

Senate Bill No. 882

CHAPTER 848

An act to add and repeal Chapter 8.9 (commencing with Section 10089.7) of Part 1 of Division 2 of the Insurance Code, relating to earthquake insurance, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 12, 1995. Filed
with Secretary of State October 13, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

SB 882, Rosenthal. Earthquake insurance: mediation.

Existing law requires the Insurance Commissioner to establish a program to investigate complaints and respond to inquiries regarding insurers. The program includes procedures for mediation of complaints.

This bill would require the Department of Insurance to establish a pilot program for the mediation of certain disputes over claims arising out of the Northridge earthquake of 1994 and any subsequent earthquake, excluding claims involving specified matters. The department would contract with a diverse pool of mediators to provide mediation services, and may provide training to the mediators, as specified. An insured is not required to participate in mediation. However, an insurer may be required to participate in mediation under specified circumstances. If an insured and an insurer do participate, neither party is required to accept an agreement proposed during the mediation. If the insured elects to have counsel present for the mediation, the insurer may also have counsel present. If an insured does elect to participate, the insured can rescind the settlement agreement within 3 days after reaching the agreement unless the insured has counsel at the mediation who signs the settlement agreement. A mediator would have the authority to protect information from disclosure if the mediator determines that the materials are privileged or otherwise confidential. In addition, all statements by the parties, negotiations, and documents produced at the mediation are confidential, subject to the department's access for the purpose of evaluating the mediation program or to comply with reporting requirements, and other provisions of law concerning discoverability and admissibility of documents. The department would be authorized to adopt regulations to implement the program.

These provisions would become inoperative on July 1, 1998, and would be repealed on January 1, 2000. The commissioner would be

required to report on the pilot program to the Governor and the Legislature, as specified.

The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Chapter 8.9 (commencing with Section 10089.7) is added to Part 1 of Division 2 of the Insurance Code, to read:

CHAPTER 8.9. EARTHQUAKE INSURANCE MEDIATION

10089.7. The department shall establish a pilot program for the mediation of the disputes between insured complainants and insurers arising out of the Northridge earthquake of 1994 or any subsequent earthquake. The pilot program shall apply only to personal lines of insurance related to residential coverage. The goal of the pilot program shall be to favorably resolve a statistically significant number of disputes sent to mediation under the program. This chapter does not apply to any dispute that turns on a question of major insurance coverage or a purely legal interpretation, or disputes involving the actions of an agent or broker in which the insurer is not alleged to have been responsible for the conduct, or any complaint the commissioner finds to be frivolous, or any dispute in which a party is alleged to have committed fraud.

10089.71. Any person having a dispute with an insurer under a policy of residential insurance arising out of the Northridge earthquake of 1994 or any subsequent earthquake may file a written complaint with the department. The complaint shall indicate that the complainant has not been able to reach a satisfactory settlement of a claim with the insurer.

10089.72. The department shall notify the insurer of the claim or dispute. To avoid referral to mediation, the insurer shall have 28 days to resolve the dispute following notice of the dispute from the department, unless the department, for good cause, extends the period by an additional 7 days.

10089.73. If the dispute is not resolved within the time period prescribed by Section 10089.72, the insurer shall notify the department of the failure, and may include the reason for the failure. The insurer may at that time notify the department of its position with respect to the dispute.

10089.74. (a) If the insurer notifies the department of the failure to resolve the dispute, the department shall notify the insured of the insured's ability to request mediation and ask the insured whether the insured requests mediation. If the insured responds affirmatively, the department shall refer the dispute to mediation.



(b) If the insurer fails to give the required notice to the department prior to the expiration of the time limits set forth in Section 10089.72, the department shall notify the insured of the insured's ability to request mediation and ask the insured whether the insured requests mediation. If the insured responds affirmatively, the department shall refer the dispute to mediation. The department may not refer a dispute to mediation if the matter turns upon a question of major insurance coverage, a purely legal interpretation, the actions of an agent or broker in which the insurer is not alleged to have been responsible for the conduct, or if a party is alleged to have committed fraud, any complaint the commissioner finds to be frivolous, or if for other good cause the commissioner determines that mediation of the dispute is inappropriate.

(c) If the insured has filed a civil complaint, the insurer is excused from mediating under this chapter any claims or disputes involved in the civil action.

10089.75. (a) Any insurer may inform an insured who has filed a complaint with the department concerning a dispute arising out of an earthquake of the existence of the mediation program and may ask the insured to seek mediation under this chapter jointly with the insurer.

(b) Notwithstanding Section 10089.82, if the commissioner makes a finding that an individual insurer has engaged in unreasonable or arbitrary refusals to mediate, the commissioner shall have the authority to require that insurer to participate in mediation in all cases deemed by the commissioner appropriate for mediation under this chapter.

(c) Any insurer who has been ordered to participate in mediation on a mandatory basis may seek a review of the order by filing in a court of competent jurisdiction within 30 days of the order. The commissioner's order to participate in mediation, however, may not be stayed during the pendency of any judicial proceeding for any period beyond 60 days after the initial date of the order to participate. The basis for the commissioner's decision to require an insurer to participate in the mediation program shall not be made public unless review is sought. The commissioner's decision not to require an insurer to participate, including the basis for the decision, shall be made public.

(d) Any insured whose request to mediate his or her claim under this chapter was declined by an insurer may request the commissioner to require the insurer to participate in the mediation program and may seek review in a court of competent jurisdiction of the commissioner's decision not to require the insurer to participate in the mediation program. The review shall be required to be sought within 30 days after the commissioner's decision.

10089.76. Upon referral of a complaint to mediation, the department shall immediately transfer all necessary information



concerning the claim, including the name and address of the insured and the insurer, to a mediator.

10089.77. The department shall contract with a diverse pool of mediators for the provision of mediation services. The contractors shall provide qualified mediators who meet standards that may be established by the commissioner. The commissioner shall establish standards in consultation with consumer groups, policyholder groups, mediators, alternative dispute resolution groups, insurers, and the State Bar. These standards shall include:

(a) Mandatory training that may be provided by the department, which shall include, at a minimum, the legal rules for insurance policy interpretation and the rights of insureds under California law, and methods of determining costs of construction and reconstruction in given geographical areas.

(b) A requirement that no mediator participating in this program may have business, familial, contractual, or other affiliation with, or financial interest in, the insured, or in any insurer, insurance agent, or agency. For purposes of this subdivision, an investment in a mutual fund that holds insurer stocks is not a financial interest. Financial interest does not include prior representation of, or an employment or contractual relationship with a law firm or lawyer who represents, one or more insurers or who represents insurance agents in connection with their business affairs, provided the law firm or lawyer has not previously represented any of the parties to the mediation.

However, any prior representation, employment, or contractual relationship shall be disclosed to the parties to the mediation. If any party objects to the mediator because of the prior representation, employment, or contractual relationship, the department shall dismiss that mediator and select a new mediator. An objection under this subdivision does not limit a party's right to object once under subdivision (d).

(c) A requirement that no mediator participating in this program may be either a lawyer or an employee of a lawyer or law firm that has represented any party to the mediation in the previous 36 months, or a person who has a business, familial, contractual, or other affiliation with a lawyer or law firm that has represented any party to the mediation in a lawsuit against the insurer in the last 36 months.

(d) Each party to the mediation may object once to the mediator assigned by the department. If a party objects to the mediator, the department shall dismiss the mediator and assign another mediator.

(e) In selecting mediators, the department shall give priority to mediators who bid less than four hundred dollars (\$400) while offering complete and cost-effective mediation services. In addition, the department may use, on a pro bono basis, mediators who meet the standards of the program.



10089.78. Upon receipt of a complaint, the mediation service shall issue a notice to the insured and the insurer setting a date and time within 21 days of the date of the notice for commencement of a mediation conference. The mediator shall make all reasonable efforts to schedule the mediation at a time agreeable to both parties. The notice shall inform the parties that the cost of mediation will be borne by the insurer, except to the extent provided in Section 10089.81. The notice shall also state that in the event of a proposed settlement the insured may have three business days in which to rescind the agreement, as specified in subdivision (c) of Section 10089.82.

10089.79. The costs of mediation shall be reasonable, and shall be borne by the insurer, except as provided in Section 10089.81. The commissioner may set a fee not to exceed four hundred dollars (\$400) for each dispute mediated.

10089.80. (a) The representatives of the insurer shall know the facts of the case and be familiar with the allegations of the complainant. The insurer or the insurer's representative shall produce at the settlement conference a copy of the policy and all documents from the claims file relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The insured shall produce, to the extent available, all documents relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The mediator may also order production of other documents that the mediator determines to be relevant to the issues under mediation. If a party declines to comply with that order, the mediator may appeal to the commissioner for a determination of whether the documents requested should be produced. The commissioner shall make a determination within 21 days. However, the party ordered to produce the documents shall not be required to produce while the issue is before the commissioner in this 21-day period. If the ruling is in favor of production, any insurer that is subject to an order to participate in mediation issued under subdivision (a) of Section 10089.75 shall comply with the order to produce. Insureds, and those insurers that are not subject to an order to participate in mediation, shall produce the documents or decline to participate further in the mediation after a ruling by the commissioner requiring the production of those other documents. Declination of mediation by the insurer under this section may be considered by the commissioner in exercising authority under subdivision (a) of Section 10089.75.

The mediator shall have the authority to protect from disclosure information that the mediator determines to be privileged, including, but not limited to, information protected by the attorney-client or work-product privileges, or to be otherwise confidential.



(b) The mediator shall determine prior to the mediation conference whether the insured will be represented by counsel at the mediation. The mediator shall inform the insurer whether the insured will be represented by counsel at the mediation conference. If the insured is represented by counsel at the mediation conference, the insurer's counsel may be present. If the insured is not represented by counsel at the mediation conference, then no counsel may be present.

(c) Sections 703.5 and 1152.5 of the Evidence Code apply to a mediation conducted under this chapter.

(d) A mediator may not file, and a court may not consider, a declaration or finding of any kind by the mediator other than a required statement of agreement or nonagreement, unless all parties to the mediation expressly agree otherwise in writing.

(e) The statements made by the parties, negotiations between the parties, and documents produced at the mediation are confidential. However, this confidentiality shall not restrict the access of the department to documents or other information the department seeks in order to evaluate the mediation program or to comply with reporting requirements. This subdivision does not affect the discoverability or admissibility of documents that are otherwise discoverable or admissible.

10089.81. All parties to the mediation proceeding shall negotiate in good faith and shall have the authority to immediately settle claims. An insurer that fails to appear for a scheduled mediation conference or meeting for which the consumer appears shall pay the consumer for his or her actual expenses incurred in attending the conference plus the value of lost wages. An insured who has good cause for a failure to appear may reschedule one time, at a time set by the mediator. If an insured fails to demonstrate good cause for the first failure to appear or subsequent failures to appear, that insured loses his or her right to mediate the claim under this chapter and shall pay all costs charged by the mediator up to the time of the failure to appear that terminates the mediation.

10089.82. (a) An insured may not be required to use the department's mediation process. An insurer may not be required to use the department's mediation process, except as provided in Section 10089.75.

(b) Neither the insurer nor the insured is required to accept an agreement proposed during the mediation.

(c) If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed



by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded.

(d) This section does not affect rights under existing law for claims for damage that were undetected at the time of the settlement conference.

(e) All settlements reached as a result of department-referred mediation shall address only those issues raised for the purpose of resolution. Settlements and any accompanying releases are not effective to settle or resolve any claim not addressed by the mediator for the purpose of resolution, nor any claim that the insured may have related to the insurer's conduct in handling the claim.

Referral to mediation or the pendency of a mediation under this article is not a basis to prevent or stay the filing of civil litigation arising in whole or in part out of the same facts. Any applicable statute of limitations is tolled for the number of days beginning from the referral to mediation until the date on which the mediation is either completed or declined, or the date on which the insured fails to appear for a scheduled mediation for the second time, or, in the event that a settlement is completed, the expiration of any applicable three business day cooling off period.

10089.83. (a) On or before August 1, 1996, and on or before August 1 of each succeeding year in which this program is in effect, the commissioner shall issue a report on the status of the program in the prior year, including statistics about the number of cases suitable for mediation, the number sent to mediation, and the number accepted, as well as declined, by the insurers, and other similar information concerning the operation of the program.

(b) At six-month intervals, the department shall collect from the mediators with which it contracts for this service the following information: the number of persons to whom mediation was offered, the number of insurers that accepted and declined mediation, the number of settlements, and of those settlements, the number rejected within the three business day cooling off period. For each settlement, the mediation service shall also report the amount initially claimed by the consumer and the amount agreed to be paid, if any, by the insurer or other party.

(c) The department may adopt regulations, including reporting requirements, in the commissioner's discretion, to implement this chapter. The regulations shall be adopted as emergency regulations pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of the regulations is deemed necessary for the immediate preservation of the public peace, health or safety, or general welfare.

10089.84. This chapter will become inoperative on July 1, 1998, and is repealed as of January 1, 2000, unless a later enacted statute, which is enacted before January 1, 2000, deletes or extends that date. Any case referred to mediation by the department prior to July 1,



1998, shall be mediated under this chapter whether or not the mediation has been completed prior to July 1, 1998. No later than August 1, 1998, the commissioner shall report to the Governor and the Legislature on whether the pilot program should be extended, expanded, terminated, or otherwise modified and shall include specific findings regarding the use of the program by insureds and insurers.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide immediate response to the Northridge earthquake of 1994, it is necessary for this act to take effect immediately.

