

ORD
234550

IN THE DISTRICT COURT
OF BRAZORIA COUNTY, TEXAS
412TH JUDICIAL DISTRICT

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FILED
at _____ o'clock _____ M

AUG 12 2009

JERRY DEERE
Clark of District Court Brazoria Co. Texas
DEPUTY

**STANDING PRETRIAL ORDER CONCERNING
RESIDENTIAL HURRICANE IKE CASES**

All residential Hurricane Ike cases filed in the 149th District Court and the 239th District Court of Brazoria County, Texas have been transferred to the 412th District Court. After consideration of pretrial issues and discussion with counsel representing claimants and counsel representing residential insurance carriers, the Court finds that pretrial matters should be expedited for the efficient handling of such claims.

IT IS ACCORDINGLY ORDERED AS FOLLOWS:

- A. This Order shall be effective and apply to all lawsuits pending or hereafter filed in the 149th, the 239th or the 412th District Courts of Brazoria County, Texas in which any policy holder (the "Plaintiff") asserts a claim arising from damage to residential property caused by Hurricane Ike, against an insurance carrier who issues insurance policies for residential property (the "Carrier").
- B. Pleadings may, but are not required to be filed electronically. Any Plaintiff who is aware of this Order shall attach a copy of this Order to their Original Petition in all cases filed after the date of this Order. Plaintiff is also responsible for notifying all parties in existing and future cases of this Order. A copy of this Order will be posted on the Brazoria County website at www.brazoria-county.com.
- C. Within one hundred (100) days after the Carrier makes an appearance in the lawsuit, or the date of this Order, whichever is later, all parties are ordered to agree on a mediator from the list of mediators approved by the Court and a mediation date. However, the mediation can be set to occur outside of this time period. Once the parties have agreed on a mediator and mediation date, they shall notify the 412th Court coordinator, Linda Kellogg, of the date of the mediation and the name, address and telephone number of the mediator and the location. All mediations shall be subject to, and conducted in accordance with the Court's procedures concerning mediations, a copy of which are attached to this Order. All mediations shall take place in Brazoria County, Texas, unless otherwise ordered by the Court, and the parties shall select a mediator whose office is within thirty-five (35) miles of either (a) the location of the damaged residential dwelling or (b) the residence of the owner of the damaged residential dwelling.
- D. Immediately upon the filing of the Carrier's Original Answer, the case will be abated until (a) thirty (30) days after the date of the letter from the mediator declaring an impasse or (b) notice by any party that the party desires to unilaterally end the abatement period applicable to a particular case thirty (30) days from the date the notice is received by the opposing party. The abatement period will apply to all court ordered deadlines or Rule 190 discovery deadlines. The abatement period will not apply to any statutory deadline, interest or penalties

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that may apply under any statutory code or law. The parties may send written discovery during the abatement time period; however, the responses and objections to those discovery requests will not be due until thirty (30) days after the earlier of an impasse letter from the mediator or a party's termination of the abatement period. It is the intent of this Order that if a party elects to participate in mediation or any other provisions of this Order, or elects to opt out, such actions alone will not affect any parties' statutory or contractual rights.

- E. Within sixty (60) days of the filing of the Carrier's Original Answer or the date of this Order, whichever is later, the parties will use their best efforts to exchange information and documentation pertaining to the residence, to the extent it exists, including the following: expert reports, engineering reports, estimates of damage or repairs, contents lists for contents' damages claims, photographs, repair receipts or invoices, flood claim payments received by Plaintiff(s), including the estimate the flood payment was made on, the non-privileged portions of the Carrier's and adjusting company's claims file (including all claim diary notes, activity logs, loss notes and email correspondence regarding the insurance claim), payment ledger, payment log and/or proof of payment from the Carrier, a copy of the insurance policy in effect at the time of the Hurricane Ike claim, and the non-privileged portions of the underwriting file. If the Carrier is not in possession of the adjusting company's/adjuster's claims file, and the adjusting company/adjuster is not named as a party in the lawsuit represented by separate counsel, then the insurance carrier shall seek the adjusting company's claims file and use its best efforts to exchange this information within the sixty (60) day time period. The Carrier is also ordered to notify the independent adjusting company that all emails, activity notes and loss diary notes pertaining to a hurricane claim in litigation shall be preserved and not destroyed pursuant to this Order. A privilege log will be produced in accordance with the Texas Rules of Civil Procedure for any redactions or privileges being asserted on any documents in the claims file or claim correspondence.
- F. Any expert reports, engineering reports, contractor estimates or any other estimates of damages or repairs obtained by directive of counsel for settlement, demand, or mediation purposes and exchanged prior to mediation, shall be for "mediation purposes only," and shall be considered confidential, except that any estimates and/or reports that are part of the claims file, which were obtained or prepared during the claims handling, shall not be considered confidential under this paragraph. Otherwise, such reports and estimates exchanged for mediation purposes shall only be used at trial if Plaintiff or Defendant designates the consultant as a retained testifying expert and does not properly de-designate prior to trial. If a consultant, whose report is produced at mediation, produces a subsequent report for use at trial, the mediation report shall remain confidential unless agreed to otherwise. The reports and estimates are only confidential for the lawsuit in which they are being used. Expert reports designated for mediation purposes shall be returned to the providing party within fourteen (14) days of a written request by the providing party for their return after mediation. Such reports shall not be discoverable or admissible at trial or any hearing. If the party procuring the report designates the expert to testify, such party shall have the right to prevent discovery or testimony by the expert regarding the mediation report and any discovery or testimony by the expert regarding the mediation report and any opinions therein. The procuring party may use data such as measurements and photographs without waiving this privilege. Nothing in this paragraph shall prohibit the use of those reports and estimates in any subsequent insurance claims or lawsuits involving the same carrier.

- G. Once a mediation date and mediator are agreed to by all parties, the Defendants shall be permitted one inspection of the residence involved in the lawsuit (as soon as practicable) prior to mediation. If the mediation is unsuccessful, the Carrier and other Defendants may re-inspect the residence with the same, new or additional experts pursuant to the Texas Rules of Civil Procedure.
- H. The mediator shall notify the court within forty-eight (48) hours once the case settles or an impasse has been declared by the mediator. This notice shall be in writing and sent to all parties and the court.
- I. Upon the expiration of the abatement period applicable to the case (30 days) the parties will enter into an Agreed Docket Control Order (DCO). If the parties cannot agree on a DCO within ten (10) days after the end of the abatement period, a party may request a hearing for the Court to enter a DCO. The form for the DCO for the 412th District Court can be found on the Brazoria County website. The Court at this time has set aside the weeks of June 1, 2010 (Tuesday); August 30, 2010; September 7, 2010; October 11, 2010 and November 1, 2010 for trials of Hurricane Ike related claims. Available dates for trial and the status conference date must be obtained from the 412th coordinator and such dates cannot be obtained until after the period of abatement ends. Parties may set their case for trial for weeks other than the specially designated weeks, but settings for any other date will be subject to the Court's general procedures for setting of trials. These procedures can be found on the Brazoria County website.
- J. The Court has set aside every Tuesday and Friday afternoons of the third full week of each month beginning September, 2009, to hear ancillary matters concerning Hurricane Ike related matters. The time and date for the setting can be obtained by calling the court coordinator. A copy of the Court's procedures for setting hearings can be found on the Brazoria County website.
- K. When any abatement period ends by any method permitted by this Order, the parties will then be governed by the Texas Rules of Civil Procedure and the Brazoria County Local Rules as in any other civil case.
- L. ALL PARTIES SHALL PROVIDE COURTESY COPIES TO THE COURT OF ALL SUMMARY JUDGMENT AND OTHER MOTIONS THAT ARE DISPOSITIVE OF THE CASE OR A PORTION THEREOF. DO NOT FILE COURTESY COPIES FOR ANY OTHER HEARINGS WITH THE COURT AS THEY WILL NOT BE ACCEPTED. NO FACSIMILE OR EMAIL COURTESY COPIES SHALL BE SUBMITTED TO THE COURT.

Signed this 12th day of August, 2009.


W. Edwin Dorman
JUDGE PRESIDING

Attachments
Rules for Mediation

RULES FOR MEDIATION

1. Definition of Mediation. Mediation is a process under which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement or understanding among them. The mediator may suggest ways of resolving the dispute, but may not impose his own judgment on the issues for that of the parties.

2. Agreement of Parties. Whenever the parties have agreed to mediation they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement to mediate.

3. Consent to Mediator. If no written objection to the mediator appointed is filed with the clerk of the court within 10 days after the date the Order Referring Case to Mediation is signed, the parties consent to the appointment of the individual named as mediator in their case. The Mediator shall act as an advocate for resolution and shall use his best efforts to assist the parties in reaching a mutually acceptable settlement.

4. Conditions Precedent to Serving As Mediator. The Mediator shall not serve as a mediator in any dispute in which he has any financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. In the event that the parties disagree as to whether the Mediator shall serve, the Mediator shall not serve.

5. Authority of Mediator. The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator is authorized to conduct joint and separate meetings with the parties and to offer suggestions to assist the parties achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.

6. Commitment to Participate in Good Faith. While no one is asked to commit to settle their case in advance of mediation, all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.

7. Parties Responsible for Negotiating Their Own Settlement. The parties understand that the Mediator will not and cannot impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. The Mediator does not warrant or represent that settlement will result from the mediation process.

8. Authority of Representatives. PARTY REPRESENTATIVES MUST HAVE AUTHORITY TO SETTLE AND ALL PERSONS NECESSARY TO THE DECISION TO SETTLE SHALL BE PRESENT. The names and addresses of such persons shall be communicated in writing to all parties and to the Mediator.

9. Time and Place of Mediation. The Mediator shall fix the time of each mediation session. The mediation shall be held at the office of the Mediator, or at any other convenient location agreeable to the Mediator and the parties, as the Mediator shall determine.

10. Identification of Matters in Dispute. Prior to the first scheduled mediation session, each party shall provide the Mediator and all attorneys of record with an Information Sheet and Request For Mediation on the form provided by the Mediator setting forth its position with regard to the issues that need to be resolved. At or before the first session, the parties will be expected to produce all information reasonably required for the Mediator to understand the issues presented. The Mediator may require any party to supplement such information.

11. Privacy. Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator.

12. Confidentiality. Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the Mediator. All records, reports or other documents received by a mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum. Any party that violates this

agreement shall pay all fees and expenses of the Mediator and other parties, including reasonable attorneys' fees, incurred in opposing the efforts to compel testimony or records from the Mediator.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding: a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; b) admissions made by another party in the course of the mediation proceedings; c) proposals made or views expressed by the Mediator; or d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

13. No Stenographic Record. There shall be no stenographic record of the mediation process and no person shall tape record any portion of the mediation session.

14. No Service of Process at or near the site of the Mediation Session. No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session upon any person entering, attending or leaving the session.

15. Termination of Mediation. The mediation shall be terminated: a) by the execution of a settlement agreement by the parties; b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or c), after the completion of one full mediation session, by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

16. Exclusion of Liability. The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation.

Neither Mediator nor any law firm employing Mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

17. Interpretation and Application of Rules. The Mediator shall interpret and apply these rules.

18. Fees and Expenses. The Mediator's daily fee shall be agreed upon prior to mediation and shall be paid in advance of each mediation day. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including fees and expenses of the Mediator, and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise.