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June 30, 2011

## Bad Faith - Private Right of Action Permitted for Violation of Insurance Code Provision

*Chris Hughes v. Progressive Direct Insurance Company*  
Court of Appeal, Second District (June 15, 2011)

Insurance Code Section 758.5 prohibits an insurer from either requiring that an insured's automobile be repaired by a specific automobile repair dealer or suggesting or recommending that a specific repair dealer be used unless the insured is first informed in writing of his or her right to go elsewhere. This case considers whether violation of this section would support a claim for violation of Unfair Competition Laws under Business and Professions Code Section 17200. Chris Hughes was involved in an automobile accident on August 15, 2005. He was insured by Progressive Direct Insurance Company, and he made a claim for repair to his vehicle. Hughes informed Progressive Direct of his desire to take the car to a particular shop, which he understood was not part of Progressive's "Direct Repair Program." Progressive responded by telling Hughes that he should take his vehicle to Champion Collision and Paint, which was a DRP facility. He was further told that his claim would be approved and the repairs would be performed more quickly. Progressive did not inform Hughes that he had a right to take his car to the shop of his preference. Hughes took the car to Champion, but was ultimately dissatisfied with their work.

Hughes subsequently filed a class action complaint against Progressive Direct. The complaint contained a single cause of action alleging violation of Business and Professions Code Section 17200. In addition to alleging that Progressive Direct enticed its insureds to go to its DRP



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shops without advising of their rights to go elsewhere, he alleged that Progressive Direct told its insured that its selection of a dealer as a DRP was based only on that dealer's performance of "the highest quality work." On the other hand, Hughes alleged that the carrier in fact chose its DRP shops because they agreed to Progressive Direct's demand to reduce costs of repairs without regard to the interest of their customers. He also alleged that there was a "company wide policy" to steer insured to the DRP shops.

Progressive Direct demurred to the complaint. Progressive Direct argued that since Section 758.5 said it was to be enforced by the Insurance Commissioner pursuant to the Unfair Insurance Practices Act (UIPA), and since the Supreme Court had held in Moradi-Shalal v. Fireman's Fund Insurance Companies (1988) 46 Cal.3d 287 that there was no private right of action for violation of the UIPA, there was equally no private right of action under Section 758.5. Progressive Direct argued that to rule otherwise would be to circumvent the holding of Moradi-Shalal. The trial court sustained the demurrer without leave to amend. Hughes appealed.

The Court of Appeal reversed. The Court of Appeal noted that like Insurance Code Section 790.03, enforcement for violations of the section was to be handled by the Insurance Commissioner. However, in contrast to Section 790.03, this enforcement was not the exclusive remedy available. In addition, Insurance Code Section 1861.03(a) makes the "business of insurance" generally subject to the provisions of California's Unfair Competition Laws as stated in Business & Professions Code Section 17200. Thus, claims for violation of Unfair Competition Laws may be maintained against an insurer when the alleged conduct, even though violating the UIPA, also violates other statutes applicable to insurers.

Further, the Court noted that here, the allegedly unlawful conduct at issue--failure to provide a statutorily required notice regarding the right to repair--did not approximate the bad faith refusal to settle insurance claims or other claims handling misconduct at the heart of Moradi-Shalal's analysis. Thus, the Court held that recognizing a violation of Section 758.5 as an unlawful business practice thus did not conflict with the Supreme Court's ruling in that case. Hence, a violation of this statute may serve as the basis for a cause of action for violation of

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Unfair Competition Laws. The Court reversed the order dismissing the action, holding that the demurrer should have been overruled.

## COMMENT

This case further represents the courts' willingness to allow violations of Insurance Code Sections (or the actions behind them) to support a cause of action on behalf of an insured for violation of Unfair Competition Laws. It will be worth noting what the Supreme Court does with a similar issue before it in Zhang v. Superior Court (Weekly Law Resume, **NOVEMBER 5, 2009**), in which the Fourth District held that violation of the Insurance Regulations supported an Unfair Competition Law cause of action.

For a copy of the complete decision see:

[HTTP://WWW.LOWBALL.COM/WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/B224990.PDF](http://www.lowball.com/www.courtinfo.ca.gov/opinions/documents/B224990.pdf)

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