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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHRIS HUGHES,

Plaintiff and Appellant,

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,

Defendant and Respondent.

After a Decision By the Court of Appeal
Second Appellate District, Division Seven
Case No. B224990

From the Superior Court for Los Angeles County
Case No. BC426745
The Honorable Carolyn B. Kuhl, Judge

PETITION FOR REVIEW AND/OR FOR A GRANT-AND-HOLD ORDER

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I. ISSUE PRESENTED FOR REVIEW

In *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, this Court held that a private right of action may not be based on a violation of the Unfair Insurance Practices Act, Insurance Code section 790, *et seq.* (UIPA). This petition presents the issue whether, as the Court of Appeal held, an alleged violation of statutes specifically applicable to insurers other than UIPA may serve as a predicate for a claim under California's Unfair Competition Law, (Business and Professions Code sections 17200, *et seq.*) (UCL), absent an express legislative direction to the contrary. A related issue is presented in *Zhang v. Superior Court*, No. S178542, review granted February 10, 2010 (*Zhang*).

II. INTRODUCTION

In *Moradi-Shalal*, *supra*, 46 Cal.3d 287, this Court held that a private right of action may not be based on a violation of UIPA, given the Insurance Commissioner's broad authority to regulate conduct governed by UIPA. *Moradi-Shalal* reversed *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, a decision that had authorized private third-party "bad faith" actions premised on alleged UIPA violations and that had been widely criticized by courts and commentators due to the "erroneous nature of [the Supreme Court's] holding (i.e., the strained interpretation of the statutory provisions, and the misreading or disregard of available legislative history) and the undesirable social and economic effects of the decision (i.e., multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other "transaction" costs)." *Moradi-Shalal*, 46 Cal.3d at p. 299.

As Justice Woods recognized in his concurrence in this case, the Court of Appeal's published decision departing from the rationale of

Moradi-Shalal presents many of the same analytical problems and the same potential for disastrous societal and economic effects that led this Court to take the extraordinary step of revisiting and reversing *Royal Globe*.

Beginning with *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1494, the lower courts have long recognized that a private litigant cannot circumvent *Moradi-Shalal*'s bar on private actions by re-fashioning a UIPA claim as one under the UCL and arguing that the conduct is "unlawful" within the meaning of the UCL because it violates the UIPA. Several Court of Appeal decisions have extended this reasoning to Insurance Code provisions other than UIPA. These courts have reasoned that, just as with UIPA, the Legislature did not intend to give private litigants the power to file private actions to enforce other sections of the Insurance Code that the Legislature did not expressly empower private litigants to enforce, but instead gave the Insurance Commissioner broad powers to regulate.

The question presented here is whether the Court of Appeal properly held, in direct conflict with other published appellate decisions, that a plaintiff may pursue a UCL claim based on conduct that a plaintiffs says is unlawful because it violates insurance laws other than UIPA, such as the anti-steering statute, Insurance Code section 758.5. While section 758.5 is not located in the same article of the Insurance Code as UIPA, the Legislature expressly made section 758.5 enforceable by the Insurance Commissioner through the same remedial powers described in UIPA.

The Court of Appeal's decision constitutes a dramatic departure from earlier decisions interpreting *Moradi-Shalal*. It categorically held that *any* insurance law *other* than the UIPA can serve as the predicate for a UCL claim, unless the legislature "expressly" provided otherwise. Were this reasoning applied to the UIPA provisions at issue in *Moradi-Shalal*, a UCL claim would be allowed based on conduct is unlawful only under UIPA,

rendering *Moradi-Shalal*'s bar on private actions meaningless. To overcome this logical anomaly, the Court of Appeal simply carved out UIPA from the reach of its rule, without explaining how parallel Insurance Code provisions are materially distinguishable from the UIPA provisions at issue in *Moradi-Shalal.*

The Court of Appeal determined that even where a statute's legislative history affirmatively indicates an intent to preclude private enforcement, the statute remains subject to private enforcement unless it expressly bars the cumulative remedies made available by the UCL. (Typed Opn. at pp. 17-18.) However, no provision in the Insurance Code, *including UIPA*, expressly states it may not be used as a predicate for a UCL claim based on unlawful conduct. In fact, the only references to the UCL in the Insurance Code are in various provisions in which the Legislature has expressly stated that a violation of the provision *shall* also form the basis of a UCL claim—suggesting that the converse is true absent such authorizing language. *See, e.g.*, Insurance Code sections 10139.4, 12725.5, 12698.50, 12693.81.

The Court of Appeal's decision potentially subjects without limitation all provisions of California's Insurance Code, other than UIPA, to private enforcement by both first-party and third-party claimants, even where the alleged violation is proscribed only by the applicable insurance statute, and even where, as was true in this case, the applicable insurance statute expressly incorporates UIPA's administrative remedies.

In a concurrence that expressed concern over the wide-sweeping implications of the majority opinion, Justice Woods summed up the analytical deficiencies in the rule announced by the court:

> [T]he 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.

(Typed Opn., J. Woods, Concurring at p. 1.) He went on to express grave concerns over the societal and economic implications of the rule articulated by the majority:

> 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.

(*Id.*)

III. WHY REVIEW SHOULD BE GRANTED

Review should be granted for at least three reasons, which are explained in greater detail below. First, the Court of Appeal's decision

raises issues that are likely to be impacted by this Court's decision in *Zhang*, which presents similar issues relating to *Moradi-Shalal*'s bar on private actions for violation of UIPA and the impact of that bar on claims brought under the UCL. If, upon issuance of the *Zhang* opinion it appears that the opinion does not provide adequate guidance for resolving the issue presented here, this court can and should grant full review.

Second, there are strong public policy reasons for granting review. As Justice Woods predicts in his concurring opinion, there is a strong likelihood the decision will give rise to "marginally or superficially meritorious lawsuits," resulting in "[h]igh insurance policy rates" and "meritless settlements." (Typed Opn., Woods, J., Concurring at pp. 2-3.) The Court of Appeal's analysis and holding implicates the very same concerns inherent in *Royal Globe*'s interpretation of UIPA. In *Royal Globe*, this 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 private right to sue." (Typed Opn. at p. 9.) Although *Moradi-Shalal* held that this analysis was erroneous, the Court of Appeal made the same analytical error regarding section 758.5.

Third, aside from the possible conflict that may be created by this Court's decision in *Zhang*, review is required to secure uniformity of decision. The broad rule announced by the Court of Appeal conflicts with at least two other published Court of Appeal decisions and a prior decision of this Court, in addition to a federal court ruling on the specific issue whether section 758.5 of the Insurance Code can provide the predicate for a UCL claim based on "unlawful" conduct.

IV. STATEMENT OF THE CASE

Plaintiff alleged that Progressive Direct provided him with collision coverage for his vehicle. (AA 5 [Complaint at ¶ 13].)[1] After his vehicle was damaged in an accident, he submitted a claim to Progressive Direct. (*Id.*) Plaintiff alleges that he told Progressive Direct that he wanted his vehicle repaired by a particular repair shop that was not a part of the Direct Repair Program ("DRP") but that Progressive Direct told him that instead he should have his vehicle repaired at one of its DRP shops, Champion. (AA 5 [Complaint at ¶ 14].)

Plaintiff alleges that Progressive Direct never informed him in writing of his right to decide on the body shop of his choice. (AA 5 [Complaint at ¶ 15].) He took his vehicle to Champion where it was repaired, but allegedly not to its condition prior to the loss. (AA 5 [Complaint at ¶¶ 16-17].) Plaintiff alleges that Progressive Direct has a company-wide policy and practice of steering its insureds to automobile repair shops approved and controlled by Progressive Direct (AA 2 [Complaint at ¶ 3]). He argues that this alleged conduct violates section 758.5 of the California Insurance Code, which requires certain disclosures and prohibits certain acts by an insurance company when dealing with an insured who is looking for a body shop to repair his or her vehicle. In turn, Plaintiff asserts that violations of section 758.5 support a cause of action for "unlawful" conduct under the UCL.

The trial court sustained Progressive Direct's demurrer without leave to amend, finding that by adopting the enforcement mechanism in section 790.03, the Legislature intended that section 758.5 also may be enforced only by the Insurance Commissioner, not by private litigants.

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[1] Citations are to the Appellant's Appendix ("AA") filed in the Court of Appeal.

In a published decision, the Court of Appeal of the Second Appellate District, Division Seven, reversed. It held that an alleged violation of statutes applicable to insurers, other than the UIPA, "whether part of the Insurance Code or . . . the Business and Professions Code, may serve as the predicate for a UCL claim absent an express legislative direction to the contrary." (Typed Opn. at p.18.)

V. LEGAL DISCUSSION

A. This Case Presents An Issue Likely To Be Impacted By *Zhang v. Superior Court*, Already Before This Court.

Review is necessary because the outcome of this case is likely to be impacted by this Court's decision in *Zhang*. (*See* Typed Opn. at p.8, fn. 5 [noting that the issues presented in *Zhang* are "similar to" those presented by this case].)

In *Zhang*, this Court will address whether a plaintiff may bring a cause of action against an insurer under the UCL by recasting an alleged violation of UIPA as a claim for fraudulent misrepresentation or fraudulent advertising. Thus, just as in its previous decisions in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, and *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, it is very likely that this Court will analyze *Moradi-Shalal*'s holding that a private right of action may not be based on a UIPA violation and offer guidance on the implications of *Moradi-Shalal* to UCL claims based on "unlawful" conduct. This, in turn, would require reconsideration of the analysis employed by the Court of Appeal here.

In addition, the issues presented by this case share several specific similarities with the issues in *Zhang*. For example, like the claims in *Zhang*, the factual predicate for plaintiff's UCL claim here is conduct that could only be considered unlawful because it violates the requirements of a provision of the Insurance Code.[2]

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[2] Here, Plaintiff alleges a violation of section 758.5 based on an alleged failure by Progressive Direct to provide "written notification to their insureds of the right to select the automotive repair dealer." (*See* AA 5 [Complaint at ¶16].) But for the existence of section 758.5, there would be nothing requiring an insurer to make these written disclosures. Similarly, Plaintiff alleges a violation of section 758.5 because Progressive Direct allegedly had a policy or practice of referring insureds to specific body

The only potential distinction between this case and *Zhang* is that the alleged conduct here would arguably violate section 758.5, not one of the subsections of section 790.03. However, as discussed in more detail below, section 758.5 and section 790.3 are integrally linked. The only express remedy for a violation of either statute is enforcement by the Insurance Commissioner under the powers conferred by UIPA. Thus, to the extent that the Court's decision in *Zhang* addresses the circumstances in which the administrative remedies described in UIPA are exclusive, the decision will affect the outcome of this case.

The briefs filed by the parties and *amicus curiae* in *Zhang* reveal various other potential issues that, if addressed by the Court, could have a significant impact on the viability of the rule announced by the Court of Appeal in this case, including:

1) Whether the bar on private actions imposed by *Moradi-Shalal* applies to first-party as well as third-party insurance claims;

2) Whether consumer fraud claims under the UCL are available in every insurance claims dispute on the theory that the insurer has committed fraud if it has taken a position in adjusting a claim that turns out not to be correct; and

3) Whether *Moradi-Shalal*'s bar on private actions should be construed broadly because it refers to private rights of action generally, or whether it should be limited to the portions of UIPA that were at issue before the Court.

B. The Issue Presented Is Of Great Statewide Importance.

That the issues presented in this case are of great statewide importance is reflected in this Court's decision to grant review in *Zhang*.

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shops without first making this written disclosure. Making a referral to a body shop without providing the written notification required by the statute is a business practice that would not be prohibited but for section 758.5.

Moreover, the broad scope of the rule adopted by the Court of Appeal raises an additional issue of statewide concern. In particular, the decision threatens to render virtually the entire Insurance Code enforceable by both first-party and third-party litigants, an outcome that raises the same public policy concerns that led this Court in *Moradi-Shalal* to revisit *Royal Globe*, namely "undesirable social and economic effects," including "escalating insurance, legal and other 'transaction' costs." (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 299.)

1. The Court of Appeal selectively focused on Legislative History and disregarded the plain language of section 758.5.

The plain language of a statute is the best indicator of legislative intent. (*See Vikco Ins. Servs., Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 61, citing *Cal. Fed. Sav. & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349). ["In the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all"].)

The plain language of section 758.5, and the Insurance Regulations enforcing it, reflect a clear legislative intent that the section be enforced by the Insurance Commissioner, not private litigants. The section expressly adopts the enforcement mechanisms applicable to remedy violations of UIPA. Additionally, section 2695.8(e) of Title 10 of the California Code of Regulations enforces section 758.5 and effectively mimics the statute. Tit. 10, C.C.R. § 2695.8(e). That provision is part of the "Fair Claims Settlement Practices Regulations" found in Title, 10, Subchapter 7.5, Article 1 of the Insurance Regulations, which are explicitly adopted by

UIPA. In short, the statute makes clear reference to enforcement by the regulator, and makes no reference to private enforcement.

Instead of focusing on the plain language of the statute, the Court of Appeal relied on selective portions of its legislative history to reinforce its holding that enforcement of 758.5 is not limited to the Insurance Commissioner. However, in *Moradi-Shalal*, this Court held that *Royal Globe* had erred in relying on the same type of legislative history. For example, the plaintiff in *Moradi-Shalal* argued that 790.03 was intended to be privately enforced because, in part, "the Legislature modified section 790.03 in certain unrelated respects without changing subdivision (h) or addressing the Royal Globe issue[,]" and "failure to act indicates acquiescence with the prior law." (*Moradi-Shalal*, *supra*, 36 Cal.3d at pp. 300-301.) In *Moradi-Shalal*, however, this Court held that the Legislature's failure to adopt changes in response to particular case law is not indicative of implied legislation. (*Id.* at p. 301, citing *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 923.)

Here, the Court of Appeal similarly examined Assembly Amendments to the Senate Bill No. 551 (as it was originally introduced) to conclude that because the Legislature did not adopt an earlier version of the bill that deemed a violation of 758.5 to be a violation of UIPA, the Legislature did not intend enforcement of 758.5 to be limited to the Insurance Commissioner. This analysis disregards key legislative history appearing in the Senate Rules Committee SB 551 Rule Analysis, attached hereto as Ex. B, indicating that in adopting section 758.5, the Legislature expressly intended to incorporate existing regulatory law, i.e. section 2695.8(e) of Title 10 of the California Code of Regulations, the "Fair Claims Settlement Practices Regulations," which are explicitly adopted under UIPA. *See* SB 551 Senate Bill Analysis, Digest (2003) ("This bill codifies existing regulatory law [section 2695.8 (e) of the Fair Claim

Settlement Practices Regulations] and prohibits an insurer from requiring that an automobile be repaired at a specific automotive repair dealer, as defined.")

Under the Court of Appeal's reasoning, a private right of action could also be maintained for a violation of UIPA, contrary to *Moradi-Shalal,* because UIPA contains functionally the same language as the "shall include" language in subdivision (f) of section 758.5, which the Court of Appeal held means that the Legislature did *not* intend to limit enforcement of section 758.5 to the Insurance Commissioner. (Typed Opn. at p. 17.) Section 790.08, which is part of UIPA, states:

> The powers vested in the commissioner in this article shall be additional to any other powers to enforce any penalties, fines or forfeitures, denials, suspensions or revocations of licenses or certificates authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

Moreover, in *Royal Globe*, the majority opinion relied on Insurance Code section 790.09, which provides that cease and desist orders issued by the Insurance Commissioner under UIPA shall not "relieve or absolve" an insurer 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," to hold that a private right of action could be based on a violation of UIPA. (*Royal Globe*, *supra*, 23 Cal.3d at pp. 885-886.) However, in *Moradi-Shalal*, this Court agreed with Justice Richardson's dissent in *Royal Globe* that, had the Legislature truly intended to grant third party claimants a private cause of action for violations of UIPA, " 'then surely much more direct and precise language would have been selected.' " (*Moradi-Shalal*, *supra*, 46 Cal.3d at pp. 294-295, quoting *Royal Globe*, *supra*, 23 Cal.3d at p. 896, dissenting Opn. of Richardson, J.)

The Court of Appeal here implicitly recognized the tension between its decision and *Moradi-Shalal* by carving out a UIPA exception to its rule. That is not a legitimate way to distinguish binding authority.

2. The Court of Appeal's wide-reaching rule threatens to resurrect the same negative social and economic consequences created by *Royal Globe*.

In his concurring opinion, Justice Woods likened the social problems caused by *Royal Globe*'s interpretation of UIPA (including increased insurance costs and multiple litigation) to "a similar dilemma pertaining to Insurance Code section 758.5." (Typed Opn., J. Woods, Concurring at p. 1.) And, given the majority's sweeping rational, the same dilemma will arise with respect to private enforcement of all other insurance laws, other than UIPA.

In overturning *Royal Globe*, this Court did not depend on an "express" repeal of other remedies for violation of UIPA, because doing so would obviate legislative intent and the important public policy decisions at the core of its holding. Instead, this Court gave great weight to the adverse social consequences created by *Royal Globe,* including increased litigation costs, multiple litigation, increased insurance premiums, and the possible conflict of interest created by a direct duty of the insured to third parties, and coerced settlements. (*Moradi-Shalal*, *supra*, 46 Cal. 3d at pp. 301-303.) The Court of Appeal here failed to apply the same analysis in interpreting section 758.5. In essence, its decision subjects without limitation all provisions of the California Insurance Code, other than UIPA, to private enforcement by both first-party and third-party claimants, even where, as is true here, the alleged violation is proscribed only by the applicable insurance statute.[3]

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[3] That the Court of Appeal's holding is controversial and has led to unease amongst those who practice in the insurance arena is clear from the

Not only will the opinion substantially increase the cost of insurance in California, it is likely to result in an increase in meritless lawsuits. As Justice Woods explained:

> 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?

(Typed Opn., J. Woods, Concurring at p. 2.)

This Court should grant review to address the significant adverse economic and social consequences of the Court of Appeal's conclusion that private parties may enforce the Insurance Code.

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media attention it has received. The following excerpt from a Los Angeles Daily Journal article analyzing the Court of Appeal's decision (and referencing *Zhang*) is illustrative:

> *Hughes* is arguably controversial for distinguishing Insurance Code Section 758.5 from the UIPA, and finding that there was no express private bar action under that section – because that finding provided the foundation for holding that plaintiff could proceed with his putative class action complaint under Section 17200. Interested parties are now awaiting with great anticipation Supreme Court's decision in *Zhang v. Superior* Court, which is expected to clarify whether an insured can bring a statutory unfair competition claim against its insurer based on allegations of fraudulent misrepresentation and false advertising.

(Deborah L. Stein, *Insurance litigation storm warnings on the horizon*, LOS ANGELES DAILY JOURNAL, July 21, 2011, at 3.)

C. The Court Of Appeal Decision Creates A Conflict With Established Case Law On Matters Requiring Uniformity.

Review is also necessary to "secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).) The Court of Appeal's decision is in direct conflict with at least two other published Court of Appeal decisions, in addition to being in direct conflict with a federal court's ruling on the narrower issue of whether section 758.5 of the Insurance Code can provide the predicate for a UCL claim based on "unlawful" conduct.

In *Vikco, supra,* 70 Cal.App.4th 55, the plaintiff attempted to bring a private right of action under Insurance Code section 769, which requires an insurer to give 120-days notice before terminating an agency contract. The plaintiff asserted that even if a private right of action did not exist under section 769, it could pursue its section 769 claim under the UCL. It argued that *Moradi-Shalal* was distinguishable because, while the Legislature expressly provided administrative remedies for violations of the unfair insurance practices enumerated in section 790.03, "thereby placing responsibility for enforcement of the unfair practices provision in the hands of the Insurance Commissioner[,]" section 769 lacks a provision expressly setting out administrative remedies. (*Vikco, 70* Cal.App.4th at 64.)

The Court of Appeal in *Vikco* first held that the plain language of section 769 indicates that the Legislature did not intend to create a private right of action to enforce it. (*Id.* at pp. 61-63.) In interpreting the statute, the court stated, "[c]ourts are not at liberty to impute a particular intention to the Legislature when nothing in the language of the statute implies such an intention." (*Id.* at p. 62, citing *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 658.) And despite the plaintiff's arguments, the court held that section 769 did in fact provide express direction for an administrative remedy: "[S]ection 790.06 specifically gives the Insurance Commissioner the power to undertake

administrative proceedings to enforce unfair business practices *not* enumerated or defined in section 790.03." (*Id.* at p. 64.)

Even though section 769, unlike section 758.5, does not make any reference to the Insurance Commissioner or UIPA, the court held that the administrative remedies under UIPA were intended to cover violations of other sections of the Insurance Code. A fortiori, if a statute (like section 758.5) expressly provides for enforcement under UIPA, the Legislature could not have intended that it may also be enforced by private citizens.

The Court of Appeal's opinion here is also in conflict with *Farmers Ins. Exch. v. Superior Court* (2006) 137 Cal.App.4th 842. In *Farmers,* the court applied *Moradi-Shalal* to section 1861.10 of the Insurance Code and held that because the Legislature affirmatively banned private enforcement of that section, a violation could not support a private right of action under the UCL. (*Id.* at p. 850; *see also Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142 ["*Moradi-Shalal* establishes the analytical framework applicable to all claims of implied private right of action under statutes not expressly providing for private rights of action"].)

The federal court in *Aho Enters. v. State Farm Mut. Auto. Ins. Co.*, No. 3:08-cv-04133-SBA, 2008 U.S. Dist. LEXIS 90590, *1 (N.D. Cal. Nov. 4, 2008) (case copy attached hereto as Exhibit C), adopted the same reasoning with respect to the very statute at issue here. Relying on *Moradi-Shalal,* it held that section 758.5 cannot be enforced through a private action. In *Aho*, the plaintiff requested leave to amend its complaint to allege a UCL claim based on an alleged violation of section 758.5. *Id.* at *12. The court discussed *Moradi-Shalal*'s holding that UIPA "does not create a private right of action for its provisions and, instead, can only be directly enforced by the Insurance Commissioner." (*Id.*) It then applied the *Moradi-Shalal* analysis to section 758.5, stating: "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 there is no private right of action created by section 758.5, section 17200 cannot be used to circumvent *Moradi-Shalal*." (*Id.* at *13-14 internal italics omitted.)

The Court of Appeal's decision here is in direct conflict with the reasoning and holding of these cases, none of which required an "express legislative intent" in order to bar a private right of action to enforce the Insurance Code sections at issue in those cases.

Finally, the Court of Appeal's rule requiring an express statement of legislative intent to preclude UCL actions creates an inherent conflict with the guidance provided by this Court in *Manufacturers Life*, *supra,* 10 Cal.4th 257. In *Manufacturers Life,* this Court recognized that where the Legislature did not intend to create a private right of action in a statute and a plaintiff complains of conduct that violates only that statute, a plaintiff should not be permitted to plead around this limitation by recasting the claim as one for violation of UCL.[4] (*Id.* at p. 284; *see also Stop Youth Addiction, Inc., supra*, 17 Cal.4th at 565-66 [recognizing that what set *Manufacturer's Life* apart from *Moradi-Shalal* was that in *Manufacturer's Life*, the plaintiff pled conduct that could be violative of not only UIPA but also the Cartwright Act].) The Court of Appeal's opinion here conflicts with *Manufacturer's Life* because, even though the plaintiff undisputedly complained of conduct proscribed only by section 758.5, it permitted plaintiff to plead a UCL claim.

VI. CONCLUSION

This Court should grant review and stay briefing and argument pending its decision in *Zhang*. Alternatively, it should grant review,

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[4] Ultimately, this Court permitted the plaintiff to pursue a UCL claim because he also alleged a violation of the Cartwright Act.

reverse the judgment below, and resolve the conflict among the Courts of Appeal that it creates.

Dated: July 22, 2011 Respectfully submitted,

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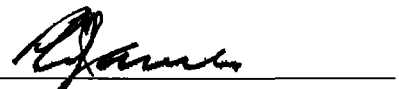

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rules 8.504(d)(1))

The text of this petition consists of 4,884 words as counted by the word-processing program used to generate the petition.

Dated: July 22, 2011

Peter W. James

EX A TO PETITION

CERTIFIED FOR PUBLICATION

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.

EX B TO PETITION

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 551

UNFINISHED BUSINESS

Bill No: SB 551
Author: Speier (D), et al
Amended: 9/5/03
Vote: 21

SENATE INSURANCE COMMITTEE : 5-2, 5/7/03
AYES: Speier, Figueroa, Perata, Scott, Soto
NOES: Johnson, Morrow

SENATE FLOOR : 22-13, 6/4/03
AYES: Alarcon, Alpert, Burton, Cedillo, Chesbro, Ducheny, Dunn, Escutia, Figueroa, Florez, Karnette, Kuehl, Machado, Murray, Ortiz, Perata, Romero, Scott, Sher, Soto, Speier, Vincent
NOES: Aanestad, Ackerman, Ashburn, Battin, Brulte, Denham, Hollingsworth, Johnson, Knight, Margett, McClintock, Morrow, Poochigian
NO VOTE RECORDED: Bowen, McPherson, Oller, Torlakson, Vasconcellos

ASSEMBLY FLOOR : 79-0, 9/8/03 - See last page for vote

SUBJECT : Insurance: automotive repair dealers

SOURCE : Author

DIGEST : This bill codifies existing regulatory law and prohibits an insurer from requiring that an automobile be repaired at a specific automotive repair dealer, as defined. It also prohibits an insurer from suggesting or recommending that an automobile be repaired at a specific

CONTINUED

automotive repair dealer unless the claimant requested the referral or the claimant is informed, in writing, of his or her rights, as specified. This bill requires the insurer, if the suggestion or recommendation that an automobile be repaired at a specific automotive repair dealer is contained in the insurance contract, to disclose that provision, in writing at specified times, and would prohibit the insurer, if the insured chooses the automotive repair dealer, from limiting or discounting the reasonable repair costs, as specified.

The bill grants the Insurance Commissioner specified enforcement powers with respect to these provisions.

Assembly Amendments delete civil penalties from the Senate version and the provision concerning State Department of Insurance to adopt regulations. The amendment adds disclosure requirements to be given to consumers. They also grant the Insurance Commissioner specified enforcement powers with regard to provisions of the bill, and defines claimant.

ANALYSIS : Existing law:

1. Provides for the licensing and regulation of auto body repair shops by the Bureau of Automotive Repair (BAR) in the State Department of Consumer Repairs (DCA).

2. Provides that DCA may invalidate the registration of an automobile repair dealer for any number of reasons including engaging in conduct that constitutes fraud or gross negligence and willfully departing from or disregarding accepted trade standards for good and workmanlike repair.

3. Requires insurers to provide each insured with an Auto Body Repair Consumer Bill of Rights (Bill of Rights) either at the time the insured applies for an automobile insurance policy or after an accident that is reported to the insurer.

Existing regulations (Section 2695.8 (e) of the Fair Claim Settlement Practices Regulations) provides that no insurer shall do (1) require that an automobile be repaired at a

specific repair shop, or (2) direct, suggest or recommend that an automobile be repaired at a specific repair shop, unless such referral is expressly requested by the claimant, or the claimant has been informed in writing of the right to select the repair facility; and the insurer promises that the damaged vehicle will be restored to its pre-loss condition at no additional cost to the claimant if the work is performed at a recommended repair shop.

Background

Last year the author carried legislation (SB 1648) to prohibit an insurer from having an ownership interest in an auto body shop. The author's office asserted that insurer ownership of auto body shops created the potential for widespread "steering" of customers, by an insurer, to an auto body shop of the insurer's choice (i.e. an auto body shop owned by the insurer). SB 1648 failed passage on the Assembly Floor.

As a result of the failure of SB 1648, insurer owned auto body shops are likely to proliferate in California over the next few years. In 2001, the Interinsurance Exchange of the Automobile Club (Auto Club) purchased a 19 percent interest in Caliber Collision Centers which has 34 shops in Southern California. In addition, Sterling Collision Centers, which operates in seven states, but not California, is a wholly owned subsidiary of Allstate which has announced plans to build Sterling facilities in California in the coming years.

A significant amount of the SB 1648 debate dealt with the insurance industry practice of direct repair programs (DRPs). DRPs are a written agreement between insurers and participating auto body repair shops. Under a DRP the auto body shop agrees to certain conditions in return for being placed on a list of shops that the insurer will refer customers to in the event that the policyholder's vehicle needs auto body work. Typical conditions which bind the shop are labor rate, (usually below what the shop normally charges), and a promise to guarantee the work performed.

According to the author's office, Allstate established the first DRP in 1976 as a way to control costs and to ensure

quality of work. Today, DRPs are widespread throughout the industry. The California Autobody Association reports that 88 percent of its members have at least one DRP.

The author's office notes that the shrinking bottom line at DRP shops has led to a high incidence of insurance industry fraud. The author's office notes that the BAR auto body inspection program has detected discrepancies in 43 percent of the cars inspected over the past year. The average cost of fraud was $586 and often involved charges for work that was not done, or parts that were not used.

The author' notes that the insurance industry has defended DRPs as a way to expedite the repair process, to contain costs and to promote quality work. The industry states that in order to obtain a DRP, a shop must satisfy insurer requirements for formal training of shop personnel and use specific equipment to make complex repairs such as straightening a frame. According to the industry, electronic hook-ups between the insurer and the DRP serve to speed the work approval process. The industry maintains that a set labor rate between the insurer and the DRP shop serves to keep costs down and to prevent a shop from padding an invoice with work that was not provided. Finally, the industry maintains that they inspect the work of DRP shops, and therefore, these shops strive to please insurers.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No Local: No

SUPPORT : (Verified 9/8/03)

Accurate Auto Body
Advanced Auto Body Center
Apex Auto Glass
Arcata Body Shop
Burlingame Collision Center
Byron Orris Inc. Auto Body
California Autobody Association
California Auto Glass Safety Council
Consumers for Auto Reliability and Safety
Department of Insurance
Eagleson Body Works

Evelyn Auto Body
Foster's Body and Paint
Hiller Auto Body & Frame
Insurance Auto Collision Center
J&M Body Shop
Jack Orr Auto Body Shop Inc.
Lompoc Honda
M & G Auto Body
Maaco
Mainline Auto Body
Marquez Auto Body
McLean's Auto Body and Paint
Monte's Auto Body
Nagare Body Shop
Neira's Body Works
Opie's Body Shop
Pioneer Auto Body, Inc.
Premier Auto Body
Reid's Auto Body Works
San Luis Autobody
San Luis Customs, Inc.
Skill Craft Body Shop
Specialty Paint and Body Works
Tri-County Auto Body
Vintage Auto Body

ARGUMENTS IN SUPPORT : According to the author, the current regulations, known as the anti-steering regulations, are weak and provide no real deterrence to an insurer intent on steering claimants to shops that are either owned by an insurer or that have a DRP relationship with the insurer. The author contends that the bill's sole purpose is to deter steering. The author states that the bill does not in any way threaten existing DRP relationships, so long as the insurer affords consumers an opportunity to have their vehicle repaired at the automotive repair dealer of his or her choosing.

On May 7, 2002, the author sent the State Department of Insurance (DOI) a letter requesting that DOI amend existing anti-steering sections of the Fair Claims Settlement Practices Regulations. In the letter, the author noted that under existing regulations an insurer is allowed to recommend an auto body shop if the claimant has received a

written notice regarding his or her right to choose a shop. According to the author, the regulations are silent as to when this written notice must be provided to the insured. The author noted in the May letter to DOI that this section of the regulations "would be strengthened if it were clarified that written notice must be given after an accident has occurred, a time when the claimant has the greatest need to know his or her right to choose a shop." The author further states that the intent of the regulations was to inform the policyholder of his or her "right to choose" in a "reasonable manner." According to the author, that time would be at the greatest time of need, after an accident and before arranging for repair of the auto.

The author contends that widespread abuse of the anti-steering regulations occurs today. According to the author, one way that an insurer "steers" claimants is by emphasizing the "benefits" of having the work done at a shop with which the insurer has a direct repair relationship. These benefits include "no waiting for an adjuster," and a "guarantee of all work." According to the author, the policyholder is not told about the lower labor rate, nor the other policies governing the discounts the shop must absorb in order to maintain the direct repair relationship. Furthermore, the policyholder is not told that all body shops are required by law to guarantee their work. According to the author, it is this selective sharing of information by the insurer with the policyholder that constitutes the unfair steering of policyholders to shops favored by the insurer.

According to the California Autobody Association (CAA), consumers are routinely being steered to an auto body shop chosen by the insurer and not by the consumer. CAA asserts that over the years, the spirit and the intent of the Fair Claims Settlement Practices regulations, which were enacted to prevent undue influence by an insurer, have been violated by the insurance industry on a regular basis.

According to CAA, while the insurance industry acknowledges the consumer's freedom of choice, they use the existing regulations against the consumer by implying that the consumer's preferred repair shop is somehow inferior or

inconvenient as compared to the insurer-approved repair shop. Phrases such as "your shop didn't make our preferred list" are intended to erode the consumer's confidence in the shop that he or she has chosen. Other tactics include telling the consumer that "if you take your car to that shop we cannot guarantee the work." In addition, CAA reports that some insurers imply that not going to the insurer's shop will cause delays. A typical tactic is to tell the consumer "if you take your car to that shop we won't be able to get an adjuster out for a least a week, but if you go to our shop they can start the repairs immediately."

According to CAA, all of the above tactics violate the spirit and intent of the regulations. Because these tactics are so wide-spread in the insurance industry, CAA strongly recommends the passage of SB 551 so that insurers who illegally steer customers will be held liable for their unfair business practices.

AYES: Aghazarian, Bates, Benoit, Berg, Bermudez, Bogh, Calderon, Campbell, Canciamilla, Chan, Chavez, Chu, Cogdill, Cohn, Corbett, Correa, Cox, Daucher, Diaz, Dutra, Dutton, Dymally, Frommer, Garcia, Goldberg, Hancock, Harman, Haynes, Jerome Horton, Shirley Horton, Houston, Jackson, Keene, Kehoe, Koretz, La Malfa, La Suer, Laird, Leno, Leslie, Levine, Lieber, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nakano, Nation, Negrete McLeod, Nunez, Oropeza, Pacheco, Parra, Pavley, Plescia, Reyes, Richman, Ridley-Thomas, Runner, Salinas, Samuelian, Simitian, Spitzer, Steinberg, Strickland, Vargas, Wiggins, Wolk, Wyland, Yee, Wesson

DLW:nl 9/9/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

EX C TO PETITION

Not Reported in F.Supp.2d, 2008 WL 4830708 (N.D.Cal.)
(Cite as: 2008 WL 4830708 (N.D.Cal.))

HOnly the Westlaw citation is currently available.

United States District Court,
N.D. California.
AHO ENTERPRISES, INC., dba Superior Auto Body, a California corporation Plaintiff,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation and Does 1-20, Defendants.

No. 3:08-cv-04133-SBA.
Nov. 6, 2008.

West KeySummary**Torts 379** 244

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k244 k. Insurance in General. Most Cited Cases

Torts 379 255

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)3 Actions in General
379k255 k. Pleading. Most Cited Cases

An automobile repair shop failed to allege in its complaint that the automobile insurer had committed an independently wrongful act, as required to state a claim upon which relief may be granted on a cause of action for intentional interference with prospective economic advantage. The repair shop's complaint did not allege any facts that would entitle it to more than 15-days of storage fees pursuant to the California Vehicle Code. Further, a letter attached to the insurer's brief indicated that the insurer paid the repair shop $1,200 for storage, which was 15-days of storage at the repair shop's claimed rate of $80 per day. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; West's Ann.Cal.Bus. & Prof.Code § 17200; California Vehicle Code section 22524.5(a); Section 10652.5 of the California Vehicle Code.

Jana Lynn Scott, Jeffrey G. Knowles, Conor Patrick Moore, Coblentz, Patch, Duffy & Bass, LLP, San Francisco, CA, William Francis Devine, Jr., William Devine Esquire, Menlo Park, CA, for Plaintiff.

David Joel Weinman, James Raymond Robie, Steven Samuel Fleischman, Robie & Matthai, PC, Los Angeles, CA, for Defendants.

ORDER ON DEFENDANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION TO DISMISS PURSUANT TO FRCP RULE 12(B)(6)

SAUNDRA B. ARMSTRONG, District Judge.

*1 The motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure by defendant State Farm Mutual Automobile Insurance Company ("State Farm") challenging the complaint filed by plaintiff AHO Enterprises, Inc., dba Superior Auto Body ("Superior") came on regularly for hearing on October 28, 2008 before this Court. Steven S. Fleischman, Robie & Matthai, a Professional Corporation, appeared on behalf of State Farm; Conor P. Moore, Coblentz, Patch, Duffy & Bass LLP, appeared on behalf of Superior.

Having considered the pleadings and argument of counsel the Court hereby rules as follows:

BACKGROUND

This is a diversity action under California law filed by Superior against State Farm. Superior is an automobile repair shop located in San Carlos, California. State Farm is an automobile insurance company. The gravamen of Superior's complaint is that State Farm did not pay for certain repair and storage charges regarding a Ford F 150 truck owned by Patricia Hopper ("Hopper"), a State Farm insured.

By way of background, under California law an insured has the right to choose where his/her automobile may be repaired. (Cal. Ins.Code § 758.5.) However, an insurer, such as State Farm, has the right to suggest or recommend that an automobile be repaired at a specific automobile repair shop, so long as the referral is requested by the insured or the insured has been informed in writing of its right to se-

lect the automobile repair dealer. (*Id.*, § 758.5(b)(1).) If the insurer's recommendation is accepted by the insured, then the insurer shall cause the damaged vehicle to be restored to its condition prior to the loss at no additional cost to the insured other than as stated in the insurance policy (i.e., a deductible) or as provided by law. (*Id.*, § 758.5(b)(2).) In this case, State Farm did not suggest or recommend to Hopper that her truck be repaired at Superior. Therefore, State Farm's only contractual obligation is to Hopper as spelled out in State Farm's insurance policy, *i.e.*, to prepare an estimate sufficient to restore the damage to the vehicle to "pre-loss condition," including pricing based upon a State Farm labor rate survey. (*Levy v. State Farm Mut. Auto. Ins. Co.* (2007) 150 Cal.App.4th 1, 7-9, 50 Cal.Rptr.3d 54.)

With that background in mind, Superior alleges: On March 14, 2008, Hopper's truck was involved in an automobile accident and taken to Superior for repairs. (Complaint, ¶ 7.) On March 20, 2008, State Farm prepared a preliminary estimate for $8,992.94 to repair the truck. Because Hopper had a $250 deductible, State Farm wrote a check to Hopper for $8,742.94 and left the check with Superior. (Complaint, ¶ 8.) Superior commenced repairs on the truck and alleges that it found additional damage thereto. On April 3, 2008, Superior prepared a Preliminary Supplement indicating that the total to repair Hopper's truck would now be $12,723.16. (Complaint, ¶ 10.) The next day, State Farm's representative inspected the truck and orally informed Superior that the truck "could be a total loss." (Complaint, ¶ 11.) On April 8, 2008, State Farm informed Superior in writing that the truck was a total loss and requested that Superior cease making any repairs. (Complaint, ¶ 12.)

*2 On April 9, 2008, Superior faxed to State Farm its calculation of money owing, as follows: (1) $3,609.25 for parts and labor; (2) $268 .75 for towing; and (3) $2,460 for 27 days of storage. (Complaint, ¶ 13.) Superior's claim for storage included purported storage during the time period Superior was making repairs to Hopper's truck. (Complaint, ¶¶ 8-9, 13.) Superior subsequently reduced the amount it was claiming for storage to $2,220. (Complaint, ¶ 14.)

On April 11, 2008, State Farm sent a letter to Superior in which State Farm disputed the amount owing for storage. In the letter, which as discussed below can be considered on a Rule 12(b)(6) motion because it is referred to in Superior's complaint, State Farm contended that the ordinary storage rate in the San Carlos and surrounding area is $60/day. Nonetheless, State Farm paid Superior $1,200 representing 15 days of storage at $80/day, the daily rate claimed by Superior. State Farm also paid Superior $3,609.25 for the repairs and $268.75 for towing, for a total of $5,078.

Superior alleges in its complaint that its claim for storage fees continues to accrue at $80/day, which through July 18, 2008 is $5,280. (Complaint, ¶ 23.)

Superior filed this action in San Mateo County Superior Court on July 21, 2008. Superior's complaint alleges causes of action for: (1) breach of implied contract; (2) intentional interference with prospective economic advantage; (3) negligent interference with economic advantage; (4) unfair competition under California Business & Professions Code section 17200; and (5) declaratory relief. State Farm timely removed this action to this Court and filed a Rule 12(b) (6) motion directed at the second, third and fourth causes of action.

LEGAL STANDARD

A Rule 12(b)(6) motion tests the legal sufficiency of a claim and the court must determine whether the facts, if true, would state a claim for relief. (*Conley v. Gibson* (1957) 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 .) In ruling on a Rule 12(b)(6) motion, a court may consider exhibits referred to in the complaint, even if not attached to the complaint. (*Branch v. Tunnell* (9th Cir.2004) 14 F.3d 449, 454, *overruled on other grounds, Galbraith v. County of Santa Clara* (9th Cir.2002) 307 F.3d 1119, 1127; *Chambers v. Time Warner, Inc.* (2d Cir.2002) 282 F.3d 147, 153, fn. 3; *Bryant v. Avado Brands, Inc.* (11th Cir.1999) 187 F.3d 1271, 1281, fn. 16.)

ANALYSIS

1. Second Cause of Action

The second cause of action for intentional interference with prospective economic advantage is dismissed for failure to state a claim upon which relief may be granted. The complaint does not allege, as it must, that State Farm has committed an "independently wrongful" act. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, 45

Cal.Rptr.2d 436, 902 P.2d 740.)

At oral argument, Superior claimed that the "independently wrongful" acts that Superior could allege are purported violations of California Business & Professions Code section 17200 ("Section 17200") and California Vehicle Code section 22524.5(a) ("Section 22524.5"). For the reasons set forth below, Superior's claim under Section 17200 fails as a matter of law.

*3 With respect to Section 22524.5, that provision relates to storage fees. However, Section 10652.5 of the California Vehicle Code ("Section 10652.5") limits a claim for storage fees to 15 days unless certain requirements are satisfied. Superior's complaint does not allege any facts that would entitle it to more than 15 days of storage fees under Section 10652.5. Paragraph 15 of Superior's complaint refers to an April 11, 2008 letter from State Farm, which is thereby incorporated into the complaint as a matter of law and can be considered on a Rule 12(b)(6) motion. (*Branch v. Tunnell* (9th Cir.2004) 14 F.3d 449, 454; *Chambers v. Time Warner, Inc.* (2d Cir.2002) 282 F.3d 147, 153, fn. 3.) That letter, attached to State Farm's reply brief, shows that State Farm paid Superior $1,200 for storage, which is 15 days of storage at Superior's claimed rate of $80/day. In addition, under California law, Superior cannot claim storage fees during the period of time in which it was making repairs. (Complaint, ¶¶ 8-10, 13; *Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 845, 57 Cal.Rptr. 100.) Moreover, Superior's complaint alleges that State Farm paid Hopper $8,742.94 and left the check with Superior. (Complaint, ¶ 8.)

Therefore, the Court finds that State Farm has paid Superior all that it could have been required to pay for storage fees under Section 10652.5. Accordingly, Superior has not alleged a violation of Section 10652.5 which could form the basis for an "independently wrongful" act to support a claim for intentional interference with prospective economic advantage.

Superior also contended at oral argument that State Farm's actions were "independently wrongful" because of State Farm's alleged breach of its contractual duty to its insured, Hopper. This contention fails. Superior lacks standing to assert claims on behalf of third-parties. (*Tileston v. Ullman* (1943) 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603.) "Representational" standing is inapplicable in this case. (*Powers v. Ohio* (1991) 499 U.S. 400, 410-411, 111 S.Ct. 1364, 113 L.Ed.2d 411.) Even assuming *arguendo* that Superior had standing, State Farm cannot be sued for purportedly interfering with its own contract of insurance. (*Applied Equipment Corp. v. Litton Saudi Arabia* (1994) 7 Cal.4th 503, 514, 28 Cal.Rptr.2d 475, 869 P.2d 454.) The same applies to claims for interference with prospective economic advantage. (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 181-183, 8 Cal.Rptr.3d 840; *Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266, 45 Cal.Rptr.2d 90.) Moreover, California courts have rejected the argument advanced by Superior, to wit, that an insured can sue an insurer for allegedly not paying for repairs according to "industry scale." (*Levy v. State Farm Mut. Auto. Ins. Co.* (2007) 150 Cal.App.4th 1, 8, 50 Cal.Rptr.3d 54; *see also Joaquin v. Geico Gen'l Ins. Co.* (N.D.Cal.2008) 2008 WL 53150 *3 [White, J.].)

Therefore, State Farm's motion to dismiss the second cause of action is GRANTED. Superior is granted leave to amend, only if it can in good faith plead additional facts showing that it is entitled to more than 15 days of storage fees under Section 10652.5. Leave to amend is otherwise denied in all respects; no additional claims may be asserted in any amended complaint.

2. Third Cause of Action

*4 The third cause of action for negligent interference with prospective economic advantage is dismissed for failure to state a claim upon which relief may be granted because the complaint does not allege that State Farm owes a duty of care to the plaintiff. (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 348, 60 Cal.Rptr.2d 539.) Moreover, the Court holds, as a matter of law, that State Farm does not owe any duty to Superior. (*Ibid.*) Under California law, State Farm does not owe a duty to its insured to pay Superior based upon claims of "industry scale" for automobile repairs. (*Levy v. State Farm Mut. Auto. Ins. Co.* (2007) 150 Cal.App.4th 1, 8, 50 Cal.Rptr.3d 54; *Joaquin v. Geico Gen'l Ins. Co.* (N.D.Cal.2008) 2008 WL 53150 *3 [White, J.].) If State Farm does not owe that duty to its own insureds, it certainly does not owe that duty to Superior, who is not a party to the contract of insurance and who is simply a third-party vendor.

Therefore, State Farm's motion is GRANTED as to the third cause of action without leave to amend.

3. Fourth Cause of Action

The fourth cause of action for alleged violations of Section 17200 is dismissed for failure to state a claim upon which relief may be granted and for lack of standing.

Under California law, standing under Section 17200 is limited to persons or entities who can seek restitution from the defendant. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 817, 66 Cal.Rptr.3d 543; *Johnnie Walker dba PJ's Auto Body v. USAA Casualty Ins. Co.* (E.D.Cal.2007) 474 F.Supp.2d 1168, 1173-1174.) Superior lacks standing to pursue this cause of action because it has not alleged that it ever had an "ownership interest" in any money or property paid to State Farm which would make it eligible for restitution. (Cal. Bus. & Prof.Code §§ 17203, 17204; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144-1145, 1148, 131 Cal.Rptr.2d 29, 63 P.3d 937) The complaint does not allege that Superior ever paid any money to State Farm, and counsel for Superior conceded at oral argument that Superior never paid State Farm any money. Nonetheless, Superior contends that it is entitled to restitution based upon the value of parts, repair services and storage included in its repair to the vehicle at issue. This contention, however, is belied by the allegations of Superior's complaint. Paragraph 13 of the complaint alleges that Superior was entitled to payment of $3,609.25 for "parts and labor." State Farm's April 11, 1008 letter shows that State Farm paid $3,609.25 for that claim. In addition, as set forth above, Superior has not alleged any facts showing that it is entitled to more than the $1,200 State Farm paid for storage under Section 10652.5. Therefore, Superior cannot allege any entitlement to restitution, which would provide it with standing to pursue a Section 17200 claim.

Even assuming *arguendo* that Superior had standing to pursue a Section 17200 claim, the Section 17200 claim still fails. Superior claims that State Farm's conduct was "unlawful" and "unfair" under Section 17200; Superior does not contend that State Farm's conduct was "fraudulent." For conduct to be "unlawful" under Section 17200, it must violate a statute. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel-Tech*).) In *Cel-Tech,* the California Supreme Court held that in cases involving competitors, in order for a business practice to be "unfair" under Section 17200, the conduct complained of must be "tethered" to an independent statutory violation or be violative of antitrust laws. (*Cel-Tech, supra,* 20 Cal.4th at pp. 186-187, 83 Cal.Rptr.2d 548, 973 P.2d 527.) Even in cases which are not "competition" cases, the "tethering" requirement still applies. (*See In re Firearms Cases* (2005) 126 Cal.App.4th 959, 973, 24 Cal.Rptr.3d 659; *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1072, 13 Cal.Rptr.3d 586; *Gregory v. Albertson's Inc.* (2002) 104 Cal.App.4th 845, 854, 128 Cal.Rptr.2d 389; *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1166, 93 Cal.Rptr.2d 439.) For the reasons set forth above, Superior has not alleged a violation of the California Vehicle Code regarding storage fees. Accordingly, Superior has not alleged conduct that is "unlawful" or "unfair" to support a Section 17200 claim.

***5** At the hearing, Superior requested leave to amend to allege a Section 17200 claim based upon alleged violations of the "anti-steering" provisions of California Insurance Code section 758.5 ("Section 758.5"). That request is DENIED.

Section 758.5 does not create a private right of action under *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58 (*Moradi-Shalal*). 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.* (*Textron Financial Corp. v. National Union* (2004) 118 Cal.App.4th 1061, 1070, 13 Cal.Rptr.3d 586; *Manufacturer's Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 267, 282-284, 41 Cal.Rptr.2d 220, 895 P.2d 56; *AICCO, Inc. v. In-*

surance Co. of N. Am. (2001) 90 Cal.App.4th 579, 596, 109 Cal.Rptr.2d 359; *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1493-1494, 265 Cal.Rptr. 585; *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1598, 270 Cal.Rptr. 222; *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093, 1097, 257 Cal.Rptr. 655.) In this regard, the Court has granted State Farm's unopposed request for judicial notice of an order of the Orange County Superior Court in a case entitled *Spectrum Collision Center v. State Farm Mutual Automobile Insurance Company*, Orange County Superior Court case No. 30-2008-00105694. In that case, the Orange County Superior Court specifically held that Section 758.5 does not create a private right of action under *Moradi-Shalal* and, therefore, a purported violation of Section 758.5 cannot be used to support a Section 17200 claim under the authorities cited above. Superior has provided this Court with no contrary authority.

Leave to amend may be denied when the proposed amendment is futile or would be subject to dismissal. (*Saul v. United States* (9th Cir.1991) 928 F.2d 829, 843.) Accordingly, the fourth cause of action is dismissed without leave to amend.

CONCLUSION

Therefore, State Farm's motion to dismiss is GRANTED, without leave to amend as to the third and fourth causes of action, and GRANTED with limited leave to amend, as to the second cause of action as set forth above. Superior is granted 14 days leave to amend, if it can do so consistent with this Order. Thereafter, State Farm has 14 days to respond to the amended complaint or to answer.

IT IS SO ORDERED.

N.D.Cal.,2008.
AHO Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.
Not Reported in F.Supp.2d, 2008 WL 4830708 (N.D.Cal.)

END OF DOCUMENT

PROOF OF SERVICE VIA U.S. MAIL

I, Barbara J. Kennedy, declare:

I am employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12100 Wilshire Boulevard, 15th Floor, Los Angeles, California 90025-7120. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On July 22, 2011, I served a copy of the within document :

PETITION FOR REVIEW AND/OR

FOR A GRANT-AND-HOLD ORDER

by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on July 22, 2011, at Los Angeles, California.

Barbara J. Kennedy

Barbara J. Kennedy