

Storm Sandy Mediation Program: A Learning Experience

By: Dan Wade, Staff Attorney

The government-sponsored Storm Sandy mediation programs in New York and New Jersey offered the promise of a low-cost easy access forum for disaster survivors to sit down face-to-face with their insurer to resolve claim disputes. A modest number of homeowners in both states with claim disputes averaging \$50,000 used these programs with some success, but from a policyholder perspective, the results can be more fairly deemed a learning experience rather than a resounding success. New Jersey reports a relatively high settlement rate in the relatively few claims processed through its Sandy mediation program. The New York program was more widely used and publicized. The American Arbitration Association (AAA) was chosen to administer the New York program. It held a panel discussion at Fordham Law School in New York City in early March to discuss outcomes and impressions. I attended the program with Rutgers Distinguished Professor of Law and UP advisor Jay M. Feinman.

The discussion was a largely self-congratulatory exercise for the mediators on the panel and in the audience, and only near the end of the last hour did the speakers drill down to examine the program's strengths and weaknesses. While UP strongly supports setting up affordable extra-judicial forums for resolving claims disputes after large scale disasters, the AAA mediation program model has room for improvement.

For starters, policyholders come to the mediation at a disadvantage. The mediators are often lawyers with experience in insurance law and the insurance company representative is of course an insurance professional. Even the savviest of policyholders must devote considerable time and energy to self-educate in order to negotiate from a position of relative strength. In addition, insurers are repeat customers of AAA, which means they're comfortable in the forum and the AAA has an economic incentive to keep them happy. By contrast, policyholders are one-time users, unfamiliar with the forum. AAA has no incentive to keep them happy.

While policyholders who find their way to UP's website can read tips on [how to prepare for a mediation](#) and [effectively negotiate with their insurer](#), there is no official preparation component of the program that we at UP have seen. In addition, multiple mediators in attendance admitted that at least initially, their role was essential as an interpreter for the insurer. Also, mediators seemed to prefer policyholders come to the mediation without counsel, which begs the question – who is the advocate for the insured? Are policyholders prepared?

Although AAA boasts a 64% settlement rate, a 97% customer satisfaction rating, and an anecdotal curb on Sandy-related litigation, they were not required to document settlement amounts as against claims and in some cases reached a settlement for zero, making it difficult to ascertain the program's real effectiveness. Many claims are still open and many have reached only partial or interim settlements awaiting re-appraisal, new information, or the outcome of pending litigation, which may be precedent-setting for certain claims. The panel discussion focused mainly on how well the program is working and the panelists repeatedly complimented insurers for their behavior and good-faith participation without offering any supporting evidence.

Going forward, states implementing post-disaster mediation programs, including New York and New Jersey, would do well to reflect on collective experience thus far. There is useful guidance in UP's [Mediation Best Practices](#) report on helping policyholders prepare, and be savvy negotiators. In order to determine how balanced and effective the program is, implementing states should require thorough documentation of the outcomes. Connecticut and Rhode Island, who have not yet implemented their programs, have an opportunity to start fresh with new programs that draw on the best features of New York and New Jersey's programs but with an emphasis on policyholder protections. There are many possible ways to improve the process that UP would support. One improvement would be to appoint a "policyholder advocate" to prepare policyholders for the process – an extension of the idea of [Office of Public Insurance Counsel](#) in Texas and the [IRS "taxpayer advocate" service](#). [Oklahoma has implemented a post-disaster mediation program](#) that uses third-party neutral pro-bono attorneys trained by the Oklahoma Supreme Court as mediators instead of hiring a for-profit organization such as the AAA.

It will be interesting to see if the programs change going forward and how other states implement them. Mediation programs continue to fill a much-needed gap as a forum for small claims that most contingency lawyers will not take. Because most policyholders will not find counsel for their small claims and there is scant number of [pro-bono service organizations and law school clinics](#) that will take these

claims, mediations must be conducted fairly. However, for the time being, it seems that policyholders still have limited options for a quick, cost-effective, and fair resolution of insurance claim disputes.