Case No. **S178542**

In the Supreme Court
of the
State of California

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CASE NO. S178542

YANTING ZHANG,
Petitioner,

vs.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,
Respondent,

CALIFORNIA CAPITAL INSURANCE COMPANY,
Real Party in Interest.

———

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two.
Case No. E047207

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PETITION FOR REVIEW

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ISSUE PRESENTED

In 1988, this Court held that no private right of action exists under the Unfair Insurance Practices Act (Cal. Ins. Code §§ 790 et seq.) (UIPA). *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287. In 2004, the Fourth District Court of Appeal, Division Three held that a first- or third-party claimant could not plead around *Moradi-Shalal* by asserting an unfair-competition claim under Business and Professions Code sections 17200 et seq. (UCL) for the types of activities governed and prohibited by the UIPA in an insurance claim-handling lawsuit over contractual policy benefits. *Textron Financial Corp. v. Nat'l Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1070.

In this case, the Fourth District Court of Appeal, Division Two expressly disagrees with *Textron*, and holds otherwise. The Court allows a cause of action for violation of section 17200 for activities proscribed by and intrinsically intertwined with the UIPA. In carving out this exception to *Moradi-Shalal* and its progeny, the Court of Appeal ignores clear distinctions established in prior cases and approved by this Court, and expressly creates a conflict among the Courts of Appeal.

Does California's UCL permit insureds and third-party claimants in claim-handling or amount-of-loss lawsuits to plead around *Moradi-Shalal*, and bring private causes of action for the very types of activities proscribed by and intrinsically intertwined with the UIPA?

II

INTRODUCTION

A violation of Business and Professions Code section 17200 cannot be predicated upon conduct that is privileged or does not allow for a private right of action. *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283–284. A private cause of action may be stated under Business and Professions Code section 17200 for alleged violations of the Cartwright Act (Business and Professions Code §§ 16700 et seq.), but not "to confer private standing to enforce a provision of the UIPA." *Id.* at 284. Plaintiffs cannot plead around the limitations established in *Moradi-Shalal* "by relying on conduct which violates only the UIPA as the basis for a UC[L] cause of action." *Id.* at 283.

Moradi-Shalal's limitations "should not evaporate because [Zhang] discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct." *Rubin v. Green* (1993) 4 Cal.4th 1187, 1203. In fact, the UIPA proscribes all of Zhang's alleged grievances, including alleged false or misleading advertising. Zhang, therefore, should not be permitted to label the same grievances as a UCL claim.

The UIPA—which has been deemed a codification of the tort of breach of the implied covenant of good faith and fair dealing—expressly prohibits an insurer from committing a myriad of unfair practices. The UIPA also expressly prohibits insurers' untrue, deceptive, fraudulent, or misleading advertising, including as to promised policy benefits. The UIPA's purpose is to regulate insurance-claims-settlement practices and prevent false advertising in the business of insurance.

Moradi-Shalal and its progeny hold that no private rights of action exist for claims arising under the UIPA. Since *Moradi-Shalal*, the courts of appeal have consistently held in numerous decisions that no party may

recast a private right of action for UIPA violations as a UCL claim. *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491; *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592; *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093; *Lee v. Travelers Companies* (1988) 205 Cal.App.3d 691, 694-695; *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1289; *American International Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 768.

A claim-handling dispute is in essence "an action by an insured or third party based on the insurer's alleged failure to comply with a policy or to provide benefits." *Textron*, 118 Cal.App.4th at 1072. Claim-handling and amount-of-loss disputes involve the types of activities that the UIPA governs and proscribes. These activities are so intrinsically intertwined with the UIPA that they cannot be parsed and separated.

Thus, in claim-handling cases, conduct that is "unfair," "fraudulent," or an example of "false advertising" cannot be parsed or separated from the same types of activities governed and proscribed by the UIPA, for which no private right of action exists. The courts retain ample jurisdiction to impose civil damages and other remedies against insurers in civil actions involving claim-handling disputes, and plaintiffs cannot circumvent *Moradi-Shalal* by simply recasting their allegations as UCL violations for conduct proscribed under the UIPA. Otherwise, every claim-handling or amount-of-loss dispute can be repackaged as a potential UCL "false advertising" claim.

Zhang sued California Capital in this first-party claim-handling dispute, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of Business and Professions Code § 17200. Zhang alleges that California Capital engaged in improper and fraudulent claims-settlement practices, and that it falsely advertised that it would properly handle and adjust her claim.

Specifically, Zhang alleges that California Capital falsely advertised that it would "timely pay proper coverage" and that, based on the claims-handling conduct alleged in her complaint, "California Capital Insurance Company in fact has no intention of properly paying the true value of its insureds' covered claims [and] [¶] . . . honoring such advertised promises." App. 32, ¶¶ 92–93.

Zhang's allegations are almost verbatim recitations of UIPA's proscriptions. Zhang recasts her allegation that California Capital failed to pay what Zhang believes was the "true value" of her claim into a UCL false-advertising claim by simply alleging that California Capital "falsely advertised" that it would pay covered claims. If permitted, every dispute over the amount of policy benefits owed may be turned into a UCL claim, as every insurer implicitly promises that it will pay covered claims.

Zhang petitioned for writ of mandate. The Court of Appeal, Fourth Appellate District, Division Two issued a peremptory writ of mandate directing the Superior Court of San Bernardino County to vacate its order and to enter a new order overruling the demurrer. The Court expressly disagreed and created a conflict with *Textron*:

> [T]he trial court also relied on *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061 (*Textron Financial*). We are compelled to disagree in part with the decision in *Textron Financial* and to hold that *Moradi-Shalal* does not bar the claim under the UCL." Slip Op. at 3.

To justify its conflict with *Textron*, the Court read selectively from the UIPA, citing only 790.03(h)(5) and (9) as examples of insurer conduct properly barred from being repackaged as UCL claims by *Moradi-Shalal* and related cases. The Court then distinguished *Textron* because Zhang alleges "fraudulent misrepresentation" and "misleading advertising" in her UCL claim. But the Court overlooked that the UIPA expressly governs and

proscribes such conduct at Insurance Code sections 790.03(a), (b), and (h)(7).

The Court of Appeal's decision expressly conflicts with *Textron* and creates a conflict among the Courts of Appeal. It also runs contrary to the limitations and exceptions to UCL actions applied by this Court. This Court should, therefore, "secure uniformity of decision [and] settle an important question of law." Cal.R.Ct. 8.500(b)(1).

This Court should resolve the conflict among the Courts of Appeal and hold that a plaintiff in a claim-handling dispute, alleging the types of activities covered by and intrinsically intertwined with the UIPA, may not plead around *Moradi-Shalal's* bar against repackaging UIPA violations as UCL claims.

III

WHY REVIEW SHOULD BE GRANTED

In *Textron*, Plaintiff brought a UCL claim in a claim-handling dispute based upon specific allegations of wrongful conduct that are the types of activities covered by the UIPA. Plaintiff alleged the insurer:

- "'Engag[ed] in unfair competition' in the 'handling [of plaintiff's] claim, and the claims of other persons.'"
- "Used misleading documents to falsely suggest that it would provide insurance…where it had no intention to do so."
- "Falsely suggested that it would…provid[e] timely notice of [policy] cancellations."
- "Misrepresented the terms and meaning of its policies…to provide pretext for its refusal to provide timely notice."
- "Engaged in a pattern and practices of wrongful and false cancellations of insurance policies."

Textron, 118 Cal.App.4th at 1069–1070.

The *Textron* court held that "[t]he specific allegations of wrongful conduct contained in plaintiff's fourth cause of action [for violations of Business and Professions Code section 17200], 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. (Ins. Code § 790.03 subds. (a) and (h).)" *Id*. at 1070. Thus, the *Textron* court predicated its holding—that the trial court properly sustained without leave to amend the demurrer to plaintiff's cause of action for violations of Business and Professions Code section 17200—on three distinct conclusions:

- "First, the holding in *Safeco Ins. Co. v. Superior Court*, *supra*, 216 Cal.App.3d 1491, supports the result."
- "Second, this case is distinguishable from *Quelimane* and *Manufacturers Life* in two respects. Neither decision involved an action by an insured nor third party based on the insurer's alleged failure to comply with a policy or to provide benefits. . . . Also, in both cases, the Plaintiff alleged a Cartwright Act violation as the basis for its unfair competition cause of action."
- "Finally, given the Supreme Court's disapproval of *State Farm's* 'amorphous' definition of 'unfair' practices and its focus on legislatively declared public policy, reliance on general common law principals to support a cause of action for unfair competition is unavailing."

Id. at 1072.

In this case, Zhang employs a strategy identical to *Textron's* plaintiff. She asserts a UCL cause of action in a claim-handling dispute based upon specific allegations of wrongful conduct that are the very types of activities covered by the UIPA. Zhang's claim for violation of Business and Professions Code section 17200 alleges:

- "The plaintiff/insured Yanting Zhang repeats and realleges paragraphs 1 through 88, inclusive of the Complaint and incorporates the same herein by reference as though set forth in full [including causes of action against California Capital for breach of contract and breach of the implied covenant of good faith and fair dealing]."
- "Defendant California Capital Insurance Company engaged in unfair, deceptive, untrue, and/or misleading advertising when it advertised its Businessowners policy products, such as the California Capital policy herein."

- "California Capital Insurance Company promises its insureds that it will timely pay proper coverage in the event the insured suffers a covered loss. By this promise, California Capital Insurance Company agrees that if an insured suffers compensable loss, it will pay the true value of that covered claim. However, as its conduct herein demonstrates, California Capital Insurance Company in fact has no intention of properly paying the true value of its insureds' covered claims."

App. 31–32.

Instead of labeling California Capital's conduct as "unfair competition"—like the *Textron* plaintiff—Zhang's UCL claim labels its conduct as "fraud" and "false advertising." But despite differing labels, both the *Textron* plaintiff and Zhang alleged that their insurers fraudulently misrepresented insurance-policy benefits in handling their property claims. *Textron*, 118 Cal.App.4th at 1070. And just like the *Textron* plaintiff, Zhang alleges that California Capital's conduct is outside and independent of the UIPA, despite the fact that Zhang alleges conduct practically verbatim to the UIPA's proscriptions. App. 32, ¶ 92.

California Capital's alleged activities, which Zhang labels as "fraud" and "false advertising," are, in fact, expressly proscribed by the UIPA, and so intrinsically intertwined with the UIPA that the activities cannot be separated. Under *Moradi-Shalal*, therefore, California Capital's alleged conduct cannot support a private UIPA or UCL right of action. This is true even when Zhang recasts California Capital's alleged UIPA violations as UCL violations.

So in a claim-handling suit brought by a plaintiff-insured—like Zhang—addressing advertising and claims-settlement practices that the UIPA proscribes, a private UCL right of action should not be available. But the Court of Appeal's decision here permits all insureds with claim-

handling and amount-of-loss disputes to assert private UCL rights of action to address UIPA violations:

> Such a case does not represent an attempt to subvert or work around the Supreme Court's [*Moradi-Shalal*] holding; although the Unfair Insurance Practices Act does not provide a private cause of action, in the UCL the Legislature clearly *has* provided such a remedy for conduct which falls within its purview. Slip Op. at 11.

The Court of Appeal's decision in this case, therefore, directly conflicts with *Textron*, and by extension with *Manufacturers Life*. This Court should resolve the conflict among these Courts of Appeal, approve *Textron*, and bar parties from using California's unfair-competition laws to circumvent *Moradi-Shalal*.

IV

FACTUAL STATEMENT

On or about February 3, 2005, California Capital issued an insurance policy to Zhang. The Policy provides coverage for physical damage to covered building property located at 17502-18 Sequoia Avenue, Hesperia, California, subject to the applicable terms and conditions. Return, ¶ 6; App. 35–107. On July 5, 2005, the Property was damaged by fire. Zhang submitted a claim for the fire loss to California Capital. Return, ¶ 16(a).

Beginning on July 5, 2005, California Capital thoroughly investigated the loss and adjusted the claim, including but not limited to conducting a fire investigation to determine the cause of the fire, obtaining architectural and engineering drawings, preparing a repair estimate, locating two contractors immediately prepared to commence and complete the work with a three to four month timeline. California Capital communicated with Zhang through the entire adjustment of the claim over the phone and in writing. Return, ¶ 16(a).

On or about September 21, 2005, California Capital issued payments to Zhang for $8,586.00 representing an estimated amount for her business-income loss (estimated because despite numerous requests, Zhang had still not provided documentation of her business-income loss) and $64,066.47 for actual cash value of building repairs (based on repair estimate of $101,063.80 less replacement-cost-value holdback and deductible). Return, ¶ 16(b).

California Capital revised its estimate on February 7, 2006 to $111,277.75, primarily due to vandalism damage that had occurred largely due to Zhang's failure to properly secure the loss site in compliance with the Policy. On February 14, 2006, California Capital issued another payment to Zhang for $8,264.07 representing revised Actual Cash Value based on the

February 7, 2006 estimate, which had been agreed to by two competent and reputable area repair contractors. Return, ¶ 16(c).

Despite having received payment for her loss at actual cash value, Zhang failed to commence repairs with reasonable speed. In early June 2006, Zhang informed California Capital that she had signed a contract with "Chow Construction" to complete repairs at the Property, and submitted an estimate from that firm for $384,474.10, an amount far in excess of California Capital's agreed-price repair estimate. Return, ¶ 16(d).

Upon review, the Chow Construction estimate submitted by Zhang was found to be demonstrably inflated. Likewise, Zhang never produced any signed contract for the repairs reflected in the estimate she provided, nor did Chow Construction actually complete any of the repairs reflected in the estimate. California Capital declined payment of the claim based on the Chow Construction estimate, and took exception to a defective and inflated sworn Proof of Loss Zhang submitted that was apparently based on the same inflated estimate. Return, ¶ 16(d).

In early April 2007, nearly one year after sending the Chow Construction estimate and 21 months after the fire; Zhang forwarded another estimate from a different contractor identified as "A & A Top's General Construction" totaling $185,161.31. Work on the property finally commenced afterward. Return, ¶ 16(e).

On January 31, 2008, Zhang's mortgage holder e-mailed to California Capital documentation verifying that repairs to Zhang's property had finally been completed. Within days, on February 6, 2008, California Capital paid $36,447.21 for the balance of the covered portion of Zhang's replacement-cost claim. Return, ¶ 16(f).

Additional amounts for engineering services, board-up costs, etc. were paid directly to various vendors, bringing the total loss payments to $131,853.91. California Capital paid the covered amount of Zhang's loss

and claim in full. Throughout the claim process, California Capital wrote numerous detailed letters to Zhang disclosing and explaining the terms, provisions, and conditions of her policy, the basis for its adjustment of her claims, and the discrepancies found in her claim submissions. Return, ¶ 16(g).

Throughout the adjustment of this claim, Zhang failed to comply with the conditions of the Policy. She failed to secure the Property from further damage, resulting in further damage. She failed to provide documentation of her business-income-loss claim. She filed an incomplete and inflated sworn Proof of Loss, and did not file her Proof of Loss within the time period specified in the policy. She failed to take necessary steps to resume her business operations as quickly as possible. She failed to timely commence repairs to her property. Return, ¶ 16(h).

Zhang filed the instant lawsuit on July 5, 2007. Zhang's initial complaint and first amended complaint did not contain a cause of action for violations of Business and Professions Code section 17200. Return, ¶ 16(i).

On or about July 21, 2008, Zhang filed her second-amended complaint. Zhang asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and violations of Business and Professions Code section 17200. App. 1–148.

California Capital demurred to Zhang's third cause of action, alleging violations of Business and Professions Code section 17200. The trial court sustained California Capital's demurrer without leave to amend. App. 187–218.

Zhang petitioned for a writ of mandate. In a published decision, the Court of Appeal of the Fourth Appellate District, Division Two issued a peremptory writ of mandate directing the Superior Court to vacate its order and to enter a new order overruling the demurrer. The Court of Appeal

expressly disagreed with *Textron*, creating a conflict among the courts of appeal:

> Defendant demurred to this [UCL] cause of action on the basis that the conduct alleged . . . was prohibited by Insurance Code section 790.03, and plaintiff could not state a private cause of action due to decision in *Moradi-Shalal* . . . . In accepting this position, the trial court also relied on *Textron Financial* . . . . We are compelled to disagree in part with the decision in *Textron Financial* and to hold that *Moradi-Shalal* does not bar the claim under the UCL. Slip Op. at 3 (citations omitted).

V

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEAL, AND DETERMINE THAT A PLAINTIFF IN A CLAIM-HANDLING DISPUTE MAY NOT UTILIZE SECTION 17200 TO CIRCUMVENT *MORADI-SHALAL* AND ASSERT PRIVATE UIPA CLAIMS

A. A Violation of Business and Professions Code Section 17200 Cannot be Predicated Upon Conduct Which is Privileged or Does Not Allow for a Private Right of Action

The major purpose of Business and Professions Code section 17200 is the "preservation of fair business competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949 ("The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.").

Since its passage, the courts have expansively interpreted the UCL to include unfair-business practices that harm the general public. But no alleged UCL violation, even in the consumer-protection context, may be predicated upon conduct that is privileged or provides no private right of action. *Rubin*, 4 Cal.4th 1187; *Manufacturers Life*, 10 Cal.4th 257. This is true even if the conduct would otherwise fall within the definition of conduct prohibited by the UCL statute. *Moradi-Shalal*, 46 Cal.3d at 287; *Textron*, 118 Cal.App.4th 1061; *Zephyr Park v. Superior Court* (1989) 213 Cal.App.3d 833, 836–838; *Maler*, 220 Cal.App.3d at 1592; *Safeco*, 216 Cal.App.3d at 1494.

While this case involves a UCL claim predicated upon conduct that provides for no private right of action, this Court previously disallowed

UCL causes of action based upon underlying conduct that by statute is absolutely privileged:

> The salutary purpose of the privilege…should not be frustrated by putting a *new label* on the complaint. If it is desirable to create an absolute privilege in defamation, not because we desire to protect a shady practitioner, but because we do not want the honest one to have to be concerned with libel or slander actions while acting for his client, we should not remove one concern and saddle him with another for doing precisely the same thing. *Rubin*, 4 Cal.4th at 1202, quoting *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 99.

This Court held that no plaintiff may state a claim otherwise barred by the litigation privilege by merely labeling the claim as an UCL violation:

> To permit the same communicative acts to be the subject of an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity. If the policies underlying section 47(b) are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b). *Rubin*, 4 Cal.4th at 1203.

Likewise, no plaintiff should be permitted to label a UIPA claim as a UCL claim and proceed under the UCL alleging conduct that does not allow for a private right of action. As this court affirmed, Plaintiffs cannot plead around *Moradi-Shalal* "by relying on conduct which violates only the UIPA as the basis for a UC[L] cause of action." *Manufacturers Life*, 10 Cal.4th at 283.

B. The UIPA Expressly Prohibits an Insurer from Committing Unfair Practices, Including "Unfair" and "Fraudulent" Practices, and "Untrue, Deceptive or Misleading Advertising"

The UIPA is codified at Insurance Code sections 790 et seq. The UIPA forbids specific allegations of wrongful and bad-faith conduct by insurance companies, including the improper or untimely handling of insurance claims, underpayment of claims, and untrue, deceptive, or misleading advertising with respect to the business of insurance.

The UIPA expressly prohibits the conduct that the Court of Appeal refers to in its attempt to distinguish Zhang's allegations from the *Textron* plaintiff's allegations:

> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies. . . . [¶]
>
> (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear. Ins. Code § 790.03(h).

However, the UIPA also expressly prohibits insurers' "false advertising" and "fraudulent misrepresentation:"

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.
>
> (a) Making, issuing, circulating, or causing to be made, issued or circulated, any…illustration, circular or statement misrepresenting the terms of any policy…or the benefits or advantages promised thereby . . . .
>
> (b) Making or disseminating or causing to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever, any statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his or her insurance business, which is untrue, deceptive, or misleading, and which is known, or which by the exercise of

> reasonable care should be known, to be untrue, deceptive, or misleading. . . . [¶]
>
> (h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: . . .[¶]
>
> (7) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application. Ins. Code § 790.03.

The UIPA codifies the tort of bad faith in claim-handling disputes:

> Section 790.03(h) has been termed "a codification of the earlier tort of bad faith, which historically is a breach of the duty of good faith and fair dealing which is implied in every contract" . . . . *Zephyr Park*, 213 Cal.App.3d at 837.

The UIPA expressly forbids insurers' fraudulent, wrongful, and bad-faith conduct, which includes the improper handling of insurance claims and untrue, deceptive, or misleading advertising. Ins. Code § 790.03.

A claim-handling dispute, by its nature, alleges the type of activities covered by the UIPA and conduct intrinsically intertwined with it. That conduct cannot be parsed and separated. Thus, in a claim-handling case, conduct that is "unfair," "fraudulent," or "false advertising" cannot be parsed or separated from conduct covered by the UIPA.

C. Moradi-Shalal Determined that the Legislature Intended No Private Right of Action for Claims Arising Under the UIPA

In overruling its previous decision in *Royal Globe Ins. Co. v Superior Court* (1979) 23 Cal.3d 880, this Court held, "Neither 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(h)." *Moradi-Shalal*, 46 Cal.3d at 304.

Following *Moradi-Shalal*, the Courts of Appeal concluded that neither insureds nor third-party claimants could assert private UIPA claims:

> Were we, however, to concede that the ruling in *Moradi-Shalal* does not directly address first party claims, and that to the extent that it does it is dictum; and that the obligation of determining the survival of first party section 790.03 claims is squarely upon our shoulders, we would nevertheless reach the same conclusion. *Zephyr Park*, 213 Cal.App.3d at 837.

Indeed, *Moradi-Shalal* should be read broadly as it consistently refers to private rights of action generally:

> Because *Moradi-Shalal* involved a third party claim, it remained for *Zephyr Park* to address whether *Moradi-Shalal's* ruling also barred first party claims. *Zephyr Park* concluded *Moradi-Shalal* "mandates the exclusion of all private causes of action [under section 790.03], whether first or third party." [¶] In arriving at this broad reading of *Moradi-Shalal*, *Zephyr Park* observed *Moradi-Shalal's* treatment of the issue by other jurisdictions is not limited to the question of third party claims. Further, in discussing scholarly criticism of *Royal Globe* and in reviewing legislative history, *Moradi-Shalal* consistently refers to "private rights of action" generally, rather than to third party rights. *Maler*, 220 Cal.App.3d at 1597 (citations omitted).

After *Moradi-Shalal*, there exists no private right of action for UIPA violations, which include improper claim handling, fraud, and false advertising. No plaintiff, therefore, may circumvent *Moradi-Shalal* by merely labeling and casting alleged UIPA violations arising out of improper claim handling, fraud, and false advertising as UCL violations.

D. Following *Moradi-Shalal*, this Court and the Courts of Appeal Have Barred Plaintiffs from Renaming and Recasting Private UIPA Claims as UCL Claims.

In *Rubin*, this Court relies upon *Moradi-Shalal* to hold that no plaintiff may plead around the absolute barrier to relief by recasting the barred claim as a UCL violation:

> These decisions have rejected the claim that a plaintiff may, in effect, "plead around" absolute barriers to relief by relabeling nature of the action as one brought under the unfair competition statute. 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, several decisions of the Court of Appeal have held that the bar on such implied private causes of action, imposed by our decision in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 301, may not be circumvented by recasting the action as one under Business and Professions Code section 17200.
>
> In a typical case, *Safeco v. Superior Court* (1990) 216 Cal.App.3d 1491, the plaintiff sued an insurance carrier for its conduct in settling an automobile collision claim; he sought damages under the unfair practices provision of the Insurance Code (Ins. Code, § 790.03 subd. (h)) as well as compensatory damages, injunctive relief, attorneys fees and punitive damages under Business and Professions Code section 17200. (216 Cal.App.3d at p. 1493.) The Court of Appeal ordered the complaint dismissed, holding that *Moradi-Shalal*, supra, 46 Cal.3d 287, barred not only the Insurance Code claims, but that "[section 17200 of] the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*. . . . To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless."

> The Courts of Appeal reached the same result in *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1598, and *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093, 1096, both of which held that implied private rights of action, alleging bad faith claims against insurers, barred by our opinion in *Moradi-Shalal*, were not resurrected by casting the action as one for relief under the unfair competition statute. *Rubin*, 4 Cal.4th at 1201–1202 (citations omitted).

In *Manufacturers Life*, this Court followed *Rubin* and approved *Safeco's* holding that no plaintiff may utilize Business and Professions Code section 17200 to circumvent *Moradi-Shalal* and state a private UIPA claim in a claim-handling dispute:

> The court held that the plaintiff could not plead around the absolute bar to relief created by the litigation privilege by recasting the cause of action as one for unfair competition. It analogized such pleading to the attempts to avoid the bar to "implied" private causes of action under section 790.03, which several Courts of Appeal had held could not be avoided by characterizing the claim as one under the UCA. *Manufacturers Life*, 10 Cal.4th at 283.

E. Zhang's UCL Claim Alleges the Very Types of Activities Proscribed by and Intrinsically Intertwined with the UIPA, For Which Zhang Has No Private Right of Action.

Zhang's second-amended complaint addresses California Capital's alleged claim-handling misconduct. Alleged claim-handling misconduct underpins each and every allegation in the second amended complaint, including the cause of action for a violation of Business and Professions Code section 17200. App. 1–34.

To support her UCL claim, Zhang alleges that California Capital engaged in fraud and false advertising arising out of its handling of her property claim:

> Defendant California Capital . . . engaged in unfair, deceptive, untrue, and/or misleading advertising when it advertised its Businessowners policy products, such as the California Capital Policy herein. California Capital . . . promises its insureds that it will timely pay proper coverage in the event the insured suffers a covered loss. By this promise, California Capital . . . agrees that if an insured suffers compensable loss, it will pay the true value of that covered claim. However, as its [claim-handling] conduct herein demonstrates, California Capital . . . in fact has no intention of properly paying the true value of its insureds' covered claims. App. 32, ¶ 92.

Zhang's lawsuit for breach of contract and breach of the implied covenant of good faith and fair dealing alleges the types of activities covered by the UIPA:

> California Capital . . . violated the requirements of Insurance code sections 790.03, *et seq.*, as well as the California Code of Regulations, Title 10 Chapter 5, subchapter 7.5. Such violations evidence California Capital['s] . . . tortious breach of the California Capital . . . Policy issued to, and purchased by, the insured Yanting Zhang. App. 28, ¶ 79.

Thus, it matters not that Zhang casts and labels California Capital's conduct as "fraudulent," "false advertising," or "unfair practices" in order to plead around *Moradi-Shalal's* holding that the Legislature intended no

private UIPA rights of action. Zhang's UCL claim is still underpinned by California Capital's alleged failure to properly pay her policy benefits, which is a garden-variety claim-handling and amount-of-loss dispute. All of Zhang's allegations against California Capital describe conduct that is expressly prohibited by the UIPA.

Zhang's alleged claim-handling dispute is intrinsically intertwined with her allegations of UIPA violations in her second-amended complaint, even those specifically alleging false advertising, fraud, and unfair practices. The holdings in *Moradi-Shalal* and its progeny prohibit Zhang from bringing a cause of action for a violation of Business and Professions Code section 17200 predicated on a claim-handling dispute.

F. Common-Law Contract and Tort Remedies Fully Compensate Insurance Consumers in Claim-Handling Litigation

This Court has previously observed that in drafting California's unfair competition laws, "the legislature deliberately traded the attributes of tort law for speed and administrative simplicity." *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266–1267. But in garden-variety claim-handling disputes, no plaintiff-insured would forgo traditional common-law breach-of-contract and bad-faith remedies for the sake of speed and administrative efficiency. Insurers are subject to a myriad of tort- and contract-based liability theories and claims. In practice, litigated claim-handling disputes commonly include breach-of-contract, bad-faith, and punitive-damage claims.

For the insured, common-law breach-of-contract and bad-faith claims offer remedies that make the insured whole for claim mishandling. The insured may recover contractual and tort damages, which include emotional distress and attorney fees. *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817.

Insurance law in the area of claims-settlement practices is highly evolved; it offers the insurance consumer highly developed protections that are not available in any other business transaction, including tort damages and attorneys fees:

> Insurance contracts are unique in nature and purpose. An insured does not enter an insurance contract seeking profit, but instead seeks security and peace of mind through protection against calamity. The bargained-for peace of mind comes from the assurance that the insured will receive prompt payment of money in times of need. Because peace of mind and security are the principal benefits for the insured, the courts have imposed special obligations, consonant with these special purposes, seeking to encourage insurers promptly to process and pay claims….[¶] These special duties, at least to the extent breaches thereof give rise to tort liability, find no counterpart in the obligations owed by parties to ordinary commercial contracts….To avoid or discourage conduct which would thus frustrate realization of the contract's principal benefit (i.e. peace of mind), special and heightened duties of good faith are imposed in insurers and made enforceable in tort. While these "special" duties are akin to, and often resemble, duties which are owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, not because an insurer *is* a fiduciary. *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148 (citations omitted).

The protections offered to insurance consumers in claim-handling disputes, such as common law causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, are extensive. *Moradi-Shalal*, 46 Cal.3d at 304–305. These common-law protections exceed the UCL's limited remedies in equity provided for the sake of "administrative simplicity."

For this very reason, the appellate courts extended this Court's *Moradi-Shalal* holding to first-party insureds. Because common-law contract and bad-faith remedies provide the insured with everything the insured needs to

seek redress for improper claims handling, the courts have consistently refused—until this case—to circumvent *Moradi-Shalal*:

> Finally, and perhaps most significantly, first party insureds are not significantly affected by denial of the right to bring a statutory claim. Thus, "[t]here is less reason to be concerned about depriving first parties of their use of section 790.03 as a basis for claims, than exists for third parties. First parties are in privity with the insurance carrier and typically have regular contract claims, including common law 'bad faith' claims, which can be pursued. Section 790.03(h) has been termed 'a codification of the earlier tort of bad faith' . . . . The evident purpose of the legislation, as confirmed by *Moradi-Shalal*, was to vest in an administrative agency the power to police 'bad-faith' practices in the industry. The creation of section 790.03(h) did nothing either to expand or restrict the preexisting common law right of action; the limitation of the utilization of section 790.03 to governmental entities should similarly have no effect upon the common law private right of action. There is simply no need, therefore, to perpetuate the availability of section 790.03(h) as the basis for first party causes of action." *Tricor California, Inc. v. Superior Court* (1990) 220 Cal.App.3d 880, 887 (citations omitted).

Likewise, adequate contract and common-law remedies exist to which the insured may resort to resolve claim-handling disputes and seek redress for improper claim handling. As to the Court of Appeal's concerns in this case that insurers would somehow receive a "free pass" if plaintiffs were not permitted to pursue UCL claims, this Court succinctly stated, "[T]he courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions . . . ." *Moradi-Shalal*, 46 Cal.3d at 304.

There simply is no need, therefore, to perpetuate the availability of section 17200 as the basis for first-party causes of action involving claim-handling or amount-of-loss disputes. In such instances, the insured cannot "demonstrate an unlawful or unfair practice"—other than a UIPA-prohibited practice for which the Legislature intended no private right of

action—to maintain a UCL claim. *See Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886, 895.

Common-law remedies for breach of contract and the implied covenant of good faith and fair dealing provide the insured full and fair redress for any claim mishandling. Permitting plaintiffs to plead around *Moradi-Shalal's* clear prohibitions by repackaging claim-handling and amount-of-loss disputes as UCL claims turns every claim-handling and amount-of-loss dispute into a UCL action, and invites class-action lawsuits. Such repackaging dramatically and needlessly increases the costs of litigating and resolving claim-handling disputes, and inevitably burdens the courts and premium-paying insurance consumers.

VI

THE COURT OF APPEAL'S DECISION FAILS TO DISTINGUISH BETWEEN PERMISSIBLE UCL CLAIMS AGAINST INSURANCE COMPANIES AND CONDUCT GOVERNED BY THE UIPA, FOR WHICH PRIVATE UCL CLAIMS ARE BARRED

The Court of Appeal's decision in this case does not differentiate between UCL claims against insurance companies arising out of the business of insurance that might be violations of the Cartwright Act or other laws, and UCL claims arising out of claim handling governed by the UIPA. Like all other businesses in California, insurance companies are subject to UCL claims for unfair-business practices. But UCL claims may not be predicated upon conduct that does not allow for a private right of action.

Moradi-Shalal and its progeny distinctly hold that the Legislature intended no private rights of action for violations arising out of the UIPA for unfair-claims practices. *Moradi-Shalal*, therefore, prohibits UCL claims in claim-handling cases, because claim-handling cases by their nature allege the type of conduct prohibited by the UIPA.

In this case, the Court of Appeal recognizes that Zhang's UCL claim arises out of claim-handling conduct that the UIPA prohibits:

> Plaintiff's *specific additional allegations* made part of the UCL cause of action were that real party in interest made *fraudulent misrepresentations* and promulgated *misleading advertising* with respect to its intentions to "pay proper coverage in the event the insured suffered a loss." Slip Op. at 9.

Thus, the crux of Zhang's UCL claim is not that California Capital falsely advertised, but that it did not properly adjust her claim.

The Court of Appeal relies on *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263 as an example of a proper UCL claim

against an insurance company "if false advertising or similar misrepresentations can be proved." Slip Op. at 9. The Court notes that "the *Progressive West* decision does not cite *Textron Financial*. Interestingly, the Supreme Court denied review in both cases." Slip Op. at 10 n.5.

But the Court of Appeal's reliance on *Progressive West* is misplaced. *Progressive West* is predicated, not on a claim-handling dispute that would allege violations of the types of activities covered by the UIPA, but an insured's post-claim reimbursement dispute. By the time the Progressive West insured sued Progressive West for unfair-competition, the insured's claim was completely resolved. *Progressive West*, therefore, was not a claim-handling dispute, but instead involves the business of insurance not predicated upon a UIPA violation. *Progressive West* is consistent with, not an exception to, *Moradi-Shalal* and its progeny.

In *Progressive West*, the insurer filed an action "to recover money it paid to [the insured] under a first-party medical payments provision of his automobile insurance policy." *Progressive West*, 135 Cal.App.4th at 268. The insured cross-complained for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair-business practices under Business and Professions Code section 17200.

The insurer had fully paid all contract benefits to its insured for his claim. *Id.* at 281. Progressive West's insured did not allege that benefits were due him under the policy, or that benefits were wrongfully or unreasonably withheld from him. The insured did not plead bad-faith allegations comprising a claim-handling dispute. Instead, the insured's lawsuit involved Progressive West's attempt to obtain post-claim-handling reimbursement of benefits already paid. Progressive West's insured never alleged that Progressive West violated the UIPA. Instead, the insured

contended that Progressive West unfairly attempted to obtain reimbursement of policy benefits already paid.

As Progressive West had fully paid all policy benefits to its insured, the *Progressive West* court overruled the trial court and held that the insured could not properly state common-law breach-of-contract and bad-faith claims against Progressive West. The court did not permit Progressive West's insured to allege a common-law bad-faith tort claim for its claim handling. *Id.* at 276-281.

The court described the case as "no different than any garden variety contractual dispute between two parties to a contract." *Id.* at 279. Because the case was not predicated on a claim-handling dispute or UIPA violations, the court held that the insured had properly alleged fraudulent- and unfair-business practices—although not unlawful-business practices—thereby allowing the insured to state a UCL claim.

The underlying allegations in *Progressive West* differ vastly from those that Zhang asserts in her second-amended complaint. Zhang's breach-of-contract and breach-of-the-implied-covenant claims allege that California Capital wrongly and unreasonably withheld insurance-policy benefits. Her allegations supporting her unfair-business-practices claim under Business and Professions Code section 17200 exclusively alleges activities prohibited by and intrinsically intertwined with the UIPA.

Zhang characterizes her allegations of wrongful claim-handling as "fraud," "false advertising," and "unfair business practices" in order to plead around *Moradi-Shalal's* prohibition of private UIPA rights of action. The Court of Appeal decision in this case, therefore, carves out a grand exception to *Moradi-Shalal*. The decision permits every plaintiff in every claim-handling dispute to state a claim for violations of Business and Professions Code section 17200 that parrots the UIPA provisions for which

there are no private rights of action. The Court of Appeal's holding directly conflicts with *Textron*, and by extension *Manufacturers Life*.

VII

CONCLUSION

This Court's *Moradi-Shalal* decision prohibits all private UIPA actions, including those renamed, recast, and realleged as private UCL actions. Claim-handling cases for breach of contract and breach of the implied covenant of good faith and fair dealing inherently involve the type of activities proscribed by and intrinsically intertwined with the UIPA. Zhang should not be permitted to rename, recast, and reallege her private UIPA claim as a private UCL claim to circumvent *Moradi-Shalal*.

This Court should grant review of the Court of Appeal's decision and resolve the conflict among the Courts of Appeal that it creates.

WORD-COUNT CERTIFICATE

(Cal.R.Ct. 8.504(d)(1))

This brief's text contains 7,165 words, as counted by the Microsoft Office Word 2003 word-processing program used to generate the brief.

DATED: December 8, 2009

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Lance D. Orloff

PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Orange)

I am a citizen of the United States and a resident of or employed in the city of Irvine, County of Orange; I am over the age of eighteen years, and not a party to the within action; my business address is 2030 Main Street, Suite 1600, Irvine, California 92614.

On December 8, 2009, I caused the within **PETITION FOR REVIEW** in *Zhang v. California Capital Insurance Company* to be served on all parties interested in said action, by placing one true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Irvine, California, addressed as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on December 8, 2009, at Irvine, California.

_____
Norma Reeves