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 Published Opinion By The Court of Appeal,
Fourth Appellate District, Division Two, Case No. E047207

COMBINED ANSWER TO AMICI CURIAE BRIEFS OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, *ET AL.*, CALIFORNIA LAND TITLE ASSOCIATION, AND AMERICAN INSURANCE ASSOCIATION

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INTRODUCTION

There are two distinct issues presented:

1) Whether a first party insured can predicate a UCL (Bus. & Prof. C. § 17200, *et seq.*) claim on unfair, unlawful, or fraudulent conduct that is *not* solely proscribed by the UIPA (Ins. C. § 790.03, *et seq.*); and

2) Whether a first party insured can predicate a UCL claim on unfair, unlawful, or fraudulent conduct that *is* solely proscribed by the UIPA.

Real Party and amici curiae urge "no" to both issues. But, there is a glaring omission in their briefs:

Real Party and amici curiae disregard:

- The Court's statement 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. . . ."[1]

- Just over two months ***later***, the November 9, 1988 enactment of California Insurance Code section 1861.03(a), which 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." (Emphasis added.)

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[1] *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 305.

The focus of each of the amicus curiae briefs is a bit different; however, none directly respond to the fact that the People of this State and the Legislature have spoken on the issues raised. As Steven Murray succinctly states in the Italian Marble & Tile amicus brief (p. 16):

> "It is unthinkable today that the insurance industry could be immunized from any enforcement of laws protecting consumer rights. Given the undeniable scarcity of state and local resources, neither the Insurance Commissioner nor local law enforcement officials have the ability to stop unfair business practices engaged in by insurers. Keeping tabs on this industry affected with the public interest is a full time job. The government can't - nor should it - do it all alone. Upholding California Capital's position will mean no enforcement, not just less enforcement.
>
> Proposition 103 made clear that insurers are to be treated like any other business - not subject to greater liability but certainly not to less. Upholding Zhang's position will not interefere at all with *Moradi-Shalal's* concerns about damage actions against insurers for statutory violations. Both the Legislature and the People have spoken on the subject; the right result is to listen to them."[2]

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[2] It is also to be noted that Mr. Murray raised the effect of the Legislature's enactment of Evidence Code section 1152(b) in 1998; the Legislature's amendment was an approval and ratification of an insured's right to privately enforce Insurance Code section 790.03. Real Party has submitted its Answer to the Italian Marble & Tileamicus brief. The heart of California Capital's Answer is that the Legislature, by enacting 1152(b), did not approve this Court's decision in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880. Petitioner believes that this misses a critical point in Italian Marble's amicus brief. By acknowledging, tacitly approving,

ARGUMENT

I. AMICI CURIAE FAIL TO REFUTE THE EXPRESS PROVISIONS OF INSURANCE CODE SECTION 1863.01(a), AS WELL AS DECISIONAL LAW CONSTRUING THAT STATUTE

California Land Title Association ("CLTA") is the only amicus curiae to directly address Insurance Code section 1861.03. CLTA states that section 1861.03 "has no application here" because the "general laws" do not permit a UCL cause of action based on claims handling.

There are two problems with CLTA's conclusion. The first is that this is circular reasoning similar to stating that Babe Ruth is the best baseball player ever because he was unequaled. The fallacy of CLTA's position is that the reason given for section 1861.03's inapplicability is nothing more than a restatement of the conclusion that poses as the reason for the conclusion.

The second problem with CLTA's contention is that there are allegations here of non-UIPA conduct. (This issue is discussed in detail at section VI of this brief, *infra*.) Since the filing of the Second Amended

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and ratifying section 790.03 in Evidence Code section 1152(b), the Legislature recognized UIPA actions, and thereby authorized their filing and maintenance. This is to be distinguished from the Legislature's advocating the wisdom of the *Royal Globe* decision.

Complaint, Petitioner Yanting Zhang has undergone three (3) days of having her deposition taken. Ms. Zhang's deposition testimony, of course, is not part of this record.[3] What is clear from Petitioner's testimony, however, is that Real Party's (mis)conduct went far beyond claims handling. For whatever reason (possibly because of the personality of the involved claims adjuster), Real Party's conduct was vindictive and personally antagonistic, to the point of malevolent. The evidence is that Real Party was well aware of the problems with this particular claims adjuster, and did nothing to rectify the situation before Petitioner's claim.

In its discussion of section 1861.03, CLTA additionally cites to *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56. *Fairbanks*, however, supports Petitioner's position. The plaintiffs in *Fairbanks* argued that Proposition 103, codified in Insurance Code section 1861.03, buttressed their contention that the Consumers Legal Remedies Act applied to life insurance. This Court disagreed, noting that Proposition 103 does not apply to life insurance. (*Fairbanks v. Superior Court, supra,* 46 Cal.4th at 65.)

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[3] It is critical that the genesis of this proceeding was the trial court's sustaining of Real Party's demurrer as to Petitioner's third cause of action alleging Business and Professions Code sections 17200, *et seq.* violations *without leave to amend.* Upon reversal Zhang will amend her Complaint to allege such extra-claims misconduct.

This Court concomittantly stated in *Fairbanks*:

> "Assuming for the sake of argument that this provision [Proposition 103] does apply to the insurance industry generally, its effect is merely to preclude courts from exempting insurance from general laws that would otherwise apply to it. The Consumers Legal Remedies Act is not an otherwise applicable general law, however. Rather than applying to all businesses, or to business transactions in general, the Consumers Legal Remedies Act applies only to transactions for the sale or lease of consumer 'goods' or 'services' as those terms are defined in the act. Insurance Code section 1861.03, subdivision (a), does not override the limitations that the Legislature incorporated into that statutory scheme."

(*Id.*)

To the contrary, here, the Legislature did not incorporate such limitations in the UCL - rather, "the Legislature. . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." (*Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 - 181.) *Fairbanks* does not provide the support CLTA's circular reasoning requires.

None of the amici curiae briefs directly address the fact that the Court in *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968 reversed the trial court's sustaining of Mercury's demurrer to the UCL

cause of action. The court rejected Mercury's contention, and the trial court's conclusion, that the Insurance Commissioner had exclusive jurisdiction over the UCL allegations.

Citing explicitly to Insurance Code section 1861.03(a), the Court in *Donabedian* 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 Association of California Insurance Companies, *et al.* ("ACIC") amicus curiae brief acknowledges that *Donabedian*, as well as the cases of *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257 and *State Farm Fire and Cas. Co. v. Superior Court* (1996) 45 Cal.App.4th

1093, hold that "a private right of action does exist for alleged violations of the UCL by insurers." (ACIC brief, p. 3.)

CLTA's amicus curiae brief does not dispute the general holding of *Donabedian,* but rather focuses on a statement in the Summary of the opinion regarding insurance rates. (CLTA brief, p. 6.) Pointedly, that portion of the Summary additionally states that "[t]he court [of appeal] held that a claim predicated on violation of the Insurance Code [1861.03] is ***not*** restricted to the formal administrative process when the claim is filed under the UCL." (*Donabedian v. Mercury Ins. Co., supra,* 116 Cal.App.4th at 969, emphasis added.)

American Insurance Association's ("AIA") amicus curiae brief does not cite to either Insurance Code section 1863.01 or *Donabedian* at all.

We hear best what the amici curiae briefs do not say. As Mr. Murray states: "Both the Legislature and the People have spoken on the subject; the right result is to listen to them."

II. A UCL THEORY IN A FIRST PARTY CASE DOES NOT ABROGATE *MORADI-SHALAL*

An issue that has become obfuscated in the wending of this process is that the issue here involves a first party claim brought by Real Party's own policyholder. *Moradi-Shalal* applied only to actions brought by third

parties. The Petitioner insured here is not advocating regarding or on behalf of third party insureds.

Further, this Court in *Moradi-Shalal* expressly articulated that whether an insured should be able to assert a private right of action for violations of Insurance Code section 790.03 is for the Legislature to decide. Approximately three months after *Moradi-Shalal*, the Legislature did decide - as expressed in Insurance Code section 1861.03.

ACIC warns that if the Fourth District Court of Appeal's decision is upheld herein, Justice Richardson's concerns as articulated in his dissent in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, 898 "will return to life." Justice Richardson's concerns pertained to third party cases - not first party.

Moreover, Proposition 64 has limited UCL claims to persons who have suffered injury in fact, and have lost money or property as a result of a defendant's UCL violation. As noted in the Italian Marble brief, a third party claimant will not have standing under the Proposition 64 requirement without a judgment against the insured. Only then will the third party have established the insured's liability, and the third party's right to recovery. Under such circumstances, the third party has a direct action pursuant to Insurance Code section 11580(b)(2), and is, in effect, a *de facto* insured.

Given that consumers in general, or groups such as "Stop Youth Addiction," can no longer bring suit (in light of Proposition 64), a UCL remedy for first party insureds should be allowed.

III. STATUTORY LAW, DECISIONAL LAW, AND LOGIC UNDERMINE AMICI CURIAE'S CONTENTIONS THAT THE POWER TO ENFORCE THE UIPA IS DELEGATED EXCLUSIVELY TO THE INSURANCE COMMISSIONER

A. Pertinent Statutory Law Underscores That The UCL Remedies Are "Cumulative"

Business and Professions Code section 17205 expressly provides that the UCL penalties are cumulative to each other and to the remedies or penalties available under all other laws of this state. As AIA emphasizes, section 17205 states that the UCL remedies are cumulative "unless otherwise expressly provided." AIA contends that the Fourth District ignored this language in granting Petitioner's Writ. Not so.

AIA posits that the Legislature "otherwise expressly provided" for an administrative scheme that excludes a private right of action under the UIPA. The Legislature's support for this contention is *Moradi-Shalal.* (AIA brief, pp. 10 - 11.) This again is circular reasoning whereby the result AIA seeks is cited as its own support.

In fact, not only has the Legislature ***not*** provided that the UCL remedies are exclusive, the Legislature has expressly provided that the UCL remedies are cumulative.

Article 6.5, Unfair Practices, includes (in addition to 790.03) Insurance Code section 790.09, which states:

> **"§ 790.09. Administrative action against license or certificate; civil liability; criminal penalty**
>
> No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same **shall in any way relieve or absolve such person from any** administrative action against the license or certificate of such person, **civil liability** or criminal penalty **under the laws of this State** arising out of the methods, acts or practices found unfair or deceptive." (Emphases added.)

The People again spoke to the issue of cumulative remedies by the very enactment of Insurance Code section 1861.03 itself (and, of course, in Bus. & Prof. Code section 17205).

AIA's admonishments that the Insurance Commissioner has exclusive jurisdiction over UIPA actions simply (and patently) ignores pertinent statutory law.

B. The Insurance Commissioner Exclusive Jurisdiction Argument Ignores This Court's Prior Pronouncements

In *Farmers Ins. Exchg. v. Superior Court* (1992) 2 Cal.4th 377, this Court held that the UCL applies even where the predicate 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.)

The amici briefs similarly disregard this Court's statements in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565:

> "Neither from our discussion nor from the authorities we cited in *Manufacturers Life*, however, does it follow that a private plaintiff lacks UCL standing whenever the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action. To the contrary, as noted, in *Manufacturer's Life* we permitted a UCL claim based on the Cartwright Act to go forward, ***even while recognizing that the conduct alleged as unfair competition also violated the UIPA,***[4] for the direct enforcement

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[4] This directly controverts AIA's contention that "the Legislature intended such claims to be governed by the UIPA and that no private right

> of which, following *Moradi-Shalal*, there is no private right of action. Because the UCL claim at issue in *Manufacturers Life* was not (as this UCL action is not) 'based on conduct which is absolutely privileged or immunized by another statute' (citation omitted) we affirmed the Court of Appeal judgment overruling a demurrer to the claim.
>
> "In *Manufacturers Life*, moreover, we explained that *Moradi-Shalal* was not meant to impose sweeping limitations on private antitrust or unfair competition actions. In *Moradi-Shalal*, we stated, the court concluded 'that the Legislature did not intend to create *new* causes of action when it described unlawful insurance business practices in [Insurance Code] section 790.03,' but the court 'did *not* hold that by identifying practices that are unlawful in the insurance industry. . . 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 (UCL) are cumulative to other remedies and penalties." (Emphases in part in original and added.)

(*Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra,* 17 Cal.4th at 565.)

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of action would be permissible even under a UCL claim that *touches on* territory covered by the UIPA." (AIA brief, p. 3, emphasis added.)

This Court has expressly articulated that conduct violative of the UIPA may support a UCL claim, and that *Moradi-Shalal* "was not meant to impose sweeping limitations on. . . unfair competition actions." (*Id.*)

If, indeed, the Commissioner must address some truly regulatory aspect of a UCL claim, the Court in *Donabedian* articulated a solution:

> "'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its view.'. .
>
> We conclude the legislative scheme at issue here does not address the primary jurisdiction issue, and a court thus is free to exercise its discretion to determine whether to stay proceedings in this suit pending action by the Insurance Commissioner. '[S]ection 1861.03 (, which makes the UCL applicable to insurance practices,) does not condition a suit under Business and Professions Code section 17200 on prior resort to the administrative process under the Insurance Code. . . ."

(*Donabedian v. Mercury Ins. Co., supra,* 116 Cal.App.4th at 985 - 986.)

Finally, this Court's discourse in *In re Tobacco II Cases* (2009) 46 Cal.4th 298 was nothing short of prophetic, in light of California's current financial condition:

> "Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public. . . These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts."

(*In re Tobacco II Cases, supra,* 46 Cal.4th at 313.)

Perhaps at no other time more so than now has it been clearer that private enforcement efforts are crucial in light of governmental and administrative budgetary constraints. The economic crisis itself is a good reason to ensure that insurance companies, which are paid for and entrusted with protecting the people of this state, act fairly and lawfully.

C. Amici Curiae's Contention - That The "Insurance Department Regulators," Rather Than The Courts, Are In A Better Position To Define Or Explain Terms Like "Reasonably Clear," "Prompt," And "Fair" - Is Insupportable

AIA contends that the provisions of the UIPA do not set forth "justiciable standards for enforcement." AIA contends that courts are ill or less equipped than the Department of Insurance to "define, explain or expound" on standards that "use terms like 'reasonably clear,' 'prompt' and 'fair.'" (AIA brief, p. 19.) This is a curious statement, at best. Courts are

constantly deciding what constitutes reasonable, prompt, and fair conduct. *See, e.g., Hanson By & Through Hanson v. Prudential Ins. Co. of America* (9th Cir. 1985) 783 F.2d 762, 767 (applying Calif. law) (in holding insurer's conduct "not unreasonable," the court considered the insurer's purpose and attitude in withholding payment of benefits); *State Farm Mut. Auto. Ins. Co. v. Crane* (1990) 217 Cal.App.3d 1127, 1136 (court considered whether carrier's tender of policy limits was timely and prompt); *Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1624 and *Hughes v. Blue Cross of No. Calif.* (1989) 215 Cal.App.3d 832, 845 - 846 (courts required to determine whether carrier's conduct was reasonable and "fair").

The cases where courts "define, explain or expound" on terms like "reasonably clear," "prompt," and "fair" are innumerable.

Furthermore, juries determine what constitutes reasonable, prompt, and fair carrier conduct - in the context of the very factors set forth at Insurance Code section 790.03(h). *See,* BAJI 12.94. The standards set forth at Insurance Code section 790.03 are precisely suited for judicial consideration, construction, and enforcement.

It is troubling that the one amicus curiae brief (AIA) most emphatically arguing administrative exclusivity states that "[i]t is a fundamental principle of statutory interpretation that a specific statute

relating to a particular subject (like the UIPA) governs as against a more general statute (like the UCL). . . ." (AIA brief, p. 3.) Yet, AIA fails to acknowledge or even mention Insurance Code section 1863.01(a) - at all.

IV. AMICI CURIAE'S RECITATION OF CIRCUMSTANCES WHERE INJUNCTIVE OR RESTITUTIONARY RELIEF IS APPROPRIATE UNDER THE UCL ONLY SERVES TO ILLUMINATE ITS APPLICABILITY HERE

As ACIC states: Cases allowing UCL claims "share a common characteristic." (ACIC brief, pp. 11 - 12.) "In every reported case in which a UCL claim has been permitted despite the constraints of *Moradi-Shalal*, the facts of the case alleged specific wrongdoing which could be addressed through an injunction that was not 'uncertain or ambiguous." (*Id.*)

Unambiguous injunctions are available, viable - and important - in UCL actions that allege UIPA violations. These may include, for example, an injunction requiring the insurance company to provide a claims manual to its claims handling personnel that includes a copy of the Regulations.[5]

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[5] California Code of Regulations, Title 10, Chapter 5, subchapter 7.5, section 2695.6(b)(2)(A) requires insurance companies to have claims adjusting manuals that contain a copy of the Regulations themselves: "(2) where the licensee is an entity, the annual written certification shall be executed, under penalty of of perjury, by a principal of the entity as follows: (A) that the licensee's claims adjusting manual contains a copy of these regulations and all amendments thereto. . . ." Petitioner's counsel has personal experience with insurance company claims executives (and the carrier's experts) testifying in deposition that the

Compliance with such an order may be demonstrated by Declaration. This is not difficult, and would help to ensure that carriers are providing necessary claims instruction. Such an injunction, it would seem, is far simpler than the injunction "ordering reformation of the insurance contract and prohibiting the insurer from adjusting the claim pursuant to the policy terms that were allegedly imposed illegally" - ACIC's description of the "certain and unambiguous" injunction ordered in *State Farm Fire and Cas. v. Superior Court, supra,* 45 Cal.App.4th 1093.

ACIC states that an appropriate injunction order was readily available in *Donebedian*, where the carrier was accused of wrongfully using lack of prior insurance as a factor in rating auto policies. (ACIC brief, p. 14.) An injunction requiring carriers to pay replacement cost after property has been restored is no more complicated.[6] Indeed, Petitioner Zhang

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carrier need not have a claims manual, and need not provide their claims personnel with a copy of the Regulations.

[6] Many policies provide that the insurance company owes no more than the actual cash value of the damage until actual repair or replacement is completed. (*Conway v. Farmers Home Mut. Ins. Co.* (1994) 26 Cal.App.4th 1185, 1189.) Such a provision gives the carrier the right to withhold the difference between the replacement cost ("RCV") and the actual cash value ("ACV") of the property, until the property is repaired, rebuilt or replaced. Once the insured repairs, rebuilds, or replaces the insured property, the carrier must pay "the difference between the actual cash value and the full replacement cost reasonably paid to replace the damaged property, up to the limits stated in the policy." *See,* Ins. C. § 2051.5(a). ACV is derived by ascertaining RCV and deducting for depreciation. Despite the fact that RCV is a known, quantified number before ACV is even paid, some carriers refuse to pay (or promptly pay) RCV owed.

discovered, after the operative pleading was filed, that Real Party improperly applied an across the board depreciation of 35 percent in deriving RCV for her damaged real property. An injunctive order addressing such improper depreciation would not be onerous.

Amici curiae contend that the alleged wrongdoing in this case (including the alleged fraudulent advertising) is so "vaguely asserted that any injunction would inevitably be uncertain and unambiguous." (ACIC brief, p. 14.) As a preliminary matter, this proceeding follows the sustaining of a demurrer without leave to amend. Additional facts have since been adduced that demonstrate the propriety of relief under the UCL herein. (*See,* footnote 3 at p. 5, *supra.*)

Furthermore, in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, this Court affirmed UCL theories against a healthcare insurance company, where the heart of the allegations involved alleged deceptive advertising. 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 in *Cruz* 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.)

Private enforcement assistance, and redress of correctible erroneous business practices, are important - and viable.

V. THE ACIC AMICUS CURIAE BRIEF APPEARS TO ARTICULATE THE INSURANCE INDUSTRY'S TRUE CONCERNS REGARDING UCL ACTIONS

ACIC states that UCL actions may allow "broad-ranging discovery" that may cause carriers to "decide that making inflacted settlements is preferable to having their internal business practices become part of the

litigation record." (ACIC brief, pp. 19 - 20.) First, insurance companies have never been known to have difficulty fighting improper "broad-ranging discovery." More offensively, this argument completely ignores the positive value of and protections afforded by UCL actions *vis-à-vis* the consumers of this state. ACIC states that the "claim for equitable relief in this case is not anything other than an effort to increase [Petitioner's] bargaining leverage." (ACIC brief, p. 21.) ACIC's charge has no place in this discussion.

VI. PETITIONER ALLEGES NON-UIPA CONDUCT

Amici curiae urge that Petitioner alleges no non-UIPA conduct. Even assuming *arguendo* that UCL theories may not properly be alleged based only on UIPA activities, Petitioner submits that just as in *Cruz, supra,* Petitioner's allegations regarding Real Party's unfair, deceptive, untrue, and/or misleading advertising will support her UCL claim.

Real Party's falsely advising Ms. Zhang's mortgage company that Petitioner had no intention of repairing the damaged real property - to prompt the lender's legal action against her - has nothing to do with claims handling. Zhang's allegations of false advertising which induced Zhang to buy insurance from California Capital also support a claim for false promise, a promise made without any intention of performance. This is a

form of fraud. (Civ. C. § 1710(4); *see, Engalla v. Permanente Medical Group* (1997) 15 Cal.4th 951, 973 - 974.)

Furthermore, the Court in *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 283, found that the allegations of the carrier's unfair 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 UCL claim.

CONCLUSION

What we get, when we buy insurance, is nothing more than the carrier's promise that it will help us if we suffer a covered loss. To effectively help, the insurance company must act fairly, promptly, and lawfully.

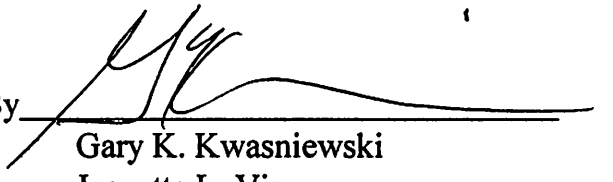
No other business is given a pass under the UCL. To give the insurance industry immunity - when insurance pervades our lives (we have insurance for our homes, autos, businesses, health, demise) - makes no sense.

Such an exemption only for insurance companies makes even less sense considering that the Legislature and the people of this state have stated their position on this issue - listening to them *is* the right result.

Dated: August 17, 2010

Respectfully submitted,

VIAU & KWASNIEWSKI

By 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(1))

Petitioner's brief consists of 4,692 words as counted by the WordPerfect version 10 word-processing program used to generate the brief.

Dated: August 17, 2010

Gary K. Kwasniewski

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 August 17, 2010, I filed/served the foregoing document described as:

COMBINED ANSWER TO AMICI CURIAE BRIEFS OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, *ET AL.*, CALIFORNIA LAND TITLE ASSOCIATION, AND AMERICAN INSURANCE ASSOCIATION

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 17th day of August, 2010, at La Cañada, California.

Christina Lambert

APPENDIX A

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APPENDIX A (cont.)

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