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PALMER, J., dissenting. Under General Statutes § 38a-816 (10), whenever an insurer enters into a service contract that provides for reimbursement for services performed by any practitioner of the healing arts licensed to practice in this state, including podiatrists, "reimbursement under such . . . service contract shall not be denied because of race, color or creed nor shall any insurer make or permit any unfair discrimination against . . . persons so licensed." The majority concludes, first, that § 38a-816 (10) prohibits only the outright denial of reimbursement due to race, color or creed and, second, that the statutory prohibition against "any unfair discrimination" on the basis of licensure mirrors that prohibition and, likewise, bars only the complete denial of reimbursement on account of licensure. On the basis of this construction of § 38a-816 (10), the majority further concludes that, because it is undisputed that the defendant, Health Net of Connecticut, Inc., merely *discriminates* against podiatrists on account of licensure—that is, it pays podiatrists less than it pays medical doctors for the same care and treatment solely because podiatrists hold a different license than medical doctors—but does *not deny payment altogether* to podiatrists, the defendant's practice, as a matter of law, does not constitute unfair discrimination in violation of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., and the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

In my view, the majority is wrong in its interpretation of the scope of the statutory prohibition against "any unfair discrimination" on the basis of licensure because, among other reasons, it is wrong in its predicate interpretation of the scope of the statutory protection barring discrimination on the basis of race, color or creed. Under that interpretation, the defendant is free to discriminate on the basis of race, color or creed, and also on the basis of licensure, unless the defendant *refuses altogether* to reimburse a licensed medical professional for covered services rendered. In other words, in reaching its conclusion that it is permissible under § 38a-816 (10) for an insurer to discriminate on the basis of licensure with respect to the amount it reimburses a medical professional, the majority reaches the threshold conclusion that § 38a-816 (10) also does not bar an insurer from reimbursing a medical professional in an amount less than he or she otherwise would be entitled to receive for the same service merely because of his or her race, color or creed. This interpretation of § 38a-816 (10) is unacceptable because it imputes to the legislature an intent to countenance invidious discrimination, an unconscionable result that the legislature could

not possibly have intended.

I would conclude, rather, that § 38a-816 (10) bars discrimination on the basis of race, color, creed or licensure both with respect to the outright denial of reimbursement and to the amount of reimbursement. Accordingly, I also would conclude that the named plaintiff, the Connecticut Podiatric Medical Association (association), and the individual plaintiffs, podiatrists Jeffrey F. Yale, Anthony R. Iorio, and R. Daniel Davis,[1] have set forth a viable claim that the setting of lower reimbursement rates that the defendant pays to podiatrists as compared to medical doctors—rates that the plaintiffs contend are unfairly discriminatory because the medical care that podiatrists provide is equal to or better in quality than the care that medical doctors provide for the same services—constitutes an unfair insurance practice in violation of § 38a-816 (10).[2] Accordingly, the plaintiffs are entitled to the opportunity to prove their claims at trial.

Before turning to the issue of statutory interpretation raised by the plaintiffs' appeal, it bears emphasis that the defendant does not challenge the plaintiffs' claim that the defendant reimburses podiatrists in an amount less than medical doctors for the same services and that the defendant does so solely because podiatrists hold a different license than medical doctors.[3] In fact, podiatrists collectively would have been paid approximately $1.2 million more annually by the defendant if they had been reimbursed at the same rates that the defendant reimburses medical doctors for the same services, an amount that represents more than one third of the annual total fees paid to podiatrists by the defendant. The defendant also does not dispute that this difference in reimbursement rates is not based on any difference in the quality of the medical care provided by podiatrists and medical doctors or on any differences in the education or training of podiatrists and medical doctors. In fact, according to expert testimony proffered by the plaintiffs, the education and training of podiatrists in foot and ankle care generally exceed that of medical doctors and orthopedic surgeons who do not specialize in such care. In addition, the plaintiffs maintain that the quality of care given by podiatrists is equal to or surpasses the quality of care given by medical doctors for procedures that fall within the scope of the practice of podiatrists. Finally, the plaintiffs contend that, in light of these facts, there is no legitimate justification for the different reimbursement rates for medical doctors and podiatrists. Because these allegations are supported by sworn affidavits and testimony, it was improper for the trial court to have granted the defendant's motion for summary judgment unless those facts, even if proven, were insufficient as a matter of law to support the plaintiffs' claims. See, e.g., *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 787, 967 A.2d 1 (2009) ("[t]he party seeking summary

judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to . . . judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact" [internal quotation marks omitted]). Contrary to the conclusion of the majority, the plaintiffs' allegations give rise to triable issues of fact.

The majority commences its statutory analysis by construing the language of § 38a-816 (10) that immediately precedes the language at issue in the present case. Specifically, the majority construes the phrase "reimbursement . . . shall not be denied because of race, color or creed," as follows: "[T]he scope of [that] . . . clause is easy to discern—it is expressly limited to decisions *denying* reimbursement and its protection extends to denials made on the basis of race, color or creed . . . ." (Emphasis in original.) Having concluded that the scope of that language is "limited to decisions denying reimbursement," the majority then states that the issue presented by this appeal is whether the scope of the language that follows, namely, "nor shall any insurer make or permit any unfair discrimination against particular individuals or persons so licensed"; General Statutes § 38a-816 (10); also is limited to decisions denying reimbursement, or whether the prohibition against unfair discrimination extends to all decisions concerning reimbursement, including rate setting.[4] The majority ultimately decides that the two provisions have exactly the same meaning, that is, they both apply *only* to *denials* of reimbursement and *not* to the *rate or amount* of reimbursement.

The majority's conclusion is unsupportable for several reasons. First, it simply is inconceivable that the legislature intended for the language of § 38a-816 (10) that prohibits the denial of reimbursement on the basis of race, color or creed to be applied literally and strictly only to denials of reimbursement and not to other decisions concerning reimbursement. To conclude otherwise, as the majority does, leads to an utterly untenable result, namely, that it is *permissible* under § 38a-816 (10) for an insurer to discriminate on the basis of race, color or creed as long as that insurer does not deny reimbursement altogether. In other words, under the majority's analysis, it would be an acceptable practice for an insurer to discriminate on the basis of race, color or creed in establishing its reimbursement schedule. Indeed, because the provisions of CUIPA reflect the public policy of this state, as articulated by the legislature, both with respect to insurance practices that are prohibited and with respect to those that are not prohibited, under the majority's interpretation of § 38a-816 (10), discrimination on the basis of race, color or creed in the amount of reimbursement "[is] not so violative of the public policy of this state as to warrant statutory

intervention."[5] *Mead* v. *Burns*, 199 Conn. 651, 666, 509 A.2d 11 (1986).

For reasons so obvious that they require no elaboration, this cannot possibly reflect the intent of the legislature. In fact, it is difficult to think of conduct not barred by our Penal Code that is more clearly contrary to public policy than discrimination on the basis of race, color or creed. When strict adherence to the literal language of a statute leads to such an unconscionable result—a result that rationally cannot be attributed to the legislature—we will not apply that language in accordance with its literal meaning. See, e.g., *State* v. *Salamon*, 287 Conn. 509, 524, 949 A.2d 1092 (2008) ("[a]lthough we frequently adhere to the literal language of a statute, we are not bound to do so when it leads to unconscionable, anomalous or bizarre results"). Indeed, in light of the bizarre and intolerable result that is achieved by construction of the term "deni[al]" as representing only complete or total denials of reimbursement, common sense dictates that the term must be construed broadly to include partial denials of reimbursement. Thus, the only reasonable interpretation of the language of § 38a-816 (10) barring the denial of reimbursement on the basis of race, color or creed is that neither the denial of reimbursement *nor any other decision pertaining to reimbursement* is permitted to be made on the basis of race, color or creed. In fact, the majority's interpretation is so implausible that even the defendant does not contend that that provision permits discrimination on the basis of race, color or creed in the setting of reimbursement rates.[6]

Second, it cannot be disputed that the language of § 38a-816 (10) barring "any unfair discrimination" on the basis of licensure is worded in much broader terms than the statutory prohibition against the denial of reimbursement due to race, color or creed. Because the provision specifically pertaining to reimbursement extends not only to the denial of reimbursement but also to decisions concerning the amount of reimbursement, the far broader prohibition against "any unfair discrimination" necessarily must also be read to include all such decisions. To conclude otherwise would be to ignore the fact that the language of that provision is significantly more encompassing than the language of the prohibition against denials of reimbursement on the basis of race, color or creed.

The majority acknowledges that, under its interpretation of § 38a-816 (10), that provision does not prohibit insurers from discriminating on the basis of race, color or creed with respect to the amount that those insurers reimburse medical professionals. The majority nevertheless seeks to justify its construction of § 38a-816 (10) by asserting, first, that, contrary to my statement that invidious discrimination is permitted under the majority's construction of § 38a-816 (10), that provision "does

not . . . sanction any discriminatory actions; [rather] it provides a civil remedy for discriminatory denials of reimbursement"; footnote 6 of the majority opinion; and, second, that "the issue of discrimination on the basis of race, color or creed is not before us in this appeal" because "[t]he present case does not involve such a claim . . . ." Id. The majority's reliance on these semantical distinctions is unconvincing. With respect to the majority's first point, CUIPA represents a legislative determination that certain insurance practices are unfair and, therefore, must be prohibited. Under the majority's interpretation of CUIPA, discrimination in the amount of reimbursement on the basis of race, color or creed is *not* an unfair insurance practice. In light of the majority's express conclusion that such discrimination is *not prohibited* under CUIPA, it *necessarily is permitted* under CUIPA. See, e.g., *Mead* v. *Burns*, supra, 199 Conn. 665–66 (CUIPA establishes certain "regulatory principles" that reflect public policy determination of legislature in regard to both prohibited insurance practices and insurance practices that, because they are not prohibited, are permissible under CUIPA). For the majority to assert otherwise defies logic and ignores this court's prior pronouncement on the matter. See id.; see also *Quimby* v. *Kimberly Clark Corp.*, 28 Conn. App. 660, 671–72 and n.8, 613 A.2d 838 (1992) (observing, in accordance with *Mead*, that because definition of unfair insurance settlement practice for purposes of CUIPA requires proof that conduct at issue constituted general business practice, isolated instances of such conduct do not violate this state's public policy as articulated by legislature under CUIPA).

With respect to its second point, the majority's attempt to minimize the import of its interpretation of § 38a-816 (10) also is unavailing. Contrary to the majority's assertion, the issue of discrimination on the basis of race, color and creed most certainly *is* before this court in this appeal because the majority has elected to place it before the court by virtue of its statutory analysis. This is so because the majority's statutory interpretation is expressly predicated on its determination that § 38a-816 (10) bars only complete denials of reimbursement on the basis of race, color or creed, and not other discriminatory reimbursement practices based on race, color or creed. Thus, far from "overreach[ing] to decide an issue that is not before [this court]"; footnote 6 of the majority opinion; I am merely pointing out a necessary, and untenable, consequence of the majority's interpretive analysis.

Indeed, under the majority's narrow construction of § 38a-816 (10) as prohibiting only the complete denial of reimbursement on the basis of race, color or creed, an insurer readily could defeat that prohibition. Specifically, if an insurer wished to prevent a medical professional from participating in its network because of his or her race, color or creed, it could do so without

violating § 38a-816 (10) simply by reimbursing that medical professional in an amount that is far less than he or she could afford to accept in payment. Under the majority's interpretation of § 38a-816 (10), there is absolutely no bar against such conduct by the insurer. Thus, the construction of § 38a-816 that the majority advances would create a loophole rendering meaningless the very protection that the majority itself has identified under the statute.[7] This cannot have been the intent of the legislature. See, e.g., *Hartford Courant Co*. v. *Freedom of Information Commission*, 261 Conn. 86, 101, 801 A.2d 759 (2002) (legislature "[does] not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results" [internal quotation marks omitted]).

Even if the majority were correct in its interpretation of the language of § 38a-816 (10) as barring only denials of reimbursement on the basis of race, color and creed, its construction of the statutory bar against "any unfair discrimination" on the basis of licensure is unpersuasive. Under the majority's construction, the scope of the two provisions of § 38a-816 (10) is precisely the same: the first clause bars the denial of reimbursement on account of race, color and creed, and the second clause bars the denial of reimbursement on account of licensure. The majority, however, does not explain why the legislature would have elected to use entirely different language in the two clauses if it had intended for those provisions to have identical meanings. "Ordinarily, when the legislature uses different language, the legislature intends a different meaning." (Internal quotation marks omitted.) *Dias* v. *Grady*, 292 Conn. 350, 361, 972 A.2d 715 (2009). This is especially true in view of the fact that the legislature could have achieved the result that the majority attributes to it merely by adding the word "licensure" to the terms "race," "color" and "creed."[8] Instead, the legislature opted for entirely different and much broader language for purposes of the second clause.[9] It is telling that the majority does not even acknowledge this obvious problem with its linguistic analysis.

To support its conclusion, the majority relies on the scant legislative history of § 38a-816 (10). That legislative history is, at best, unhelpful in determining the scope of that provision. For example, in commenting on Public Acts 1967, No. 852, § 1, which is now codified as amended at § 38a-816 (10), and which applied only to chiropractors,[10] Senator John P. Janovic remarked: "[The] act will prohibit an insurance company from denying benefits to a person treated by a chiropractor. It will prohibit insurance companies from discriminating against a chiropractor for services rendered under future insurance contracts." 12 S. Proc., Pt. 5, 1967 Sess., p. 2346. Commenting on a 1969 amendment, Senator George L. Gunther characterized the scope of the protection afforded to practitioners of the healing arts

under what is now § 38a-816 (10) as "eliminat[ing] any insurance reimbursement being denied [to] anyone based on race, color, creed, or healing art." Conn. Joint Standing Committee Hearings, Insurance, 1969 Sess., p. 1. These broad, general comments provide no meaningful insight into the precise parameters of the insurance practices barred by § 38a-816 (10), and they certainly cannot be deemed to limit the exceedingly broad statutory prohibition against "*any* unfair discrimination . . . ." (Emphasis added.) General Statutes § 38a-816 (10). Indeed, for the reasons that I have explained, the references in the legislative history to the "deni[al]" of reimbursement on the basis of race, color or creed reasonably cannot be understood as reflecting an intent to limit the scope of the statutory protection to outright or complete denials but, rather, must be read as including *any* denial, either complete or partial, on the basis of race, color or creed.

In sum, the majority's interpretation of § 38a-816 (10) finds insufficient support in the statutory language or in the pertinent legislative history. In view of the fact that the provision's broad prohibition against "any unfair discrimination" on the basis of licensure surely encompasses disparate reimbursement rates *based solely on the license* held by a medical professional and not on the nature or quality of the care provided by that professional, as the plaintiffs allege, the plaintiffs are entitled to their day in court.[11] Cf. *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 505, 746 A.2d 1277 (2000) (whether acts of defendant constitute unfair trade practices gives rise to question of fact for decision by trier of fact). Because the majority denies them that right, I respectfully dissent.

[1] I hereinafter refer to the association and the individual plaintiffs collectively as the plaintiffs.

[2] As the majority explains, the individual plaintiffs seek both damages and injunctive relief. The trial court dismissed the association's claim for damages, and the association has not appealed from the dismissal of that claim. Consequently, the association's claim is limited to injunctive relief. I agree with the majority that the plaintiffs have standing to pursue their respective claims.

[3] I note that the defendant is the only private insurer that reimburses podiatrists in this state at a lower rate than medical doctors for the performance of the same medical services.

[4] For purposes of this appeal, I accept the majority's assertion that the scope of the "unfair discrimination" language of § 38a-816 (10) "is limited to an insurer's actions with respect to reimbursement." I also agree that that language prohibits any such discrimination on the basis of licensure.

[5] In *Mead*, this court explained that, because "[t]he definition of unacceptable insurer conduct [under CUIPA requires proof that the conduct at issue constitutes a general business practice, that definition] reflects the legislative determination that isolated instances of unfair insurance settlement practices are not so violative of the public policy of this state as to warrant statutory intervention." *Mead* v. *Burns*, 199 Conn. 651, 666, 509 A.2d 11 (1986). Thus, in *Mead*, we held that, although CUTPA applies to unfair or unethical insurance practices, the plaintiff in *Mead* had not raised a viable claim under CUTPA merely by alleging a single instance of an alleged unfair settlement practice because to conclude otherwise would be contrary to the public policy reflected in the legislature's definition of unacceptable insurer conduct. See id., 665–66. In other words, the fact that the legislature has limited the reach of CUIPA to a certain category of insurance practices

represents a legislative policy decision that conduct by an insurer that does not fall within that category is not prohibited.

[6] With respect to the provision of § 38a-816 (10) barring the denial of reimbursement on the basis of race, color or creed, the defendant states that the plaintiffs make no claim that the defendant has violated that provision.

[7] Although such discrimination by an insurer on the basis of race, color or creed might not be in that insurer's best financial interest, undoubtedly, an insurer bent on discriminating in that manner would not be deterred from doing so by economic considerations. Indeed, if it were otherwise, there would have been little need for the provision barring discrimination on the basis of race, color or creed.

[8] The majority appears to suggest that construing § 38a-816 (10) to include unfair discrimination in the setting of reimbursement rates on the basis of licensure somehow renders superfluous the preceding clause barring discrimination on the basis of race, color or creed. Specifically, the majority states that it "cannot interpret" the clause prohibiting unfair discrimination "so broadly that it completely encompasses the meaning of the . . . clause" prohibiting discrimination on the basis of race, color or creed. Because the two clauses target discrimination involving different groups, neither clause renders the other superfluous.

[9] I also note that, as the plaintiffs contend, if § 38a-816 (10) does not prohibit unfair discrimination in the setting of rates, then the protections of the provision are largely, if not entirely, illusory. Under the majority's interpretation, an insurer could reimburse podiatrists at very low rates, thereby effectively denying podiatrists the opportunity to participate in the defendant's network and thwarting the purpose of the statute.

[10] Podiatrists were not included in the protected class of "practitioner[s] of the healing arts"; General Statutes § 38a-816 (10); until 1981. See Public Acts 1981, No. 81-471, § 4 (amending General Statutes [Rev. to 1981] § 20-1 to include podiatry in definition of "[t]he practice of the healing arts").

[11] In support of its contention that the trial court properly granted its motion for summary judgment, the defendant asserts that the different reimbursement rates that it pays to medical doctors and podiatrists cannot constitute unfair discrimination because, as a matter of law, medical doctors and podiatrists are not similarly situated. This argument lacks merit because the plaintiffs have raised a statutory claim, not a claim under the equal protection clause of the fourteenth amendment. See, e.g., *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 602 and n.10, 834 A.2d 52 (2003) (equal protection clause of fourteenth amendment applies only upon threshold showing that state statute or practice treats similarly situated persons differently). Moreover, § 38a-816 (10) protects certain practitioners of the healing arts, including podiatrists. To the extent that a claim under § 38a-816 (10) alleging unfair discrimination requires a showing by a plaintiff that the medical services that he or she has rendered were of equal or better quality than the same services provided by a medical professional reimbursed at a higher rate, the determination of whether the plaintiff has made such a showing is one for the trier of fact, not the court.