

DEPARTMENT OF INSURANCE**Legal Division, Office of the Commissioner**

45 Fremont Street, 23rd Floor
San Francisco, CA 94105

John Finston
General Counsel
TEL: 415-538-4379
FAX: 415-904-5889
E-Mail: finstonj@insurance.ca.gov
www.insurance.ca.gov



August 7, 2015

SUBJECT: Legal Opinion Regarding Private Right of Action Under Article 6.3

The Department of Insurance received a request for a legal opinion on the issue set forth below. The following legal opinion letter is issued pursuant to Insurance Code section 12921.9¹.

I. Requested Opinion

Is a private right of action afforded for the violation of Article 6.3 (California Insurance Code (CIC) §785 et. seq.)?

II. Answer

Yes. California Insurance Code, Division 1, Part 2, Chapter 1, Article 6.3, specifically §785, affords a private right of action.

III. Background:

Article 6.3 imposes requirements on insurers and insurance professionals in the marketing and sales of insurance policies to senior citizens aged 65 and older. The purpose of this Article is to protect senior citizens from being disadvantaged by unscrupulous insurance companies and insurance agents. In enacting the protections in Article 6.3, the legislature recognized that seniors require separate and enhanced protections as a vulnerable segment of our population. CIC §785 imposes a special duty of honesty, good faith and fair dealing on insurance companies and agents doing business with senior citizens that exceeds the duty otherwise imposed when dealing with younger consumers and which expressly benefits the policyholder. In addition to the enhanced duty established by CIC §785, CIC

¹ California Insurance Code Section 12921.9 states, “(a) A letter or legal opinion signed by the Commissioner or the Chief Counsel of the Department of Insurance that was prepared in response to an inquiry from an insured or other person or entity and that discusses either generally or in connection with a specific fact situation the application of the Insurance Code or regulations promulgated by the commissioner shall be made public. The department may redact the name, address, policy number, and other identifying information regarding a particular insured or other person or entity from the letter or legal opinion when it is made public.

(b) A letter or legal opinion made public pursuant to this section shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation, as those terms are described in Sections 11340.5 and 11342.600 of the Government Code.”

§789 provides for separate and distinct administrative remedies and various penalties for violations of the duties and requirements of Article 6.3, which may be enforced by state officials.

IV. Relevant Statutes:

CIC Section 785: “(a) All insurers, brokers, agents, and others engaged in the transaction of insurance owe a prospective insured who is 65 years of age or older, a duty of honesty, good faith, and fair dealing. This duty is in addition to any other duty, whether express or implied, that may exist.

(b) Conduct of an insurer, broker, or agent, or other person engaged in the transaction of insurance, during the offer and sale of a policy or certificate previous to the purchase is relevant to any action alleging a breach of the duty of good faith and fair dealing.”

CIC Section 789: “(a) The commissioner shall have the administrative authority to assess penalties against insurers, brokers, agents, and other entities engaged in the transaction of insurance or any other person or entity for violations of this article.

(b) Upon a showing of a violation of this article in any civil action, a court may also assess the penalties prescribed in this chapter.

...(e) Actions for injunctive relief, penalties specified in Section 789.3, damages, restitution, and all other remedies in law, may be brought in superior court by the Attorney General, district attorney, or city attorney on behalf of the people of California. The court shall award reasonable attorney's fees and court costs to the prevailing plaintiff who establishes a violation of this article.”

V. Analysis

The court in *Moradi-Shalal v. Fireman's Fund Ins. Companies*, (1988) 46 Cal. 3d 287, held that “apart from administrative remedies, the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on ... breach of the implied covenant of good faith and fair dealing.” *Id. at 304*. Section 785(a) provides not an implied covenant of good faith and fair dealing, but an express enhanced duty that expressly runs to the insured, which states, “[a]ll insurers, brokers, agents, and others engaged in the transaction of insurance *owe a prospective insured* who is 65 years of age or older, a duty of honesty, good faith, and fair dealing. This duty is in addition to any other duty, whether express or implied, that may exist.” (emphasis added) Using the *Moradi-Shalal* court’s reasoning that a private right of action exists for the breach of an implied covenant, it follows that a private right of action exists for the breach of the express covenant found in CIC §785.

While the court in *Moradi-Shalal* found that there is no private right of action for violations of CIC 790.03, CIC §790 et. seq. and §785 have very different purposes and must be analyzed differently. According to CIC §790, “The purpose of this article is to regulate trade practices in the business of insurance ... by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.” The regulatory requirements in §790 et. seq. apply to all insurers and agents, whether or not the transactions involve seniors. In contrast, the

purpose of CIC §785 is to protect a specific class of insurance consumers that are recognized as being a vulnerable segment of the population. Section 785 establishes a special duty of honesty, good faith, and fair dealing owed directly to *individual* senior consumers. This exceeds the regulatory scheme of §790 et. seq.. Since the duty in §785 is owed directly to the individual senior and not to the Commissioner, the remedy for the breach of the duty must lie with the individual harmed.

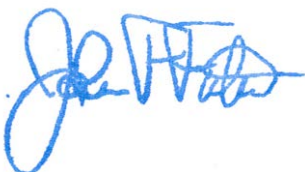
In addition, the holding of *Moradi-Shalal* is limited to §790.03. *Moradi-Shalal* doesn't bar all statutory, as opposed to common law, causes of action against insurers. *Manufacturers Life Ins. Co. v. Superior Court*, (1995) 10 Cal. 4th 257, 284. Although California may limit certain statutory remedies for certain claims under its insurance code, California still provides for a robust policy in favor of vindicating the rights of private plaintiffs damaged by an insurer's unlawful conduct. *In Re National Western Life Insurance Deferred Annuities Litigation*, (2006) 467 F.Supp. 2d 1071.

In further support of a private right of action under §785, §789(e) states that governmental attorneys "may" bring actions in superior court on behalf of the people. The court held in *Shea v. Shea* (1975) 537 P.2d 417, "The word *may* usually is employed to imply permissive or discretionary, and not mandatory, action or conduct." The inclusion of the word "may" indicates that while bringing civil actions through the governmental attorneys is one avenue to seek redress for injured parties, it is not the only avenue. Injured seniors do not need to wait for or rely on governmental attorneys to protect their rights but may bring civil actions on their own accord for a violation of the duty owed to them by insurers and insurance producers.

As a matter of practicality, no governmental agency has the means to vindicate the rights of all damaged parties. The Commissioner lacks the resources to address every improper or inappropriate sale of insurance products to a senior citizen. The Commissioner cannot represent individuals for damages they have suffered by the misdeeds of insurers and other insurance professionals. In light of the non-exclusive remedies provided by CIC §789, seniors must be afforded the ability to address violations of the duty they are owed.

Inappropriate insurance sales and sales tactics aimed at senior citizens are a significant and growing problem in California. Insurance products are very complex. Seniors are a large and growing segment of the population and are vulnerable to improper sales tactics. The important governmental interest in protecting seniors from improper insurance sales tactics and insurance products is furthered by allowing them redress in the courts via a private right of action.

Very truly yours,



John Finston
General Counsel