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Parvaneh Moradi-Shalal v. Fireman's Fund Insurance Companies: The End of Private Party Enforcement of the Unfair Practices Act against Insurance Companies

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Parvaneh Moradi-Shalal v. Fireman's Fund Insurance Companies: The End of Private Party Enforcement of The Unfair Practices Act Against Insurance Companies

The California Supreme Court held in *Royal Globe Insurance Company v. Superior Court*[1] that third party claimants can bring a cause of action against an insurance company for acting in bad faith in violation of the Unfair Practices Act.[2] In creating the right of private claimants to bring an action against an insurer for violating the Unfair Practices Act, the *Royal Globe* court ignored the well established rule in *Murphy v. Allstate Insurance Company*.[3] *Murphy* held an insurer's duty to settle runs to the insured, not to injured third parties.[4] Nine years after the *Royal Globe* decision, it was overruled in *Parvaneh Moradi-Shalal v. Fireman's Fund Insurance Companies*[5] by stating that the insurance commissioner is the sole enforcer against an insurance company when the insurer violates the

1. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

2. *Id.* at 884-85, 592 P.2d at 332, 153 Cal. Rptr. at 845; CAL. INS. CODE §§ 790-790.10 (West 1972 & Supp. 1989) (the Unfair Practices Act). *See infra* notes 12-68 and accompanying text (discussing the development of the Unfair Practices Act).

3. Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976). *See Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d at 889, 592 P.2d at 335, 153 Cal. Rptr. at 848 (discussing *Murphy*).

4. *Id.* at 941, 553 P.2d at 587, 132 Cal. Rptr. at 427. *See also* Comment, *Royal Globe Insurance Co. v. Superior Court: Right to Direct Suit Against an Insurer by a Third Party Claimant*, 31 HASTINGS L. REV. 1161, 1165 (1980) (discussion of cases leading up to the rule in *Murphy*).

5. 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

Unfair Practices Act.[6] The court found the insurance code was not intended to create a cause of action for private party claimants, insured or third party, and therefore overruled *Royal Globe* and removed the ability of a private claimant to bring an action against an insurer for violating the Unfair Practices Act.[7]

This note assesses the court's decision in *Moradi-Shalal*. Part I of this note discusses the Unfair Practice Act, statutory interpretations of the act, and case law leading to the *Royal Globe* decision.[8] Part II analyzes the *Moradi-Shalal* decision and impact on the *Royal Globe* doctrine.[9] Part III discusses possible legal ramifications of *Moradi-Shalal* and the scope of any common law remedies available to a private party plaintiff against the insurer.[10]

I. Legal Background

A. Statutory Regulation of the Insurance Industry in California

The McCarran-Ferguson Act[11] enables the states to exercise a majority of control over the insurance industry operating within their respective states.[12] Accordingly, the Unfair Practices Act, as codified

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6. *Id.* at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126-7. The Unfair Practice Act, as codified within the Insurance Code section 790 lists numerous actions by an insurance company which give rise to sanctions, but these sanctions are solely for use by the insurance commissioner. *Id.*

7. *Id.*

8. *See infra* notes 12-111 and accompanying text.

9. *See infra* notes 112-229 and accompanying text.

10. *See infra* notes 230-285 and accompanying text.

11. 15 U.S.C. §§ 1011-1015 (1976).

12. In Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), the United States Supreme Court held that insurance contracts were not included within interstate commerce. *Paul*, at 168. But in 1944 the United States Supreme Court overruled *Paul* in United States v. South-Eastern Underwriters, 322 U.S. 533 (1944), declaring that regulation of the insurance industry was not within the sole province of the states. *Id.* 322 U.S. 533. *See* Comment, *supra* note 5, at 1167 (discussing the constitutional case history leading to state regulation of the insurance industry). In response to *South-Eastern Underwriters*, Congress enacted the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015. Congress intended the McCarran-Ferguson Act to enable the states to continue having a majority of control over the insurance industry within their states. *See* Comment, *supra* note 5 at 1167 (this act stated the Sherman Antitrust Act, the Clayton Antitrust Act, and the Federal Trade Commission Act are applicable to the insurance industry only to the extent such business is not regulated by the laws of the state). The McCarran-Ferguson Act was upheld as constitutional by the United States Supreme Court in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). *But see* Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985). In *Metropolitan*, the Supreme Court held in a 5-4 decision that the McCarran-Ferguson Act lifted commerce clause restrictions but not equal protection ones. *Id.* at 1679. Therefore, the equal protection clause still applies to discrimination against out of state insurance companies. *Id.* at 1676.

in the California Insurance Code, regulates the insurance industry in California.[13] The National Association of Insurance Commissioners (NAIC) proposed a model draft[14] which gave the states a regulation system to control unfair practices by the insurance industry.[15] California codified the Unfair Practices Act in the adoption of the Insurance Code section 790 in 1959[16] and in large part directly adopted the model act of the NAIC.[17] In 1972, California added to section 790.03 provisions prohibiting unfair claim settlement practices which are codified as section 790.03(h).[18]

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13. CAL. INS. CODE §§ 790-790.10 (West 1972 and Supp. 1989).

14. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *An Act Relating to Unfair and Deceptive Acts and Practices in the Business of Insurance* (1947). *See generally* Parvaneh Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d at 299, 758 P.2d at 63, 250 Cal. Rptr. at 123 (discussion of 2 NAIC Proceedings 392-400, An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance (1947)). *See also generally infra* notes 145-155 and accompanying text (discussing the California Supreme Court's analysis in *Moradi-Shalal* of the NAIC Model Act as compared to California and other states which used the model act as a basis for the state code).

15. *Moradi-Shalal*, 46 Cal. 3d at 299, 758 P.2d at 64, 250 Cal. Rptr. at 123.

16. CAL. INS. CODE §§ 790-790.10 (West 1972 & Supp. 1989). Section 790 states the purpose of the article is:

> To regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Id.

17. 1959 Cal. Stat. ch. 1737, sec. 1, at 4187 (enacting CAL. INS. CODE §§ 790-790.10) (California legislature adopting the NAIC Model Act). *Royal Globe*, 23 Cal. 3d at 885, 592 P.2d at 332, 153 Cal. Rptr. at 845 (discussing the adoption of the NAIC Model Act by California).

18. Amended by 1972 Cal. Stat. ch. 725, sec. 1, at 1314 (enacting CAL. INS. CODE § 790.03(h)(1)-(13)); 1975 Cal. Stat. ch. 790, sec. 1, at 1812 (enacting CAL. INS. CODE § 790.03(h)(14)-(15)).

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.
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> . . .
>
> (h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the unfair claims settlement practices:
>
> (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.
>
> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
>
> (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
>
> (4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
>
> (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
>
> (6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered

Section 790.03(h) of the Unfair Practices Act enumerates fifteen subheadings of what constitutes unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.[19] For example, section 790.03 prohibits insurance companies from: committing misrepresentation, failing to acknowledge and act upon communications, failing to adopt and implement reasonable standards for prompt investigation and processing of claims, and failing to affirm or deny coverage of claims within a reasonable time.[20] More specifically, section 790.03(h)(5) states an insurer can be liable for not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.[21] Further, section 790.03(h)(14) states that an insurer can be liable for directly advising a claimant not to obtain an attorney.[22]

The Unfair Practices Act includes provisions for the enforcement of the insurance code against insurance companies.[23] The insurance

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in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.
(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.
(8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent, or broker.
(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.
(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.
(14) Directly advising a claimant not to obtain the services of an attorney.
(15) Misleading a claimant as to the applicable statute of limitations.

CAL. INS. CODE § 790.03(h) (West Supp. 1989).

19. CAL. INS. CODE § 790.03(h) (West Supp. 1989).

20. CAL. INS. CODE § 790.03(h) (West Supp. 1989).

21. CAL. INS. CODE § 790.03(h)(5) (West Supp. 1989).

22. *Id.* Section 790.03(h)(5) was the basis for the plaintiff's action in *Royal Globe. Royal Globe Ins. Co. v. Superior Court*, 23 Cal 3d at 885, 592 P.2d at 332, 153 Cal. Rptr. at 845 (1979).

23. CAL. INS. CODE § 790.04 (West 1972).

commissioner has the statutory power to examine and investigate the affairs of every person engaged in the business of insurance within California.[24] The commissioner determines whether the insurance company practices unfair methods of competition or commits deceptive or unfair acts.[25] If the commissioner finds deceptive or unfair practices or acts,[26] then the commissioner may issue a cease and desist order requiring the insurer to refrain from continuing these practices.[27] Cease and desist orders issued by the commissioner under

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> The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in the State in order to determine whether such person has been or is engaged in any unfair method or competition or in any unfair or deceptive act or practice prohibited by Section 790.03 or determined pursuant to this article to be an unfair method of competition or an unfair or deceptive practice in the business of insurance. Such investigation may be conducted pursuant to Article 2 (commencing at Section 11180) of Chapter 2, Part 1, Division 3, Title 2 of the Government Code.

Id.

24. CAL. INS. CODE § 790.04 (West 1972).

25. *Id.*

26. *Id.* § 790.03 (West Supp. 1989). Unfair methods of competition and unfair and deceptive acts or practices in the business of insurance are:

> (a) Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.
>
> (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 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.
>
> (c) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.
>
> (d) Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public any false statement of financial condition of an insurer with the intent to deceive . . . .

Id.

27. *Id.* § 790.05 (West 1972). Section 790.05 provides for a hearing when the commissioner has reason to believe any person is engaged in an unfair method of competition or any unfair or deceptive act or practice. *Id.* The hearing is held not less than thirty days after service of notice by the commissioner. *Id.* If the commissioner finds any of the charges as justified then

the provisions of the Unfair Practices Act do not absolve an insurer from civil liability or criminal penalty under the laws of the state arising out of the methods, acts, or practices found unfair or deceptive.[28]

B. Case Law Interpretation of the Unfair Practices Act.

Prior to *Royal Globe*, California appellate courts interpreted section 790.03(h) as providing a cause of action by third party claimants against insurers committing unfair acts or practices.[29] These appellate decisions served as the basis for *Royal Globe* which held that the Unfair Practices Act affords both a private cause of action and a third party claim against the insurer.[30] *Moradi-Shalal* overruled these cases along with *Royal Globe*.[31]

The appellate courts previously held that section 790.09 contemplates a private action to impose civil liability.[32] For example, *Green-*

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section 790.05 states in part, "If . . . justified the commissioner shall issue and cause to be served upon such person an order requiring such person to cease and desist from engaging in such methods, acts, or practices as have been found to be unfair or deceptive." *Id.* A hearing under section 790.07 is available when the commissioner has reason to believe that any person violated a cease and desist order pursuant to section 790.05, or a court order pursuant to section 790.06. *Id.* After the hearing, if the violation was found to have occurred, the commissioner has the power to fine the party. *Id.* The fine is not to exceed $5,000 unless the act was willfully done, then the fine is not to exceed $55,000. *Id.* For any subsequent violations the commissioner may, after a hearing, suspend or revoke the license of certificate of that person not to exceed one year. *Id.* § 790.07 (West Supp. 1989).

28. *Id.* § 790.09 (West 1972).

> No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal acts or practices found unfair or deceptive.

Id.

29. Greenberg v. Equitable Life Assurance Society, 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973) (section 790.03 does give private parties the ability to successfully bring a cause of action); Shernoff v. Superior Court, 44 Cal. App. 3d 406, 118 Cal. Rptr. 680 (1975) (a private claimant does not have to exhaust all administrative avenues with the insurance commissioner before bringing an action based on a violation under section 790.03(h)); Homestead Supplies v. Executive Life Ins. Co., 81 Cal. App. 3d 978, 992, 147 Cal. Rptr. 22 (1978) (a later case affirming the reasoning of both *Greenberg* and *Shernoff*). "These well-reasoned authorities make it clear, therefore, that private litigants may rely upon the proscriptions set forth in the act as a basis for the imposition of civil liability upon the insurer." *Royal Globe*, 23 Cal. 3d at 886, 592 P.2d at 333, 153 Cal. Rptr. at 846.

30. *Royal Globe*, 23 Cal. 3d at 888-89, 592 P.2d at 334-35, 153 Cal. Rptr. 847-48.

31. *Moradi-Shalal*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

32. *Greenberg*, 34 Cal. App. 3d 994, 110 Cal. Rptr. 470. *See infra* notes 32-41 and accompanying text (discussing *Greenberg*).

berg v. Equitable Life Assurance Society[33] held that a private party claimant can bring an action under the Unfair Practices Act irrespective of any action by the government against the insurer.[34] *Greenberg* was a class action filed against the insurance company for offering and promoting home loans secured by deeds of trust on the condition that the borrower purchase life insurance from the defendant and assign the policy as further security for the indebtedness.[35] In *Greenberg*, the insurer, Equitable Life, argued that section 790.03 enforcement was vested exclusively in the insurance commissioner.[36] The court responded by stating section 790.09 gives the insured the power to enforce the Unfair Practices Act by an appropriate civil action regardless of any action taken by the insurance commissioner.[37]

The *Greenberg* court held that the sole disciplinary authority of the insurance commissioner in this case was either to issue a cease and desist order or to obtain an injunction to restrain the illegal conduct.[38] Greenberg, an insured suing on behalf of a class, sought

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33. *Greenberg*, 34 Cal. App. 3d 994, 110 Cal. Rptr. 470 (1973).

34. *Id.* at 1001, 110 Cal. Rptr. at 475.

35. *Id.* at 996, 110 Cal. Rptr. at 472. Section 790.03(c) must be construed in light of statutes prohibiting activities in restraint of trade in business other than insurance. *Id.* at 998-99, 110 Cal. Rptr. at 473. *See also* Chicago Title Ins. Co. v. Great W. Fin. Corp., 69 Cal. 2d 305, 444 P.2d 481, 70 Cal. Rptr. 849 (1968) (the California statute is similar to the Clayton Act, 15 U.S.C. § 12 (1914), and goes beyond the common law and the Sherman Act, 15 U.S.C. § 1 (1890), to inhibit the trade restraints at their inception, the Cartwright Act, CAL. BUS. & PROF. CODE § 16700 (West 1941) and common law are expressly superseded and contravened by specific provisions in the California Insurance Code). At issue in *Greenberg* was whether the actions by the insurer equaled coercion. *Greenberg*, 34 Cal. App. 3d at 999, 110 Cal. Rptr. at 474. In *Greenberg*, the court found coercion prohibited by subdivision (c) as "coercion in the antitrust sense, conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it." *Id. See also* Atlantic Ref. Co. v. FTC, 381 U.S. 357, 368-69 (1965) (tire manufacurers and gas distributors agreed to promote tires, batteries, and accessories by reduction of gas prices in exchange for commissions on sales made by such retailers, was an unfair method of competition); Simpson v. Union Oil Co., 377 U.S. 13, 17 (1964) (a private antitrust case holding a supplier cannot use coercion on retail outlets to achieve resale price maintenance); United States v. National Retail Lumber Dealers Ass'n, 40 F. Supp. 448, 455 (D.C. Colo.) (1941) (under the Sherman Antitrust Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se).

36. *Greenberg*, 34 Cal. App. 3d at 996, 110 Cal. Rptr. at 472. *See infra* notes 221-229 and accompanying text (Justice Mosk in the *Moradi-Shalal* dissent discussing *Greenberg* as precedent for *Royal Globe* finding a private cause of action within the Unfair Practices Act).

37. *Greenberg*, 34 Cal. App. 3d at 996, 110 Cal. Rptr. at 472. In a footnote the court said any other construction of section 790.09 would overturn by implication the rule of Crisci v. Security Insurance Company, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). *Greenberg*, 34 Cal. App. 3d at 1001 n.5, 110 Cal. Rptr. at 475 n.5. *See infra* notes 83-95 and accompanying text (discussion of *Crisci*).

38. *Greenberg*, 34 Cal. App. 3d at 1001, 110 Cal. Rptr. at 475.

damages for the coercive actions of Equitable Life.[39] The court noted that the Unfair Practices Act at section 790.09 specifically provides the insurance commissioner cannot relieve or absolve the insurer from a claim for damages.[40] The court therefore held that an insured did not have to exhaust all administrative remedies before bringing a civil action against an insurer.[41]

Similarly, *Shernoff v. Superior Court*[42] supports the result in *Greenberg* but like *Greenberg* was overruled by *Moradi-Shalal*.[43] *Shernoff* was a class action by the insureds against a title insurer for damages incurred by a conspiracy to fix title insurance rates.[44] The insurer, The Title Insurance and Trust Company, asserted that the insured plaintiffs had not exhausted all administrative remedies before the commissioner before bringing the civil action, and therefore argued that a demurrer should be granted.[45] The superior court held that the insurance commissioner should be given first opportunity to act on the rate fixing allegations.[46]

As in *Greenberg*, the *Shernoff* court agreed that exhaustion of administrative remedies was not required under the language of the Unfair Practices Act.[47] The *Shernoff* court found the Unfair Practices Act, in section 790.09, to reserve expressly to litigants all civil and criminal remedies against persons who have violated the law.[48] The court found section 790.04[49] and section 790.05[50] as keeping within

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39. *Id.* at 994, 110 Cal. Rptr. at 472.

40. *Id.* at 1001, 110 Cal. Rptr. at 475. *See* CAL. INS. CODE § 790.09 (West 1972).

41. *Greenberg*, 34 Cal. App. 3d at 1101, 110 Cal. Rptr. at 475. "At most, the potential administrative remedy before the insurance commissioner bears upon us the propriety of the class action aspect of appellant's cause. That issue is not before us." *Id.* at 1001 n.6, 110 Cal. Rptr. at 475 n.6.

42. 44 Cal. App. 3d 406, 118 Cal. Rptr. 680 (1975).

43. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 250 Cal. Rptr. at 116. *See Shernoff*, 44 Cal. App. 3d at 409-10, 118 Cal. Rptr. at 681-82. The *Shernoff* court agreed with the finding of *Greenberg* and quoted from the decision at length concerning the discussion of section 790.09. *Id.* at 410, 118 Cal. Rptr. at 682.

44. *Shernoff*, 44 Cal. App. 3d at 408, 118 Cal. Rptr. at 681.

45. *Id.*

46. *Id.*

47. *Id.* at 410, 118 Cal. Rptr. at 682.

48. *Id.* at 409, 118 Cal. Rptr. at 681. *See* CAL. INS. CODE § 790.09 (West 1972). "No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any . . . civil liability . . . under the laws of this State arising out of the methods, acts or practices found unfair or deceptive." *Shernoff*, 44 Cal. App. 3d at 409, 118 Cal. Rptr. at 682.

49. CAL. INS. CODE § 790.04 (West 1972). *See supra* notes 23-25 and accompanying text (discussing section 790.04).

50. CAL. INS. CODE § 790.05 (West 1972). *See supra* note 27 and accompanying text (discussing section 790.05).

the courts, not the insurance commissioner, the power to award money judgments.[51] Since the insured plaintiffs here sought damages for past illegal conduct, no reason existed for allowing only the insurance commissioner to enforce the Unfair Practices Act against the insurer.[52] The court held that the commissioner had disciplinary authority limited to restraint of future illegal conduct, and that the commissioner possessed no authority to enter money judgments against the insurer for past injuries to an insured.[53]

The California Supreme Court in *Royal Globe* agreed with the *Greenberg* and *Shernoff* decisions and upheld the filing of a civil suit against the insurer under the Unfair Practices Act.[54] The *Royal Globe* court differentiated between the NAIC Model Act, on which the California act was based, and section 790.03 as adopted by California.[55] The Model Act states that a person shall not be absolved of liability under any "other" state laws.[56] The California act in section 790.09 eliminates the word "other" and provides that an insurer shall not be absolved from civil liability "under the laws of the state" arising out of the unfair acts of the insurer.[57] The *Royal Globe* court found this omission of the word "other" as affirmative authority for the filing of a civil suit based on alleged violations of the act.[58] The court found the intentional omission of "other" significant as implying that the California legislature intended to endorse civil actions based on the Unfair Practices Act.[59]

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51. *Shernoff*, 44 Cal. App. 3d at 409, 118 Cal. Rptr. at 682.

52. *Id.*

53. *Id.* at 410, 118 Cal. Rptr. at 682. *See* Homestead Supplies v. Executive Life Ins. Co., 81 Cal. App. 3d 978, 992, 147 Cal. Rptr. 22, 30 (1978) (reiterating the basic principles of the holdings of *Greenberg* and *Shernoff* that the doctrine of promissory estoppel kept the insurer from claiming no consideration for the modification to the insurance contract).

54. *Royal Globe*, 23 Cal. 3d at 886, 592 P.2d at 333, 153 Cal. Rptr. at 846.

55. *Id.*

56. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance*, 2 NAIC Proceedings 392 (1947). *See Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d at 886, 592 P.2d at 333, 153 Cal. Rptr. at 846 (1979). *See supra* notes 14-68 and accompanying text (discussing the NAIC Model Act and the development of the California Unfair Practices Act).

57. *Compare* CAL. INS. CODE § 790.09 (West 1972) *with* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance* (1980). *See Royal Globe*, 23 Cal. 3d at 886-87, 592 P.2d at 333, 153 Cal. Rptr. at 846. The *Royal Globe* court found this shows the intent to include a civil cause of action under section 790.03(h) of the act. *Id.*

58. *Royal Globe*, 23 Cal. 3d at 885, 592 P.2d at 333, 153 Cal. Rptr. at 846.

59. *Id.* at 886, 592 P.2d at 333, 153 Cal. Rptr. at 846.

The plaintiff in *Royal Globe*, a third party claimant, was allowed to bring suit under section 790.03(h) of the Unfair Practices Act.[60] However, Royal Globe Insurance Company, the insurer, argued that *Greenberg* was distinguishable because the complaint in *Greenberg* was based on "tie-in sales"[61] coercion by the insurer, an illegal practice even without the provisions in section 790.03.[62] The *Royal Globe* court affirmed *Greenberg*, however, expressly recognizing that only the Unfair Practices Act prohibits anticompetitive activity by an insurer, and a private party can rely upon section 790.03(h) in bringing a private suit for civil damages.[63] The language of section 790.03(h) is ambiguous and has been interpreted in different ways. Under section 790.03(h) the insurance company must have knowingly committed, or performed with such frequency as to indicate a general business practice, the numerous practices listed in section 790.03.[64] In *Royal Globe*, the majority interpreted section 790.03(h) as requiring the claimant to show either that the insurance company knew of the unfair practices or that the actions taken were the common business practice of the company.[65] However, in *Moradi-Shalal*, the

60. *Id.* at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.

61. "Tie-in" sales or a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition the buyer also purchases a different (or tied) product. *Greenberg*, 34 Cal. App. 3d at 997, 110 Cal. Rptr. at 472-473. The complaint in *Greenberg* alleged that the insurer offered otherwise secured loans to home owners only on restrictive conditions. *Id.* The insured plaintiff charged the insurer required the borrower to purchase high cost cash value adjustable whole life insurance from the insurer. *Greenberg*, 34 Cal. App 3d at 996, 110 Cal. Rptr. at 472. Along with this purchase the insured was required to borrow the entire amount available on any existing policies of life insurance issued to him by other insurers to assist in paying for insurance issued by the insurer defendant. *Id.* The pleading further alleged the insurance company promoted and offered the home loans on the condition that after purchasing the life insurance, in the amount of the home loan, the insured plaintiff assign it over to the insurer. *Id.* The pleading also stated the insured plaintiffs could have secured insurance from other insurance companies at a cost less than the policy the insured sold as a condition of the home loan. *Id.* at 997, 110 Cal. Rptr. at 472-473. Tie-in agreements are inherently coercive; underlying the illegality of such agreements is the assumption that, " . . . such arrangements coerce the buyer into taking a product he doesn't want . . . ' and that ' . . . buyers are forced to forego their free choice between competing products." *Greenberg*, 34 Cal. App. 3d at 997, 110 Cal. Rptr. at 472-473.

62. *Royal Globe*, 23 Cal. 3d at 886-87, 592 P.2d at 333, 153 Cal. Rptr. at 846. *See Greenberg*, 34 Cal. App. 3d at 994, 110 Cal. Rptr. at 470 (discussing coercive tie-in sales).

63. *Royal Globe*, 23 Cal. 3d at 885-86, 592 P.2d at 333, 153 Cal. Rptr. at 846. The court in *Greenberg* determined that the Cartwright Act (Business & Professional Code section 16700) antitrust provisions did not apply to insurance companies and therefore only section 790.03 prohibits insurers from engaging in anticompetitive activity. *Greenberg*, 34 Cal. App. 3d at 999 n.2, 110 Cal. Rptr. at 474 n.2.

64. CAL. INS. CODE § 790.03(h) (West Supp. 1989).

65. *Royal Globe*, 23 Cal. 3d at 890, 592 P.2d 336, 153 Cal. Rptr. at 849. Royal Globe Insurance argued a third party claimant could not base an action against the insurer upon a single instance of unfair conduct. *Id.* at 891, 592 P.2d at 336, 153 Cal. Rptr. at 849. Royal

court interpreted this language more narrowly in stating that a claimant would have a hard time proving a frequency of unfair practices by the insurer. The *Moradi-Shalal* court further stated that no other state has agreed with *Royal Globe* in holding a showing of one unfair practice was a sufficient basis for an action against the insurance company under the Unfair Practices Act.[66] According to the *Moradi-Shalal* court, a claimant would have a hard time proving a general business practice and showing one unfair act is not sufficient, therefore, section 790.03 was intended as a source of power for the insurance commissioner alone.[67]

C. *Common Law Based Actions Prior to Royal Globe*

In addition to the interpretations of the Unfair Practices Act, a separate body of law has established a basis for nonstatutory civil actions against an insurer for acting in bad faith. In 1958, the California Supreme Court in *Comunale v. Traders & General Insurance Company*[68] held that a breach by the insurer of an express obligation to defend the insured did not release the insurer from the implied duty to consider the interest of the insured in the settlement.[69] In *Comunale*, the insurer wrongfully refused to defend the insured and refused a reasonable settlement within the policy limits.[70] The

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Globe argued that improper conduct was actionable only if committed with such frequency as to indicate a general business practice. *Id.* The court rejected this argument and held the claimant could show either knowledge or frequency of improper conduct to establish liability. *Id.*

66. *Moradi-Shalal*, 46 Cal. 3d at 303, 758 P.2d at 67, 250 Cal. Rptr. at 126.

67. *Id.*

68. 50 Cal. 2d 654, 328 P.2d 198 (1958). *Comunale* was an action by pedestrians who were walking across a street and were struck by the insured driver. *Comunale*, 50 Cal. 2d at 656, 328 P.2d at 200. The Comunales sued the insurer, Traders & General Insurance Company, to recover the portion of their judgment against the driver not paid by the insured. *Id.* Traders was obligated to defend any personal injury suit covered by the policy, but was given the right to make such settlement as the insurer might deem expedient. *Id.* The Comunales sued the truck driver and Traders refused to represent him. *Id.* The Comunales also offered to settle for $4000 and Traders again refused. *Id.* The truck driver insisted Traders assume the defense and settlement of the case. *Id.* Traders refused and the trial court entered judgment for Mr. Comunale for $25,000 and Mrs. Comunale for $1,250. *Id.* The insured did not pay the judgment, and the Comunales sued Traders under a provision in the insured's policy that permitted an injured party to maintain an action after obtaining judgment against the insured. *Id.* at 657, 328 P.2d at 200.

69. *Id.* at 660, 328 P.2d at 202 (where there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, liability of the insurer is usually limited to the amount of the policy plus attorney's fees and costs but, such a rule does not apply where the insurer wrongfully refuses to accept a reasonable settlement within the policy limits).

70. *Id.*

Comunales, third party plaintiffs, obtained an assignment of all of the insured's rights against the insurer Traders and then commenced an action to recover from Traders the excess of the judgment against the insured.[71] The insurer was held liable for the entire judgment rendered against the insured even though it exceeded the policy limits.[72]

In reaching the result of liability against Traders, the insurer, the court first stated that an implied covenant of good faith and fair dealing exists in all contracts.[73] The court further held that the implied covenant of good faith and fair dealing applies to insurance policies.[74] The *Comunale* court held that the implied covenant of good faith and fair dealing requires the insurer to settle, in an appropriate case, although express terms of the policy do not impose a duty to settle.[75] In reaching this holding, the court reaffirmed *Brown v. Superior Court*,[76] which held every contract has an implied covenant of good faith and fair dealing that neither party will do anything that injures the right of the other to receive the benefits of the contract.[77] If found liable for a tort based on the bad faith refusal to settle, the insurer can be liable for amounts in excess of the insurance policy limits; otherwise the insurer is liable only to the policy limit.[78]

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71. *Id.* at 658, 328 P.2d at 200.

72. *Id.* The court defined situations in which the insurer may be found liable for the whole amount of a settlement regardless of the policy limit. *Id.* First, when the insurer defends the insured and is guilty of bad faith in refusing a settlement. *Id.* Second, when an insurer denies coverage even though its position may not have been entirely groundless, if the denial is found wrongful then the insurer is liable for the full amount which will compensate insured for all detriment caused by insurer's breach of the express and implied obligations under the contract. *Id.* Third, when there is no opportunity to compromise the claim and the only wrongful act of the insurer is refusal to defend, liability is usually limited to the policy amount plus attorney's fees and cost, unless the insurer wrongfully refuses to accept a reasonable settlement offer. *Id.* at 654, 328 P.2d at 198.

73. *Comunale*, 50 Cal. 2d at 657, 328 P.2d at 200 (quoting, Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878 (1949)) (*Brown* held there was an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other party to receive the benefits of the agreement).

74. *Id.* at 658, 328 P.2d at 200. *See* Hilker v. W. Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930). The *Hilker* court pointed out the rights of the insured, "go deeper than the mere surface of the contract written for him by the defendent" and that implied obligations are imposed "based upon those principles of fair dealing which enter into every contract." *Comunale*, 50 Cal 2d at 659, 328 P.2d at 201 (quoting Hilker v. W. Auto. Ins. Co., 204 Wis. at 2, 231 N.W. at 258 (1930)).

75. *Comunale*, 50 Cal. 2d at 659, 328 P.2d at 201.

76. 34 Cal. 2d 559, 212 P.2d 878 (1949).

77. *Comunale*, 50 Cal. 2d at 659, 328 P.2d at 201. *See Brown*, 34 Cal. 2d at 564, 212 P.2d at 881.

78. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 428, 426 P.2d 173, 175-76, 58 Cal. Rptr. 13, 15-16 (1967). *See* Comment, *supra* note 5, at 1164.

In *Comunale*, the third party plaintiffs brought the action against the insurer by an assignment of the insured's rights under his insurance policy.[79] The *Comunale* court held that an insured can assign the rights under the policy regardless of any provision in the policy requiring the insurer's approval.[80] The court in *Comunale* also stated that an action for damages in excess of the policy limits based on an insurer's wrongful failure to settle is assignable whether the action is considered as sounding in tort or in contract.[81]

The proposition in *Comunale* that the implied covenant would require an insurer to settle in an appropriate case[82] was affirmed in *Crisci v. Security Insurance Company*.[83] *Crisci*, unlike *Comunale*, was not a suit based on an assignment. The insured plaintiff, Crisci, sought a recovery from the insurer, Security Insurance, on a judgment obtained against her when Security Insurance failed to settle before the suit.[84] Crisci claimed Security Insurance breached the implied covenant of good faith and fair dealing by refusing to settle for $9000., since her policy limit was $10,000.[85] The judgment against Crisci was $101,000.[86] Crisci argued that in wrongfully refusing to settle for less than the policy limit, Security Insurance breached the

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79. *Comunale*, 50 Cal. 2d at 659, 661, 328 P.2d at 200, 202.

80. *Comunale*, 50 Cal. 2d at 660, 328 P.2d at 202. The court found it was well—settled that such a provision does not preclude the transfer of a cause of action for damages for a breach of contract. *Id. See* Trubowitch v. Riverbank Canning Co., 30 Cal. 2d 335, 339-340, 182 P.2d 182 (1947) (holding that a provision requiring approval by the insurer of any assignment does not preclude the transfer of a cause of action for damages for breach of contract). This rule has been applied to provisions against assignability in insurance policies similar to the provision involved in the *Comunale* case. *Id.*

81. *Comunale*, 50 Cal. 2d at 660-61, 328 P.2d at 202. The court stated the rule that although a wrongful refusal to settle has generally been treated as a tort, where a case sounds both in contract and in tort the plaintiff will ordinarily have freedom of election between an action in tort and one of contract. *Id.* at 662, 328 P.2d at 203. *See* Brown v. Guar. Ins. Co., 155 Cal. App. 2d 679, 693-95 (1958). In deciding whether the refusal by an insurer to settle a claim within the policy limits against the insured constitutes a breach of duty by the insurer to exercise good faith, factors which should be considered are: strength of claimant's case, attempts by insurer to induce the insured to contribute to the settlement, failure of the insurer to properly investigate the claim, a rejection of advice by the insurer of the attorney for the insurer, failure of the insurer to inform the insured of a compromise offer, amount of financial risk to which each party is exposed in event of refusal to settle, fault of the insured in inducing the insurer to reject the compromise offer by giving misleading facts, and any other factors which tend to negate or establish bad faith on the part of the insurer. *Id.*

82. *Comunale*, 50 Cal. 2d at 660, 328 P.2d at 201.

83. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). *Crisci* was an action by the insured, against whom a judgment for $101,000 had been entered, against the insurer for refusing to settle for $9,000 on a $10,000 policy. The suit was based on a breach of the implied covenant of good faith and fair dealing. *Id.*

84. *Id.* at 427-28, 426 P.2d at 175, 58 Cal. Rptr. at 15.

85. *Id.* at 428-29, 426 P.2d at 175, 58 Cal. Rptr. at 15-16.

86. *Id.*

implied covenant of good faith and fair dealing and therefore was liable for the entire $101,000 judgment even though the judgment far exceeded her $10,000 policy limit.[87]

In *Crisci*, the California Supreme Court held that the insurer had a duty to the insured to accept reasonable settlements.[88] The *Crisci* court holding was based on the duty of the insurer to consider the interest of the insured in settlement offers,[89] a duty inherent in the implied covenant of good faith and fair dealing.[90] The court stated that whether the insurer had given adequate consideration to the interests of the insured, in reference to settlement offers, was tested by asking whether in the same situation a prudent insurer without policy limits would accept the offer.[91] The liability against Security

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87. *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16. The court stated that although *Comunale* was mainly concerned with the contract aspect of the action, *Comunale* was correct in stating that an action which sounds in both tort and contract was ordinarily at the plaintiff's discretion to bring a suit in tort or contract. *Id.* at 432 n.3, 426 P.2d at 178 n.3, 58 Cal. Rptr. at 18 n.3 (the court also stated that although this rule was applied in *Comunale* to a statute of limitations, the rule also was applicable in determining liability).

88. *Id.* at 430-31, 426 P.2d at 176, 58 Cal. Rptr. at 17.

89. *Id.*

90. *Id.* at 430-31, 426 P.2d at 176-77, 58 Cal. Rptr. at 17. *See Royal Globe*, 23 Cal. 3d at 899, 592 P.2d at 341, 153 Cal. Rptr. at 854. "It thus becomes clear that *Greenberg* assumed that it was necessary to construe section 790.03 as 'contemplating' a private action in order to preserve the *Crisci* rule". *Id.* at 898, 592 P.2d at 341, 153 Cal. Rptr. at 854.

91. *Crisci*, 66 Cal. 2d at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16. *See* Kinder v. Western Pioneer Ins. Co., 231 Cal. App. 2d 894, 900, 42 Cal. Rptr. 394 (1965) (when a claim is made against an insured for damages resulting from an automobile accident, the automobile liability insurer must give at least as much consideration to the interest of the insured as the insurer gives to its own interest in attempting to settle the claim against the insured); Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 798, 41 Cal. Rptr. 401 (1964) (without regard to a policy limit on liability, an insurer may be liable for the entire amount of a judgment against the insured if the insurer has been guilty of bad faith in refusing an offer of settlement within the policy limits); Martin v. Hartford Accident & Indemnity Co., 228 Cal. App. 2d 178, 183, 39 Cal. Rptr. 342 (1964) (where the insurer engaged in compromise negotiations for the claim against the insured and the injured party offered to settle for limits of the policy, the insurer was under a duty to exercise good faith in considering the interest of the insured in the settlement); Davy v. Public Nat. Ins. Co., 181 Cal. App. 2d 387, 400, 5 Cal. Rptr. 488 (1960) (policy of public liability insurance by which the insurer is required to defend an action on a claim covered by the insurance policy, and is authorized to compromise such within the policy limits, imposes upon the insurer the obligation to exercise good faith in considering an offer of compromise within those limits; such an obligation is implied in every such contract); *See also*, Hodges v. Standard Accident Ins. Co., 198 Cal. App. 2d 564, 579, 18 Cal. Rptr. 17 (1962) (failure to communicate offers of settlement, standing alone without other elements of bad faith or conflict of interests, does not justify finding of bad faith and imposition of liability on the insurer for judgment in excess of the policy limits). The *Crisci* court said this proposed rule was a simple one to apply and would avoid the burdens of a determination whether a settlement offer within the policy limits was reasonable. *Crisci*, 66 Cal. 2d at 431, 426 P.2d at 177, 58 Cal. Rptr. at 17. The rule would eliminate the danger that an insurer, faced with a settlement offer at or near the policy limits, would reject it and "gamble with the insured's money" to further its own interests. *Id.* The court also found elementary justice in the rule which would require that, in the situation where the insured's and insurer's interests

Insurance for breach of the implied covenant of good faith and fair dealing was imposed not for a bad faith breach on the policy, but rather for failure of the duty to accept the reasonable settlement.[92] The court held that the duty is to accept reasonable offers, not just to avoid acting in bad faith.[93] The court also stated that although several prior cases contained language to the effect that bad faith is the equivalent of dishonesty, fraud, and concealment, the absence of any evidence of these is not fatal to a cause of action.[94]

The duty from *Crisci* of an insurer to accept reasonable settlements was clarified in *Murphy v. Allstate Insurance Company*.[95] The California Supreme Court in *Murphy* held that the insurer's duty to settle runs to the insured, not to a third party claimant.[96] Therefore, the third party claimant can bring suit only on the insurance contract if there is an assignment from the insured to the third party.[97] The court, citing *Comunale*, said that the insured may assign the cause of action for breach of the duty to settle without consent of the insurance carrier, even when the policy provisions require approval by the insurer of the assignment.[98]

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conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision. *Id.*

92. *Crisci*, 66 Cal. 2d at 432, 426 P.2d at 177, 58 Cal. Rptr. at 17. The court said *Crisci* was entitled to recover $25,000 from the insurer for mental suffering. *Id.* Crisci had arranged settlement with a judgment creditor whereby latter received $22,000, a 40% interest in insured's claim to a particular piece of property and an assignment of insured's cause of action against insurer. *Id.* Crisci, an immigrant widow of seventy, became indigent, then worked as a babysitter while her rent was paid by her grandchildren. *Id.* She also had declining health and hysteria and attempted suicide. *Crisci*, at 427-428, 426 P.2d at 175, 58 Cal. Rptr. at 15.

93. *Id*, at 432-33, 426 P.2d at 178, 58 Cal. Rptr. at 18.

94. *Id.*

95. 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976).

96. *Id.* at 944, 553 P.2d at 588, 132 Cal. Rptr. at 428.

> "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him." (citations omitted)
> "As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler. Permitting a third party to enforce a covenant made solely to benefit others would lead to the anomaly of granting him a bonus after his receiving all intended benefits. Because, as we have seen, the duty to settle is intended to benefit the insured and not the injured claimant, third party beneficiary doctrine does not furnish a basis for the latter to recover."

Id.

97. *Id.*

98. *Id.* at 942, 553 P.2d at 587, 132 Cal. Rptr. at 427. *See also* Shapero v. Allstate Ins. Co., 14 Cal. App. 3d 433, 92 Cal. Rptr. 244 (1971) (where interests of the insured and the insurer are in conflict, and the insurer breaches the duty to consider in good faith the interest of the insured in settling the claim, damages to the insured may be measured by the entire amount of the excess liability). *See supra* notes 80-81 and accompanying text (discussing

Murphy established the rule that the duty of the insurer to settle a bona fide claim runs to the insured, not an injured third party.[99] Under *Murphy*, the insured could sue the insurer for breach of the implied covenant of good faith and fair dealing if the insurer had wrongfully refused to settle and a judgment exceeding the policy limits was rendered.[100] Following *Murphy*, the injured party can sue the insured or can obtain an assignment of the insured's cause of action.[101] Then, the third party can proceed directly against the insurance company.[102] When the injured third party receives an assignment from the insured, the insured usually receives in return a covenant from the third party not to execute further actions against the insured.[103]

In *Royal Globe*, the court took a much broader view of the right of a third party claimant to bring an action against the insurer.[104] The *Royal Globe* court holding extended beyond the holding of *Crisci* and without much analysis or explanation implicitly overruled *Murphy*.[105] The *Royal Globe* court held that a third party claimant can bring a cause of action against an insurer for violation of the Unfair Practices Act.[106] The court held that the third party plaintiff could bring suit against the insurer for violation of section 790.03(h)(5) and (14) because these subdivisions create a duty the insurer owes directly to the plaintiff as a claimant.[107] The *Royal Globe* court distinguished *Murphy*, stating that the *Murphy* requirement of assignment before a suit by a third party claimant was based on contractual principles.[108] In *Royal Globe*, the third party claimant did not base her suit on the insurance policy between the insured and the insurer; instead she brought suit against the insurer based on a violation of section 790.03(h).[109] The court held that since the suit was not based on a breach of contract to the insured, as in

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Comunale and the ability to assign regardless of a clause in the insurance policy requiring approval by the insurer).

99. *Murphy*, 17 Cal. 3d at 942, 553 P.2d at 588, 132 Cal. Rptr. at 427.
100. *See* Comment, *supra* note 5, at 1166-68 (discussing the impact of *Murphy*).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Royal Globe*, 23 Cal. 3d at 884., 592 P.2d at 332, 153 Cal. Rptr. at 845.
105. *Id.* at 884-85, 592 P.2d at 332, 153 Cal. Rptr. at 845.
106. *Id.* at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.
107. *Id.* at 889-90, 592 P.2d at 335, 153 Cal. Rptr. at 848. *See supra* notes 12-68 and accompanying text (discussing section 790.03 of the insurance code).
108. *Royal Globe*, 23 Cal. 3d at 889, 592 P.2d at 335, 153 Cal. Rptr. at 848.
109. *Id.* at 889-90, 592 P.2d at 335, 153 Cal. Rptr. at 848.

Murphy, no assignment from the insured to the third party claimant was necessary as a precedent to the claimant's bringing suit against the insurer.[110]

II. The Case

Nine years after *Royal Globe*, the California Supreme Court overruled *Royal Globe* in *Parvaneh Moradi-Shalal v. Fireman's Fund Insurance Companies*.[111] In *Moradi-Shalal*, the court held that section 790.03(h) does not give a private cause of action to insured or third party claimants against an insurer for violations by the insurer of the Unfair Practices Act.[112] The *Moradi-Shalal* court directly rejected the reasoning of *Royal Globe* that section 790.03(h) imposed a duty on the insurer directly to the third party claimant.[113] The court in *Moradi-Shalal* also pointed out that *Royal Globe* was contrary to the unanimous decision of the same court in *Murphy* that the insurer has a duty to settle which runs to the insured, not to the injured third party.[114]

A. The Facts

In July 1983, plaintiff, Parvaneh Moradi-Shalal, was injured in an automobile accident when a vehicle driven negligently by the insured struck her vehicle.[115] In 1984, after requesting a settlement from the insurer of the driver, Fireman's Fund, and receiving no acknowledgement of her request, Moradi-Shalal again wrote Fireman's Fund requesting settlement of her damages and giving notification that she was reserving her right of action under *Royal Globe*.[116] Moradi-Shalal sued the insured driver.[117] Five months later, Moradi-Shalal settled

110. *Id.*
111. 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).
112. *Id.* The court stated the clear intent of the insurance code was to give to the insurance commissioner sole power of enforcement against the insurance companies which violate the insurance code. *Id.* at 303-04, 758 P.2d at 67, 250 Cal. Rptr. at 126.
113. *Moradi-Shalal*, 46 Cal. 3d at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126. *See supra* notes generally 55-68 and accompanying text (discussing *Royal Globe*).
114. *Moradi-Shalal*, 46 Cal. 3d at 295, 758 P.2d at 61, 250 Cal. Rptr. at 120. *See supra* notes 96-109 and accompanying text (discussing *Murphy*).
115. *Moradi-Shalal*, 46 Cal. 3d at 293, 758 P.2d at 60, 250 Cal. Rptr. at 118-19.
116. *Id.*
117. *Id.*

with the driver, and the suit was dismissed with prejudice.[118] Afterward, Moradi-Shalal brought an action against Fireman's Fund under *Royal Globe* based on Fireman's Fund's refusal to fairly settle her claim promptly and fairly against the insured.[119]

Moradi-Shalal alleged that the defendant insurer, Fireman's Fund, violated section 790.03(h) subdivisions (2), (3) and (5) of the Unfair Practices Act.[120] Her complaint stated that Fireman's Fund did not acknowledge or act upon her letters, did not promptly investigate or process the claim, and did not make a good faith attempt to make a prompt, fair, and equitable settlement of the claim in which liability was reasonably clear.[121] The trial court sustained Fireman's Fund's general demurrer without leave to amend.[122] The court of appeals reversed.[123]

B. The Decision

The California Supreme Court granted review of *Moradi-Shalal* in an attempt to resolve the widespread confusion in the way the appellate courts were applying *Royal Globe*.[124] However, upon receiving arguments the court was confronted with the more fundamental question of whether *Royal Globe* should be overruled.[125] In *Moradi-Shalal*, the California Supreme Court affirmed the trial court

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118. *Id.*

119. *Id.* Her subsequent complaint against the defendant insurer for violations of section 790.03, subdivisions (h)(2), (3), and (5) alleged numerous bad faith acts by the insurer. *Id. See supra* notes 16-18 (discussing section 790 of the Unfair Practices Act as codified in the Insurance Code).

120. *Moradi-Shalal*, 46 Cal. 3d at 292-93, 758 P.2d at 60, 250 Cal. Rptr. at 118. *See supra* notes 16-18 and accompanying text (discussing section 790.03(h) of the Unfair Practices Act).

121. *Moradi-Shalal*, 46 Cal. 3d at 292-93, 758 P.2d at 60, 250 Cal. Rptr. at 118. Plaintiff alleged in her complaint that defendant "did not acknowledge or act upon [her attorney's] communication, did not promptly investigate or process [the] claim, and did not attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claim, in which liability was reasonably clear." *Id.*

122. *Moradi-Shalal*, 46 Cal. 3d at 293, 758 P.2d at 60-61, 250 Cal. Rptr. at 119. The trial court based the decision to dismiss on the absence of a final judgment in the underlying action which therefore precluded a *Royal Globe* action against Fireman's Fund. *Id. See infra* note 183-199 and accompanying text (discussing the *Moradi-Shalal* requirement of a final "judicial" determination of the insured's liability prior to any action against the insurer).

123. *Moradi-Shalal*, 46 Cal. 3d at 293, 758 P.2d at 60-61, 250 Cal. Rptr. at 119. The court of appeals reversed holding that a settlement with prejudice was a sufficient conclusion of the underlying action to support a subsequent *Royal Globe* action against the insurer. *Id. See infra* note 187 and accompanying text (discussing the final "judicial" determination requirement in *Moradi-Shalal*).

124. *Moradi-Shalal*, 46 Cal. 3d at 292, 758 P.2d at 59, Cal. Rptr. at 118.

125. *Id.*

order sustaining the demurrer by defendant, Fireman's Fund.[126] In affirming the trial court, the California Supreme Court reversed the appeals court and remanded the cause for further proceedings.[127] The majority opinion of *Moradi-Shalal* was written by Justice Lucas and the dissenting opinion was written by Justice Mosk, who also wrote the majority opinion in *Royal Globe*.[128]

The *Moradi-Shalal* decision creates a substantial change in California law that can be analyzed by dividing the holding into three major areas. First, the Unfair Practices Act, as codified in the Insurance Code, did not create any private cause of action in favor of insured or third party claimants.[129] Second, the rule in *Moradi-Shalal* that no private cause of action existed under the Insurance Code, would not be applied retroactively to plaintiffs who had already initiated actions.[130] Third, final judicial determination of the insured's liability is a condition precedent to any action by a third party claimant in order to recover for the insurer's alleged bad faith failure to settle.[131]

1. No Private Cause of Action Under The Unfair Practices Act

The majority of the *Moradi-Shalal* court found the gratuitous creation of a new remedy in *Royal Globe* wholly inconsistent with the precedent established by the California Supreme Court.[132] The

126. *Id.* at 313, 758 P.2d at 75, 250 Cal. Rptr. at 133.
127. *Id.*
128. *Moradi-Shalal*, 46 Cal. 3d at 313, 758 P.2d at 75, Cal. Rptr. at 133. *See generally* Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).
129. *Moradi-Shalal*, 46 Cal. 3d at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126.
130. *Id.* at 305, 758 P.2d at 69, 250 Cal. Rptr. at 127. The court uses the language "unfair practices" instead of *Royal Globe* when discussing the requirements for the cases which were filed under *Royal Globe* prior to *Moradi-Shalal* becoming final. *Id.*
131. *Moradi-Shalal*, 46 Cal. 3d at 306, 758 P.2d at 69, 250 Cal. Rptr. at 127-28. In *Royal Globe*, the court stated a requirement for "prior determination of the insured's liability" before a civil action could be brought against the insurer. *Id.* (citing Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d at 891, 592 P.2d at 336, 153 Cal. Rptr. at 849 (1979)). After *Royal Globe*, the lower courts had difficulty in deciding what was a sufficient prior determination of liability. *Moradi-Shalal*, 46 Cal. 3d at 306, 758 P.2d at 70, 250 Cal. Rptr. at 128. In *Moradi-Shalal*, the court clarified this requirement for the *Royal Globe* cases filed prior to *Moradi-Shalal* becoming final. *Id. Moradi-Shalal* requires a *final judicial determination* of the insured's liability; therefore any other type of settlement beyond a judicial determination will not meet the condition precedent for a *Royal Globe* suit. *Id.* at 308, 758 P.2d at 71, 250 Cal. Rptr. at 129. In *Moradi-Shalal*, the court found the plaintiff did not have a sufficient conclusion of the insured's liability to warrant her action against Fireman's Fund and reversed in favor of Fireman's Fund. *Id.* at 313, 758 P.2d at 75, 250 Cal. Rptr. at 133.
132. *Moradi-Shalal*, 46 Cal. 3d at 296, 758 P.2d at 62, 250 Cal. Rptr. at 120.

court stated that the decision in *Royal Globe* was contrary to the unanimous decision in *Murphy v. Allstate Insurance Company*, which held that the duty of the insurer to settle runs to the insured, not to an injured third party claimant.[133] The majority adopted Justice Richardson's reasoning in his *Royal Globe* dissent where he stated California has consistently held that the duty of the insurer to settle, when liability of the insured is reasonably clear, runs to the insured.[134] The court held that section 790.03(h) did not create an independent duty in the insurer to a third party claimant.[135] The court further held that section 790.03(h) did not create grounds for civil liability based on a violation of the Unfair Practices Act.[136] The majority also found *Royal Globe* inconsistent with a fair and reasoned analysis of the Unfair Practices Act.[137] Again, agreeing with the dissent in *Royal Globe*, the majority in *Moradi-Shalal* stated that if the legislature had intended to create a third party right of action in the Unfair Practices Act, the legislature could have easily and clearly done so.[138]

The majority stated that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices.[139] The majority further explained that stare decisis is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system.[140] The *Moradi-Shalal* court, however, also emphasized the well-established rule that stare decisis is a flexible policy that permits the court to reconsider, and depart from if necessary, prior precedent in an appropriate case.[141] In overruling *Royal Globe*, the court applied this flexibility policy because although stare decisis serves the important functions of certainty, predictability, and sta-

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133. *Id. See* Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976).

134. *Moradi-Shalal*, 46 Cal. 3d at 295, 758 P.2d at 61, 250 Cal. Rptr. at 120. *See* Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d at 892, 592 P.2d at 337, 153 Cal. Rptr. at 850 (1979) (Richardson, J. dissenting).

135. *Moradi-Shalal*, 46 Cal. 3d at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126.

136. *Id. See Royal Globe*, 23 Cal. 3d at 892, 592 P.2d at 337, 153 Cal. Rptr. at 850 (1979) (Richardson, J. dissenting).

137. *Moradi-Shalal*, 46 Cal. 3d at 296, 758 P.2d at 62, 250 Cal. Rptr. at 120. *See Royal Globe*, 23 Cal. 3d at 898, 592 P.2d at 341, 153 Cal. Rptr. at 854 (Richardson, J. dissenting).

138. *Moradi-Shalal*, 46 Cal. 3d at 295, 758 P.2d at 61, 250 Cal. Rptr. at 120.

139. *Id.* at 296, 758 P.2d at 62, 250 Cal. Rptr. at 121.

140. *Id.* " . . . that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." *Id.*

141. *Id.* "But, this policy is a flexible one which permits this court to reconsider, and ultimately depart from, our own prior precedent in an appropriate case." *Id.*

bility in the legal system, court-created error should not be shielded from correction.[142]

Like forty-eight other states, California derived the State Unfair Practices Act from the National Association of Insurance Commissioner's Model Unfair Claims Practices Act.[143] The majority in *Moradi-Shalal* found that the courts of nineteen of those states, not including California, had addressed the issue whether the act created a private action.[144] Seventeen of those nineteen states had refused to recognize a *Royal Globe* action.[145] Further, the court in eight of those states acknowledged but declined to follow *Royal Globe*,[146] while the court in nine other states implicitly rejected the *Royal Globe* holding by interpreting the statutory language differently from *Royal Globe* without mentioning the case.[147] The majority noted that

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142. *Id.* 46 Cal. 3d at 296, 758 P.2d at 62, 250 Cal. Rptr. at 121 (quoting Cianci v. Superior Court, 40 Cal. 3d 903, 924 (1985)).

143. *Moradi-Shalal*, 46 Cal. 3d at 297-98, 758 P.2d at 62-63, 250 Cal. Rptr. at 121-22. *See supra* notes 29-68 and accompanying text (discussing the history and interpretation of the Unfair Practices Act).

144. *Moradi-Shalal*, 46 Cal. 3d at 297, 758 P.2d at 62, 250 Cal. Rptr. at 121.

145. *Id.* 46 Cal. 3d at 297-98, 758 P.2d at 62-63, 250 Cal. Rptr. at 121-22.

146. *Id. See* A & E Supply Co. v. Nationwide Mut. Fire. Ins. Co., 798 F.2d 669, 673-75 (4th Cir. 1986) (Virginia Unfair Insurance Practices Act does not create a private cause of action in tort); White v. Unigard Mut. Ins. Co., 112 Idaho 94, 96, 730 P.2d 1014, 1020-21 (1986) (there is a common law duty on part of insurers to their insureds to settle first-party claims in good faith and breach of that duty will give rise to action in tort, but the Idaho Unfair Claims Settlement Practices Act does not give rise to private right of action whereby insured can sue the insurer for statutory violations in settling claims); Scroggins v. Allstate Ins. Co., 74 Ill. App. 3d 1027, 1029, 393 N.E.2d 718, 723-25 (1979) (no right of private action given in the Unfair Practices Act); Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 40-43 (Iowa 1982) (the statute, I.C.A. § 507B.4(9)(f), defining unfair methods of competition and unfair or deceptive acts or practices in the business of insurance does not create a cause of action for damages in individuals entitled to insurance proceeds when an insurance carrier has violated that statute); Earth Scientists v. United States Fidelity & Guar., 619 F. Supp. 1465, 1470-71 (1985) (Kansas Uniform Trade Practices Act does not provide a private cause of action in favor of an insured for a violation by the insurer of the Act); Tweet v. Webster, 610 F. Supp. 104, 105 (1985) (Nevada does not recognize existence of any statutory duty running from the insurer to the insured requiring the insurer to negotiate settlements in good faith); Patterson v. Globe American Cas. Co., 101 N.M. 541, 541-42, 685 P.2d 396, 397-98 (1984) (no private cause of action against an insurer by an insured under the Unfair Insurance Practices Act); *Moradi-Shalal*, 46 Cal. 3d at 297 n.4, 758 P.2d at 62 n.4, 250 Cal. Rptr. 121 n.4.

147. *Moradi-Shalal*, 46 Cal. 3d at 297-98, 758 P.2d at 62-63, 250 Cal. Rptr. at 121-22. *See* Young v. Michigan Mut. Ins. Co., 362 N.W.2d 844, 846-47 (Mich. 1984) (insured had no private cause of action in tort for violation of the provisions of the Uniform Trade Practices Act by an insurer); Morris v. American Family Mut. Ins. Co., 386 N.W.2d 233, 234-38 (Minn. 1986) (private party does not have a cause of action against an insurer for a violation by an insurer of the Unfair Claims Practices Act); Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 581 (N.H. 1978) (financial damages to insured were foreseeable and properly made a basis for a bad faith claim against the insurer; but the suit is in breach of contract); Fairrus v. U.S. Fidelity & Guar. Co., 284 Ore. 453, 457, 587 P.2d 1015, 1018-23 (1978) (absent

although holdings from other states were not controlling, the near unanimity of other state courts indicated that California should question continuing to hold a minority interpretation of the statute.[148]

The *Moradi-Shalal* court determined the intent of the California Legislature in passing the California Unfair Practices Act by examining the history of the NAIC Model Act upon which the California Unfair Practices Act was based.[149] The majority analyzed a 1980 report from the NAIC.[150] The NAIC report, written after *Royal Globe*, recited that although some proposals had been made to create a private cause of action, the NAIC advisory committee recommended against including a provision providing a private cause of action against an insurer for violating the Act.[151] In fact, the advisory committee deleted one provision from the Model Act draft that would have specifically included a private cause of action for violations of the Model Act.[152] The majority found the NAIC report reflected the intent of the framers of the Model Act on which California based the Unfair Practices Act, not to create a private cause of action by a claimant against the insurer.[153]

The *Moradi-Shalal* majority then reviewed the legislative history of section 790.03. The California State Legislative Analyst had reviewed the proposed legislation creating section 790.[154] The report

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statutory penalty allowing punitive damages to be awarded in actions against insurers by insureds for breach of contract, to use civil penalties to accomplish the same purpose would be inappropriate); D'Ambrosio v. Pa. Natl. Mut. Ins. Co. 431 A.2d 966, 969-70 (Penn. 1981) (insured was not entitled to supplement remedies in Unfair Insurance Practices Act by an action in trespass to obtain damages for emotional distress and punitive damages because of the alleged bad faith conduct of the insurer in denying the claim); Swinton v. Chubb & Son Inc., 320 S.E.2d 495, 496-97 (S.C. 1984) (the claims practices section of Automobile Reparation Reform Act did not expressly or by clear and unequivocal implication authorize a direct bad faith suit by a third party claimant against the insurer of an alleged tortfeasor); Russell v. Hartford Casualty Ins. Co., 548 S.W.2d 737, 742 (Texas 1977) (insurer could not be joined in the action because any statutory liability the insurer may have to the insured plaintiff was not connected to the suit against the insured); Wilder v. Aetna Life & Casualty Ins. Co., 433 A.2d 309, 310 (Vermont 1981) (the Insurance Trade Practices Act does not create a private cause of action); Tank v. State Farm Fire & Casualty Ins. Co., 38 Wash. App. 438, 438-39, 686 P.2d 1127, 1132 (1984) (third party claimant was not the proper party to challenge the insurer; there was also a substantial question whether the Consumer Protection Act was violated). *Moradi-Shalal*, 46 Cal. 3d at 297-98 n.5, 758 P.2d at 62 n.5, 250 Cal. Rptr. at 122 n.5.

148. *Moradi-Shalal*, 46 Cal. 3d at 298, 758 P.2d at 63, 250 Cal. Rptr. at 122.

149. *Id. See supra* notes 29-68 and accompanying text (discussing the legislative history of the Unfair Practices Act).

150. *Moradi-Shalal*, 46 Cal. 3d at 299, 758 P.2d at 64, 250 Cal. Rptr. at 123.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 300, 758 P.2d at 64, 250 Cal. Rptr. at 123.

from the analyst described the bill as contemplating only administrative enforcement by the insurance commissioner.[155] The Legislative Counsel Digest, which accompanied the proposed bill, likewise described the bill as calling for administrative enforcement; no mention was made of a possible private civil remedy against an insurer for violating section 790.[156] The fact that neither the Legislative Analyst nor the Legislative Counsel observed the new act as creating a private right of action was a strong indication to the majority that the legislature never intended to create a private cause of action against an insurer for violating the Unfair Practices Act.[157]

In addition, the court emphasized that shortly after *Royal Globe* was decided, the senate tried to enact legislation to abrogate the holding in *Royal Globe*.[158] Senate Bill no. 483 provided that a violation of section 790.03(h) would not impose civil liability on any insurer; the intent of the bill was clearly to overrule *Royal Globe*.[159] Although the bill never made it to the assembly floor, the majority declined to find this as determinative of any intent that the proposed legislation should fail.[160]

The *Moradi-Shalal* majority found numerous developments occurring subsequent to *Royal Globe* that convinced the court *Royal Globe* was incorrectly decided.[161] The court emphasized numerous scholarly articles criticizing the erroneous nature of the holding in *Royal Globe*[162] and the undesirable social and economic effects of the decision.[163] The court found the large amount of criticism leveled at

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155. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance*, at 392. *See Moradi-Shalal*, 46 Cal. 3d 287, 300, 758 P.2d 58, 64, 250 Cal. Rptr. 116, 123 (1988).

156. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance*, at 392-400.

157. *Moradi-Shalal*, 46 Cal. 3d 300, 758 P.2d at 64, 250 Cal. Rptr. at 123.

158. *Id.* at 300, 758 P.2d at 63-64, Cal. Rptr. at 122-23.

159. *Id.* at 300, 758 P.2d at 64, 250 Cal. Rptr. at 123. *See infra* notes 218-221 and accompanying text (Justice Mosk's strong dissent over the majority dismissing this "silence" as no showing of the intent of the legislature).

160. *Moradi-Shalal*, 46 Cal. 3d at 300, 758 P.2d at 64, 250 Cal. Rptr. at 124.

161. *Id*, at 301-03, 758 P.2d at 65-67, 250 Cal. Rptr. at 123-26.

162. *Id*, at 301-02, 758 P.2d at 65-66, 250 Cal. Rptr. at 124-25. " . . . the strained interpretation of the statutory provisions, and the misreading or disregard of available legislative history." *Id.* " . . . multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other transaction costs." *Id.* at 301, 758 P.2d at 65, 250 Cal. Rptr. at 125.

163. *Moradi-Shalal*, 46 Cal. 3d at 301, 758 P.2d at 65, Cal. Rptr. at 124. *See*, Note, *Rodriguez v. Fireman's Fund Ins. Co.; an Illustration of the Problems Inherent in the Royal*

the *Royal Globe* decision disturbing and, like the flood of contrary decisions of other state's courts, pertinent to the determination of whether to reconsider the *Royal Globe* decision.[164]

The majority relied on several commentators that suggested several adverse social and economic consequences of *Royal Globe*.[165] The commentaries claimed that *Royal Globe* promoted multiple litigation because the holding contemplated, indeed encouraged, 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.[166] The commentaries also claimed *Royal Globe* encouraged unwarranted settlement demands by claimants, coerced inflated settlements by insurers seeking to avoid the cost of a second lawsuit, and exposed insurers to bad faith actions by both insured and third party claimants.[167] The commentaries also found that *Royal Globe* created a serious conflict of interest for the insurer when the insurer owed a duty to the third party claimant.[168] Considering these commentaries, the majority stated that the public will indeed suffer from escalating costs of insurance coverage caused by inflated settlements and costly litigation.[169] The court concluded by stating that *Royal Globe* would continue to produce inequitable results, costly multiple litigation, and unnecessary confusion unless it was overruled.[170]

Globe Doctrine, 15 SW. U.L. REV. 371, 377 (1985); Note, *Bad Faith: Defining Applicable Standards in the Aftermath of Royal Globe v. Superior Court*, 23 SANTA CLARA L. REV. 917, 919 (1983); Note, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833, 843 (1982) [hereinafter *Need for Legislative Intervention*]; Comment, *Liability Insurers and Third Party Claimants: The Limits of Duty*, 48 U. CHI. L. REV. 125, 148-51 (1981); Comment, *Liability to Third Parties for Economic Injury*, 12 SW. U.L. REV. 87, 111-18, 125-27 (1981); Note, *Royal Globe Insurance Company v. Superior Court: Right to Direct Suit Against an Insurer by a Third Party Claimant*, 31 HASTINGS L.J. 1161, 1176-87 (1980) [hereinafter *Right to Direct Suit*]; Note, *Extending the Liability of Insurers for Bad Faith Acts: Royal Globe Insurance Company v. Superior Court*, 7 PEPPERDINE L. REV. 777, 791-93 (1980) [hereinafter *Extending Liability*].

164. *Moradi-Shalal*, 46 Cal. 3d at 299, 758 P.2d at 63, 250 Cal. Rptr. at 123.

165. *Moradi-Shalal*, 46 Cal. 3d at 297-99, 758 P.2d at 62-64, 250 Cal. Rptr. at 122-23. The majority of the court relied on the commentaries although stating the court could not verify the different arguments as accurate. *Id.*

166. *Id.* at 301, 758 P.2d at 65, 250 Cal. Rptr. at 124. *See* Note, note 5, at 1165.

167. *Moradi-Shalal*, 46 Cal. 3d at 301, 758 P.2d at 65, 250 Cal. Rptr. at 124. Note, *supra* note 5, *Right to Direct Suit*, at 1186-87; Note, *supra* note 165, *Extending Liability*, at 790-91; Note, *supra* note 165, *Need For Legislative Intervention*, at 851.

168. *Moradi-Shalal*, 46 Cal. 3d at 301, 758 P.2d at 65, 250 Cal. Rptr. at 124. *See supra* note 165, *Need for Legislative Intervention*, at 851; *Extending Liability*, at 791-92, see *supra* note 5, at 1183-84.

169. *Moradi-Shalal*, 46 Cal. 3d at 301, 758 P.2d at 65, 250 Cal. Rptr. at 125. *See supra* note 5, at 1186.

170. *Moradi-Shalal*, 46 Cal. 3d at 302, 758 P.2d at 65-66, 250 Cal. Rptr. at 125.

The majority found importance in the difficulty the lower courts were having in applying the *Royal Globe* holding.[171] First, *Royal Globe* held that a third party claimant could bring suit only against the insurer after a conclusion of liability of the insured.[172] The lower courts reached conflicting determinations as to whether a settlement constituted a conclusion for the purposes of bringing a *Royal Globe* suit.[173] Second, *Royal Globe* held that under section 790.03(h) the claimant has to show only that the insurer had knowledge of the bad faith action; the claimant does not have to show the action of the insurer constituted a general business practice.[174] The *Moradi-Shalal* court found that no other state has interpreted an Unfair Practices Act based on the NAIC model act in this way.[175] The majority stated that seldom will a claimant have the ability to prove a general business practice of the insurer.[176] The majority found the absence of the ability of a private claimant to prove a general business practice as an important indicator that the legislature did not intend to create a private cause of action within the Unfair Practices Act.[177]

The majority stressed that the *Moradi-Shalal* holding leaves substantial administrative sanctions available for the insurance commissioner to use against insurance companies that violate section 790.03 of the Unfair Practices Act.[178] The majority stated that, contrary to the dissent, enforcement of the act by the insurance commissioner would protect claimants because the insurer's would realize acting in

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171. *Moradi-Shalal*, 46 Cal. 3d at 302, 758 P.2d at 67, 250 Cal. Rptr. at 126.

172. *Royal Globe*, 23 Cal. 3d at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.

173. *Moradi-Shalal*, 46 Cal. 3d at 302, 758 P.2d at 67, Cal. Rptr. at 126. Two other states have found a private cause of action created in the statute but even those courts have rejected the *Royal Globe* conclusion that a single violation of the statute is a sufficient basis for a suit for damages. *Id.* at 297-298, 758 P.2d at 62, 250 Cal. Rptr. at 121.

174. *Moradi-Shalal*, 46 Cal. 3d at 303, 758 P.2d at 67, 250 Cal. Rptr. at 126. *See supra* note 18 and accompanying text (listing and discussing section 790.03(h)).

175. *Royal Globe*, 23 Cal. 3d at 891, 592 P.2d at 336, 153 Cal. Rptr. at 842. *See* Parvaneh Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d at 303, 758 P.2d at 67, 250 Cal. Rptr. at 126 (1988).

176. *Id.*

177. *Id.*

178. *Id.* at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126-27. In response to the dissent argument that the insurance commissioner will not enforce the Unfair Practices Act based on a finding of no published appellate cases, the majority said "surely we can assume very little from the absence of apposite appellate cases." *Moradi-Shalal*, 46 Cal. 3d at 304, 758 P.2d at 68, Cal. Rptr. at 127. The majority argued it was likely that the commissioner's efforts prevailed without the necessity of an appeal, or that any relevant opinions were unpublished, or that administrative enforcement was deemed unnecessary in light of the deterrent effect of inevitable *Royal Globe* actions routinely filed whenever immediate settlement of the claims did not occur. *Id. See* notes 23-28 and accompanying text (discussing the duties and enforcement powers of the insurance commissioner).

bad faith would result in a fine.[179] The majority further stated that the courts still retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions based on traditional theories such as fraud, infliction of emotional distress, and, as to the insured, either breach of contract or breach of the implied covenant of good faith and fair dealing.[180]

2. Pending "Royal Globe" Case Requirement: Final Judicial Determination of Liability

At the time *Moradi-Shalal* was before the California Supreme Court, numerous actions based on *Royal Globe* were already filed. In overruling *Royal Globe*, the court held that *Moradi-Shalal* was not retroactive.[181] In the interest of fairness to the substantial number of third party claimants who already filed suits based on a violation by the insurer of the Unfair Practices Act the court allowed their cases to continue.[182] The third party claimant suits seeking relief under section 790.03 would be decided under *Royal Globe*.[183] However, the majority did establish a requirement for plaintiffs to meet in order to avoid dismissal of their pending *Royal Globe* suits.[184] *Moradi-Shalal* requires a "final conclusive judicial determination" of the liability of the insured before a third party claimant can bring an action against the insurer.[185] The requirement of a final judicial determination of the insured's liability also clarifies another *Royal Globe* ambiguity.

In *Royal Globe*, the court did not explicitly consider what would constitute a sufficient "conclusion" of the action between the injured party and the insured before the injured party could bring an action against the insurer for a violation of the California Unfair Practices Act.[186] In *Moradi-Shalal*, Parvaneh Moradi-Shalal settled with the

179. *Moradi-Shalal*, at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126.
180. *Id.* at 304-05, 758 P.2d at 68-69, 250 Cal. Rptr. at 127. *See infra* notes 230-277 and accompanying text (discussing common law actions available to the claimant or the third party claimant in bringing an action against the insurer after *Moradi-Shalal*).
181. *Moradi-Shalal*, 46 Cal. 3d at 305, 758 P.2d at 69, 250 Cal. Rptr. at 127 (suits brought under *Royal Globe* before *Moradi-Shalal* was final are decided based on the Unfair Practices Act).
182. *Id.*
183. *Id.*
184. *Moradi-Shalal*, 46 Cal. 3d at 304-05, 758 P.2d at 69, 250 Cal. Rptr. at 127-28.
185. *Moradi-Shalal*, 46 Cal. 3d at 306, 758 P.2d at 69, 250 Cal. Rptr. at 127.
186. *Moradi-Shalal*, 46 Cal. 3d at 305, 758 P.2d at 69, 250 Cal. Rptr. at 127. In *Royal*

insured and her case was dismissed with prejudice;[187] the court concluded that this was not a final judicial determination of liability within the underlying action sufficient to bring an action under the Unfair Practices Act.[188] Therefore, a settlement with prejudice or any other form of settlement beyond a favorable judicial determination of liability will not meet the requirement set forth in *Moradi-Shalal*, and the case should be dismissed.[189] In stating the requirement of a prior judicial determination, the *Moradi-Shalal* court was not creating a new requirement, but rather the court was clarifying what constituted a "conclusion" of the insured's liability under *Royal Globe*.[190]

In requiring a prior judicial determination of the liability of the insured before an injured party can bring suit against the insurer for violating the Unfair Practices Act, the court considered prior appellate cases. The court concluded that *Williams v. Transport Indemnity Co.*[191] and *Heninger v. Foremost Insurance Company*[192] correctly held

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Globe, the court did not discuss the actual procedural prerequisites of a third party's section 790.03 claim against an insurer, except to hold that such a claim, "cannot be brought until the action between the injured party and the insured is completed." *Royal Globe*, 23 Cal. 3d at 884, 592 P.2d at 331, 153 Cal. Rptr. at 844.

187. *Moradi-Shalal*, 46 Cal. 3d at 293, 758 P.2d at 60, 250 Cal. Rptr. at 118.

188. *Id.* at 323, 758 P.2d at 74, 250 Cal. Rptr. at 133. The court listed three reasons why the plaintiff cannot sue the insurer and the insured jointly. *Id.* First, a joint trial would obviously violate both the letter of the law and spirit of the the Evidence Code. *Id.* Section 1155 of that code provides that evidence that an alleged tortfeasor is insured is inadmissable to prove the insured's negligence or wrongdoing. *Id.* Second, a joint trial would hamper the defense of the insured on the liability question. *Id.* Third, that damages suffered by the injured party as a result of the insurer's violation of the Unfair Practices Act may best be determined after conclusion of the action by the third party claimant against the insured. *Id. See* Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 892, 592 P.2d 329, 337, 153 Cal. Rptr. 842, 850 (1979) ("[u]nless the trial against the insurer is postponed until the liability of the insured is first determined, the defense of the insured party may be seriously hampered by discovery initiated by the injured claimant against the insurer").

189. *Moradi-Shalal*, 46 Cal. 3d at 313, 758 P.2d at 74, 250 Cal. Rptr. at 133.

190. *Id.*

191. 157 Cal. App. 3d 953, 959-961, 203 Cal. Rptr. 868, 874 (1984). The widow of a decedent involved in an accident with the defendant's insured brought suit against the insurer alleging wrongful refusal to settle decedent's personal injury claim. *Williams*, 157 Cal. App. 3d at 953, 203 Cal. Rptr. at 868. The *Williams* court affirmed a summary judgment in favor of the insurer; because the third party claimant failed to initiate any legal action against the insured. *Id.* The claimant argued that under section 790.03 the liability of the insured was not at issue, only whether the insurer made a good faith attempt to settle when liability of the insured was reasonably clear. *Williams*, 157 Cal. App. 3d at 957, 203 Cal. Rptr. at 871. Because under its indemnity contract the insurer could be liable only if the insured was liable, the court said, ". . . the essential preliminary inquiry in any action alleging the insurer's violation of . . . section 790.03(h)(5) must be whether the insured was liable in actuality for the third party claimant's injury." Willaims, 157 Cal. App. 3d at 961, 203 Cal. Rptr. at 875. *See* Parvaneh Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d at 306-07, 758 P.2d at 70, 250 Cal. Rptr. at 128.

192. Heninger v. Foremost Ins. Co., 175 Cal. App. 3d 830, 50 Cal. Rptr. 303 (1975).

that the injured plaintiff has a right to recover under *Royal Globe* only after proving that the insured was actually liable.[193] The *Moradi-Shalal* court reasoned that if the insured was not liable for the claimant's injuries, the claimant did not have a right to damages from the insured.[194] The *Moradi-Shalal* majority stated that without a prior determination of liability of the insured, the claimant cannot be permitted to recover for "unfair conduct" by the insurer in refusing to settle an underlying unmeritorious claim.[195] Under *Moradi-Shalal*, the insurer has a duty to settle when liability becomes reasonably clear, but the duty to settle here is different from the right of a claimant to recover under the Unfair Practices Act.[196] The insurer, therefore, does not need to settle all claims under section 790.03, but does need to act in good faith when liability of the insured is reasonably clear.[197]

With *Moradi-Shalal*, the court has ended the *Royal Globe* right to a private action by third party claimants against an insurance company for a violation of the Unfair Practices Act.[198] *Moradi-Shalal* overturns nine years of case law concerning private actions against an insurer.[199] A third party claimant can no longer bring a private action against an insurer for a violation of section 790.03(h) of the Insurance Code.[200]

C. The Dissenting Opinion

Justice Mosk wrote the dissenting opinion with Justice Broussard concurring.[201] Justice Mosk, author of *Royal Globe*, began with "Royal Globe (1979-1988), may it rest in peace."[202] He claimed that the majority has replaced *Royal Globe* with a "Royal Bonanza" for

193. *Moradi-Shalal*, 46 Cal. 3d at 308, 758 P.2d at 71, 250 Cal. Rptr. at 129.
194. *Id.*
195. *Id.*
196. *Id.* 46 Cal. 3d at 311, 758 P.2d at 74, 250 Cal. Rptr. at 131-32. *See* Davy Public National Ins. Co., 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960) (where an offer of settlement within policy limits is subject under consideration, the obligation imposed upon the insurer is to exercise good faith in considering the interest of the insured in the settlement, and an insurer guilty of bad faith in refusing to settle claim within policy limits breaches the insurance contract and the insurer is liable for the entire amount of the judgment).
197. Heninger v. Foremost Ins. Co., 175 Cal. App. 3d 830, 221 Cal. Rptr. 303 (1985).
198. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 250 Cal. Rptr. at 116.
199. *Id.*
200. *Id.*
201. *Id.* at 313, 758 P.2d at 75, 250 Cal. Rptr. at 133 (Mosk, J., dissenting).
202. *Id.*

insurance carriers and has removed a rule that served the victims of unfair and deceptive practices.[203] Justice Mosk claimed that the majority created sweeping changes within a case in which *Royal Globe* principles were not the reason for review by the California Supreme Court.[204] The dissent made four main arguments: first, knowledge of one violation by the insurance company was sufficient to bring an action;[205] second, there are no cases in the recorders in which the insurance commissioner has brought an action against an insurer;[206] third, the failed 1983 amendment clearly shows legislative intent for *Royal Globe* to stand;[207] and fourth, at least three cases preceding *Royal Globe* held that the Unfair Practices Act authorized action by claimants and did not give the power to enforce the Act exclusively to agents of the state.[208]

Justice Mosk first argued that contrary to the majority opinion, knowledge of a one-time violation by the insurer was sufficient to meet the Unfair Practices Act requirement of "knowledge of an act or a general business practice."[209] Justice Mosk argued that the wording of section 790.03(h), which prohibits knowingly committing or performing with enough frequency to indicate a general business practice, was unclear in whether the meaning was to provide one or two alternate methods of showing prohibited acts.[210] The dissent protested that the most logical interpretation of section 790.03(h) provided two alternative methods of showing a violation: if the prohibited acts were knowingly committed on one occasion or, if knowledge cannot be established, then it would suffice if the acts were performed with enough frequency as to indicate a general

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203. *Id.* at 313-14, 758 P.2d at 75, 250 Cal. Rptr. at 133 (Mosk, J., dissenting).

204. *Id.* at 314, 758 P.2d at 75, 250 Cal. Rptr. at 133 (Mosk, J., dissenting).

205. *Id.* at 316, 758 P.2d at 77, 250 Cal. Rptr. at 135 (Mosk, J., dissenting). *See infra* notes 211-14 and accompanying text (Justice Mosk arguing that a claimant having knowledge of one violation of the Unfair Practices Act is sufficient to bring a cause of action).

206. *Moradi-Shalal*, 46 Cal. 3d at 317, 758 P.2d at 77, 250 Cal. Rptr. at 135 (Mosk, J., dissenting). *See infra* notes 215-17 and accompanying text (discussing Justice Mosk's argument that no cases brought by the Insurance Commissioner against insurers for violations of the Unfair Practices Act can be found in the Reporters).

207. *Moradi-Shalal*, 46 Cal. 3d at 318, 758 P.2d at 78, 250 Cal. Rptr. at 136 (Mosk, J. dissenting). *See infra* notes 218-21 and accompanying text (discussing the failed 1983 amendment).

208. *Moradi-Shalal*, 46 Cal. 3d at 318, 758 P.2d at 78, 250 Cal. Rptr. at 136 (Mosk, J. dissenting). *See supra* notes 173-179 and accompanying text (the *Moradi-Shalal* majority discussing the burden of a third party plaintiff in being able to show the insurer's knowledge or a general business practice).

209. *Moradi-Shalal*, 46 Cal. 3d at 316, 758 P.2d at 77, 250 Cal. Rptr. at 135.

210. *Id.*

business practice.[211] Therefore, according to Justice Mosk, the majority opinion argument that the clear legislative intent of the statute was to be an administrative remedy is not valid.[212]

Second, Justice Mosk argued that since the passage of the Unfair Practices Act in 1959, there has not been one recorded case in which the insurance commissioner took any disciplinary action against an insurer for violating section 790.[213] Justice Mosk found the absence of enforcement of the Unfair Practices Act by the insurance commissioner a good reason for individuals to litigate on their own.[214] The dissent found the majority opinion's caution to the insurance industry not to commit unfair practices and the majority opinion's invitation to the insurance commissioner to continue enforcing the laws completely unneccesary, since the code was not being enforced anyway.[215]

Third, the dissent strongly disagreed with the majority concerning the silence by the legislature on the amendment initiated to overrule

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211. *Id.* This interpretation of the section was adopted by a commentator in reviewing certain amendments to subdivision (h). *Review of Selected 1975 California Legislation*, 7 PAC. L.J. 237, 484 (1976). "There would be no rational reason why an insured or a third party claimant injured by an insurer's unfair conduct, knowingly performed, should be required to demonstrate that the insurer had frequently been guilty of the same type of misconduct involving other victims in the past." *Moradi-Shalal*, 46 Cal. 3d at 316, 758 P.2d at 77, 250 Cal. Rptr. at 135. (Mosk, J., dissenting). The majority of the *Moradi-Shalal* court responded to this reasoning with:

> although the *Royal Globe* majority believed this proof problem justified its conclusion that a single act will subject the insurer to liability for damages for unfair practices, it is more likely that the majority's initial premise, that a direct action is permitted under section 790.03, was incorrect, and that the provision was instead limited to providing administrative sanctions by the Insurance Commissioner once an investigation revealed such a pattern. *Moradi-Shalal*, 46 Cal. 3d at 303, 758 P.2d at 67, 250 Cal. Rptr. at 126.

212. *Moradi-Shalal*, 46 Cal. 3d at 316, 758 P.2d at 77, 250 Cal. Rptr. at 135 (Mosk, J., dissenting). The dissent noted that particularly in clauses (8), (9), (10), and (11) of section 790.03(h) a distinction is clearly made between the insured and claims or claimants. *Id. See supra* note 18 (listing the provisions of section 790.03(h)).

213. *Moradi-Shalal*, 46 Cal. 3d at 317, 758 P.2d at 77, 250 Cal. Rptr. at 135 (Mosk, J., dissenting).

> The majority fails to demonstrate that such enforcement has ever existed. Since 1959 when sections 790 and the following Insurance Code were adopted, 62 volumes of California Reports and 297 volumes of California Appellate Reports have been published. In those 359 volumes there are more than 300,000 pages. On not one page of one volume is a single case reported in which the Insurance Commissioner has taken disciplinary action against a carrier for "unfair and deceptive acts or practices in the business of insurance" involving a claimant. Not one case in 29 years.

Id.

214. *Id.*

215. *Id.* 46 Cal. 3d at 317, 758 P.2d at 77, 250 Cal. Rptr. at 135 (Mosk, J., dissenting).

Royal Globe.[216] The majority found the legislative silence as giving no indication of legislative intent.[217] Justice Mosk argued the nonadoption of the amendment was not merely silence, but rather the legislature's refusal to pass a bill that expressly overruled *Royal Globe*.[218] The dissent stressed that the legislature's amending the act in 1983 without changing any provisions of section 790.03 showed an intent to leave the law as it stood.[219]

Finally, the dissent argued that cases preceding *Royal Globe* held the Unfair Practices Act authorized actions by private claimants.[220] The majority opinion dismissed both *Greenberg* and *Shernoff* because neither involved any of the unfair practices listed in section 790.03(h).[221] The dissent found *Greenberg*,[222] as precedent for a private cause of action under the Unfair Practices Act.[223] Justice Mosk agreed with the *Greenberg* court's statement that a fair interpretation of the Unfair Practices Act was that the person to whom civil liability runs should be able to bring an action against the insurer.[224] The dissent also cited *Shernoff*[225] as further support of a private cause of action existing within the Unfair Practices Act.[226] The *Shernoff* court argued that the disciplinary authority of the insurance commissioner was limited to the restraint of future illegal conduct by real parties in interest, and the commissioner possessed no authority to enter money judgments.[227] Therefore, the *Moradi-Shalal* dissent argued that a fair interpretation of the act was that the person to whom the civil liability ran could bring an appropriate action.[228]

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216. *Moradi-Shalal*, 46 Cal. 3d at 318, 758 P.2d at 78, 250 Cal. Rptr. at 136 (Mosk, J., dissenting).

217. *Id.* at 318, 758 P.2d at 78, 250 Cal. Rptr. at 136 (Mosk, J., dissenting).

218. *Id.* Justice Mosk found that under the circumstances this represents legislative approval and confirmation of the *Royal Globe* decision far beyond mere inattention. *Id.*

219. *Moradi-Shalal*, 46 Cal. 3d at 318, 758 P.2d at 78, 250 Cal. Rptr. at 136 (Mosk, J., dissenting).

220. *Id.*

221. *Id.* at 295, 758 P.2d at 61, 250 Cal. Rptr. at 120.

222. *Greenberg*, 34 Cal. App. 3d at 994, 110 Cal. Rptr. at 470. *See supra* notes 32-41 and accompanying text (discussing the *Greenberg* decision).

223. *Moradi-Shalal*, 46 Cal. 3d at 318-19, 758 P.2d at 78, 250 Cal. Rptr. at 136-37.

224. *Id. See Greenberg*, 34 Cal. App. 3d at 1001, 110 Cal. Rptr. at 475-76. "Section 790.09 . . . contemplates a private suit to impose civil liability irrespective of governmental action against the insurer for violation of a provision of the Insurance Code." *Id.*

225. 44 Cal. App. 3d 406, 118 Cal. Rptr. 680 (1975). *See supra* notes 42-55 and accompanying text (discussion of *Shernoff* and other cases prior to the *Royal Globe* decision).

226. *Moradi-Shalal*, 46 Cal. 3d at 319-20, 758 P.2d at 78, 250 Cal. Rptr. at 137 (Mosk, J., dissenting).

227. *Id. See* Shernoff v. Superior Court, 44 Cal. App. 3d 406, 118 Cal. Rptr. 680.

228. *Moradi-Shalal*, 46 Cal. 3d at 319, 758 P.2d at 78, 250 Cal. Rptr. at 136-37 (Mosk,

III. LEGAL RAMIFICATIONS

Without *Royal Globe*, an insured party can still bring common law actions against the insurer such as: fraud, emotional distress, breach of the implied duty of good faith and fair dealing, and breach of contract.[229] The California Supreme Court held in *Brown v. Superior Court*[230] that every contract has an implied covenant of good faith and fair dealing which requires neither party do anything to injure the rights of the other to receive the benefits of the contract.[231] In *Comunale*, the California Supreme Court extended the implied covenant principle to insurance policies and required the insurer to settle in an appropriate case even though the express terms of policy do not impose any duty to do so.[232] Under *Murphy*, however, the duty of the insurer to settle a bona fide claim runs to the insured, not to an injured third party claimant.[233] *Johansen v. California State Automobile Association Inter-Insurance Bureau*[234] held that an insurer must settle within the policy limits when there is a substantial likelihood of recovery in excess of the policy limits.[235]

J., dissenting). *See* Shernoff v. Superior Court, 44 Cal. App. 3d at 409-10, 118 Cal. Rptr. at 681-82. "[The authority to enter money judgments is in the courts], and Insurance Code section 790.09, expressly reserves to litigants all civil . . . remedies." *Shernoff*, at 409, 118 Cal. Rptr. at 682.

229. *Moradi-Shalal*, 46 Cal. 3d at 319, 758 P.2d at 78, 250 Cal. Rptr. at 136-37 (Mosk, J. dissenting). *See infra* note 240 (discussing the limited statutory recovery available under the California Insurance Code section 11580(b)(2)). If a judgment is rendered against the insurer upon bodily injury, death, or property damage then the third party can recover directly against the insurance company on the policy and subject to the limitations within the policy. CAL. Ins. Code § 11580 (West 1988). In section 11580(b)(1), neither insolvency or bankruptcy of the insured releases the insurer from payment of damages for a claimants injury sustained or loss occasioned during the life of the policy. *Id.* § 11580(b)(1).

230. 34 Cal. 2d 559, 212 P.2d 878 (1949).

231. *Brown*, 34 Cal. 2d at 564, 212 P.2d at 881 (1949). *See* Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 939, 553 P.2d 584, 586, 132 Cal. Rptr. 424, 426.

232. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). *See supra* notes 69-111 and accompanying text (discussing the *Comunale* decision and related common law prior to *Royal Globe*).

233. *Murphy*, 17 Cal. 3d 941, 553 P.2d at 587, 132 Cal. Rptr. at 427. *See* Shapero v. Allstate Ins. Co., 14 Cal. App. 3d 433, 92 Cal. Rptr. 244 (1976) (under Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958) and Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) the insurer has a duty to deal fairly and in good faith with the insured in determining whether to settle). *See supra* notes 96-109 accompanying text (discussing *Murphy* and the affect *Royal Globe* had on the *Murphy* holding); *supra* notes 69-95 and accompanying text (discussing *Comunale* and *Crisci* and their place in the development in the common law of implied good faith and fair dealing).

234. 15 Cal. 3d 9, 538 P.2d 744, 123 Cal Rptr. 288 (1975).

235. *Johansen*, 15 Cal. 3d at 16, 538 P.2d at 774, 123 Cal. Rptr. at 288. *See Crisci*, 66 Cal. 2d at 430, 426 P.2d at 176-77, 58 Cal. Rptr. at 16-17. *See* also, *Murphy*, 17 Cal. 3d at 937, 553 P.2d at 584, 132 Cal. Rptr. at 424.

The court developed the doctrine of an implied duty to settle in order to protect the insured. If an insurer did not act in good faith and consider the interest of an insured at least as much as the insurer's own, the insurer may be liable for any judgment in excess of the policy amount.[236]

Beyond the rights of an insured under common law, the decision in *Moradi-Shalal* removes the ability of a third party claimant to bring an action directly against an insurer for violating the Unfair Practices Act.[237] The third party claimant can bring an action against the insurance company based on traditional theories, such as fraud, infliction of emotional distress and, if accompanied by an assignment from the insured, either breach of contract or breach of the implied covenant of good faith and fair dealing.[238] A third party claimant has two main methods of bringing an action against the insurer for breach of contract or breach of the implied covenant of good faith and fair dealing.[239] First, the claimant can receive an assignment

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236. *Crisci*, 66 Cal. 2d at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16. The *Crisci* court stated that the expectations of the insured are that the insurance company will apply at least the amount available under the insured's policy to avoid liability on the insured. *Id.* Therefore, in light of this expectation an insurer should not be permitted to further its own interest by rejecting opportunities to settle within the policy limits unless the insurer is also willing to absorb losses which may result from the failure to settle. *Id. See supra* notes 74-79 accompanying text (discussing the *Comunale* listings of when an insurer may be found liable for a judgment in excess of the insured's policy). *See* Comment, *supra* note 5, at 1165.

237. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 250 Cal. Rptr. at 116. *See also* Coleman v. Gulf Ins. Group, 41 Cal. 3d 782, 718 P.2d 77, 226 Cal. Rptr. 90 (1986). In *Coleman*, the former third party claimants alleged the insurer instigated a meritless appeal in a previous action in order to achieve a delay and coerce settlement on the appeal. *Coleman*, 41 Cal. 3d at 782, 718 P.2d at 77, 226 Cal. Rptr. at 90. The Supreme Court of California held section 790 was intended to apply only to prejudgment conduct. *Id.* Therefore, section 790 provided no basis for any subsequent actions by a former third party against the former appellant's insurer. *Id.*

238. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 250 Cal. Rptr. at 116. The California Supreme Court also held that nothing in the *Moradi-Shalal* opinion would prevent the legislature from creating additional civil or administrative remedies, including a private cause of action for violation of section 790.03. *Id.* The court stated, however, that thus far the legislature had not manifested such an intent to create this private cause of action. *Id.*

239. CAL. INS. CODE § 11580 (West 1988). The California Insurance Code still has a statutory alternative for the third party claimant to reach the insurer. *Id.* The Insurance Code section 11580(b)(2) offers a limited ability for a third party claimant to recover directly from the insured. *Id.* § 11580(b)(2). Section 11580 requires all policies issued or delivered in California to contain the provisions of section 11580(b). *Id.* Whether or not the policy actually contains the provisions, the policy will be treated as if the provisions were embodied therein. *Id.* Section 11580(b)(2) provides that policies must include the following:

> A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

Id.

from the insured of the insured's rights under the insurance policy.[240] Assignments here include the possibility that the claimant can negotiate a settlement with the insured and bring an action against the insurer if the insurer wrongfully fails to settle.[241] Second, the claimant can obtain a lien against the insured for the payment from the insurer.[242]

1. Assignment By Insured of Rights To Third Party Claimants

In overruling *Royal Globe*, the court in *Moradi-Shalal*, by implication, reaffirmed *Murphy* as the law in California.[243] *Murphy* does not give a third party claimant a direct cause of action against the insurer for bad faith actions.[244] Numerous rights may be assigned to a third party claimant. Under *Murphy*, the insured may assign a right of action for a wrongful failure to settle to a third party claimant.[245] Also, under *Trubowitch v. Riverbank Canning Company*,[246] the insured may assign the right to sue the insurer for breach of contract.[247] *Comunale* further broadens assignable actions by allowing assignment of the right to indemnity of the insured under the policy up to the limit of the policy to a third party claimant.[248] The assignment can be made before the judgment becomes final; however, the third party claimant cannot bring an action against the insurer

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240. *Comunale*, 250 Cal. 2d at 654, 328 P.2d at 198 (1958). *See supra* notes 69-82 and accompanying text (discussing *Comunale*).

241. Thomas, *Third Parties Against Insurers*, CAL. LAW., Dec., 1988, at 87.

242. *Id.* at 87-88.

243. *See supra* notes 96-109 and accompanying text (discussing the *Murphy* decision and the developing California common law in the area of private actions against an insurer for acting in bad faith).

244. *Murphy*, 17 Cal. 3d at 942, 553 P.2d at 587, 132 Cal. Rptr. at 427 (the California Supreme Court has frequently held that an insured breaches no duty to the insurer when he assigns his rights against the insurer to the injured third party in return for a covenant not to execute). *See supra* notes 80-82 and accompanying text (discussing *Comunale*; that the insured may assign a cause of action against the insurer regardless of any insurer consent requirement in the policy). *See also* Coleman v. Gulf Ins. Group, 41 Cal. 3d 782, 718 P.2d 77, 226 Cal. Rptr. 90 (1986). In *Coleman*, the plaintiffs alleged the insurance company instigated an appeal merely to delay and coerce a settlement on the appeal. *Id.* The *Coleman* court extended *Murphy* and held the plaintiffs could not maintain an independent action against the insurer for breach of the implied covenant of good faith and fair dealing within the policy (contract). *Id.*

245. *Murphy*, 17 Cal. 3d at 937, 553 P.2d at 584, 132 Cal. Rptr. at 425.

246. 30 Cal. 2d 335, 182 P.2d 182 (1947).

247. *Id.* The *Trubowitch* court held that a contract provision or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract or of money damages for breach of contract. *Id.* at 338, 182 P.2d at 183.

248. *Comunale*, 50 Cal. 2d at 661, 328 P.2d at 202.

on the assignment until completion of the underlying action.[249]

Further, under *Gray v. Zurich Insurance Company*,[250] a third party claimant can be assigned a cause of action against the insurer for failure to defend the insured.[251] The Supreme Court of California applied the holding of *Gray* in *Samson v. Transamerica Insurance Co.*[252] In *Samson*, the court held the defendant insurer liable on the judgment against the insured based on a wrongful refusal to defend.[253] *Samson* held that even if the insurer honestly believes the policy does not provide coverage, the insurer is liable on the judgment if coverage is found to exist.[254] A third party claimant may also enter into a reasonable, noncollusive settlement with the insured and collect from the insurer for failing to defend.[255] Although the death of *Royal Globe* closed a major avenue in which a third party plaintiff could reach an insurer, *Comunale*, *Murphy*, *Trubowitch*, *Gray*, and *Samson* show numerous avenues are still left to a third party claimant.[256] The

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249. Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 799, 41 Cal. Rptr. 401, 402 (1964). (*See supra* note 92 for discussion of *Critz*). *See also* Parvaneh Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 313, 758 P.2d 58, 75, 250 Cal. Rptr. 116, 133 (1988). Requiring a prior judicial determination of liability of the insurer before a private claimant can bring a *Royal Globe* action against an insurer. *Id.* Note this only applies to suits filed prior to *Moradi-Shalal* becoming final; suits filed after *Moradi-Shalal* cannot use *Royal Globe* as a basis of liability of the insurer. *Id.*

250. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

251. *Gray*, 65 Cal. 2d at 279, 419 P.2d at 177, 54 Cal. Rptr. at 102. *See also* Metz v. Universal Underwriters Ins. Co., 10 Cal. 3d 45, 55, 513 P.2d 922, 930, 109 Cal. Rptr. 698, 706 (1973) (suit by insurer seeking declaratory relief in which the injured party cross-complained seeking the balance of the judgment from the insured); Geddes & Smith v. St. Paul Mercury, 51 Cal. 2d 558, 561-62, 334 P.2d 881, 887-88 (1959) (action by building contractor to recover amount of judgment obtained against the manufacturer of defective doors); Ford v. Providence Washington Ins. Co., 151 Cal. App. 2d 431, 435, 311 P.2d 930, 934 (1957) (person who obtained judgment against driver of insured automobile brought an action against the insurer, on the ground that insurer was obligated under the policy to indemnify the alleged driver; court held that insurers failure to defend did not relieve the insurer of an insurers obligations).

252. 30 Cal. 3d 220, 636 P.2d 32, 178 Cal. Rptr. 343 (1981).

253. *Samson*, 30 Cal. 3d at 223, 636 P.2d at 35, 178 Cal. Rptr. at 346.

254. *Id.* The *Samson* court also found the insurer liable for failure to accept a reasonable offer. *Id.* at 237, 636 P.2d at 45, 178 Cal. Rptr. at 358.

255. Columbia S. Chemical Corp. v. Manufacturers & Wholesalers Indem. Exch., 190 Cal. App. 2d 194, 11 Cal. Rptr. 762 (1961) (if there is a wrongful refusal to defend, a liability insurer loses the right to control the litigation and is liable for any reasonable settlement arrived at in good faith and paid by the insured); Ritchie v. Anchor Casualty Co., 135 Cal. App. 2d 245, 286 P.2d 1000 (1955) (where a policy contains an obligation of the insurer to defend actions and claims against the insured and the insurer does not so defend, the question of the insurer's liability to defend remains open for adjudication in a later proceeding, but the settlement becomes presumptive evidence of the liability of the insured and the amount of liability). *See* Saylin v. California Ins. Guar. Ass'n, 179 Cal. App. 3d 256, 224 Cal. Rptr. 493 (1986) (where the facts learned from all sources reveal that potential liability does not exist under the policy, the insurer may take the risk of refusing to defend the suit).

256. *See supra* and *infra* notes 230-277 and accompanying text (discussing the common law avenues left to a third party claimant after *Moradi-Shalal*).

common law routes left open to the third party claimant may take longer to traverse, but the result should be the same.

After assignment by the insured, the injured third party can also recover damages directly from the insurer for refusing a reasonable settlement.[257] Under *Crisci*, the insurer has a duty to accept a reasonable offer within the policy if the offer is the most reasonable way of settling the claim.[258] If a prudent insurer, without policy limits, would have accepted the settlement, the insurer will be liable for the judgment against the insured.[259] The insured may assign to the third party claimant the right to recover against the insurer.[260]

The insured may recover for mental suffering caused by the actions of the insurer under *Tan Jay International v. Canadian Indemnity Co.*[261] The *Tan Jay* court reasoned that by taking out an insurance policy, the insured was seeking to protect himself from harm, including mental distress.[262] The *Tan Jay* court stated that mental suffering was a possible result of the insurer not defending the insured and the insured suffering a large loss.[263] Therefore, damages for mental suffering were included within those recoverable for the insurer's breach of the implied covenant of good faith and fair dealing.[264] So far in California, damages for emotional distress have not been assignable.[265] However, considering the change of direction by the California Supreme Court in *Moradi-Shalal*, breathing new life into common law actions against an insurer, coupled with the court's finding a right to recover for mental suffering caused by an insurer in *Tan Jay*, a third party claimant may have a good argument for recovery of mental suffering caused by the insurer.

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257. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 429, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967). *See supra* note 88 and accompanying text (discussing that when an action sounds in both tort and contract it is usually at the discretion of the plaintiff whether to elect a tort or contract cause of action).

258. *Crisci*, 66 Cal. 2d at 428, 426 P.2d at 175, 58 Cal. Rptr. at 15.

259. *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16.

260. *Id.*

261. 198 Cal. App. 3d 695, 243 Cal. Rptr. 907 (1988).

262. *Id.*

263. *Id.*

264. *Id. See also* Truestone, Inc. v. Travelers Ins. Co., 55 Cal. App. 3d 165, 169-170, 127 Cal. Rptr. 386, 389 (1976) (damages for unintentional infliction of emotional distress are not recoverable absent other damage to the claimant or property to which the damages are related, however, damages for mental suffering are included within those recoverable for an insurer breaching the duty of good faith and fair dealing).

265. Murphy v. Allstate Ins. Co., 17 Cal. 3d at 942, 553 P.2d at 587, 132 Cal. Rptr. at 427.

2. Third Party Claimant Obtaining a Lien Against Unassignable Causes of Actions

The insured cannot assign certain types of damages to the third party claimant. For example, in *Murphy* the court held that the insured could not assign causes of action for emotional distress or punitive damages.[266] The *Murphy* court relied on *Richert v. General Insurance Company of America*,[267] which held that purely personal tort causes of action were not assignable in California.[268] Since a purely personal tort action is not assignable, the court reasoned that a claim for damages based on emotional distress was not assignable either.[269] Also, neither legal malpractice claims[270] nor actions for recovery under a statutory penalty are assignable.[271]

However, the third party claimant may obtain a lien against the insured's interest in a cause of action that is not assignable under *Purcell v. Colonial Insurance Co.*[272] In *Purcell*, the insured assigned his cause of action for breach of the duty to settle, and the third party claimant sued under the assignment.[273] After the suit by the third party plaintiff, the insured brought an action for mental distress against the insurer.[274] The second action was held to violate the rule against splitting a cause of action.[275] The court indicated through dicta that the insured should have brought a single action in his own name for all damages and agreed to have paid part of the recovery to the third party claimant.[276]

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266. *Id.*

267. 68 Cal. 2d 822, 834, 442 P.2d 377, 69 Cal. Rptr. 321 (1968) (the only causes or rights of action which are not assignable are those founded upon wrongs of a purely personal nature, for example: slander, assault and battery, and negligent personal injuries).

268. *Id.*

269. *Murphy*, 17 Cal. 3d at 942, 553 P.2d at 587, 132 Cal. Rptr. at 427. *See also* Dugar v. Happy Tiger Records, 41 Cal. App. 3d 811, 819, 116 Cal. Rptr. 412, 416 (1974) (the general rule is that in the absence of a statute, exemplary damages are allowed only to the immediate person).

270. Goodley v. Wank & Wank, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976) (a third party claimant brought a claim for damages for legal malpractice against a law firm; the claim was held not assignable).

271. Peterson v. Ball, 211 Cal. 461, 296 P. 291 (1931) (a corporation's right of action against the directors for creating debt in excess of capital stock is not assignable).

272. 20 Cal. App. 3d 807, 97 Cal. Rptr. 874 (1971).

273. *Purcell*, 20 Cal. App. 3d at 814, 97 Cal. Rptr. at 880.

274. *Id.*

275. *Id.*

276. *Id. See also* City of San Jose v. Superior Court, 12 Cal. 3d 447, 464, 525 P.2d 701,

IV. CONCLUSION

With *Parvaneh Moradi-Shalal v Fireman's Fund Insurance Company*, the California Supreme Court overruled the strained interpretation of the Unfair Practices Act made by the court in *Royal Globe Insurance Company v Superior Court*.[277] The *Moradi-Shalal* decision removes the ability of private claimants to bring actions against insurance companies for violating section 790.03(h) of the Unfair Practices Act as codified in the California Insurance Code.[278] However, the *Moradi-Shalal* holding was not retroactive so that cases filed under *Royal Globe* before *Moradi-Shalal* can still be maintained if there is a prior final judicial determination of liability of the insured.[279] Under the prior judicial determination of liability rule from *Moradi-Shalal*, a settlement between an injured third party and an insured, when the case is dismissed with prejudice, would not be a final judicial proceeding, and therefore the third party claimant could not bring an action under the Unfair Practices Act.[280] The insurance commissioner is now the sole enforcer against insurance companies that violate section 790.03(h) of the Unfair Practices Act.[281] The Commissioner can discipline by using a cease and desist order alone or in combination with a fine, if the insurer violates an order.[282] An insured can bring suit against an insurer for acting in

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708, 115 Cal. Rptr. 797, 804 (1974) (as a general rule a party cannot split a single cause of action because the first judgment bars recovery in a second suit on the same cause of action).

277. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 250 Cal. Rptr. at 116. *See generally* Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d at 866, 592 P.2d at 329, 153 Cal. Rptr. at 842. Justice Richardson concluded his dissent in *Royal Globe* with these prophetic words:

> Neither the statutory nor decisional law supports the majority's holding herein. It seems predictable that in almost every case in which an insurer hereafter declines a settlement offer the injured third party claimant will be tempted to file an independent action against the carrier despite the clear admonition in our recent unanimous *Murphy* decision that the insurer's duty to settle runs to the *insured* and *not* to the *injured party*. The gratuitous creation of such a new remedy is wholly inconsistent both with our own firmly established California precedent, and with a fair and reasoned analysis of the applicable legislation. (Italics in original).

Id. at 898, 592 P.2d at 341, 153 Cal. Rptr. at 854 (Richardson, J. dissenting).

278. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 153 Cal. Rptr. at 116.

279. *Id.* at 313, 758 P.2d at 74-75, 153 Cal. Rptr. at 133.

280. *Id.* (this does not apply to cases filed after *Moradi-Shalal* became final).

281. *Id. See* CAL. INS. CODE §§ 790.05-09 (West 1972 & Supp. 1989).

282. *Moradi-Shalal*, 46 Cal. 3d at 304, 758 P.2d at 68, 250 Cal. Rptr. at 126-27. These sanctions include the insurance commissioner issuing cease and desist orders to enjoin. CAL. Ins. Code § 790.07 (West Supp. 1989). Further violations of these orders may result in a maximum fine of $55,000; repeated violations may result in a suspension of the insurer's license for up to one year. *Id.* In order for the commissioner to use this discipline power the acts of the insurance company must be shown to be of a general business nature. *Id.*

bad faith based on the implied covenant of good faith and fair dealing.[283] Third party claimants may obtain an assignment of the insured's claim of a breach of the implied covenant of good faith and fair dealing and then bring suit against an insurer. Therefore, in overruling *Royal Globe*, the California Supreme Court in *Moradi-Shalal* did not prevent an insured or a third party claimant from bringing a civil suit against an insurer, but rather brought California into line with the other States and reemphasized common law actions still available to private parties against insurers.

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283. Seaman's Direct Buying Service v. Standard Oil Co. of California, 236 Cal. 3d 752, 759, 686 P.2d 1158, 1165, 206 Cal. Rptr. 354, 361 (1984) (the implied covenant of good faith and fair dealing has been extended to allow tort recover in non-insurance contracts). In *Seaman's*, the contract was a bargain and exchange yet the plaintiff was allowed to recover in tort for a breach of the implied covenant of good faith and fair dealing. *Id.* "A party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." *Id.*