MICHELMAN & ROBINSON, LLP
ATTORNEYS AT LAW

William L Gausewitz
BGausewitz@mrllp.com

Sacramento Office
915 L Street, Suite 1110
Sacramento, CA 95814
P 916.447.4044 **F** 916.405.3404 www.mrllp.com

August 19, 2011

Supreme Court of California
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

Re: *Hughes v. Progressive Direct Insurance Company*, 196 Cal. App. 4th 754; Request for Supreme Court Review

Honorable Justices of the Supreme Court:

This letter is submitted pursuant to Rule 8.500(g) of the California Rules of Court on behalf of the Personal Insurance Federation of California (PIFC) as amicus curiae, in support of the Petition for Review and/or for a Grant-and-Hold Order by petitioner Progressive Direct Insurance Company, in the case of *Hughes v. Progressive Direct Insurance Company*, 196 Cal. App. 4th 754 (*Hughes*). PIFC is an association of insurance companies whose members write a majority of the property and casualty insurance in California which are directly affected by the Court of Appeal's decision in this case. PIFC Is an organization which represents the interests of its member companies in legal and public policy matters. As a representative of its member companies PIFC has a direct interest in the Court's decision on this petition.

The petition by Progressive Direct should be granted. The appellate court decision in *Hughes* is another of many cases which examine the question of when a private right of action against an insurer is permitted under the California Unfair Competition Law[1] (UCL) or when such an action is barred by *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 (*Moradi-Shalal*). This is a

[1] California Business and Professions Code § 17200, Iet seq.

complex and developing area of law with far-reaching legal and public policy implications. This Court has granted review to another case addressing this question of law, *Zhang v. Superior Court*, 178 Cal. App. 4th 1081 (*Zhang*). *Hughes* should not be allowed to become binding legal precedent while the legal issue it addresses is under review by the Supreme Court.

In brief summary, *Moradi-Shalal* held that there is no private right of action available against an insurer for actions by insurers that are regulated under the Unfair Insurance Practices Act (UIPA)[2]. This rule has been variously expanded, restricted, and refined over the succeeding 23 years[3]. A particularly difficult issue has been determining when *Moradi-Shalal* bars an action against an insurer based upon an alleged violation of the UCL. The extensive development of the common law on this question has ultimately not produced clear legal standards. This legal question – if and when a claim under the UCL is barred by *Moradi*-Shalal, is the basic issue in both *Hughes* and *Zhang.* This Court's review in *Zhang* will provide more definitive standards to guide both potential litigants and the lower courts on this difficult issue. The need to avoid further complication of this complex area of common law pending the decision in *Zhang* is alone an adequate justification for granting this petition.

The petition, however, should also be granted because *Hughes* was wrongly decided. The Court of Appeal's opinion in *Hughes* establishes a broad new rule of law which is inconsistent with much of the existing common law addressing the basic question of when *Moradi-Shalal* does or does not bar a UCL claim.

The rule established in *Hughes* is, in essence, that a UCL claim may be maintained against an insurer based upon a violation of any statute other than section

---

[2] California Insurance Code § 790 *et seq.* Unless stated otherwise, all further section citations in this letter refer to the California Insurance Code.

[3] Among the significant cases that have found private rights of action against insurers barred by *Moradi-Shalal* are *Safeco Insurance Company v. Superior Court*, 216 Cal. App. 3d 1491 (1990); *Maler v. Superior Court*, 220 Cal. App. 3d 1592 (1990); and *Textron Financial v. National Financial Union Fire Insurance Company, 118 Cal. App. 4th 1061* (2004). Cases that have permitted private actions against insurers notwithstanding the *Moradi-Shalal* rule include *Manufacturers Life Insurance Co. v. Superior Court*, 10 Cal. 4th 257 (1995); *State Farm Fire and Casualty Company v. Superior Court*, 45 Cal. App. 4th 1093 (1996); *Donebedian v. Mercury Insurance Company*, 116 Cal. App. 4th 968 (2004).

790.03(h) unless that statute "expressly" prohibits such an action. This potentially subjects insurers to private actions for nearly any violation of the Insurance Code, with the possible exception of section 790.03(h), since few if any sections of the Insurance Code contain the type of express prohibition which *Hughes* would require to bar a UCL claim.

The rule requiring an express statutory prohibition on UCL claims conflicts directly with other appellate court precedent. In *Vikco Insurance Services v. Ohio Indemnity Company*, 70 Cal. App. 4th 55 (1999), a UCL claim was rejected by the court despite the fact that the insurer was alleged to have violated section 769 of the Insurance Code, a statutory prohibition distinct from the UIPA. Section 769 contains no express prohibition against serving as the basis for a UCL claim and is thus directly inconsistent with the rule established in *Hughes*. The inconsistency between *Hughes* and *Vikco Insurance Services* is alone an adequate reason to grant the petition.

The Court of Appeal also erred in interpreting the statute in *Hughes*. The statute in question is section 758.5, which restricts the role of insurers in the selection of body shops in auto insurance claims requiring repair of a vehicle. In enacting section 758.5 the Legislature included subdivision 758.5(f), which provides that "[t]he powers of the commissioner to enforce this section shall include those granted in" the UIPA. This amounts to a clear statement of legislative intent that although this section is not included in the UIPA, a violation of the section should be enforced by the Commissioner as if it were a violation of the UIPA. Thus an alleged violation of section 758.5 should be treated as precisely the type of allegation that, under *Moradi-Shalal*, does not support a private right of action against an insurer.

The *Hughes* opinion employs a faulty analysis of the legislative history in order to reach exactly the opposite conclusion. The plain language of the statute makes it clear that the Legislature intended violations of section 758.5 to be subject to administrative enforcement by the Insurance Commissioner. A litigant should not be able to use an alleged violation of a statute which the Legislature explicitly placed under the authority of the Commissioner to plead around the *Moradi-Shalal* restriction by characterizing it as

a UCL violation.

Finally, this petition should be granted for reasons of sound public policy. One of the explicit bases of the *Moradi-Shalal* decision was concern that the rule established under the *Royal Globe*[4] promoted excessive and meritless litigation. This same concern supports the petition in *Hughes*. By severely restricting the application of *Moradi-Shalal*, *Hughes* would permit a private action in any case in which an insurer can be alleged to have violated a statute which does not have an express prohibition against a UCL claim. Justice Woods raised this concern in his concurring opinion in *Hughes*. His concern is well-founded. The rule established in *Hughes* will result in a significant increase in weak and meritless litigation.

For the reasons stated above, PIFC respectfully requests and urges that the Court grant Respondent's petition in this case.

Respectfully submitted,

MICHELMAN & ROBINSON, LLP

William L. Gausewitz

[4] *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880 (1979)