FEATURED ARTICLE

Insurance Litigation

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Bad Faith

Moradi-Shalal does not prohibit UCL claim against insurer.

Zhang v Superior Court (2009) 178 CA4th 1081, 100 CR3d 803

The insured filed a lawsuit alleging that the insurer violated the Unfair Competition Law (UCL) (Bus & P C §§17200–17210) by falsely advertising and fraudulently misrepresenting that it would provide coverage in the event that the insured suffered a loss. The insurer demurred on the grounds that the UCL cause of action violated the Unfair Insurance Practices Act (Ins C §§790–790.15). See Ins C §790.03. The trial court sustained the demurrer.

The Fourth District Court of Appeal reversed. Defendant argued that the supreme court in *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116, held that an insurer is never liable in tort for its unfair practices. However, *Moradi-Shalal* was a third party action brought under Ins C §790.03, not the UCL. Further the supreme court in *Moradi-Shalal* noted that "the courts retain jurisdiction to impose damages and civil remedies against insurers in appropriate common law actions, under traditional theories such as fraud. . . ." 46 C3d at 304. Here, the insured alleged conduct that violates the UCL, and there is no reason to interpret *Moradi-Shalal* as prohibiting a false advertising cause of action.

COMMENT: Ever since the California Supreme Court held that there is no private right of action for unfair claims practices under Ins C §790.03(h), insurers have argued that they are completely immune from liability under any theory if that liability would also be a violation of §790.03(h). As the *Zhang* court explains, this is untrue. If the only basis for liability would be a violation of §790.03, then a plaintiff cannot bootstrap a claim under some other theory. However, if an action (such as, in this instance, fraud) would be a violation under both §790.03(h) and some other common law or statutory claim, there is no prohibition against pursuing the latter.—*Arnold R. Levinson*

COMMENT: Mr. Levinson's analysis of *Zhang* is correct as far as it goes. What it fails to note, however, is the significant difficulty cases such as *Zhang* present in helping trial courts determine when a complaint crosses the line into *Moradi-Shalal* territory. Although a bright-line rule is no doubt impossible, the demarcation between viable UCL claims and prohibited Ins C §790.03 claims is becoming increasingly blurred. Part of the problem may lie with insurers themselves. By challenging these claims at the demurrer stage, when the court must accept the allegations as true and give every benefit of the doubt to the pleading, carriers are essentially fighting with a half-empty arsenal. Although it might cost a little more to develop a factual record on which to challenge the asserted claims, it might well be that the long-term savings would justify the front-end expenditure.—*Susan M. Popik*

Duty to Defend

Stay of insurer's declaratory relief action overturned because coverage issues did not overlap issues in pending litigation against insured.

Great Am. Ins. Co. v Superior Court (2009) 178 CA4th 221, 100 CR3d 258

The insurer settled two groundwater contamination cases on behalf of the insured. When a third, related case against the insured was filed, the insurer filed a declaratory relief action for an order that policy limits were exhausted and thus it was not required to defend the insured in the remaining action. The insured argued that the declaratory relief action should be stayed because it involved issues that overlapped with issues to be decided in the lawsuit and a potential, but unfiled, counterclaim for bad faith. The trial court stayed the declaratory relief action.

The Second District Court of Appeal reversed. The only issue to be decided in the declaratory relief action is the interpretation of the policy. Thus, there are no overlapping issues that would prejudice the insured on any issue to be determined in the underlying lawsuit. Because the bad faith claim is unfiled, it is premature to rule on whether it would overlap with the declaratory relief action.

However, the existence of the declaratory relief action has prejudicial impact that the trial court did not consider: Whenever an insurer seeks an order that policy limits are exhausted while there is litigation against the insured, the necessity of defending the two actions simultaneously prejudices the insured. *Montrose Chem. Co. v Superior Court* (1994) 25 CA4th 902, 910, 31 CR2d 38. On the other hand, if the declaratory relief action is stayed, the insurer is prejudiced by expending defense costs that it may be unable to recoup. On remand, the trial court should reconsider whether to stay the declaratory relief action by balancing the competing interests of both parties.

COMMENT: An insurer has a duty to defend an insured whenever there is any possibility of coverage under the policy. Indemnity requires actual coverage. Thus, when an insured is sued, one potential avenue for an insurer is to file a companion declaratory relief action seeking an order establishing a lack of coverage. This insurer practice is sometimes viewed as suspect because it exposes an insured to two lawsuits instead of one. The general rule of thumb is that if the insured would be prejudiced by the declaratory relief action, the action must be stayed pending resolution of the underlying personal injury action. The test of prejudice is generally whether a fact could be decided in the declaratory relief action, which could adversely affect the insured in the personal injury action. Here, the court found that no such preju-