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Insurance

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Selected 1995 Legislation

Insurance

Insurance; earthquake insurance—availability

Insurance Code §10089.1 (repealed); §§ 10082, 10083, 10086, 10089, 10091 (amended).
AB 1366 (Knowles); 1995 STAT. Ch. 939

Existing law requires insurers to offer coverage for loss or damage from an earthquake when issuing or delivering a residential property insurance policy. Prior law prescribed that minimum coverage include all property insured by a residential property insurance policy including, but not limited to, the dwelling

1. CAL. INS. CODE § 10081 (West 1993); see id. (requiring such coverage to be provided within the residential property insurance policy as a specific policy provision, in a separate policy specifically providing for such loss or damage, or in combination with other disasters); id. § 10084 (West 1993) (setting forth compliance modes for insurers regarding offers of coverage to include: (1) offering to underwrite directly the risk of damage or loss caused by an earthquake, (2) arranging an alternative offer from an affiliated insurer, or (3) arranging an alternative offer from a nonaffiliated insurer); id. § 10087(a) (West 1993) (defining a "residential property insurance policy" as one that only insures the following: (1) individually owned residential structures with less than five dwelling units; (2) individually owned condominium units; or (3) individually owned mobile homes, including contents, used exclusively for residential purposes, but not including insurance for real property or contents used in conjunction with commercial, industrial, or business purpose, unless it is a structure with less than five units rented for residential purposes); see also id. § 530 (West Supp. 1995) (providing that an insurer is liable for loss of which a peril insured against is the proximate cause even though such peril was not contemplated by the contract and was a remote cause of the loss); Marina Green Homeowners Ass’n v. State Farm Fire & Casualty Co., 25 Cal. App. 4th 200, 206, 30 Cal. Rptr. 2d 364, 368 (1994) (holding that a residential property insurance policy does not include insurance coverage of common areas, distinguishable from the air space owned by each individual condominium owner); Premier Insurance Co. v. Welch, 140 Cal. App. 3d 720, 724-25, 189 Cal. Rptr. 657, 660 (1983) (holding that if a covered cause and an excluded cause of loss under an insurance policy are both applicable to that loss, such loss is covered if the covered cause is the moving or efficient cause or the covered cause is the proximate cause). See generally CAL. GOV’T CODE § 8870 (West 1992) (declaring that the Legislature finds the following: (1) many government agencies have substantial responsibilities relating to earthquake preparation and seismic safety, (2) there is a need to provide a consistent policy framework in order to coordinate the efforts of each agency with regard to seismic safety, and (3) long-term progress should be made toward higher levels of seismic safety); 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 261, 878 P.2d 566, 32 Cal. Rptr. 2d 807, 834 (1994) (providing that in determining whether rate rollbacks on earthquake insurance are confiscatory, one must look at the insurance company as a whole, and not merely the performance of earthquake insurance as a subset of the insurance company); Ziello v. Superior Court, 36 Cal. App. 4th 321, 329-30, 32 Cal. Rptr. 2d 251, 256 (1995) (holding that a lender that does not require earthquake insurance for the property securing its loan may not control insurance monies received under that policy); Brian Mattis, Earth Movement Claims Under All Risk Insurance: The Rules Have Changed In California, 31 SANTA CLARA L. REV. 29 (1990) (describing the changes in California earthquake coverage); Rob Risley, Comment, Landslide Peril and Homeowners' Insurance in California, 40 UCLA L. REV. 1145, 1153-78 (1993) (reviewing the progression of landslide loss litigation, its costs, and the need for legislative reform in California); Eric Slater, Lenders Owe Quake Funds, Owners Say, L.A. TIMES, at A1 (July 29, 1995) (discussing the California Court of Appeal decision in Ziello v. Superior Court, upholding a homeowner's right to control earthquake insurance payout for property damaged or destroyed in the Northridge earthquake, and stating that lenders are not complying with the ruling); B Glenn, Annotation, Business Interruption or Use and Occupancy Insurance, 83 A.L.R. 2d 885 (1995) (discussing the recent case history behind business interruption insurance).
become uninsurable). Additionally, prior law required insurers to offer optional coverage for earthquake related structural engineering or demolition costs. Chapter 939 repeals this optional coverage provision, and requires only that earthquake coverage be offered by insurers, subject to minimum content and dwelling specifications.

Prior law provided that if an offer for earthquake coverage was accepted, such coverage must have been continued under the original applicable terms, unless canceled by the insurer or insured. Under Chapter 939, earthquake coverage must only be continued for the term of the policy, under specified conditions, unless canceled by the insurer or insured. At the time of renewal, Chapter 939 permits insurers to modify the terms and conditions of a policy, so long as the required notice has been afforded to the insured, and the policy as

2. 1984 Cal. Stat. ch. 916, sec. 1, at 3071 (enacting CAL. INS. CODE § 10082); see id. (providing that the required offer must include coverage against the risks of loss or damage from an earthquake on all property insured under the residential property insurance policy, and in accordance with the insurer's rules and rating plan).

3. 1990 Cal. Stat. ch. 1116, sec. 6, at 4886-87 (enacting CAL. INS. CODE § 10089.1(a)); see id. (requiring insurers to offer, in addition to the required minimum offer of coverage, optional coverage including coverage of the insured residential dwelling for payment of services for the purpose of structural engineering costs, or demolition costs due to the structural condemnation resulting from damage caused by an earthquake).

4. See CAL. INS. CODE § 10091(f) (amended by Chapter 939) (defining an "insurer" as a person undertaking to indemnify another against damage, loss, or liability arising from an unknown or contingent event including reciprocals and interinsurance exchanges).

5. 1995 Cal. Legis. Serv. ch. 939, sec. 5, at 5602 (repealing CAL. INS. CODE § 10089.1); CAL. INS. CODE § 10082(a) (amended by Chapter 939); see id. (requiring a policy to include coverage for risk of loss or damage resulting from an earthquake and in accordance with the minimum coverage requirements of California Insurance Code § 10089(a), (b)); see also id. §10089(a), (b) (amended by Chapter 939) (requiring minimum earthquake coverage to include: (1) a dwelling, separate from outbuildings, appurtenant structures, masonry fences and walls independent of the structural integrity of the dwelling, swimming pools, walkways and patios independent of that which is required for access to the dwelling, patio coverings, artistic and decorative features, landscaping, or masonry chimneys, so long as the policy covers replacement of a damaged masonry chimney with a nonmasonry, earthquake resistant chimney; (2) contents coverage no less than 10% of the amount of the covered dwelling loss, or at a minimum of $5000, provided that in the event the policy does not cover structural loss, the amount of the contents coverage after the deductible is considered; and (3) additional living expenses in the amount of at least $1500 to cover expenses while the residential dwelling remains uninhabitable); id. (providing that in the case of coverage under either (1) or (2), the deductible may not exceed 15% of the contents coverage provided for the dwelling (which shall be no less than $5000), and in any case the insurer may exclude glassware, china, porcelain, or ceramic items, artwork, or other decorative items from coverage); id. § 10089(b) (amended by Chapter 939) (limiting the deductible to 15% of the coverage provided for the dwelling).


7. CAL. INS. CODE § 10086(a) (amended by Chapter 939); see id. § 10086.5(b) (West 1993) (providing that an insurer may not refuse to cancel, reject, or renew a policy of residential property insurance after an acceptance of an offer of earthquake coverage based solely on the fact that the insured has accepted the offer, unless the policy has been terminated by the named insured); see also id. § 676 (West 1993) (setting forth grounds for valid notification of cancellation of a policy that has been in effect for at least 60 days or immediately following renewal to include: (1) nonpayment of a premium, (2) conviction of a crime having as one of its elements increasing any hazard against the insured, (3) discovery of fraud or material misrepresentation by the insured, (4) discovery of grossly negligent acts or omissions by the insured that increases hazards against the insured, or (5) physical changes in the insured property causing the property to become uninhabitable).
modified meets specified minimum coverage specifications. Moreover, Chapter 939 requires coverage provisions and a coverage disclosure summary to be approved by the California Insurance Commissioner. In addition, Chapter 939 provides that the California Fair Plan Association must issue earthquake coverage.

COMMENT

The main impetus behind Chapter 939 was the Northridge earthquake of 1994. In less than a minute, over $12 billion in losses were accrued by insurers of property in Southern California, and it is speculated that an earthquake of equal or greater magnitude to the Northridge earthquake could render at least twelve California Insurance providers insolvent. Chapter 939 was designed to reduce the threat of earthquake related insolvency of California insurance providers, and

8. Id. § 10086(a)(1), (2) (amended by Chapter 939); see id. (requiring that the terms of a policy as modified meet with minimum coverages set forth in the California Insurance Code § 10089, and requiring the insurer to provide a renewal notice to the insured in a stand-alone disclosure document upon modification at time of renewal, stating the changes made to the policy, and a proof of mailing of the disclosure document using first-class mail to the insured’s mailing address that creates a conclusive presumption that such document was provided).

9. Id. § 10086(a)(2) (amended by Chapter 939); see id. (providing that the California Insurance Commissioner must approve the form of a disclosure summary concurrently with an insurance policy); id. § 10083(a) (amended by Chapter 939) (putting forth language to be stated in every offer of earthquake insurance to include a short statement providing (1) that earthquake coverage is not provided within a homeowners’ existing policy, (2) that California law requires an offer thereof to be made, (3) that an offer may have several exclusions, (4) that additional coverage may be purchased in addition to the minimum offered coverage, (5) the deductible amounts, and (6) the effective date of coverage).

10. See id. § 10094 (West 1993) (describing the function of the California Fair Plan Association as an industry placement facility for the formulation and administration of a program for the equitable apportionment among insurers unable otherwise to procure insurance of basic property insurance).

11. Id. § 10091(a) (amended by Chapter 939); see id. § 10091(c) (amended by Chapter 939) (defining “basic property insurance,” as insurance covering against the direct loss of real or tangible property at a fixed location in a designated geographic or urban area, and from perils insured under a standard fire policy and extended coverage endorsement and vandalism and malicious mischief and such other insurance coverage as may be added with respect to such property by the industry placement facility with the approval of the California Insurance Commissioner, or by the joint reinsurance association (California Fair Plan Association) with approval from the California Insurance Commissioner, and requiring that the joint reinsurance association sell and renew only those policies as specified under California Insurance Code §10089).


13. Id.; see id. (reciting the most recently revised insurance statistics with regard to the Northridge earthquake in 1994); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1366, at 4 (Sept. 13, 1995) (stating that California Pool and Spa Industry Education Council opposes Chapter 939 because of its potential adverse effects on the pool and spa industry). See generally Ruth Gastel, Financial and Market Conditions, INS. INFO. INST. REP., July 1995 (reporting that the estimated cost of the Northridge earthquake stands at $11.7 billion; however, this estimate has been revised six times upwards, and the biggest losses were sustained by California’s largest home insurers, Allstate Corporation and State Farm, while Twentieth Century Insurance Company lost an estimated $900 million; all of which were threatened by insolvency due to these long losses).
in so doing, increase the amount of insurers offering insurance to homeowners, while increasing consumer access to homeowners' insurance.14

Daniel L. Keller

Insurance; genetic discrimination

Civil Code § 56.17 (new); Health and Safety Code § 1374.9 (new); § 1374.7 (amended and repealed); Insurance Code §§ 10123.31, 10123.35, 10140.1, 10140.5, 11512.96, 11512.965 (new); §§ 10123.3, 10147 (amended); §§ 10140, 11512.95 (amended and repealed).

SB 1020 (Johnston); 1995 STAT. Ch. 695

Under existing law health care service plans1 are regulated by the provisions of the California Health and Safety Code.2 Existing law regulates life and disability insurance carriers, self-insured employee welfare benefit plans, and nonprofit hospital service plans through the California Insurance Code.3 Chapter 695 makes identical revisions and additions to each of these codes where they

14. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1366, at 2 (June 29, 1995); see id. (providing that Assemblymember Knowles initiated AB 1366 in an effort to induce insurers to return to the active writing of homeowners' and earthquake insurance policies, and that reducing the amount of required coverage, according to this bill's supporters, will reduce the underwriting risk to insurers, and in return provide consumers with increased access to more affordable earthquake insurance); Telephone Interview with John Caldwell, supra note 12 (stating that under the prior system insurers were exposed to excess risk, and in an effort to avoid further exposure, insurers have decreased the number of homeowners' policies offered); see also Henry Chu, Insurance Crunch Has Homeowners Seeking Relief, L.A. TIMES, July 30, 1996, at B1 (stating that 11% of the homeowners in the San Fernando and Santa Clarita Valleys lost their homeowners' insurance coverage following the Northridge earthquake); Cynthia H. Craft, Fears Cited Over Access to Quake Insurance, L.A. TIMES, July 12, 1995, at B1 (discussing consumer concerns that competing bills over earthquake coverage could limit coverage by causing insurers to flee the market if there is no guarantee of access to earthquake coverage); Ilana DeBare, A Quake Insurance Dilemma, SACRAMENTO BEE, June 6, 1995, at E1 (stating that earthquake regulations are making it difficult for homeowners to find regular homeowners' insurance).

1. See CAL. HEALTH & SAFETY CODE § 1345(f) (West Supp. 1995) (defining a "health care service plan" as an agreement where a person arranges to provide health care services to another for a prepaid or periodic charge).

2. Id. § 1343(a) (West Supp. 1995); see id. (declaring that the provisions of California Health and Safety Code §§ 1340-1399.64 apply to all health care service plan contracts).

3. CAL. INS. CODE §§ 10110-11546 (West 1993 & Supp. 1995); see id. (covering life and disability insurance, including self-insured employee welfare benefit plans and nonprofit hospital service plans).
concern genetic characteristic\(^4\) discrimination.\(^5\)

Existing law forbids any health care service plan, life or disability insurance carrier, self-insured employee welfare benefit plan, or nonprofit hospital service plan from refusing coverage to an applicant on the basis of a genetic characteristic which he or she possesses.\(^6\) Existing law also prohibits these insurers and plans from charging a higher rate or premium to individuals based upon their genetic characteristics.\(^7\)

Chapter 695 restricts insurers and plans from offering or providing different terms, conditions, or benefits to a person because he or she possesses a particular genetic characteristic.\(^8\) Chapter 695 gives the Commissioner of Corporations\(^9\) and the Insurance Commissioner\(^10\) the authority to enforce anti-genetic characteristic discrimination policies through administrative penalties.\(^11\)

Chapter 695 adds penalties to be enforced against any person who discloses the results of an individual’s genetic test results without his or her written authorization.\(^12\) Chapter 695 sets maximum civil penalties for the negligent

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4. See CAL. HEALTH & SAFETY CODE § 1374.7(c) (amended and repealed by Chapter 695); CAL. INS. CODE § 10147(b) (amended by Chapter 695); see also id. (defining “genetic characteristic” as any scientifically or medically identifiable gene or chromosome which is not presently associated with the symptoms of any disease or disorder, but is known either to cause, or to increase the risk of developing, any disease or disorder); cf. ARIZ. REV. STAT. ANN. § 20-448(F)(3) (Supp. 1994) (defining “genetic condition” as a specific chromosomal or single gene condition).

5. CAL. HEALTH & SAFETY CODE § 1374.7 (amended and repealed by Chapter 695); CAL. INS. CODE §§ 10123.3, 10140, 11512.95 (amended and repealed by Chapter 695).

6. CAL. HEALTH & SAFETY CODE § 1374.7(a) (amended and repealed by Chapter 695); CAL. INS. CODE §§ 10123.3(a), 10140(b), 11512.95(a) (amended and repealed by Chapter 695).

7. CAL. HEALTH & SAFETY CODE § 1374.7(a) (amended and repealed by Chapter 695); CAL. INS. CODE §§ 10123.3(a), 10140(b), 11512.95(a) (amended and repealed by Chapter 695); cf. WIS. STAT. ANN. § 631.89(3)(b)(2) (West 1995) (requiring life insurers and income continuation insurers to establish rates and other aspects of coverage that are reasonably related to the risk presented).

8. CAL. HEALTH & SAFETY CODE § 1374.7(a) (amended and repealed by Chapter 695); CAL. INS. CODE §§ 10123.3(a), 10140(b), 11512.95(a) (amended and repealed by Chapter 695); cf. ARIZ. REV. STAT. ANN. § 20-448(E) (Supp. 1994) (prohibiting life and disability insurers from basing rates, terms, or conditions of coverage on the existence of a genetic condition); WIS. STAT. ANN. § 631.89(2)(d) (West 1995) (supplying a general prohibition on the consideration of genetic test results when determining rates or any other aspect of insurance coverage or health care benefits).


11. CAL. HEALTH & SAFETY CODE § 1374.9 (enacted by Chapter 695); CAL. INS. CODE §§ 10123.31, 10140.5, 11512.96 (enacted by Chapter 695). Compare CAL. HEALTH & SAFETY CODE § 1374.9(a) (enacted by Chapter 695) (listing administrative penalties for the first violation as a maximum of $2500, between $5000 and $10,000 for the second violation, and between $15,000 and $100,000 for each additional violation) with CAL. INS. CODE §§ 10123.31(b), (c), 10140.5(b), (c), 11512.96(b), (c) (enacted by Chapter 695) (designating administrative penalties for the first violation as a maximum of $2500, between $5000 and $10,000 for the second violation, and between $15,000 and $100,000 for each violation that the commissioner finds to be a demonstrated business practice or done knowingly).

12. CAL. CIV. CODE § 56.17(a)-(e) (enacted by Chapter 695); CAL. INS. CODE §§ 10123.35(a)-(e), 10140.1(a)-(e), 11512.965(a)-(e) (enacted by Chapter 695); see CAL. CIV. CODE § 56.17(g) (enacted by Chapter 695) (requiring the written authorization, for purposes of these sections, to include: (1) plain language, (2) the date and signature of the person acting for the individual, (3) the types of people permitted to disclose
disclosure of another's genetic test results at $1000, and between $1000 and $5000 for a willful disclosure. Any person who releases genetic test information which leads to economic, bodily, or emotional harm to another is guilty of a misdemeanor and is liable to the victim for all proximate damages.

COMMENT

Scientists researching DNA have located the genes responsible for thousands of diseases and disorders including Huntington’s disease, Lou Gehrig’s disease, and specific strands of ataxia and cancer. Genetic information is a useful tool for the early detection of certain diseases, many of which doctors anticipate they will be able to treat on a genetic level in the near future. Knowledge of a genetic predisposition to a disease affords the individual the ability to take precautionary measures to prevent or postpone the onset of the disease.

Despite its potential benefits to society, genetic testing could also be used by insurance companies to discriminate against those with specific genetic characteristics by denying them coverage or charging them a higher premium. Chapter 695, effective January 1, 1995, prevents insurers and health care service plans from abusing test results by prohibiting them from using genetic test

information, (4) the nature of information permitted to be disclosed, (5) the names or positions of those entitled to receive the information, (6) the purposes for which the information may be used, (7) the time for which the permission is valid, and (8) notice of the individual’s right to receive a copy of the written authorization); CAL. INS. CODE §§ 10123.35(g), 10140.1(g), 11512.965(g) (enacted by Chapter 695) (setting forth similar requirements for written authorization as those enumerated in California Civil Code §56.17(g)).

13. CAL. CIV. CODE § 56.17(b), (c) (enacted by Chapter 695); CAL. INS. CODE §§ 10123.35(b), (c), 10140.1(b), (c), 11512.965(b), (c) (enacted by Chapter 695).

14. CAL. CIV. CODE § 56.17(d), (e) (enacted by Chapter 695); CAL. INS. CODE §§ 10123.35(d), (e), 10140.1(d), (e), 11512.965(d), (e) (enacted by Chapter 695); see CAL. CIV. CODE § 56.17(d) (enacted by Chapter 695) (establishing a maximum penalty of $10,000 for a disclosure that results in damage to another); CAL. INS. CODE §§ 10123.35(d), 10140.1(d), 11512.965(d) (enacted by Chapter 695) (containing the same language as California Civil Code § 56.17(d)); cf. COLO. REV. STAT. § 10-3-1104.7(12) (1994) (permitting an individual who is injured by the improper use of genetic information to recover any actual damages incurred as well as equitable relief, such as a retroactive order, which would require the violator to provide the coverage that would have been granted had the genetic information not been used).

15. Philip Elmer-Dewitt, supra note 15, at 49-50; see id. at 46-49 (discussing the Human Genome Project, a research venture attempting to locate every gene contained in human DNA); Jon Matthews, Bias Based on Genetic Testing Targeted, SACRAMENTO Bee, May 7, 1995, at A3 (reporting that genetic tests can reveal predispositions to thousands of diseases including Alzheimer’s disease and cystic fibrosis).

16. Elmer-Dewitt, supra note 15, at 49-50; see id. (reporting the first successful gene-therapy treatment, with bovine ADA, of two patients).

17. See Carol Lee, Comment, Creating a Genetic Underclass: The Potential for Genetic Discrimination by the Health Insurance Industry, 13 PACE L. REV. 189, 191-92 (1993) (stating that early detection of certain genetic diseases allows individuals to seek preventive care); see also Elmer-Dewitt, supra note 15, at 52 (reporting the possibility for those with a genetic predisposition for heart disease or breast cancer to take precautionary measures).

18. See Lee, supra note 17, at 222 (asserting that permitting insurance companies to use genetic test results would lead to more uninsured people either because companies would deny coverage to those with certain characteristics or charge them unaffordable premiums).
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information as a factor for accepting an applicant or determining an enrollee's rates.19 The California Legislature strengthened these provisions with Chapter 695 to give people the opportunity to undergo genetic testing without the fear that they will be penalized by their health care plan or insurance company.20

Insurance companies argue that genetic characteristics are an important health indicator which can assist them when making coverage decisions.21 Insurance companies contend that both the insurer and the insured should have the same access to genetic test results so that each can make informed decisions from equal bargaining positions.22

Currently there is no federal legislation controlling the use of genetic information by insurers.23 While the Americans with Disabilities Act of 1990 protects individuals who are presently disabled by a genetic disease, it specifically exempts the insurance industry's practice of underwriting and classifying risks

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19. 1994 Cal. Legis. Serv. ch. 761, sec. 1-10, at 3249-62 (amending and repealing CAL. HEALTH & SAFETY CODE § 1374.7; enacting CAL. HEALTH & SAFETY CODE § 1374.7; amending and repealing CAL. INS. CODE § 10123.3, 10140, 11512.95; enacting CAL. INS. CODE § 10123.3, 10140, 10146, 10147, 10148, 10149, 10149.1, 11512.95); see Sally Lehrman, New California Law Prohibits Genetic Discrimination by Health Insurers, BIOTECHNOLOGY NEWSWATCH, Oct. 17, 1994, at 1 (quoting Dr. Paul Billings, associate clinical professor at Stanford University, as saying the number of plans and insurers covered and the definition of genetic information makes Chapter 761 the strongest genetic privacy law in the United States); cf. COLO. REV. STAT. § 10-3-1104.7(3)(a), (b) (1994) (placing restrictions on the use of genetic test information by health care insurance, group disability insurance, and long-term care insurance coverage, but not life insurance); GA. CODE ANN. § 33-54-7 (Michie Supp. 1995) (exempting life insurance and disability insurance companies from the state's restrictions on the use of genetic test results); 1995 N.H. ch. 101, § 141-H:5(I), (II) (applying the provisions of the bill limiting the use of genetic test information to health insurance companies, but not to life insurance, disability income insurance, or long-term care insurance). But see Richard A. Epstein, The Legal Regulation of Genetic Discrimination: Old Responses to New Technology, 740 B.U. L. Rev. 1, 20-21 (1994) (proposing that the better solution to insuring people with genetic disorders is to have the government subsidize the difference between the individual's premium as it would be without the condition and what it is with the condition).

20. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1020, at 2 (Sept. 5, 1995) (noting the purpose of SB 1020 is to enhance the existing strict privacy protections regarding genetic tests); see also Lehrman, supra note 19 (stating that the sponsor's intent behind Chapter 761 was to allow people to take genetic tests without worrying that the result might later be used against them); Mary Beth Barber, Brave New World, CAL. J., Aug. 1, 1995, at 34 (listing examples of a man found to be a carrier of neurofibromatosis ["elephant man" disorder] who, along with his children, was declared uninsurable, and a pregnant woman who was permitted to have her fetus tested for adult polycystic kidney disease by her health care service plan as long as she agreed to terminate the pregnancy if the test was positive); id. (stating that instances of genetic discrimination have not yet reached the courts because of the newness of the field); Elmer-Dewitt, supra note 15, at 53 (referring to a study by the National Academy of Sciences which reported that cases have already been reported of people losing their health insurance on the basis of genetic test results).


22. See Lee, supra note 17, at 208-09 (stating the insurance industry's concern that individuals, empowered with information regarding their genetic conditions, could hide that knowledge and exploit the insurer).

23. See id. at 220 (stating that, while there are protections against discrimination based upon race, gender, religion, national origin, age, and disability, there is no protection against discrimination based upon genetic make-up).
Congress has been considering proposals to prohibit health plans from making enrollment, eligibility, continuation, or contribution decisions on the basis of genetic information, however, the Senate Labor and Human Resources Committee has acknowledged the need to further define the term "genetic information." 25

Christopher P. Blake

Insurance; health care coverage—domestic violence

Health and Safety Code § 1374.75 (new); Insurance Code § 10144.2 (new).
AB 1973 (Figueroa); 1995 STAT. Ch. 603

Under existing law, the Knox-Keene Health Care Service Plan Act of 19751 regulates health care plans, the willful violation of which is a crime. 2 Existing law also regulates trade practices in the business of insurance by defining, prohibiting, and setting civil penalties 3 for persons who engage in unfair methods of competition, as well as any unfair or deceptive practices. 4

24. 42 U.S.C.A. § 12201(c) (West Supp. 1995); see id. (exempting insurers, hospital or medical service companies, and health maintenance organizations from its provisions).


2. Id. § 1342(e) (West 1990); see id. § 1340 (West 1990) (stating that this section is to be known as "The Knox-Keene Health Care Service Plan Act of 1975"); see also id. § 1342(g) (West 1990) (declaring that one of the Legislature’s intentions underlying the Knox-Keene Act is to assure the availability and accessibility to health and medical services); id. § 1390 (West 1990) (stating that any person who willfully violates any provision, rule, or order contained in the California Health and Safety Code §§ 1340-1399.64 will, upon conviction, be fined not more than $10,000, be imprisoned in the state prison or county jail for not more than one year, or receive both a fine and imprisonment; however, no person may be imprisoned if it is proven that such person had no knowledge of the rule or order); Samura v. Kaiser Found. Health Plan, Inc., 17 Cal. App. 4th 1284, 1299, 22 Cal. Rptr. 2d 20, 29 (1993) (holding that exclusive power to regulate and enforce violations of the Knox-Keene Act is entrusted to the California Department of Corporations, pre-empting even the common law powers of the Attorney General).

3. See CAL. INS. CODE § 790.035(a) (West 1993) (providing that any person who engages in any unfair method of competition or an unfair or deceptive act is liable to the state for a civil penalty fixed by the California Insurance Commissioner, not to exceed $5000 for each act—unless the act was willful, then not to exceed $10,000); see also Moradi-Shalal v. Fireman’s Fund Ins. Co., 46 Cal. 3d 287, 304, 758 P.2d 58, 68, 250 Cal. Rptr. 116, 126 (1988) (holding that there is no private civil cause of action against insurers under California Insurance Code § 790.3(h) for unfair claims settlement practices).

4. CAL. INS. CODE § 790.02 (West 1993); see id. (stating that no individual shall engage in any trade practice that is defined as an "unfair method of competition" or an "unfair deceptive practice" in the business of insurance); see also id. § 790.01 (West 1993) (providing that the California Unfair Insurance Practices Act

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Chapter 603 provides that health care service plans\(^5\) may not use an applicant's or covered person's history of being, or future potential to be, a victim of domestic violence\(^6\) in any discriminatory\(^7\) manner.\(^8\) Additionally, Chapter 603 applies to reciprocal and interinsurance exchanges, Lloyds insurers, fraternal benefit and fire societies and insurers, grants and annuities societies, insurers holding exemptions, motor clubs, nonprofit hospitals, life agents, broker-agents, surplus line and special lines surplus line brokers, and all other persons engaged in the insurance business; id. § 790.03(a)-(h) (West 1993) (defining "unfair methods of competition" and "unfair and deceptive practices" in the insurance business). See generally id. §§ 790-790.10 (West 1993) (establishing the Unfair Insurance Practices Act); Homestead Supplies, Inc. v. Executive Life Ins. Co., 81 Cal. App. 3d 978, 992, 147 Cal. Rptr. 22, 29-30 (1978) (stating that California Insurance Code § 790.03, proscribing unfair methods of competition and deceptive acts or practices in the insurance business, is directed at insurers, not insureds, despite the fact that the insured participated in the illegal transaction).

5. See CAL. HEALTH & SAFETY CODE § 1345(f) (West Supp. 1995) (defining "health care service plan" as any person who arranges for the provision of health care services to subscribers or enrollees, or pays for or reimburses any part of the cost of health care services in return for payment); see also id. § 1341 (West 1990) (stating that the California Commissioner of Corporations is responsible for the administration and enforcement of health care service plans); id. § 1346(a) (West Supp. 1995) (providing that the Commissioner of Corporations can propose and recommend the enactment of legislation necessary to protect and promote the interests of the public, subscribers, enrollees, and providers of health care service plans in California); id. § 1347(a), (b) (West Supp. 1995) (establishing a health care service plan advisory committee in the Department of Corporations whose purpose is to assist and advise the commissioner in the implementation of his duties); id. § 1367 (West Supp. 1995) (outlining the general and licensing requirements for health care service plans).

6. See CAL. FAM. CODE § 6211 (West 1994) (defining "domestic violence" as abuse perpetrated against a spouse or former spouse, a cohabitant or former cohabitant, a dating or engagement partner, a person with whom the perpetrator conceived a child, a child of the perpetrator, or any other related person); see also CAL. HEALTH & SAFETY CODE § 300.5 (West Supp. 1995) (requiring the Maternal and Child Health Branch of the State Department of Health Services to administer a comprehensive domestic violence program); Cynthia Fuchs Epstein, Justice and Gender, 79 CAL. L. REV. 577, 585 (1991) (stating in a book review that all states have adopted some form of domestic violence legislation); Mark W. Owens, Review of Selected 1994 California Legislation, 26 PAC. L.J. 202, 380 (1995) (discussing the Battered Women Protection Act of 1994); Armin Brott, Battered Statistics, SACRAMENTO BEE, Aug. 7, 1994, at F1 (stating that statistics regarding domestic violence are often used irresponsibly and are not very accurate). See generally Billy G. Mills & Mary Lyons McNamar, California's Response to Domestic Violence, 21 SANTA CLARA L. REV. 1, 4-19 (1981) (outlining an overview of California’s judicial and legislative attempts to remedy domestic violence).

7. See CAL. INS. CODE § 10140(a) (West Supp. 1995) (proscribing arbitrary discrimination by insurers in issuance, cancellation, and premiums based on race, color, religion, national origin, ancestry, or sexual orientation); see also id. § 10143(a) (West 1993) (providing that no insurance company may discriminate in issuing, renewing, or selling a policy because an insured carries a genetic-trait disability); id. § 10144 (West 1993) (providing that no insurance company shall refuse to insure, renew, or limit coverage solely because of the insured’s physical or mental impairment); id. § 10145 (West 1993) (providing that no insurance company shall refuse to insure, renew, or limit coverage solely because of the insured’s blindness or partial blindness); id. § 11628(b)(1) (West Supp. 1995) (permitting an insurer to consider an insured’s or applicant’s occupation when issuing, canceling, or setting a premium); National Indem. Co. v. Garamendi, 233 Cal. App. 3d 392, 406, 284 Cal. Rptr. 278, 287 (1991) (holding that an insurer has the right to cancel or refuse to renew commercial motor vehicle policies, but that their right to cancel or refuse to renew private passenger vehicle policies is restricted). But see 68 Op. Cal. Atty. Gen. 153, 165 (1985) (opining that gender-based differentials provided for in California Insurance Code § 790.3(f) relating to life insurance violate the Equal Protection Clauses of both the United States and California Constitutions). See generally Sandra E. Stone, Note, HIV Testing and Insurance Applicants: Exploring Constitutional Alternatives to Statutory Protections, 19 HASTINGS CONST. L.Q. 1163, 1170-73 (1992) (outlining various state’s statutory responses to HIV testing and insurance).

8. CAL. HEALTH & SAFETY CODE § 1374.75(a) (enacted by Chapter 603); see id. (stating that a health care service plan cannot deny, refuse to enroll or renew, cancel or otherwise terminate, restrict, exclude, or limit coverage, or charge a different rate for the same coverage under the plan because the applicant or person covered is, has been, or may be the subject of domestic violence).

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prohibits disability insurers covering hospital, medical, or surgical expenses from using an insured’s history of being a victim of domestic violence in any way that would affect the insured’s coverage.9

Chapter 603 does not, however, prevent health care service plans or disability insurers from underwriting coverage on the basis of an individual’s medical condition as long as the consideration of the condition (1) does not take into account whether the individual’s condition was caused by domestic violence; (2) is the same for all individuals regardless of whether they are victims of domestic violence or not; and (3) does not violate any other act, regulation, or rule of law.10

Moreover, the fact that an individual is, has been, or may become a victim of domestic violence is not considered a medical condition.11

COMMENT

The purpose of Chapter 603 is to allow victims of domestic violence access to health care at reasonable rates, and to encourage them to disclose the cause of their injuries to doctors who may help stop the violence.13 By barring health insurers from using a victim’s history of domestic violence to affect the terms of his or her health insurance coverage, Chapter 603 also attempts to stem the tide of domestic violence and to end the cycle of abuse against domestic violence.

9. See CAL. INS. CODE § 106 (West 1993) (defining “disability insurance” as insurance covering injury and death resulting to the insured from accidents and covering disablement caused by either accident or sickness).

10. Id. § 10144.2(a) (enacted by Chapter 603); see id. (mandating that a disability insurer covering hospital, medical, or surgical services may not deny, refuse to insure or renew, cancel, or otherwise terminate, restrict, exclude, or charge a different rate for the same coverage, or limit coverage under a policy because the applicant or insured is, has been, or may be the subject of domestic violence).

11. CAL. HEALTH & SAFETY CODE § 1374.75(b) (enacted by Chapter 603); CAL. INS. CODE § 10144.2(b) (enacted by Chapter 603).

12. CAL. HEALTH & SAFETY CODE § 1374.75(b) (enacted by Chapter 603); CAL. INS. CODE § 10144.2(b) (enacted by Chapter 603).

13. Assembly Committee on Health, Committee Analysis of AB 1973, at 2 (May 2, 1995); see id. (noting a 1994 congressional survey that indicated that half of the 16 major insurance companies use domestic violence as a reason for not writing an insurance policy); see also Fact Sheet on Assembly Bill 1973, from the office of Assemblymember Liz Figueroa (July 7, 1995) (copy on file with the Pacific Law Journal) (stating that there was a concern that refusals of insurance coverage would discourage abused women from reporting and documenting abuse, and giving an example of a Cumberland County, Pennsylvania resident who, in 1993, was denied health, life, and mortgage disability insurance because her medical records revealed incidents of domestic violence); Ben Chamy, Battered Women Finding Insurance Hard to Come by, FREMONT ARGUS, Mar. 15, 1995, at A1 (reporting that a Santa Cruz woman was continuously denied health insurance after her medical record revealed a history of domestic violence); Insurer to End Bias Against Abuse Victims; State Farm Responds to Criticism that Nation’s Largest Carriers Deny Policies to Women Beaten by Their Husbands, L.A. TIMES, June 14, 1994, at D3 (asserting that thousands of women had been denied coverage and others were discouraged from reporting their abuse to doctors or police). But see Diana Griego Erwin, Some Insurance Policies Add to Abuse of Women, SACRAMENTO BEE, Mar. 2, 1995, at A2 (arguing that experts do not know if insurance companies have been denying coverage to victims of domestic violence in California).
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victims.  

However, by assuming less risk through a reduction in coverage for individuals likely to need medical services, insurers have been able to meet the serious demand for low cost health care for all.  

Barring health care insurers from using a domestic violence victim’s history in any discriminatory manner is consistent with national trends.  

Timothy J. Moroney

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14.  ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 1973, at 2 (May 2, 1995); see 141 CONG. REC. S3752 (daily ed. Mar. 6, 1995) (statement of Sen. Wellstone) (introducing the Victims of Abuse Access to Health Insurance Act and stating that domestic violence should be treated as a crime, not as voluntary risky behavior, and not as a pre-existing condition).

15.  ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 1973, at 2 (May 2, 1995); see id. (stating that by denying coverage to high risk people, the average cost for the insured masses stays down); see also Activists Say Insurers Deny Coverage To Battered Women, L.A. TIMES, May 13, 1994, at D2 (noting that often the batterer is the beneficiary, and insurers do not want to provide financial incentive to the batterer, especially when life insurance is involved).  

But see Nightline: The Hidden Cost Of The Battered Wife (ABC Television broadcast, Apr. 3, 1995) (transcript #3616 on file with the Pacific Law Journal) (expressing Ken Vest’s of the American Council of Life Insurance position that he and his organization will not be opposed to laws that prohibit insurers from using domestic violence histories as long as the laws allow insurers to look at an applicant’s medical history).

16.  S. 524, 104th Cong., 1st Sess., § 2 (1995); see id. (proposing to bar insurers from using a person’s history of domestic violence in any discriminatory manner); see also H.B. 6935, Conn. Gen. Assembly, Reg. Sess., § 8 (1995) (proposing to add to the list of unfair and deceptive insurance practices discriminating against a person because they were a victim of domestic violence); S.B. 1369, La. Senate, Reg. Sess., § 1 (1995) (proposing that discriminating against a victim of domestic violence is an unfair and deceptive insurance practice); Chamy, supra note 13 (noting that Florida, New York, Pennsylvania, and Washington state have bills pending that would ban discrimination by insurers because of domestic violence).
Insurance; insurer insolvency—claim preference

Insurance Code §§ 1033, 10541 (amended).
SB 1328 (Haynes); 1995 STAT. Ch. 795

Under existing law, the Insurance Commissioner (Commissioner) may act as a conservator of an insolvent insurance company and is empowered to liquidate an insurer if it appears that it would be futile to proceed with the rehabilitation of the insolvent insurer. Additionally, existing law established a system of priorities for claims against an insolvent insurer. The fifth in order of preference includes all claims of policyholders of insolvent insurers that are not covered claims.

Chapter 795 adds all claims under insurance and annuity policies or contracts, including funding agreements, to the fifth order of preference.

comment

Enactment of Chapter 795 is vital to protect the financial well-being of those California municipalities that invested approximately $40 million worth of bond proceeds with the Executive Life Insurance Company (ELIC), a California-based life insurance company. The local municipalities invest in innovative annuity-
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like products known as Guaranteed Investment Contracts (GIC’s). In turn, ELIC established reserves representing its future liabilities on these contracts. Unfortunately, ELIC’s reserves were primarily funded by investments in high risk bonds, aptly denominated “junk,” and by 1991 the market in these bonds had crashed. Ultimately, ELIC became insolvent requiring the Commissioner to seize the assets of ELIC and place the company in conservatorship.

The California Court of Appeals stated in dicta in Texas Commerce Bank v. Garamendi that contracts with the characteristics of GIC’s are non-insurance funding agreements rather than insurance annuities. Hence, holders of contracts similar to GIC’s would only be entitled to class six priority status in proceedings involving insurer insolvency.

The California Court of Appeals, in In re Executive Life Insurance Company relied on the dicta in Texas Commerce Bank and stated that GIC’s were only entitled to class six priority status. Because the assets of ELIC are such that in all probability class six creditors will receive nothing on their claims, the investments made by California counties, municipalities, colleges and pension plan participants in GIC’s were at risk of becoming worthless.

Enactment of Chapter 795, however, adds funding agreements to those claims invested the proceeds in contracts with Executive Life Insurance Company; see also Thomas S. Mulligan, Executive Life Ruling to Cost Three Communities, L.A. TIMES, Feb. 17, 1995 at D1 (reporting that the collapse of Executive Life Insurance Company could mean losses of nearly $40 million for the communities of Simi Valley, Temecula, and Whittier because the municipalities had used the proceeds of their bond sales to buy Guaranteed investment contracts).


7. Executive Life Ins. Co., 32 Cal. App. 4th at 356, 38 Cal. Rptr. 2d at 459; see id. (stating that ELIC was required by law to have reserves).

8. Id.; see id. (explaining that the reserves were funded by investments, primarily in high yield fixed income securities with no, or very low, credit ratings and that the market in those investments had crashed); see also Thomas S. Mulligan, Policyholders of Failed Insurer Brace for Cuts in Benefits, L.A. TIMES, Oct. 15, 1993, at D1 (describing ELIC as awash in junk bond investments that turned sour).


11. Texas Commerce Bank, 11 Cal. App. 4th at 491, 14 Cal. Rptr. 2d at 874; see id. at 469, 14 Cal. Rptr. 2d at 859-60 (distinguishing life annuities from contracts requiring periodic payments for a specified term, but not contingent upon human life).

12. Id. at 491, 14 Cal. Rptr. 2d at 874; see id. (concluding that Muni-GIC’s are funding agreements, and therefore, subject to class six priority status).


15. Id. at 368, 38 Cal. Rptr. 2d at 466; see SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1328, at 2 (May 18, 1995) (discussing the potential hardship of $40 million in losses); Susan Harrigan, Despite a Record Bailout, the Collapse of Executive Life Has Few Happy Endings, NEWSDAY, May 1, 1994, at A92 (describing the economic impact that the settlement has on pension plan investors, including a retired Unisys Corp. engineer who is going to lose a large portion of his 401(k) retirement plan, a retired shipping company worker who is pondering how to pay for food, rent and medication, and a couple who are facing foreclosure because the monthly check from an out-of-court settlement to care for their disabled daughter has been cut by more than one half).
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entitled to class five priority status. Thus, Chapter 795 provides financial protection to ELIC investors who purchased GIC's.

Anthony A. Babcock

Insurance; mortgage guaranty insurance

Insurance Code §§ 12640.02, 12640.09 (amended).
AB 1611 (Archie-Hudson); 1995 STAT. Ch. 270

Existing law, known as the Mortgage Guaranty Insurance Act, specifies that mortgage guaranty insurance is insurance against financial loss by reason of nonpayment of principal, interest, or other sums agreed to be paid under the terms of any promissory note, bond, or other form of indebtedness secured by a mortgage, deed of trust, lien, or other charge on real estate, provided that any

16. CAL. INS. CODE § 1033(a)(5) (amended by Chapter 795); see id. § 10541(g) (amended by Chapter 795) (providing that the holder of a funding agreement shall retain priority five status, under California Insurance Code § 1033).

17. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1328, at 2 (May 18, 1995).

1. See CAL. INS. CODE § 12640.01 (West 1988) (stating that §§ 12640.01-12640.20 of the California Insurance Code are to be known and cited as the Mortgage Guaranty Insurance Act); see also id. § 12640.17 (West 1983) (providing that all code sections and other statutes, unless in conflict, apply to the operation and conduct of the business of mortgage guaranty insurance). See generally id. §§ 12640.01-12640.20 (West 1988 & Supp. 1995) (establishing the provisions of the Mortgage Guaranty Insurance Act).

2. See Hopkins v. Anderson, 218 Cal. 62, 65, 21 P.2d 560, 561 (1933) (stating that a "mortgage" is merely a lien and nothing more); Johnson v. Razy, 181 Cal. 342, 344, 164 P. 657, 657 (1919) (holding that a "mortgage" is merely security for a debt and cannot transfer to another entity without a transfer of the debt); Booker v. Castillo, 154 Cal. 672, 677, 98 P. 1067, 1069 (1908) (explaining that a "mortgage" is a mere lien, which transfers no property subject to the lien). See generally 44 CAL. JUR. 3D, Mortgages § 1 (1978) (defining a "mortgage" as every non-trust transfer of an interest in real property made only as security for the performance of another act).

3. See Weber v. McCleverty, 149 Cal. 316, 320, 86 P. 706, 708 (1906) (explaining that a deed of trust does not create a lien or encumbrance on real property, but conveys legal title to the trustee); La Areada Co. v. Bank of Am., 120 Cal. App. 397, 398, 7 P.2d 1115, 1115 (1932) (stating that a "deed of trust" is a "conveyance in trust to secure an indebtedness or charge against... the property conveyed, with [the] power of sale vested in the trustee"). See generally 27 CAL. JUR. 3D (Rev), Part 1, Deeds of Trust § 1 (1987) (defining a "deed of trust" as a contract in which mutual obligations are imposed on the trustor, trustee, and the beneficiary, and its terms ascertain the rights and duties of each party).

4. See CAL. INS. CODE § 12640.02(a)(1)-(3) (amended by Chapter 270) (stating that when the securing instrument constitutes a lien, it can be a first lien, junior lien, or other type of lien; see also CAL. CIV. CODE § 2872 (West 1993) (explaining that a "lien" is a charge, other than a transfer in trust, "upon specific property by which it is made security for the performance of an act"); id. § 2873 (West 1993) (declaring that liens are either general or specific); id. § 2874 (West 1993) (defining a "general lien" as "one which the holder thereof is entitled to enforce as a security for the performance of all obligations"); id. § 2875 (West 1993) (defining a "special lien" as one which the holder thereof is entitled to enforce as security for the performance of a particular act or obligation); id. § 2881 (West 1993) (describing liens as creations of contract or by operation of law); Ingels v. Boteler, 100 F.2d 915, 919 (9th Cir. 1939) (declaring that the law of the state will control as to the nature of a lien, its creation, and the time of taking effect), aff'd, 308 U.S. 51 (1939); Lewis v. Booth, 3 Cal. 2d 345, 349, 44 P.2d 560, 562 (1935) (stating that a lien is but an incident of debt secured, and cannot
improvement on the real estate is a residential building, a condominium unit, a building designed for occupancy by not more than four families, a building designed for occupancy by not more than five families, or a building designed for commercial or industrial purposes.\(^5\)

Existing law also provides that mortgage guaranty insurance may only be written to insure loans secured by first liens,\(^6\) or junior liens\(^7\) under various conditions, on authorized real estate securities.\(^8\) Chapter 270 redefines what is meant by authorized real estate securities—as it applies to junior liens.\(^9\)

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5. CAL. INS. CODE § 12640.02(a) (amended by Chapter 270); see id. § 119 (West 1993) (defining “mortgage guaranty insurance” as “insurance [that] protects against financial loss because of nonpayment of principal, interest, or other sums that were agreed to be paid on any note, bond, or other indebtedness secured by [a] mortgage,” deed of trust, lien, or charge on real estate); cf. id. § 117 (West 1993) (defining “mortgage insurance” as insurance that includes the guaranteeing of the payment of the principal, interest, and other sums agreed to be paid under the terms of any note or bond secured by a mortgage and the guaranteeing or insuring against loss thereon). See generally David T. Griffith, Jr., Mortgage Guaranty Insurance Is What?, 48 CAL. ST. B.J. 683, 684 (1973) (providing the definitions for mortgage insurance and mortgage guaranty insurance and stating that the biggest difference between the two is that a mortgage insurer undertakes liability to all losses sustained, while the mortgage guaranty insurer must limit its coverage).

6. See BLACK'S LAW DICTIONARY 635 (6th ed. 1990) (defining “first lien” as “one taking preference over all other encumbrances upon the property, which must be satisfied before other charges or encumbrances are entitled to proceeds from the sale of the property”).

7. See id. at 851 (defining “junior lien” as a lien which is subordinate to a prior lien).

8. CAL. INS. CODE § 12640.07(a)(1), (2) (West Supp. 1995); see id. § 12640.02(b) (amended by Chapter 270) (defining “authorized real estate security” as real estate, plus the balance of any pledged cash account, borrower retirement account, or collateralized guaranty agreement contracted for by parents, blood relatives, employers, or nonprofit corporations or real estate securing a note, bond, or other indebtedness by junior mortgage, deed of trust, or other instrument constituting a junior lien on real estate which, when combined with all existing mortgages does not exceed a total indebtedness equal to 97% of the fair market value of the real estate, provided that if the junior lien is securing an equity line of credit, the line of credit is to be considered the amount of the loan).

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1611, at 1 (June 1, 1995). Compare 1993 Cal. Legis. Serv. ch. 115, sec. 5, at 1031-32 (amending CAL. INS. CODE § 12640.02(b)(1)) (including in the definition of “authorized real estate security,” real estate securing a form of indebtedness by an instrument constituting a junior lien, which, when combined with all existing mortgage loans does not exceed a total indebtedness equal to 90% of the fair market value of the real estate provided, unless otherwise approved by the Department of Insurance subject to a limitation on indebtedness of 95% of the fair market value) with CAL. INS. CODE § 12640.02(b)(1)(B) (amended by Chapter 270) (redefining “authorized real estate security” to include an instrument constituting a junior lien, which, when combined with all existing mortgages does not exceed a total indebtedness equal to 97% of the fair market value of the real estate, provided that the junior lien is securing an equity line of credit, the line of credit is to be considered the amount of the loan, and that the 97% ceiling can be reached without the approval of the Department of Insurance as was required with the 95% ceiling established under prior law); cf. ARIZ. REV. STAT. ANN. § 20-1541(1)(a) (Supp. 1994) (defining “authorized real estate security” as real estate secured by first liens subject to a loan maximum of 97% of the fair market value of the combined security); IDAHO CODE § 41-2651(2) (Supp. 1995) (defining “authorized real property security” as real property secured by a first lien, subject to total indebtedness not exceeding 97% of the fair market value of the property); KAN. STAT. ANN. § 40-3502(c) (Supp. 1994) (defining “authorized real

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Additionally, under existing law, mortgage guaranty insurers are required to limit their coverage or may elect to pay the entire indebtedness to the insured and acquire title to the authorized real estate security. Chapter 270 establishes, despite the limits set for junior liens, that a mortgage guaranty insurer can elect to insure a portfolio of loans secured by junior liens, provided that the maximum at risk in any one portfolio not exceed twenty percent of the original principal amount of the mortgage loans secured by the junior liens.

Chapter 270 also provides that if the borrower is required to pay the costs of the insurance, the lender is required to disclose in writing to the borrower that the borrower is not a beneficiary of, nor a party to the mortgage guaranty insurance policy.

**COMMENT**

Chapter 270 is intended to expand and simplify the possibilities under which lenders can obtain insurance on their second mortgage loans and equity lines of credit. By increasing the limit to ninety-seven percent on the loan to value ratio and by allowing mortgage guaranty insurers to pool all second mortgages in a portfolio, Chapter 270 makes it easier for individuals to secure second estate security” as property secured by an amortized note, bond or other evidence of indebtedness of not greater than 97% of the fair market value of the real estate).

10. **CAL INS. CODE § 12640.09(a), (b)(1) (amended by Chapter 270); see id. (stating that for first liens coverage is to be limited to a maximum of a net of 25% of the entire indebtedness, and for junior liens, coverage is to be limited to a maximum of a net of 25% of the combined indebtedness of all existing loan amounts secured by all liens or charges on the real estate); see also id. § 12640.09(c) (amended by Chapter 270) (stating that a mortgage guaranty insurer can extend its coverage past the established maximums provided that the excess is insured by a contract of reinsurance).**

11. **Id. § 12640.09(b)(2) (amended by Chapter 270).**

12. **Id. § 12640.09(b)(3) (amended by Chapter 270).**

13. **ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF AB 1611, at 2 (May 9, 1995); see SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1611, at 2 (July 13, 1995) (explaining that under prior law mortgage guaranty insurance could only be extended if the second mortgage, when combined with a first mortgage, accounted for 90% of the fair market value, which could be raised to 95% with the approval of the Department of Insurance, yet AB 1611 increases the ceiling to 97% without having to get Department of Insurance approval, thus simplifying the process for securing second mortgages); see also Letter from Frank R. Zbacnik, Manager, Weststar Mortgage Corporation, to Assemblymember Marguerite Archie-Hudson (May 8, 1995) (copy on file with the Pacific Law Journal) (explaining how regulations prior to enactment of Chapter 270 encumbered the loan review process, which often was not favorable to the borrower); Letter from Greg Marcella, Director Real Estate, Premier America Federal Credit Union, to Assemblymember Marguerite Archie-Hudson (Apr. 10, 1995) (copy on file with the Pacific Law Journal) (maintaining that the regulations prior to the enactment of Chapter 270 unnecessarily restricted the availability of loans, and that insurers could not insure loans, not because of default risk, but because of the size of the loan in relation to the amount of liens on the subject property); Letter from Deborah J. Sunderland, Vice President Operations, FENC Federal Credit Union, to Assemblymember Marguerite Archie-Hudson (Mar. 30, 1995) (copy on file with the Pacific Law Journal) (stating that regulations prior to the enactment of Chapter 270 required the lenders to calculate the maximum loan that could be insured, which many times proved insufficient to accommodate the borrowers needs).
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mortgages. Thus, low-income and minority homeowners will have increased access to capital without any added costs placed upon other consumers in the system.

Additionally, Chapter 270 broadens the availability of secured lines of credit to borrowers making credit available at lower rates with the added bonus that these credit lines are usually tax deductible.

Timothy J. Moroney

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1611, at 2 (June 1, 1995); see id. (stating that by allowing the insurers to pool all the second mortgages in a portfolio they can extend more coverage because the 20% coverage limitation is on the total of the pool, rather than the unpaid balance of an individuals first and second loans); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1611, at 2-3 (July 13, 1995) (stating that consumer groups support the bill because it increases capital available to homeowners making it easier to get second mortgages, and that real estate lenders support AB 1611 because greater access to mortgage guaranty insurance increases a lender’s capability to approve new loans).


16. Letter from William G. Rutland, Jr., George R. Steffes, Inc., Legislative Advocates, to Assemblymember David Knowles (May 8, 1995) (copy on file with the Pacific Law Journal); see id. (explaining that consumers who are good credit risks turn to credit card lines of credit for extra cash at very high interest rates and that AB 1611, by allowing mortgage guaranty insurance on loans secured by junior liens to be more readily available, will make lower interest secured lines of credit accessible to borrowers).
Insurance; public entity operation of employee health plans—exemption from the Knox-Keene Act

Health and Safety Code § 1349.2 (amended); Insurance Code § 740 (amended).
AB 1272 (V. Brown); 1995 STAT. Ch. 756

Existing law—the Knox-Keene Health Care Service Plan Act of 1975¹—provides that certain public entities² engaging in the business of a health care service plan³ or receiving advance or periodic consideration in connection with a health care service plan, are exempt from obtaining a license⁴ from the Commissioner of Corporations.⁵ Chapter 756 makes permanent the existing exemption from such licensing requirements, which was set to expire on January 1, 1996.⁶

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1. See CAL. HEALTH & SAFETY CODE § 1340 (West 1990) (providing that California Health and Safety Code §§ 1340-1399.64 is to be known as the Knox-Keene Health Care Service Plan Act of 1975); see also id. § 1342 (West 1990) (setting forth the intent of the Legislature to promote the delivery of medical and health care for Californians enrolled in, or subscribing to services rendered by a health care service plan or specialized health care service plan by (1) providing for the continuation of the professional, i.e. the doctor, dentist, etc., as the determiner of patients' health needs; (2) maintaining subscriber consumer awareness; (3) prosecuting malefactors; (4) ensuring competitive health care costs; (5) promoting effective representation for subscribers; (6) regulation to ensure financial stability; and (7) maintaining accessible and available care for subscribers); id. § 1343(a) (West 1995) (stating that the California Health and Safety Code §§ 1340-1399.64 applies to health care service plans and specialized health care service plan contracts).

2. See id. § 1349.2(a)(1) (amended by Chapter 756) (listing those public entities eligible under this exemption as any city, county, city and county, public entity, or political subdivision providing services to its employees, retirees, and dependents of those employees and retirees, but not to the general public).

3. See id. § 1345(f) (West Supp. 1995) (defining “health care service plan provider” as any person who undertakes to provide health care services to subscribers or enrollees, or to pay for or reimburse any portion of such services, in return for a prepaid or periodic charge); CAL. INS. CODE § 10198.6(a) (West Supp. 1995) (defining “health benefit plan” as any group policy or contract, offered or sponsored by an employer, that provides medical, hospital, or surgical benefits, but does not include accident only, credit, disability income, coverage of Medicare services with regard to government contracts, Medicare supplement long-term care insurance, dental, vision, supplemental liability insurance, insurance under worker’s compensation, automobile medical payment insurance, or no-fault insurance required in any liability insurance policy or equivalent self-insurance).

4. See CAL. HEALTH & SAFETY CODE § 1345(g) (West Supp. 1995) (defining “license” to mean a license as a plan pursuant to the California Health and Safety Code § 1353); see also id. § 1353 (West 1990) (providing that a license is issued after consideration of an application and results of investigation by the commissioner).

5. Id. § 1349 (West 1990); see id. (making it unlawful for one to engage in the business of a health care service plan in California without first having secured a license, unless such person is exempt, and providing that a person licensed under the California Health and Safety Code §§ 1340-1399.64 need not be licensed under the California Insurance Code); see also CAL. CORP. CODE § 25600 (West Supp. 1995) (providing that the California Commissioner of Corporations is appointed by the Governor and is the chief officer of the California Department of Corporations); CAL. HEALTH & SAFETY CODE §1346 (West Supp. 1995) (requiring the California Commissioner of Corporations to administer and enforce the California Health and Safety Code §§ 140-1399.64).

Moreover, existing law provides that the following criteria must be met in order to qualify for an exemption: (1) The plan must be operated and funded by a specified public entity; (2) services must be limited to employees, retirees, and their dependents; and (3) funding for the program must be provided.\(^7\)

Prior law required the Senate Office of Research to complete a study of factors to be considered, and the scope of an exemption for public entity health plans.\(^8\) Chapter 756 does not require a Senate Office of Research study or report, but does require annual reporting to the California State Controller.\(^9\)

Prior law presumed any person or entity that provided health care to be subject to the jurisdiction of the California Department of Insurance,\(^10\) unless subject to the jurisdiction of another state or federal entity.\(^11\)

Chapter 756 exempts from the California Insurance Code any health care service plan, or self-insured reimbursement plan, operated by a specified public entity that is exempt under the Knox-Keene Health Care Service Plan Act.\(^12\)

**COMMENT**

A permanent exemption from licensing requirements will prevent an increase in costs to specified public entities and public management trusts permitting (amended by Chapter 756) (establishing a permanent exemption).

7. CAL. HEALTH & SAFETY CODE § 1349.2(a)(1)-(3) (amended by Chapter 756).
8. 1993 Cal. Legis. Serv. ch. 760, sec. 1, at 3445 (amending CAL. HEALTH & SAFETY CODE § 1349(b)(1)-(9)); see id. (providing that the factors to be considered by the Senate Office of Research in conducting their study included: (1) an estimate of the number of plans affected by the exemption, (2) the fiscal impact of requiring licensing on public entities and regulatory agencies, (3) the impact on plan services, (4) the potential for concomitant increases in taxes, (5) risks and inadequacies of not requiring licensing, (6) the impact on private industry, (7) the impact of increased financial need by licensing authorities on enrollee assessments, (8) the competition between exempt and nonexempt plan providers, and (9) any constitutional barriers).
9. CAL. HEALTH & SAFETY CODE § 1349.2 (amended by Chapter 756); see CAL. GOV’T CODE § 12463 (West 1992) (providing that the State Controller must report the appropriations limits and the total annual appropriations subject to limitation of each county, city, and school district within the state of California); see also id. § 7502 (West 1980) (providing that the California State Controller must review annual financial reports as well as establish an advisory committee).
10. See CAL. GOV’T CODE § 11200.1 (West 1992) (providing that the Governor is to appoint, upon nomination of the California Insurance Commissioner, a chief deputy along with a deputy director of the California Department of Insurance to provide assistance for the California Insurance Commissioner).
11. 1984 Cal. Stat. ch. 582, sec. 2, at 2256 (amending CAL. INS. CODE § 740(a)); see id. (stating that any person or entity providing coverage in California for medical, surgical, chiropractic, physical therapy, speech pathology, audiology, professional mental health, dental, hospital, or optometric expenses is presumed within the jurisdiction of the California Department of Insurance unless subject to the jurisdiction of another agency).
12. CAL. INS. CODE § 740(i) (amended by Chapter 756); see id. (providing that exempt plans operated by any city, county, city and county, public entity, or political subdivision, or a public joint labor management trust remain subject to prohibitions pursuant to California Insurance Code §§ 790.03 and 790.035); see also id. § 790.03 (West 1993) (defining “unfair methods of competition” and “unfair and deceptive acts or practices” in the business of insurance); id. § 790.035(a) (West 1993) (providing that any person engaging in unfair competition or deceptive acts or practices is civilly liable for no more than $5000 for each act, or if willful, not to exceed $10,000).
public agencies to continue providing cost efficient, self-insured health plans.\textsuperscript{13} However, the change in violation procedures will increase costs to the State Controller.\textsuperscript{14} Since most providers are not at risk in contracting arrangements, and access to providers is not restricted, licensing requirements may not be necessary for public entities, but some oversight may be advisable to ensure financial solvency and fair trade practices.\textsuperscript{15}

Daniel L. Keller

\textsuperscript{13} Senate Committee on Insurance, Committee Analysis of AB 1272, at 2-3 (July 12, 1995); see id. (concluding that AB 1272 will permit public agencies to continue providing self-insured and cost efficient health care by providing for the avoidance of fees involved in licensing); Assembly Committee on Health, Committee Analysis of AB 1272, at 4 (Apr. 4, 1995) (addressing concerns of an unfair competitive edge being dealt to public entity health care plans via such an exemption and furthermore an incentive for public entities to self insure instead of seeking care from licensed providers, leading to problems with quality care and plan solvency).

\textsuperscript{14} Assembly Committee on Health, Committee Analysis of AB 1272, at 2 (Apr. 4, 1995); see id. (providing that additional costs to the State Controller are undetermined).

\textsuperscript{15} Id. at 3; see id. (discussing the Senate Office of Research report and recommending alternatives for oversight of public entity health care plans which include: (1) requiring plans to be licensed as disability insurers, (2) requiring the commissioner to propose special regulations for public entity plans, (3) applying the Insurance Code Unfair Practices Act to public entity plans, or (4) requiring the State Controller to formulate regulations); see also Senate Committee on Insurance, Committee Analysis of AB 1242 at 3 (July 12, 1995) (finding that there are between 111 and 251 self-insured health care plans in California that would otherwise be required to seek licensing without an exemption, 35% of which are publicly sponsored and 60% of which are sponsored by a Joint Powers Authority or trust, while the remaining 5% are sponsored by some other public entity); Assembly Committee on Health, Committee Analysis of AB 1272, at 3-4 (Apr. 4, 1995) (providing that in the event public entity run health plans became subject to licensing requirements, approximately 41% indicated they would discontinue operation, but that concerns remain about constraint on insured choice of health care since exemption from fees may provide public entity health care plans with a competitive advantage).
Insurance; separate account contracts by life insurers

Insurance Code § 10507.5 (new); § 10506.4 (amended).
SB 188 (Russell); 1995 STAT. Ch. 419
(Effective August 10, 1995)

Existing law allows certain admitted life insurers to issue guaranteed asset value separate account contracts (SACs) as investment products, with the approval of the California State Insurance Commissioner. Existing law also prescribes a specified manner of payment for SAC funds not withdrawn on the account's conversion date.

Chapter 419 expands existing law by providing that the payment manner for SAC funds not withdrawn on the account conversion date should also apply to SAC funds not withdrawn on the account guarantee effective dates. Further, Chapter 419 clarifies existing law by specifying that account guarantee effective dates are dates upon which insurers' guarantee payments will be transferred from

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1. CAL. INS. CODE § 10506.4(a)-(c) (amended by Chapter 419); see 29 U.S.C.A. § 1002(17) (West Supp. Pamphlet 1995) (defining a "separate account" as an insurance company account which credits or charges income, gains, and losses, whether or not realized, against that account in accordance with an applicable contract and without regard to other income, gains, or losses of the insurance company); CAL. INS. CODE § 10506(a) (West Supp. 1995) (describing insurers' use of separate account contracts, which provide variable benefits, as investment products for pension, retirement, retirement medical benefits, and profit-sharing plans); see also id. §§ 1170-1182, 1190-1202, 1211-1212 (West 1993 & Supp. 1995) (listing the types of investments authorized for insurance companies); Mack Boring & Parts v. Meeker Sharkey Moffitt, 930 F.2d 267, 275 (3d Cir. 1991) (citing to H.R. REP. No. 93-1280, 93rd Cong., 2d Sess. 296 (1974)) (recognizing that insurers have a general fiduciary responsibility regarding SAC funds, because these funds are separately managed and their payments are generally based on the investment performance of those particular assets); ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF SB 188, at 1 (June 27, 1995) (explaining that SACs are generally accounts consisting of bonds and other investment assets utilized as pension plan investments for large companies, that SAC assets are owned and held by the insurer, and that the value of these assets are guaranteed at some contractually agreed upon value, known as book value); Stephen E. Roth et al., Reorganizing Insurance Company Separate Accounts Under Federal Securities Laws, 46 BUS. LAW. 537, 537-55 (1991) (setting forth the basic nature and structure of insurer SACs); Prohibited Transactions, Reporting, Coverage Issues Discussed in Letters, 10 BNA PENSIon & Benefits REP., 1686 (1983) (reporting that an insurer is responsible under general fiduciary rules for assets in SACs, unless those assets are the insurer's excess funds put into the account for contingencies). See generally 15 U.S.C.A. § 80a-1 to 64 (West 1981 & Supp. 1995) (setting forth the Investment Company Act of 1940 which enumerates laws that govern companies providing investment products); 39 CAL. JUR. 3D Insurance Companies §§ 134-136 (1977 & Supp. 1995) (enumerating the licensing requirements for insurance agents seeking to offer variable benefit SACs).

2. CAL. INS. CODE § 10506.4(b)(1)(D), (b)(2)(D), (b)(3)(E) (amended by Chapter 419); see id. (specifying that withdrawals be paid either (1) as a lump sum not to exceed the SAC market value, or (2) as one or more contract value installments with a present value equal to or less than the aggregate withdrawal's market value); id. § 10506.4(b)(4) (amended by Chapter 419) (defining "conversion date" as the date, specified in the SAC agreement, on which SAC funds are converted or applied to the purchase of annuities or returned to the SAC owner or its designees).

3. Id. § 10506.4(b)(1)(D), (b)(2)(D), (b)(3)(E) (amended by Chapter 419); see id. (specifying that withdrawals be paid either (1) as a lump sum not to exceed the SAC market value, or (2) as one or more contract value installments with a present value equal to or less than the aggregate withdrawal's market value).
the insurers’ general accounts to the separate accounts, if necessary.4

Additionally, Chapter 419 authorizes certain insurers to issue guaranteed book value benefit insurance products based on investment portfolios not owned or possessed by the insurers.5

COMMENT

Chapter 419 is intended to clarify prior legislation and guarantee that California life insurers are not at a competitive disadvantage when compared to other states’ banks and insurers.6 Proponents of Chapter 419 believe it addresses

4. Id. § 10506.4(b)(7) (amended by Chapter 419); see id. § 10506.4(a) (amended by Chapter 419) (allowing transfers from insurers’ general accounts to separate accounts to maintain reserves necessary to meet guarantee obligations); see also id. § 10506(f)(2) (West Supp. 1995) (mandating transfers from insurers’ general accounts to separate accounts made to maintain reserves for guarantee obligations may only be made in cash and in accordance with California Insurance Code § 10506.4(e)); id. (declaring that these transfers do not increase permissible allocation amounts to SACs made pursuant to California Insurance Code § 10506(b), (f)(1) and are not limited by the provisions of California Insurance Code § 10506(b)).

5. Id. § 10507.5(a) (enacted by Chapter 419); see id. § 10507.5(a)(1) (enacted by Chapter 419) (requiring insurers who offer guaranteed book value benefit insurance products be authorized to deliver or issue for delivery life insurance policies in California); id. § 10507.5(a)(2) (enacted by Chapter 419) (mandating that insurers who offer guaranteed book value benefit insurance products have $1 billion in admitted assets or $100 million in capital and surplus as shown on the most recent financial statement filed with the California State Insurance Commissioner); id. (defining “capital and surplus” to include capital and surplus plus the asset valuation reserve and one-half of the dividend liability); id. § 10507.5(b) (enacted by Chapter 419) (providing that the California State Insurance Commissioner shall issue a bulletin setting forth reasonable requirements for insurers offering guaranteed book value insurance products and that this bulletin shall be enforceable until the Commissioner issues additional or amended regulations); see also SENATE COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF SB 188, at 2 (Apr. 19, 1995) (describing “guaranteed book value benefit insurance products” as investments which extend current insurer products by allowing insurers to transfer some of their risks to the retirement plan investors since the assets continue to be owned by the plans, rather than the insurers). See generally Laurie Goodman et al., A Flood of New GICs; Weak Insurance Industry Causes Many to Question Guaranteed Investment Contracts, BEST’S REV.—LIFE-HEALTH INS. ED., Apr. 1993, at 27 (describing guaranteed book value benefit insurance products, known as synthetic guaranteed investment contracts (synthetic GICs), as assets owned by investors, but serviced by banks, securities dealers, investment managers, and life insurers, and explaining the types of synthetic GICs being offered and their manner of payout to investors).

6. ASSEMBLY COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF SB 188, at 2 (June 27, 1995); see 1995 Cal. Legis. Serv. ch. 419, sec. 3, at 2658 (providing that Chapter 419 must take effect immediately to guarantee California-based insurers the same competitive advantage as other states’ insurers and to allow California residents the same opportunity to partake of SACs and synthetic GICs); SENATE COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF SB 188, at 2 (Apr. 19, 1995) (advocating the necessity of synthetic GICs for California insurers to maintain their competitive advantage, asserting these products are the most current stable value product sought by retirement plan participants and large employer plans, and enumerating these products’ benefits as increased diversification, better insulation from insurer insolvency, and better return on performance for investments); see also Jim Connolly, GIC Shifts Noted in ‘93 Sales Totals, NAT’L UNDERWRITER—LIFE & HEALTH/FN. SERV. ED., July 11, 1994, at 3 (recognizing the increasing popularity of SACs and synthetic GICs); Goodman et al., supra note 5 (examining the insurance industry’s downturn, consumers’ search for more secure investments, types of investments, including SACs and synthetic GICs, and these investments’ pros and cons); Fred Williams, GIC Market Stable as Aetna Withdraws; Demand Picks Up for New Alternatives, PENSIONS & INVESTMENTS, Feb. 21, 1994, at 20 (reviewing a major insurance carrier’s shift to SACs and synthetic GICs due to their profitability, increased return of investment, and decreased risk of loss due to insurer insolvency); Fred Williams, Sponsors Rush to Pooled GIC Funds; Yield, Diversification Are Attraction, PENSIONS & INVESTMENTS, Nov. 29, 1993, at 3 (explaining that the growth of the pooled GIC
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carens that other states' insurance regulators have expressed regarding similar investment products.7

Kelly L. McDole

Insurance; underwritten title companies—escrow accounts

Insurance Code § 12389.6 (new).
SB 193 (Costa and O'Connell); 1995 STAT. Ch. 408

Insurance Code §§ 12376, 12377 (new)
SB 892 (Leslie); 1995 STAT. Ch. 700

Under existing law, an underwritten title company1 can deposit funds into an escrow account.2 Existing law authorizes the Insurance Commissioner3 to place

market, which includes synthetic GICs, is based on higher yields, increased diversification, and lower risk). But see Goodman et al., supra note 5 (commenting on disadvantages of these products, such as potential losses by SAC investors despite the account guarantee aspects and the complex nature of synthetic GICs).

7. SENATE COMMITTEE ON INSURANCE, COMMITTEE ANALYSIS OF SB 188, at 2 (Apr. 19, 1995); see Goodman et al., supra note 5 (asserting that legislation can guarantee asset insulation by expressly stating SAC assets cannot be used to satisfy insurer insolvency); Fred Williams, States Question Synthetic GICs; Insurance Firms Target of Inquiries, PENSIONS & INVESTMENTS, Jan. 10, 1994, at 2 (questioning whether insurers can incur financial liability for synthetic GICs when they do not own the underlying assets); id. (reporting that the guarantee aspects of synthetic GICs are written "so tightly" and the investments are of such high quality that insurers' financial liability is minimal).

1. See CAL. INS. CODE § 12340.5 (West 1988) (defining an "underwritten title company" as a corporation engaged in the business of preparing title searches, title examinations, title reports, certificates or abstracts, all of which serve as the basis for written title policies); see also id. § 12340.1 (West 1988) (defining "title insurance" as insurance for owners of real or personal property, or holders of liens or encumbrances, against loss or damage suffered by (1) liens or encumbrances on, or defects in the title; (2) invalidity or unenforceability of any liens or encumbrances; or (3) incorrectness of searches relating to the title to real or personal property); id. § 12340.2 (West 1988) (defining a "title policy" as any written instrument of which title insurance liability is assumed); id. § 12340.10 (West 1988) (defining "abstract of title" as a written representation listing all recorded conveyances, instruments or documents which impart constructive notice with respect to the chain of title to the real property). See generally 4 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, Real Property § 215(3) (9th ed. 1987) (indicating that an underwritten title company, unlike a title insurer, does not issue policies; it only searches and prepares abstracts on which policies are based); F.W. Audrain, The Role of Title Insurance in Land Commerce, 5 SANTA CLARA L. REV. 10 (1965) (Illustrating the significant role title insurance plays in real estate transactions in California).

2. CAL. INS. CODE § 12389(b) (West 1988); see id. (authorizing an underwritten title company to deposit funds into an escrow account provided that it maintains a record of all receipts and disbursements of escrow funds and deposits a $7500 bond with the Insurance Commissioner); id. § 12413.5 (West Supp. 1995) (requiring an underwritten title company to deposit funds received in connection with conducting an escrow in a separate depository account in a bank, savings and loan association, or an industrial loan company); see also id. § 12413.1(1) (West Supp. 1995) (defining an "escrow account" as an account with a financial institution in which funds are deposited with respect to any transaction between two parties for the sale, transfer, encumbrance, or lease of real or personal property, and one person delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person, to be held until the satisfaction of a condition, when it is then to be delivered by the third person to a grantee, grantor,

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underwritten title companies into bankruptcy, receivership, or conservatorship upon discovery of any shortages in its escrow accounts. If an underwritten title company is placed into bankruptcy, receivership, or conservatorship, Chapter 700 obligates the title insurers who are operating under an underwriting contract with the underwritten title company to be liable for any deficiencies in the escrow or subescrow accounts of the underwritten title company.

promissee, promisor, obligee, obligor, bailee, bailor, or any agency or employee of the latter). See generally 1 CAL. JUR. 3d, Abstracters and Title Insurers § 18 (1972) (describing the conditions an underwritten title company must meet in order to engage in the escrow business).


5. See BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (defining "receivership" as a legal or equitable proceeding in which a receiver is appointed for an insolvent corporation, partnership or individual to preserve its assets for the benefit of affected parties such as creditors, and as the state or condition of a corporation, partnership, or individual over whom a receiver has been appointed).

6. CAL. INS. CODE § 1011 (West 1993); see id. (authorizing the commissioner, upon an order by the court, to take possession of a company's books, records, property, real and personal, and assets, and to conduct, as conservator, the business of that company for the following reasons: (1) the company has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner; (2) the company has neglected or refused to observe an order of the commissioner to take care of any deficiency in its capital or in its reserve within the time prescribed by law; (3) the company, without written consent of the commissioner, has transferred substantially its entire property or business, or has entered into a transaction the effect of which is to merge, consolidate, or reissue substantially its entire property or business in or with the property or business of another company; (4) the company is found to be in such condition that its further transaction of business will be hazardous to its policyholders, creditors, or to the public; (5) the company has violated its charter; (6) an officer of the company refuses to be examined under oath; (7) an officer or attorney of the company has embezzled, sequestered or wrongfully diverted assets of the company; (8) the company is a domestic insurer that does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked; or (9) the company is insolvent; see also id. § 1010 (West 1993) (indicating that California Insurance Code §§ 1010-1062 applies to companies subject to examination by the Commissioner, or purporting to do insurance business in California); id. § 1013 (West 1993) (authorizing the Commissioner to seize possession of the property, business, books, records, and accounts of a company without notice and a hearing and to retain possession subject to the order of the court if any of the conditions set forth in California Insurance Code § 1011 exist, or if irreparable loss or injury to the property or business of the company has occurred or may occur; id. § 1037 (West 1993) (authorizing the Commissioner to do the following as conservator: (1) collect all moneys due to the company, and any other acts necessary to collect, conserve, or protect the company's assets, property, and business and to conduct the business and affairs of the company; (2) collect all debts due and claims belonging to the company, and sell, compound, compromise, or assign any bad or doubtful debts; (3) compound, compromise, or negotiate settlement of any claims against the company; (4) acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with, any real or personal property of the company except the Commissioner must receive permission by the court to enter into a transaction involving real or personal property where the market value exceeds $20,000; (5) transfer stock of an insurer to a trustee under a voting trust agreement; (6) prosecute and defend any and all suits and other legal proceedings, and execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of any real or personal property; and (7) invest funds and assets of the company except the Commissioner must receive permission by the court to invest an amount exceeding $100,000; id. § 12389(c) (West 1988) (authorizing the Commissioner to examine the business and affairs of underwritten title companies).

7. See id. § 12340.4 (West 1988) (defining "title insurer" to mean any company issuing title policies as insurer, guarantor, or indemnitee).

8. Id. § 12376(a) (enacted by Chapter 700); see id. (providing that a title insurer is liable to the extent the underwritten title company is unable to meet its obligations); id. § 12376(b) (enacted by Chapter 700) (describing liabilities of each title insurer if six months prior to the bankruptcy, receivership, or
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Existing law governs the time and manner of disbursements of funds held in escrow accounts. Chapter 408 mandates that the underwriting agreement between the title insurance company and the underwritten title company include procedures designed to prevent misappropriation, disappearance, or wrongful use of funds.

conservatorship, the underwritten title company was authorized by an underwriting agreement to issue title policies for more than one insurer; id. § 12376(c) (enacted by Chapter 700) (requiring the title insurer to deposit its proportionate share directly into an account established solely for reimbursement to escrow accountholders within 90 days of written notification); id. § 12376(d) (enacted by Chapter 700) (providing that no one is relieved of liability under any other provision of law and that the title insurer is permitted to use every available remedy or bring any cause of action that would have been available to a person compensated by the title insurer); id. § 12376(e) (enacted by Chapter 700) (permitting a title insurer who has compensated an escrow accountholder for shortages to make claims for reimbursement); id. § 12377(a) (enacted by Chapter 700) (indicating that escrow funds received by an underwritten title company must not be considered as part of the estate of the company for purposes of liquidation, receivership, bankruptcy, or conservation); id. § 12377(b) (enacted by Chapter 700) (requiring the conservator, liquidator, receiver, or trustee to do everything reasonably possible to trace escrow funds to other depository accounts or assets); id. § 12377(c) (enacted by Chapter 700) (providing that any real or personal property traceable to shortages in the escrow accounts must not be considered part of the estate available to other claimants and that those assets must be used to reimburse title insurers that have reimbursed escrow depositors); see also SENATE FLOOR, COMMITTEE ANALYSIS OF SB 892, at 3 (Sept. 12, 1995) (discussing that SB 892 was amended to improve upon SB 193, Chapter 408, Statutes of 1995, and to provide that consumers would be reimbursed within 3 months instead of 18 months as provided by SB 193).

9. CAL. INS. CODE § 123413.1 (West Supp. 1995); see id. § 12413.1 (West Supp. 1995) (providing that except for cash deposits or electronic payments, deposits subject to next day availability pursuant to Part 229 of Title 12 of the Code of Federal Regulations must not be disbursed until the business day following the business day of deposit); id. § 12413.1(b) (West Supp. 1995) (providing that except for drafts, deposits not accorded next day availability must not be disbursed until the day on which these funds must be made available to depositors under federal regulation); id. § 12413.1(c) (West Supp. 1995) (requiring funds deposited by cash or by electronic payment to be disbursed following deposit on the same business day as the business day of the deposit); id. § 12413.1(d) (West Supp. 1995) (providing that deposits other than drafts may be disbursed on the business day following the business day of deposit if the bank informs the title insurance company, controlled escrow company, or underwritten title company by a written document or by an electronically transmitted document that final settlement has occurred on the deposited item); id. § 12413.1(e) (West Supp. 1995) (providing that where a draft, other than a share draft, has been received and submitted for collection, no title insurance company, controlled escrow company, or underwritten title company can disburse funds from an escrow account with respect to the draft until payment has been received); id. § 12413.1(f) (West Supp. 1995) (providing that no title insurance company, controlled escrow company, or underwritten title company will be liable for violation of California Insurance Code § 12413.1 if the violation was not intentional); see also 12 C.F.R. § 229.10 (1995) (setting forth policies regulating next-day availability of cash deposits, electronic payments, and certain check deposits into a bank account).

10. CAL. INS. CODE § 12389.6(a) (enacted by Chapter 408); see id. (requiring the underwriting agreement to contain one of the following written procedures: (1) the underwritten title company must possess a fidelity bond or insurance policy with a face amount that is ten times the underwritten title company's required minimum net worth to cover losses caused by misappropriation; (2) disbursements of escrow funds must be reviewed and approved by an employee of the title insurer; (3) account review processes and oversight and internal guidelines, in electronic or other medium, drafted by a title insurance industry advisory organization and approved by the Commissioner, or (4) written procedures approved by the commissioner that provide for the protection and control of escrow funds); see also id. § 12389.6(b) (enacted by Chapter 408) (obligating the Commissioner to approve or deny written procedures submitted to him or her for approval within 60 days of receipt); id. (providing that if the Commissioner takes no action within the 60-day period then the request is deemed approved).

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COMMENT

Recently, two underwritten title companies illegally appropriated clients' escrow funds and used them to pay for other company obligations, including payroll costs. Subsequently, the companies became insolvent and were placed into conservatorship by the Department of Insurance. Chapter 408 and Chapter 700 are designed to protect escrow accountholders from underwritten title companies which fraudulently deplete escrow funds.

By making the title insurers liable for shortages in escrow accounts of the underwritten title company, and by requiring the insurers to closely monitor the companies activities associated with the escrow accounts, Chapter 408 and Chapter 700 are intended to create a safety net for the consumers' money held in these accounts.

Julia A. Butcher
Insurance

Insurance; voluntary unemployment—charges to employers

Unemployment Insurance Code § 1032\(^1\) (amended).
AB 1821 (Battin); 1995 STAT. Ch. 383

Existing law establishes the unemployment fund\(^2\)—a fund used to provide benefits for individuals unemployed\(^3\) through no fault of their own.\(^4\) The amount of unemployment benefits that an individual is eligible to receive depends on wages\(^5\) paid to that person during his or her base year period.\(^6\) Additionally, existing law provides that any unemployment benefits paid to an unemployed

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1. California Unemployment Insurance Code § 1032 was originally amended by Chapter 172 (SB 1157). See 1995 Cal. Legis. Serv. ch. 172, sec. 1, at 530. Chapter 383 amended § 1032 in an identical manner. See 1995 Cal. Legis. Serv. ch. 383, sec. 1, at 1928. Any reference throughout this article to "SB 1157" or "Chapter 172" are equally pertinent to the analysis of this code amendment. See generally CAL. GOV'T CODE § 9605 (West 1992) (explaining that when two or more statutes are enacted during the same session of the Legislature which affect the same code provision, the statute enacted last with a higher chapter number prevails over statutes enacted earlier).

2. See CAL. UNEMP. INS. CODE § 1521 (West 1986) (stating that the fund consists of all employer contributions, interest earned on any money in the fund, any property or securities acquired with fund money, any earnings of such property and securities, all money credited to the fund, and all other money received from any source).

3. See id. § 1252(a)(1)-(4) (West 1986) (stating that individuals are unemployed in any week when they perform no services and receive no wages, when they work less than full-time and receive wages less than their weekly benefit amount, when they would be entitled to benefits under California Unemployment Insurance Code § 1253.5, or when they perform five days as a juror or a witness); see also id. § 1253.5 (West 1986) (establishing that an individual who becomes unable to work due to physical or mental illness or injury, for one or more days during a week, is to be paid benefits at a reduced rate); Bradshaw v. California Employment Stabilization Comm'n, 46 Cal. 2d 608, 611, 297 P.2d 970, 972 (1956) (stating that individuals who are deemed unemployed and who satisfy the requirements of the Unemployment Act are entitled to receive benefits from the unemployment fund reasonably sufficient to satisfy their needs until they can secure employment).

4. CAL. UNEMP. INS. CODE § 100 (West 1986); see id. (announcing that the Legislature's policy underlying unemployment insurance is that when the purchasing power of large numbers of the population of California is unstable due to unemployment, it is detrimental to the interests of all Californians; therefore, for the good and general welfare of the public, funds need to be set aside to be used for a system of unemployment insurance providing benefits to individuals unemployed through no fault of their own); Gillum v. Johnson, 7 Cal. 2d 744, 765-66, 63 P.2d 810, 811 (1936) (stating that the Legislature has the power to direct the State Treasurer to invest funds in interest bearing accounts); Perales v. Department of Human Resources Dev., 32 Cal. App. 3d 332, 336, 108 Cal. Rptr. 167, 170 (1973) (declaring that the basic purpose of unemployment insurance law is to insure diligent workers against the "vicissitudes of enforced unemployment not voluntarily created without good cause"); B. P. Schulberg Prods. v. California Employment Comm'n, 66 Cal. App. 2d 831, 834, 153 P.2d 404, 406 (1944) (holding that, through unemployment insurance, the Legislature intended to establish a fund, by imposing compulsory contributions from workers and employers, from which benefits could be paid to individuals unemployed through no fault of their own).

5. See CAL. UNEMP. INS. CODE § 926 (West 1986) (defining wages as all remuneration payable to an employee, including commissions, bonuses, and the cash value of all remunerations in other than cash).

6. Id. § 1275 (West 1986); see id. (defining the base period for benefit years beginning in November, December, or January, as the four calendar quarters ending in the next month of June; for benefit years beginning in February, March, or April, as the four calendar quarters ending in the next month of September; for benefit years beginning in May, June, or July, as the four calendar quarters ending in the next month of December; and for benefit years beginning in August, September, or October, as the four calendar quarters ending in the next month of March).
individual be charged against the reserve account of the individual’s former employer.\textsuperscript{7}

If, however, an individual worked for more than one employer during his base period, benefits are charged against each respective employer’s account in proportion to the wages paid to the individual by each employer.\textsuperscript{8} Moreover, existing law provides that employers are not to be charged, except as specified,\textsuperscript{9} for benefits paid to a claimant when the claimant leaves the employer’s service voluntarily or without good cause.\textsuperscript{10}

Under existing law, if a claimant for unemployment compensation leaves the employer’s employ voluntarily\textsuperscript{11} and without good cause,\textsuperscript{12} the benefits paid to

\begin{itemize}
    \item \textsuperscript{7} Id. § 1026(b) (West Supp. 1995); see id. § 675 (West 1986) (defining employer as any employing unit which has in employment one or more employees and pays wages of greater than $100 per quarter).
    \item \textsuperscript{8} Id. § 1026(b) (West Supp. 1995).
    \item \textsuperscript{9} See id. § 1026(e) (West Supp. 1995) (stating that employers’ accounts will be charged, in proportion to the amount each employer’s taxable wages bears to the total of all employers’ taxable wages, for any increase in negative reserve account balances, for benefit overpayments, for benefits not charged to individual employer accounts, and for any other expense charges not included in an individual employer’s account); see also id. § 1030(a)-(c) (West Supp. 1995) (requiring that the employer furnish specified information within a certain period of time in order to avoid charges).
    \item \textsuperscript{10} Id. § 1032 (amended by Chapter 383); see id. (providing that if it is determined that the claimant terminates the employment relationship voluntarily or without good cause, or was discharged, or was a student returning to school, or left to accompany a spouse where it would be impracticable to commute to work or be transferred, the employer’s account cannot be charged); see also id. § 1030(d) (West Supp. 1995) (providing that if the claimant voluntarily leaves work without notifying the employer of the reasons, the leaving is presumed to be without good cause); id. § 1030(e) (West Supp. 1995) (stating that an individual who is forced to retire under a collective bargaining agreement is not considered to have left voluntarily or without good cause); id. § 1256 (West Supp. 1995) (disqualifying an individual for unemployment compensation for voluntary termination without good cause or discharge for misconduct); Katherine Kempfer, Disqualifications for Voluntary Leaving and Misconduct, 55 YALE L.J. 147, 150 (1945) (stating that unemployment compensation is limited to involuntary unemployment because public opinion would not support the payment of benefits to voluntarily unemployed individuals).
    \item \textsuperscript{11} See Evenson v. Unemployment Ins. Appeals Bd., 62 Cal. App. 3d 1005, 1016, 133 Cal. Rptr. 488, 495 (1976) (construing the word “voluntary” in a nonliteral way in that an employee need not actually choose to be unemployed; but may also willfully act to cause or instigate the unemployment); id. (holding that because plaintiff chose not to pay union dues, he had voluntarily made himself unemployable for unemployment); see also Kentucky Unemp. Ins. Comm’n v. American Nat’l Bank and Trust Co., 367 S.W.2d 260, 262 (Ky. Ct. App. 1963) (holding that an employee who accepts a job which he knows in advance to be temporary does not voluntarily leave when the job ceases to exist, and that hiring a guard to work at a temporary location falls under this scenario).
    \item \textsuperscript{12} See MacGregor v. Unemployment Ins. Apps. Bd., 37 Cal. 3d 205, 209, 689 P.2d 453, 456, 207 Cal. Rptr. 823, 826 (1984) (defining “good cause” as a cause which would reasonably motivate an average able-bodied and qualified worker to give up the rewards of employment in order to join the ranks of the unemployed); Evenson, 62 Cal. App. 3d at 1016, 133 Cal. Rptr. at 495-96 (defining “good cause,” in the context of an unemployment compensation statute, as a cause that justifies an employee in voluntarily leaving his or her position the quitting must be for such a cause as would motivate the average able-bodied, qualified worker in a similar situation to give up his or her employment with its certain wage rewards in order to enter the ranks of the unemployed); California Portland Cement Co. v. California Unemp. Ins. Apps. Bd., 178 Cal. App. 2d 263, 272, 3 Cal. Rptr. 37, 43 (1960) (stating that the term “good cause” includes some personal reasons); see also Hildebrand v. Unemployment Ins. Apps. Bd., 19 Cal. 3d 765, 770, 566 P.2d 1297, 1299, 140 Cal. Rptr. 151, 153 (1977) (stating that the public policy denying unemployment benefits to individuals who voluntarily leave their employment without good cause promotes the valid state purposes of assuring that benefits are saved for individuals unemployed through no fault of their own and discouraging voluntary unemployment); Perales v. Department of Human Res. Dev., 32 Cal. App. 3d 332, 337, 108 Cal. Rptr. 167,
the claimant are not charged to the account of the employer. Furthermore, a claimant who left the employer’s employ has good cause for leaving if there was

171 (1973) holding that quitting a job in order to attend school does not render the individual eligible for unemployment benefits, the unemployment insurance system cannot be used to subsidize an employee’s education; Douglas Aircraft Co. v. California Unemp. Ins. Apps. Bd., 180 Cal. App. 2d 656, 641, 4 Cal. Rptr. 723, 726 (1960) (stating that an employer has the right to challenge unemployment compensation awards to ineligible individuals, and no charges can be made against the employer’s account unless the individual is eligible for unemployment compensation); cf. Mississippi Emp. Sec. Comm’n v. Medlin, 171 So. 2d 496, 499 (Miss. 1965) (holding that leaving employment to enter self-employment is not “good cause” since this would convert the unemployment compensation fund into an insurance fund, and a claimant who enters business for oneself and later fails cannot fall back on compensation benefits); id. (stating that in a free society any employee may quit work for any reason, but if in gambling with one’s job as an employee in the hope of becoming a businessperson and an employer himself one cannot expect to keep all the possible gains while the employers shoulder all to the losses); Pennington v. Catherwood, 306 N.Y.S.2d 744, 745 (1970) (holding that a sailor who voluntarily left his employment to secure a better job, left his employment without good cause); 1995 Okla. Sess. Laws, SB 478 (maintaining that “good cause” for unemployment compensation purposes does not include voluntarily leaving work by a temporary employee of a temporary help firm if the employee does not contact the firm for reassignment, provided that the employee was notified by the firm of the obligation to contact the firm and that unemployment benefits may be denied for failure to do so). See generally South Dakota Stockgrowers Ass’n, Inc. v. Holloway, 438 N.W.2d 561, 563 (S.D. 1989) (concluding that where an employer notifies its employee that his or her employment is being definitely terminated as of a given date, and the employee chooses not to work during the period between notification and the date of termination, the employee has voluntarily left the employment with good cause attributable to the employer) (citing Johnston v. Florida Dept. of Commerce, 340 So. 2d 1229 (Fla. App. 1976)).

13. CAL. UNEMP. INS. CODE § 1032 (amended by Chapter 383); see id. (providing that the benefits paid to the claimant subsequent to termination of employment are not to be charged to the account of the employer if it is ruled that (1) the claimant left the employer’s employ voluntarily and without good cause or was discharged for misconduct; (2) that he or she was a temporarily-employed student who left to return to school; (3) that he or she left to accompany his or her spouse at a place from which it is impractical to commute; or (4) if he or she was discharged or quit as the result of the irresistible use of intoxicants); id. (charging the benefits paid to a claimant who leaves with good cause to the employers’ account); id. (defining “spouse” to include a person to whom marriage is imminent); see also id. § 1026(a)-(c) (West Supp. 1995) (setting forth the following: (1) the director must maintain a separate reserve account for each employer, and must credit each account with all the contributions paid on his or her behalf; (2) unemployment compensation benefits paid during any benefit year must be charged against the reserve of his or her employer during his or her base period; and (3) the director must credit the interest earned by the Unemployment Fund to each positive reserve employer account in proportion to the amount the account bears to the total of all positive reserve accounts); id. § 1030(a) (West Supp. 1995) (requiring the employer to submit all facts pertaining to whether the claimant left the employer’s employ voluntarily and without good cause to enable the Employment Development Department to make a ruling on the issue); id. § 1030(d) (West Supp. 1995) (providing that if the claimant voluntarily leaves the employer’s employ without notification of the reasons therefor, such leaving will be presumed to be without good cause if the employer submits all facts pertaining to the claim within 10 days); id. § 1328 (West 1986) (requiring the department to consider the facts submitted by the employer and make a determination as to the claimant’s eligibility for benefits); Yellow Cab Co. v. Unemp. Ins. Appeals Bd., 194 Cal. App. 2d 343, 344, 15 Cal. Rptr. 425, 426 (1961) (maintaining that an employer can relieve its reserve account of unemployment benefit charges if it can prove that the claimant left the employer’s employ voluntarily and without good cause or was discharged for reason of misconduct in connection with work); Douglas Aircraft Co. v. Unemp. Ins. Appeals Bd., 180 Cal. App. 2d 636, 639, 648, 4 Cal. Rptr. 723, 725, 731 (1960) (holding that an employer has the right to challenge unemployment compensation awards to ineligible individuals, and no charges can be made against the employer’s reserve account unless the individual allowed benefits is eligible for unemployment benefits); cf. ARK. CODE ANN. § 11-10-513(a)(1) (Michie 1987) (mandating that an individual be disqualified from unemployment insurance benefits if he or she voluntarily and without good cause left his or her last work). See generally Steven A. Wise, Steering a Neutral Course—Applying the Unemployment Law’s Labor Dispute Disqualification in South Dakota, 38 S.D. L. REV. 296, 310 (1993) (discussing a case where workers went on strike but were found to not have voluntarily and with good cause left their employment; thus, the paid benefits were charged against the employer’s account).
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a definite assurance of employment in another, substantially better job.14

Chapter 383 extends existing law by providing that unemployment benefits paid to a claimant who terminates the employment relationship to take a substantially better job are not chargeable to the account of the employer.15

COMMENT

The purpose of Chapter 383 is to deal fairly with employers when it comes to charging them for unemployment benefits of past employees who voluntarily sever the employment relationship to take a better job.16 By fairly treating individual employers, Chapter 383 shifts the costs to all employers.17 Additionally, many businesses in California support Chapter 383 as it establishes a clear policy that denies claims against employers when employees voluntarily terminate their employment.18

However, opponents of Chapter 383 argue that the further socialization of

14. California Portland Cement Co. v. Unemp. Ins. Appeals Bd., 178 Cal. App. 2d 263, 274, 3 Cal. Rptr. 37, 44 (1960); see id. (holding that in determining the issue of good cause in cases involving leaving of work to accept other employment, consideration must be given to relative remuneration, permanency and working conditions of respective employments as well as inducements or assurances made to claimant by the prospective employer); Robert J. Samuelson, Full Employment: Dangers in Good Times, L.A. TIMES, Aug. 11, 1988, at B7 (reporting that the aging of the baby-boom generation promotes slightly lower unemployment because older workers change jobs less often than do teenagers or young adults); cf. ALA. CODE § 254-77(a)(3)(C) (Supp. 1994) (defining “suitable employment” as work of a substantially equal or higher skill level than the individual’s past adversely affected employment, and wages for such work at not less than 80 percent of the individual’s average weekly wage).

15. CAL. UNEMP. INS. CODE § 1032 (amended by Chapter 383); cf. CONN. GEN. STAT. ANN. § 31-225a(c) (West Supp. 1995) (instructing that an employer’s account is not to be charged if (1) wages paid to the claimant were less than $500; (2) a natural disaster causes unemployment; or (3) if the individual would be ineligible for Unemployment Compensation benefits because he or she left work voluntarily and without sufficient cause, left work to attend school, or retired); KY. REV. STAT. ANN. § 341.530(3) (Baldwin 1994) (clarifying that an employer’s reserve account is not to be charged if the employee was discharged for misconduct or voluntarily left work without good cause); PA. CONS. STAT. ANN. § 782(a)(1) (1991) (stating that an employer’s reserve account is not to be charged if the employee was discharged for misconduct or voluntarily left work without good cause).

16. ASSEMBLY FLOOR, ANALYSIS OF AB 1821, at 2 (June 1, 1995); see id. (stating that AB 1821 is meant to parallel existing law regarding unemployment benefits paid to individuals leaving a temporary job to return to school, or leaving a job to join a spouse); see also Letter from Julianne Broyles, Director Insurance and Employee Relations, California Chamber of Commerce, to Assemblymember Jim Battin (Apr. 11, 1995) (copy on file with the Pacific Law Journal) (noting that the California Chamber of Commerce members feel strongly that holding employers liable for a former employee’s unemployment benefits when the unemployment was instigated by the claimant is unfair to employers).

17. ASSEMBLY FLOOR, ANALYSIS OF AB 1821, at 3 (June 1, 1995); see id. (explaining that by relieving employers of benefit charges when an employee voluntarily leaves to take a better job AB 1821 is socializing costs); see also ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1821, at 1-2 (May 10, 1995) (noting that all participating employers would ultimately bear the increased costs).

18. See Letter from Anthony E. Harnack, President, Wellington Foods, Inc., to the California Chamber of Commerce (June 16, 1995) (copy on file with the Pacific Law Journal) (stating that the policy of allowing administrative law judges to render decisions regarding whether or not an employee’s voluntary termination was supported by good cause is arbitrary and needs to be replaced with a clear policy).
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unemployment benefits will result in higher costs to employers. Yet, since each employer's State Unemployment Insurance Account is charged when unemployment insurance benefits are paid to workers, and each employer then has to pay taxes on these charges, employers with stable work forces have fewer charges and lower tax rates.

Chapter 383 helps ease the tax burden on employers by relieving them of taxes on unemployment benefits charged to their accounts for which they are not responsible—such as cases where employees leave for better jobs. Still, these charges do not simply disappear, for they eventually are spread across all employer reserve accounts so every employer will end up paying more.

Timothy J. Moroney / Tyson Shower

19. Senate Committee on Industrial Relations, Committee Analysis of AB 1821, at 2 (July 12, 1995); see id. (explaining that the California Taxpayers' Association is opposed to AB 1821 because further socialization of unemployment benefits undermines the goal of an experience rating system, which is to encourage employers to make employment decisions to minimize unemployment costs and that socialized costs resulting from the good and bad experience of all employers will lead to increased costs and charges to employers).

20. See Senate Floor, Committee Analysis of SB 1157, at 1 (May 11, 1995) (stating that when unemployment insurance benefits are paid to a claimant, these benefits are charged against the employer's account upon which the employer has to pay taxes up to $7000 of wages for each worker); see also Interstate Brands v. Unemployment Ins. Appeals Bd., 26 Cal. 3d 770, 776, 608 P.2d 707, 710-11, 163 Cal. Rptr. 619, 623 (1980) (commenting that awarding benefits to a claimant that are chargeable to the reserve account of the claimant's employer has the effect of increasing the employer's rate of contributions to the fund that pays out the unemployment insurance benefits); George L. Perry, Times Board of Economists: Job Market Benefits From Growth, L.A. Times, May 15, 1988, at D2 (reporting on unemployment statistics as follows: (1) males ages 16-19 in 1963 had an unemployment rate of 17.3%, while in 1988 it was 16.6%; (2) males ages 20 and up had an unemployment rate of 4.5% in 1963, while in 1988 it was 5.0%; (3) likewise, females ages 20+ had unemployment rates of 5.4% in 1963, while in 1988 it was 5.0%; however (4) the total civilian unemployment rate in 1963 was the same in 1988 at 5.7%).

21. Senate Floor, Committee Analysis of SB 1157, at 2 (May 11, 1995); see id. (suggesting that SB 1157 makes the unemployment insurance system more fair to employers by relieving employers of charges to their accounts where employees quit for better jobs); see also Altaville Drug Store v. Employment Dev. Dep't, 44 Cal. 3d 231, 236, 746 P.2d 871, 874, 242 Cal. Rptr. 732, 735 (1988) (noting that it seems fundamentally unjust to employers to have their unemployment insurance taxes increased for reasons totally beyond their control); Michael A. Rosenhouse, Estoppel of State or Local Government in Tax Matters, 21 A.L.R. 4th 573, 695 (1983) (explaining that a taxpayer who has relied on an erroneous ruling that he or she was not liable for unemployment compensation insurance contributions is relieved of liability, under the principle of estoppel, for the interest on delayed contributions found to be due).

22. Senate Floor, Committee Analysis of SB 1157, at 2 (May 11, 1995); see id. (observing that the California Taxpayers Association opposes further socialization of unemployment benefits in that it undermines the system because the charges are just spread across all employer reserve accounts since they must be paid under California law); Kenneth M. Casebeer, Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology, 35 B.C.L. Rev. 259, 317 (1994) (arguing that unemployment compensation insurance is a dignified, morale-preserving method of supporting the unemployed; however, while it is far superior to relief, it is not a solution to the unemployment problem).
Insurance; workers’ compensation—policy regulations and rating organization

Insurance Code §§ 11664, 11751.35, 11753.2 (amended).
SB 1087 (Polanco); 1995 STAT. Ch. 375

Existing law requires an insurer of workers’ compensation insurance to give notice of nonrenewal of the insured’s policy in writing, subject to certain exceptions. Chapter 375 amends the California Insurance Code to include within these exceptions that notice of nonrenewal is not required if the insurer has made an offer to the employer to renew the policy at a rate increase of less than twenty-five percent.

Existing law provides that a rating organization is to be composed of four

2. See id. § 11750.1(c) (West Supp. 1995) (defining “insurance” to include workers’ compensation and employers’ liability insurance).
3. Id. § 11664(c) (amended by Chapter 375); see id. (providing that an insurer must give notice of nonrenewal at least 30 days, but not more than 120 days, before the policy expires, and must also state the rationale for the nonrenewal); Mutual Benefit Health & Accident Ass’n v. Lyon, 95 F.2d 528, 532-33 (8th Cir. 1938) (stating that the arbitrary nonrenewal of an insurance policy that provided for the acceptance of premiums as optional by the insurer was valid); Grimes v. Waters, 564 So. 2d 235, 236 (Fla. 1990) (holding that an insurance company providing workers’ compensation that erroneously stated to an employer that the policy was renewed was not estopped from denying coverage unless the employee could prove that detrimental reliance occurred); Aetna Ins. Co. v. Houck, 411 So. 2d 936, 938 (Fla. 1982) (holding an insurer of workers’ compensation liable to an employee who was injured, even though the accident occurred subsequent to the notified date set for termination, because of the parties’ previous course of dealings); Glover v. Employers’ Liab. Assurance Corp., 80 S.W.2d 1078, 1080 (Tex. 1935) (stating that a workers’ compensation policy may be canceled like any ordinary contractual relationship by those parties in privity to it, and thus the insurer was not liable to injured employee after cancellation of the insurance); see also 64 Cal. Jur. 3d Work Injury Compensation § 393 (1981) (stating that if a policy specifies that cancellation must be in writing, then there is no cancellation until notice of intent to cancel is given); cf. Mo. Ann. Stat. § 287.090(3) (Vernon Supp. 1995) (requiring that an insurance company that covers workers’ compensation file with the division a written notice of any cancellation or renewal to any employer).
5. See Cal. Ins. Code § 11750.1(b) (West Supp. 1995) (defining a “rating organization” as any organization which makes rates and plans for workers’ compensation insurance); Senate Committee on Industrial Relations, Committee Analysis of SB 1087, at 2 (May 10, 1995) (defining a “rating organization” as having the primary objective of collecting workers’ compensation losses and making premium rates); see also Cal. Ins. Code § 11751.4 (West 1988) (requiring every insurer to be a member of a rating organization); id. § 11750.3(a)-(f) (West Supp. 1995) (declaring that the purpose of the rating organization is to perform the following functions: (1) provide reliable statistics regarding workers’ compensation insurance, (2) collect information in order to develop premium rates, (3) formulate rules for administration of rating classifications, (4) inspect risks for classification purposes, (5) examine policies in order to insure they comply with existing law, and (6) initiate test audits to insure accuracy of insured employer’s payroll); Susan R. Denious, Review of Selected 1989 California Legislation, 21 Pac. L.J. 331, 572 (1989) (reporting that a rating
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public members, with two representing insurers and two representing labor. Chapter 375 provides that a public member can only be removed from a governing committee of a rating organization for cause.

Further, under existing law, if a change in a classification of a workers' compensation insurance policy is caused by an erroneous classification, the decreased premium will become effective on the date the classification is published. In addition, if a rating organization assigns the classification, the change becomes effective when the insurer and the insured are notified in writing that the error is under review.

Chapter 375 requires that if a change in a classification is caused by a change in operations of the employer, any premium change will become effective on the date of that change.

COMMENT

Chapter 375 was enacted to make technical amendments to legislation that was enacted last year requiring insurers to provide notification of policy nonrenewal. Chapter 375 also addresses the problem that has occurred when

organization must prepare a statistical analysis of any changes in workers' compensation costs from legislative enactments.

6. **CAL. INS. CODE** § 11751.35(a) (amended by Chapter 375).

7. *Id.*: cf. P.W. Stephens, Inc. v. State Compensation Ins. Fund, 21 Cal. App. 4th 1833, 1837, 27 Cal. Rptr. 2d 107, 109 (1994) (holding as valid a statute which shared the membership scheme of California Insurance Code § 11751.35 in that it appointed four members of the public, two representing organized labor and two representing insured employers, to a rating organization); cf. **TEX. REV. CIV. STAT. ANN.** art. 5.76-3 § 3(a) (West Supp. 1995) (providing that the board of directors of the workers' compensation insurance fund be composed of nine members that are citizens of the state).

8. **CAL. INS. CODE** § 11753.2(a), (b) (amended by Chapter 375); *see id.* § 11753.2(b) (amended by Chapter 375) (providing also that if the classification error results in increased premiums, the classification will become effective on the date of the erroneous classification provided certain conditions occur); *id.* (listing the conditions to include the following: (1) the revised classification assignment is published within three months of the effective date of the error, (2) the insurer was notified in writing within three months of the effective date that the error was under review, and (3) the designated rating organization notified the insurer within three months that the error was under review).

9. *Id.* § 11753.2(a) (amended by Chapter 375).

10. *Id.* § 11753.2(c) (amended by Chapter 375); *see id.* § 11753.2(d) (amended by Chapter 375) (requiring that any insurer who violates California Insurance Code § 11753.2 is subject to a fine of up to $5000 per violation).

11. **SENATE COMMITTEE ON INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF SB 1087**, at 2 (May 10, 1995); *see id.* (reporting that Chapter 375 is making technical changes to Chapter 398 that was enacted in 1994).

Selected 1995 Legislation
public members of a rating organization are arbitrarily dismissed from the governing board due to political reasons.\textsuperscript{12}

\textit{Gregory T. Flahive}

\textbf{Insurance; workers' compensation—reinsuring injury, disablement, or death portions of policies}

Insurance Code §§ 11690, 11715 (amended).
SB 680 (Peace); 1995 STAT. Ch. 148

Existing law requires that every insurer desiring admission for workers' compensation insurance, as a prerequisite to such admission, maintain on file in the office of the commissioner a bond to guarantee payment of future workers' compensation benefits to injured workers.\textsuperscript{1} Existing law also provides that in lieu

\textsuperscript{12} Id. at 3; \textit{see} Telephone Interview with Diana Rude, Legislative Consultant to Senator Polanco on SB 1087 (July 3, 1995) (notes on file with the \textit{Pacific Law Journal} (stating that SB 1087 was partly enacted in response to Commissioner Garamendi's removal of a public member from a rating organization due to a differing political viewpoint, and this created a problem because the persons who appointed these members could have removed and structured the rating organization to serve their own political purposes).

\textsuperscript{1} CAL. INS. CODE § 11690 (amended by Chapter 148); \textit{see} \textit{id.} (mandating that a bond be posted in favor of the commissioner as trustee for the beneficiaries of compensation awards against the insurer, or against any other insurer upon a policy reinsured by the insurer, as a prerequisite to selling workers' compensation insurance); \textit{id.} (stating that California Insurance Code § 11690 does not apply to the State Compensation Insurance Fund); \textit{see also id.} § 105(a),(b) (West 1993) (defining "surety insurance" to include the guaranteeing of behavior of persons and contracts, as well as insurance against loss due to forgery or alteration of any instrument); \textit{id.} § 11693.5 (West Supp. 1995) (charging a late filing fee of $295 for failing to file a timely workers' compensation bond and further charging an additional late filing fee of $354 for each and every month or fraction of a month thereafter that the workers' compensation insurer fails to post a bond and continues to transact the business of workers' compensation insurance); \textit{id.} § 11770 (West Supp. 1995) (stating that the State Compensation Insurance Fund is to be administered by the board of directors for the purpose of transacting workers' compensation insurance, and insurance against the expense of defending any suit for serious and willful misdeed, against an employer or his or her agent, and insurance to employees and other persons of the compensation fixed by the workers' compensation laws for employees and their dependents); CAL. PUB. UTIL. CODE § 4130(c) (West Supp. 1994) (requiring a certificate of workers' compensation insurance coverage or a surety bond issued by an insurance company to grant a permit to operate a public utility); Adams Fruit Co. v. Barrett, 494 U.S. 638, 650-51 (1990) (holding that liability bond requirements do not indicate a congressional intent to do away with liability under the AWPA (Migrant and Seasonal Agricultural Worker Protection Act) for bodily injuries where employers have obtained insurance coverage under state law); Durand v. Western Sur. Co., 514 N.W.2d 840, 842-43 (Neb. 1994) (holding that plaintiff's injury claim arising out of his employment is not covered by employer's bond because the bond is not liability insurance for an employee who suffers an injury due to a dealer's lack of adequate tools); St. Paul Fire and Marine Ins. Co. v. Industrial Comm'n, 506 N.E.2d 202, 203 (Ohio 1987) (holding the surety liable for all obligations arising out of injuries or deaths which occurred during the period of time covered by the surety bond); 2 B.E. \textit{Witkin, Summary of California Law, Workers' Compensation} § 185 (9th ed. 1987 & Supp. 1995) (maintaining that compensation may be awarded for an injury arising out of and in the course of employment); \textit{id.} (stating that "in the course of employment" means roughly that the engagement in the work the employee has been hired to perform); \textit{id.} (stating further that "arising out of" the employment is the causal element and refers to the origin of the accident); \textit{cf.} ARK. CODE ANN § 11-9-712 (Michie 1987) (allowing any beneficiary of a final compensation
of placing a bond on file, an insurer may instead deposit security deposits such as letters of credit, interest bearing securities, investment certificates and certain stock.2

Chapter 148 extends the requirement to post a bond or security deposit to insurers who desire to reinsure injuries, disability or death portions of workers' compensation policies under the class of disability insurance.3

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order or award to record the order as a judgment and lien against an employer who fails to comply); GA. CODE ANN. § 34-9-129 (Michie 1992) (maintaining that every insurance company issuing workers' compensation insurance must furnish a bond payable to the state in the sum of $50,000). But see CAL. INS. CODE § 11720 (West 1988) (stating that bonds to protect beneficiaries of workers' compensation insurance are not applicable to insurance covering household domestic workers).

2. CAL. INS. CODE § 11715(a) (amended by Chapter 148); see id. (stating that any worker's compensation insurer, or re-insurer of the injury, disablement, or death portions of worker's compensation policies under the class of disability insurance, may, in lieu of a bond required by § 11690 of the California Insurance Code, deposit cash instruments, approved letters of credit, or approved interest-bearing securities or approved stocks readily convertible into cash, investment certificates or share accounts issued by a savings and loan association doing business in this state and insured by the Federal Deposit Insurance Corporation, certificates of deposit or savings deposits in a bank licensed to do business in this state, or approved securities registered with a qualified depository located in a reciprocal state as defined in California Insurance Code § 1104.9); id. (requiring that the deposit be made from time to time as demanded by the commissioner and, may be made with the Treasurer, or a bank or savings and loan association authorized to engage in the trust business); see also CAL. FIN. CODE § 106 (West 1989) (defining "trust business" as the business of acting as executor, administrator, guardian or conservator of estates, assignee, receiver, depository or trustee upon the appointment of any court, or by authority of any law of this or any other state of the United States, or as trustee for any purpose permitted by law); id. § 5102(a) (West 1989) (defining "association" or "savings association" as a mutual or stock savings association, savings and loan association or savings bank); CAL. INS. CODE § 1064.1(f) (West 1993) (defining "reciprocal state" as any state other than this state in which, in substance and effect, the provisions of this act are in force); id. § 1104.9(a)(2) (West Supp. 1995) (defining "qualified depository" as an entity that is located in this state or a reciprocal state and is one of the following: (1) depository that provides for the long-term immobilization of securities or a clearing corporation that is also a depository, and that in either case has been approved by or registered with the Securities and Exchange Commission; (2) a Federal Reserve Bank, or (3) an entity approved by the commissioner as a qualified depository); id. § 11715(b) (amended by Chapter 148) (maintaining that an insurer that uses a security deposit must also execute a power of attorney in favor of the commissioner and that the power of attorney cannot be revoked or withdrawn without the consent of the commissioner); id. (mandating that any worker's compensation insurer that submits securities, stock, investment certificates, or share deposits registered in a depository's name, shall execute a trust agreement that grants the commissioner the authority to withdraw the deposit); id. § 11715(c) (amended by Chapter 148) (stating that the commissioner shall require payment of $177 for each letter of credit and an annual fee of $118 in advance on account of such letter until its expiration or revocation); id. § 11715(d) (amended by Chapter 148) (setting forth that the commissioner must require payment of $118 in advance as a fee for the initial filing of a trust agreement with a bank, savings and loan association, or trust company on deposits made pursuant to California Insurance Code § 11715(a)); id. (stating further that an additional fee of $118 must be made for each amendment, supplement, or other change to the deposit agreement, and that the commissioner shall require payment of $58 dollars in advance for receiving and processing deposit schedules and an additional fee of $29 shall be payable for each withdrawal, substitution, or any other change in the deposit). See generally American Ins. Co. v. Ohio Bureau of Workers' Comp., 616 N.E.2d 979, 982 (Ohio 1992) (holding that the proceeds of a letter of credit have to be applied first to any future payments arising from workers' compensation claims incurred during the primary year covered).

3. CAL. INS. CODE § 11690 (amended by Chapter 148); id. § 11715(a) (amended by Chapter 148).
Insurance

COMMENT

Chapter 148 is part of a continuing effort to rearrange the troubled workers' compensation insurance system which is expensive for employers and gives workers relatively poor benefits.4

Chapter 148 permits disability insurers to reinsure the part of workers' compensation insurance that is within the scope of their disability insurance, such as death or disablement.5 Chapter 148 also enables insurers who purchase reinsurance to receive credit for the reinsurance against their bond or security deposit.6

Most importantly, Chapter 148 will help protect insurers against insolvency and ensure that workers receive workers' compensation benefits in the event that

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4. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS of SB 680, at 1 (June 28, 1995) (stating that the intent of SB 680 is to correct an inconsistency within the Insurance Code regarding reinsurance of workers' compensation insurance for disability insurers since state law allows for disability insurers to provide reinsurance to workers' compensation insurers, even though disability insurers are not licensed to sell workers' compensation insurance or reinsurance in California); Dana Wilkie, Battle Over Workers' Comp Gets a Bit Vulgar, SAN DIEGO UNION-TRIB., Aug. 30, 1992, at A16 (reporting on Senator Peace's efforts to reform insurance programs and how Senator Peace and other lawmakers believed Governor Wilson was blocking worker's compensation reform); see also James Rainy & Marc Lacey, 6 City Employees Suspected in Workers' Comp Fraud, L.A. TIMES, June 7, 1994, at A1 (reporting on an incident where six employees who help review workers' compensation claims for the city of Los Angeles may have cheated taxpayers out of $1 million or more by creating fake worker injury claims); Stuart Silverstein, Man Gets $1-Million Workers' Comp Award, L.A. TIMES, May 11, 1994, at D2 (reporting that the state's workers' compensation system is troubled due to fraud by insurance claimants and their doctors and lawyers, and also because insurers drag their feet for years in handling claims, driving many disabled people into poverty or bullying them into unfair settlements); Dan Weikel & Stuart Silverstein, State Warns Five Workers' Comp Judges on Conduct, L.A. TIMES, Apr. 14, 1994, at D1 (reporting on an investigation into the workers' compensation courts where five judges may have violated state law and breached the state code of judicial conduct by receiving bribes or improper compensation in the form of gifts, money and speaking fees from insurance company representatives, attorneys, or doctors involved with cases pending before some of the judges).

5. CAL. INS. CODE § 11690 (amended by Chapter 148); id. § 11715 (amended by Chapter 148); see SENATE FLOOR, COMMITTEE ANALYSIS of SB 680, at 1 (May 11, 1995) (stating that proponents of Chapter 148 argue that it permits disability insurers to reinsure portions of workers' compensation insurance that fall within their policies).

6. SENATE FLOOR, COMMITTEE ANALYSIS of SB 680, at 2 (May 11, 1995); see CAL. INS. CODE § 11690 (amended by Chapter 148) (requiring a bond to be posted for anyone seeking to insure workers' compensation); id. § 11715 (amended by Chapter 148) (extending the bond requirement to include the use of security deposits).
Insurance

their workers' compensation insurance will not cover their injuries or in the event of a disaster causing injury to a large number of workers.7

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7. SENATE FLOOR, COMMITTEE ANALYSIS of SB 680, at 2 (May 11, 1995); see Jessica Baldwin, Four Years Later, Safety First in North Sea, L.A. TIMES, Dec. 27, 1992, at A33 (reporting on the world's worst offshore platform disaster that killed 167 North Sea oil workers); Eric Malnic and George Ramos, I Dies, 38 Hurt in Chemical Accident, L.A. TIMES, July 24, 1991, at B1 (reporting on a chemical disaster at a paper recycling factory where one man was killed and at least 38 others injured when a cloud of toxic hydrogen sulfide gas enveloped a storage area).