

STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE  
45 Fremont Street, 21<sup>st</sup> Floor  
San Francisco, CA 94105

RH03030123

December 28, 2006

**TEXT OF PROPOSED REGULATION**

Amend Title 10, California Code of Regulations, Chapter 5, Subchapter 7.6, Article 1, Section 2696 to read as follows:

SUBCHAPTER 7.6 ~~Earthquake-Dispute~~ Insurance Mediation Program

§ 2696.1 Purpose.

The purpose of these regulations is to interpret, clarify and make specific the Department's ~~pilot~~ program relating to the mediation of earthquake, homeowners and automobile collision and physical damage claims pursuant to Insurance Code section 10089.70. ~~This subchapter shall be construed to favor mediation.~~

Note: Authority cited: Section 10089.83, Insurance Code. Reference: Section 10089.70 and 10089.83, Insurance Code.

§2696.2. Definitions.

For the purposes of these regulations:

- (a) "Residential Coverage" means insurance coverage for individually owned:
- (1) One to four family dwellings, used exclusively for residential purposes; or,
  - (2) Manufactured homes, used exclusively for residential purposes; or,
  - (3) A single family unit within a row house, town house, condominium, planned unit development, or cooperative and used exclusively for residential purposes; or,
  - (4) Tenant residences located within any residential unit:

(b) "Question of major insurance coverage" ~~concerns~~ shall mean the core determination of whether earthquake, residential property, or automobile collision or physical damage insurance coverage is or is not in dispute. All disputes relating to canceled or non-renewed policies, non-mandated building code upgrades, and claims for ~~earthquake~~ damage where there is no underlying ~~earthquake~~ coverage involve a question of major insurance coverage and will not be referred to mediation. Disputes including, but not limited to, scope of damage, scope or method of repairs, cause of damage, asbestos or other contaminations, additional living expenses, aftershock damage and disputes over preexisting damage do not concern a question of major insurance coverage and are eligible for referral to mediation;

(c) "Purely legal interpretation" means where the resolution of the dispute rests solely upon interpretation of law, including but not limited to statutes, regulations or case law. All disputes including but not limited to statutes of limitation, contractual deadlines,

and allegations of bad faith, the resolution of which involves only a question of law, fall within a purely legal interpretation and will not be referred to mediation. Disputes including, but not limited to, questions of fact and questions of liability do not involve a purely legal interpretation and are eligible for referral to mediation;

(d) "Disputes involving the action of an agent or broker" means where the insurer is not alleged to have been directly involved in the conduct of an agent or broker;

(e) "Frivolous complaint" means any complaint which includes, but is not limited to, a complaint designed to vex or harass or concerns matters of a wholly trivial nature.

(f) "Disputes in which a party is alleged to have committed fraud" means complaints in which the insurer is actively investigating the claim for fraud, including the insurer's compliance with Insurance Code section 1872.4, and there is no possibility of resolving the claim until the fraud investigation has been completed.

(g) "Calendar day" means each and every day including Saturdays, Sundays, Federal and California State Holidays, but if the last day for performance of any act required by these regulations falls on a Saturday, Sunday, Federal or State Holiday, then the period of time to perform the act is extended to and includes the next calendar day which is not a Saturday, Sunday, or Federal or State holiday;

(h) "Mediation" means the good faith participation by an insurer and insured, and their representatives, in a nonbinding procedure before a neutral third party directed toward the resolution of a pending claim for damages caused by an earthquake or eligible homeowners, automobile collision, or automobile physical damage loss under a policy of insurance.

(i) "Policy" means the written contract between an insured and an insurance company stating the obligations and responsibilities of each party. A policy may include any applications, binders, declaration forms, endorsements, certificates, and any other documents which describe, affect or limit coverage under the policy;

(j) "Business day" means each and every day except Saturdays, Sundays, Federal and California State Holidays;

(k) "In writing", as referenced in this subchapter, includes transmission by facsimile (fax).

(l) "Homeowners" means insurance that covers:

(1) Loss of or damage to real property which is used predominantly for residential purposes and which consists of not more than four dwelling units.

(2) Loss of or damage to personal property in which natural persons resident in specifically described real property of the kind described in paragraph (1) have an insurable interest, except personal property used in the conduct of a commercial or industrial enterprise.

(m) An eligible homeowners loss is either a claim that arises under a homeowners insurance policy and that involves a loss due to a fire for which the Governor has declared a state of emergency pursuant to Section 8558 of the Government Code; or a claim that arises under a policy covering earthquake damage and involves loss due to an earthquake for which the Governor has declared a state of emergency pursuant to Section 8558 of the Government Code.

(n) An eligible automobile collision or automobile physical damage claim is a claim that arises under automobile collision coverage or automobile physical damage coverage, in a policy as defined in Section 660 of the Insurance Code.

Note: Authority cited: Section 10089.83, Insurance Code. Reference: Sections 660, 675, 10089.7, 10089.70 and 10089.83, Insurance Code.

#### §2696.3. Determination of Eligibility.

~~(a) This subchapter shall only apply to disputes involving personal lines of insurance relating to residential coverage, as those terms are defined in Section 2696.2 of this subchapter.~~

~~(b)~~ The following will not be referred to mediation under this subchapter:

(1) Disputes that turn on a question of major insurance coverage as that term is defined in Section 2696.2(b) of this subchapter;

(2) Disputes involving a purely legal interpretation as that term is defined in section 2696.2(c) of this subchapter;

(3) Disputes involving the actions or conduct of an agent or broker, unless there are allegations that the insurer is responsible for the actions or conduct;

(4) Disputes in which a party is alleged to have committed fraud as defined in Section 2696.2(f) of this subchapter;

(5) Disputes involving allegations of bad faith, or other claims for extra contractual damages; ~~including under insurance~~;

(6) Disputes concerning which a lawsuit has already been filed; ~~or~~

(7) Those requests for mediation determined by the Department to be frivolous or to have been filed in bad faith.

~~(e)~~ (b) Notwithstanding subsection (a) ~~(b)~~, should a claim involve more than one disputed issue and one or more of those issues are not eligible for referral to mediation, nothing in this subchapter shall preclude the commissioner from referring to mediation only those issues eligible for mediation. However, the Commissioner shall not refer to mediation those issues which are rendered moot by the determination that a question of major insurance coverage or purely legal interpretation exists.

Note: Authority cited: Section 10089.83, Insurance Code. Reference: Sections 10089.7, 10089.72 and 10089.74, Insurance Code.

#### ~~§2696.4. Procedure for Initiating Mediation.~~

~~(a) In order to initiate mediation, those persons potentially eligible for referral to mediation under Section 2696.3 must file a written request for earthquake mediation assistance with the Department, indicating their inability to reach a satisfactory settlement of their claim with their insurer. Such requests may be directed to: California Department of Insurance, 300 S. Spring St., South Tower, Ninth Floor Los Angeles, CA 90013. Attn: Earthquake Mediation Program.~~

~~(b) Upon receipt of the written request for mediation the Department shall determine whether that dispute, or any part of that dispute, is eligible for referral to mediation according to Section 2696.3 of this subchapter. If such dispute, or any part of that dispute, is eligible for mediation, the Department shall immediately transmit, in writing, a Notice to Insurer of Dispute to the affected insurer.~~

~~(c) The affected insurer shall have 28 calendar days to resolve the dispute following the transmission of Notice to Insurer of Dispute from the Department. The Department, however, upon written request from the insurer, may extend this time period~~

by an additional 7 calendar days if the insurer demonstrates good cause, as determined by the Commissioner. Such requests must be received by the Department prior to the 28th calendar day following the transmission of the Notice to Insurer of Dispute. Should the insurer and the insured fail to resolve the dispute, the insurer shall immediately notify the Department in writing of such failure.

~~(d) If the insurer notifies the Department of the failure to resolve the dispute, or fails to notify in writing within the time period prescribed under Section 2696.4(c), the Department shall immediately notify the insured, in writing, of the insured's ability to request mediation and shall ask the insured, in writing, whether they wish to mediate the dispute under this subchapter. Should the insured respond affirmatively, in writing within ten calendar days, then the Department shall immediately refer the dispute to mediation.~~

~~Note: Authority cited: Section 10089.83, Insurance Code. Reference: Sections 10089.71, 10089.72, 10089.73, 10089.74 of the Insurance Code.~~

~~§2696.5.~~ 2696.4 Selection of Mediator; Objections.

(a) Immediately upon referral of a dispute to mediation, the Department shall transfer all information it deems necessary concerning the disputed claim to a mediator of its choosing, provided that such mediator has otherwise met the standards and qualifications set forth in Insurance Code Section 10089.77. Such information shall include, but not be limited to, the name of the insured, the address of the insured, the name of the insurer, and the address of the insurer.

(b) The Department shall select the mediator primarily on a rotation basis. The Department shall select a mediator that has expressed availability to conduct the mediation in the county of the insured's residence. The process of selecting a mediator, and the manner in which the mediator is assigned to mediate a dispute, shall be within the sole discretion of the Department, provided that such mediators have otherwise met the standards and qualifications set forth in Insurance Code Section 10089.77.

(c) After a mediator has been selected by the Department, either party to the mediation may object once to the selection of that mediator. If either party conveys that objection directly to the Department, in writing, the Department shall notify the other party and the mediator, and shall dismiss that mediator and select another mediator within 5 calendar days. If either party conveys an objection to the mediator directly to that mediator, then that mediator shall immediately notify, in writing or otherwise, the Department and the Department shall, within 5 calendar days, dismiss that mediator and select another mediator. Nothing in this subsection shall effect the right of a party to exercise their right to object pursuant to Insurance Code Section 10089.77(b).

Note: Authority cited: Section 10089.83, Insurance. Reference: Sections 10089.76 and 10089.77, Insurance Code.

~~§2696.6.~~ 2696.5 Mandatory Participation; Appeal.

(a) No insurer may be compelled to participate in mediation except where the Commissioner finds that the insurer has engaged in an arbitrary or unreasonable refusal or refusals to mediate a dispute which the Commissioner has deemed appropriate for

mediation. Where the Commissioner so finds, he shall issue ~~to and serve~~ upon the insurer an Order to Participate, citing his reasons therein.

(b) Any insurer to whom an Order to Participate has been issued may seek a review of said Order by filing in a court of competent jurisdiction within 30 calendar days of the ~~service~~ issuance of that Order. The Commissioner's Order to Participate, 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.

(c) Any insured whose request to mediate his or her claim under this subchapter was declined by an insurer may file a written request to the Commissioner to require the insurer to participate in the mediation program. Upon receipt of such request, the Commissioner shall either:

- (1) Issue an Order to Participate pursuant to subsection 2696.5(a) ~~2696.6(a)~~; or
- (2) Make a written inquiry to the insurer to determine the reasons for declining mediation; or
- (3) Issue to the insured a Decision Not to Compel Mediation which sets forth the basis of the Commissioner's decision not to require the insurer to participate in mediation of that dispute.

(d) Any insured to whom a Decision Not to Compel Mediation has been issued, may seek a review of said Decision by filing in a court of competent jurisdiction within 30 calendar days of the ~~service~~ issuance of that Decision.

Note: Authority cited: Section 10089.83, Insurance Code. Reference: Section 10089.75, Insurance Code.

~~§2696.7.~~ 2696.6 Pre-Mediation Procedures; Telephone Conference; Notice of Commencement; Written Statement.

(a) Upon receipt of the Referral to Mediation from the Department, the mediator shall hold a telephone conference prior to the mediation conference to discuss items necessary to the mediation. Necessary items include, but are not limited to:

- (1) The date, time, and location of the mediation conference;
- (2) Whether the insured will be represented by counsel at the mediation conference and, if so, whether the insurer will be represented by counsel;
- (3) What documents will be produced at the mediation conference, ~~pursuant to section 2696.8 of this subchapter~~, and whether there is any dispute with respect to the production of documents;
- (4) Any other matters as shall promote an effective mediation conference, including attendance and participation of non-parties at the mediation conference.

(b) During the telephone conference, or at any time before the mediation conference commences, the mediator may, in his or her discretion, order either party to produce other documents that the mediator determines to be relevant to the issues under mediation.

- (c) Upon completion of the telephone conference, the mediator shall issue a written notice to the insured and the insurer. Such notice shall:
- (1) Contain the date, time and location for commencement of the mediation conference;
  - (2) Advise the parties that the cost of the mediation will be borne by the insurer, except to the extent provided in Insurance Code section 10089.81 and the applicable regulations contained in this subchapter;
  - (3) State that, in the event of the proposed settlement, the insured may have three business days, ~~as that term is defined in Section 2696.2(j) of this subchapter,~~ to rescind the agreement, as specified in subdivision (c) of Insurance Code Section 10089.82.
- (d) Within 5 calendar days of the date of the mediation conference, the insurer shall provide the insured and the mediator a written statement of the facts concerning the dispute. Within 5 calendar days before the date of mediation, the insured shall provide the insurer and the mediator a written statement setting forth the allegations and the issues which are the subject of the mediation.

Note: Authority cited: Section 10089.83, Insurance Code. Reference: Sections 10089.78 and 10089.80. Insurance Code.

~~§2696.8. Production of Documents; Determination of the Commissioner.~~

~~(a) — The insurer shall produce at the mediation conference a copy of the policy and all documents from the claims file relevant to the degree of loss, value of claim, and the fact or extent of damage.~~

~~(b) The insured shall produce at the mediation conference, to the extent available, all documents relevant to the degree of loss, value of the claim, and the fact or extent of damage.~~

~~(c) If a party declines to comply with a mediator's production order referenced in Section 2696.7(b), the mediator may appeal to the Commissioner for a determination of whether the documents should be produced by sending a letter describing the issue and the relevant documents to the Commissioner, c/o Legal Unit, Department of Insurance, 45 Fremont St., 2 1 st Floor, San Francisco, CA 94105.~~

~~(d) — The Commissioner shall make a determination within 21 calendar days and notify the mediator, in writing, of that determination. Thereafter, the mediator shall immediately convey to the parties, in writing, or otherwise, the determination of the Commissioner.~~

~~(e) — The party ordered to produce documents shall not be required to produce such documents during the 21-day period referenced in section 2696.8(d).~~

~~(f) — If the determination is in favor of production, any insurer that has been issued an Ordered to Participate pursuant to section 2696.6(a) shall comply with the order to produce.~~

~~(g) — If the determination is in favor of production, the insured and any insurer not subject to an Order to Participate pursuant to Section 2696.6(a) shall produce the documents. Should either party fail to comply with the order to produce, the mediator terminate the mediation.~~

~~(h) — If an insurer declines to produce documents which had been ordered to be produced, said declination may be considered by the Commissioner in determining whether the insurer has engaged in an unreasonable or arbitrary refusal to mediate pursuant to Insurance Code Section 10089.75(b) and Section 2696.6(a).~~

~~Note: Authority cited: Section 10089.83(c), Insurance Code. Reference: Section 10089.80(a), Insurance Code.~~

~~§2696.9. 2696.7 Mediation Conference; Failure to Appear; Confidentiality Agreement.~~

~~(a) The To the extent possible the mediation conference shall be held within 21 calendar days of the date of transmission of the notice referenced in section 2696.7(e) 2696.6(c) of this subchapter. If the mediation cannot be commenced within 21 calendar days of this notice, then it shall be commenced as soon as practicable for all parties, as determined by the mediator. To the extent possible, the mediation conference shall be held in the county where the insured resides.~~

~~(b) The parties are required to appear for the mediation conference at the date, time, and location set forth on the notice referenced in subsection 2696.7(e) 2696.6(c). For the purposes of this subchapter, a party has failed to appear at the mediation conference if it:~~

- ~~(1) Fails to be physically present at the conference within 30 (thirty) minutes of the scheduled time;~~
- ~~(2) Fails to send to the conference a representative with full authority to bind settlements.~~

~~(c) For the purposes of this subchapter, the following shall apply:~~

~~(1) Should either party fail to appear at the mediation conference without good cause, that party shall bear all actual expenses charged by the mediator.~~

~~(2) Should both parties fail to appear at the mediation conference without good cause, then all actual expenses charged by the mediator shall be borne equally between the parties.~~

~~(3) Should the insurer fail to appear for a scheduled mediation conference at which the insured appears, that insurer shall pay the insured for his or her actual expenses incurred for attending the mediation conference, in attending the mediation conference plus the value of his or her lost wages, if any.~~

~~(4) Should an insured fail to appear at a scheduled mediation conference and has demonstrated good cause for the failure to appear, as defined in Section 2696.9(d), that insured may be allowed once to reschedule the mediation conference for a time set by the mediator. The mediator shall reschedule the mediation conference in a manner not inconsistent with Section 2696.7(c).~~

~~(5) Should an insured fail to appear at a scheduled mediation conference, or at a rescheduled mediation conference pursuant to 2696.9(c)(4), and has not demonstrated good cause for the failure to appear, as defined in Section 2696.9(d), that insured loses his or her right to mediate the claim~~

~~under this subchapter and shall pay all costs charged by the mediator up to the time of the failure to appear that terminates the mediation.~~

(d) "Good cause," for the purposes of subsection ~~2696.9(e)~~, 2696.7(c), shall include, but not be limited to, the unforeseen circumstances, especially medical emergencies, which preclude the physical presence of a party. The Department, upon review of the facts and circumstances provided by the parties to the mediation, including the mediator, shall decide whether good cause has been demonstrated.

~~(e) The cost of each mediation shall be \$400.00, and such cost shall be promptly paid by the insurer to the mediator within 30 calendar days of billing.~~

~~(f)~~ (e) In order to participate in the mediation conference and before the mediation conference commences, each party to the mediation, as well as the mediator, must sign a "Confidentiality Agreement", wherein the parties and the mediator agree that, pursuant to Insurance Code Sections 10089.80(c) and 10089.80(d), as well as California Evidence Code Sections 1115 through and including 1128, the statements made by the parties to the conference, negotiations between the parties, and documents produced at the mediation conference are confidential; and, that the mediator may not file and a court may not consider any declaration or finding of any kind by the mediator, ~~including the "Mediator Report Form" referenced in Section 2696.10(b)~~, other than a required statement of agreement or nonagreement, unless all parties to the mediation expressly agree otherwise in writing prior to the commencement of the mediation; and that the mediator shall not voluntarily testify on behalf of a party.

~~(g)~~ (f) Notwithstanding Section ~~2696.7(e)~~ 2696.9(f), nothing in this subchapter shall preclude the Department from obtaining the information referenced in Section ~~2696.8~~ 2696.10(b), and ~~Section 2696.10(e)~~.

Note: Authority cited: Section 10089.83, Insurance Code. Reference: Sections 10089.78 10089.79, 10089.80 and 10089.8 1, Insurance Code.

~~§2696.10:~~ 2696.8 Post Mediation; Cooling-Off Period; Reporting Requirements.

(a) The insured may be represented at the mediation conference by any person of his or her own choosing. If the parties agree to a settlement agreement, the insured, or their representative, shall have three business days, ~~as defined in Section 2696.2(j)~~, 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.

(b) Within 10 calendar days of the conclusion of the mediation, ~~or within 30 calendar days of referral pursuant to 2696.4(d)~~, the mediator shall furnish to the department a completed Form EQM-1 CCB-023 B [~~California Earthquake Claims Mediation Program~~ Mediator Report Form] Rev. 11/14/05 ~~8/96~~-incorporated by reference herein.

~~(c) In addition to the reporting requirement described in Section 2696.10(b), at regular six month intervals, the Department shall transmit to all mediators with whom it has contracted for mediation services a letter requesting the submission of the following~~

~~information: the number of persons to whom mediation was offered, the number of insurers accepting and declining mediation, the number of settlements, and of those settlements, the number rejected within the three business day cooling off period. For each settlement, the mediator 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.~~

~~(d)(c)~~ The completed mediator reports received by the Department pursuant to these regulations ~~Sections 2696.10(b) and (e)~~ shall be used by the Department only for its use in compiling required reports for the legislature and for evaluating the status of the program. The mediator report forms, papers, and any other documents provided by the mediators to the Department in accordance with this subchapter, shall not be subject to subpoena or subpoena duces tecum.

Note: Authority cited: Section 10089.83 of the Insurance Code. Reference: Sections 10089.82 and 10089.83 of the Insurance Code.