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Supreme Court of California
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

Re: Yanting Zhang v. Superior Court, 178 Cal. App. 4th 1081; Request for Supreme Court Review

Honorable Justices of the Supreme Court:

Pursuant to California Rules of Court Rule 8.500(g) we write on behalf of *amicus curiae* the Association of California Insurance Companies and the Personal Insurance Federation of California, two trade associations of insurance companies operating in California. We respectfully support Appellant's Petition for Review and urge the Court to review *Yanting Zhang v. Superior Court*, 178 Cal. App. 4th 1081, 100 Cal. Rptr. 3d 803 (Cal. App. 4th Dist. 2009). This decision should be overturned. It creates uncertainty over the law governing insurance claims and would disrupt the relatively stable legal and regulatory regime applicable to insurance claims which has developed in the two decades following your decision in *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287; 758 P.2d 58; 250 Cal. Rptr. 116 (1988).

The Association of California Insurance Companies and the Personal Insurance Federation of California represent property and casualty insurers that collectively write a majority of the property and casualty insurance sold in California. The member companies of these trade associations are directly affected by the appellate court's decision. Unless the Supreme Court reviews and overturns the lower court's decision in *Zhang,* these insurers will be forced to operate under conflicting appellate court decisions regarding liability. Also, both the insurers and their customers will be subjected to increased costs for providing insurance coverage. As associations formed by to represent the legal and public policy interests of these insurers, *amicus curiae* have a compelling interest in this matter.

Summary of the Case: The issue presented in this case is fairly simple: under what circumstances may a policyholder sue his or her insurer for violation of California's Unfair Competition Law (UCL) (Business and Professions Code section 17200 *et seq*)?

The resolution of this issue is complicated, however, involving analysis of the UCL, the California Unfair Insurance Practices Act (UIPA) (Insurance Code sections 790 – 790.15), and the large body of common law interpreting these statutes. *Zhang* specifically addresses the issue of whether a policyholder may sue his or her insurer for acts alleged to violate both the UCL and the UIPA.

The UCL governs all entities doing business in California and establishes the general standard that businesses shall operate lawfully and fairly. It prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code[1]" Cal Bus & Prof Code § 17200.

Insurers are additionally subject to regulation under the UIPA, a statutory regulatory scheme specific to the unique characteristics of the business of insurance. The mandates and prohibitions found in the UIPA are relatively specific, especially when compared to the sweeping prohibition against illegality and unfairness found in the UCL. In short, the UCL is broad in application but relatively nonspecific; the UIPA is much narrower in application, applying only to the business of insurance, but it is relatively specific in application.

Given the overlapping subject matters of the UCL and the UIPA, it is inevitable that some acts can potentially be characterized as violations of both statutes. This has naturally lead to legal questions regarding when an insurer may be sued under UCL, when under the UIPA, and whether it may be sued under both statutes for the same alleged malfeasance.

The general rule which has evolved over the past two decades of litigation is that there is no private right of action against an insurer for violation of the UIPA[2], but there is a private right of action against an insurer for a violation of the UCL if the alleged UCL violation is not also a UIPA violation[3]. In other words, civil action is unavailable to enforce the UIPA; UIPA enforcement is limited to administrative actions by the Insurance Commissioner. Civil enforcement of the UCL is permitted, but only for acts which are not regulated also under the UIPA.

In *Zhang v. Superior Court* the Court of Appeals changed this regulatory and

[1] These are the Business and Professions Code statutes governing advertising.
[2] Claims by third parties to enforce the UIPA in civil actions were prohibited in *Moradi-Shalal v. Fireman's Fund Ins. Companies*; 46 Cal.3d 287; 250 Cal. Rptr. 116; 758 P.2d 58 (1988). The rule was extended to first party actions in *Zephyr Park v. Superior Court* 213 Cal. App. 3d 833; 262 Cal. Rptr. 106 (1989).
[3] Any facts which support a contract law cause of action or a common law tort cause of action may still be brought on that basis. The sole issue raised by *Zhang* is the availability of a statutory cause of action in addition to the contract law and common law tort cause.

legal scheme. It ruled, instead, that civil enforcement of the UCL is available for acts which are potentially subject to regulation under both the UCL and the UIPA. In effect, the law as interpreted under *Zhang* is that the prohibition of civil action to enforce the UIPA applies only if a UIPA violation cannot also be characterized as a UCL violation. Since the UCL provides such a broad and general prohibition, under the *Zhang* interpretation there is virtually no case in which an alleged UIPA could not be litigated civilly by merely recasting it as a UCL violation.

The Court should review *Zhang* because it directly conflicts with other appellate court decisions. The Court of Appeal in *Zhang* self-consciously created a conflict between appellate court precedents. For this reason alone, the Court should accept *Zhang* for review.

The *Zhang* decision directly conflicts with the decision in *Textron Financial Corp. v. National Union Fire Ins. Co.*, 118 Cal. App. 4th 1061; 13 Cal. Rptr. 3d 586 (2004). In both *Zhang* and *Textron Financial* the plaintiffs sought to characterize a dispute about a claim as a possible violation of the UCL. In both cases the court recognized that the facts alleged to comprise the UCL claim were subject to regulation under the UIPA. The *Textron* court said that "[t]he specific allegations of wrongful conduct contained in plaintiff's fourth cause of action, using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of activities covered by the UIPA. … merely alleging these purported acts constitute unfair business practices under the unfair competition law is insufficient to overcome Moradi-Shalal." *Textron Financial Corp. v. National Union Fire Ins. Co., supra*, 118 Cal. App. 4th 1061, 1070-1071.

In contrast, the court in *Zhang* reached the opposite conclusion based upon nearly identical facts. It said that "if a plaintiff expressly alleges conduct expressly prohibited by the UCL, such as fraudulent conduct likely to deceive the public (citation omitted) or false advertising, there is simply no reason to apply Moradi-Shalal to prohibit the cause of action." *Zhang v. Superior Court, supra,* 178 Cal. App. 4th 1081, 1089-1090. Referring specifically to the contrary holding in *Textron Financial*¸ the court said that "to the extent that *Textron Financial* is inconsistent, we disagree." *Zhang v. Superior Court*, *supra*, 178 Cal. App. 4th 1081, 1089.

As a result of *Zhang*, the law on this question could not possibly be more unsettled. Sister courts in different divisions of the same appellate district have issued contradictory decisions on the same legal question. Only the Supreme Court can restore clarity to this legal issue. For this reason alone, *Zhang* should be reviewed.

The Court should review *Zhang* because the decision establishes harmful and unwise precedent. Beyond the need to restore clarity to the law the Court should review *Zhang* because that decision establishes unwise public policy. Specifically, it would

undercut the decision in *Moradi-Shalal v. Fireman's Fund Ins. Companies, supra*; 46 Cal.3d 287, thus encouraging unproductive and duplicative litigation while increasing the costs imposed on insurance consumers.

Moradi-Shalal overturned *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880; 592 P.2d 329; 153 Cal. Rptr. 842 (1979). *Royal Globe* was decided in 1979 and established the right of an individual to bring a civil action to enforce the UIPA. The nine years during which the *Royal Globe* rule prevailed revealed a host of problems caused by the rule. The problems caused by *Royal Globe* were discussed at length in *Moradi-Shalal*[4].

Royal Globe created a civil cause of action allowing a 3rd party claimant under a liability policy to bring an action against a liability insurer, despite the fact that there was no privity of contract between the claimant and the insurer. *Zhang* does not go that far. It creates a new cause of action for a policyholder to whom the insurer owes contractual duties. Still, the nature of the harm caused by *Royal Globe,* harm which caused it to be overturned, is the same under *Zhang* as it was under *Royal Globe*. The *Zhang* decision, if allowed to prevail, will subject insurers to multiple litigation based upon the same factual predicate. This would increase insurance costs and further burden the courts with unnecessary and duplicative litigation.

The rule established in *Zhang* would allow a UCL claim to be established in virtually every first-party claim under an insurance policy. The specific violation alleged in *Zhang* is that the insurer failed to pay the amount due under the plaintiff's policy. In addition to pleading the full array of contract and tort causes based upon this alleged failure, the plaintiff also asserted that the insurer's failure to pay demonstrated

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[4] The critique of *Royal Globe* included the following discussion:

> Confirming Justice Richardson's prediction in his Royal Globe dissent, several commentators have observed that the rule in that case promotes multiple litigation, because its holding contemplates, indeed encourages, two lawsuits by the injured claimant: an initial suit against the insured, followed by a second suit against the insurer for bad faith refusal to settle (citation omitted). As a corollary, Royal Globe may tend to encourage unwarranted settlement demands by claimants, and to coerce inflated settlements by insurers seeking to avoid the cost of a second lawsuit and exposure to a bad faith action (citation omitted).
>
> Thus, one author observed, "One result of this decision is that every time a demand is now made to settle a lawsuit, an additional demand is likely to be forthcoming to coerce higher settlements. The demand now carries the threat that, unless settlement is immediate, a separate suit will be filed for violation of the Unfair Practices Act. The public ultimately will be affected by the additional drain on judicial resources. Moreover, the public will indeed suffer from escalating costs of insurance coverage, a certain result of inflated settlements and costly litigation" (citation omitted).
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> *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 301 (Cal. 1988)

that it did not intend to pay as provided under the policy and, therefore, that its public statements that it would pay valid claims promptly was a misrepresentation and a violation of the UCL. In other words, the mere existence of the claims dispute is treated by the plaintiff and the appellate court as sufficient evidence of misrepresentation and, therefore, of a UCL violation.

Every insurance policy, by its own terms and as required by law, is a representation that the insurer will pay claims promptly. The plaintiff in *Zhang* asserted that the insurer did not satisfy this contractual duty. Such an assertion is an inevitable component of a civil action based upon failure to pay an insurance claim. The *Zhang* decision holds that such a claim is adequate to support a claim that the insurer "misrepresented" the policy and, therefore, that it may have violated the UCL and should be required to litigate the question. By this reasoning, there can never be an insurance policy claim dispute which is not adequate to support a UCL claim. If the mere existence of a claim is enough to support an accusation of misrepresentation, the *Zhang* rule will result in a UCL claim being available in virtually every first-party insurance claim.

Moradi-Shalal and subsequent cases implementing and interpreting *Moradi-Shalal* have resulted in a reasonably sound and stable regulatory and legal regime. To begin with, it is important to remember that insurance policyholders are entitled to the full protection of contract law and tort common law with respect to claims under their policies. *Zhang* cannot in any way be characterized as protecting these basic rights. These rights will continue to prevail if *Zhang* is overturned.

With respect to statutory remedies, *Moradi-Shalal v. Fireman's Fund, supra,* 46 Cal. 3d 287 established that there is no private right of action for third parties to enforce the UIPA. *Zephyr Park v. Superior Court, supra,* 213 Cal. App. 3d 833 extended this rule to first party actions. Insurers *are* subject to civil UCL actions for alleged unfair competition which is not regulated by the UIPA (*Manufacturers Life Insurance v. Superior Court,* 10 Cal. 4th 257; 895 P.2d 56; 41 Cal. Rptr. 2d 220). Insurers are not subject to civil UCL actions for alleged unfair competition which is regulated by the UIPA (*Textron Financial Corp. v. National Union Fire Ins. Co., supra*, 118 Cal. App. 4th 1061). This is a reasonable and effective way to assign potential liability, given the overlapping terms of the UCL and the UIPA.

The UIPA, which is enforced by the Insurance Commissioner, is not and should not be subject to civil enforcement. Those statutes which are not subject to the Commissioner's jurisdiction under the UIPA, may be enforced through civil litigation under the UCL. This is a clear rule which is consistent with *Moradi-Shalal.*

Zhang creates a new rule under which virtually every insurance claim would have an associated UCL claim. This would be costly to insurance consumers, it would lead to unnecessary litigation, and it would create bogus statutory claims in matters that are

properly either contract or common law tort actions. The *Zhang* rule is thus unsound on both legal and public policy grounds.

For these reasons we respectfully request that the Court grant appellant's application for review of *Zhang v. Superior Court.*

Respectfully submitted,

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