

# THE STORM IS JUST BEGINNING WHEN THE HURRICANE FINALLY ENDS: APPLICABILITY OF MEDIATION TO SETTLEMENT OF INSURANCE CLAIMS IN MASS DISASTERS

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## I. INTRODUCTION

As of December 25, 2008, more than 730,000 insurance claims had been filed for damages sustained from Hurricane Ike.<sup>1</sup> The magnitude of this latent problem may be seen comparing this statistic with the 95,000 claims filed in Texas following Hurricane Rita some three years earlier.<sup>2</sup> While the majority of these claims will be handled quite routinely, more than 1,200 complaints had already been filed with the Texas Department of Insurance.<sup>3</sup> In response, or perhaps in anticipation, billboards have sprung up all over the Texas Gulf Coast offering the services of attorneys who are supposedly skilled at obtaining the maximum amount of money for unsatisfied insureds. But at what cost – in time, in delays, and in sheer frustration? And is mediation or some other form of alternative dispute resolution a viable mechanism to handle these inevitable complaints? Texas is currently examining implementation of such a program, modeled perhaps on the experience of other states that have made some use of ADR in

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<sup>1</sup> TEXAS DEPT. OF INS., BIENNIAL REPORT TO THE 81ST TEXAS LEGISLATURE (Dec. 2008), at 35, available at <http://www.tdi.state.tx.us/reports/report10.html>.

<sup>2</sup> Purva Patel, *State Looks at Mediation on Ike Claims*, HOUSTON CHRON., Dec. 25, 2008, at C1. Hurricanes Katrina, Rita and Ike dwarf prior disasters. For example, in 1992 Hurricane Iniki, a Pacific hurricane, was ranked the third costliest disaster in U.S. history and was expected to generate 50,000 insurance claims. In the same year, Hurricane Andrew, which spawned the American Arbitration Association's mass disaster mediation process, generated some 25,000 claims. Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative ADR, or a Lion's Den?*, 7 PEPP. DISP. RESOL. L.J. 401, 404-05 (2007).

<sup>3</sup> Patel, *supra* note 2.

similar situations.<sup>4</sup> Should such a plan be implemented, and what should be its parameters?

## II. OTHER STATES' PROGRAMS AND EXPERIENCE

### A. *Previously Implemented Programs*

Beginning in the aftermath of Hurricane Andrew in Florida in 1992, at least six other states have implemented programs to mediate claims resulting from mass disasters -- Alabama, California, Florida, Louisiana, Mississippi, and North Carolina have all implemented these plans.<sup>5</sup> Although most of these have been directed at damages resulting from hurricanes, California's emanated from claims in the 1994 Northridge earthquake.<sup>6</sup>

These programs have generally been helpful in expediting settlement of disputes. After four named storms struck Florida in 2004 at speeds ranging from 105 mph to 150 mph, 12,160 mediation requests were received. Of these, as of December 2005, roughly one-half had been settled prior to mediation and a 92-93% settlement rate was achieved on the remainder.<sup>7</sup> Mississippi achieved an 82% settlement rate on the roughly 5000 Katrina claims that had completed mediation as of August 2008.<sup>8</sup> And as of November 2007, the Louisiana program had settled approximately 75% of the more than 12,000 mediation requests received in that state.<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> TEXAS DEPT. OF INS., *supra* note 1. Florida's plan was implemented first, and was extensively revised in 2004, with administrative responsibilities relocated from the American Arbitration Association to the Collins Center, a public interest organization. FLA. DEP'T OF FIN. SERV., ADVISORY COMM. ON STANDARD PERSONAL LINES, HURRICANE MEDIATION OVERVIEW (Oct. 4, 2005), *available at* <http://www.myfloridacfo.com/pressoffice/documents/retrievedocument.asp?documentid=%7B7bc0fb78-89c7-4dca-b408-7b98e1a70131%7D>.

<sup>6</sup> Murrill, *supra* note 2, at 404-05.

<sup>7</sup> HURRICANE MEDIATION OVERVIEW, *supra* note 5; Nell Floyd, *Consumers Winning in Mediation*, JACKSON CLARION-LEDGER, Feb. 22, 2006, at C1.

<sup>8</sup> Anita Lee, *Stronger, Safer Construction is Insurance Key*, BILOXI SUN HERALD, August 27, 2008, at A1.

<sup>9</sup> Maria R. Volpe, *Taking Stock: ADR Responses in Post-Disaster Situations*, 9 CARDOZO J. CONFLICT RESOL. 381, 388 (Spring 2008).

**B. Program Outlines**

The quality of information readily available to the public varies, ranging from an excellent guide to the California Program on the web site of the California Department of Insurance<sup>10</sup>, to an arcane series of links on the web site of the Louisiana Department of Insurance.<sup>11</sup> Some part of this may be attributable to the lack of current activity in some states, where the programs are now inactive. As a result, much of the material that follows is taken from a single source that provides an excellent summary of the various state programs.<sup>12</sup>

- In all programs, only residential claims are subject to mediation;
- Programs are optional on the part of the insured, while they are required of the insurer;
- Most programs specify minimum amounts that must be in dispute, ranging from \$500 in most programs to as much as \$2,000 in California;
- The insurer must make the insured aware of the mediation alternative very soon after it becomes aware that a dispute exists; Mississippi requires the notice to be sent within ten days, while most programs require a five-day period;
- All programs require the insurer to bear the cost of the mediation;
- Many programs discourage, but do not forbid, involvement of an attorney representing the insured;
- At least the Louisiana program provides for a minimum starting point in the negotiations – an acknowledged database of construction and remodeling costs.
- All programs provide for strict confidentiality.

A number of other administrative requirements are in place, such as responsibility for selection of the mediator, periods of time for rescission, and the degree to which guidelines for conduct of the mediation are specified.

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<sup>10</sup> EARTHQUAKE CLAIMS MEDIATION PROGRAM, *available at* <http://www.insurance.ca.gov/0100-consumers/0060-information-guides/0040-residential/earthquake-claims-mediation.cfm>.

<sup>11</sup> See [http://www.lidi.la.gov/Whats\\_New/HurricaneGustav/HurricaneGustav.htm](http://www.lidi.la.gov/Whats_New/HurricaneGustav/HurricaneGustav.htm).

<sup>12</sup> Melissa Blair et al., *State Legislative Update*, 2006 J. DISP. RESOL. 555, 567-71 (2006).

### III. THE PROPOSED TEXAS PLAN

#### A. General Program Parameters<sup>13</sup>

The general parameters of the program currently being considered include:

- Residential claims only;
- Minimum claim of \$1,000 and a minimum difference in position of the parties of at least \$500, although both parties may agree on a lower threshold;
- Participation is voluntary on the part of both the insurer and the insured;
- Costs, as yet undetermined, are to be borne by the insurer;
- If the insured is not represented by counsel at the mediation conference, the insurer may not be represented;
- The insurer has 21 days after a request for mediation by the insured to attempt to resolve the case;
- Good faith negotiations are required of both parties;
- Penalties are provided on both sides for failure to appear; sending a representative without authority to settle is deemed a failure to appear by the insurer;
- A three-day rescission period is provided unless the insured is represented by counsel and a settlement is signed by all parties at the time of the mediation.

#### C. *Current Status*<sup>14</sup>

While a number of dates are referenced in the latest discussion draft of the program, the actual roll-out date appears to be June or July, 2009, although a pilot program may begin as early as March. It is clear that there are a number of issues to be resolved in implementing such a program, including “buy-in” from the insurers, who have little incentive to rush to mediation or to agree quickly to a mediation plan. Indeed, time favors the industry in several ways. Pressure is on the insured party to resolve the claim, because in many instances they will depend on those funds to repair not just their property, but also their lives.<sup>15</sup> And delay in payments allows the

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<sup>13</sup> The description of the Texas plan is taken from TEXAS DEPT. OF INS., HURRICANE IKE MEDIATION PROPOSAL DISCUSSION DRAFT (Jan. 12, 2009), distributed by the Department preparatory to a meeting of the Texas State Disaster Coalition on Jan. 15, 2009, available in the author’s files.

<sup>14</sup> *Id.*

<sup>15</sup> See Murrill *supra* note 2, at 409 (discussing the financial incentives accruing to insurers as a result of delay in claims payments).

insurer to retain its funds, reducing the cost of any ultimate payment in terms of its present value.

#### **IV. ADVANTAGES AND DISADVANTAGES OF MEDIATION IN MASS DISASTERS**

The various advantages and disadvantages of mediated settlements are well known and widely published, but it is helpful to review them and to keep in mind their particular meaning in the context of a mass casualty as opposed to a normal commercial setting.

##### ***A. Advantages***

The major advantage to the insured is the speed of settlement, since a mediation can be conducted in a matter of days or weeks as opposed to the much longer time to prosecute a lawsuit. This is particularly important given the time pressures to get on with one's life after a disaster such as a hurricane or earthquake. Overall costs are lower to both parties, avoiding the expense of a lawyer and the related hourly or contingent fees. In the context of a property claim, this can be particularly important to the insured, who will need every dollar of the settlement to effectuate repairs to his property. And the insured may gain a feeling of empowerment and satisfaction at being heard, coming at a critical emotional juncture.

The insurer likewise benefits from a lower overall cost, although this may be illusory, since most of the insurer's counsel for matters such as these are on staff and will be paid regardless of the insurer's case load. Moreover, since claims will have to be paid more quickly, the insurer may lose the benefit of having pressure on the insured to settle, as well as the time value of money.

The insurer will also benefit from there being no adverse precedential trials that may negatively impact future claims, since all the proceedings are confidential.

### ***B. Disadvantages***

On the other hand, there are a number of disadvantages to the process. Probably the most glaring detriment to the insured is the significant disparity in power between the insured and the insurer. This disparity emanates from a variety of sources including availability of resources, access to and availability of counsel, social training and familiarity with the process and goals of a mediation procedure, educational differences, and cultural upbringing.

Certainly, not all of these factors are present in every case, but it is not difficult to imagine that enough of them will exist in many cases to create a situation that is ripe with opportunity for oppression on the part of the negotiator for the insurer. A mass disaster, by its very nature, does not discriminate by neighborhood or socioeconomic background, and yet those whose residences are in better neighborhoods are probably better equipped to deal with the claims process. The population who would need the services of a state-sponsored mediation program is almost self-selecting to be most susceptible to the type of oppression being described.

### ***C. Safeguards***

It is possible to address many of these issues, and several of the states do so. For example, Louisiana levels the field on the issue of knowledge by requiring that mediation begin with an offer based on an accepted data base of construction costs.<sup>16</sup> Some states require participants to watch a film explaining and demonstrating the mediation process prior to their

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<sup>16</sup> See Michael A. Patterson, *Evaluating the Louisiana Department of Insurance's Hurricane Katrina Homeowners Mediation Program*, 62-OCT. DISP. RESOL. J. 34, 36 (Aug.-Oct. 2007) (describing use of software such as Simsol and Xactware to provide guidance as to the cost of damages in the mediation process).

actual scheduled appointment.<sup>17</sup> Other states have lawyers available to explain the process, although they are not allowed to advocate for the insured.<sup>18</sup>

But what is not possible to address is the severe disparity in the impact of time on the process. The insured needs the funds from the claim to get his life and property back in shape; the insurer benefits from the passage of time both in terms of the pressure it places on the insured to settle for a lower number, as well as the reduction in the present value today of a settlement paid some time in the future.<sup>19</sup>

Despite these criticisms, participants in these mediations appear generally to be satisfied with the outcomes and the process.<sup>20</sup> Further research should be conducted, however, as to whether “satisfaction” ratings, which are developed almost as exit questionnaires, accurately represent true success, or whether the stress of negotiation, which results in lower demands and faster resolution, may create the appearance of successful resolution, while actually resulting in inferior outcomes.

## **V. THE TEXAS PLAN – SUGGESTIONS FOR IMPROVEMENTS**

Texas has the opportunity to create a state of the art mass disaster mediation program, but the present plan as outlined is at best incomplete. And coming as late as it does, the plan will not be as useful as if it had been in effect at the time Hurricane Ike hit the Texas Gulf Coast.

Specific suggestions for improvements are, briefly:

- Maintain the program in an active state even after completion of the mediations related to Hurricane Ike so as to avoid the need to reenergize and remobilize;

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<sup>17</sup> See HURRICANE IKE MEDIATION PROPOSAL DISCUSSION DRAFT *supra* note 13, at 5 (referencing a video prepared in connection with the Florida program).

<sup>18</sup> Blair, *supra* note 12, at 570.

<sup>19</sup> *Id.*

<sup>20</sup> See Patterson, *supra* note 16, at 38-39; *How Satisfied are Katrina Claimants?*, CLAIMS MAGAZINE, Oct. 2006, at 6 (asserting that implication of poor handling of claimants is contradicted by polls of participants in Mississippi and Louisiana).

- Administer the program through AAA or a local non-profit organization such as United Fund (who may also have space available for conducting mediations), using the Collins Center Model in Florida;<sup>21</sup>
- Establish clinical programs at area law schools to provide counsel to insureds in the mediation process. These clinics could also perform valuable research during “quiet” periods where demand for mediation is low;<sup>22</sup>
- Following the Louisiana model, require starting offers from the insurers to be based on accepted construction cost databases;<sup>23</sup>
- Establish an advisory panel of construction industry experts whose expertise could be called upon to advise on otherwise deadlocked mediations;
- Prepare a video showing a mock mediation and otherwise clarifying the process so as to reduce anxiety and manage expectations of the insured participant;<sup>24</sup>
- Train mediators to recognize signs of stress and trauma-impaired judgment;<sup>25</sup>
- Publicize the availability of the program without waiting for rejection by the insured of a proposed settlement; insurers should also be required to provide prominent notice at the time of filing the claim and again when a settlement figure is proposed;<sup>26</sup>
- Make participation mandatory on the part of the insurer if the insured requests mediation;<sup>27</sup>
- Consider a provision to extend the time provided for the actual mediation at the discretion of the mediator if a settlement appears close at hand;<sup>28</sup>
- Provide for a follow up satisfaction survey at, say, three and six months following a claim settled through mediation in order evaluate the true level of success of the program.

## VI. CLOSING THOUGHTS

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<sup>21</sup> See ADVISORY COMM. ON STANDARD PERSONAL LINES, HURRICANE MEDIATION OVERVIEW *supra* note 5 and related text (enumerating establishment of programs in other states).

<sup>22</sup> See Murrill, *supra* note 2, at 423 (suggesting research and training opportunities that would accrue to law schools who participate in such processes).

<sup>23</sup> See Patterson *supra* note 16 (listing software packages that provide guidelines as to costs of damage repairs).

<sup>24</sup> See HURRICANE IKE MEDIATION PROPOSAL DISCUSSION DRAFT *supra* note 13, at 5 (indicating the usefulness of watching a descriptive video tape as a preparatory step in the mediation process).

<sup>25</sup> See Murrill, *supra* note 2, at 418-22 (discussing impact of impaired decision making on the negotiation process and the need for mediator recognition of the syndrome).

<sup>26</sup> Currently, Texas proposes to provide notification when a proposed settlement is rejected by the insured, and to publicize the program at outreach events, disaster recovery centers and on the agency website. A more proactive program would more readily apprise insureds of the alternative resolution mechanism that exists, letting them know that there is an alternative to mere acceptance or rejection of a proposed settlement. See HURRICANE IKE MEDIATION PROPOSAL DISCUSSION DRAFT *supra* note 13, at 3 (enumerating suggested methods of creating awareness of the state’s mediation program).

<sup>27</sup> Currently participation is optional for both parties. *Id.* at 2.

<sup>28</sup> Most programs have strict time limits. Texas, too, is proposing such a limit, although the length of time is still not fixed. *Id.* at 4.

The most significant criticism of all these programs is that, for them to be truly helpful, they should be set up in advance, enabled by any required legislation and regulations, and not allowed to be dismantled when the rush from the storm du jour has passed. Mississippi has kept its Katrina/Rita program going, but there is no assurance that it will continue to be in place when the next storm hits. Florida, through its relationship with the Collins Center, has maintained its program and continues to search for improvements in the process. Louisiana, on the other hand, shut down its program near the end of 2008, Texas is in the throes of what appears to be a nine-month process merely to enable its program, and no eastern seaboard state, with the exception of Florida and North Carolina, has such a program. The delays involved in implementing a new program or ramping up an old one, are virtually intolerable in the context of the need for immediate resolution of insurance claims at the time of a mass disaster.

If the full benefits of mediation are to be realized in times of mass disaster, programs must be set up in advance, plans for staffing must be in place, and constant improvements must be sought to make and maintain a level playing field on which the parties can negotiate.

## APPENDIX A

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