged misconduct, Zhang's common-law contract and tort claims seek contract benefits and emotional-distress, bodily-injury, attorney's-fees, and punitive damages. App. 33.

The UCL "permit[s] members of the public to police the spectrum of 'unfair competition.'" *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201. In drafting the UCL, "the legislature deliberately traded the attributes of tort law for speed and administrative simplicity." *Id.* at 1200. Although UCL claims have been permitted for allegedly unfair insurance-business practices that are not governed by UIPA, such as ratemaking and collections practices, private litigants are not permitted to relabel UIPA direct actions as UCL claims.

Every claim-handling and amount-of-loss dispute is unique, and requires the trial courts to apply statutory and common-law remedies. California public policy anticipates that insureds and insurers may disagree over the true value of an insured loss, and the Legislature provides a statutory means for parties resolve their disagreements informally. In first-party amount-of-loss disputes, the parties may avoid protracted litigation by engaging in the appraisal process. Ins. Code § 2071. Where a dispute concerning the true amount of a loss is lawfully resolved in appraisal, the statutory, contractual, and common-law remedies available to resolve the dispute negate the insured's ability to "demonstrate an [insurer's] unlawful or unfair practice" necessary to maintain a UCL claim. *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886, 895.

Damages under the UCL are not available. *Korea Supply*, 29 Cal.4th at 1144. "The only nonpunitive monetary relief under the [UCL] is the disgorgement of money that has been wrongfully obtained . . . ." *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266. These UCL recoveries are no substitute for the contract and tort common-law remedies that insureds may pursue, nor the UIPA claims and penalties that the Department of Insurance may pursue.

The Insurance Commissioner's overwhelming power under the UIPA defies the Court of Appeal's and Zhang's assertions that *Moradi-Shalal* and *Textron* give insurers a "free pass" for claim-handling misconduct. On December 13, 2007, Insurance Commissioner Steve Poizner announced a $12.6 million fine against Blue Shield for UIPA violations, including "[f]ailure to pay claims on a timely basis."[2] On January 24, 2006 the Insurance Commissioner levied a $1 million fine against Farmers Ins. Group for UIPA violations.[3] More recently on August 6, 2009, the Insurance Commissioner fined Canseco Ins. Co. $500,000 "over its unfair claims handing practices" under the UIPA.[4]

Given insureds' common-law remedies and the Insurance Commissioner's UIPA remedies, the entire notion that insurers get a "free pass" from and "enjoy impunity for" claim-handling misconduct, simply because no insured may recast a UIPA claim as a UCL claim, is simply wrong. This wrong notion is the Court of Appeal's rationale for its express disagreement with *Textron*.

This Court, therefore, should grant review, approve *Textron*, and resolve the conflict that the Court of Appeal's decision creates.

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[2]http://www.insurance.ca.gov/0400-news/0100-press-releases/0060-2007/release126-07

[3]http://www.insurancejournal.com/news/west/2006/01/24/64475.htm

[4]http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2009/release120-09

III

ALTHOUGH UCL REMEDIES ARE "CUMULATIVE" TO OTHER LAWS OF THE STATE, CONDUCT FOR WHICH THERE IS NO PRIVATE RIGHT OF ACTION CANNOT SUPPORT A UCL CLAIM

The UCL statute states, "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties under all other laws of the state." Bus. & Prof. Code § 17205. Zhang contends that this provision permits her to recast her private UIPA claim as a UCL claim, but she neglects and ignores the opening clause, "Unless otherwise expressly provided."

This Court holds that no alleged UCL violation, even in the consumer-protection context, may be predicated upon conduct for which the Legislature intended no private right of action. *Moradi-Shalal*, 46 Cal.3d at 300–304; *Manufacturers Life*, 10 Cal.4th at 283–284; *cf. Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565 ("Simply no basis exists for concluding that, by indentifying and penalizing in Penal Code section 308 . . . certain tobacco sales practices, the Legislature intended to bar unfair competition causes of action based on such practices."). Thus, claim-handling conduct that the UIPA proscribes—for which the Legislature intended no private right of action—cannot support a UCL claim:

> The question the court addressed in *Rubin v. Green, supra*, 4 Cal.4th 1187, was whether allegedly improper solicitation by an attorney, which could not form the basis of a tort action because the conduct fell within the litigation privilege of Civil Code section 47, subdivision (b), could be the basis of an action for injunctive relief under the UC[L]. Plaintiff's theory was that the conduct could do so as it was prohibited by Business and Professions Code sections 6152 and 6153. Therefore, it was a species of "unfair competition" as to which, under Business and Professions Code section 17204,

> plaintiff, acting in the interests of the general public, had standing to seek an injunction.
>
> The court held that the plaintiff could not plead around the absolute bar to relief created by the litigation privilege by recasting the cause of action as one for unfair competition. It analogized such pleading to the attempts to avoid the bar to "implied" private causes of action under section 790.03, which several Courts of Appeal had held could not be avoided by characterizing the claim as one under the UCA . . . *Manufacturers Life*, 10 Cal.4th at 283.

In this case, Zhang attempts to do precisely the same thing as the *Rubin* plaintiff attempted to do—circumvent a prohibition against a private UCL action—and what the *Textron* plaintiff attempted to do—circumvent *Moradi-Shalal* by recasting UIPA violations as a private UCL claim. But although the UCL is cumulative to all other laws of the state, conduct which is privileged or cannot support a private cause of action, even if alleged as a violation of the UCL or another statute or regulation, cannot be used to circumvent the privilege or prohibition.

IV

THE PEOPLE PASSED PROPOSITION 103 TO REGULATE AUTOMOBILE-INSURANCE RATES, NOT TO LEGISLATE AROUND *MORADI-SHALAL*

Zhang cites Insurance Code section 1861.03(a), which states that "[t]he business of insurance shall be subject to the laws of California applicable to any other business, including" the UCL. Zhang contends that section 1861.03 permits her to recast UIPA violations as a private UCL claim, despite *Moradi-Shalal's* prohibition. Answer at 17–18. But the voters passed Proposition 103, which added section 1861.03, to regulate automobile-insurance rates, not to regulate claim handling:

> To protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable insurance commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." Historical and Statutory Notes, 42A, West's Ann. Ins. Code (1993 ed.) foll. § 1861.01, p. 649.

Although Proposition 103 brought the business of insurance within the purview of unfair-competition laws, it did not overrule *Moradi-Shalal* or its progeny:

> Because the insurance industry obviously was subject to section 790.03 prior to the adoption of section 1861.03, the latter section did not extend the application of section 790.03 to the business of insurance. Thus section 1861.03 cannot be construed to supersede *Moradi-Shalal's* ban on private actions for damages under section 790.03. Further, plaintiffs cannot circumvent that ban by bootstrapping an alleged violation of section 790.03 onto Business and Professions Code section 17200 so as to state a cause of action under section 1861.03. *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1598.

Nor did the passage of Insurance Code section 1861.03 create an independent cause of action:

> [S]ection 1861.03 (of the Insurance Code) does not in itself create an independent cause of action. A plaintiff aggrieved by an insurer's alleged misconduct must state a cause of action under applicable California law, not merely a cause of action for breach of section 1861.03. *Id.*

UCL remedies are cumulative to the other laws of the state unless expressly provided otherwise. No alleged UCL violation, even in the consumer-protection context, may be predicated upon conduct for which the Legislature intended no private right of action. *Manufacturers Life*, 10 Cal.4th at 283–284. The Legislature intended no private right of action under the UIPA. *Moradi-Shalal*, 46 Cal.3d at 304.

The "numerous regulations" that Zhang "alleges that California Capital violated" (Answer at 11) were all promulgated by the Insurance Commissioner to establish minimum standards for the settlement of claims, which, if violated knowingly or with such frequency to indicate a business practice, would constitute violations of UIPA at 790.03(h); to promote good-faith, prompt settlement of claims on a cost-effective basis; to discourage the filing of fraudulent claims by insureds; and to promote the investigation and reporting of fraudulent claims by insurers:

> Section 790.03(h) of the California Insurance Code enumerates sixteen claims settlement practices that, when either knowingly committed on a single occasion, or performed with such frequency as to indicate a general business practice, are considered to be unfair claims settlement practices and are, thus, prohibited by this section of the California Insurance Code. The Insurance Commissioner has promulgated these regulations in order to accomplish the[se] objectives. Cal. Regs. § 2691.5(a)

The Insurance Commissioner has sole authority to enforce the claims-handling regulations promulgated by his office. The Legislature, therefore, intended no private right of action under the Commissioners's regulations. *Moradi-Shalal*, 46 Cal.3d at 304.

The cases that Zhang contends support her UCL claim actually offer her no help. No case that Zhang relies upon involves a claim-handling dispute, nor an attempt to circumvent *Moradi-Shalal* by asserting a private UCL claim based upon UIPA violations.

In *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 276–271, the trial and appellate courts did not permit the insured to pursue common-law bad-faith tort claims for improper claim handling. Instead, the court of appeal simply allowed the insured to proceed with a UCL claim based on Progressive West's allegedly improper attempt to collect post-claim reimbursement of medical-payment benefits. *Id.* at 279–281. In *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 598, the court only permitted the plaintiff to pursue a private UCL claim against insurance agents, brokers, and automobile dealers for violating Insurance Code section 1631's licensing requirements. *Id.* at 598. In *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1315, the court only permitted a UCL claim against Farmers for failing to disclose a service charge on monthly premiums, which violated Insurance Code section 381.

Similarly, Proposition 103, passed to regulate automobile-insurance rates, did not overrule *Moradi-Shalal*. Section 1861.03, therefore, does not allow for UCL causes of action based on claim-handling disputes for conduct prohibited by and intrinsically intertwined with the UIPA.

V

CONCLUSION

Zhang renames and realleges her claim-handling lawsuit as one for "fraud," "false-advertising," and "unfair-practices" solely for the purpose of pleading around the prohibition of private rights of action under the UIPA, including UCL causes of action "brought to confer private standing to enforce a provision of the UIPA." *Textron* disallowed Zhang's tactic, which compelled the trial court to dismiss Zhang's UCL claim. But the Court of Appeal here reached out and expressly disagreed with *Textron*.

The Court of Appeal's decision permits every plaintiff in every claim-handling lawsuit to plead around *Moradi-Shalal* and its progeny, by the simple addition of false-advertising, fraud, or unfair-practices allegations into a garden-variety complaint for breach of contract and breach of the implied covenant of good faith and fair dealing. Such an all-encompassing exception to *Moradi-Shalal* prohibitions would effectively render the it meaningless, and permit a section-17200 claim in each and every claim-handling suit against an insurer.

In this claim-handling case, Zhang's allegations, including her allegations of "fraud" and "false advertising" are prohibited by the UIPA, and cannot support a UCL cause of action, even if they are not expressly alleged as UIPA claims. Zhang should not be permitted to rename, recast, and reallege her private UIPA claim as a private UCL claim to circumvent *Moradi-Shalal*.

This Court should grant review of the Court of Appeal's decision and resolve the conflict among the Courts of Appeal that it creates.

WORD-COUNT CERTIFICATE
(Cal.R.Ct. 8.504(d)(1))

This brief's text contains 3,098 as counted by the Microsoft Office Word 2003 word-processing program used to generate the brief.

DATED: February 1, 2010

Lance D. Orloff

PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Orange)

I am a citizen of the United States and a resident of or employed in the city of Irvine, County of Orange; I am over the age of eighteen years, and not a party to the within action; my business address is 2030 Main Street, Suite 1600, Irvine, California 92614.

On February 1, 2010, I caused the within **PETITION FOR REVIEW** to be served on all parties interested in said action, by placing one true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Irvine, California, addressed as follows:

Gary K. Kwasniewski Viau & Kwasniewski One Bunker Hill 601 West Fifth Street, Eighth Floor Los Angeles, Ca 90071-2004	San Bernardino County Superior Court Victorville District 14455 Civic Drive Victorville, CA 92392
Court of Appeal, State of California Fourth Appellate District Division Two 3389 12th Street Riverside, CA 92501	Attorney General of the State of California 300 S. Spring Street Los Angeles, CA 90013-1230
County of San Bernardino District Attorney 316 N. Mountain View Ave. San Bernardino, CA 92401	

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on February 1, 2010, at Irvine, California.

Norma Reeves