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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICA ONLINE, INC., a Delaware corporation,

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, an Indiana corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a Pennsylvania corporation; ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; EXECUTIVE RISK SPECIALTY INSURANCE COMPANY, a Connecticut corporation, and DOES 1 through 50,

Defendants.

No. 5:06-cv-00198 JW (PVT)

DEFENDANTS FEDERAL INSURANCE COMPANY AND EXECUTIVE RISK SPECIALTY INSURANCE COMPANY'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS NINTH CAUSE OF ACTION FOR UNFAIR BUSINESS PRACTICES

Date: February 27, 2006
Time: 9:00 a.m.
Courtroom: 8

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In opposing Federal Insurance Company and Executive Risk Specialty Insurance Company's (collectively, "Defendants") motion to dismiss the complaint's ninth cause of action under California Business & Professions Code § 17200, Plaintiffs point this Court to various cases in which a § 17200 claim was allowed to proceed against an insurance company. Plaintiffs argue that because § 17200 claims have been stated against some insurance companies, the § 17200 claim they seek to bring against the Defendants in this case is proper. Plaintiffs hold out

the recent decision in Progressive West Insurance Co. v. Yolo County Superior Court, 135 Cal. App. 4th 263 (2005), as "strikingly similar" to the present case, and dispositive of Defendants' motion. However, the only similarity between Progressive and the present case is that both involved lawsuits against insurance companies.

Neither Progressive, nor any of the other garden-variety § 17200 cases cited by Plaintiffs, address the defects at issue in the Plaintiffs' claim. Plaintiffs simply cannot overcome the fact that (1) Textron Financial Corp. v. National Union Fire Insurance Corp., 118 Cal. App. 4th 1061 (2004), bars Plaintiffs' § 17200 claim because the activities on which the § 17200 claim are based are within the scope of California's Unfair Insurance Practices Act, for which no private right of action exists; (2) Plaintiffs fail to allege that they lack an adequate remedy at law – an essential element of a § 17200 claim; (3) the relief sought by Plaintiffs – both for themselves and on behalf of the public at large – is improper and not available under § 17200; and (4) even if Plaintiffs could state a claim for § 17200, they fail to allege a violation of § 17200 with sufficient particularity. Accordingly, the ninth cause of action against Federal and ERSIC should be dismissed. Because some of these defects – such as the holding in Textron – cannot be cured, Defendants' motion should be granted without leave to amend.

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I. PLAINTIFFS FAIL TO STATE A CLAIM UNDER CAL. BUS. & PROF. CODE § 17200

A. *Moradi-Shalal* and *Textron* Bar Plaintiffs' § 17200 Claim

In Moradi-Shalal v. Fireman's Fund Insurance Cos., 46 Cal. 3d 287, 304-05 (1988), the California Supreme Court held that a plaintiff cannot state a private right of action under California Insurance Code § 790.03 – otherwise known as the Unfair Insurance Practices Act ("UIPA"). The court in Textron, 118 Cal. App. 4th at 1070-72, recognized that the holding of Moradi-Shalal also precludes any claim under Business & Professions Code § 17200 that is premised on the type of activities covered by the UIPA – otherwise, Moradi-Shalal's holding would be rendered meaningless. The court in Textron found that the "specific allegations of wrongful conduct contained in plaintiff's [§ 17200 claim, such as] misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of

activities covered by the UIPA." Id. at 1070. As such, the court held that "merely alleging these purported acts constitute unfair business practices under [§ 17200] is insufficient to overcome Moradi-Shalal." Id. at 1070-71. Thus, the court concluded that the demurrers to plaintiff's unfair competition claim were properly sustained. Id. at 1072.

The impact of Textron is clear: "parties cannot plead around Moradi-Shalal's holding by merely relabeling their cause of action as one for unfair competition" under § 17200. Id. at 1070. Accordingly, activity covered under the UIPA cannot form the basis of a § 17200 claim as a matter of law, and claims based on such allegations should be dismissed.

In Plaintiffs' perfunctory discussion in their opposition papers of this dispositive issue (at pages 8-9), they make no effort to distinguish Textron. Indeed, they make no mention of Textron at all. Rather, Plaintiffs' allege that because they do not reference the UIPA in their complaint, their § 17200 claim is not premised on a violation of the UIPA, and so they should be permitted to proceed with their § 17200 claim. However, the plaintiff in Textron did not explicitly rely on any UIPA provision in its complaint either. Nevertheless, the court recognized that the activities of which the plaintiff complained were the type covered by the UIPA, and so under Moradi-Shalal, could not form the basis of claim under § 17200 as a matter of law.

Indeed, Plaintiffs' brief makes it clear that the bases of their § 17200 claim *are* alleged activities that fall within the UIPA. Plaintiffs "contend Defendants committed fraudulent and unfair business practices when they sold insurance policies with broad 'personal injury' or 'Media Activities' coverage which they had no intention of honoring in the context of privacy-related claims." Opp. at 8:17-19. The UIPA prohibits, among other things, "misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby," "[m]aking or disseminating … any statement … with respect to the business of insurance … which is untrue, deceptive, or misleading," "[m]isrepresenting to claimants . . . insurance policy provisions relating to any coverages at issue," and "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Cal. Ins. Code §§ 790.03(a), (b), (h)(1) and (h)(5) . Here, as in Textron, Plaintiffs' § 17200 allegations mirror the acts prohibited by the UIPA. Plaintiffs have merely relabeled an alleged UIPA

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violation as a violation of § 17200 – which Textron expressly forbids.

Rather than address Textron, Plaintiffs cite to several cases that have permitted a § 17200 claim to proceed against insurers. None of those cases control here. First and foremost, with the exception of the Progressive case (which did not involve a UIPA violation), *all of the cases pre-date the 2004 decision in Textron*.

The decision in Hangarter v. Paul Revere Life Insurance Co., 236 F. Supp. 2d 1069 (N.D. Cal. 2002), on which Plaintiffs rely heavily in their brief (Opp. at 8-9), not only pre-dates Textron by two years, but it was *reversed in relevant part by the Ninth Circuit* in Hangarter v. Provident Life & Accident Insurance Co., 373 F.3d 998, 1021-22 (9th Cir. 2004). The Ninth Circuit held that the plaintiff lacked standing to pursue the § 17200 claim, and so vacated and reversed the district court's judgment on the §17200 claim. Id.

The decision in Pastoria v. Nationwide Insurance, 112 Cal. App. 4th 1490 (2003), was not based on any UIPA violation, but rather involved alleged violations of Insurance Code §§ 330-334. Id. at 1492. Chabner v. United of Omaha Life Insurance Co., 225 F.3d 1042 (9th Cir. 2000), involved an alleged violation of Insurance Code § 10144 – which is not part of the UIPA. Id. at 1048-49. The court's decision in Kapsimallis v. Allstate Insurance Co., 104 Cal. App. 4th 667 (2002), did not mention Moradi-Shalal. Thus, it made no holding on the viability of a § 17200 claim in light of Moradi-Shalal, and it cannot be inferred that had it addressed the issue, it would have been inconsistent with the holding reached by Textron two years later.

Similarly, Progressive West Insurance Co. v. Yolo County Superior Court, 135 Cal. App. 4th 263 (2005), has no bearing on Textron's analysis. Progressive did not involve activities falling under the UIPA, and made no mention of Moradi-Shalal or Textron. Instead, it involved a very different kind of claim than is asserted by Plaintiffs here, or that is covered under the UIPA. In Progressive, the court found that the insurer had *not* improperly denied benefits and did *not* act in bad faith, and so dismissed the causes of action for breach of contract and bad faith. Id. at 281. It let the § 17200 claim proceed, however, because it was based – not on claims handling issues or representations concerning the scope of coverage afforded by the policy – but on a theory that after the claim was resolved, the insurer was improperly seeking to collect money from its

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insureds when it had no basis to do so.

The only similarity between Progressive and the present case is that both involved insurance companies. And, merely because Progressive involved a § 17200 claim against an insurance company does not support the conclusion that Plaintiffs can state a § 17200 claim against Defendants here. Defendants do not contend that a § 17200 claim can never be stated against an insurance company. However, California law is clear that a private right of action against insurers for activities falling within the scope of the UIPA – whether labeled as one under Insurance Code § 790.03 or under Business & Professions Code § 17200 – is *not* permitted.

Because Plaintiffs' § 17200 claim is based on activities falling within the scope of the UIPA, under the clear holding of Textron, it fails as a matter of law and should be dismissed without leave to amend.

B. Plaintiffs Fail to Allege the Essential Element That They Have No Adequate Remedy at Law

Even if Textron was not controlling here – which it is – Plaintiffs cannot state a cause of action for § 17200 because they have not pled an essential element of that claim. Heighley v. J.C. Penney Life Insurance Co., 257 F. Supp. 2d 1241, 1259-60 (C.D. Cal. 2003), recognized that in order to state a cause of action under § 17200, a plaintiff *must* allege that it has no adequate remedy at law. This requirement was reaffirmed recently in Stewart v. Life Insurance Co. of North America, 388 F. Supp. 2d 1138, 1144 (E.D. Cal. 2005). Where a plaintiff does not or cannot assert an essential element of a claim, the cause of action should be dismissed. *See, e.g.*, Cox Communications PCS, L.P. v. City of San Marcos, 204 F. Supp. 2d 1272, 1283 (S.D. Cal. 2002).

In response, Plaintiffs simply ignore the holding in Stewart, and attempt to dismiss the holding in Heighley by contending that it is mere dicta. Opp. at 9, n.5. The language used by the court in Heighley indeed constitutes a holding and not dicta: "Plaintiff has failed to allege that he has no adequate remedy at law .... Accordingly, *the court finds* that Plaintiff has failed to properly allege claims for relief under sections 17200 and 17500." 257 F. Supp. 2d at 1259-60 (emphasis added).

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Plaintiffs then contend that their § 17200 claim should not be dismissed merely because they seek an improper remedy. Opp. at 9:15. However, Plaintiffs miss the point. Plaintiffs' § 17200 claim fails, not merely because they seek an improper remedy, but because they are required under the holdings of Stewart and Heighley to plead, as an essential element of their § 17200 claim, that they have no adequate remedy at law. They do not plead this essential element, and so their claim should be dismissed.

Indeed, Plaintiffs (and any other members of the public whose claims allegedly were denied improperly) have adequate remedies at law – to wit, compensatory damages for breach of contract and bad faith – and they thus cannot state a claim for equitable relief under § 17200. Plaintiffs' assert in their brief, at 10:8-12, that injunctive relief is necessary because the insurance policies at issue remain in force and could be called upon to provide coverage in the future for privacy-related claims. This allegation, however, is not pled in the complaint, and is not properly considered on a motion to dismiss. Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (consideration of motion to dismiss is limited to contents of the complaint); North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983) (same). Plaintiffs speculation in their brief as to any unknown future claims does not overcome the failure of the complaint to plead the essential elements of a § 17200 claim, and so the claim should be dismissed. *See, e.g.*, Cox Communications, 204 F. Supp. 2d at 1283.

C. Plaintiffs Lack a Cognizable Remedy for their § 17200 Claim, and so the Claim Should be Dismissed or Alternatively, the Relief Stricken

Defendants explained in their opening brief that Plaintiffs improperly seek to turn a straight-forward breach of contract claim here into a § 17200 claim by labeling the amounts they seek to recover as "disgorgement" or "restitution" when, in fact, the only amounts they may seek here are "damages," which are not allowed under § 17200. *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1140-44 (2003).

In response, Plaintiffs allege that they seek "an order directing Defendants to disgorge *to the public*" funds and profits acquired by conduct that violates § 17200. Opp. at 11:5-7 (emphasis added). Plaintiffs reiterate that they do "not demand payment of disgorged profits to them," but

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rather "to the public." Opp. at 11:25-27. They assert that such relief is permitted under § 17203. Opp. at 11:9. This position of the Plaintiffs conflicts with the allegations of the complaint and with applicable law.

Plaintiffs' position in their brief contradicts the allegations of their own complaint, in which they plead that they bring their § 17200 claim "in their individual capacities" – not as representatives of the public. Complaint ¶ 77. Indeed, the complaint contradicts itself, insofar as its prayer for relief then seeks disgorgement to the public. Complaint, Prayer for Relief, ¶ 14.

As noted in Defendants' opening papers – and ignored by Plaintiffs in their opposition – Proposition 64 amended § 17203 to eliminate "representative actions." Now, a plaintiff seeking relief not just for itself, but for public, must satisfy class action pleading requirements. Abels v. JBC Legal Group, P.C., 227 F.R.D. 541, 549 (N.D. Cal. 2005) (§ 17203 "bars representative actions that cannot meet the class certification requirements imposed by § 382 of the California Code of Civil Procedure"). Plaintiffs have made no class allegations and have merely made a conclusory and blanket statement that they seek to recover on behalf of the public in their prayer for relief. This plainly does not meet the requirements of § 17203.

Accordingly, Plaintiffs are not entitled to the remedies sought under their § 17200 claim, and their claim should be dismissed. Alternatively, Defendants join in co-defendant St. Paul Mercury Insurance Company's motion to strike Plaintiffs' prayer for relief.

D. Plaintiffs Fail to Plead a Cause of Action Under § 17200 With Sufficient Particularity

Plaintiffs contend that they have pled their § 17200 claim with sufficient particularity. Opp. at 12. However, in making this blanket contention, Plaintiffs fail to acknowledge the clear holding in Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal. 1997) that *under the federal pleading standards*, a plaintiff alleging unfair business practices under § 17200 must state with *reasonable particularity* the facts supporting the statutory elements of the violation. *See also* Qarbon.com, Inc. v. eHelp Corp., 315 F. Supp. 2d 1046, 1052-53 (N.D. Cal. 2004) (under federal pleading standard, court dismissed unfair competition counterclaim where claim not pled with "'reasonable particularity'").

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Here, instead of addressing the Silicon pleading test, Plaintiffs merely point to their conclusory allegation that Defendants "have a policy and practice of automatically denying all claims that implicate their 'personal injury' and/or 'Media Activities' coverages when privacy allegations are asserted against insureds." Opp. at 12 (citing Complaint ¶ 78). Such a bare allegation is insufficient under Silicon and the federal pleadings standard. Accordingly, Plaintiffs' § 17200 count should be dismissed for failure to plead with sufficiently particularity.

II. LEAVE TO AMEND SHOULD NOT BE GRANTED

As discussed above, Plaintiffs cannot state a viable claim under § 17200 as a matter of law. Because leave to amend would be futile, Plaintiffs' request for leave to amend should be denied. Albrecht v. Lund, 845 F. 2d 193, 195 (9th Cir. 1988) (leave to amend properly denied where amendment would be futile because plaintiff could not allege additional facts that would cure defects in complaint). *See also* Textron, 118 Cal. App. 4th at 1070-72 (affirming dismissal of § 17200 claim based on unfair insurance practices without leave to amend).

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Federal's and ERSIC's moving papers, Plaintiffs' Ninth Cause of Action for violation of § 17200 should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, the relief sought in that cause of action should be stricken for the reasons set forth in the Motion to Strike, filed by co-defendant St. Paul Mercury Insurance Company, in which Defendants join.

Dated: February 13, 2006

Respectfully submitted,

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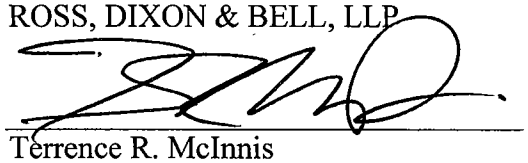

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