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A New California Court of Appeal Decision Might Breathe Some New Life Into Unfair Competition Law Claims Against Insurers

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In *Zhang v. Superior Court (California Capital Insurance Co.)*, Case No. E047207 (filed October 19, 2009), the Fourth District of the California Court of Appeal reversed the trial court's decision to sustain a demurrer on a policyholder's claim for false advertising under California's Unfair Competition Law ("UCL"), California Business & Professions Code section 17200 *et seq.* The UCL is, among other things, a very broad consumer protection statute that applies to false advertising and other business conduct that is unlawful, fraudulent, or unfair.

In *Zhang*, the policyholder alleged insurer misconduct in connection with the handling of a claim arising from a fire at her commercial premises. Among the causes of action she asserted was a cause of action for violation of the UCL. This cause of action was based on alleged claim handling conduct and procedures, and also on an allegation of false advertising. She asserted that the insurer had advertised that it would "timely pay proper coverage" when it "in fact has no intention of honoring such advertised promises."

In sustaining the insurer's demurrer on the UCL cause of action, the trial court relied on the California Supreme Court's decision in *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287 (1988), and on *Textron Financial Corp. v. National Union Fire Ins. Co.*, 118 Cal. App. 4th 1061 (2004), a California Court of Appeal decision applying *Moradi-Shalal*. In *Moradi-Shalal*, the California Supreme Court held that there is no private right of action for violations of section 790.03 of the California Insurance Code. That provision, a part of the Unfair Insurance Practices Act, contains a very broad, wide-ranging, and extensive list of prohibited practices in the "business of

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insurance." These include claim handling practices and false advertising. In *Moradi-Shalal*, the supreme court held that the California Insurance Commissioner has the exclusive right to enforce 790.03.

Textron Financial presented the question of whether *Moradi-Shalal* bars a claim under the UCL if the claim arises from conduct that is also prohibited under 790.03. In *Textron Financial*, the court of appeal concluded that *Moradi-Shalal* does bar such claims.

In a later case, *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263 (2005), the court of appeal (without referring to *Textron Financial* or addressing any issue related to 790.03) held that a defendant could maintain a UCL claim against an insurer with respect to fraudulent conduct.

In *Zhang*, the court cited *Progressive West*, stating that "[w]e agree with the approach in *Progressive West*, and to the extent that *Textron Financial* is inconsistent, we disagree." The court reasoned that it would make no sense to immunize insurers from the consequences of conduct that is actionable under the UCL simply because the conduct is also prohibited under 790.03.

The court did not rule that the plaintiff's claim handling allegations - as opposed to her false advertising allegations - gave rise to a proper UCL claim that was not barred by *Moradi-Shalal*. The court side-stepped that issue. The court explained that, so long as at least one allegation supports a claim, it is not proper to sustain a demurrer to the claim. Accordingly, it went on to explain that the fact that the plaintiff's false advertising allegation supported her UCL claim made it unnecessary to consider whether her claim handling allegations also supported that claim. It did state, however, that a "strong case can be made" that, to the extent that claim handling practices do violate the UCL, insurers should not get a "free pass" on their violations on account of the fact that 790.03 also bars the practices.

The conflict between *Textron Financial* and *Zhang* might make the *Zhang* case an attractive one for supreme court review. We shall see.

Click [here](#) to read the court's opinion.

For additional information on this issue, contact:



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