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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHRIS HUGHES, Plaintiff and Appellant, v. PROGRESSIVE DIRECT INSURANCE COMPANY, Defendant and Respondent.	B224990 (Los Angeles County Super. Ct. No. BC426745)

APPEAL from an order of the Superior Court of Los Angeles County, Carolyn B. Kuhl, Judge. Reversed.

Kabateck Brown Kellner, Brian S. Kabateck, Ricahrd L. Kellner and Alfredo Torrijos for Plaintiff and Appellant.

Baker & Hostetler, Peter W. James; Baker & Hostetler, Paul G. Karlsgodt and Tina Amin for Defendant and Respondent.

In *Moradi-Shalal v. Fireman's Fund Insurance Companies* (1988) 46 Cal.3d 287 (*Moradi-Shalal*) the Supreme Court reversed its decision in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880 and held the prohibitory provisions of Insurance Code section 790.03 (part of the Unfair Insurance Practices Act (UIPA) (Ins. Code, § 790 et seq.)) did not create a private right of action under that statute against "insurers who commit unfair practices enumerated in that provision." (*Moradi-Shalal*, at p. 292.) The holding and rationale of *Moradi-Shalal* have been extended by the Courts of Appeal to preclude claims under California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) (UCL) based directly on violations of the UIPA.

Insurance Code section 758.5 (section 758.5) prohibits an insurer from either requiring an insured's automobile be repaired by a specific automobile repair dealer or suggesting or recommending that a specific automobile repair dealer be used unless the insured is informed in writing of his or her right to select another repair dealer. Although section 758.5 is not part of the UIPA, section 758.5, subdivision (f), provides the powers of the Insurance Commissioner to enforce the section include those granted by the UIPA. Does *Moradi-Shalal* bar a cause of action by an insured against its insurer under the UCL based solely on allegations the insurer violated section 758.5? We conclude section 758.5 does not expressly bar such a claim, and the Legislature intended the Insurance Commissioner's authority to use UIPA enforcement powers to be cumulative, not exclusive. Accordingly, we reverse the order of dismissal entered after the trial court sustained without leave to amend the demurrer of Progressive Direct Insurance Company (Progressive Direct) to Chris Hughes's putative class action complaint for violation of Business and Professions Code section 17200.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Progressive Direct's Practice of Steering Insureds to Approved Automobile Repair Facilities*[1]

Progressive Direct provides automobile insurance to California drivers. Progressive Direct's Direct Repair Program (DRP) certifies certain approved repair facilities that have agreed to repair vehicles referred by Progressive Direct under strict conditions set by the insurer.

Hughes, who at the time was a resident of California covered by an automobile insurance policy issued by Progressive Direct, was involved in an accident on August 15, 2005 that damaged his car. Hughes advised Progressive Direct of the accident and informed it he wanted his automobile repaired by a specific repair shop that was not a DRP facility. Progressive Direct responded to Hughes's claim by telling him he should take his automobile to Champion Collision & Paint (Champion) in El Cajon, California, which participated in the DRP, explaining that his claim would be approved and the repairs on his car completed more quickly there. Progressive Direct did not inform Hughes of his right under section 758.5 to select the facility that would repair his vehicle.

Without knowing he had a right to use the shop he preferred, Hughes took his car to Champion for repairs. Champion repaired Hughes's car and returned it to him on November 21, 2005. Hughes was dissatisfied with Champion's work, believing that not all repairs necessary to restore the vehicle to its pre-accident condition had been completed and that substandard or used parts had been used.

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[1] We accept as true all facts properly pleaded in Hughes's complaint to determine whether the demurrer was properly sustained. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 173, fn. 1; *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182-183 ["[t]he reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled"]; see *Mack v. Soung* (2000) 80 Cal.App.4th 966, 971 [all properly pleaded allegations deemed true, regardless of plaintiff's ability to later prove them].)

2. *Hughes's Lawsuit for Violation of the Unfair Competition Law*

On November 23, 2009 Hughes filed a complaint against Progressive Direct for violation of Business and Professions Code section 17200 on behalf of himself and a proposed class of "[a]ll persons who are or were a resident of California, who had a claim covered by a Progressive automobile insurance policy, and who had their vehicle repaired by a shop belonging to Progressive's Direct Repair Program without having been provided written notification of their right to select a repair shop of their own choice." In addition to the factual allegations described above, Hughes's complaint alleged Progressive Direct tells its insureds that DRP facilities are carefully selected to provide only the highest quality work, but, in fact, repair shops are selected because they have agreed to Progressive Direct's demands to reduce the costs of repairs without regard to the interests of their customers (Progressive Direct's insureds). Progressive Direct then closely monitors all DRP shops for compliance with mandated restrictions on repairs, allowing Progressive Direct to control its payouts on claims to repair its insureds' vehicles.

The complaint further alleged Progressive Direct has a company-wide policy and practice of steering its insureds to its DRP shops: "Progressive uses its position of power over its insured, in the form of incentives and requirements to carry out its program of steering. The tactics employed . . . include telling insureds: that it does not do business with non-DRP shops; that a claim may not get paid if done at another shop; it is 'easier' to have the car repaired at DRP shops; that the insured can receive free towing if the vehicle is brought to a DRP shop; that the insured can receive a discount off of his or her deductible by using a DRP shop; that it will not guarantee work done at a non-DRP shop, but will guarantee the work at its DRP shops for the life of the vehicle; and that payment of their claims and the repair of their vehicles will be delayed if take[n] to a non-DRP shop."

The complaint asserted a single cause of action for violation of California's UCL (Bus. & Prof. Code, § 17200), alleging Progressive Direct's policy and practice of

steering insureds to its DRP shops is unlawful, unfair and deceptive. On behalf of himself and the members of the putative class he seeks to represent, Hughes requested disgorgement of profits received, restitution and/or injunctive relief and attorney fees.

3. *Progressive Direct's Demurrer and the Trial Court's Order*

Progressive Direct demurred to the complaint on the ground it did not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Progressive Direct argued *Moradi-Shalal, supra*, 46 Cal.3d 287 and appellate decisions following it prohibit private actions to enforce provisions of the Insurance Code, including claims under the UCL. Accordingly, its alleged violation of section 758.5 does not support a claim for violating Business and Professions Code section 17200.

In his opposition to the demurrer Hughes emphasized that section 758.5 is not part of the UIPA and argued *Moradi-Shalal* has never been extended to preclude a UCL claim based on violations of non-UIPA Insurance Code provisions or regulations.

In its reply brief Progressive Direct analyzed the legislative history of section 758.5 and argued it demonstrated the section did not create a private right of action. Progressive Direct also cited a nonpublished federal district court decision, *AHO Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.* (N.D.Cal. Nov. 6, 2008, No. 3:08-cv-04133-SBA) 2008 U.S. Dist. Lexis 90590, which denied leave to amend a complaint to allege a UCL claim based upon alleged violations of section 758.5, explaining, "In *Moradi-Shalal*, the California Supreme Court held that the Unfair Insurance Practices Act ('UIPA') (Cal. Ins. Code, § 790 et seq.) does not create a private right of action for violations of its provisions and, instead, can only be directly enforced by the Insurance Commissioner. Subdivision (f) of Section 758.5 provides that the statute should be enforced by the Insurance Commissioner pursuant to the UIPA. Therefore, just as there is no private right of action under the UIPA, there is no private right of action created by Section 758.5. Because no private right of action exists under Section 758.5, Section 17200 cannot be used to circumvent *Moradi-Shalal*."

At the May 10, 2010 hearing on Progressive Direct's demurrer, the trial court, although noting that the federal district court's ruling in *AHO Enterprises* was not binding, stated it found that case "a persuasive analysis of California law." The court sustained the demurrer without leave to amend.

DISCUSSION

1. *Standard of Review*

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry*, at p. 967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

2. *Section 758.5*

Section 758.5 was enacted to prevent insurance companies from using coercive tactics to steer consumers to particular automobile repair shops or dissuade consumers from using a repair shop of their own choosing. (See *Maystruk v. Infinity Ins. Co*. (2009) 175 Cal.App.4th 881, 887 [quoting an excerpt from the Insurance Commissioner's Legislative Analyst endorsing section 758.5].)[2] Section 758.5, subdivision (a), prohibits an insurer from "requir[ing] that an automobile be repaired at a specific automotive repair

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[2] The question presented by the case at bar was also raised by the parties, but not answered by the court, in *Maystruk*. (*Maystruk v. Infinity Ins. Co., supra,* 175 Cal.App.4th at p. 899 ["Plaintiff also contends that the trial court erroneously sustained the demurrer on the ground that a section 758.5 violation cannot provide a proper basis for a UCL claim. We need not reach this issue, however, which was rendered moot by our determination that the complaint failed to allege a section 758.5 violation."].)

dealer." Section 758.5, subdivision (b)(1), the provision allegedly violated by Progressive Direct, prohibits an insurer from "suggest[ing] or recommend[ing] that an automobile be repaired at a specific automotive repair dealer unless either of the following applies: [¶] (A) A referral is expressly requested by the claimant. [¶] (B) The claimant has been informed in writing of the right to select the automotive repair dealer."[3]

Section 758.5, subdivision (f), the statutory provision relied upon by the trial court in sustaining Progressive Direct's demurrer, states, "The powers of the commissioner to enforce this section shall include those granted in Article 6.5 (commencing with Section 790) of Chapter 1 of Part 2 of Division 1 [that is, the UIPA]." As the trial court also noted, section 758.5 does not create a private right of action to enforce its provisions.

3. *The UCL*

California's UCL[4] comprehensively prohibits "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. [Citation.] It is not necessary that the predicate law provide for private civil enforcement." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 531-532.) Specifically, a private right of action under the predicate statute is not necessary in order to state a cause of action under the UCL for violation based on that statute. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565 (*Stop Youth Addiction*) [rejecting contention that plaintiff cannot sue under the UCL when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action"]; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950

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[3] Section 758.5, subdivision (b)(3), specifies the form of written notice that must be provided by the insurer.

[4] Business and Professions Code section 17200 provides, "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act provided by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

[same].) Indeed, a practice that is "unfair" or "deceptive" can be challenged as a violation of the UCL even if not "unlawful." (*Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

Moreover, as the *Stop Youth Addiction* Court emphasized, "'[E]ven though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code.'" (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 572; see *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1110-1111, disapproved on other grounds in *Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co., supra*, 20 Cal.4th at pp. 184-185 [rejecting insurer's argument that recognition of an injunctive remedy under the UCL "would interfere with the Insurance Commissioner's ability to uniformly regulate the insurance industry or even the marketing activities of a particular insurer"; "State Farm's concern that such a holding may present the spector of unrestricted use of [UCL] actions by insureds is unwarranted but, in any event, is a matter which should be addressed to the Legislature"].)

Given the breadth of the UCL, absent some competing principle of law, a violation of section 758.5 should be a proper basis for Hughes's UCL claim. Progressive Direct argues, and the trial court ruled, *Moradi-Shalal* and its progeny provide such a mandate barring this action. We disagree.[5]

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[5] In *Zhang v. Superior Court* (2009) 178 Cal.App.4th 1081, review granted Feb. 10, 2010, S178542, the Supreme Court will consider two related issues similar to, but not necessarily dispositive of, the question presented by the case at bar: "(1) Can an insured bring a cause of action against its insurer under the unfair competition law (Bus. & Prof. Code, § 17200) based on allegations that the insurer misrepresents and falsely advertises that it will promptly and properly pay covered claims when it has no intention of doing so? (2) Does *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 bar such an action?"

4. *Moradi-Shalal and Claims Based Solely on Violations of the Unfair Insurance Practices Act*

The UIPA is intended "to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015] by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Ins. Code, § 790.) In particular, Insurance Code section 790.03 defines and prohibits a series of improper insurance practices including in subdivision (h) specific unfair claims settlement practices "[k]nowingly commit[ed] or perform[ed] with such frequency to indicate a general business practice." (See, e.g., § 790.03, subd. (h)(1) [misrepresenting facts or policy provisions relating to coverage], (5) [not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear], (13) [failing to prove promptly a reasonable explanation of the basis for the denial of a claim or for the offer of a compromise settlement].) The UIPA does not expressly create a private right of action, but Insurance Code section 790.09, part of the UIPA, states the Insurance Commissioner's issuance of an administrative cease-and-desist order under the act does not "does not relieve or absolve such person from" any "civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive." (See generally *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 272-275.)

In *Royal Globe Ins. Co. v. Superior Court, supra,* 23 Cal.3d 880 the Supreme Court examined the language and legislative history of the UIPA and held, although the statutory scheme itself provided only regulatory remedies, the Legislature intended to create a new private right to sue. In reversing *Royal Globe* nine years later, the *Moradi-Shalal* Court held, "Neither [Insurance Code] section 790.03 nor section 790.09 was intended to create a private civil cause of action against an insurer that commits one of the various acts listed in section 790.03, section (h). The contrary *Royal Globe* holding reportedly has resulted in multiple litigation or coerced settlements, and has generated

confusion and uncertainty regarding its application." (*Moradi-Shalal, supra,* 46 Cal.3d at p. 304.) The Court further explained that private suits brought under the UIPA by third-party claimants against insurers were undesirable because of the "adverse social and economic consequences," such as encouraging post-settlement lawsuits against the insured's insurer, inflated settlements to avoid exposure to bad faith actions, the awkwardness of owing a direct duty to a third-party claimant and escalating insurance costs due to inflated settlement demands and litigation. (*Id.* at p. 301.)

Moradi-Shalal's holding barring a third-party claimant from bringing a private action against an insurer for UIPA violations has been extended to include not only first-party claims under the UIPA (see, e.g., *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1597-1598; *Zephyr Park v. Superior Court* (1989) 213 Cal.App.3d 833, 836-838) but also UCL claims based directly on violations of the UIPA. As explained in an early opinion by our colleagues in Division Two of this court, to permit a plaintiff to maintain such a UCL action "would render *Moradi-Shalal* meaningless." (*Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1494.) In *Safeco* a motorcyclist who had been involved in a collision with a driver insured by Safeco settled his claim with the insured and then sued Safeco seeking both monetary damages and injunctive relief under the UCL, alleging Safeco's refusal to pay a collision damage waiver on an automobile he had rented while his motorcycle was being repaired constituted an unfair and deceptive claims settlement practice under Insurance Code section 790.03, subdivision (h). The Court of Appeal issued a writ of mandate, directing the superior court to grant Safeco's motion for summary judgment, explaining, "[W]e have no difficulty in [holding] the Business and Professions Code provides no toehold for scaling the barriers of *Moradi-Shalal.*" (*Safeco Ins. Co.*, at p. 1494.)

Similarly, in *Maler v. Superior Court, supra,* 220 Cal.App.3d 1592 plaintiffs sued their insurers after they had refused to defend or indemnify them in an underlying action. Emphasizing that Insurance Code section 1861.03, adopted by the electorate as part of Proposition 103 after *Moradi-Shalal,* subjects the business of insurance to California laws

applicable to any other business,[6] plaintiffs asserted their action was authorized by that statute and Business and Professions Code section 17200. Division Three of this court rejected the argument, holding that plaintiffs were impermissibly attempting to plead a cause of action based solely on a violation of the UIPA. "In essence, plaintiffs allege that defendants' breach of [their] statutory duties under section 790.03 amounts to unfair competition within the meaning of Business & Professions Code section 17200, thereby constituting a violation of section 1861.03. [¶] . . . [S]ection 1861.03, subdivision (a), simply declares that the insurance industry is subject to California laws applicable to any other business, including the antitrust and unfair business practices laws. [Citations.] Because the insurance industry obviously was subject to section 790.03 prior to the adoption of section 1861.03, the latter section did not extend the application of section 790.03 to the business of insurance. Thus, section 1861.03 cannot be construed to supersede *Moradi-Shalal*'s ban on a private action for damages under section 790.03. Further, plaintiffs cannot circumvent that ban by bootstrapping an alleged violation of section 790.03 onto Business and Professions Code section 17200 so as to state a cause of action under section 1861.03." (*Maler*, at p. 1598, fn. omitted; accord, *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1070 ["parties cannot plead around *Moradi-Shalal*'s holding by merely relabeling their cause of action as one for unfair competition"].)

Safeco and *Maler* were cited with approval in *Rubin v. Green* (1993) 4 Cal.4th 1187, an action against an attorney for soliciting clients, in which the Supreme Court described them as helpful authority to support its holding a unfair competition claim could not be maintained based on conduct immunized by Civil Code section 47, subdivision (b): "Notably in the case of actions arising out of an insurer's alleged bad faith refusal to settle insurance claims, formerly brought under the Insurance Code,

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[6] Insurance Code section 1861.03, subdivision (a), provides, "The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, . . . the antitrust and unfair business practices laws . . . ."

several decisions of the Courts of Appeal have held that the bar on such implied private causes of action, imposed by our decision in *Moradi-Shalal* . . . , may not be circumvented by recasting the action as one under Business and Professions Code section 17200." (*Rubin*, at pp. 1201-1202.)

5. *The Limits on Moradi-Shalal*

Moradi-Shalal, of course, does not bar all private actions against insurers for unfair or anticompetitive behavior. As discussed, Insurance Code section 1861.03, subdivision (a), makes the "business of insurance" generally subject to the provisions of California's UCL.[7] Thus, UCL actions may be maintained against an insurer when the alleged conduct, even though violating the UIPA, also violates other statutes applicable to insurers.

For example, in *Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th 257 plaintiff insurance agency sued several insurance companies alleging they had violated the UIPA, the UCL and the Cartwright Act (Bus. & Prof. Code, §§ 16720 & 16721.5) by engaging in an unlawful boycott. The Court of Appeal had held the trial court properly overruled a demurrer to the complaint because the conduct on which the plaintiff predicated the UCL cause of action violated not only the UIPA but also the Cartwright Act. (*Manufacturers Life*, at p. 283.) The Supreme Court affirmed explaining, "As the Court of Appeal . . . 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. . . . [¶] . . . The court [in *Moradi-Shalal*] concluded . . . that the Legislature did not intend to create

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[7] In *Donabedian v. Mercury Ins. Co*. (2004) 116 Cal.App.4th 968, 982-983, Division One of this court relied, in part, on Insurance Code section 1861.03, subdivision (a), to reverse the trial court's order dismissing UCL claims relating to automobile insurance rates and premiums. Rejecting the insurer's argument the Insurance Commissioner had exclusive jurisdiction over the rate-setting claims, Justice Mallano's opinion quoted from an amicus curiae brief filed in the case by the California Department of Insurance, "In enacting Proposition 103, the voters vested the power to enforce the Insurance Code in the public as well as the Commissioner."

new causes of action when it described unlawful insurance business practices in [Insurance Code] 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." (*Manufacturers Life*, at p. 284.)

Several years later, the Supreme Court in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43-44 elaborated on its ruling in *Manufacturers Life*, expressly stating that the UIPA did not exempt insurance companies from civil liability for anticompetitive conduct: "[I]n adopting the UIPA the Legislature had not granted a general exemption from antitrust and unfair competition statutes. 'Rather, the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted to the Insurance Commissioner to enjoin future unlawful acts and impose sanctions in the form of license and certificate suspension or revocation when a member of the industry violates any applicable statute, rule, or regulation.' [Citations.] We observed that no court had accepted the argument that the UIPA exempted insurance companies from other state antitrust laws or from civil liability for anticompetitive conduct . . . ."

6. *A Violation of Section 758.5 May Serve as a Predicate Unlawful Business Practice for a UCL Claim*

The Supreme Court in *Stop Youth Addiction, supra*, 17 Cal.4th 553 recognized that a UCL claim is barred when it is based on conduct that is absolutely privileged, as was held in *Rubin v. Green, supra*, 4 Cal.4th 1187, involving conduct protected by the litigation privilege of Civil Code section 47, subdivision (b), or effectively immunized by another statute, as has been held with respect to the UIPA by *Moradi-Shalal* and its progeny. With respect to this latter category, however, the Court emphasized that the UCL states, "'Unless otherwise *expressly* provided the remedies or penalties provided by this chapter [i.e., ch. 5, Enforcement, Bus. & Prof. Code, §§ 17200-17209] are cumulative to each other and to the remedies or penalties available under all other laws of

this state.'" (*Stop Youth Addiction,* at p. 573.) The Court continued, "The term '"expressly" means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly."'" (*Ibid.*) The Court refused to hold the Penal Code provision prohibiting the sale of cigarettes to minors impliedly precluded a private cause of action under the UCL, explaining to do so "we would have to read the word 'implicitly' into [Business & Professions Code] section 17205 or read the word "expressly' out of it." (*Ibid.*; see also *State Farm Fire & Casualty Co. v. Superior Court, supra*, 45 Cal.App.4th at p. 1111.)

Here, Hughes is not suing Progressive Direct for violating the UIPA but another, express statutory provision, section 758.5. Nor does the allegedly unlawful conduct at issue—the failure to provide a statutorily required notice that the insured could have his automobile repaired at a facility of his own choosing—approximate the bad faith refusal to settle insurance claims or other claims handling misconduct at the heart of *Moradi-Shalal*'s analysis rejecting *Royal Globe*. Thus, recognizing a violation of section 758.5 as a predicate unlawful business practice for a UCL claim does not appear to conflict with *Moradi-Shalal* and the case law extending its holding to UCL causes of action based solely on alleged violations of the UIPA. Indeed, several other appellate decisions have allowed UCL claims expressly based on non-UIPA violations of the Insurance Code. (See, e.g., *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1336 & fn. 18 [alleging violation of Ins. Code, § 381, subd. (f), based on failure to disclose service charge as part of premium; "Farmers apparently do not, and could not successfully, argue that a violation of section 381, subdivision (f), cannot constitute a predicate unlawful business practice or conduct for a UCL cause of action"]; *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528 [reversing denial of class certification in UCL action alleging unlawful postclaims underwriting by rescinding disability insurance policies in violation of Ins. Code, §§ 10113, 10381.5].)

To be sure, there is no express private right of action for a violation of Insurance Code section 758.5. Moreover, as the trial court emphasized, section 758.5,

subdivision (f), grants the Insurance Commissioner the power to enforce the section in the same manner (that is, primarily the issuance of administrative cease-and-desist orders and the imposition of civil penalties) as UIPA violations. In our view, that is not enough to constitute an "express" repeal of the cumulative remedies made available by the Legislature under the UCL or to transform section 758.5 into simply another unlawful practice under the UIPA, a conclusion that is reinforced by the legislative history of Senate Bill No. 551 (2003-2004 Reg. Sess), which added section 758.5 to the Insurance Code.

7. *Insurance Code Section 758.5 Does Not Expressly Bar A UCL Claim*

As originally introduced by Senator Jackie Speier, Senate Bill No. 551 (2003-2004 Reg. Sess.), with the short title "Auto Body Repair Consumer Choice Act of 2003," would have added a new section 758.5 to the Insurance Code, providing simply in subdivision (a), "It is unlawful for an insurer, including an affiliate or subsidiary of an insurer, in connection with a claim, to direct, suggest, or recommend that an automobile be repaired, or not be repaired, at a specific auto body repair shop, unless the claimant specifically requests a referral from the insurer." (Sen. Bill No. 551 (2003-2004 Reg. Sess.) as introduced Feb. 20, 2003, § 3(a).) Subdivision (b) of section 758.58 as proposed in Senator Speier's original bill created a private cause of action to enforce the new law: "An insurer that violates this section shall be liable for any damages suffered by the claimant or auto body repair shop, including compensatory, special and exemplary damages. Any injured party may bring an action for damages. The prevailing party in any action brought pursuant to this section shall be awarded reasonable attorney's fees and costs." (*Id.*, § 3(b).)

The initial amendment to Senate Bill No. 551 made only minor language changes in the substantive prohibition barring insurers from directing their insureds to specific repair locations and retained the private cause of action, but eliminated the right to recover attorney fees. (Sen. Amend. to Sen. Bill No. 551 (2003-2004 Reg. Sess.) Apr. 28, 2003, § 3.) A further amendment in the Senate deleted the right to recover

punitive damages, simplifying proposed subdivision (b) of the new section 758.5 to read: "An insurer that violates this section shall be liable for compensatory damages suffered by the insured or other claimant, or by the automotive repair dealer." (Sen. Amend. to Sen. Bill No. 551 (2003-2004 Reg. Sess.) May 13, 2003, § 3(b).) As so amended, Senate Bill No. 551 was approved by the Senate on June 3, 2003.

Assembly amendments to Senate Bill No. 551 substantially modified its substantive provisions, allowing an insurer to suggest particular repair facilities provided the insured was informed in writing of his or her right to select a different shop. (Assem. Amend. to Sen. Bill No. 551 (2003-2004 Reg. Sess.) July 3, 2003, § 3.) In addition, the private cause of action was eliminated entirely. In its place, proposed section 758.5, subdivision (h), provided: "The powers of the commissioner to enforce this section shall include those granted in Article 6.5 (commencing with Section 790) of Chapter 1 of Part 2 of Division 1 [that is, the UIPA]. Any person who violates this section shall be deemed to have violated that article, and shall be liable to the state for a civil penalty to be fixed by the commissioner pursuant to Section 790.035 and 790.05."

A report on Senate Bill No. 551 prepared for a July 9, 2003 hearing before the Assembly Committee on Insurance identified various organizations that supported or opposed the legislation and specifically noted, "The Civil Justice Association of California is opposed to this bill unless it is amended to remove a provision creating a new private cause of action." As the report explained, however, "In the most recent version of this bill [as amended in the Assembly on July 3, 2003], the author removed this provision from the measure." (Assem. Com. on Insurance, Analysis of Sen. Bill. No. 551 (2003-2004 Reg. Sess) as amended July 3, 2003.)

Senate Bill No. 551 was further revised by Assembly amendments following the hearing before the Assembly Committee on Insurance. These additional amendments struck all reference to enforcement (either by the Commissioner or by private cause of action). (See Assem. Amend. Sen. Bill No. 551 (2003-2004 Reg. Sess.) July 16, 2003.) (These Assembly amendments also deleted the short title and the legislative findings

regarding the shortcoming of existing law regulating the consumer's right to choose an automobile repair shop.) (*Ibid*.) Two months later, however, enforcement of proposed section 758.5 by the Commissioner was reinserted in the legislation as a new subdivision (f), but without the earlier language deeming a violation of the new section to be a violation of the UIPA itself: "The powers of the commissioner to enforce this section shall include those granted in Article 6.5 (commencing with Section 790) of Chapter 1 of Part 2 of Division 1." (Assem. Amend. to Sen. Bill No. 551 (2003-2004 Reg. Sess.) Sept. 2, § 1.) This is the enforcement language that was ultimately adopted and remains in Insurance Code section 758.5, subdivision (f), today.[8]

As this legislative history demonstrates, the Legislature neither authorized direct private enforcement of Insurance Code section 758.5—the provision creating a private right of action was removed in the initial Assembly amendments—nor intended simply to classify a violation of the section as another unfair insurance practice with enforcement limited to those remedies set forth in the UIPA—that alternative, too, was eliminated from the legislation. Rather, the grant to the Insurance Commissioner of UIPA-based enforcement powers was in addition to other, existing enforcement mechanisms (hence the language "shall include"). Even more significantly in light of the language in *Stop Youth Addiction* requiring an "express" repeal of the cumulative remedies generally made available under the UCL, the Legislature did not in any way indicate a violation of section 758.5 fell within the sweep of *Moradi-Shalal* or suggest such a violation could

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[8] To complete the account, a final, technical amendment to the language of Senate Bill No. 551, which did not relate to subdivision (f)'s enforcement provision, was made in the Assembly on September 5, 2003; the bill was then approved by the Assembly on September 8, 2003. The Senate concurred in the Assembly amendments on September 11, 2003. The Governor signed the legislation on October 10, 2003.

In 2009 Insurance Code section 758.5, subdivision (b), was amended to authorize an insurer to provide a claimant with "specific truthful and nondeceptive information regarding the services and benefits available during the claims process," including "information about the repair warranties offered, the type of replacement parts to be used . . ." and other information about the repair process. (See Stats. 2009, ch. 387, § 1.) No changes were made in subdivision (f) regarding enforcement of the section.

not serve as a predicate unlawful business practice for a UCL claim. (See *People v. Harrison* (1989) 48 Cal.3d 321, 329 [Legislature "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof"]; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 212 [same]; *People v. Licas* (2007) 41 Cal.4th 362, 367 [same].)

In sum, if a plaintiff relies on conduct that violates the UIPA but is not otherwise prohibited, the principles of *Moradi-Shalal* require that a civil action under the UCL be considered barred. An alleged violation of other statutes applicable to insurers, however, whether part of the Insurance Code or, as in *Manufacturers Life Ins. Co. v. Superior Court, supra,* 10 Cal.4th 257, the Business and Professions Code, may serve as the predicate for a UCL claim absent an express legislative direction to the contrary. Because there is no express legislative direction here, Hughes's allegations that Progressive Direct violated section 758.5 properly stated a cause of action for unfair competition. Progressive Direct's demurrer should have been overruled.

DISPOSITION

The order dismissing the action is reversed. Hughes is to recover his costs on appeal.

PERLUSS, P. J.

I concur:

ZELON, J.

WOODS, J., Concurring:

I write separately to respectfully state my thoughts on concurring, but with considerable misgivings.

Fast forwarding to the summation set forth in the concluding paragraph of the opinion, the issue in this case hangs precipitously on one word, namely "express." Or, as the opinion states, the Business and Professions Code may serve as the predicate for a UCL claim absent an "express" legislative direction to the contrary. In my view, the reed on which the opinion stands may not be thin, as is sometimes used in the vernacular, but the reed certainly appears to me to be quite frail and perhaps suffering from detectible anemia.

I have no quarrel with comments in the opinion pertaining to *Moradi-Shalal*, or the decisional law following the *Moradi* decision or the accuracy of the statement of legislative history after the *Moradi-Shalal* decision.

What is disturbing is the demonstrated inroads that have been made into the policy articulated by our high court in dealing with the social problems brought on in part by our high court's decision in *Royal Globe*, in which the court commented that the case has reportedly caused multiple litigation or coerced settlements and has generated confusion and uncertainty. No doubt *Royal Globe* had a profound impact on the cost of insurance in California, and which raised a storm of adverse comments throughout California and the nation in its holding that the UIPA did not preclude private enforcement of Insurance Code section 790.03, subdivision (h).

Now we are faced with a similar dilemma pertaining to Insurance Code section 758.5 and whether a private cause of action is inclusive in the right to enforce the problems addressed in the statute. Our conclusion is that it does, but my concurrence in the opinion is accompanied by a desire to report storm warnings on the horizon.

I respect the separation of powers principle endemic in our constitutional framework and the exclusive jurisdiction of the legislature to constitutionally address and

enact legislation with the purpose of remedying a social problem, as in this case. However, to hold that Insurance Code section 758.5 allows a private right of enforcement based upon one word (ie. "expressed") strikes me as a bit weak and will advance the drift away from *Moradi*-Shalal and the legislative enactments intended to cement the holding in that case to cure a social problem but with limited reservations.

By allowing the Unfair Competition statute in Business and Professions Code section 17200 to proceed without any UIPA constraints is most unfortunate. This decision adds to a growing list of problems, in my opinion.

The first that comes to mind is the continued attack on MICRA and the desire in some circles to eliminate or lift the cap on allowable medical malpractice damages which the courts have resisted in due respect for the legislative function to address needed emergency measures to prevent phenomenal and frequent judgments against doctors for astronomical damage awards. I ask the question whether our opinion will add fuel to flame of desire to lift the cap imposed to solve a social problem by a legislative policy consideration?[1]

The second problem that comes to mind is the perverse use of Business and Professions Code section 17200 by unscrupulous counsel in using the section inordinately to harass business owners with questionable lawsuits in hoping for and actually obtaining meritless settlements thereby sparing business owners of the threat of extensive litigation expenses. Will our opinion have the effect of encouraging such condemned conduct in the future?

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[1] See California Health Law Monitor dated March 9, 1998, by Lois Richardson, entitled "*Why California Needs MICRA*." (6 No. 5 Cal. Health L. Monitor 2.)

In writing separately, I merely state that I certainly hope our opinion does not have the collateral consequence raised in this concurrence. High insurance policy rates are not a socially desirable thing in my opinion and perhaps our interpretation of Insurance Code section 758.6 when juxtapositioned next to the UIPA and its manifested policy will dampen most desires to bring marginal or superficially meritorious lawsuits.

WOODS, J.