S178542

IN THE SUPREME COURT OF CALIFORNIA

YANTING ZHANG,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO,
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

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether an insured may allege violation of the Business and Professions Code sections 17200, *et seq.* based upon:

(a) unlawful, unfair, and fraudulent conduct by the insurance company that extends beyond just the (mis)handling of the insured's claim;

(b) predicate theories *other than* Insurance Code section 790.03, including the unlawful, unfair, and fraudulent advertising of the insurance company's insurance contract products.

INTRODUCTION

A pivotal issue in this case is whether insurance companies are entitled to broad immunity from the proscriptions of the Unfair Competition Law ("UCL") set forth at Business and Professions Code sections 17200, *et seq.*, when they engage in unlawful, unfair, and fraudulent business practices *vis-à-vis* first party claims. Petitioner submits that logically, insurance companies are not entitled to a broad immunity not enjoyed by any other business or industry. Further, when the people of the State of California passed Proposition 103 in the November 8, 1988 election, three important sections were added to the California Insurance Code. One of these, section 1861.03(a), expressly provides that the business of insurance shall be subject to the unfair business practices laws set forth pursuant to the UCL.

California Insurance Code section 1861.03(a) states:

> "**§ 1861.03. Unfair insurance practices; prohibition**
>
> (a) The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to. . . the. . . unfair business practices laws (Parts 2 commencing with Section 16600 [including 17200]). . . of the Business and Professions Code."

The importance and utility of a UCL cause of action are multiple:

- The theory focuses on representations carriers make in the sale of their policies to consumers (as opposed to strictly applying to alleged bad faith claims handling).
- The rights and remedies afforded pursuant to the Business and Professions Code are, by the statutory scheme's own terms, "***cumulative***. . . to the remedies or penalties available under all other laws of this state." (Bus. & Prof. C. § 17205.)
- An injunctive remedy, in a form the trial court finds equitable, responsive, and fair under the circumstances should be left to the trial courts' discretion.
- Restitution of ill-gotten gains (such as return of policy premium) is a relief accorded pursuant to Business and Professions Code sections 17200, *et seq.*
- The California courts, and the Legislature, expressly recognize the importance of a fee award aspect to a UCL claim. Pursuant to Code of Civil Procedure section 1021.5, fees may be awarded to the party prevailing under a 17200 claim where, *inter alia,* widespread misconduct, affecting a number of consumers, is revealed and exposed.

California Capital's advertisements include the following statements in the carrier's web site:

> "Our goal is to be a valuable asset to you - every step of the way, whether you have a claim or not. . . We are second to none in our dedication to your safety and security. . . Our solid commitment to stay by your side has attracted the leading insurance advisors. You can rely on our expert network of independent agents to offer you custom coverage that fits your life." *See,* www.ciginsurance.com/main_body., web page.

Yanting Zhang owned property in Hesperia, California, which she has lost through foreclosure resulting from California Capital's misconduct ("Property"). The Property consisted of multi-unit rentals.

Yanting Zhang viewed the California Capital web site before she purchased the carrier's Policy for the Property. The site's promises gave her reassurance; she purchased the Policy based on the promises made.

On July 5, 2005, Yanting Zhang suffered a fire loss at the Property. As the Second Amended Complaint alleges, California Capital engaged in a variety of misconduct relating to that loss - including acts that rose to a malevolence far exceeding mere claims handling improprieties. Further, as Yanting Zhang expressly alleged:

> "92. 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.
>
> 93. As demonstrated by its acts herein, California Capital Insurance Company had and has no intention of honoring such advertised promises. As such, California Capital has violated Business and Professions Code sections 17200, *et seq.*, and has engaged in unfair, deceptive, untrue, and/or misleading advertising. . . ."[1]

Yanting Zhang's allegations against Real Party went beyond the carrier's refusal to pay the true value of her covered claims. Whether California Capital is entitled to immunity under the UCL for such far-reaching misconduct with devastating consequences is at the heart of this dispute.

STATEMENT OF THE CASE

On or about July 5, 2005, in Unit 6 of the Property, a fire erupted. The fire and resulting damage spread to Unit 1 - as well as other Units at the Property. (AE 173.) The fire was the result of accidental conduct by a tenant.

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[1] Appendix of Evidence filed in support of Yanting Zhang's Writ ("AE"), p. 32 of the Appendix.

(AE 173, 174.) The Hesperia Fire Department was dispatched. The fire, and the considerable amount of water necessary to extinguish the fire, caused widespread damage and loss. (AE 174.)

Subsequent to Petitioner's proper and timely loss notice to California Capital, the carrier proceeded to engage in a campaign of deliberate harassment, which appears to have been motivated by bias, prejudice, and greed. (AE 174.) Indeed, California Capital's conduct was so outrageous and took on a personally malevolent tenor that its behavior and actions went far beyond mere "claims handling." (*E.g.*, AE 20, ll. 6 - 15; AE 175, ll. 18 - 22.)

In the wake of California Capital's misconduct, Yanting Zhang lost the Property through foreclosure.

The events in this proceeding illuminate that the appraisal process is not the panacea California Capital contends. California Capital demanded that Yanting Zhang accept $111,277.75 for Property repairs. Yanting Zhang's contractors' estimates were well above that amount. California Capital invoked Appraisal. The Appraisal was concluded on March 16, 2009. The Appraisal Award is binding upon the parties, with respect to the issue of the cost to repair the real property damage Petitioner suffered. California Capital requested that the Appraisers base the award on November 2005 building prices. Petitioner requested that the Appraisers base the award on March 2007

prices; this was the earliest Petitioner could have the Property repaired in light of her own financial straits and California Capital's underpayment. Each party retained an Appraiser. The Appraisers selected a neutral Umpire.

The binding Award based on November 2005 prices totaled $185,261.47. The binding Award based on March 2007 prices totaled $194,491.41. California Capital's Appraiser signed off on the Award. Petitioner's Appraiser refused on the belief that the Award was unacceptably low. Both Awards are, in any event, in stark contrast to the $111,277.75 California Capital demanded that Petitioner accept.

It was California Capital that insisted upon the Appraisal. Petitioner initially represented herself in *pro per*. At that time, she could ill afford the Appraisal, and was at a complete loss when faced with the carrier's complicated Appraisal Instructions and Conditions. Only with the assistance of counsel was Petitioner able to meaningfully participate in the Appraisal.

The Appraisal costs alone for Petitioner exceeded $30,000, due in part to the contentiousness of the process, and errors by California Capital's Appraiser. By the Appraisal Award, it was determined that California Capital undervalued Petitioner's property losses at least by approximately $73,000.00.

That is a significant undervaluation by any analysis. As stated above, that undervaluation lead to financial disaster for the Petitioner, and loss of the

Property through foreclosure. The costs, effort, and time required to establish that undervaluation verged on prohibitive.

In addition to its undervaluation of Petitioner's property loss, the carrier's acrimonious campaign included conduct not proscribed in the Unfair Insurance Practices Act ("UIPA" at Insurance Code sections 790.03, *et seq.*):

- Harassing and dunning notices from California Capital advising Petitioner that if she did not repair the Property, the carrier would cancel her insurance. However, it was because of California Capital's ***own*** unreasonable undervaluation, conduct, and delays that Petitioner could not properly repair the Property. As such, California Capital engaged in "unfair," harmful conduct against Petitioner, causing her physical and emotional injury and damage. California Capital then cancelled Petitioner's Policy (AE 12, 13) - in violation of Insurance Code section 675.5. California Capital's dunning cancellation notices, and unlawful cancellation of her Policy, were not claims handling practices. This conduct was unlawful, and unfair, and motivated out of a desire to harm the Petitioner. This conduct is not proscribed in the UIPA. (AE 175.) Rather, the conduct is prohibited by Insurance Code sections 675, *et seq.*, and

constitutes a non-UIPA predicate theory for Petitioner's UCL claim.

- Interfering with Petitioner's attempts to retain a Public Adjuster to assist her. At least one such Public Adjuster refused to work on Petitioner's claim once he discovered the identity of the California Capital adjuster. (AE 175.)
- Informing the mortgage holder on the Property that Petitioner had no intention of effectuating repairs. The California Capital adjuster testified in deposition that, in fact, he knew at all times Petitioner fully intended to repair the Property. By 2007, Petitioner had to pay out of her own pocket in her attempts to repair the Property, which was the catalyst for her financial hardship. California Capital's fraudulent representations to the mortgage holder caused the mortgage holder to initiate legal proceedings against the Petitioner - legal proceedings Petitioner had to defend. (AE 175.) Real Party's representations were unlawful, unfair, and fraudulent, and constitute economic contractual interference between Petitioner and her mortgage company. The stress resulting from having to defend against the mortgage company's accusations caused Petitioner severe

pregnancy complications, and the premature birth of her daughter, with its attendant health risks.

This was not merely a "reasonable dispute over the amount of loss." This was years of personal, vindictive animus by the carrier - conduct nowhere delineated in or proscribed by the UIPA. Petitioner specifically alleges conduct *other than* UIPA violations as constituting Real Party's unlawful, unfair, and fraudulent conduct. Petitioner's UCL claim is not an attempt to plead around *Moradi-Shalal*. Petitioner's UCL claim is an attempt to hold a business accountable for its misconduct, and to provide the trial court with the means of fashioning appropriate equitable remedies towards achieving that accountability.

LEGAL DISCUSSION

I. THE UNFAIR COMPETITION LAW APPLIES TO ALL "BUSINESSES," AND DOES NOT EXEMPT INSURANCE COMPANIES

A. By Its Express Terms, The UCL Statute Applies To All Businesses

Business and Professions Code section 17200 states:

"**§ 17200. Definition**

> 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."

The UCL does not carve out an exception for insurance companies.

Moreover, the courts broadly construe what constitutes "unfair competition" under the UCL:

> "The statutory language referring to 'any unlawful, unfair *or* fraudulent practice' makes clear that

a practice may be deemed unfair even if not specifically proscribed by some other law. 'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and *vice versa*.'

'[T]he Legislature. . . intended by this sweeping language to permit tribunals ***to enjoin on-going wrongful business conduct in whatever context such activity might occur***. Indeed. . . the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive.' (*American Philatelic Soc. v. Claibourne* (1953) 3 Cal.2d 689, 698.) As the *Claibourne* court observed: 'When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent

> to frustrate its consummation because the scheme is an original one.'. . . '[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.'"

(Emphasis in original and added. *Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 - 181; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 573 - 574.)

There is no exemption in the statute for insurance companies. To the contrary, the UCL includes "wrongful business conduct in whatever context such activity might occur." (*People v. McKale* (1979) 25 Cal.3d 626, 632.)

B. The Courts Uniformly Hold That Insurance Companies Are Subject To The UCL

As the Fourth District Court noted, "[u]ndoubtedly an insurer is subject to suit under the UCL, and numerous cases so reflect." (Slip Op. at 5.) For example:

- Suit brought under the UCL "seeking to enjoin improper handling of claims. . . ." (*Gallimore v. State Farm Fire & Cas. Ins. Co.* (2002) 102 Cal.App.4th 1388, 1391, as described by the Court

in *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 851.)

- UCL allegations upheld in a case predicated on claims mishandling based upon the carrier's bad faith denial of coverage for the insureds' Northridge earthquake claims. (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 676 - 677.)
- Suit against an insurance carrier relating to automobile insurance rates and premiums alleging UCL violations upheld. The Insurance Commissioner does not have exclusive jurisdiction over carriers, and the courts may enforce UCL remedies in civil cases. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 984; *see* extended discussion at pages 18 - 21.)
- In *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, the Court found that the plaintiff/insured properly alleged a UCL theory based on the insurance company's "sharp, illicit business practice." The Court itself articulated the insured's theory:

"Preciado [insured] alleges that Progressive has a 'pattern and practice of ignoring California Law by seeking 100% reimbursement for the amounts paid under its med-pay provision. This systematic scheme is contrary to law, and is nothing more than a sharp, illicit business practice.' Based on these key allegations, Preciado alleges Progressive fails to investigate claims, fails to properly explain policy benefits, misled Preciado and misrepresented material facts pertaining to his claim, imposes unacceptably high reimbursement amounts, and forced Preciado to retain an attorney and incur economic damages in order to receive proper benefits under the policy.

These practices, to the extent they are more general than the allegations of the breach of contract and breach of the covenant of good faith and fair dealing causes of action, state a cause of action. . . ." (*Id.* at 283.)

- Acts constituting insurance "bad faith" "may also constitute an *unfair* business practice under section 17200. . . While plaintiffs' allegations obviously charge violations of several of the statutory proscriptions in section 790.03. . . they also allege acts amounting to common law fraud and multiple breaches of the implied covenant of good faith." (*State Farm Fire and Cas. Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1105, 1107, review denied September 4, 1996; cited with approval in *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 181; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268.)[2]

- UCL properly alleged against an insurance company that engaged in a "pattern of behavior" or "a course of conduct" regarding its insurance products. Specifically, the company sought to induce sales through incomplete and misleading information concerning the projected benefits of the policy. (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 966.)

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[2] To the extent *State Farm v. Superior Court, supra* is in conflict with *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, Petitioner submits that *Textron* should be disapproved.

- UCL claim against Farmers Insurance based on allegedly improper monthly premium service charges upheld. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305.)

(*See also, Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38 - 39 and *Ticconi v. Blue Shield of Calif. Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, as the Fourth District made a point of noting (Slip Op. at 5.))

There is no valid reason why an insurance company should enjoy special immunity from UCL liability not possessed by any other industry. Petitioner Yanting Zhang expressly alleged that California Capital made "unfair" and "fraudulent" promises in its advertising likely to deceive the public. As the Fourth District Court concluded, "[n]o reason appears why an insurance company should not be subject to similar liability under the UCL if false advertising or similar misrepresentations can be proved." (Slip Op. at 9.)

II. INSURANCE CODE SECTION 1861.03(a) SPECIFICALLY PROVIDES THAT THE BUSINESS OF INSURANCE SHALL BE SUBJECT TO THE UCL

Real Party contends that *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287 proscribes Petitioner's third cause of action.

Notably, this Court stated in *Moradi-Shalal*:

> "Finally, nothing we hold herein would prevent the Legislature from creating additional civil or administrative remedies, including, of course, creation of a private cause of action for violation of section 790.03. . . ."

(*Moradi-Shalal, supra,* 46 Cal.3d at 305.)

After the Court's August 18, 1988 *Moradi-Shalal* decision, Insurance Code section 1861.03(a) was enacted. This statutory provision expressly mandates that the "business of insurance shall be subject to" the unfair business practices laws, set forth at Business and Professions Code sections 17200, *et seq.*

Pursuant to express statutory edict, the business of insurance is specifically subject to the provisions of the UCL.

Furthermore, decisional law underscores that Insurance Code section 1861.03 subjects insurance carriers to the provisions of the UCL. In *Donabedian v. Mercury Ins. Co., supra,* the Second District Court of Appeal reversed the trial court's order sustaining Mercury's demurrer to the UCL cause of action. The trial court erroneously concluded that the Insurance Commissioner had exclusive jurisdiction over the UCL allegations. The Court

of Appeal discussed the legislative history of Proposition 103, which dates back to 1944, and stated:

> "[Proposition 103] subjects the insurance industry to the laws - including the UCL - that are applicable to other types of businesses. . .
>
> 'In enacting Proposition 103, the voters vested the power to enforce the Insurance Code in the public as well as the Commissioner. . . The voters expressly provided in Insurance Code section 1861.03(a), that the business of insurance is subject to the laws of California that are applicable to any other business, including the antitrust laws and the Unfair Business Practices Act. . . [T]he voters envisioned that the Commissioner's ability to enforce the (specified) provisions of the Insurance Code would be supplemented by the use of private attorneys general."

(*Donabedian v. Mercury Ins. Co., supra,* 116 Cal.App.4th at 982 - 983.)

The Court next considered the plain meaning of the statute:

> "In sum, as Mercury would have it, a violation of Proposition 103 would always fall within the exclusive jurisdiction of the Insurance Commissioner and would never give rise to a civil action in the first instance. But that interpretation is contrary to the Proposition's plain language and the analysis in *Farmers* [*Ins. Exchg. v. Superior Court* (1992) 2 Cal.4th 377] and *SCIF* [*State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930].
>
> "It would make little sense if Proposition 103 - which subjects insurers to the UCL - were to be interpreted to preclude a civil action alleging a violation of that very Proposition."

(*Donabedian v. Mercury Ins. Co., supra,* 116 Cal.App.4th at 991.)

In *Donabedian*, the Second District cited to this Court's decision in *Farmers Ins. Exchg. v. Superior Court* (1992) 2 Cal.4th 377. In *Farmers*, this Court concluded that because its sweep is broad, the UCL applies even where the alleged acts are subject to administrative review and remedy:

> "[T]here is nothing from which we can conclude that the Legislature intended to preclude a court presented with a suit under the Unfair Practices Act from exercising discretion under the primary jurisdiction doctrine, in situations in which the practice challenged is one over which an administrative agency may also exercise jurisdiction."

(*Farmers Ins. Exchg. v. Superior Court, supra,* 2 Cal.4th at 395.)

As the Court in *Donabedian* inferred, it makes little sense to immunize insurance companies from their unlawful, unfair, and fraudulent acts, when there is a statutory provision (enacted after *Moradi-Shalal*) that specifically precludes such immunity.

III. PETITIONER'S THIRD CAUSE OF ACTION ALLEGES A VIABLE UNFAIR COMPETITION CLAIM

A. First, Petitioner Alleges California Capital Misrepresented Its Insurance Promises

California Capital argues that the UCL theory is improper given that it is solely predicated on alleged violations of Insurance Code section 790.03,

and thus abrogates *Moradi-Shalal*. This is an inaccurate description of the pleading's allegations.

Petitioner's third cause of action alleges that 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. Petitioner further alleges that California Capital promises its insureds that it will timely and properly pay covered claims; 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 has no intention honoring its advertised promises. (AE 32.)

As the Fourth District Court stated:

> "At the very least, 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. Although real party in interest argues strenuously and repeatedly that this is merely a 'claims handling' dispute, this argument simply

> ignores the facts that Zhang has chosen to assert in the third cause of action."

(Slip Op. at 11.)

There is no doubt that allegations of such false advertising supports a UCL claim. (*Shersher v. Superior Court* (2007) 154 Cal.App.4th 1491, 1494 - 1496; *Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal.App.4th 663, 679.) Furthermore, fraudulent inducement to enter into a contract is a common law tort separate and apart from breach of the contract itself. (*Wetherbee v. United Ins. Co. of America* (1968) 265 Cal.App.2d 921, 931.)

There is no abrogation of *Moradi-Shalal* where the unlawful, unfair, and fraudulent conduct has no nexus with the UIPA. Hence, "[n]o reason appears why an insurance company should not be subject to similar liability under the UCL if false advertising or similar misrepresentations can be proved." (Slip Op. at 9.)

Concomitantly, the fraudulent advertising/inducement prong of the UCL is distinct from common law fraud:

> "'A (common law) fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are

> required to state a claim for injunctive relief' under the UCL. (Citations omitted.) This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices. (*Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453.)"

(*In Re Tobacco II Cases, supra,* 46 Cal.4th at 312.)

For this reason, establishment that defendant actually misled is not required under the UCL, only that defendant's conduct was likely to mislead. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1274.)

California Capital simply should not be immune from liability pursuant to Business and Professions Code statutory provisions that were specifically designed by the Legislature to prohibit and proscribe such unscrupulous conduct, and promises the carrier - by its conduct here - had no intention of honoring.

B. Petitioner's UCL Allegations Are Not Predicated Solely On Insurance Code Section 790.03 Violations

"Unfair," "unlawful," and "fraudulent" conduct not proscribed in the UIPA were and are alleged in support of Petitioner's UCL claim. *Moradi-Shalal* is not undermined by applicability of Business and Professions Code sections 17200 theories against California Capital. Petitioner cites to a number of acts California Capital engaged in that ultimately were not part of the claims handling. (*Supra,* at pages 8 and 9.)

California Capital's advising Yanting Zhang's mortgage company that she had no intention of repairing the Property, prompting the initiation of foreclosure proceedings against her, was not claims handling misconduct. There is no such proscription in section 790.03. Petitioner contends that Real Party retains biased consultants and contractors to undervalue losses and damage. Insurance Code section 790.03 does not speak to that type of sharp business practice. Petitioner alleges that the carrier ties employee performance reviews and compensation packages to claim payments. This is not proscribed in the Code. Representations made in selling insurance products do not constitute claims handling misconduct.

Moreover, Real Party's analysis renders the UCL virtually meaningless. Petitioner's theories are not predicated wholly on the UIPA. Common law

theories support Petitioner's allegations. It makes no sense that such common law theories, even where their genesis is in contract breach or bad faith, cannot support a UCL claim. So long as the alleged misconduct is not wholly predicated on the UIPA, the precepts of *Moradi-Shalal* are left intact.

Petitioner's Second Amended Complaint alleges misconduct not proscribed by or addressed in the UIPA.

C. The Case Law Real Party Cites Is Distinguishable

Real Party states that this court "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." (Opening Brief, p. 16.)

Real Party ignores the conduct not abrogated by the UIPA alleged in support of Petitioner's UCL theory. Because of that, and concomitantly, the cases Real Party cites in support of this allegation are to be distinguished.

In *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, a third party (not a first party) insured attempted to assert section 17200 allegations against the insurance carrier - solely based on UIPA violations. Here, a first party insured alleges non-UIPA misconduct against the carrier. These are two important distinguishing features.

Real Party also cites to *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592. Not only does *Maler* not support Real Party's position; but, in fact,

Maler supports the proposition that a first party insured may properly maintain UCL claims against his/her insurance company. Indeed, the Court's holding in *Maler* underscores that UCL claims are viable in insurance bad faith cases.

In *Maler*, the plaintiffs/insureds builders and contractors sued their own liability insurer for the carrier's refusal to defend them in an underlying liability action. The plaintiffs/insureds alleged: (a) breach of Insurance Code section 790.03; (b) breach of Insurance Code section 1861.03; and (c) violations of Business and Professions Code sections 17200, *et seq.* The Second District Court of Appeal held that the plaintiffs/insureds could maintain their 17200 claims in the third cause of action - but sustained the trial court's demurrer as to the alleged Insurance Code violations. (*Maler v. Superior Court, supra,* 220 Cal.App.3d at 1596.)

The case of *Zephyr Park, Ltd. v. Superior Court* (1989) 213 Cal.App.3d 833, which Real Party also cites, similarly only applies to causes of action predicated on UIPA transgressions. In *Zephyr Park*, the insureds' claims against the carrier were wholly based on the UIPA. The Petitioner has no cause of action predicated upon Insurance Code section 790.03 in this case. *Zephyr Park* does not apply.

Further, *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283 - 284 does not support Real Party's argument, again for the

simple reason that Real Party ignores the non-UIPA allegations here. This Court reiterated in *Manufacturers Life* that the Legislature clearly stated its intent that the remedies and penalties under sections 17200, *et seq.* are cumulative, citing to section 17205:

> "Relying on this court's decision in *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201 - 1202, the Court of Appeal held that, because section 790.03 does not create a private civil cause of action, plaintiff could not plead around that limitation by relying on conduct which violates only the UIPA as the basis for a UCA cause of action. It held, however, that the trial court had properly overruled defendants' demurrers to the UCA cause of action because the conduct on which plaintiff predicated that cause of action also violated the Cartwright Act. Therefore, the conduct could form the basis for a cause of action under the UCA. . .
>
> As the Court of Appeal here recognized. . . 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 UCA to confer private standing to enforce a provision of the UIPA. Nor is the cause of action based on conduct which is absolutely privileged or immunized by another statute, such as the litigation privilege of Civil Code section 47, subdivision (b).

"This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful business practices in section 790.03, and therefore that section did not create a private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature

> intended to bar Cartwright Act causes of action based on those practices. Nothing in the UIPA would support such a conclusion. The UIPA nowhere reflects legislative intent to repeal the Cartwright Act insofar as it applies to the insurance industry, and the Legislature has clearly stated its intent that the remedies and penalties under the UCA are cumulative to other remedies and penalties."

(*Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th at 283 - 284.)

Because Real Party refuses to address the non-UIPA allegations in the governing pleading, its contention that Petitioner seeks to plead around *Moradi-Shalal* is inapt.

IV. A UCL ACTION PREDICATED ON, *INTER ALIA*, ADVERTISING MISREPRESENTATIONS IS NEITHER UNMANAGEABLE OR A CONFUTATION OF THE LEGISLATURE'S PURPOSE

In *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, this Court affirmed UCL theories against a healthcare insurance company. The

insured alleged that PacifiCare misrepresented that its primary commitment was to improving the quality of healthcare provided, when in fact, the carrier sought to increase its own profits by reducing claim payouts. The insured alleged:

> "[T]hat 'through its misleading and deceptive material representations and omissions,' PacifiCare has employed a 'fraudulent, unlawful, and/or unfair scheme designed to induce' persons to enroll in its health plans by 'misrepresenting. . . that its primary commitment. . . is to maintain and improve the quality of healthcare provided.' In fact, Cruz alleged, PacifiCare 'has been aggressively engaged in implementing undisclosed systemic internal policies that are designed, *inter alia*, to discourage PacifiCare's primary care physicians from delivering medical services and to interfere with the medical judgment of PacifiCare healthcare providers.' The result of these policies, he alleged, is a 'reduction in the quality of (provided) healthcare'

that 'is directly contrary to PacifiCare's representations.'"

(*Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at 308.)

Emphasizing that the Legislature intended by the UCL to protect consumers as well as competitors from unfair practices, this Court concluded that "[i]n the present case, the request for injunctive relief is clearly for the benefit of health care consumers and the general public by seeking to enjoin PacifiCare's alleged deceptive advertising practices." (*Id.* at 315.)

As the Fourth District Court noted, Zhang's allegations in the third cause of action are that real party solicited her business and sold its policy through false advertising and false promises. The allegations mirror those in *Cruz*.

Real Party contends a court would be tasked with examining thousands of claims to determine whether the carrier has a general practice of not offering the true value of its insureds' losses. Such a review is not necessary where the insured presents evidence, and the jury finds, that the insurance company engages in a particular pattern and practice of misconduct.[3]

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[3] Petitioner submits that such a multiple claims review does not necessarily present the nightmare Real Party posits. California courts have seen the utility of multiple claims evidence, and litigants have been quite able to engage in and present findings regarding similar multi-claims reviews. (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360; *Colonial Life & Acc. Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785.)

For example, in deriving the Replacement Cost Value ("RCV") of Petitioner's real property damage here, California Capital improperly applied across the board depreciation to calculate Actual Cost Value ("ACV"). Under the Policy, the carrier is to determine the reasonable RCV to repair the property. The carrier then deducts depreciation for building components subject to depreciation. The resulting number is the ACV for property repair. Once the insured actually repairs the property, the carrier owes the amount deducted for depreciation, *i.e.,* the difference between RCV and ACV. In determining ACV here, Real Party applied a flat 35% across the board deduction - without regard to whether the components were subject to depreciation. The 35% across the board "holdback" included depreciation for non-depreciable items, *e.g.,* cleaning, labor, overhead, profit. This across the board holdback was improper. Insurance Code section 2051 states:

> "In case of partial loss to the structure [as here], a deduction for physical depreciation shall apply ***only*** to components of a structure that are ***normally subject to repair and replacement*** during the useful life of that structure." (Emphasis added.)

A flat 35% depreciation or "holdback" in determining ACV is proscribed by section 2051, and results in a significant underpayment to the

insured. An across the board depreciation of overhead and profit further is violative of the California Code of Regulations, Title 10, Chapter 5, subchapter 7.5, section 2695.9(f)(1).[4] Application of a flat percentage to derive depreciation results in a savings on claim pay-out, and the carrier reaps an improper profit at the expense of its insureds. This is also a sharp business practice.

Such violative conduct demonstrates that the insurer in fact is not "like a good neighbor," or "on your side." The trial court should not be stripped of the power and ability to fashion an appropriate remedy under the UCL.

V. INJUNCTIVE RELIEF, AS WELL AS RESTITUTION, ARE VIABLE, IMPORTANT REMEDIES

A. Injunction In This Action Is Feasible

The remedies afforded under the UCL are cumulative. (Bus. & Prof. C. § 17205.) Courts have the insight and foresight to fashion appropriate

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[4] Section 2695.9(f)(1) of the Regulations states in pertinent part:

"Under a policy, subject to California Insurance Code Section 2071, where the insurer is required to pay the expense of repairing, rebuilding or replacing the property destroyed or damaged with other of like kind and quality, the measure of recovery is determined by the actual cash value of the damaged or destroyed property, as set forth in California Insurance Code Section 2051. Except for the intrinsic labor costs that are included in the cost of manufactured materials or goods, *the expense of labor necessary to repair, rebuild or replace covered property is not a component of physical depreciation and shall not be subject to depreciation or betterment.*" (Emphasis added.)

injunctive remedies. This Court in *Cruz* left it to the trial court to effect an appropriate injunctive remedy regarding PacifiCare's advertisements. In cases involving more complex fact issues and potential injunctive difficulties, the courts have been able to devise effective remedies and relief.

In *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, this Court upheld the UCL theories against the manufacturers of breakfast cereals that "engaged in a sophisticated advertising and marketing program" "designed to capitalize on the unique susceptibilities of children and preschoolers" to induce them into eating "candy breakfasts." It was left to the creativity of the trial court to fashion an appropriate remedy.

In *People ex rel. Bill Lockyear v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, the carrier was charged with violating the UCL in its sales of insurance products to senior citizens, which involved going to their residences, and making misleading and deceptive statements regarding Fremont's annuity policies. The trial court devised a plan for rectifying the carrier's past misconduct, as well as ensuring accurate representations *vis-à-vis* future policy sales, which included: (a) the drafting and presentation of an explanatory letter to persons who had purchased annuity policies; (b) enjoining certain conduct of the agents who went to prospective insureds' homes; (c)

requiring certain disclosures in policies and brochures; and (d) dictating the size of the annuity policies' margins. (*Id.* at 530 and 533.)

Just recently, in a case venued in the Orange County Superior Court, a UCL case was resolved against Safety Kleen Systems, Inc., one of the largest suppliers of petroleum-based solvents and parts washers to auto repair and body shops, service stations, and other businesses. The UCL theory was predicated on Safety Kleen's sales of solvents containing illegally high levels of smog-forming ingredients. While Safety Kleen's activities were regulated by the South Coast Management Air Quality District ("AQMD"), it was still subject to the proscriptions of the UCL. The Court's remedy included a permanent injunction barring future violations of the AQMD rules, as well as additional record keeping, reporting, and employee training to ensure compliance with AQMD regulations. (*People v. Safety Kleen Systems, Inc.*, (April 16, 2010) OCSC Case No. 00361817.)

Real Party contends that the alleged unfair business practice in *Progressive West Ins. Co. v. Superior Court, supra,* did not concern the carrier's claims adjustment practices, but its general policy of seeking med-pay reimbursement. *Progressive West*, California Capital submits, is an example of a case where it would be "a simple matter to frame an injunction directing the insurer to change that practice." (Opening Brief, p. 32.)

The wrongful practice at issue in *Progressive West* was in fact the manner in which the carrier handled claims:

> "Based on these key [med-pay] allegations, Preciado alleges Progressive fails to investigate claims, fails to properly explain policy benefits, misled Preciado and misrepresented material facts pertaining to his claim, imposes unacceptably high reimbursement amounts, and forced Preciado to retain an attorney and incur economic damages in order to receive proper benefits under the policy. . . ."

(*Progressive West Ins. Co. v. Superior Court, supra,* 135 Cal.App.4th 263, 283.)

Furthermore, if it is "a simple matter to frame an injunction" in *Progressive West*, directing Real Party here to, *e.g.,* only depreciate depreciable items in first party homeowner cases would be no more complex.

It should be left to the trial court, which hears the evidence, to determine appropriate injunctive relief. For example, California Capital advertises that "our goal is to be a valuable asset to you - every step of the way, whether you have a claim or not." If it is determined that California

Capital's advertised promises are misleading because the carrier improperly takes an across the board 35% depreciation (notably, an act not proscribed by the UIPA), the carrier may be enjoined from utilizing such an improper method of depreciation. Ultimately, however, the trial court's power to fashion an appropriate remedy should not be obliterated wholesale.

B. Restitution Will Not Result In A "Double Recovery"

Restitution of premiums by carriers found to have breached the insurance contract will not result in a "double recovery" as Real Party contends. Insureds purchase insurance for peace of mind, and prompt payment of a claim upon the happening of an event insured against - not a right of action against the carrier. (*Austero v. National Cas. Co. of Detroit, Michigan* (1978) 84 Cal.App.3d 1, 48 - 49, 57 - 58.) An insured compelled to file a lawsuit in order to obtain the benefit of the bargain is not made "whole" by breach of contract damages. The insured should not be precluded from seeking return of the premium paid for the policy the carrier chose to ignore.

Restitution of policy premium under certain circumstances is appropriate, as illustrated by hypothetical. Some businesses pay substantial premiums, including for liability coverage (*e.g.*, wrongful termination insurance). Commercial liability insurance premiums upward of $80,000 are not uncommon for this type of coverage. When the business is sued by a

former employee, and the carrier refuses to defend, the business insured loses not only the amounts incurred in funding its own defense (which are often significant), but the protections paid for in the form of policy premium - promised protection that is forever gone. Equitable restitution of policy premium under such circumstances is an important remedy.

Real Party's citations to *Alder v. Drudis* (1947) 30 Cal.2d 372 and *Jozovich v. Central Calif. Berry Growers Ass'n* (1960) 183 Cal.App.2d 216 are inapposite. In both cases, the contract involved the transfer of tangible items - a third dimensional motion picture device in *Alder*, and a strawberry freezing machine in *Jozovich*. The courts held that the plaintiff could not seek damages for the failure of the tangible items that were the subject of the bargain, and also restitution of sums paid in consideration of the items.

To the contrary, with insurance, the insured is not purchasing a tangible item - the insured is purchasing peace of mind - a promise. The carrier promises to promptly and properly pay for covered claims. If the carrier refuses to honor that promise, and the insured must file suit, the carrier's later payment of contract benefits does not satisfy the promise made. The insured has still been denied the very thing the insured has purchased - peace of mind. Restitution of the premium paid - for a policy the carrier refused to honor - is not a "double recovery" at all.

Furthermore, and in the event this Court does not agree with restitution of the policy premium, the trial court still should not be divested of the power to fashion appropriate injunctive relief in a UCL case against a carrier predicated on, *inter alia,* misrepresentation of policy benefits.

VI. ATTORNEYS' FEES ARE RECOVERABLE IN A UCL ACTION WHEN COUPLED WITH A CCP SECTION 1021.5 THEORY; TO ABROGATE THIS CLAIM AT THE DEMURRER STAGE IS IMPROPER

This Court holds that where an aggrieved party, such as Petitioner Yanting Zhang, is harmed by the unfair business practices of a defendant, the party may be entitled under certain circumstances to attorneys' fees pursuant to the UCL and Code of Civil Procedure section 1021.5. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc, supra,* 17 Cal.4th at 576.)

Real Party cites to *Shadoan v. World Savings & Loan Ass'n* (1990) 219 Cal.App.3d 97 for the proposition that fees are not recoverable in a UCL action. (Opening Brief, p. 24.) In *Shadoan*, the plaintiffs did seek, and the Court upheld, fees under a private attorney general theory pursuant to Code of Civil Procedure section 1021.5. That is the very basis for Petitioner's fee request here. (AE 34.)

In order to obtain an award of fees under section 1021.5, one must be a successful party in an action, resulting in enforcement of an important right affecting the public interest. A significant benefit, whether pecuniary or otherwise, must have been conferred on the general public or a broad class of persons. The necessity and financial burden of private enforcement must transcend the private litigant's personal interest in the controversy. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 543 - 544.) Whether a party has successfully met the statutory requirements for an award of fees, and the reasonable amount for such fees, are matters for the trial court to decide. (*Crawford v. Board of Education* (1988) 200 Cal.App.3d 1397, 1405 - 1406.) An attempt at the demurrer stage to preclude Petitioner from the right to recover such fees is premature.

CONCLUSION

By voting a majority in favor of Proposition 103, the People of the State of California determined that insurance companies should be subject to theories predicated upon Business and Professions Code sections 17200, *et seq.* By promulgating Insurance Code section 1861.03(a), the California Legislature upheld and underscored that determination. There is no valid basis on which to conclude that insurance companies should be immune from UCL

violations when statutory and decisional law underscore otherwise, as do logic and the fundamental principles on which the UCL itself was enacted. Petitioner respectfully submits that the Fourth District Court of Appeal's decision should be affirmed.

Dated: June 7, 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.520(c)(1))

Petitioner's brief consists of 7,549 words as counted by the WordPerfect version 10 word-processing program used to generate the brief.

Dated: June 7, 2010

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. I am employed in the County of Los Angeles, State of California. My business address is One Bunker Hill, 601 West Fifth Street, 8th Floor, Los Angeles, CA, 90071-2004. My mailing address is 466 Foothill Boulevard, No. 323, La Cañada, CA, 91011. On June 8, 2010, I served the foregoing document described as:

PETITIONER'S ANSWER BRIEF ON THE MERITS

As set forth on Appendix A.

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

Executed on this 8th day of June, 2010, at La Cañada, California.

Christina Lambert

APPENDIX A

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