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August 26, 2011

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**VIA FEDERAL EXPRESS**

The Honorable Chief Justice Tani Cantil-Sakauye  
and Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102

Re: *Hughes v. Progressive Direct Insurance*  
Supreme Court Case No. S195069  
Letter in Support of Petition for Review

Dear Honorable Chief Justice Tani Cantil-Sakauye and Honorable Associate Justices:

*Amici curiae* the Chamber of Commerce of the United States of America (Chamber) and American Insurance Association (AIA) respectfully request that the Court grant the petition for review filed by defendant Progressive Direct Insurance Company (Progressive) in the above-referenced case to determine whether Business & Professions Code section 17200 can be used to resuscitate private rights of action under the Insurance Code (the same type of claims this Court rejected in *Moradi-Shalal v. Fireman's Fund Insurance Companies* (1988) 46 Cal.3d 287 over twenty years ago).

The Chamber is the nation's largest federation of business companies and associations, representing 300,000 direct members and indirectly representing an underlying membership of more than 3,000,000 businesses and professional associations of every size and in every sector and geographic region of the country, including California. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

AIA is a leading national trade association representing some 300 major property and casualty insurance companies, based in California and most other states, that collectively underwrote more than \$117 billion in direct property and casualty premiums in 2008,

The Honorable Chief Justice Tani Cantil-Sakauye  
and Honorable Associate Justices

August 26, 2011

Page 2

including 30 percent of the property and casualty insurance market in this State. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

Both the Chamber and AIA have had a longstanding interest in the scope and application of unfair practices and insurance law. AIA filed an *amicus curiae* brief in another case currently pending before this Court, *Zhang v. Superior Court*, Supreme Court Case No. S178542, in which overlapping and related issues concerning the application of Business & Professions Code section 17200 in the insurance context are raised. The Chamber and AIA urge this Court to grant review of this case and hold it in light of *Zhang v. Superior Court*, or, in the alternative, to grant review and address the propriety of using Business and Professions Code section 17200 to resurrect private rights of action under the Insurance Code in this state.

Over 20 years ago, this Court held that there is no private right of action under Insurance Code section 790, et seq. (the Unfair Insurance Practices Act or UIPA). (*Moradi-Shalal v. Fireman's Fund Insurance Co.* (1988) 46 Cal.3d 287.) In so doing, the Court reversed the decade-old *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, which created a private right of action against insurers who committed the unfair practices enumerated under section 790 of the UIPA. (See generally, Hon. Walter Croskey, *Bad Faith in California: Its History, Development and Current Status* (1990-1991) 26 Tort & Ins. L.J. 561 [tracing the history of California bad faith law].)<sup>1</sup> The Court reversed *Royal Globe* because it found “disturbing” “the breadth of criticism leveled” against the decision and “the flood of contrary decisions of other state courts.” (*Moradi-Shalal, supra*, 46 Cal.3d at p. 299.) The Court observed that “only two states other than California recognize[d] a statutory cause of action for private litigants” and 17 of the 19 states that had adopted model acts similar to California’s had refused to recognize a private right of action, in the process either expressly rejecting the *Royal Globe* analysis or interpreting similar statutory language differently. (*Id.* at pp. 297-298.) In California, the Court observed, lower courts had

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<sup>1</sup> The Legislature subsequently enacted legislation to restore the *Royal Globe* doctrine allowing private suits for insurer bad faith, but this legislation was overturned in a statewide referendum in 2000.

The Honorable Chief Justice Tani Cantil-Sakauye  
and Honorable Associate Justices  
August 26, 2011  
Page 3

“experienced considerable difficulty in attempting to define the scope of the *Royal Globe* cause of action.” (*Id.* at p. 303.)<sup>2</sup>

Scholarly criticism, also, “emphasize[d] both the erroneous nature of [the] holding (i.e., the strained interpretation of the statutory provisions, and the misreading or disregard of available legislative history) and the undesirable social and economic effects of the decision (i.e., multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other “transaction” costs).” (*Id.* at p. 299.) In particular, the *Moradi-Shalal* court noted that commentators had observed that “*Royal Globe*, and its allowance of a direct action against the insurer, may result in escalating insurance costs to the general public resulting from insurers’ increased expenditures to fund coerced settlements, excessive jury awards and increased attorney fees.” (*Id.* at p. 301.)

The adverse social and economic effects of *Royal Globe* and the private right of action against insurers it created were not merely theoretical. In a 2001 report, for example, the RAND Institute for Civil Justice described the effects of third-party bad faith doctrine on automobile insurance costs and compensation in California: under *Royal Globe*, bodily injury payouts increased 36% while the average total costs of bodily injury claims (including attorney fees) rose to 40% above the cost of other states and total average automobile insurance premiums increased between 11% and 19%; once *Royal Globe* was overturned, bodily injury payouts decreased 26%, the total cost of bodily injury claims returned to levels equivalent with those in other states, and auto insurance premiums dropped. (Angela Hawken, *et al.*, *The Effects of Third-Party, Bad Faith Doctrine on Automobile Insurance Costs and Compensation* (RAND Institute for Civil Justice 2001).) Likewise, a study prepared by economist William G. Hamm concluded that “[r]einstating third-party lawsuits in California . . . could cost California individuals and businesses up to \$1.4 billion in additional automobile insurance premiums annually” and cause a rise of \$200 million in liability insurance costs. (William G. Hamm, *The Economic Effect of Propositions 30 and 31* (2000) p. 1.)

Now Plaintiffs are attempting to revive private rights of action against insurers by asserting unfair competition claims under Business & Professions Code section 17200. This Court has already granted review in *Zhang v. Superior Court*, Supreme Court Case No.

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<sup>2</sup> Indeed, by the time this Court decided *Moradi-Shalal*, it had “granted review in approximately 25 other cases raising a variety of *Royal Globe* issues and reaching a variety of conflicting conclusions,” all of which the Court granted review in and held pending its decision in *Moradi-Shalal*. (*Id.* at p. 303.)

The Honorable Chief Justice Tani Cantil-Sakauye  
and Honorable Associate Justices

August 26, 2011

Page 4

S178542, in which this Court has been asked to decide whether “California’s UCL permit[s] insureds and third-party claimants in claim-handling or amount-of-loss lawsuits to plead around *Moradi-Shalal* and bring private causes of action for the very types of activities proscribed by and intrinsically intertwined with the UIPA.” (*Zhang* Petition for Review, p. 1.) The petition in this case raises a related issue: can violations of statutes other than the UIPA which are specifically applicable to insureds serve as a predicate for a claim under Business & Professions Code section 17200? The Chamber and AIA urge the Court to grant review in this case as well, and reassert the reach of *Moradi-Shalal*’s prohibition on private rights of action.

Respectfully submitted,

SNELL & WILMER L.L.P.

By: 

Mary-Christine Sungaila  
Attorneys for *Amici Curiae* United States  
Chamber of Commerce and American  
Insurance Association

## Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On August 26, 2011, I served, in the manner indicated below, the foregoing document described as **Amicus Letter in Support of Progressive Direct Insurance Company** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

***Please see attached Service List***

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A) as indicated on the service list.
- BY FACSIMILE: (C.C.P. § 1013(e)(f)), as indicated on the service list.
- BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).
- BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 26, 2011, at Costa Mesa, California.

  
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Sandy Cairelli

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