AMENDED IN SENATE JUNE 4, 2001

AMENDED IN SENATE MAY 1, 2001

SENATE BILL No. 708

Introduced by Senator Speier

February 23, 2001

An act to amend Sections 790.035, 10089.70, 10089.71, 10089.72, 10089.73, 10089.74, 10089.75, 10089.77, 10089.78, 10089.79, 10089.82, 10089.83, 10089.84, and 12921.3 of, and to add Sections 10089.3, 12921.9, and 12926.2 to, the Insurance Code, relating to insurance.

LEGISLATIVE COUNSEL'S DIGEST

SB 708, as amended, Speier. Insurance.

(1) Existing law provides for regulation of the business of insurance by the Insurance Commissioner. Existing law prohibits trade practices defined or determined to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance, imposes specified civil penalties for violations, and provides discretion to the commissioner to establish what constitutes an act for these purposes.

This bill would ~~provide for penalties in specified amounts, would delete the discretion of~~ *require* the commissioner to ~~establish what~~ *adopt regulations regarding the conduct that* constitutes an act for these purposes, and would authorize the commissioner to order an insurer to pay ~~a claim~~ *restitution* associated with those violations.

(2) Existing law requires the Department of Insurance to establish a program for the mediation of disputes between insureds and insurers arising out of the 1994 Northridge earthquake. This program is authorized to continue through January 1, 2005.

This bill would *extend the operation of the program until January 1, 2006, and would* expand ~~the mediation program~~ *it* to *include* disputes arising out of an event for any insured peril that involves ~~personal~~ lines of insurance for residential and automobile coverage *and any other insured loss the commissioner determines would be best served by the mediation process.* The bill would make other changes to the mediation program.

(3) Existing law requires the commissioner to receive, investigate, and respond to complaints and inquiries relative to the handling of insurance claims by insurers.

This bill would provide that the commissioner may not decline to investigate complaints on various grounds, including that the insured is represented by an attorney or is involved in a civil action against an insurer, or that the complaint is from an attorney. The bill would also require the department to make certain information concerning these complaints public.

(4) Existing law sets forth various other duties and responsibilities of the commissioner and the department.

This bill would require the department to make public any letters *signed by the commissioner or the department's chief counsel* and legal opinions of the department prepared in response to an inquiry from an insured or other person or entity. The bill would define the term ''extraordinary circumstances'' for the purpose of the department determining noncompliance with the insurance laws and regulations and determining appropriate penalties. The bill would impose limitations on the authority of the department to enter into settlement agreements referencing the existence of extraordinary circumstances for a period of more than 6 months. The bill would also require the department to adopt regulations relative to the training and accreditation of insurance adjusters in the evaluation of earthquake damage.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

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

SECTION 1. Section 790.035 of the Insurance Code is amended to read:

790.035. (a) Any person who engages in any unfair method of competition or any unfair or deceptive act or practice defined

in Section 790.03 is liable to the state for a civil penalty to be fixed by the commissioner, not to exceed seven thousand five hundred dollars ($7,500) for each act, or, if the act or practice was willful, a civil penalty not to exceed fifteen thousand dollars ($15,000) for each act. ~~An act for these purposes is a ____. However, when the issuance, amendment, or servicing of a policy or endorsement is inadvertent, all of those acts shall be a single act for the purpose of this section.~~

(b) *The Commissioner shall have the discretion to establish what constitutes an act. In exercising that discretion, the commissioner shall adopt regulations providing criteria to be applied in making that determination and in establishing the penalty to be imposed. Those criteria shall include, at a minimum, those factors to be considered in determining that an act is willful, consideration of the severity of the detriment to the public caused by the act, the relative number of claims where acts are found to exist when contrasted to the total number of claims handled during the relevant time period, and the existence or nonexistence of previous violations of this section by the insurer. However, when the issuance, amendment, or servicing of a policy or endorsement is inadvertent, all of those acts shall be a single act for the purpose of this section.*

(c) The penalty imposed by this section shall be imposed by and determined by the commissioner as provided by Section 790.05. The penalty imposed by this section is appealable by means of any remedy provided by Section 12940 or by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

~~(c)~~

(d) In addition to the penalty provided in this section, the ~~commissioner may order an insurer to pay a claim. However, it~~ *commissioner may, by way of settlement or by decision after hearing, order the payment of restitution to individual insureds or claimants or to designated classes of insureds or claimants upon the terms and conditions that the commissioner in the reasonable exercise of discretion may require. However, it* shall not be a defense in a private civil action that the commissioner ~~did not order an insurer to pay a claim pursuant to this subdivision.~~ *did not order the payment of restitution to individual insureds or claimants or to*

designated classes of insureds or claimants pursuant to this subdivision.

SEC. 2. Section 10089.3 is added to the Insurance Code, to read:

10089.3. *(a)* The department shall adopt regulations setting forth standards governing the training of insurance adjusters in evaluating damage caused by earthquakes. On or before December 31, 2004, insurers shall train and accredit adjusters in accordance with these standards. Thereafter, an insurer using one or more adjusters who are not trained and accredited in accordance with those standards shall submit the names of those adjusters to the department, along with information concerning earthquake claims those persons have adjusted.

(b) For purposes of this section, 'insurance adjuster' shall include the following persons:

(1) Persons licensed pursuant to Chapter 1 (commencing with Section 14000) of Division 5.

(2) Employees of persons licensed pursuant to Chapter 1 (commencing with Section 14000) of Division 5 who perform insurance adjusting activities as defined in Section 14021.

(3) Employees of an insurer who perform insurance adjusting activities as defined in Section 14021.

SEC. 3. Section 10089.70 of the Insurance Code is amended to read:

10089.70. The department shall *establish and* maintain a *mediation* program*, consistent with Section 10089.79,* for the mediation of the disputes between insured complainants and insurers arising out of ~~an~~ *any* event ~~related to any~~ *that results from an* insured peril. The program shall apply only to ~~personal~~ lines of insurance related to residential coverage, as defined in paragraphs (1) and (2) of subdivision (a) of Section 675, and *collision and* automobile *physical damage* coverage, as defined in subdivisions (c) and (d) of Section 660 *and any other insured property loss that the commissioner determines would be best served by the mediation process*. The goal of the 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.

SEC. 4. Section 10089.71 of the Insurance Code is amended to read:

10089.71. Any insured having a dispute with an insurer under ~~a policy of residential or automobile insurance arising out any qualifying event pursuant to Section 10089.70 may file a written~~ *a policy that qualifies for this program 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. *The department shall, if deemed appropriate, notify the insurer against whom the complaint is made of the nature of the complaint, may request appropriate relief for the complainant, and may meet and confer with the complainant and the insurer in order to attempt resolution of the dispute.*

SEC. 5. Section 10089.72 of the Insurance Code is amended to read:

10089.72. (a) ~~The department shall~~ *If, after the department's intervention, the insurer and the insured do not reach agreement, the department may* notify the insurer of the claim or dispute. To avoid referral to mediation, the insurer shall have 28 *calendar* 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 *calendar* days.

(b) The department may not refer ~~an automobile~~ *a* claim to ~~mediation unless the claimant's bid is five thousand dollars ($5,000) or more, and the amount in dispute exceeds one thousand dollars ($1,000).~~ *mediation unless the amount claimed by the insured exceeds seven thousand five hundred dollars ($7,500) and the amount in dispute exceeds two thousand dollars ($2,000).*

SEC. 6. Section 10089.73 of the Insurance Code is amended to read:

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 shall, within the time period prescribed by Section 10089.72, notify the department of its position if it believes that the dispute is not eligible for the mediation program.

SEC. 7. Section 10089.74 of the Insurance Code is amended to read:

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 any of the reasons or conditions set forth in Section 10089.70, relative to applicability, 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.

SEC. 8. Section 10089.75 of the Insurance Code is amended to read:

10089.75. (a) Any insurer may inform an insured who has filed a complaint with the department concerning a dispute ~~arising out of a qualifying event~~ *that qualifies for this program* of the existence of the mediation program and may ask the insured to seek mediation under this chapter jointly with the insurer. Any insurer may notify the department of any dispute arising out of a qualifying event that it believes may be appropriately resolved through the mediation program. The department, with respect to that notification, shall proceed as provided in subdivision (a) of Section 10089.74.

(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 *calendar* 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 *calendar* 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 *calendar* days after the commissioner's decision.

SEC. 9. Section 10089.77 of the Insurance Code is amended to read:

10089.77. The department shall contract with a diverse pool of mediators for the provision of mediation services. The contractors shall be qualified mediators who meet standards 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 and costs of automobile repair 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.

SEC. 10. Section 10089.78 of the Insurance Code is amended to read:

10089.78. Upon receipt of a complaint, the mediation service, to the extent possible, shall issue a notice to the insured and the insurer setting a date and time within 21 *calendar* 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.

SEC. 11. Section 10089.79 of the Insurance Code is amended to read:

10089.79. *(a)* 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 seven hundred dollars ($700) for each dispute mediated.

(b) The mediation program shall only begin if it is funded through an appropriation made in the annual Budget Act. This appropriation shall be repaid, under a plan approved through the annual Budget Act, by the fees established in subdivision (a).

SEC. 12. Section 10089.82 of the Insurance Code is amended to read:

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. Notwithstanding Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, if the insured rescinds the agreement, it may not be admitted in evidence or disclosed unless the insured and all other parties to the agreement expressly agree to its disclosure. 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 notification date to the insurer *pursuant to Section 10089.72,* 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.

SEC. 13. Section 10089.83 of the Insurance Code is amended to read:

10089.83. (a) On or before ~~August 1, 1996, and on or before~~ August 1 of each 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.

SEC. 14. Section 10089.84 of the Insurance Code is amended to read:

10089.84. This chapter shall remain in effect until January 1, ~~2005~~ *2006*, and as of that date is repealed, unless a later enacted

statute, which is enacted before January 1, ~~2005~~ *2006*, deletes or extends that date. Any case referred to mediation by the department prior to January 1, ~~2005~~ *2006*, shall be mediated under this chapter whether or not the mediation has been completed prior to January 1, ~~2005~~ *2006*. No later than ~~August~~ *October* 1, 2004, the commissioner shall report to the Governor and the Legislature on whether the 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. 15. Section 12921.3 of the Insurance Code is amended to read:

12921.3. (a) The commissioner, in person or through employees of the department, shall receive complaints and inquiries, investigate complaints, prosecute insurers when appropriate and according to guidelines determined pursuant to Section 12921.1, and respond to complaints and inquiries by members of the public concerning the handling of insurance claims, including, but not limited to, violations of Article 10 (commencing with Section 1861) of Chapter 9 of Part 2 of Division 1, by insurers, or alleged misconduct by insurers or production agencies.

(b) The commissioner shall not decline to investigate complaints for any of the following reasons:

(1) The insured is represented by an attorney in a dispute with an insurer, or is in mediation or arbitration.

(2) The insured has a civil action against an insurer.

(3) The complaint is from an attorney, if the complaint is based upon evidence or reasonable beliefs about violations of law known to an attorney because of a civil action.

(4) The commissioner may defer the investigation until the finality of a dispute, mediation, arbitration, or civil action involving the claim is known.

(c) In addition to the required summary report referenced in subdivision (c) of Section 12921.1, and within 90 days of making a finding that a complaint is justified pursuant to Section 12921.1, the department shall release to the public the information set forth in paragraphs (2), (3), and (4) of subdivision (c) of Section 12921.1, and any response by the insurer, but shall not include any information that would identify the insured, including the name, address, policy number, or other information that would tend to

identify the insured. An insurer shall have 30 days prior to release of this information to provide a response to the department.

(d) The commissioner, as he or she deems appropriate, and pursuant to Section 12921.1, shall provide for the education of, and dissemination of information to, members of the general public or licensees of the department concerning insurance matters.

SEC. 16. Section 12921.9 is added to the Insurance Code, to read:

12921.9. A letter *signed by the commissioner or the department's chief counsel* or legal opinion of the department, prepared in response to an inquiry from an insured or other person or entity, that discusses the application of the law and regulations generally or in connection with specific fact situations, shall be made public. However, 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.

SEC. 17. Section 12926.2 is added to the Insurance Code, to read:

12926.2. (a) As used in this section, ''extraordinary circumstances'' means circumstances outside of the control of a licensee that severely and materially affect the licensee's ability to conduct normal business operations.

(b) In determining noncompliance with this code and regulations adopted pursuant to this code, and appropriate penalties, if any, the commissioner may consider evidence concerning the existence of extraordinary circumstances.

(c) A settlement agreement between the commissioner and an insurer may not contain a provision referencing the existence of extraordinary circumstances relative to the subject matter at issue, unless the agreement specifies the precise period of time during which extraordinary circumstances were in existence. Except as provided in subdivision (d), extraordinary circumstances may not be stated to exist for a duration of more than six months.

(d) A settlement agreement may concede the existence of extraordinary circumstances for a period of time exceeding six months if all of the following conditions are met:

(1) The commissioner makes a finding in the agreement that extraordinary circumstances existed for more than six months, and documents in that finding facts supporting that conclusion.

(2) The finding identifies the public purpose justifying the extension of extraordinary circumstances beyond the six-month period.

(3) The beginning and ending date, by month and year, of the commencement and termination of the extraordinary circumstances are identified.

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