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IN THE SUPREME COURT OF CALIFORNIA

YANTING ZHANG,
Petitioner,

v.

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

OPENING BRIEF ON THE MERITS

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OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

The petition for review presents the following issue:

Does California's [Unfair Competition Law, Business & Professions Code section 17200, et seq.] permit insureds and third-party claimants in claim-handling or amount-of-loss lawsuits to plead around *Moradi-Shalal* [*v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287], and bring private causes of action for the very types of activities proscribed by and intrinsically intertwined with the [Unfair Insurance Practices Act, Insurance Code section 790, et seq.]?

(PFR 1.)

INTRODUCTION

This case presents the issue whether a policyholder may turn a dispute with her insurer over the amount owed for a fire loss into an action under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200, et seq.) by alleging that the insurer has a general practice of not paying the true value of covered claims.

Plaintiff and petitioner Yanting Zhang sued defendant and real party in interest California Capital Insurance Company when, following a fire at her property, they were unable to agree on the amounts owed for damage to Zhang's building and for business income loss. In addition to seeking contract and tort damages in her first two causes of action, in her third cause of action Zhang purported to state a UCL claim by alleging that California Capital "has no intention of properly paying the true value of its insureds' covered claims." According to Zhang, because California Capital promises its insureds that it will "timely pay proper coverage in the event the insured suffers a covered loss," and allegedly did not pay what Zhang believed was the "true value" of her claim, it violated the UCL by engaging in "deceptive, untrue or misleading advertising . . . ." (See Bus. & Prof. Code, § 17200.)

The trial court sustained California Capital's demurrer to the third cause of action without leave to amend, but the Court of Appeal granted Zhang's petition for a writ of mandate and directed the trial court to overrule the demurrer. The Court of Appeal's decision should be reversed because Zhang's attempt to state a UCL cause of action fails for multiple reasons.

First, Zhang has not alleged false advertising because she does not allege that the coverage afforded by her policy differed from the coverage promised in California Capital's advertising. Rather, she alleges that California Capital has failed to pay what it owes under its policy. Her third cause of action alleges wrongful claims handling, not false advertising. If she can state a cause of action for false advertising by alleging that California Capital breached a promise to pay the true value of covered claims, then every lawsuit challenging an insurer's claims handling practices—and particularly those involving amount of loss disputes—could be turned into a false advertising lawsuit because every insurer that advertises implicitly promises that it will pay what it owes under its policies.

Second, Zhang's third cause of action does not state a UCL cause of action because the Legislature has provided insureds with an adequate remedy —appraisal—in the event the insured does not believe that an insurer has paid the true value of a fire loss where the amount of that loss is in dispute.

Third, even outside the context of fire losses, a UCL action cannot be maintained based on disputes regarding an insurer's alleged claims handling practices and amount of loss. Although an insurer that had a practice of never paying the true value of its policyholders' claims would be in violation of the Unfair Insurance Practices Act (Ins. Code, § 790, et seq.) (UIPA) and would be subject to administrative sanctions by the Insurance Commissioner, in *Moradi-Shalal* (1988) 46 Cal.3d 287 (*Moradi-Shalal*) this court held that the UIPA does not give rise to a private right of action. In

addition, this court has approved decisions by the courts of appeal rejecting attempts to "plead around" *Moradi-Shalal* by relabeling an action based on an insurer's claims handling practices as a UCL action—precisely what Zhang attempts to do here.

Fourth, a UCL action based on an insurer's alleged claims handling practices would be unmanageable and inconsistent with the Legislature's objective when it enacted that statute, namely, "to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition . . . ." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173-174 (*Cortez*).) A court tasked with determining whether an insurer has a general practice of not offering the true value of its insureds' losses would have to examine thousands of claims, determine the true value of each claim, compare that value to what the insurer offered, and then determine, as to each claim where the insurer offered less than the true value, whether it did so pursuant to a company-wide practice as opposed to an error in judgment by an individual adjuster, or for other reasons. Thus, the trial of such a UCL claim would necessarily devolve into thousands of mini trials.

Fifth, the only remedies available under the UCL are restitution and injunctive relief, neither of which are feasible remedies under the facts alleged by Zhang. Any policyholder who is not offered what he or she believes is the true value of his or her claim has an adequate legal remedy—contract damages. Restitution of the premium would constitute an impermissible double recovery and an injunction is not available to remedy past acts. In addition, the courts have consistently denied injunctive

relief under the UCL where there is an adequate administrative remedy. A court that attempted to police an insurer's handling of the claims of all of its policyholders through the issuance of an injunction would undertake a highly burdensome regulatory function already performed by the Insurance Commissioner, which possesses the expertise and statutory mandate to deal with the sort of amorphous claims of misconduct alleged by Zhang.

Finally, this court should disapprove *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093 (*State Farm*), which held a UCL action may be based on multiple breaches of the implied covenant of good faith and fair dealing. The Court of Appeal in *State Farm* failed to appreciate that although an individual insured may pursue an action for breach of the implied covenant of good faith based on an insurer's handling of that insured's unique claim, the only remedy available to address an insurer's purported general claims handling practices is an administrative proceeding instituted by the Insurance Commissioner. The Court of Appeal in *State Farm* also failed to appreciate that a UCL action based on an insurer's alleged general claims handling practices would be unmanageable and would thwart the Legislature's objective of providing a streamlined procedure for preventing unfair practices, and that neither restitutive nor injunctive relief under the UCL is a feasible remedy for an insurer's wrongful claims handling. Indeed, in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163 (*Cel-Tech*), this court called into question *State*

Farm's holding that a UCL action may be based on breach of the implied covenant of good faith. (*Id.* at pp. 186-187.)

STATEMENT OF THE CASE[1]

Because Yanting Zhang's writ petition challenged an order sustaining California Capital's demurrer to her claim under the UCL, we recite the pertinent facts she alleged, which are assumed to be true only for purposes of this proceeding.

Zhang owned real property in Hesperia, California. (AE 3.) In July 2005, a fire broke out on the property. The fire, and the water used by city officials to suppress the fire, caused extensive damage to the property. (AE 4.)

At the time of the fire, the property was insured under a policy California Capital had issued to Zhang. (AE 3.) The policy covered some or all of the damage to the property. (AE 4, 10.)

Immediately after the fire, Zhang notified California Capital of the losses she had sustained. (AE 4.) California Capital assigned an adjuster, Vince Furriel, who provided plaintiff with a "restoration scope and estimate" of $102,000, representing California Capital's estimate of the cost to repair and restore the damaged property. (AE 10, 13.) Zhang believed the estimate was too low, so she asked a number of contractors to provide their own

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[1] Record citations are to the Appendix of Exhibits filed in support of Zhang's Petition for Writ of Mandate and are designated as AE, followed by the page number in the appendix.

estimates. (AE 10-11.) Those contractors purportedly estimated the cost of repairs to be about $200,000. (AE 11.)

Zhang and California Capital were unable to agree on an estimate. (AE 11.) During the course of their dispute, the property was vandalized. (*Ibid.*)

Zhang was losing business income because of the unrepaired building damage. (AE 12.) She asked Furriel to expedite the resolution of her claim. (*Ibid.*) He agreed to do so and, in light of the vandalism, agreed to obtain additional sums to fund the repairs. (*Ibid.*) In paragraph 24 of the complaint, Zhang alleges that these assurances were false and no additional sums were allocated to the repairs. (*Ibid.*) However, in paragraph 31, Zhang alleges that Furriel agreed to increase California Capital's initial estimate to about $117,000 to account for the vandalism, and California Capital paid plaintiff about $70,000 of that amount. (AE 13-14.)

California Capital later cancelled Zhang's policy, citing her failure to comply with the company's loss control recommendations. (AE 13.)

Zhang subsequently retained Har-Bro Inc. to provide another restoration scope and estimate for the damaged property. (AE 13.) Har-Bro's estimate was $208,919. (*Ibid.*) Zhang gave Furriel the estimate, but he refused to consider it or to work with Har-Bro. (*Ibid.*) He contended that Har-Bro's estimate was inflated and covered repairs and upgrades not related to the fire. (*Ibid.*) Zhang contends Furriel's contention was false and misleading. (*Ibid.*)

The parties continued to dispute whether California Capital's estimate was sufficient to repair and restore the property. (AE 14.)

Zhang found another contractor willing to do the restoration work for $185,000. (*Ibid.*) Furriel declined to increase California Capital's estimate. (AE 14-15.)

Zhang then filed this action against California Capital. The operative second amended complaint alleged that the basis for the action was California Capital's "refusal to provide adequate and proper coverage for a covered first party property damage claim, and related acts, omissions, damage and injury . . . ." (AE 2.)

Zhang pleaded causes of action for breach of contract (AE 21) and breach of implied covenant of good faith (AE 24), both of which included allegations that California Capital's conduct violated Insurance Code section 790.03 and related regulations. (AE 22, 28.)

Most significantly for present purposes, Zhang also pleaded a third cause of action for violation of the UCL. (AE 31.) In that cause of action, Zhang alleged that California Capital

> 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 . . . promises its insureds that it will timely pay proper coverage in the event the insured suffers a covered loss. By this promise, California Capital . . . 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 . . . in fact has no intention of properly paying the true value of its insureds' covered claims.

(AE 32.) Because, according to Zhang, it has no intention of honoring its advertised promises, "California Capital has violated Business and Professions Code sections 17200, *et seq.*, and has

engaged in unfair, deceptive, untrue, and/or misleading advertising." (*Ibid.*) Zhang alleged she was entitled to "restitution of policy premium, and other appropriate restitution . . . ." (*Ibid.*)

On the cause of action for violation of the UCL, Zhang prayed for "[r]estitution to the plaintiff/insured herein," as well as attorney fees. (AE 33-34.)

California Capital demurred to the third cause of action, contending that it failed to allege a cause of action for violations of the UCL. (AE 149.)

The trial court sustained the demurrer without leave to amend. (AE 216-217.) The Court of Appeal granted Zhang's petition for writ of mandate and directed the trial court to reinstate the third cause of action. The Court of Appeal held that Zhang's "allegations in the third cause of action that real party in interest solicited her business through false advertising and false promises clearly justifies a claim under the UCL." (Typed opn., 11.)

LEGAL DISCUSSION

I. THE THIRD CAUSE OF ACTION DOES NOT ALLEGE A VIABLE UNFAIR COMPETITION CLAIM.

A. Though couched in terms of "false advertising," Zhang's UCL claim actually rests on California Capital's alleged undervaluation of her fire loss.

The Court of Appeal held that Zhang's third cause of action alleged false advertising and therefore alleged a claim for "unfair competition" under the UCL.[2] However, Zhang did not allege that the coverage afforded by her policy differed from the coverage promised in California Capital's advertising. Rather, she alleged that California Capital promises its insureds "that it will timely pay proper coverage in the event the insured suffers a covered loss" but, "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." (AE 32.) Because the UCL addresses acts and practices, not intentions, Zhang's allegation that California Capital advertises with no intention to pay the full value of claims is directed at California Capital's claims handling, not its

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[2] Business and Professions Code section 17200 provides: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

advertising. Indeed, Zhang's second amended complaint alleged that the basis for her action was California Capital's "refusal to provide adequate and proper coverage for a covered first party property damage claim, and related acts, omissions, damage and injury . . . ." (AE 2.) As we demonstrate (§ IV, *post*), neither remedy under the UCL for false advertising—restitution and an injunction—is feasible based on Zhang's allegations, which confirms she has not stated a claim for false advertising.

If Zhang's pleading is construed as a claim for false advertising, then every lawsuit challenging an insurer's claims handling practices or the amounts it pays for claims could be turned into a false advertising lawsuit because every insurer that advertises implicitly promises that it will pay what it owes under its policies. As we show, because Zhang's third cause of action rests on the wrongful handling and underpayment of her fire loss claim, it does not state a UCL claim.

B. An insured who contends her insurer has undervalued her fire loss may not maintain a UCL action because the Legislature has provided an adequate statutory remedy—appraisal pursuant to Insurance Code section 2071.

As this court explained in *Cel-Tech*, *supra*, 20 Cal.4th 163: "[i]f the Legislature has . . . considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor' plaintiffs may not

use the general unfair competition law to assault that harbor." (*Id.* at p. 182.)

Here, as the Court of Appeal in *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886 (*CAR*) explained, the Legislature has considered the situation alleged by Zhang and determined that no action for restitution or an injunction under the UCL may be maintained. Rather, if an insurer fails to offer what the insured believes is the true value of a fire loss, the insured has an adequate remedy through appraisal, a form of arbitration. Specifically, Insurance Code section 2071 mandates that every fire insurance policy include a provision that if the insured and the insurer cannot agree on the amount of a fire loss, either can demand an appraisal. The amount for which the insurer is liable shall be payable 60 days after either the insured and the insurer agree as to the amount of the loss or the filing of an appraisal award in the event they are unable to agree. In addition, section 2071 provides:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or *equity* unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

(Emphasis added.)

The provision for appraisal mandated by section 2071 "constitutes an 'agreement' within the meaning of [Code of Civil Procedure] section 1280, subdivision (a), and therefore is considered to be an arbitration agreement subject to the statutory contractual arbitration law." (*Louise Gardens of Encino Homeowners' Assn.,*

Inc. v. Truck Ins. Exchange, Inc. (2000) 82 Cal.App.4th 648, 658.) Consequently, if an insured is dissatisfied with the appraisal award, his or her remedy is to petition to vacate the award pursuant to Code of Civil Procedure section 1285. (*Jefferson Ins. Co. v. Superior Court* (1970) 3 Cal.3d 398; *Cheeks v. California Fair Plan Assn.* (1998) 61 Cal.App.4th 423.)

In *CAR*, *supra*, 92 Cal.App.4th 886, the Court of Appeal, relying upon the appraisal process mandated by Insurance Code section 2071, rejected an attempt to state a UCL claim very similar to the claim Zhang asserts in this case. In *CAR*, the plaintiff brought an action against 194 insurance companies, alleging that their formula for valuing property loss claims violated the UCL. The trial court sustained the insurers' demurrers without leave to amend and dismissed the action. The Court of Appeal affirmed. It explained that because "[t]he appraisal term [in section 2071] creates an arbitration agreement subject to the statutory contractual arbitration law," "notwithstanding how the insurer approaches valuation of the damaged property during adjustment of the claim, the Legislature has provided the remedy to which the parties must resort for determination of the amount of the loss." (*Id.* at p. 893.) The Court of Appeal concluded: "[I]f the insured disagrees with a value suggested by the carrier, the appraisal process provides the means by which the dispute is to be settled. In light of the scheme provided by section 2071, plaintiff has failed to demonstrate an unlawful or unfair practice." (*Id.* at p. 895.)

CAR demonstrates that the Court of Appeal here erred in holding Zhang stated a cause of action under the UCL. Even if she

is correct that California Capital "has no intention of properly paying the true value of its insureds' covered claims" (AE 32), under the appraisal process mandated by Insurance Code section 2071, California Capital's "promise is not to pay such damage as the insured should suffer, but to pay such sum as the arbitrator should fix as the amount of damage sustained." (*Carroll v. Girard Fire Ins. Co.* (1887) 72 Cal. 297, 302.) In other words, even accepting as true Zhang's allegation that California Capital has no intention of paying the true value of claims, an insured who disagrees with what an insurer offers for a claim may compel it to submit the dispute to binding resolution in appraisal. Thus, if any of California Capital's other insureds have not received the full value of their losses, it is not because California Capital acted "unfair[ly]" or "unlawful[ly]" (see Bus. & Prof. Code, § 17200), but because they either failed to avail themselves of the appraisal process or the appraisers erred in appraising the loss.

Zhang alleged that California Capital waived an appraisal because its adjuster told her she had no alternative other than to accept California Capital's valuation of her loss. (AE 16.)[3] But Zhang does not rest her UCL cause of action on this ground. She contends that California Capital has a general practice of not offering to pay the true value of its insureds' claims. As the Court of Appeal here acknowledged, Zhang cannot "recover under [her third]

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[3] The allegation that California Capital "waived an appraisal" is a legal conclusion, and, moreover, irrelevant. The issue is whether *Zhang* is entitled to appraisal. Insurance Code section 2071 does not place any limitation on the time within which an insured may demand an appraisal.

cause of action if she proves *only* that California Capital behaved unreasonably in handling her claim. She will also have to establish that [California Capital] advertised or otherwise represented to the public that it operated honestly and equitably in settling claims *and* that it in fact had a policy or regular practice of 'lowballing,' delaying, or taking unfair advantage so that its advertising and/or representations were in fact likely to mislead the public." (Typed opn., 11.) However, as the Court of Appeal in *CAR*, *supra*, 92 Cal.App.4th 886 explained, the Legislature has established that the insured's remedy if he or she believes a fire insurer has offered less than the true value of a claim is arbitration through appraisal, not a UCL action. A UCL action cannot be stated where the Legislature has provided the statutory remedy for amount of loss disputes that it anticipated will inevitably occur with fire losses.

II. ZHANG'S UCL CLAIM CONSTITUTES AN IMPROPER ATTEMPT TO PLEAD AROUND THIS COURT'S HOLDING IN *MORADI-SHALAL* THAT A PRIVATE CAUSE OF ACTION CANNOT BE BASED ON A VIOLATION OF THE UIPA.

A. A UCL action against an insurer may not be based on claims handling conduct that violates only the UIPA.

Because Insurance Code section 2071 precludes a UCL action based on disputes regarding the amount of fire losses (see *ante*, § I), this court need not address the broader issue whether a UCL claim

can ever be based on allegations that an insurer violated the UIPA by having a general practice of not paying the true value of its insureds' losses. If the court chooses to address that broader issue, however, it should hold that a UCL action cannot be based on such allegations.

Although this court has permitted UCL actions based on conduct that violated the UIPA if the conduct also violated "'*other statutory . . .* law'" (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 280 (*Manufacturers Life*), it has never approved a UCL lawsuit based on conduct that violated only the provisions of the UIPA dealing with an insurer's claims handling practices. To the contrary, it held in *Moradi-Shalal, supra,* 46 Cal.3d 287 that a violation of those provisions does not give rise to a private right of action, and this court has cited with approval decisions by the courts of appeal disallowing attempts to "plead around" *Moradi-Shalal* by relabeling an action based on an insurer's claims handling practices as a UCL action.

Specifically, in *Moradi-Shalal, supra,* 46 Cal.3d at page 304, this court held that "[n]either [Insurance Code] section 790.03 nor section 790.09 was intended to create a private civil cause of action against an insurer that commits one of the various acts listed in section 790.03, subdivision (h)." Therefore, a third party claimant could not state a cause of action against an insurer based on allegations that it violated Insurance Code section 790.03 by having a general business practice of "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." (Ins. Code, § 790.03,

subd. (h)(5).) It explained "that our opinion leaves available the imposition of substantial administrative sanctions by the Insurance Commissioner (see §§ 790.05-790.09)." (*Moradi-Shalal,* at p. 304.)[4]

In *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201, an action against an attorney for soliciting clients, this court held that the plaintiff could not "'plead around'" the litigation privilege provided by Civil Code section 47, subdivision (b), by relabeling the nature of the action as one brought under the UCL. This court cited with approval *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491 (*Safeco*) and *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592 (*Maler*). It explained that those cases had properly "held that the bar on . . . implied private causes of action [for violation of the UIPA], imposed by our decision in *Moradi-Shalal* . . . , may not be circumvented by recasting the action as one under [the UCL]." (*Rubin*, at p. 1202.)

In *Safeco*, the plaintiff, a motorcyclist, was involved in a collision with a driver insured by Safeco. After settling his claim against Safeco's insured, he filed a UCL action against Safeco for both monetary and injunctive relief. He alleged that Safeco had violated the UIPA by refusing to pay a "collision damage waiver" on an automobile plaintiff rented while his motorcycle was being repaired. (*Safeco, supra,* 216 Cal.App.3d at p. 1492.) The Court of Appeal held the UCL "provides no toehold for scaling the barrier of *Moradi-Shalal.* The facts at bench are indistinguishable from those

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[4] In *Zephyr Park v. Superior Court* (1989) 213 Cal.App.2d 833 (*Zephyr Park*), the Court of Appeal applied the holding in *Moradi-Shalal* to a first party insurance claim.

in *Moradi-Shalal*. To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless." (*Id.* at p. 1494.)

Similarly, in *Maler*, the plaintiffs brought a UCL action against their insurers for damages and injunctive relief after the insurers refused to defend or indemnify them in an underlying action. In an effort to circumvent this court's holding in *Moradi-Shalal*, the plaintiffs contended the action was authorized by Insurance Code section 1861.03, which was added by Proposition 103 in 1988, and provides that the business of insurance is subject to California laws applicable to any other business. The Court of Appeal held that plaintiffs were indirectly attempting to plead a cause of action based on a violation of the UIPA:

> In essence, plaintiffs allege that defendants' breach of its statutory duties under section 790.03 amounts to unfair competition within the meaning of Business & Professions Code section 17200, thereby constituting a violation of section 1861.03. [¶] . . . [S]ection 1861.03, subdivision (a), simply declares that the insurance industry is subject to California laws applicable to any other business, including the antitrust and unfair business practices laws. . . . 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 a private action 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, supra*, 220 Cal.App.3d at p. 1598.)

Conversely, this court has permitted UCL actions against insurers where the alleged conduct, while violating the UIPA, *also* violated other statutes that apply to insurers. In *Manufacturers Life, supra*, 10 Cal.4th 257, the plaintiff, an insurance agency, brought an action against several insurance companies, alleging that they violated both the Cartwright Act (Bus. & Prof. Code, §§ 16720 & 16721.5) and the UCL by engaging in an unlawful boycott. This court agreed with the Court of Appeal in that case that "because section 790.03 does not create a private right of action, plaintiff could not plead around that limitation by relying on conduct which violates only the UIPA as the basis for a [UCL] cause of action." (*Manufacturers Life*, at p. 283; see also *id.* at p. 267 ["[t]he Court of Appeal recognized that the UIPA does not create a private right of action for violations of its provisions [citation], 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 [UCL]"].) However, it held the action was not barred by *Moradi-Shalal* because "[n]either the language of the UIPA nor its history suggests that the Legislature intended by its enactment to abolish the Cartwright Act and [UCL] remedies for conduct which the UIPA also proscribes." (*Id.* at p. 277.) It explained that the UIPA "'neither creates new private rights *nor destroys old ones* . . . . [S]ection 790.09 "preserves *any* preexisting civil or criminal liability which the insurer might face under *other statutory or decisional*

law"'" (*id.* at p. 279) and that "a cause of action for unfair competition based on conduct made unlawful by the Cartwright Act is not an 'implied' cause of action which *Moradi-Shalal* held could not be found in the UIPA. There is no attempt to use the [UCL] to confer private standing to enforce a provision of the UIPA" (*id.* at p. 284).

Similarly, in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26 (*Quelimane*), this court held that prospective sellers of real property could maintain a UCL action against a title insurer based on the insurer's refusal to issue title insurance policies on property acquired at a tax sale. It explained that because the insurer advertised that it would issue title insurance on any property with good title, "[a]rguably a violation of [Business and Professions Code] section 17500 [the false advertising statute] has been stated . . . . Advertising that title insurance is necessary and will be issued on any property with good title, when in fact it will not be issued on tax-deeded property may be deemed both misleading and false." (*Id.* at p. 52.) In addition, this court stated that the plaintiff's allegations might state a direct violation of the UCL, which defines unfair competition as including "'deceptive, untrue or misleading advertising.'" (*Id.* at pp. 54-55.) However, *Quelimane* does not assist Zhang because she alleges that California Capital violated the UIPA by underpaying a claim, not by falsely advertising that it would issue policies covering fire losses.

B. Zhang's third cause of action alleges conduct that violates only the UIPA, and therefore does not state a claim under the UCL.

This case is like *Safeco* and *Maler*, not *Manufacturers Life* or *Quelimane*. Although the UIPA ""preserves *any* preexisting civil or criminal liability which the insurer might face under *other statutory or decisional* law"" (*Manufacturers Life, supra,* 10 Cal.4th at p. 280), in contrast to *Manufacturers Life* and *Quelimane*, no other statutory or decisional law imposes liability upon an insurer for the conduct alleged in Zhang's third cause of action—a general practice of underpaying fire claims.

An insurer that underpays an individual claim by an individual insured may be held liable to that insured for damages for breach of contract and, potentially, breach of the implied covenant of good faith and fair dealing. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817.) But, accepting for purposes of demurrer the truth of Zhang's allegation that California Capital has a general practice of not offering the true value of claims, there is no common law remedy for that general practice. Rather, an insured's only common law remedy is an action for damages caused by the insurer's handling of that insured's individual claim. And, the only statutory remedy for such an alleged general practice is the imposition of administrative sanctions by the Insurance Commissioner pursuant to the UIPA. (*Moradi-Shalal, supra,* 46 Cal.3d at p. 304; see *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1072 (*Textron*) [citing

Manufacturers Life and *Quelimane*, Court of Appeal held that UCL action must be based "on legislatively declared public policy" and "reliance on general common law principles to support a cause of action for unfair competition is unavailing." Consequently, complaint alleging that insurer had practice of using misleading documents to falsely suggest it would provide coverage where it had no intention to do so did not state UCL action].)[5] Consequently, by alleging a UCL claim based on a purported general practice of underpaying claims, Zhang is attempting to circumvent this court's holding in *Moradi-Shalal* and state a private right of action under the claims handling provisions of the UIPA.

III. A UCL ACTION BASED UPON AN INSURER'S VIOLATION OF THE CLAIMS HANDLING PROVISIONS OF THE UIPA WOULD BE UNMANAGEABLE AND WOULD DEFEAT THE LEGISLATURE'S PURPOSE IN ENACTING THE UCL.

Allowing a UCL action based on the facts alleged in Zhang's third cause of action would be inconsistent with the Legislature's objective when it enacted that statute. As this court explained in *Cortez, supra*, 23 Cal.4th at pages 173-174 "'[t]he exclusion of claims for compensatory damages [in a UCL action] is . . . consistent with

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[5] As we show (§ V, *post*), *State Farm, supra,* 45 Cal.App.4th 1093, which held a UCL action can be based on multiple breaches of the implied covenant of good faith and fair dealing, should be disapproved.

the overarching legislative concern to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition'" and permitting individual claims for compensatory damages "'would tend to thwart this objective by requiring the court to deal with a variety of damage issues of a higher order of complexity.'" (See also *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266-1267 ["In drafting the [UCL], the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity"].)

It is one thing to litigate whether an insurer has engaged in an unlawful boycott against a single insurance agency (*Manufacturers Life, supra*, 10 Cal.4th 257) or whether it has a practice of refusing to issue title insurance on property acquired at a tax sale (*Quelimane, supra*, 19 Cal.4th 26). It is quite another to litigate whether an insurer in fact has a "practice" of offering less than the true value of each of its thousands of policyholders' unique claims.

A court tasked with determining whether an insurer has a general practice of not offering the true value of its insureds' losses would have to examine thousands of claims, determine the true value of each claim, compare that value to what the insurer offered, and then determine, as to each claim where the insurer offered less than the true value, whether it did so pursuant to a company-wide practice as opposed to an error in judgment by an individual adjuster. Thus, trial of Zhang's proposed UCL claim would defeat the Legislature's objective of providing a streamlined procedure

(*Cortez, supra*, 23 Cal.4th at pp. 173-174), as it would necessarily devolve into thousands of mini trials.

IV. NEITHER OF THE REMEDIES AVAILABLE UNDER THE UCL IS A FEASIBLE REMEDY FOR AN ALLEGED PRACTICE OF IMPROPER CLAIMS HANDLING.

Moreover, neither restitution nor an injunction—the only remedies available in a UCL action (*Cel-Tech, supra*, 20 Cal.4th at p. 179)—are feasible remedies when the claimed unfair practice is unfair claims handling. Zhang's third cause of action seeks restitution of her premium. However, if she is able to convince a trier of fact that California Capital failed to offer the true value of her loss, a prerequisite to any relief, she will recover contract damages. She cannot then also recover restitution of the premium that she paid in order to be entitled to those contract benefits. That would be an impermissible double recovery. (*Adler v. Drudis* (1947) 30 Cal.2d 372, 383 (*Adler*); *Jozovich v. Central California Berry Growers Assn.* (1960) 183 Cal.App.2d 216, 228-229 (*Jozovich*).) No insured would forego an award of policy benefits in order to obtain restitution of the policy premium. Although Zhang also seeks attorneys' fees (AE 34), they are *not* recoverable in a UCL action (*Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 108, fn. 7).

Business and Professions Code Section 17203 permits a plaintiff who meets the standing requirements of Business and Professions Code Section 17204 and complies with Code of Civil

Procedure section 382 to bring a class action for restitution under the UCL. However, it is inconceivable that the requirements for a class action—predominant common questions of fact, a class representative with a claim typical of the class, and a class representative who can adequately represent the class (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089)—could be met where the alleged unfair practice was an insurer's adjustment of thousands of unique claims by thousands of individual policyholders. Moreover, and in any event, formulating an appropriate restitutive award in a class action based on unfair claims handling would be impossible. Awarding restitution of the policy premium to those policyholders who had already sued the insurer (or pursued appraisal) and recovered contract damages would result in a double recovery. (*Adler*, *supra*, 30 Cal.2d. at p. 383; *Jozovich*, *supra*, 183 Cal.App.2d at pp. 228-229). And, how could a court award restitution of the policy premium to those policyholders who had suffered a loss and were satisfied with what the insurer had offered, or those who had not yet even had a covered loss, let alone received an inadequate offer? (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1152 [only "[a]ctual direct victims of unfair competition" may obtain restitution]; *Kraus v. Trinity, Inc.* (2000) 23 Cal.4th 116, 138 [only present and former tenants who were overcharged were entitled to refunds under UCL]; cf. *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1336, 1351-1352 [indicating that restitution of identical improper service charge paid by all policyholders who

purchased one month term policy would be appropriate if named plaintiff had standing under UCL to bring action].)

Formulating and enforcing an appropriate injunction, the only other remedy under the UCL, would be even more problematic under the facts alleged by Zhang. What would the injunction say—that the insurer must pay what it is already contractually obligated to pay? Further, injunctive relief under the UCL is not even available if there is another adequate legal remedy. (See *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1249-1250; see also *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306 [injunction inappropriate where monetary damages will afford adequate relief for breach of contract and these damages are not extremely difficult to ascertain].) If an insurer wrongfully denies or underpays policy benefits, the insured has an adequate remedy—a suit for damages or, in the case of a fire loss, appraisal pursuant to Insurance Code section 2071. So an insured who has already suffered a covered loss could never obtain an injunction ordering an insurer to pay the "true value" of that claim. (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320 ["Injunctive relief operates ""in futuro."" . . . Indeed, '[a]n injunction should not be granted as punishment for past acts where it is unlikely they will recur"'].)

Moreover, assuming that injunctive relief is available under the UCL on behalf of a class that had not yet suffered injury (but see *In re Tobacco II Cases, supra,* 46 Cal.4th at p. 320, fn. 13), a court that undertook through issuance of an injunction to police an insurer's claims handling practices towards all of its policyholders,

presumably by determining in contempt hearings whether thousands of individual claims were being properly adjusted, would assume the authority already possessed by the Insurance Commissioner. (*Moradi-Shalal, supra*, 46 Cal.3d at p. 304.) The Legislature has enacted a comprehensive scheme of regulation in the Insurance Code. (*American Internat. Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 764; cf. *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 (*20th Century*) ["the regulation of the insurance industry is squarely within the state's police power"].) The comprehensive statutory scheme defines certain unfair insurance practices and authorizes the Insurance Commissioner to identify and regulate all such practices. The UIPA was enacted "to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, *all* such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices . . . ." (Ins. Code, § 790, emphasis added.)

Thus, the definition of "unfairness" in the insurance industry is entrusted by the Legislature to the Insurance Commissioner rather than to piecemeal adjudication in response to individual lawsuits. (See *Zephyr Park, supra*, 213 Cal.App.3d at p. 838 ["[t]he evident purpose of [section 790.03] . . . as confirmed by *Moradi-Shalal*, was to vest in an administrative agency the power to police 'bad faith' practices in the industry"]; *Tricor California, Inc. v. Superior Court* (1990) 220 Cal.App.3d 880, 887 [same]; cf. *20th Century, supra*, 8 Cal.4th at p. 245 [noting the wide-ranging powers of the Insurance Commissioner and concluding "'[m]uch is

necessarily left to the . . . Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare'"].)

This conclusion is reinforced by the Insurance Commissioner's enactment of the Fair Claims Settlement Practices Regulations, California Code of Regulations, title 10, section 2695.1, et seq., which define unfair claims practices in detail and set forth specific criteria by which the Insurance Commissioner determines violations and appropriate penalties.

The courts have consistently denied both injunctive and restitutive relief under the UCL where there is an effective administrative remedy. (*Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1306 [court properly denied injunction under the UCL to require owners and operators of skilled nursing and intermediate care facilities to comply with nursing home requirements set forth in Health and Safety Code section 1276.5(a) where the "DHCS has the power, expertise and statutory mandate to regulate and enforce section 1276.5" and granting injunctive relief "would place a tremendous burden on the trial court to undertake a classwide regulatory function and manage the long-term monitoring process to ensure compliance with section 1276.5, subdivision (a)"]; *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-1302 [Court of Appeal reversed injunction under the UCL ordering the defendant health maintenance organization to clarify a third party liability provision in its contract, explaining that "the courts cannot assume general regulatory powers . . . through the guise of enforcing Business and

Professions Code section 17200"]; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 720-721 [reversing a restitution award under UCL where there was an effective administrative remedy with the Department of Agriculture. "With such a remedy available, one must question whether the usual remedy under section 17203 of the Business and Professions Code is necessary"]; *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 138 [criticizing use of "court-created regulation of . . . insurers through the medium of . . . injunctions and 'restitution' orders"]; see also *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, 599 [injunction prohibiting ranch owners from knowingly employing illegal aliens properly refused where "[m]ultiple injunctions . . . would have the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings. The injunctive relief sought by plaintiffs would subject . . . the courts to burdensome, if bearable, enforcement responsibilities"].)

Indeed, a court would face the same practical problems even if Zhang's third cause of action alleged false advertising, which it does not. To determine whether an insurer's promises to pay what it owed under its policies were false, a court would still have to conduct mini trials regarding the handling of thousands of claims. An award of both contract damages and restitution of the premium would still constitute a double recovery and formulating appropriate restitutive and injunctive relief to other policyholders would not be any easier. We assume that not even Zhang would suggest that a court could issue an injunction ordering an insurer to change its

advertising so that it stated the insurer did not intend to pay the true value of covered claims.

V. *STATE FARM FIRE & CASUALTY CO. V. SUPERIOR COURT* SHOULD BE DISAPPROVED.

In *State Farm*, *supra*, 45 Cal.App.4th 1093, the Court of Appeal held that a UCL cause of action seeking injunctive and restitutive relief could be based in part on allegations that the insured engaged in "lowballing" of its policyholders' claims. Defining an "unfair" business practice as a practice that "is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" (*id.* at pp. 1103-1104), the Court of Appeal in *State Farm* held that a breach of the implied covenant of good faith in an insurance policy could constitute an unfair practice under the UCL. (*id.* at pp. 1106-1108.)

However, in *Textron*, *supra*, 118 Cal.App.4th 1061, where the insured attempted to state a UCL action by alleging the insurer had a practice of using misleading documents to falsely suggest it would provide coverage where it had no intention to do so, the Court of Appeal declined to follow *State Farm*. It noted that its persuasiveness had been undercut by this court's decision in *Cel-Tech*, *supra*, 20 Cal.4th 163, which stated that *State Farm*'s "definitions are too amorphous and provide too little guidance to courts and businesses." (*Id.* at p. 185.) In *Cel-Tech*, this court concluded that "any finding of unfairness to competitors under section 17200 [must] be tethered to some legislatively declared

policy or proof of some actual or threatened impact on competition" and that under the UCL "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to the same as a violation of the law . . . ." (*Id.* at pp. 186-187.)

The Court of Appeal in *Textron* acknowledged that *Cel-Tech* limited its discussion to the context of a UCL action between competitors, leaving open whether the same definition applied to consumer actions. (*Textron, supra,* 118 Cal.App.4th at p. 1072; see *Cel-Tech, supra,* 20 Cal.4th at p. 187, fn. 12.) Nonetheless, based on this court's decision in *Moradi-Shalal,* its reliance in both *Manufacturers Life, supra,* 10 Cal.4th 257 and *Quelimane, supra,* 19 Cal.4th 26, on a Cartwright Act violation to support a UCL action, its disapproval in *Cel-Tech* of *State Farm*'s "amorphous" definition of "unfair" practices and its focus in *Cel-Tech* on legislatively declared public policy, *Textron* concluded that "reliance on general common law principles to support a cause of action for unfair competition is unavailing." (*Textron, supra,* 118 Cal.App.4th at p. 1072.)

Textron properly refused to follow *State Farm.* For all the reasons set forth in this brief, *State Farm* was incorrectly decided and should be disapproved: it failed to appreciate that although an individual insured may assert an action for breach of the implied covenant of good faith based on an insurer's handling of *that insured's* claim, the only feasible remedy available to address an insurer's purported general claims handling practices is an

administrative proceeding instituted by the Insurance Commissioner. In addition, the Court of Appeal in *State Farm* failed to appreciate that a UCL action based on an insurer's alleged general claims handling practices would be unmanageable and would thwart the Legislature's objective of providing a streamlined procedure for preventing unfair practices. (*Cortez*, *supra*, 23 Cal.4th at pp. 173-174.)[6]

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[6] In *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, the Court of Appeal held that a complaint alleging that an insurer had a pattern and practice of ignoring California law by seeking 100 percent reimbursement for amounts paid under its med-pay coverage regardless of whether the insured had been made whole stated a UCL cause of action. This court need not decide whether *Progressive West* was correctly decided because, even if it was, it does not assist Zhang. The alleged unfair practice in *Progressive West* did not concern the insurer's claims adjustment practices, but rather its general policy of seeking reimbursement of med-pay payments. Moreover, in contrast to this case, if the insurer's practice in *Progressive West* was unfair, it would have been a simple matter to frame an injunction directing the insurer to change that practice.

CONCLUSION

For all the foregoing reasons, Zhang has not stated a UCL cause of action. The Court of Appeal's decision therefore should be reversed.

May 12, 2010

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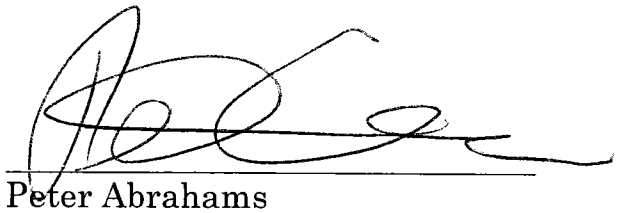

Peter Abrahams

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 12, 2010, at Encino, California.

Victoria Beebe

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Case No. S178542

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