SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property Law

Volume 5
Number 2 *Natural Disaster Symposium Edition*

Article 3

12-1-2018

"Hurricane" Sandy: A Case Study of the Eastern District of New York's Effort to Address Mass Litigation Resulting from the Effects of Climate Change

Cheryl L. Pollak
cheryl_pollak@nyed.uscourts.gov

Ramon E. Reyes Jr.
Ramon_Reyes@nyed.uscourts.gov

Robyn Weinstein
robyn_weinstein@nyed.uscourts.gov

"Hurricane" Sandy: A Case Study of the Eastern District of New York's Effort to Address Mass Litigation Resulting from the Effects of Climate Change

By: Cheryl L. Pollak, Ramon E. Reyes, Jr., & Robyn Weinstein, Esq.†

† Cheryl L. Pollak and Ramon E. Reyes, Jr. are current United States Magistrate Judges for the United States District Court, Eastern District of New York Eastern District of New York. Robyn Weinstein is the Alternative Dispute Resolution Administrator for the United States District Court, Eastern District of New York.

I. INTRODUCTION

On the evening of October 29, 2012, "Hurricane" Sandy made landfall on the New York coastline, battering the land with strong winds, torrential rain, and record-breaking storm surges.[1] Homes and commercial structures were destroyed; roads and tunnels were flooded; and more than 23,000 people sought refuge in temporary shelters, with many others facing weeks without power and electricity. At the time, Sandy was heralded as one of the costliest hurricanes in the history of the United States; the second costliest hurricane only to Katrina, which hit New Orleans in 2005. Unfortunately, recent experience with Hurricanes Florence, Maria, Harvey, and Irma suggest that this pattern of devastating *superstorms* may become the new norm as climate change produces more extreme and unpredictable weather events.

In Sandy's aftermath, as individuals returned to their homes, or what remained of them, and communities began to rebuild, the true cost of the storm became apparent. A year after the storm, the Federal Emergency Management Agency ("FEMA") estimated that over $1.4 billion in assistance was provided to 182,000 survivors of the disaster; another $3.2 billion was provided to state and local governments for debris removal, infrastructure repair, and emergency protective measures. More than $2.4 billion was provided to individuals and businesses in the form of low-interest loans through the Small Business Administration ("SBA"), and millions more were spent on grants designed to implement mitigation measures in the future and to provide unemployment assistance to survivors.

Before the storm, homeowners paid premiums for flood insurance provided through the National Flood Insurance Program ("NFIP"), and for homeowner's insurance provided by dozens of private insurers. In the months following the storm, they began to file claims for assistance in rebuilding their homes. While many such claims were resolved successfully, many homeowners were unhappy with the settlement amounts offered by their insurance carriers and felt compelled to file lawsuits in the surrounding state and federal courts. Many of those lawsuits were filed in the United States District Court for the Eastern District of New York ("EDNY"). This case study describes the EDNY's specifically crafted, unique approach to handling the mass litigation that ensued from Sandy's devastation, documents some of the problems that the Court faced during that mass litigation, and describes some of the lessons learned from the Court's experience.

1. Eric S. Blake et al., *Tropical Cyclone Report Hurricane Sandy (AL182012)*, NAT'L HURRICANE CENT. (Feb. 12, 2013), https://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf [https://perma.cc/ELD5-2XHK] Sandy began as a Category 1 hurricane in Jamaica, evolved into a Category 3 hurricane before hitting Cuba, and then devolved into a post-tropical cyclone before hitting Brigantine, New Jersey and eastern New York. *Id.*

II. SANDY CASES "FLOOD" THE EASTERN DISTRICT OF NEW YORK

Within one year of Sandy, homeowners began to file lawsuits in the EDNY.[2] The Court quickly became aware of the litigious aspect of Sandy as several of the early-filed cases were brought by multiple homeowners of separate properties against a single insurer. Early on, the Court identified more than twenty such cases involving at least 290 separate properties,[3] each of which would eventually be refiled separately under its own docket number. By January 2014, over 800 civil actions were filed in the EDNY by property owners against various insurers and FEMA. Over time, that total would swell to at least 1,440 cases. Although there were variations in the claims asserted in Sandy cases, the property owners generally sought damages under two types of insurance policies—Standard Flood Insurance Policies ("SFIP") issued under the NFIP and homeowner's insurance policies issued pursuant to New York Insurance Law. These two types of cases became known as *Flood* and *Wind* cases, respectively.[4]

Flood policies are issued directly by FEMA or private insurers, which are sometimes referred to as Write-Your-Own Carriers ("WYO Carriers").[5] WYO Carriers act as "fiscal agents" of the United States, who must strictly enforce the NFIP and FEMA regulations, and may only vary the terms of a SFIP with the express written consent of the Federal Insurance Administrator.[6] Standard NFIP policies cover a

2. *See e.g.*, Ursillo v. Farmington Cas. Co., No. 13-CV-5923 (ADS)(AKT) (filed Oct. 25, 2013); Baiardi v. The Standard Fire Ins. Co., No. 13-CV-5912 (SJF)(AKT) (filed Oct. 28, 2013).

3. *See* Complaint, Baiardi, et al. v. The Standard Fire Ins. Co., No. 13-CV-5912 (SJF)(AKT) (E.D.N.Y. Oct. 28, 2013), ECF No. 1 (85 properties joined in one action); Complaint, Funk, et al. v. Allstate Ins. Co., No. 13-CV-5933 (JS)(GRB) (E.D.N.Y. Oct. 28, 2013), ECF No. 1 (147 properties); Complaint, Downs, et al. v. Liberty Mutual Ins. Co., No. 13-CV-5957 (CBA)(CLP) (E.D.N.Y. Oct. 28, 2013), ECF No. 1 (11 properties); Complaint, Dante, et al. v. Nat'l Flood Ins. Program, No. 13-CV-6297 (ARR)(JO) (E.D.N.Y. Nov. 13, 2013), ECF No. 1 (42 properties); Case Management Order No. 1, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Feb. 21, 2014), ECF No. 243 (hereinafter, "CMO No. 1"), at Exhibit A (listing other mass joined actions).

4. Federal subject matter jurisdiction over Flood cases exists pursuant to 42 U.S.C. § 4702 (2016) and 28 U.S.C. § 1331. Federal jurisdiction over Wind cases exists pursuant to 28 U.S.C. § 1332.

5. *See* 42 U.S.C. § 4081; 44 C.F.R. 61.13(f) (2017). In many markets the NFIP represents the primary, if not exclusive provider of flood insurance. *See* Jacobson v. Metropolitan Prop. & Cas. Ins. Co., 672 F.3d 171, 176 (2d Cir. 2012). FEMA administers the NFIP, oversees its management, and exercises ultimate authority over payment or disallowance of claims. *See e.g.*, 42 U.S.C. § 4019 (FEMA authorized to "prescribe regulations establishing the general method or methods by which proved and approved claims for losses may be adjusted and paid for any damage to or loss of property which is covered by flood insurance."); Durkin v. Allstate Ins. Co., No. A-99-1304, 2000 WL 146376, *1 (E.D. La. Feb. 9, 2000).

6. *See* 42 U.S.C. § 4071(a)(1); Palmieri v. Allstate Ins. Co., 445 F.3d 179, 183 (2d Cir. 2006).

limit of $250,000 for damage to buildings and $100,000 for personal property damage.[7] More than two-thirds of the Sandy cases involved claims under SFIPs issued by WYO Carriers or FEMA.[8]

Insurance companies issue *Wind* policies pursuant to New York State insurance law. Such policies cover homes for all risks of physical loss except those that are specifically excluded, such as losses due to earthquake, war, nuclear accident, and flood. Policies vary as to coverage amounts for building damage, personal property, and deductibles. Less than one-third of the Sandy cases involved claims under *Wind* policies.

III. THE COURT'S RESPONSE TO THE "FLOOD" OF SANDY CASES

By early January 2014, the 800 filed Sandy cases were randomly assigned to the twenty-six active and senior district judges, and automatically referred for discovery and pretrial management to sixteen magistrate judges. Each district judge was asked to handle an additional thirty to fifty new cases on top of their already heavy civil and criminal caseloads.[9] However, in the absence of a coordinated effort among the judicial officers, there was a concern about inconsistent rulings on common legal issues and a multiplication of effort on the part of the judges that would hinder the swift, efficient, and fair resolution of these cases.

Given these concerns, the EDNY Board of Judges met on January 7, 2014, and appointed a committee of three magistrate judges (the "Sandy Committee") to develop, implement, and oversee a system to handle this inundation of storm-related cases.[10] That the Board of Judges chose to assign the task of managing the Sandy litigation to a committee of magistrate judges was no mistake. Pursuant to a decades-long practice in the EDNY, magistrate judges are automatically assigned to all civil cases and are responsible for all pretrial civil case management from the inception of each case to its dispositional phase; whether by motion to dismiss, summary judgment, or trial.[11]

7. SFIPs exclude coverage for damage to basements and damages caused by "earth movement."

8. More than 90% of the flood policies in effect during Sandy were written by WYO Carriers. The rest were issued by FEMA directly.

9. The Eastern District of New York is one of the busiest district courts in the United States. In the 12-month period ending September 30, 2013, over 8,300 civil and criminal cases were filed in the Eastern District. Sandy filings alone thus represented more than a 10% increase in the District's caseload.

10. The two principle authors of this Article were two of the three magistrate judges assigned to the Committee, along with the Honorable Gary R. Brown.

11. "A Magistrate Judge shall be assigned to each case upon the commencement of the action . . . . [A] Magistrate Judge so assigned is empowered to act with respect to all non-dispositive pretrial matters unless the assigned District Judge orders otherwise." E.D.N.Y. & S.D.N.Y. R. 72.2. E.D.N.Y. magistrate judges also handle a significant number of civil cases on consent pursuant to 28 U.S.C. § 636(c), including ruling

Magistrate judges are statutorily empowered to handle such matters.[12]

A. *Creation of the Sandy Master Calendar*

The Committee's initial step in fulfilling its mandate from the Board of Judges was to request that the Chief District Judge create a Miscellaneous Civil Case (the "Master Calendar") on the Court's Case Management–Electronic Case Files ("CM–ECF") system[13] for the purpose of pretrial case administration in all actions seeking insurance coverage for damage caused by Sandy.[14] The impetus for establishing the Master Calendar came from the review of numerous motions seeking the *pro hac vice* admission of attorneys. Many attorneys representing both plaintiffs and defendants were from out-of-state. These attorneys had prior experience litigating cases after Hurricane Katrina and were retained for their expertise. Since many of the individual attorneys and law firms were handling multiple cases, rather than require the attorneys to file multiple motions for admission *pro hac vice* in each case that the attorney was appearing, the Committee set up the Master Calendar under which an attorney could submit his or her motion for admission once, with a notation as to all of the individual cases in which that attorney wished to appear. The single general docket number also served other purposes. Because the individual cases were technically not related in accordance with the Court's Local Rules, but many of the Committee's orders and other filings applied to each of the cases, the Committee determined that filing common orders under the Master Calendar, and *spreading* them to individual cases as applicable, was more convenient and efficient than individually filing under separate docket numbers.[15] The Master Calendar became the main platform upon which nearly all of the Sandy litigation occurred.[16]

---

on dispositive motions and conducting bench and jury trials. E.D.N.Y. magistrate judges as a whole handle in excess of 260 civil cases on consent at any given time.

12. *See* 28 U.S.C. § 636(b)(1) (empowering magistrate judges "to hear and determine any pretrial matter pending before the court," with the exception of eight specifically enumerated types of motions).

13. CM–ECF is the Federal Judiciary's comprehensive case management system for all bankruptcy, district, and appellate courts. CM–ECF allows courts to accept filings and provides access to filed documents online. CM–ECF gives access to case files by multiple parties, and offers expanded search and reporting capabilities. The system also offers the ability to immediately update dockets and download documents and print them directly from the court system.

14. *See* Administrative Order 2014-3, *Hurricane Sandy Cases*, (No. 14-MC-41).

15. CM–ECF case participants receive email notifications of all case filings, scheduled and adjourned conferences, and court orders and rulings.

16. The day after the Master Calendar was created, the Committee issued Practice and Procedure Order No. 1, which directed the use of the "*In re Hurricane Sandy Cases*" caption and 14-MC-41 docket number for filings in all cases. Practice and Procedure Order No. 1, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 3 at 1–2. Practice and Procedure Order No. 1 also directed all counsel requiring *pro hac vice*

B. *Correcting Improperly-Filed Cases & Ascertaining Full Scope of Sandy Mass Litigation*

Prior to the appointment of the Committee, it became apparent that the plaintiffs' counsel improperly joined in mass complaints the claims of multiple property owners who held policies with the same insurance company.[17] Although the plaintiffs argued that it would be "convenient and efficient" to proceed by joining these claims against one insurer, and would produce a "considerable savings in terms of filing fees,"[18] the practice violated the Court's related case rule.[19] Not only had the Court previously held that the plaintiffs cannot avoid paying statutorily-mandated filing fees through improper mass joinder,[20] but several district judges had already dismissed Sandy complaints *sua sponte* based on the improper joinder of numerous plaintiffs and properties in one action.[21]

In some cases, individual plaintiffs filed separate actions for damages as to the same property simply because those plaintiffs held flood insurance and homeowner's insurance policies with different insurance carriers. The Committee identified eighty-one such properties with separate cases filed against a flood and wind insurer.[22] As each carrier could contend that the damages implicated the other insurer's policy, this presented the possibility of inconsistent judgments. Further complicating these matters, some cases involving the same prop-

admissions to submit their applications on the Master Calendar and "spread" them to each of the individual Sandy cases to which they applied. (*Id.* at 3–4). Practice and Procedure Order No. 1 was subsequently modified twice. *See* Practice and Procedure Order No. 2, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 25; Practice and Procedure Order No. 3, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 164.

17. *See, e.g.,* Complaint, Baiardi, et al. v. The Standard Fire Ins. Co., No. 13-CV-5912 (SJF)(AKT) (E.D.N.Y. Oct. 28, 2013), ECF No. 1 (85 properties joined in one action); Complaint, Funk, et al. v. Allstate Ins. Co., No. 13-CV-5933 (JS)(GRB) (E.D.N.Y. Oct. 28, 2013), ECF No. 1 (147 properties); Complaint, Downs, et al. v. Liberty Mutual Ins. Co., No. 13-CV-5957 (CBA)(CLP) (E.D.N.Y. Oct. 28, 2013), ECF No. 1 (11 properties); Complaint, Dante, et al. v. Nat'l Flood Ins. Program, No. 13-CV-6297 (ARR)(JO) (E.D.N.Y. Nov. 13, 2013), ECF No. 1 (42 properties); CMO No. 1, *supra* note 3, at Exhibit A (listing other mass joined actions).

18. Letter, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 65 at 3.

19. "A civil case is 'related' to another civil case . . . when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." E.D.N.Y. & S.D.N.Y. R. 50.3.1. Sandy cases involving different properties are not related because even though they may involve the same weather event and similar insurance policies and legal issues, causation is always an individual determination that is highly fact specific. *Id.*

20. *See* In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11 CV 3995, 12 CV 1147, 12 CV 1154, 2012 WL 1570765, at *12–13 (E.D.N.Y. July 24, 2012), *report and recommendation adopted sub nom*, Patrick Collins, Inc. v. Doe 1, 288 F.R.D. 233 (E.D.N.Y. 2012).

21. *See Dante*, 2013 WL 6157182, at *2 (E.D.N.Y. Nov. 21, 2013); *Baiardi*, 2013 WL 6157231, at *2–3 (E.D.N.Y. Nov. 21, 2013); *Funk*, 2013 WL 6537031, at *6–8 (E.D.N.Y. Dec. 13, 2013).

22. *See* CMO No. 1, *supra* note 3, at Exhibit B.

erty were filed separately in the Brooklyn and Central Islip courthouses and assigned to different sets of judges.[23]

A third problem was that there was no efficient way to identify cases brought because of Sandy. Although CM–ECF allows federal courts to effectively manage cases, there was no way for counsel to indicate that each case was related to Sandy when filed, apart from indicating as such in the body of the complaint. Accordingly, the Court could not simply query CM–ECF to produce a list of Sandy cases to relate to the Master Calendar. Upon the creation of the Master Calendar, the Court endeavored to determine the full extent of the Sandy filings, which required the judges to manually open the complaint to identify whether it was a Sandy-related case. That process proved to be unnecessarily cumbersome, inefficient, and ultimately ineffective.

Thus, one of the first major issues tackled by the Sandy Committee was to deal with the misjoinder and nonjoinder of cases, as well as ascertain the full breadth of Sandy cases that were and would be filed in the EDNY and determine whether there was an effective and efficient way to group such cases going forward. To accomplish these tasks, the Committee ordered the plaintiffs' counsel in all Sandy cases to submit: (1) a list identifying all Sandy-related cases by name of plaintiff, docket number, and type of insurance policy; and (2) a separate letter pursuant to Local Rule 50.3.1(d) explaining how counsel proposed to group the cases (whether based on the similarity of facts, legal issues, or policy exclusions) which might result in a substantial saving of judicial resources if the cases were assigned to the same district judge and magistrate judge.[24] In its Order, the Committee also directed counsel to identify any cases that were amenable to early mediation, or where mediation had already been attempted without success.[25] The defendants had one week to respond to the plaintiffs' proposals.[26]

C. *Sandy Case Management*

The second major issue for the Sandy Committee was to adopt a uniform case management system that could resolve all Sandy cases efficiently and expeditiously. In an effort to develop such a system, the Committee considered written submissions from the parties, some of which included sample case management orders used by federal courts following storm events in Louisiana and Texas.[27] Afterwards, the Committee held an initial conference on February 5, 2014, in the

23. *Id.*
24. *See* Order*, Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 6.
25. *Id.*
26. *Id.*
27. *See e.g.*, Letter, Downs, et al. v. Liberty Mutual Ins. Co.*,* No. 13-cv-5957 (E.D.N.Y. Dec. 20, 2013), ECF. No. 20; Letter, *Hurricane Sandy Cases*, (No. 14-MC-

EDNY's ceremonial courtroom,[28] during which the Court and the parties debated an appropriate procedure for handling the Sandy cases going forward.[29] Over one hundred attorneys attended the conference, representing several hundred homeowners and insurers.

1. Case Management Order No. 1

After the initial conference, the Committee issued Case Management Order No. 1 ("CMO No. 1") to "facilitate the efficient resolution of these matters in a manner designed to avoid duplication of effort and unnecessary expense."[30] CMO No. 1 became the central foundation upon which all Sandy cases were litigated. In CMO No. 1, the Court appointed Liaison Counsel for both the plaintiffs and the defendants ("Liaison Counsel"), established a procedure for ensuring proper joinder and relation of cases, and ordered the voluntary dismissal of certain unsupportable state-law claims.[31] The heart of CMO No. 1, however, was the establishment of mandatory, uniform discovery practices and the requirement of participation in an alternative dispute resolution process ("ADR").[32]

a. "Uniform Automatic Discovery Practices"

Pursuant to CMO No. 1, the plaintiffs were given sixty days from the filing of an answer to provide to the defendants: (1) the name of each insurer and each policy's number related to the property or the plaintiff; (2) the claim numbers for any claims made for losses relating to Sandy;[33] (3) the address of each property and the current address of the plaintiff;[34] (4) an itemized statement of claimed damages for each

41), ECF No. 65 at 3; Certain Defendants' Proposed Case Management Order for the NFIP Cases, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 201.

28. Order, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 81.

29. Transcript, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 718-5.

30. *See* CMO No. 1, *supra* note 3. A copy of CMO No. 1 is annexed hereto. CMO No. 1 was designed to "facilitate the efficient resolution of these matters in a manner designed to avoid duplication of effort and unnecessary expense." CMO No. 1 at 1. In issuing CMO No. 1, the Committee recognized the need to balance the interests of the property owners, many of whom had been "rendered homeless for a time and who may be left without the necessary records or access to qualified contractors to effect repairs", with the interests of insurers from being "safeguard[ed] [ ] from meritless or inflated claims." *Id.* at 2.

31. CMO No. 1, *supra* note 3, at 1–6.

32. Other courts have utilized model case management plans in relation to devastating weather events. *See, e.g.*, Letter, *Downs*, 13-CV-5957 (E.D.N.Y. Dec. 20, 2013), ECF No. 20-1. Case Management Order No. 1 was unique in at least one important respect, a mandatory requirement of participating in an alternative dispute resolution procedure, whether arbitration, mediation or settlement conference. CMO No. 1, *supra* note 3, at Point V.

33. This was required because many property owners had previously filed claims directly with FEMA through the administrative process and had received partial reimbursement for their losses.

34. This was necessary because many of the plaintiffs had been displaced due to the extensive damage to their homes.

property, including contents; (5) a statement as to whether any amounts were paid on the policy or offered to be paid, the amount claimed in the lawsuit, and an itemized statement of the items for which plaintiffs were making a claim that remain unpaid or were underpaid; (6) if the plaintiff had not received any reimbursement from their insurer, the plaintiff was asked to give the reasons for nonpayment that were provided by the insurer; and (7) a statement whether there were any prior efforts at mediation or arbitration of their claim.

Simultaneously, the plaintiffs were to provide a category of critical documents for their cases, including any: (1) loss estimates provided by other insurers; (2) adjusters' reports; (3) engineering reports; (4) photographs of their property and the contents of their homes both before and after the loss; (5) claim log notes; (6) documents relating to repair work performed on their property—including contracts, bids, estimates, invoices or work tickets for completed work; (7) documents reflecting any payments made from any insurer, from FEMA, or from any governmental programs; (8) documents relied upon by the plaintiff to satisfy the Proof of Loss requirements and supporting documentation required by SFIP,[35] and (9) written communication between the insured and the insurer relating to the loss, including the Proof of Loss required by the policy.

Defendants were also required to provide certain categories of information within sixty days of the filing of an answer. These included the following: (1) an explanation as to why coverage was declined if no payment was made under the policy, including: (a) policy exclusions that apply; (b) if coverage was denied because of nonpayment of premiums; (c) if there is a dispute as to the nature of damage and its coverage under the policy; (d) if there is a dispute as to the value of the claimed losses; and, (e) any other legal basis for denial; (2) the insurer's explanation of the dispute if the insurer paid or offered to pay; and (3) whether mediation or arbitration was attempted. The defendants were also directed to provide certain documents within that same period of time. Among these were: (1) documents in the claims files, including any letters declining coverage or notices of nonpayment of premiums; (2) any documentation assessing the claimed loss—including adjusters' reports, engineering reports, contractor's reports, photographs, and other evaluations of the claims; (3) the names and addresses of the adjusters; (4) claim log notes; (5) records of payments made to the insured; and (6) expert reports or other written communications that analyze or describe the scope of loss or defenses under the policy.

The parties' respective automatic disclosures became the first phase of discovery in lieu of the initial disclosures required by Federal Rule of Civil Procedure 26 and "in the absence of a showing to the contrary

35. 44 C.F.R. 61, App. A(1), Art. VII (J)(3), (4).

. . . document requests and interrogatories."[36] Additionally, CMO No. 1 also directed the parties in each case to meet, confer, and exchange any additional information that they believed would be reasonably helpful in readying cases for mediation, arbitration, or settlement conference.[37] The parties were also ordered to provide the Committee with a list of commonly occurring legal issues which they might anticipate occurring based upon their prior experience litigating such cases.

b. Reconsideration of CMO No. 1 Denied

Shortly after its issuance, the WYO carriers sought reconsideration of CMO No. 1, arguing that the Committee had denied or delayed their right to conduct formal discovery.[38] The carriers contended that because all formal discovery in the NFIP cases was barred pending completion of the process established by the Committee "as to all of those NFIP cases that the parties already know cannot be resolved without formal discovery, six months will have been lost."[39] The carriers argued that postponing their right to formal discovery would invariably slow the resolution of the cases and was "simply counterproductive."[40] "*None* of these cases will resolve without formal discovery," they predicted, while another attorney predicted that the claims would average eight years to resolve based on his experience. One carrier condemned the process as raising "constitutional [and] due process issues."[41]

In rejecting the WYO carriers' efforts to modify CMO No. 1 and resist the early mediation process, the Committee noted that there is no due process right to a particular form, quantum, or type of discovery.[42] The Court recognized its *obligation* to limit the frequency and extent of discovery where strict adherence to formal discovery devices would be inconvenient, burdensome, or unnecessarily expensive.[43] By

36. CMO No. 1, *supra* note 3, at 6.

37. One area of concern that was raised was the question of privilege. Documents which evidenced a communication between counsel and client, which would be protected by attorney-client privilege, communications between or among plaintiffs' counsel, defendants' counsel, or documents created in anticipation of litigation were areas of particular concern. The CMO required that within fourteen days prior to the production of the required documentation, the party claiming privilege was to provide a privilege log.

38. Report of Defense Liaison Counsel for the NFIP Cases, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 269

39. *Id.* at 10–11.

40. *Id*. at 15.

41. *Id*. at 12, n. 7.

42. Case Management Order No. 3 (Clarification & Denial of Reconsideration of CMO #1), *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 311, at 5 (citing Wardius v. Oregon, 412 U.S. 470, 474, 93 S. Ct. 2208, 2212 (1973) (hereinafter, "CMO No. 3").

43. *Id.* (quoting Fed. R. Civ. P. 26(b)(2)(C), "the court *must* limit the frequency or extent of discovery otherwise allowed by these rules . . .") (emphasis added); *see also* Fed. R. Civ. P. 16(b)(2)(B) (Court "may modify the timing of disclosures [and] modify the extent of discovery."); Bell Atlantic v. Twombly, 550 U.S. 544, 593 n. 13 (2007)

contrast to the uniform plan set out in CMO No. 1, the piecemeal production of document requests, interrogatories, and requests to admit by hundreds of insurers' and plaintiffs' counsel in over 1,000 cases — with inevitable disputes as to scope and relevance — would result in a significant cost to the parties, drain the Court's resources, and inevitably delay resolution of many of these cases for years.

Moreover, as the Committee explained, CMO No. 1 did not deny defendants the right to engage in discovery; instead, it "imposed a more rigorous and efficient process than the so-called 'formal' discovery urged by the carriers," and it was adopted after "considerable input" from both sides.[44] The Committee held that the discovery management tools employed in CMO No. 1 were a "well-established and recognized means of effectively managing complex cases."[45] In issuing CMO No. 1, and those that followed, the Committee considered that these cases presented a massive undertaking for all involved, and there was a need to balance (1) the concerns of the victims; (2) the need for expeditious review of the victims claim; and (3) the need to ensure that the claims were valid and covered by the policies. The Committee declared that this was "not a time for 'business as usual;' [e]xtraordinary circumstances call for extraordinary measures."[46]

2. Case Oversight and Subsequent Case Management Orders

Shortly after entry of CMO No. 1, the Committee determined the most efficient way to monitor individual cases going forward and ensured that the parties adhered to CMO No. 1. It decided that the individual Sandy cases would be assigned to the three Committee members by the insurer in order to equally distribute the cases (approximately 475 each), and this distribution would foster a more efficient monitoring system both for the Court and the parties. Each Committee member then became a "settlement judge" under the CM–ECF system to each case against their assigned insurers. As designated settlement judges, each Committee member could then schedule conferences as necessary to oversee their respective cases.[47]

(courts can "adopt[ ] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems" in a "flexible process"); In re Subpoena Issued to Dennis Friedman, 350 F.3d 65, 69 (2d Cir. 2003) ("The federal rules give district courts broad discretion to manage the manner in which discovery proceeds.").

44. CMO No. 3, *supra* note 42, at 6.

45. *Id.* (citing Manual for Complex Litigation, Fourth §11.422); *see also* B.F. Goodrich v. Betkoski, 99 F.3d 505, 523 (2d Cir. 1996) (endorsing trial court's broad authority to control discovery in complex multi-party litigation, including measures adopted by the Committee, such as "time limits, schedules for discovery, and limitations of deposition discovery. . . ."), *decision clarified on denial of reh'g*, 112 F.3d 88 (2d Cir. 1997).

46. CMO No. 3, *supra* note 42, at 7.

47. The designation of Committee members to each case did not supplant the authority of the originally assigned district and magistrate judges. Those judges re-

Throughout the life of the Sandy litigation, the Committee members held hundreds of status conferences, ruled on discrete issues in individual cases, convened settlement conferences when appropriate, and referred cases to mediation or arbitration when ready.[48] Although CMO No. 1 provided a clear and efficient procedure through which discovery could be conducted and cases were quickly referred to mediation, arbitration, or settlement conference, several systemic impediments arose that threatened to derail the expeditious resolution of hundreds of cases (mostly *Flood*). These issues were raised by Liaison Counsel or *sua sponte* by the Committee following status conferences in individual cases, and many were resolved through the entry of separate case management orders. But for the coordinated management of these cases through a committee of judges, these issues may have prevented the efficient resolution of the cases, increased expenses for the parties, and wasted scarce judicial resources through piecemeal, repeated resolution.

a. Proof of Loss Issues – CMO Nos. 2, 7 and 8

In March 2014, after receiving the lists of commonly occurring legal issues from Liaison Counsel as required by CMO No. 1, the Committee became aware of an unknown but potentially large number of *Flood* cases that were subject to fatal defects as a result of the purported failure to submit compliant proofs of loss under the NFIP and FEMA's regulations.[49]

In order to recover under an SFIP, the NFIP regulations state that an insured must comply with certain conditions precedent. Congressional mandate and the Constitution require strict compliance with the regulations.[50] One requirement is that the insured must file a *proof of loss* and supporting documents within sixty days of the loss.[51]

---

mained assigned to each case and could exercise their authority as necessary or desired.

48. *See e.g.*, Transcript of Status Hearing on Hurricane Sandy Cases before the Honorable Gary R. Brown, United States Magistrate Judge, *In re* Hurricane Sandy Cases, (No. 14-MC-41), ECF No. 485; Transcript of Civil Cause for Telephone Conference before the Honorable Ramon E. Reyes, Jr., *In re* Hurricane Sandy Cases, (No.14-MC-41), ECF No. 456; Transcript of Civil Cause for Initial Conference Before the Honorable Cheryl L. Pollak, *Bassetti v. Allstate Ins. Co.*, 13-CV-6648 (ERK) (E.D.N.Y. May 1, 2014), ECF No. 66.

49. Case Management Order No. 2 (Proof of Loss Issues in NFIP Cases), *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 308, at 1 (hereinafter, "CMO No. 2"); *See also* Transcript of March 27, 2014 Conference, *In re* Hurricane Sandy Cases, 14-MC-41 (E.D.N.Y. Mar. 27, 2014), ECF No. 327 at 5–25; Report of Defense Liaison Counsel, 14-MC-41, ECF No. 269 at 5–6; Report of Plaintiffs' Liaison Counsel in Response to Defendants' Report and List of Commonly Occurring Legal Issues, *Hurricane Sandy Cases*, (No. 14-MC-41), ECF No. 280 at 19–24 (hereinafter, "Plaintiffs' Report").

50. Decosta v. Allstate Ins. Co., 730 F.3d 76, 83 (1st Cir. 2013).

51. FEMA's website defines "Proof of Loss" as a "form used by the policyholder to support the amount they are claiming under the policy." The proper form—086-0-

Filing a proof of loss has been held as a condition precedent to filing an action in federal court.[52]

While the law is clear that filing a proof of loss is a prerequisite to recovery, it is less clear as to the proper application of these requirements. Although FEMA regulations prescribe a particular form for a proof of loss—FEMA Form 086-0-9—courts have grappled with what exactly constitutes a proof of loss.[53] Similarly conflicting guidance existed as to the proper application of the one-year statute of limitations for filing an NFIP case vis-à-vis the proof of loss filing requirement; particularly following the time extension and expedited procedure afforded to victims of Hurricane Katrina and Sandy.[54]

In Sandy's aftermath, homeowners faced tremendous difficulties finding independent adjusters to perform site inspections and to provide detailed estimates of damages incurred and the estimated replacement values. In addition, there were simply not enough contractors or construction materials available in the region for homeowners to independently estimate the cost of repair work—much less perform the actual repairs necessary. Even the supplies to repair these homes were unavailable.[55] Similarly, many homeowners repaired their

9—is available on the FEMA website. FEMA regulations provide that while an insurance adjuster sent by FEMA or the WYO carrier to investigate a policy holder's claim may provide the policy holder with the Proof of Loss claim form, and may assist in completing the form, "this is a matter of courtesy only," and the homeowner must submit the Proof of Loss within sixty days after the loss regardless of whether the adjuster provides it or not. This may differ from state law insurance regulations depending on the jurisdiction. In New York, for example, the Insurance Law provides that a claim cannot be denied for failure to submit a proof of loss unless the insurer provides the insured with written notice that it requires a proof of loss and provides the suitable forms. N.Y. Ins. L. § 3407 (McKinney).

52. *DeCosta*, 730 F.3d at 84 (holding that "compliance with the proof-of-loss provision serves as a condition [ ] precedent to a waiver by the federal government of its sovereign immunity."); Jacobson v. Metropolitan Prop. & Cas. Ins. Co., 672 F.2d 171, 176 (2d Cir. 2012) (upholding summary judgment against policyholder who submitted a proof of loss but left the total damages line blank on the form).

53. *See, e.g.*, *Decosta*, 730 F.3d at 26 (finding that a contemporaneous submission of a written estimate as to disputed sums, along with two properly completed proof of loss forms for stipulated losses, did not constitute a proper proof of loss).

54. *Compare* Qader v. Fed. Emergency Mgmt. Agency, 543 F. Supp. 2d 558, 562 (E.D. La. 2008) ("[t]he one year time-bar does not begin, as the government claims, one year from the date FEMA denies a claim based on an adjuster's report"), *with* "Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy," *In re* Hurricane Sandy Cases (E.D.N.Y. Nov. 13, 2013), ECF No. 269-1 at 3 ("FEMA Memo"). ("when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured . . . the insured [ ] still had a full year from the date of that denial letter to [ ] file a lawsuit."); *cf.* Plaintiffs' Report at 20 ("FEMA's and the WYO carriers' position is that the deadline to file a lawsuit may expire before its own extended, eighteen-month proof of loss deadline to present a claim.").

55. One anecdote is particularly illustrative. An enterprising young man, whose water heater was destroyed by the flooding, realized that Home Depot and Lowes had completely sold out of replacement water heaters due to the high demand after the Hurricane, so he drove to the middle of Pennsylvania, purchased eight water heat-

homes by themselves or with friends and family because of the lack of licensed contractors. Of course, many could not begin repair work until they received their insurance payout. The elderly were hit particularly hard. Their first concern was to find somewhere else to live. Their homes deteriorated further because they lacked the necessary funds to begin repair work.[56] All of these issues manifested in the plaintiffs' continuing difficulty in filing compliant proofs of loss under the NFIP.

In "an unprecedented action," FEMA recognized the "difficulties insureds damaged by [ ] Sandy experienced evaluating damage and supporting their flood insurance claim" by extending the deadline to submit proofs of loss from sixty days to eighteen months.[57] FEMA explained that the extension was an "effective mechanism that allows insureds to fully present their claims," and reflected "FEMA's commitment to facilitating the ability of individuals insured by the NFIP to seek payment."[58]

As a result of the difficulty in performing site inspections, obtaining independent estimates of losses, and submitting particularized proofs of loss, the plaintiffs' counsel in approximately 200 Sandy cases retained a licensed inspection service, Canopy Claims, to submit *placeholder proofs of loss*. These placeholders were timely submitted without an independent site inspection but were based on an estimate of various categories of damages that similar property owners experienced in the surrounding areas. The defendants objected in hundreds of Sandy cases to the *placeholders* and to the plaintiffs' failure to provide documents sufficient to identify other proofs of loss issues in hundreds of cases. The defendants indicated that these problems would result in the inability to engage in mediation of such cases.

Recognizing that CMO No. 1 called for the parties to disclose documents and information sufficient to uncover any proof of loss and statute of limitations issues,[59] it was clear to the Sandy Committee that such information had not yet been sufficiently disclosed and, in light of the *placeholder* proof of loss issue, it was substantially likely that

---

ers and returned to New York. He proceeded to sell the other seven immediately to neighbors who also had lost their water heaters. Of course, for those homeowners who purchased supplies from independent vendors such as this individual, there were no credit card receipts and no invoices to provide the necessary backup for the Proof of Loss that was demanded by the carriers before reimbursement could be made.

56. One elderly woman, who had no funds to repair the home she had lived in all her life, went to live with distant relatives. By the time the insurance company adjuster got around to visiting her home to assess the damage, the mold from the flood waters had spread throughout the house, climbing through the walls to the second floor. Not only was the house dangerously unsafe, but the mold was so entrenched that the house had to be demolished. She lost everything.

57. FEMA Memo, *supra* note 54, at 2.

58. *Id.* at 2, 5.

59. *See* CMO No. 2, *supra* note 49, at 2.

these issues would be litigated in a large number of cases.[60] In order to provide plaintiffs with sufficient notice to remedy any defects in their proofs of loss filings before the expiration of the FEMA extended eighteen-month deadline (April 29, 2014), and to serve the interests of the parties and the Court by potentially reducing unnecessary litigation and related expenses, the Committee required counsel for defendants in each *Flood* case to disclose to opposing counsel in writing whether they intended to contest the receipt, form, or amount of the proofs of loss submitted by the plaintiffs.[61] In turn, counsel for plaintiffs in each such case were ordered to disclose to the defendant: (a) whether the plaintiff filed one or more proofs of loss; (b) approximately when they were filed; and, (c) the total amount of losses identified therein.[62] Armed with such information, the plaintiffs could take steps to cure any proof of loss deficiencies before the extended deadline and, if necessary, dismiss any improperly filed cases without prejudice in favor of administrative resolution.

Proof of loss issues persisted after the issuance of CMO No. 2. In particular, FEMA's position was unclear about placeholder proofs of loss and whether the uncertainty would prevent successful mediation in these cases. This persistence required the Committee to issue two additional CMOs,[63] the combined effect of which required FEMA to indicate whether it would resist mediation and settlement of problematic proof of loss cases. Ultimately, after five months of litigation, the proof of loss issues were resolved. FEMA agreed to permit potentially problematic cases, including *placeholder* cases, to be mediated subject to FEMA waivers of any proof of loss filing deficiencies.[64]

Concurrent with litigating the proof of loss issues, the Committee was reminded that many plaintiffs continued failing to produce all receipts, invoices, bank records, or other proof of payment for repairs that was completed. Accordingly, the Court ordered all plaintiffs to

60. *Id.* at 6 ("It is impossible to ascertain at this juncture the number of cases before this Court in which defendants will assert a failure to file proofs of loss, but one may infer that it is likely to be substantial."). CMO No. 2 was subsequently revised to remove an unintended footnote. *See* CMO No. 2, ECF No. 321.

61. *Id.* at 8.

62. *Id.*

63. Case Management Order No. 7, *In re* Hurricane Sandy Cases (E.D.N.Y. June 4, 2014), ECF No. 391; Case Management Order No. 8, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. June 28, 2014), ECF No. 422.

64. *See* Letter, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Aug. 7, 2014), ECF No. 494 at 9 ("Based on the unique nature of these proceedings and the manner in which claims were presented in this case, FEMA agrees with the Court's statement that mediation will be 'the most efficient and equitable way' to resolve many cases. Accordingly, FEMA will permit Write-Your-Own insurance (WYO) companies to participate in mediation and to request FEMA's waiver of provisions of the Standard Flood Insurance Policy (SFIP). FEMA will grant those requests as appropriate, and the Agency will not consider the placeholder proof of loss, by itself, to be a bar to settlement."); Electronic Order, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Aug. 12, 2014).

produce such information by July 31, 2014, or provide to defendants the names and addresses of any workmen, contractors, or subcontractors who performed repair work on their homes. Defendants could use this information to serve subpoenas, but only if the subpoena process was conducted diligently so as not to further delay proceedings.[65]

b. Discovery Outside of CMO No. 1, Expert Reports, and Site Inspections—CMO No. 3

Recurring issues concerning certain plaintiffs' standing to bring suit and possible pre-existing property damage caused by Hurricane Irene also threatened to delay the resolution of many cases. In several of such cases, the defendants filed formal motions to the assigned magistrate judges to proceed outside the scope of CMO No. 1, prompting the Sandy Committee to remind the parties that CMO No. 1 required them to cooperate in exchanging relevant information. Even if such information was outside the scope of CMO No. 1, the Sandy Committee urged both sides "to provide any information that would reasonably be helpful to their adversary in evaluating the case for mediation/arbitration purposes."[66] The defendants additionally feared losing their right to obtain such discovery if the plaintiff refused to provide it voluntarily. Accordingly, the Sandy Committee directed the parties to memorialize any dispute in a letter to opposing counsel outlining the information sought. The Sandy Committee noted that "[a]t this stage, such writing will preserve a party's rights without burdening the litigants and the Court with unnecessary motion practice."[67]

The scope of the expert disclosures was another issue that arose and required clarification. The Liaison Counsel for the WYO Carriers questioned whether expert reports were subject to disclosure under CMO No. 1. Despite the fact that CMO No. 1 expressly provided for production of "all expert reports and/or written communications that contain any description or analysis of the scope of loss or any defenses under the policy."[68] Some questioned whether the parties were required to retain an expert and prepare such a report. The Committee clarified that the report must be provided to the extent that a report was prepared prior to the issuance of CMO No. 3. At the same time, however, the Committee clarified that CMO No. 1 did not impose an affirmative duty to create such a report if none then existed.

Around the same time, the Liaison Counsel for the WYO Carriers requested a sixty-day delay of CMO No. 1's mandated alternative dispute resolution procedures to permit defendants to conduct "site in-

65. CMO No. 8 at 4.

66. CMO No. 3, *supra* note 42, at 8 (*quoting* CMO No. 1 at 9).

67. *Id.* at 9.

68. CMO No. 1, *supra* note 3, at 9.

spection[s] in *all* of the NFIP cases."[69] The WYO carriers contended that, given their prior experience with potential fraud with Hurricane Ike in Texas, site inspections of each property were needed to uncover similar fraud with respect to Sandy claims. In denying the request, the Committee noted that at that time more than 500 NFIP cases were filed, and that site inspections of all such properties would require invasive examination of homes; and that such inspections would be burdensome, costly, and unnecessarily delay the resolution of the cases.[70] Instead, the Committee ordered the attorneys to meet, confer, and identify thirty sample properties to inspect, and then defendants would inspect them within thirty days. The results would be shared with the plaintiff's counsel fifteen days thereafter.[71] Subsequently, the issue of site inspections was not raised on a macro level until almost six months later.[72]

c. Lack of Answers and Notices of Appearance – CMO No. 4

As a consequence of the original misjoinder of the plaintiffs, one problem that quickly surfaced in many cases was the absence of answers. By April 24, 2014, the Committee identified over 449 cases that were pending for some time and without an answer.[73] In some instances, answers were filed in those cases, but not in the individual actions following severance and re-filing. Similarly, in many cases, no attorney filed a notice of appearance on behalf of the defendant. Without answers, CMO No. 1's automatic discovery requirements would not trigger, which seriously undermined the expeditious resolution of these cases. Thus, the Committee issued CMO No. 4 and set deadlines for the defendants' counsel to file notices of appearance and answers.

d. Recurring Discovery Deficiencies – CMO Nos. 5 & 6

Following initial conferences on May 1, 2014, in nine different *Flood* cases, Magistrate Judge Pollak identified several recurring discovery deficiencies that existed despite the clear requirements of CMO No. 1.[74] For example, plaintiffs had failed to produce "[a]ll doc-

69. CMO No. 3, *supra* note 42, at 10 (emphasis added); Court Requested List of Questions Submitted by Liaison Counsel for the NFIP Cases, *In re* Hurricane Sandy Cases (E.D.N.Y. Mar. 25, 2014), ECF No. 304, at 2.

70. CMO No. 3, *supra* note 42, at 10.

71. *Id.* at 10–11.

72. Throughout the discovery period, as the Committee was conferencing individual cases, site inspection issues were raised by defense counsel with respect to individual properties. In those cases where an additional site inspection was deemed warranted, it was ordered.

73. Case Management Order No. 4, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Apr. 24, 2014), ECF No. 326 ("CMO No. 4").

74. Case Management Order No. 5, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. May 2, 2014), ECF No. 337 at 1 ("CMO No. 5").

uments supporting or evidencing the claimed loss", including receipts for repairs and otherwise "all documents relied upon by plaintiff as satisfying Proof of Loss requirements and documentation required by SFIP 44 C.F.R. Pt. 61, App.A(1), Art. VII, J(3), (4)."[75] Accordingly, on May 2, 2014, the Sandy Committee ordered counsel for all defendants to provide the Court with a list of commonly occurring discovery deficiencies they had identified and believed would prevent meaningful mediations or settlement conferences from being conducted, along with a list of docket numbers of the cases in which each such deficiency occurred.[76] The Sandy Committee also ordered that to the extent that plaintiffs were aware of any of these identified deficiencies, "they should take the necessary steps to immediately remedy such deficiencies."[77]

Subsequent to the receipt of submissions from twenty-three defendants, the Sandy Committee identified twenty representative cases where discovery deficiencies were present and ordered the parties to appear at an in-person conference on May 22, 2014, to address these deficiencies and discuss how to remedy them.[78] After extensive colloquy with counsel, the parties were ordered to meet and confer on each such problematic case by June 4, 2014, in an effort to resolve the deficiencies, and by June 13, 2014, to provide a list to the Court of any cases in which unresolved deficiencies would prevent referrals to mediation, arbitration or settlement conference.[79]

e. Renewal of Request for Site Inspections and Non-Party Subpoenas—CMO No. 10

On September 9, 2014, the NFIP defendants again sought an extended stay of CMO No. 1's mandatory alternative dispute resolution procedures to conduct site inspections in all *Flood* cases. NFIP Liaison Counsel contended that "new written guidance from FEMA" required them to certify that: (1) an adjuster had verified the damages; (2) the damages were repaired; and (3) whether the amount of any additional claims was justified in light of the documentation presented showing the repairs.[80] The defendants insisted that the "only way" they could obtain this information was to perform a "new site inspec-

75. CMO No. 1, supra note 3, at 7–8; *see also* Transcript of Civil Cause for Initial Conference Before the Honorable Cheryl L. Pollak, Bassetti v. Allstate Ins. Co., 13-CV-6648 (ERK) (E.D.N.Y. May 1, 2014), ECF No. 66 ("Tr. 5/1/14 Conf.").

76. *Id.*

77. *Id.*

78. Case Management Order No. 6, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. May 19, 2014), ECF No. 380 at 3 ("CMO No. 6").

79. *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. May 22, 2014), ECF No. 472 at 66.

80. Report by Defense Liaison Counsel for the NFIP Cases Concerning: Impediments to Settlement, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Sept. 9, 2014), ECF No. 509 at 1–2.

tion" in every case.[81] The defendants also asked that prior to proceeding to mediation, the mediators prepare a "pre-mediation checklist" that would verify the responses to these three questions and to make it clear that mediation could not occur in the absence of all the necessary documentation. Specifically, the defendants noted that, contrary to the explicit requirements of CMO Nos. 1 and 8, many plaintiffs were arriving at mediation without adequate proof of repairs with information that the defendants had not previously seen, or both.

In addition, faced with many plaintiffs' continued inability to produce documents evidencing damages and repairs,[82] several WYO carriers issued non-party subpoenas to Canopy Claims and SE-2 Engineering seeking all documents in their files relating to certain properties. The plaintiffs objected because the sheer number of files in the possession of these two entities, which had conducted much of the estimation and engineering analysis for large numbers of plaintiffs, would impede the progress of mediation. The defendants explained that they believed these non-parties possessed documents relating to repair costs that plaintiffs had not provided pursuant to CMO Nos. 1 and 8.

Under these circumstances, the Sandy Committee granted the WYO Carriers' request to conduct new site inspections provided they paid all costs associated with the new inspections, they conducted the inspections and provided a report of the inspection at least one week prior to any scheduled mediation, and their failure to conduct a new inspection prior to the scheduled date for mediation would not be a valid excuse for not proceeding with the mediation.[83] The Sandy Committee also prohibited the defendants from issuing subpoenas to Canopy Claims or SE2 Engineering unless they first demonstrated why, in each case, they believed a subpoena was necessary in light of the plaintiff's production or lack of production of documents pursuant to CMO Nos. 1 and 8, including why they believed that either Canopy Claims or SE2 Engineering was actually in possession of relevant materials that had not already been produced.[84] The Sandy Committee would also allow the plaintiffs an opportunity to respond, but the

81. *Id.* at 2–4.

82. Plaintiffs faced a number of difficulties in providing the information required by Case Management Order No. 1. Many had consulted with a contractor or subcontractor in order to get an estimate of the costs of repairs to their homes. Often they had failed to retain the invoice showing the cost estimate, or more often they never received a written invoice at all; the contractors were so busy moving from one job to the next that payment was often in cash and no invoice was ever provided. Even when there were invoices, defendants complained that the invoices were insufficient because they simply indicated the total cost of the job without specifying the materials needed or labor expended, which the defendants believed that FEMA required.

83. Case Management Order No. 10, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Sept. 26, 2014), ECF No. 552 at 4 ("CMO No. 10").

84. *Id.* at 2.

plaintiffs' counsel were urged to make an effort to obtain all repair records in the files of any non-party adjusters or engineers so as to eliminate the need for subpoenas.[85]

IV. SANDY-DEDICATED ADR PROGRAM

Perhaps the most critical part of the EDNY's system for managing Sandy cases was the requirement of participation in ADR. Under CMO No.1, within fourteen days of the exchange of discovery, the parties must submit to either court-annexed or private arbitration or mediation, or a settlement conference with a magistrate judge.[86] Mandatory ADR proved to be the most effective mechanism through which the EDNY quickly and efficiently resolved Sandy cases.

A. *Development of Hurricane Sandy ADR Program*

Since 1992, the EDNY has maintained a preeminent alternative dispute resolution program overseen by Magistrate Judge Robert M. Levy, EDNY Alternative Dispute Resolution Oversight Judge, and is managed by the Court's ADR Administrator.[87] Local Rule 83.8, which governs the EDNY mediation program, authorizes court-annexed mediation services at a reduced rate of $600 for the first four hours of mediation and $250 for each hour thereafter.[88] The parties are to split the fee. Local Rule 83.7, which governs the EDNY arbitration program, permits no fee arbitration services and affords counsel the opportunity to request trial de novo upon issuance of the arbitration award.[89] The arbitration program is compulsory for cases that do not certify on the civil case cover sheet that damages exceed $150,000. Referrals to mediation and arbitration include civil cases such as commercial and contract matters, insurance, employment, labor, tort, civil rights, and intellectual property matters. The ADR Department maintains a list of mediators and arbitrators, with varying areas of expertise, who are appointed to serve on the panels for a three-year term. Mediators and arbitrators must apply to the panel and receive a recommendation from the Court's ADR Advisory Council. EDNY Local

85. Another request made by defendants was for the itemization of prior insurance payments and what the payments was used for. To the extent that defendants sought information as to whether monies received from a prior storm was used to repair the home before Sandy, the plaintiffs were directed to provide information as to repairs made or not paid prior to Sandy. However, the Committee declined to require plaintiffs to indicate if insurance monies were used for repairs or for other purposes, such as food and alternative housing.

86. CMO No. 1, *supra* note 3, at 10, Part V. Federal courts are authorized to order attorneys and parties to appear at alternative dispute resolution proceedings, including mediations, arbitrations and settlement conferences. *See, e.g.*, FED. R. CIV. P. 16(a)(1), (a)(5), (c)(1); 28 U.S.C. § 473(b)(5), (b)(6) (2012).

87. 28 U.S.C. § 652 (requiring district courts to establish ADR programs).

88. Local Rule 83.8.

89. Local Rule 83.7.

Rules permit attorneys to select their mediator or arbitrator from the Court's panel or elect to hire a private neutral. The ADR Department also maintains a Mediation Advocacy Program ("MAP"), which connects pro se litigants in employment discrimination matters with limited scope pro bono representation and pro bono mediation.

The Sandy Mediation Program was developed "on the fly," in response to the tremendous influx of litigation relating to Hurricane Sandy. The Program was a success and maintained a high settlement rate, however, administering the Program was instructive in many ways for the Court. This first section will describe how the EDNY ADR Department developed and administered the Program, the second section will focus on lessons learned.

To implement the Sandy Mediation Program, Magistrate Judge Levy and ADR Administrator Gerald Lepp recruited additional neutrals to the existing EDNY panel, conducted a Hurricane Sandy Mediation Training, and researched existing models of post-disaster court-annexed ADR programs.

In recruiting neutrals, the Sandy Panel drew attorneys from the Court's mediation and arbitration panels, the private bar, law schools, and bar associations. Interested attorneys submitted applications to the Court for review by the EDNY ADR Department.[90] Judges Levy and Lepp admitted ninety-six mediators and fifty-one arbitrators to the Court's Sandy Panel. Upon admission to the Sandy Panel, neutrals attended a mandatory full-day training program offered by the Court.

Judge Levy appointed EDNY Sandy Mediation Panel members Simeon H. Baum and Peter H. Woodin to develop the training curriculum.[91] Baum and Woodin worked closely with the Liaison Counsel to recruit presenters and ensure the training content was balanced.[92] In an effort to prepare for the training, the Sandy Committee ordered the parties to identify twenty cases representative of the issues that would commonly appear in the course of mediation. Then the Sandy Committee members and Judge Levy would each attempt to settle five cases in an effort to determine what the pitfalls to mediation might be.[93] Judge Levy also contacted other federal court programs

90. United States District Court Eastern District of New York ADR Neutral Application for Sandy Cases, https://img.nyed.uscourts.gov/files/forms/adrapplication-sandycases.pdf [https://perma.cc/28DT-EDKV] (last visited Feb. 16, 2019).

91. *Storm Sandy Mediation Training Materials*, U.S. DIST. COURT E.D.N.Y., https://img.nyed.uscourts.gov/files/forms/Sandy_Program_Book_WEB.pdf [https://perma.cc/2247-5FVR] (last visited Feb. 16, 2019).

92. Presenters at the Mediation Training included: Plaintiffs' Flood Liaison Counsel Tracy R. Bryan, John Houtaling, and Jeffrey Major, Defendants' Flood Liaison Counsel Bill Trace, Plaintiffs' Wind Liaison Counsel Javier Delgado, Rocco Calaci (Plaintiff's Meteorologist), Clay Morrison, and William F. Merlin, Defendants' Wind Liaison Counsel Jarrod T. Greisman, Andy Johnson (Defendant's Meteorologist), and Seth A. Schneekle, and Gerald P. Dwyer Jr.

93. *See* CMO No. 3, *supra* note 44, at 11 (requiring Liaison Counsel to identify 20 exemplary cases in which the Court would hold settlement conferences).

that administered a high volume of post-disaster claims to learn about the various models that were used by other courts.

The Sandy mediation training took place on May 22, 2014, and included presentations by Chief Judge Carol Amon, Magistrate Judge Levy, and members of the Sandy Committee. I. Ross Dickman, Meteorologist-In-Charge for the National Weather Service in New York, presented a neutral overview of the storm, and Ramoncito J. DeBorja, FEMA's Deputy Associate Chief Counsel, presented FEMA's view of the legal compensation scheme under the NFIP. The plaintiff and the defense Liaison Counsel led the latter half of the training, which included presentations from their respective expert meteorologists and an extensive discussion of the legal issues involved in litigating flood and wind claims.

Shortly after the completion of the training, the Court asked all counsel to provide the Sandy Committee the following lists: (1) cases ready for mediation; (2) cases where discovery remains to be completed; and (3) cases that due to intractable legal issues, would require court intervention. The plaintiffs initially sought to have a representative of FEMA present at every mediation in order to expedite settlement. Although this was a sensible proposal because FEMA was required to approve every settlement of NFIP claims, it was a nonstarter because FEMA was severely understaffed with too few FEMA attorneys to attend every mediation without substantial delays. The goal of the Sandy Committee was to have multiple mediations proceeding at once. In an effort to compromise, the Sandy Committee indicated that if a settlement was reached, the case would be marked settled but subject to FEMA's approval.

B. *Committee Oversight of the Mediation Program*

In the months that followed the May 2014 Sandy Mediation training program, the Sandy Committee members monitored the progress of Sandy cases, held numerous conferences to ensure that the parties complied with their obligations under the CMOs, and when appropriate referred cases to mediation. As with many other aspects of the Sandy litigation, the implementation of the Sandy Mediation Program was not without glitches. In October 2014, the Sandy Committee was informed in connection with the request for a trial schedule in *Raimey v. Wright National Flood Ins. Co.*,[94] that some 117 cases were in jeopardy of not being mediated because of the defendants' failure to disclose documents pursuant to CMO Nos. 1 and 3. The Sandy Committee promptly issued CMO No. 11, which required the parties to identify failed mediations, identify the documents that were not produced that led to the failed mediations, and to request a conference with the assigned Sandy Committee Member within fourteen

94. *Infra* Point E.

days.[95] In November 2014, the parties expressed difficulties in selecting available mediators.[96] As a result, and in light of the parties' selection of "only a small number of the mediators from the panel of Hurricane Sandy mediators," the Sandy Committee instituted a new process whereby the Court would select an available mediator should the parties fail to do so.[97] By January 2015, while 25% of the Sandy cases were settled and 600 more already scheduled for mediation, the Sandy Committee decided further measures were warranted by the parties' previous difficulties in mediating cases in Louisiana. Thus, the Sandy Committee prohibited the parties from using mediators other than those certified in the Sandy Mediation Program and conducting mediations without the physical presence of the plaintiffs.[98] Notwithstanding these problems, the Sandy Committee was able to oversee the parties' efforts and guide the multitude of Sandy cases into mediations.

C. *Mandated Mediation Proves Effective*

Parties filed a large number of Sandy cases in 2012 and early 2014, prior to the establishment of the formal Sandy Mediation Program. This is likely one reason that only half of the Sandy cases actively participated in the Sandy Mediation Program.[99] In designing the Sandy Mediation Program, the Sandy Committee anticipated that some cases would elect to arbitrate Sandy claims, however, only seven Sandy cases entered the Court's arbitration program.

The ADR Administrator shepherded cases through the Sandy Mediation Program, ensuring that counsel abided by the dates set forth in the mediation referral orders.[100] On average, cases were referred to the Sandy Mediation Program seventy-eight days after they were filed, and mediation sessions took place one hundred and seventeen days after they were referred to mediation. Most cases were closed by the Court within fifty days of completion of the mediation session, and the average life of a mediated Sandy case was three hundred and eighty days.

Of the 658 cases that actively participated in the Sandy Mediation Program, a mediation session occurred in 479 cases. The parties re-

95. CMO No. 11, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Oct. 14, 2014), ECF No. 566 ("CMO No. 11").

96. CMO No. 12, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Nov. 20, 2014), ECF No. 672 ("CMO No. 12").

97. *Id.*

98. CMO No. 13, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Dec. 2, 2014), ECF No. 832; CMO No. 14, *In re* Hurricane Sandy Cases, 14-MC-41 (CLP)(GRB)(RER) (E.D.N.Y. Jan. 7, 2015), ECF No. 925.

99. Active participation was signified by the parties selecting a mediator and scheduling a mediation session.

100. EDNY mediation referral orders include a date by which (1) the parties must select a mediator, and (2) complete the mediation.

solved 27% of the cases that actively participated in the Sandy Mediation Program prior to a scheduled mediation session. A simple referral into the mediation program thus proved to be an effective way to prompt the parties to settle their cases.

Overall, the settlement rate for mediated Sandy cases was 66%. The Sandy Mediation Program settlement rate improved during the Program's lifetime. During 2014, the settlement rate was 65%. The settlement rate increased to 70% in 2015, and to 75% in 2016. One reason for the increased settlement rate over time is that the parties became accustomed to the Sandy Mediation Program and were better able to anticipate the program requirements and effectively prepare their clients for mediation.

D. *Settlement Conferences and Private Mediations*

Although the Sandy Mediation Committee expended considerable effort in creating and implementing the Sandy Mediation Program, and although the parties largely bought into the Program, it was not by any means the only way the EDNY successfully resolved the Sandy cases. Throughout the life of the Sandy litigation, the parties settled more than half of the cases during settlement conferences with the Sandy Mediation Committee members or through private mediations using mediators from outside the Sandy Mediation Program.

From the outset of the Sandy litigation the Court contemplated that the Sandy Committee Members would hold settlement conferences.[101] Whether as a means to ascertain the dynamics of the settlement of Sandy cases to aide in the development of the Sandy Mediation Program itself,[102] or as a means to provide the parties with a no-cost alternative to the Sandy Mediation Program,[103] the Sandy Committee held settlement conferences in more than 200 cases. Often held *en masse*, with multiple settlement conferences scheduled seriatim for the same day, these conferences proved highly effective at resolving Sandy cases. Those cases that did not settle at the scheduled conferences usually settled shortly thereafter, following the exchange of additional information requested by the parties.

Recognizing the benefit of resolving cases amicably through settlement and seizing upon cost savings by conducting mediations *en masse*, several insurers hired private mediators to resolve their cases, which largely proved successful. In addition, WYO Carrier Standard Fire Insurance Company created its own mediation program utilizing specifically-trained mediators from FEMA's alternative dispute resolution office, who upon agreement as to scope and pricing of claims

101. *See* CMO No. 1, *supra* note 3, at 10 ("Mediation may, at the discretion of the Court, be conducted by a magistrate judge rather than a mediator.").

102. *See* CMO No. 3, *supra* note 42, at 11; CMO No. 1 at 10.

103. CMO No. 1, *supra* note 3, at 10.

could then submit the necessary waiver requests to FEMA's general counsel's office for expedited approval.[104]

E. *Allegations of Fraudulent Engineering Reports Threaten, But Then Hasten Sandy Mediations*

In late-September 2014, while the Sandy Mediation Program was in full swing, the flood Liaison Counsel presented the Sandy Committee with allegations of fraud by one of the WYO Carriers. At the time, these allegations appeared to threaten the speedy resolution of hundreds of Sandy cases. Over time, however, they proved to hasten the resolution of the Sandy cases, and brought about larger efforts to rectify improprieties in the manner in which all Sandy claims, even those not filed in the EDNY, were resolved.

In *Raimey v. Wright National Flood Ins. Co.*,[105] the plaintiffs, Deborah Raimey and her husband, alleged that their home in Long Beach, covered by an SFIP issued by WYO Carrier Wright National Flood Insurance Company ("Wright"), were damaged and rendered uninhabitable by Sandy-related flooding.[106] Following an unsuccessful attempt to mediate under the Sandy Mediation Program, the plaintiffs sought a schedule for full discovery and a trial.[107] In seeking that schedule, the Raimeys argued that Wright knowingly failed to produce its original December 9, 2012, engineering report in clear violation of CMO No. 1.[108] The engineering report was written by George Hernemar of U.S. Forensic, the licensed engineer who had inspected the Raimey's home on Wright's behalf, and who concluded that the extensive damage to the foundation of their home was caused by flooding:

> The physical evidence observed at the property indicated that the subject building was structural [sic] damaged by hydrodynamic forces associated with the flood event of October 29, 2012. The hydrodynamic forces appear to have caused the foundation walls around the south-west corner of the building to collapse.[109]

---

104. Transcript of Civil Cause for Telephone Conference before the Honorable Ramon E. Reyes, Jr., *supra* note 48, at 3-7. Standard Fire also successfully resolved a large number of its cases after private settlement discussions directly between the public and independent adjusters for each side.

105. 76 F. Supp. 3d 452 (E.D.N.Y. 2014).

106. *In re* Hurricane Sandy Cases, 303 F.R.D. 17, 20 (E.D.N.Y. Nov. 7, 2014), *aff'd*, *Raimey*, 76 F. Supp. 3d 452.

107. *See* Plaintiff's Motion to Set Discovery Schedule and Set for Trial, *In re* Hurricane Sandy Cases, 2014 WL 12771984 (E.D.N.Y. Sept. 26, 2014) (No. 14-MC-41), ECF No. 551.

108. CMO No. 1 required the insurers to produce "any documentation relating to an assessment of the claimed loss, including all loss reports and damage assessments, adjuster's reports, *engineering reports*," "including draft reports." CMO No. 1, *supra* note 3, at Points IV.B.2.b and IV.C.

109. *Id. See also Raimey*, 76 F. Supp. 3d at 460, n.4; *In re* Hurricane Sandy Cases, 303 F.R.D. at 26-29. The Raimeys became aware of the December 9, 2012, report

Instead, Wright produced a nearly identical report dated January 7, 2013, purportedly authored by Hernemar and containing the same identification number as Hernemar's December 9 report, but which came to the exact opposite conclusion:

> The physical evidence observed at the property indicated that the subject building was *not* structurally damaged by hydrodynamic forces, hydrostatic forces, scour or erosion of the supporting soils, or buoyancy forces of the floodwaters associated with the subject flood event.[110]

According to the Raimeys, however, Hernemar told them that he did not author a report denying that the damage to their home was caused by Hurricane Sandy.[111] The inference created by the failure to produce the original December 9 Hernemar report was that at some point in time between the preparation of that report and the production of the January 7 report, either United States Forensic, Wright, or someone else fraudulently altered the conclusion to the plaintiffs' detriment. Wright challenged the Raimeys' contentions, disclaimed possession or knowledge of the original Hernemar report, and moreover accused the Raimeys of violating CMO No. 1 by not disclosing that report prior to the unsuccessful mediation.[112]

Rather than schedule *Raimey* for full discovery and a trial, Magistrate Judge Gary R. Brown[113] scheduled an evidentiary hearing for October 16, 2014, to receive "testimony and documentary evidence concerning the allegations relating to U.S. Forensic Report No. 12.22.1304 and the various incarnations of that report. . . ."[114] Following the hearing, Judge Brown issued a scathing memorandum and order in which he held not only that Wright violated CMO No. 1's disclosure obligations by failing to produce the original Hernemar report,[115] but also that the January 7 report was "baseless," and moreover, that this problem might effect hundreds of Sandy flood cases:

---

when Hernemar permitted them to view it on his computer. While viewing the report, Ms. Raimey took a cell phone picture of title page and causation paragraph. At that time Hernemar also informed the Raimeys that he did not author any report that disclaimed that the damage to their home was caused by flooding. Plaintiff's Motion to Set Discovery Schedule and Set for Trial, *supra* note 107, at 3.

110. *Id.* (emphasis added).

111. *Id.*

112. Defendants' Memorandum in Opposition to: (1) Plaintiffs' Motion to Set Discovery Schedule and Set for Trial, with (2) Renewed Request for CMO Compliance, *In re* Hurricane Sandy Cases, 2014 WL 12771984 (E.D.N.Y. Sept. 30, 2014) (No. 14-MC-41), ECF No. 555.

113. Judge Brown was assigned to *Raimey* as the settlement judge.

114. Order Setting Evidentiary Hearing and Deferring Ruling on Motion to Set Discovery Schedule and Set for Trial, Raimey v. Wright Nat'l Flood Ins., No. 14-CV-461 (E.D.N.Y. Oct. 1, 2014).

115. *In re* Hurricane Sandy Cases, 303 F.R.D. 17, 29 (E.D.N.Y. Nov. 7, 2014), *aff'd*, *Raimey*, 76 F. Supp. 3d 452.

> U.S. Forensic, an engineering firm retained by defendant Wright National Flood Insurance Company ("Wright") to examine a storm-battered house in Long Beach, New York, unfairly thwarted reasoned consideration of plaintiffs' claim through the issuance of a baseless report. The engineer sent by U.S. Forensic opined in a written report that the home at issue had been damaged beyond repair by Hurricane Sandy. A second engineer, who did little more than review the photographs taken by the inspecting engineer, secretly rewrote the report, reversing its conclusion to indicate that the house had not been damaged by the storm, and attributing—without sufficient evidence—defects in the home to long-term deterioration. This process, euphemistically dubbed a "peer review" by U.S. Forensic, was concealed by design from the homeowners, remained uncovered during the Court-assisted discovery process and came to light through near happenstance. In a misguided attempt to defend these flawed practices, defendant has elicited evidence that this "peer review" process may have affected hundreds of Hurricane Sandy flood insurance claims—and possibly more.[116]

As a result, in addition to issuing significant remedial sanctions against Wright pursuant to Rule 37 of the Federal Rules of Civil Procedure,[117] Judge Brown directed defendants in all Hurricane Sandy cases within thirty days to provide plaintiffs with copies of all reports described in CMO No. 1 that had not previously been produced, including:

> *any drafts, redlines, markups, reports, notes, measurements, photographs and written communications related thereto* – prepared, collected or taken by any engineer, adjustor or other agent or contractor affiliated with any defendant, relating to the properties and damage at issue in each and every case, *whether such documents are in the possession of defendant or any third party*.[118]

Judge Brown's decision in *Raimey* was immediately met with widespread disapproval from nearly all Sandy defendants. Wright appealed the decision to United States District Judge Joseph F. Bianco pursuant to Rule 72 of the Federal Rules of Civil Procedure.[119] In addition, FEMA and the flood and wind insurers filed nearly 100 motions seeking reconsideration of Judge Brown's order that they produce the required documents, arguing, *inter alia*, that the order imposed new discovery obligations that were beyond the scope of CMO No. 1 and violated their due process rights as they were not parties to the

116. *Id.* at 19.

117. Judge Brown prohibited Wright from opposing plaintiffs' claims or supporting its defenses with expert testimony other than from Hernemar, or by reliance upon expert reports other than those already produced. *Id.* at 31. Judge Brown also required Wright's counsel to reimburse plaintiffs' counsel for all reasonable costs associated with motion, the hearing and all related briefing, including attorneys' fees, travel and transcription costs. *Id.* at 32.

118. *Id.* at 32 (emphasis in original).

119. *See* Appeal of Magistrate Judge Decision, *Raimey*, No. 14-CV-461, ECF No. 91.

Raimey evidentiary hearing.[120] Moreover, many of the insurers cancelled previously scheduled Sandy mediations, thereby threatening the speedy resolution of hundreds of cases.[121]

The Sandy Committee quickly disposed of the insurers' efforts to delay pending Sandy mediations by issuing CMO No. 12, which ordered that the mediations go forward even during the insurers' period to supplement their production of damage reports:

> The Committee has been advised that parties have been cancelling previously-scheduled mediations in anticipation of the production due by December 12. In light of all circumstances here, such further delays are unwarranted and unnecessary. Because it takes time to finalize resolutions reached at mediation (including, in many cases, obtaining FEMA waivers), *the parties are directed to proceed with any scheduled mediations*, aware that, should the production directed in *Raimey* affect the resolution reached, the parties will be free to renegotiate the settlement or withdraw prior finalization. Of course, nothing prevents defendants from accelerating the production in those cases in which mediation has been scheduled, thereby avoiding any further concerns.[122]

In so doing, the Sandy Committee agreed with Judge Brown's finding that the materials required to be produced "clearly fall within the ambit of CMO 1 and 3."[123] Subsequently, the Sandy Committee also rejected the plethora of motions for reconsideration, noting expressly that the production of documents ordered by Judge Brown had clearly been required by CMO Nos. 1 and 3, and therefore, the defendants' due process and other arguments were at best "meritless."[124] District Judge Bianco also quickly affirmed Judge Brown's decision in *Raimey* in its entirety, finding, *inter alia*, that CMO No. 1 clearly required the production of the original Hernemar report, that Wright violated that obligation, and, moreover, that sanctions were justified:

> [I]t is absolutely clear to this Court that the process that led to the modification of the [original Hernemar] report (including the removal of observations that were inconsistent with the new conclusions) was flawed, and the concealment of that initial report and the process that led to the new report (including conduct at the eviden-

120. *E.g.*, Notice of Motion for Reconsideration, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Nov. 21, 2014), ECF No. 679; Memorandum & Order Re: Raimey Reconsideration and Clarification Motions, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Dec. 8, 2014), ECF No. 852.

121. CMO No. 12, *supra* note 96.

122. *Id.* at 2 (emphasis added).

123. *Id.* at n. 1 (quoting Judge Brown's *Raimey* decision).

124. Memorandum & Order Re: Raimey Reconsideration and Clarification Motions, *supra* note 120, at 4. *See also In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Dec. 12, 2014), ECF No. 863 (denying Wright's and *amicus* U.S. Forensic's motions to reconsider).

> tiary hearing) has prejudiced plaintiffs in terms of delay and costs in this litigation, such that the sanctions were warranted.[125]

The revelation of engineering fraud was not limited to *Raimey*. During briefing of the insurers' motions for reconsideration of the *Raimey* production order, the plaintiffs submitted documents which appeared to show that another engineering firm, HiRise Engineering ("HiRise")[126] fraudulently rewrote the reports of the licensed inspecting engineers, which documented extensive damage from Sandy, to reflect an absence of such damage or to suggest preexisting damage.[127] These submissions argued that the inspecting engineer's signature was

125. Raimey v. Wright Nat'l Flood Ins., 76 F. Supp. 3d 452, 455-56 (E.D.N.Y. 2014).

126. Following press reports of the allegations against HiRise in these cases, the New York State Attorney General raided HiRise's premises in February 2015, and Matthew Pappalardo was subsequently indicted on multiple charges of Forgery in the Second Degree, a Class D Felony, and the Unauthorized Practice of Engineering, a Class E Felony. On January 10, 2017, both Pappalardo and HiRise entered pleas of guilty to Criminal Solicitation in the Fifth Degree. Pappalardo was sentenced to 3 years' probation and a $10,000 fine; HiRise was sentenced to pay the costs of litigation in the amount of $225,000, and both were banned from providing services to the NFIP. During the course of the investigation, it became clear that under Pappalardo's direction, numerous Sandy engineering reports were altered at the direction of individuals who had not investigated the properties and were not licensed engineers in New York.

127. *See* Memorandum & Order Re: Raimey Reconsideration and Clarification Motions, *supra* note 120, at 9 (citing ECF Nos. 830, 840 & 841). *See also* Shlyonsky v. Travelers Ins., No. 13-CV-5393 (E.D.N.Y. Dec. 5, 2014). In *Shylonsky*, the plaintiff alleged that as a result of the extensive damage caused to his home by Sandy, he made a claim to his carrier, Travelers, seeking the full policy benefit of $250,000. Complaint at ¶¶ 21-22, *Shylonsky*, No. 13-CV-5393. The claim was assigned to HiRise, a Long Island professional engineering firm, to conduct an engineering analysis of the damage caused by the storm and prepare a report. *Id*. HiRise assigned Harold Weinberg, a New York State licensed professional engineer, who inspected the property, and concluded that flood waters were 100% responsible for causing damage to the foundation. *Id.* ¶ 24. Plaintiffs alleged that Weinberg's original engineering report was significantly altered by Matthew Pappalardo, Project Manager for HiRise, removing Weinberg's findings and observations and adding opposite conclusions, stating that the damage to the home was pre-existing and not Sandy-related. *Id.* ¶ 25. This altered report was the basis upon which Travelers denied the vast majority of the Shlyonskys' claim. *Id.* During discovery, plaintiffs learned that Pappalardo, who was not licensed to practice engineering in New York and had never personally visited the property, never informed Weinberg of the changes made to his report. A subsequent affidavit submitted by Mr. Weinberg indicated that the signature on the final report had been cut from his original report and clumsily pasted into the final version without his authorization. Similar allegations were made in *Dweck*. Amended Complaint, Dweck v. Hartford Ins. of the Midwest, No. 14-CV-6920 (E.D.N.Y. Dec. 3, 2014). Mr. Weinberg, assigned by HiRise to conduct an engineering analysis of the damage to the Dweck's home, prepared a report attributing the damage to Sandy flooding. *Id.* ¶ 22. The initial report was allegedly altered by Pappalardo, and reached the conclusion that the damage was pre-existing and not due to flooding. *Id.* ¶ 23. The *Dweck* Complaint alleged that the altered engineering report was never authorized by Weinberg and that Pappalardo admitted that he "simply lift[ed] Weinberg's signature" from the earlier report and affixed it to the report that was used to deny the Dwecks' claims. *Id.* ¶ 27.

cut and pasted onto the fraudulently-modified reports.[128] The plaintiffs also alleged that there were at least two additional cases of engineering fraud involving U.S. Forensic.[129] Based on these troubling allegations, the Sandy Committee scheduled an evidentiary hearing for four cases in which such fraud allegations were raised, to be held at the Court's Ceremonial Courtroom in Brooklyn on February 19, 2015.[130]

The evidentiary hearing in these four cases never occurred.[131] On February 13, 2015, Bradley J. Kieserman, FEMA's Deputy Associate Administrator for Federal Insurance, informed the Sandy Committee that:

> *FEMA leadership is deeply troubled by recent allegations that FEMA and the Write Your Own companies may have relied on questionable and subpar engineering reports when adjusting claims*. . . . While [FEMA is] unable to speak to the veracity of the allegations regarding the engineering reports, [FEMA does] *know our policyholders now question the integrity of the NFIP claims process. To that end, FEMA* is *committed to establishing a process to resolve all Hurricane Sandy insurance claims where there is evidence of questionable engineering practices and [is] committed to ensuring NFIP business practices going forward are fair and transparent*. Consequently, [FEMA] will be reaching out to plaintiffs' and defendants' liaison counsel and Write Your Own Partners to convene a meeting with *the objective of resolving all litigation stemming from questionable engineering reports, including Class Action and RICO Claims*. At the same time, [FEMA is] initiating a thorough and multi-disciplinary assess-

128. Memorandum & Order Re: Raimey Reconsideration and Clarification Motions, *supra* note 120, at 9.

129. *Id*. Steve Mostyn and members of the Mostyn Law Firm, in addition to handling individual Sandy actions, including *Raimey*, filed three Civil RICO class action lawsuits related to the engineering fraud. *See* Ramey v. U.S. Forensic, 14-CV-6861 (E.D.N.Y. Nov. 21, 2014); *Dweck*, No. 14-CV-6920; Shlyonsky v. HiRise Eng'g PC, No. 14-CV-7136 (E.D.N.Y. Dec. 5, 2014). Mostyn claimed that out of 7,000 reports prepared by U.S. Forensic, his firm had reviewed 250 of them and determined that 248 reports on different properties were "identical." Unfortunately, Mostyn, who was instrumental in the resolution of hundreds of Sandy cases, passed away unexpectedly on November 15, 2017.

130. *See* Order, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Feb. 5, 2015), ECF No. 969. The hearing was scheduled and rescheduled several times, and cases subject to the hearing were added and retracted. *Id.* at 1-2; *In re* Hurricane Sandy Cases, No. 14-MC-41, ECF Nos. 927, 941, 953, 1001; Electronic Order, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Jan. 26, 2015).

131. Magistrate Judge Pollak did hold an evidentiary hearing on May 20 and 21 concerning alleged engineering fraud and discovery failures in two cases. Transcript, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. May 20, 2015), ECF No. 1094; Transcript, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. May 21, 2015), ECF No. 1095; *see also* Transcript of Telephone Conference, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. June 15, 2015), ECF No. 1133. Neither of these cases were raised previously as being problematic, and Judge Pollak never issued a decision on these issues as they were resolved amicably after the hearing. Minute Entry, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Aug. 7, 2015).

> ment of FEMA's delivery and oversight of the Write Your Own Program and adjustment processes, including hiring and relying upon engineering reports to resolve flood insurance claims.[132]

In addition, on February 17, 2014, two days before the evidentiary hearing was scheduled to proceed, the parties in *Shlyonsky v. Travelers Insurance Co.*, one of the cases subject to the evidentiary hearing, appeared for a settlement conference before Magistrate Judge Reyes, accompanied by Mr. Kaiserman and other FEMA representatives.[133] During the conference, the parties informed Judge Reyes that they were negotiating a process to resolve *all* pending Hurricane Sandy cases involving possible engineering fraud, including such cases that were not in litigation or that had already been paid in the normal claims process. In light of this major development and at the parties' request, the Sandy Committee adjourned the evidentiary hearing *sine die* "to allow the parties to continue conducting meaningful settlement discussions."[134]

In the months that followed, the Sandy Committee continued to monitor the parties' efforts to resolve all Sandy cases, including those involving potential engineering fraud, holding periodic in-person and telephone status conferences. The parties' efforts proved quite effective as within six weeks from the scheduling of the evidentiary hearing they had reached settlements in principle in over 400 flood cases and requested that those cases be administratively closed pending final approval from FEMA.[135] Nevertheless there were setbacks. Although cases continued to settle, the Sandy Committee had to resolve a few systemic issues that threatened to derail continued settlements across the board.[136] Following hearings, the Sandy Committee resolved each of these issues, and the settlements continued.[137]

---

132. Letter, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Feb. 13, 2015), ECF No. 985-1, at 1 (emphasis added).

133. No. 13-CV-5393 (E.D.N.Y. Dec. 5, 2014), ECF No. 95; Scheduling Order, No. 13-CV-5393 (E.D.N.Y. Feb. 13, 2015); Minute Entry, No. 13-CV-5393 (E.D.N.Y. Feb. 17, 2015).

134. Electronic Scheduling Order, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Feb. 17, 2015).

135. Plaintiffs' Motion to Administratively Close Tentatively Settled Cases, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Mar. 2, 2015), ECF No. 1019; Letter, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Mar. 11, 2015), ECF No. 1026; Letter, *In re* Hurricane Sandy Cases, No. 14-MC-41 (E.D.N.Y. Mar. 31, 2015), ECF No. 1036.

136. *See In re* Hurricane Sandy Cases, No. 14-MC-4, ECF Nos. 1007, 1008, 1021, 1029, 1030, 1034 (concerning hearing on certain WYO Carriers' efforts to extract a release of criminal liability from plaintiffs in connection with settlement of Sandy cases) & ECF Nos. 1044, 1045, 1052-56, 1063 (concerning hearing on (1) FEMA's reneging on promise of payment of attorney's fees for settlement of claims involving engineering fraud, and (2) subrogation of proposed settlement awards to other government entities).

137. *Id*.

Ultimately, the affirmance of Judge Brown's fraud findings in *Raimey* on December 31, 2014, had a huge impact on the pace with which Sandy cases were being resolved. Within three months of that affirmance, over 400 cases were resolved, and many more were resolved shortly thereafter. It cannot be understated how much the *Raimey* decision impacted the Sandy litigation as a whole. But for *Raimey*, the EDNY might still be inundated with Sandy cases.

F. *ADR Department Lessons Learned*

Once the Sandy Mediation Program was complete, the ADR Department identified the following ways that it could improve the administration of dispute resolution: (1) encourage diverse mediator selection; (2) ensure party participation; (3) conduct subject-matter specific mediation training; (4) develop mediation advocacy resources; (5) implement quality assurance mechanisms; (6) collect real-time data; and (7) make referrals to mediation mandatory.

During the administration of the Sandy Program, a very small number of EDNY Sandy mediators oversaw the majority of the cases.[138] The Sandy Committee observed that limited mediator selection caused scheduling delays and slowed case administration.[139] To diversify the mediator selection, the Sandy Committee altered the selection procedure and required that parties select mediators who were available during the timeframe set forth in the mediation referral order.[140] To implement this change, the ADR Department developed a listserv where counsel could post their case caption and mediation schedule, and Sandy Panel mediators responded directly to the requests. Under the new procedure, failure to select a mediator in the given timeframe would result in the Court appointing a mediator instead.[141] Adding a consequence for failure to make a timely selection encouraged diverse mediator selection and pushed cases through the Program more quickly and efficiently.

Another way to diversify mediator selection is to connect newly trained mediators with experienced mentors, and to increase the number of observation and co-mediation opportunities for newer mediators. In offering additional mentoring, newer mediators will have the opportunity to meet and work with the attorneys that partici-

138. Only thirteen EDNY mediators were selected in ten or more cases. The most popular mediator was selected one hundred and four times, the second most popular mediator was selected ninety-eight times. Four Sandy mediators were selected in forty-five percent of the cases that were referred to mediation.

139. CMO No. 12, *supra* note 96, at 1.

140. When an Eastern District of New York case is referred into the court's mediation program, the referring judge sets a date by which the mediator must be selected and a date by which the mediation must be completed. E.D.N.Y. Local Rule 83.8(b)(1)(A).

141. *See* CMO No. 12, *supra* note 96, at 1.

pate in mediator selection, increasing the likelihood of a newer mediator's selection.[142]

Lack of party participation is another issue that arose while administering the Program. Some attorneys elected to conduct the mediations in Louisiana where some of the most active plaintiff law firms were located, but few, if any, of the plaintiffs. In response, the Sandy Committee issued CMO No. 13 which directed plaintiffs to attend mediations and participate actively in the mediation session. The Sandy Committee also prohibited the scheduling of mediations in Louisiana, reasoning that since the actual plaintiffs in these matters were located in the EDNY, the mediations should be located in the EDNY too. In retrospect, requiring the mediations take place in the EDNY at the outset of the Program would have been the best practice.

Conducting a subject-matter specific mediator training was integral to the Sandy Mediation Program's success. It increased attorney and judicial confidence in the program and raised the quality of the mediation panel. The EDNY has adopted a similar approach to develop training courses specific to the Fair Labor Standards Act and the Court's Mediation Advocacy Program ("MAP"), the latter of which has increased referrals to that program. Future post-disaster mediator trainings, however, should include a discussion of the psychological impact of the disaster on the litigants and the mediation process.[143] Understanding the impact of trauma on the negotiation process is helpful when assisting those affected by natural disaster reach a negotiated resolution to their case.[144]

When designing a post-disaster mediation program, it is important to consider the effect of the program on pro se litigants. Very few pro se litigants filed Sandy cases, however, it would have been best practice to develop a Mediation Advocacy Program to connect pro se litigants with limited scope pro bono counsel for the purpose of mediation. The Court currently maintains a MAP for the benefit of pro se litigants in employment discrimination cases.[145] To maintain this program, the ADR Department conducts an annual mediation advocacy training and maintains a list of attorneys willing to serve as pro bono mediation advocates. This model can be replicated to assist pro se litigants in post-disaster cases, as well as other case categories that often involve pro se parties.

In order to maintain a high level of quality in a mediation program, it is necessary to constantly monitor and assess the mediators and the

142. The ADR Department is currently in the process of developing a more robust mentorship program for newer mediators.

143. Mel Rubin, *Disaster Mediation: Lessons in Conflict Coordination and Collaboration*, 9 CARDOZO J. CONFLICT RESOL. 351, 359 (2008).

144. *Id.* at 359.

145. *Pro Se Mediation Advocacy Program*, U.S. DISTRICT CT. EASTERN DISTRICT OF N.Y., https://www.nyed.uscourts.gov/pro-se-mediation-advocacy-program [https://perma.cc/HN3R-MCZ5] (last visited Feb. 14, 2019).

process. The ADR Department has long requested that counsel fill out and return a questionnaire regarding the mediation experience. Previously, attorneys filled out and returned the survey by fax or by mail. Many surveys were not returned, and the ones that were returned were received weeks or even months after the mediation was completed. After administering the Sandy cases, the EDNY ADR Department recognized the need to update its system for collecting and monitoring feedback. The surveys are now called "Mediation Reports," and a deadline is filed on the docket by which the ADR Department must receive the report.[146] Participants return Mediation Reports electronically where the data is entered into a system and analyzed. The ADR Department also dedicates staff resources towards collecting Mediation Reports, and the number of reports received has increased by more than 400% over the previous reporting year.[147]

The ADR Department also recognized the need to modernize its data collection and case tracking system. Prior to Sandy, the ADR Department relied upon the Court's electronic filing system to generate reports on case outcomes. However, the Court's system was unable to generate the reports necessary to monitor a much larger caseload. The ADR Department has since developed its own database to more easily administer cases and track outcomes. These improvements have helped the ADR Department to accurately report data, expedite case management, and efficiently administer a larger case volume.[148] Anticipating the need to efficiently monitor the mediations and collect feedback is important in the design of any large-scale ADR program.

Chief Judge Amon and the Sandy Committee were innovative to modify the Court's policy and implement a mandatory referral to mediation. CMO No. 1 included the first mandatory referral to mediation in the EDNY's history.[149] The implementation of CMO No. 1 meant a dramatic increase in the ADR Department's caseload.[150] In issuing this order, the Court recognized the mediation process as integral to the management of the Sandy litigation. The Court's support was also apparent through Chief Judge Amon's participation in the mediation

146. *Mediation Report*, U.S. DISTRICT CT. EASTERN DISTRICT OF N.Y., https://img.nyed.uscourts.gov/files/forms/Mediation%20Report.pdf [https://perma.cc/E89Z-A3CD] (last visited Feb. 14, 2019).

147. ROBYN WEINSTEIN & ROBERT M. LEVY, 2016–2017 ALTERNATIVE DISPUTE RESOLUTION REPORT 6 (2017), https://img.nyed.uscourts.gov/files/local_rules/2016-2017_ADR_Annual_Report.pdf [https://perma.cc/SKK5-9B3R].

148. For the 2017-2018 reporting year the ADR Department administered 429 mediation referrals.

149. CMO No. 1 required counsel to submit a "Notice of Consent" to either arbitration or mediation within fourteen days of the exchange of discovery. CMO No. 1, *supra* note 3.

150. Prior to Hurricane Sandy the highest volume of mediation referrals was 249 cases between July 1, 2003 and June 30, 2004.

training and Judge Levy's extensive involvement in developing the program design and training model. The Sandy Committee's constant oversight and Case Management Orders in support of mediation were also essential to the Sandy Mediation Program's success.

The success of the Sandy Mediation Program is further evidenced by the overall settlement rates, which improved during the Program's lifetime. However, another metric of success is the increase in referrals to mediations in other cases after the Sandy Mediation Program ended. It is the authors' hope that in sharing the Court's experience administering the Program that other courts may benefit from the lessons we learned while responding to the influx of cases in the aftermath of Hurricane Sandy.

V. CONCLUSION

The sudden and unprecedented influx of over 1,400 Hurricane Sandy cases presented the judges of the United States District Court for the Eastern District of New York with unique challenges. These challenges required the Court to think "outside the box" and develop a system to quickly and efficiently resolve the cases consistent with the Federal Rules of Civil Procedure, the applicable substantive law, and the rule of law that must be adhered to in all cases filed in federal court. After considering other courts' efforts to deal with mass litigation following weather events and the input of all interested parties, the Court developed a unique system that was innovative but at the same time relied upon time-honored principles of case management in the federal courts. The system proved to be instrumental in resolving all but a small handful of cases in a little over one year from filing.

Several elements of the Court's system to handle the Sandy cases proved crucial in the efficient resolution of those cases. First, the assignment of a magistrate judges committee to develop the system and oversee its implementation helped resolve those cases. Magistrate judges in the Eastern District of New York, and throughout the country, have long presided over and resolved civil proceedings and have developed expertise in doing so. Utilizing that expertise helped structure the effective system and ensure its proper implementation. Second, the solicitation of input from all parties as to the structure of the case management system and the appointment of Liaison Counsel helped in resolving the Sandy cases. By seeking the parties' input as to the structure of the system to which they would be bound, and facilitating their communication with the Court through a single, consolidated voice, the Court ensured both that the system would be responsive to the parties' needs and that they could communicate their concerns to the Court efficiently and coherently. Third, the establishment of a Master Calendar, convening of omnibus case management conferences, and the use of case management and practice and procedure orders efficiently resolved the cases. Addressing issues

and communicating with all parties in all cases at once using a single docket entry, rather than in each case individually, is far more efficient and effective. Fourth, mandatory participation in a specifically-designed alternative dispute resolution program was helpful. While ADR programs are not new, the Sandy Mediation Program was designed specifically, with input from the parties, to address issues likely to arise during those mediations. This targeted development of the program made it more likely to be successful. Finally, the constant oversight of individual cases by the magistrate judges committee helped design the case management system, and they had full knowledge of all the issues that had arisen since its inception. Without the constant oversight of the 1,400 Sandy cases, both individually and collectively, it is doubtful that these cases would have been brought to resolution so quickly. Even the best designed case management system will not work efficiently unless cases are constantly monitored to ensure they progress through that system to conclusion.