# Another Toehold in Using the UCL to Scale the Barriers of Moradi-Shalal

June 16, 2011 by Larry Golub

In 1988, the California Supreme Court issued its landmark decision in *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, disallowing private rights of action based on violations of the Unfair Insurance Practice Act ("UIPA"), otherwise known as third-party bad faith claims. Shortly thereafter, the prohibition was extended to first-party bad faith claims.

Most significantly, a series of Court of Appeal decisions disallowed violations of the UIPA to be brought as claims under the California's "Unfair Competition Law" (Business and Professions Code Section 17200, *et seq*., or the "UCL").

As one court concluded:

we have no difficulty in [holding] the Business and Professions Code provides no toehold for scaling the barriers of *Moradi-Shalal*." *Safeco Ins. Co. v. Superior Court*, 216 Cal. App. 3d 1491, 1494 (1990).

More recently, another court held that "parties cannot plead around *Moradi-Shalal*'s holding by merely relabeling their cause of action as one for unfair competition." *Textron Financial Corp. v. National Union Fire Ins. Co.*, 118 Cal. App. 4th 1061, 1070 (2004).

In November 2009, we reported on *Zhang v. Superior Court*, a case that rejected *Textron*, and held that because the UCL allows a plaintiff to allege unfair, unlawful, and misleading conduct against businesses generally (including insurers), the fact an insured asserts what appear to be violations of the UIPA is not necessarily an end run around *Moradi-Shalal* so long as the insured also alleges the insurer acted unfairly by engaging in false and deceptive advertising, suggesting it would provide coverage in the event of a loss, when it had no intent to do so.

The case was short-lived, as the Supreme Court accepted review in February 2010 and the decision became depublished. While the *Zhang* case is fully briefed, the Supreme Court has not yet set oral argument.

On June 15, however, another Court of Appeal decision issued again sought to undercut the prohibition on using the UCL to pursue UIPA-like claims.

In *Hughes v. Progressive Direct Ins. Co.*, the plaintiff sued his insurer in a purported class action based on the automobile insurer's alleged company-wide practice of steering its insureds to repair shops that were part of Progressive's Direct Repair Program (DRP) and misrepresenting their ability to take their vehicle to a non-DRP repair shop.

The sole claim alleged was under the UCL, but the predicate statute relied on to support the UCL claim was Insurance Code section 758.5.

That statute, which prohibits insurers from requiring an insured's vehicle to be repaired at a specific repair shop, or suggesting a specific shop be used, unless the insured is

informed in writing of his or her rights to select another repair shop, does not, just like the UIPA, permit a private right of action but only enforcement by the Insurance Commissioner pursuant to the UIPA.

Accordingly, the trial court sustained the insurer's demurrer to the complaint, concluding that just as the UCL could not be used to circumvent UIPA claims under Moradi-Shalal, neither could a UCL claim proceed based upon Section 758.5.

The Court of Appeal reversed, and concluded that *Moradi-Shalal* does not bar a claim by an insured against an insurer under the UCL based solely on the allegations the insurer violated Section 758.5.

After discussing in detail the decisions issued since the time of *Moradi-Shalal* vis-à-vis the UCL, as well as the legislative history of Section 758.5, and then relying on a parsed reading of the language of the UCL in which its remedies are "cumulative" to other laws unless otherwise "expressly" provided, the court found that an alleged violation of a statute like Section 758.5, so long as it does not involve conduct violating the UIPA, "may serve as the predicate for a UCL claim absent an express legislative direction to the contrary."

The decision, however, was not one of clear unanimity. One of the three Justices on the appellate panel issued his own concurring opinion, in which he expressed his "considerable misgivings" as to the majority opinion. After noting that the opinion "hangs precipitously on one word, namely 'express,'" Justice Fred Woods lamented that the social problems sought to be addressed by the *Moradi-Shalal* decision and various legislative remedies might now be undone, and that he saw "storm warnings on the horizon."

Perhaps, just as the Supreme Court accepted review of the *Zhang* case last year to address that appellate decision seeking to create a chink in the armor of *Moradi-Shalal*, it will similarly accept review of *Hughes* to address this latest attack on the scope of *Moradi-Shalal* and bring some certainty to whether the reach of the UCL is as broad as these two lower appellate courts have held.