S178542

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

REPLY BRIEF ON THE MERITS

HORVITZ & LEVY LLP
PETER ABRAHAMS (BAR NO. 44757)
MITCHELL C. TILNER (BAR NO. 93023)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
pabrahams@horvitzlevy.com
mtilner@horvitzlevy.com

GRANT, GENOVESE & BARATTA LLP
LANCE D. ORLOFF (BAR NO. 116070)
AARON J. MORTENSEN (BAR NO. 247184)
2030 MAIN STREET, SUITE 1600
IRVINE, CALIFORNIA 92614-7257
(949) 660-1600 • FAX: (949) 660-6060
ldo@ggb-law.com
ajm@ggb-law.com

ATTORNEYS FOR REAL PARTY IN INTEREST
CALIFORNIA CAPITAL INSURANCE COMPANY

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REPLY BRIEF ON THE MERITS

INTRODUCTION

Zhang spends the first eleven pages of her legal discussion arguing that the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)) applies to insurers (Answer Brief on the Merits (ABOM) 11-21), a point not in dispute. California Capital does not deny that insurers are subject to the UCL if they engage in conduct that violates a statute other than the Unfair Insurance Practices Act (Ins. Code, § 790 et seq. (UIPA)). (See Opening Brief on the Merits (OBOM) 15-20, citing *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257 (*Manufacturers Life*) and

Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26 (*Quelimane*).) Rather, California Capital contends that this case involves a dispute over its claims handling (not, as Zhang contends, its advertising) and that for several reasons a UCL action cannot be based on a dispute over an insurer's claims handling or the amount of loss:

(1) Because this case involves a fire loss, the appraisal process provided by Insurance Code section 2071 provides an adequate remedy (*Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886 (*CAR*));

(2) Even outside the context of a fire loss, a UCL action cannot be based on disputes over claims handling or the amount of loss because an insurer's alleged failure to pay the true value of a claim violates only the UIPA, and Zhang is therefore attempting to plead around this court's holding in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 (*Moradi-Shalal*) that a private cause of action cannot be based on a violation of the UIPA;

(3) Zhang is not entitled to restitution, the only remedy under the UCL which she seeks in her third cause of action; and

(4) Restitution and an injunction (the only other remedy under the UCL) are not feasible remedies in amount-of-loss disputes.

As we show, Zhang fails to refute the arguments in our opening brief.

LEGAL DISCUSSION

I. ZHANG HAS NOT ALLEGED FALSE ADVERTISING.

We demonstrated in our opening brief that Zhang's third cause of action for violation of the UCL does not allege false advertising because it does not allege that the coverage afforded by her policy differed from the coverage promised in California Capital's advertising. Rather, it alleges improper claims handling, namely, that California Capital supposedly "intends" not to pay the true value of covered claims. As we explained, because every insurer that advertises explicitly or implicitly promises that it will pay what it owes under its policies, if Zhang has alleged a false advertising claim, every lawsuit challenging an insurer's claims handling practices or the amounts it pays for losses could be turned into a suit for false advertising.[1] (OBOM 10-11.)

None of the cases cited by Zhang support her contention that she has alleged false advertising rather than improper claims handling.

Shersher v. Superior Court (2007) 154 Cal.App.4th 1491 and *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, relied on by Zhang, each concerned specific representations by the defendant regarding its product, not the defendant's unspoken

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[1] Zhang's assertion that she purchased her policy based on California Capital's purported website promises (ABOM 4) does not appear in her complaint and thus cannot be considered in evaluating the complaint's legal sufficiency.

"intentions." In *Shersher*, the defendant manufacturer, by marketing and promoting its wireless products as "11 Mbps and 54 Mbps," represented that the products were capable of delivering transmission rates of up to 11 megabits and 54 megabits. (*Shersher*, at pp. 1494-1495.) In *Colgan*, the defendant advertised its products as "made in U.S.A." even though parts of the products were manufactured outside the United States. (*Colgan*, at p. 673.)

Wetherbee v. United Insurance Co. of America (1968) 265 Cal.App.2d 921, was not a UCL action at all, let alone an action alleging false advertising. The insurer in that case induced the plaintiff not to cancel her health and accident policy and receive a refund of her premium by representing that the policy provided for lifetime payment of benefits if she was permanently disabled. The insurer thereafter denied coverage even though the plaintiff met the policy's definition of permanent disability. (*Id.* at pp. 925-927.) The Court of Appeal held the insurer committed common law fraud, not false advertising, and the plaintiff was therefore entitled to monetary damages for fraud, not equitable relief under the UCL. (See *id.* at pp. 929, 931.)

Zhang's citation to this court's opinion in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 for the proposition that her third cause of action states a false advertising claim under the UCL is particularly misleading. (See ABOM 30-32.) The plaintiff in *Cruz* alleged that the defendant induced persons to enroll in its healthcare plans by misrepresenting that its primary commitment was to maintain and improve the quality of enrollees' healthcare when it in fact discouraged the plans' primary care physicians from

delivering medical services and interfered with the physicians' medical judgment. (*Cruz*, at p. 308.) The only issue addressed by this court was whether UCL claims for restitutive and injunctive relief are arbitratable. (*Id.*, at p. 31.) The court did not hold that the plaintiff's allegations in fact stated a claim for false advertising. Moreover, because *Cruz* involved a health plan, not a fire insurance policy, this court had no occasion to decide whether the allegation that an insurer has no intention of paying the true value of fire losses states a claim for false advertising rather than improper claims handling.

II. A UCL CLAIM CANNOT BE BASED ON AN INSURER'S ADJUSTMENT OF A FIRE LOSS.

In our opening brief, we explained that the Court of Appeal in *CAR*, *supra*, 92 Cal.App.4th 886, held no action for restitution or an injunction under the UCL may be maintained based on an insurer's adjustment of a fire loss. (OBOM 11-15.) Rather, "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." (*CAR*, at p. 893.) "[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, emphasis added.)

Instead of addressing *CAR*, Zhang goes outside the record. She asserts that: (1) California Capital demanded that she accept $111,275.75 for property repairs; (2) California Capital "insisted upon" appraisal;[2] (3) California Capital requested that the appraisers base their award on November 2005 building prices; (4) Zhang requested that the appraisers base their award on March 2007 prices; (5) the appraisers' award based on November 2005 prices was $185,261.47; (6) the appraisers' award based on March 2007 prices was $194,491.41; (7) California Capital's appraiser "signed off on the Award"; (8) Zhang's appraiser refused to accept the award in the belief it was unacceptably low (ABOM 6-7); and (9) "[b]y the Appraisal Award, it was determined that California Capital undervalued [Zhang's] property losses . . . by approximately $73,000" (ABOM 7).

Because none of the foregoing facts are alleged in Zhang's operative complaint, they are not properly before this court. (See *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.) In any event, they support California Capital, not Zhang. As she acknowledges, "[t]he Appraisal Award is binding upon the parties, with respect to the issue of the cost to repair the real property damage [Zhang] suffered." (ABOM 6.) Thus, just as in *CAR*, Zhang "disagree[d]

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[2] Zhang does not explain how this statement can be squared with the allegation in her complaint that California Capital's adjuster told her she was not entitled to appraisal and had to accept its repair cost valuation. (Appendix of Exhibits (AE) 16.)

with [the] value suggested by the carrier, [and] the appraisal process [has] provide[d] the means by which the dispute is to be settled. In light of the scheme provided by section 2071, [Zhang] has failed to demonstrate an unlawful or unfair practice." (*CAR*, *supra*, 92 Cal.App.4th at p. 895.)

This observation also disposes of another assertion by Zhang that is unsupported by the record, namely that in deriving the payment it made toward the actual cash value of the damage to Zhang's building, California Capital supposedly applied a 35 percent deduction for depreciation to repair costs that are not depreciable. (ABOM 33-34.) Once again, even if this unsupported assertion were true, it would not permit Zhang to maintain a UCL claim because, regardless of how California Capital allegedly calculated depreciation, the appraisal award establishes the amount to which Zhang is entitled.[3]

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[3] In her brief, Zhang says that in allegedly applying "across the board" depreciation, California Capital violated subdivision (f)(1) of title 10, section 2695.9 of the California Administrative Code. (ABOM 34.) Aside from the fact this allegation appears nowhere in her complaint, subdivision (f)(1) did not become part of the regulations until August 30, 2006, over a year after the fire at Zhang's building. And, enforcement of that subdivision was stayed by the Los Angeles County Superior Court until January, 2007, 16 months after California Capital made its payment toward the actual cash value of the damage. (*Personal Insurance Federation of California v. Garamendi*, Super. Ct. L.A. County, 2007, No. BC298284.) Moreover, since Zhang has interjected the issue, we note that the allegation in her complaint that California Capital paid her "only approximately $70,000" (AE 14) fails to specify whether this was simply an initial advance toward the actual cash value, as contemplated by Insurance Code section 2051.5(b)(1).

III. ZHANG'S ATTEMPT TO STATE A CAUSE OF ACTION BASED ON CALIFORNIA CAPITAL'S ALLEGED CLAIMS HANDLING AND AMOUNT-OF-LOSS DECISIONS 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.

Because a violation of the UIPA does not give rise to a private right of action (*Moradi-Shalal, supra*, 46 Cal.3d 287, 304) a UCL action may not be based on an insurer's claims handling or amount-of-loss decisions. (OBOM 15-20; see *Manufacturers Life, supra*, 10 Cal.4th at p. 267 [approving holding of Court of Appeal "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]"].)

Other than *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093 which, as we explained, should be disapproved (OBOM 30-32), none of the decisions cited by Zhang held a UCL action may be based on an insurer's claims handling and amount-of-loss decisions. Zhang cites *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, as a suit brought under the UCL "seeking to enjoin improper handling of claims." (ABOM 13-14.) However, the only issue addressed by the Court of Appeal in *Gallimore* was whether the trial court had

properly dismissed the action under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The court expressed no opinion whether the complaint in fact stated a UCL cause of action. *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, also relied on by Zhang, was not an amount-of-loss case. The plaintiffs sued their insurer for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the UCL after it denied their claims for damage caused by the Northridge earthquake on the ground the claims were not brought within one year after the loss. (*Id.* at pp. 670-671.) The only issue addressed by the Court of Appeal was whether the trial court had erred in finding that the insurer's uniform use of January 17, 1994 as the date of the loss for all claimants was proper. (*Id.* at p. 672.)

Zhang totally misstates the holding in *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592 (*Maler*), discussed at pages 17 to 19 of our opening brief. According to Zhang, the plaintiffs in *Maler* alleged causes of action for breach of the UIPA, breach of Insurance Code section 1861.03, and violation of the UCL, and "[t]he Second District Court of Appeal held that the plaintiffs/insureds could maintain their [UCL] claims in the third cause of action—but sustained the trial court's demurrer as to the alleged Insurance Code violations." (ABOM 27.)

In fact, the trial court in *Maler* sustained demurrers to the causes of action for breach of the UIPA and breach of Insurance Code section 1861.03 but overruled the insurer's demurrer to the UCL cause of action. (*Maler, supra,* 220 Cal.App.3d at p. 1596.) The plaintiffs sought writ review of the trial court's order sustaining

the demurrer to the section 1861.03 cause of action, but the insurer did not file its own writ petition seeking review of the order overruling its demurrer to the UCL cause of action. (*Ibid.*) Because the ruling overruling the demurrer to the UCL cause of action was not before the Court of Appeal, Zhang's statement that the Court of Appeal held plaintiffs could maintain that cause of action is false.

Moreover, in denying the plaintiffs' writ petition, the Court of Appeal in *Maler* made clear that the adoption of Insurance Code section 1861.03 did not abrogate this court's holding in *Moradi-Shalal*, *supra*, 46 Cal.3d 287, and that the plaintiffs could not allege a claim for unfair competition under the UCL based upon an insurer's breach of its statutory duties under the UIPA: "[P]laintiffs attempt indirectly in the eighth count to plead a breach of section 790.03. 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 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.)[4]

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[4] The other authorities relied on by Zhang did not involve disputes over claims handling, amount of loss or any other violation of the UIPA, and therefore provide no support for her contention that improper claims handling may support a UCL claim. *Donabedian v.*

(continued...)

Apparently recognizing that she cannot predicate a UCL action on conduct that violates only the UIPA, Zhang says that her UCL allegations are not predicated solely on violations of that act. According to Zhang, California Capital also violated the UCL by purportedly (1) retaining "biased" consultants and contractors to undervalue losses and damage; (2) tying employee reviews and compensation packages to claim payments; and (3) advising her mortgage company she had no intention of repairing her property, which prompted the initiation of foreclosure proceedings against her. (ABOM 25.)

Zhang's assertions that California Capital retains biased consultants and contractors and ties employee performance reviews and compensation to claims payments are just different ways of

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(...continued)
Mercury Ins. Co. (2004) 116 Cal.App.4th 968, involved an insurer's practice of using the absence of prior insurance as a criteria in determining eligibility for a good driver discount and insurability. *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263 concerned an insurer's general practice of seeking 100 percent reimbursement of its med-pay payments from its insureds' recoveries from third-party tortfeasors, not the insurer's loss adjustment practices. *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, involved a life insurer's practice of misleading its insureds into believing it was beneficial to use the cash surrender value of their policies to purchase new policies. *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305 (*Troyk*) involved an insurer's practice of imposing the identical improper service charge on all policyholders who purchased a one-month term policy. *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528 involved an insurer's general practice of rescinding policies based on misrepresentations in the insured's application even though the insurer failed to attach the applications to its policies.

saying that, in her opinion, California Capital has no intention of paying the true value of covered claims. As we have shown, the latter accusation does not support a UCL action. Moreover, Zhang fails to explain how these alleged practices somehow entitle her to restitution of her premium, the only relief under the UCL that she seeks in her third cause of action. As we discuss in the following section of this brief, Zhang has failed to overcome the showing in our opening brief that awarding both policy benefits and restitution of her premium would constitute a double recovery.

Zhang's assertion that California Capital told her mortgage company she did not intend to repair her property also does not entitle her to relief under the UCL. To begin with, her UCL cause of action is based on California Capital's alleged practice of not paying the true value of covered claims (AE 32) (which she incorrectly characterizes as false advertising), not California Capital's alleged statement to her mortgage company. Indeed, even the Court of Appeal here acknowledged that Zhang cannot "recover under [her third] 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.)

Moreover, even if Zhang can prove that California Capital made false representations to her mortgage company causing her

harm, she will have an adequate remedy in damages. Once again, she fails to explain how that alleged conduct entitles her to restitution of her policy premium, the only UCL relief she seeks in her third cause of action.

Zhang says that California Capital's "analysis renders the UCL virtually meaningless." (ABOM 25.) Not so. Although Zhang's allegations do not state a UCL cause of action, nothing that California Capital urges in this case precludes a court from granting relief under that act where it is appropriate, for example, where an insurer refuses to issue title policies on property acquired at a tax sale (see *Quelimane*, *supra*, 19 Cal.4th 26), where insurers engage in an unlawful boycott (*Manufacturers Life*, *supra*, 10 Cal.4th 257), or where an insurer includes the identical improper service charge in all of its policies (*Troyk*, *supra*, 171 Cal.App.4th 1305).

IV. ASIDE FROM THE FACT ZHANG HAS NOT ALLEGED A VIOLATION OF THE UCL, HER THIRD CAUSE OF ACTION FAILS BECAUSE SHE IS NOT ENTITLED TO EITHER RESTITUTION OR AN INJUNCTION, THE ONLY REMEDIES AVAILABLE UNDER THE UCL.

A. Awarding Zhang both contract benefits and restitution of her policy premium would constitute a double recovery.

The only relief Zhang seeks under the UCL is restitution of her policy premium. (AE 32-33.) However, she fails to refute the

showing in our opening brief that an award of both contract benefits (which Zhang seeks in her first cause of action) and restitution of the consideration that entitles her to those benefits—the policy premium—would constitute a double recovery. She cites no case in which an insured was permitted to recover both restitution of her premium and benefits under the policy.

According to Zhang, it would be proper to award both contract benefits and restitution of her premium because insureds purchase insurance for peace of mind and "[a]n insured compelled to file a lawsuit in order to obtain the benefit of the bargain is not made 'whole' by breach of contract damages." (ABOM 38.) However, an insured has a complete remedy where an insurer forces an insured to file suit to recover policy benefits denied in bad faith—tort damages, including the attorneys' fees incurred by the insured to compel payment of policy benefits. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817; see *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 434 [tort damages recoverable where insurer denies policy benefits in bad faith because "[a]mong the considerations in purchasing liability insurance . . . is the peace of mind and security it will provide in the event of accidental loss"]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818.)

Thus, it is unnecessary to award restitution of the policy premium to make an insured whole in the event the insurer denies policy benefits in bad faith. Because tort damages—including attorneys' fees—provide an adequate remedy, awarding both restitution of the premium and contract damages constitutes a double recovery.

B. Zhang does not seek an injunction and is not entitled to that remedy in any event.

Because Zhang is not entitled to restitution and does not seek an injunction, the only other remedy permitted by the UCL (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144), it follows that the trial court properly sustained California Capital's demurrer to her UCL cause of action without leave to amend.

Moreover, and in any event, Zhang offers no response to the showing in our opening brief that injunctive relief is unavailable for the alleged improper handling of a single claim because monetary damages will afford adequate relief and an injunction operates only "in futuro." (OBOM 26; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320; *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1249-1250; *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306.) Further, as we discussed in our opening brief, because Zhang has not attempted to bring a class action, she could not seek injunctive relief on behalf of California Capital's other policyholders. (Bus. & Prof. Code, § 17203.)

Nor does Zhang explain how, even if she had attempted to bring a class action, injunctive relief could be granted based on allegations that an insurer has a general practice of not paying the true value of claims. It is one thing to enjoin an insurer from, for example, including improper service charges in all of its policies (*Troyk, supra,* 171 Cal.App.4th 1305) or from refusing to issue title insurance policies on property acquired at a tax sale (*Quelimane,*

supra, 19 Cal.4th 26). It is quite another to enjoin an insurer from paying less than the true value of claims.[5]

As this court has acknowledged, "[i]n some cases, the continuing supervision of an injunction is a matter of considerable complexity." (*Broughton v. CIGNA HealthPlans* (1999) 21 Cal.4th 1066, 1081.) That would be particularly true if a court attempted to enjoin the conduct alleged by Zhang. To determine whether an insurer was violating an injunction against paying less than the true value of claims, a court would have to conduct fact intensive examinations of the insurer's handling of numerous individual claims. In practical effect, the court would have to try the equivalent of multiple breach of contract actions. However, as this court explained in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, "requiring the court [in a UCL action] to deal with a variety of damage issues of a higher order of complexity" would be inconsistent "with the overarching legislative concern to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition . . . ." (*Id.* at pp. 173-174.)

Zhang does not dispute that it would be impractical to enforce an injunction prohibiting an insurer from paying less than the true value of future claims. Instead, she suggests that an injunction would be feasible if it were limited to prohibiting a particular alleged practice, such as applying a flat, across-the-board 35 percent

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[5] As we explained in our opening brief, the Legislature presumed that disputes would inevitably arise regarding the subjective question of the true value of fire losses and provided an adequate remedy—appraisal under Insurance Code section 2071—to resolve those disputes. (OBOM 11-15.)

deduction for depreciation of costs that are not subject to depreciation. (ABOM 32-33; see note 3, *supra.*) But that is not our case. Zhang nowhere alleged that California Capital has a practice of improperly applying depreciation, as she now claims (with no citations to the record) in her answer brief. Zhang alleged only that California Capital has an intention and a practice of not properly paying the true value of its insureds' covered claims. (AE 32.)

Thus, her assertion that it would be a simple matter to regulate an insurer's calculation of depreciation is not responsive to the issues presented by this case or to our argument that it would be infeasible to frame an injunction compelling California Capital to pay the true value of fire losses.

V. ZHANG IS NOT ENTITLED TO ATTORNEYS' FEES ON HER UCL CAUSE OF ACTION.

We explained in our opening brief that attorneys' fees are not recoverable in a UCL action. (OBOM 24.) Zhang says she is entitled to attorneys' fees under the private attorney general statute, Code of Civil Procedure section 1021.5 (section 1021.5), and that the Court of Appeal in *Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97 (*Shadoan*), cited in our opening brief, "upheld . . . fees under a private attorney general theory pursuant to Code of Civil Procedure section 1021.5." (ABOM 40.)

For several reasons, Zhang is wrong. First, as we have explained, Zhang is not entitled to restitution, the only available UCL relief sought in her third cause of action. Because attorneys'

fees under section 1021.5 may be awarded only "to a successful party," if she is not otherwise entitled to relief under the UCL, she cannot avoid dismissal of that cause of action by tacking on a claim for attorneys' fees under section 1021.5.

Second, Zhang is wrong when she says the Court of Appeal in *Shadoan, supra,* 219 Cal.App.3d 97, upheld an award of attorneys' fees under section 1021.5. Although the plaintiff in that case prayed for attorneys' fees under that statute, the Court of Appeal expressly stated "that no fees should be awarded to the extent the action was brought solely to enjoin an unfair business practice." (*Id.* at p. 108.) Rather, it allowed attorneys' fees pursuant to Civil Code section 1717 to the extent they were incurred litigating a contract claim because the contract provided for an award of attorneys' fees.

Third, attorneys' fees under section 1021.5 are appropriate only where the cost of pursuing the action is out of proportion to the plaintiff's individual stake in the matter. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941.) "The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interest to the extent necessary to encourage private litigation to enforce the right. . . . Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest." (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114.)

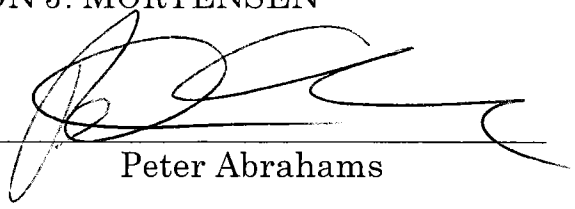
Here, Zhang's financial burden is not out of proportion to her personal stake in litigating this case, in which she seeks a substantial monetary award for policy benefits and bad faith damages. (See *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691-692 [private attorney general fees not recoverable where nonprofit corporation sought turnover of $60,000 in grant funds. "No evidence was presented that the litigation transcended Planned Parenthood's financial interests and imposed a financial burden disproportionate to its individual stake in the matter"].)

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief on the merits, Zhang has not stated a UCL cause of action. The Court of Appeal's decision therefore should be reversed.

June 29, 2010

HORVITZ & LEVY LLP
PETER ABRAHAMS
MITCHELL C. TILNER
GRANT, GENOVESE & BARATTA LLP
LANCE D. ORLOFF
AARON J. MORTENSEN

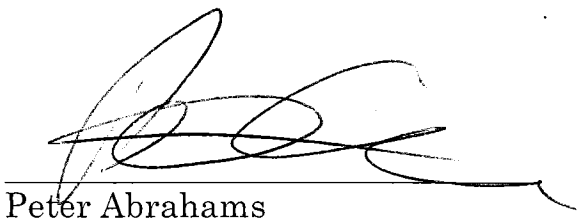
By: 
Peter Abrahams

Attorneys for Real Party in Interest
CALIFORNIA CAPITAL INSURANCE COMPANY

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this brief consists of 4,652 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: June 29, 2010



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.

On June 29, 2010, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 29, 2010, at Encino, California.

Victoria Beebe

Victoria Beebe

SERVICE LIST

Yanting Zhang v. The Superior Court of San Bernardino County (California Capital Insurance Company)
Case No. S178542

Jeanette Viau Gary Kwasniewski Viau & Kwasniewski 601 W. Fifth Street, 8th Floor Los Angeles, CA 90071-2004	Attorneys for Petitioner Yanting Zhang
Lance David Orloff Grant, Genovese & Baratta, LLP 2030 Main Street, Suite 1600 Irvine, CA 92614	Attorneys for Real Party in Interest California Capital Insurance Company
Clerk for the Honorable Joseph Brisco San Bernardino Superior Court 8303 Haven Avenue, Dept. R10 Rancho Cucamonga, CA 91730	(Case No. CIVVS701287)
Clerk of the Court California Court of Appeal Fourth Appellate District Division Two 3389 12th Street Riverside, CA 92501	(Case No. E047207)