UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

IN RE HURRICANE SANDY CASES

CASE MANAGEMENT ORDER NO. 3 (CLARIFICATION & DENIAL OF RECONSIDERATION OF CMO#1)

----------X 14 MC 41

THIS DOCUMENT APPLIES TO
ALL NFIP CASES

----------X

Case Management Order #3

In this Case Management Order, we consider a motion to reconsider or modify Case Management Order No. 1 ("CMO#1") made by defendants in the National Flood Insurance Program ("NFIP") cases, and institute certain additions and modifications to the discovery procedures adopted heretofore in order to effectively address issues that have emerged during the early stages of these matters.

A. Motion to Reconsider by the NFIP Carriers

Background

The Board of Judges has appointed a committee, consisting of three magistrate judges (the "Committee"), to recommend procedures to ensure proper case filing and relation practices, to establish a plan for expedited discovery, and to facilitate the efficient resolution of the cases arising from Hurricane Sandy (now numbering nearly 1,000) in a manner designed to avoid duplication of effort and unnecessary expense. CMO#1, Docket Entry ("DE") [243] at 1. On February 21,

2014, following a series of submissions and a hearing with counsel to all known plaintiffs and defendants, the Committee entered CMO#1, which addressed a number of issues, including appointment of liaison counsel, misjoined and related cases, common defenses and, most relevant here, adoption of "a uniform, automatic discovery procedure . . . to speed resolution of these matters while also reducing costs for the parties and the burdens on the Court." *Id.* at 6.

The Automatic Discovery Procedure

Rule 26(f) of the Federal Rules of Civil Procedure mandates that parties to an action must hold a conference to "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan." The Rules then require the submission of detailed discovery plan to the Court, which usually requires the parties to participate in a pretrial scheduling order, leading to the issuance of a scheduling order. *See* Fed.R.Civ.P. 16(b), 26(f)(2). Federal Rule of Civil Procedure 26(d)(1) forbids a party from seeking discovery "from any source before the parties have conferred as required by Rule 26(f) except as "authorized ... by court order," Fed. R. Civ. P. 26(d) (1), generally viewed as requiring a showing of good cause. *See, e.g., Ayyash v. Bank Al–Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005). Rule 26 also provides for automatic disclosure and/or identification of documents, witnesses and information that a party "may use to support its claims or defenses," calculation of damages and insurance agreements. Fed.R.Civ.P. 26(a)(1).

Because virtually all of the Hurricane Sandy cases emanate from a claims process which

has involved pre-filing exchange of information and there exist common categories of documents subject to discovery in all of these cases, compelling the parties to engage in hundreds of Rule 26(f) and 16(b) conferences and scattershot initial disclosures seemed a tremendous waste of resources and time for the parties and the Court. Therefore, with input -- and largely agreement from counsel -- the Committee implemented a uniform, automatic discovery process "in lieu of the initial disclosures required by Federal Rule of Civil Procedure 26 to avert the need for a Rule 16 conference in these cases and, in the absence of a showing to the contrary, the need to serve document requests and interrogatories." CMO#1 at 6. As discussed further below, such action falls well within the Court's authority and responsibility, as the Rules specifically contemplate that courts may tailor discovery requirements to meet the needs of individual cases and litigants.

Thus, CMO#1 directed the parties to engage in a broad, simultaneous exchange of information to be completed within a 60-day period -- a highly expedited schedule. The information required to be produced includes "all documents supporting or evidencing the claimed loss, including loss estimates from other insurers, any adjuster's reports, engineering reports, contractor's reports or estimates; photographs, claim log notes, documents relating to repair work performed after Hurricane Sandy, including contracts, bids, estimates, invoices or work tickets for completed work," as well as a broad array of other information. *See* CMO#1 at 6-9. The CMO further directs that the parties participate in arbitration or mediation beginning shortly after this exchange of documents -- and mandated that such alternative dispute resolution be completed within ninety days. The CMO also advised as follows:

> Nothing in this Order shall be construed to limit the information to be exchanged in any particular case. Counsel for each party is encouraged and expected to provide any information that would reasonably be helpful to their adversary in evaluating the case for mediation/arbitration purposes. Any information not exchanged during

> this period cannot be used in the mediation/arbitration process. The parties are strongly urged to meet and confer in good faith on the exchange of information.

CMO#1 at 9.

Objections by NFIP Defense Counsel

Counsel for the NFIP carriers complain that CMO#1 has denied or at least delayed their "right" to conduct "formal" discovery. *See, e,g.,* DE [269] at 10 ("the CMO bars all formal discovery in all NFIP cases, regardless of how far apart the parties may be, for almost six months."); *id.* at 11 ("as to all of those NFIP cases that the parties already know cannot be resolved without formal discovery, six months will have been lost"); *id.* at 12 ("the WYO carriers read the Court's CMO as a postponement of formal discovery, not blocking it forever"); *id.* at 11 ("Formal discovery is to wait 'in the absence of a showing to the contrary'").[1] The carriers further argue that this purported denial of their rights will invariably slow the resolution in these cases. *See, e.g., id.* at 15 ("barring discovery for six months in all of these matters is simply counterproductive"), *id.* at 11 ("The CMO, as currently written, will necessarily slow the resolution of virtually all of the hard NFIP cases"); *id.* at 8 ("None of these cases will resolve without formal discovery"). Finally, relying on *DeCosta v. Allstate Ins. Co.,* 730 F.3d 76, 83 (1st Cir. 2013), the carriers suggest that CMO#1 may unfairly disenfranchise plaintiffs of valuable rights. *Id.* at 11-12. ("In the Decosta matter . . . the district judge's refusal to allow the carrier to conduct discovery .

[1] One carrier -- with whom the others refuse to join -- issued the harshest condemnation of the plan adopted by the Court, stating: "Nationwide raises a concern 'regarding the potential restrictions on discovery and whether such potential limitations could raise constitutional and/or due process issues. At present, such issues are not ripe for consideration. Out of an abundance of caution, this issue is noted herein.'" Id at. P12 n7.

. . cost the insured the entire amount in dispute, when likely some of it was payable");[2] *cf. id.* at 2.

In light of these arguments, the carriers request that CMO#1 be amended "to allow formal discovery to commence now on at least one category of the NFIP cases," that category being a vaguely defined set of cases involving "mass produced estimates," which "counsel speculates [encompasses] at least half of the total NFIP case load." *Id.* at 15. That request must be denied.

Defendants simply do not have a "right" to a particular form, quantum or type of discovery. *See Wardius v. Oregon*, 412 U.S. 470, 474, 93 S. Ct. 2208, 2212, 37 L. Ed. 2d 82 (1973)("the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" in criminal cases). Rule 26 directs that:

> the court must limit the frequency or extent of discovery otherwise allowed by these rules . . . if it determines that . . . the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive [or] the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FRCP 26(b)(2)(C). Similarly, Rule 16 provides that, in its scheduling order, a Court "may modify the timing of disclosures [and] modify the extent of discovery." Fed.R.Civ.P. 16(b)(2)(B).[3]

---

[2] As discussed in greater detail in CMO#2, *DeCosta* turned on the failure to comply with proof of loss provisions, not the question of discovery. CMO#2 at 4-5.

[3] *See also Bell Atlantic v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (court may "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"); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 51 (2d Cir. 2004) ("It is axiomatic that the trial court enjoys wide discretion in its handling of pre-trial discovery."); *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").

This is particularly true where, as here, a court is confronted with managing litigation involving numerous parties:

> In complex multi-party litigation, a trial court often needs to use its broad authority to control discovery. Some of the measures adopted here, such as time limits, schedules for discovery, and limitations on deposition discovery, have been specifically recommended as acceptable options . . . .
>
> In order to have orderly and reasonable discovery, the trial judge required that a high standard of good cause be met before discovery beyond that provided in the uniform orders would be permitted. Its orders were tailored appropriately to meet this need.

B.F. Goodrich v. Betkoski, 99 F.3d 505, 523 (2d Cir. 1996), *decision clarified on denial of reh'g*, 112 F.3d 88 (2d Cir. 1997). The discovery management tools employed here -- including modification of automatic disclosure, restrictions on scope and quantity, sequencing and encouragement of informal discovery exchanges -- are well-established and recognized means of effectively managing complex cases. *See Manual for Complex Litigation*, Fourth, §11.422.

Furthermore, CMO#1 has not denied defendants the right to conduct discovery, but rather has imposed a more rigorous and efficient process than the so-called "formal" discovery urged by the carriers. Under the provisions of CMO#1, the parties are in the process of conducting discovery pursuant to a Court order containing strict deadlines and specific directives to produce vast categories of information, rather than discovery devices produced by the parties, such as interrogatories, requests to admit and document production requests. These standardized discovery directives were produced with considerable input from the parties. Indisputably, the parties are proceeding under a Court discovery plan that is far more "formal" than the discovery devices sought by the defendants. Comparing the

uniform plan imposed by CMO#1 to the production, review, response and enforcement of a patchwork of instruments that would otherwise be served in nearly a thousand cases, the result is self-evident: the cost to the parties and drain upon the Court's resources in utilizing a uniform, automatic discovery plan represents a small fraction of that associated with the inevitable wave of litigation that would otherwise occur. It may be an imperfect solution, but it remains far preferable to the alternatives.

Counsel for all parties are reminded, as noted in CMO#1, that these cases present a massive undertaking and require the balancing of serious, competing interests. *See* CMO#1 at 2 ("the Court must ensure that victims of the storm, many of whom were rendered homeless for a time and who may be left without the necessary records or access to qualified contractors to effect repairs, receive an expeditious review of their claims, while at the same time, safeguarding insurers from meritless or inflated claims"). As such, this is not a time for "business as usual." Extraordinary circumstances call for extraordinary measures. And counsel are not only expected, but *required*, to work diligently, cooperatively and reasonably to help ensure a fair and efficient resolution of these cases. *See* Local Rule 26.4 (requiring cooperation among attorneys).

Finally, CMO#1 does not represent an unassailable limitation on the parties' abilities to obtain discovery. From the outset, counsel have been encouraged to reach agreement among themselves to exchange information outside the scope of that envisioned in CMO#1. CMO#1 at 9. Moreover, as demonstrated herein, and during the course of the proceeding, the undersigned have made alterations to the formal procedures available to the parties in order to accommodate unforeseen issues and needs.

Based on the foregoing, the Court declines to implement the modifications to CMO#1 proposed by the NFIP carriers. Nevertheless, as the automatic discovery process has continued, several issues have arisen that require additional guidance for the parties. These are addressed below.

B. Modifications to the Discovery Procedures

Procedure for Obtaining Discovery Outside the Scope of CMO#1

In three cases, parties have commenced motion practice before the assigned magistrate judges in those actions to serve formal discovery demands in connection with matters that, at least arguably, appear to be outside the scope of CMO#1.[4] Similarly, at the March 27, 2014 conference, Liaison Counsel raised the question of additional discovery mechanisms and motion practice outside the procedures set forth in CMO#1. To permit broad exceptions to the automatic discovery process established by CMO#1, however, would risk undermining the very purpose of the procedures implemented herein – to wit: to insure an expedited and efficient exchange of information by the parties to prepare these cases for resolution.

Therefore, the parties are directed to review the final paragraph of Section IV of CMO #1, which, as noted above, requires counsel "to provide any information that would reasonably be helpful to their adversary in evaluating the case for mediation/arbitration purposes." CMO#1 at 9. Accordingly, if information beyond that ordered disclosed by CMO#1 is required, the parties are

[4] *See Febrizio v. Stillwater Property*, 13-cv-6999(LDW)(AKT), DE[38](seeking discovery concerning based upon carrier's expert report that claims were predicated upon pre-existing damage); *Griesman v. Stillwater Property*, 13-cv-06994(ILG)(RM) , DE [35](same); *King v. Universal North America Insurance Co.*, 13 CV 5960 (DLI)(CLP) (seeking discovery regarding standing issue based upon proper policyholder).

directed to meet and confer in good faith and exchange such information. As to the questions that have been raised to date -- cases of pre-existing damage and questions raising the standing of the plaintiff to proceed -- it would behoove both parties to exchange such information in advance of mediation or arbitration, recognizing of course that such discovery would appear reasonably necessary for successful resolution.

Liaison Counsel for the carriers raised the issue of a defendant preserving its rights if plaintiff refuses to provide information the carrier believes necessary. As such, we hereby adopt an additional procedure to deal with such an issue. Rather than engage in costly and burdensome motion practice seeking leave to serve discovery devices, in the event that any party seeking additional information is rebuffed in its genuine effort to obtain specific information from an adversary, that party may codify its dispute by sending a letter to opposing counsel outlining the information sought. At this stage, such writing will preserve a party's rights without burdening the litigants and the Court with unnecessary motion practice. Obviously, this step should be taken only in cases in which the party seeking information has a specific, good faith reason to believe that such information exists and after the party has exhausted reasonable effort to obtain voluntary provision of the information from opposing counsel.

Production of Expert Reports

Liaison Counsel forwarded a question from defense counsel to the Committee as to whether expert reports are subject to production pursuant to the automatic discovery process. It is hereby ordered that, to the extent that any such report was prepared prior to the issuance of this Order, such report must be produced immediately to opposing counsel. CMO#1 expressly provides that defendants are to provide "all expert reports and/or written communications that contain any

description or analysis of the scope of loss or any defenses under the policy." CMO#1 at 21. To be clear, any expert reports that have been prepared are required to be produced under this provision, regardless of whether a party anticipates, at this time, presenting the testimony of such expert.[5] At the same time, CMO#1 should not be read as imposing an affirmative duty to create such a report, but if it exists, it should be produced.

Site Inspections

Defendants Liaison Counsel requested a 60-day delay of the commencement of mediation and arbitration herein ""to allow site inspection in all of the NFIP cases," DE [304] at 2, based on counsel's prior experience in Texas of potential fraud and allegedly improbable similarities in the damages reported. Since it is estimated that there are now more than 500 such cases, and certain site inspections could involve invasive examination and repair of homes, this proposal seems far too burdensome and costly, and destined to delay unnecessarily resolution of many of the cases. At the same time, Liaison Counsel has explained that a relatively small number of public adjusting firms (estimated at ten) have handled nearly all of the NFIP cases, and has articulated a concern about improbable similarities in the damages reported. As such, the Committee has authorized a

[5] Rule 26(b)(4)(D) provides that "[o]rdinarily, a party may not . . . discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." However, this privilege "may only be invoked when an expert has been retained or specially employed because of the prospect of litigation, and not in the normal course of business." *QBE Ins. Corp. v. Interstate Fire & Safety Equip. Co., Inc.*, 2011 WL 692982 (D. Conn. 2011)(rejecting application of rule to notes by claims adjustor of conversations with experts); *Fine v. Bellefonte Underwriters Ins. Co*., 91 F.R.D. 420, 423 (S.D.N.Y. 1981)(reports producible unless "generation of the reports were in furtherance of a sufficiently identifiable resolve to litigate, rather than a more or less routine investigation of a possibly resistable claim on a first party insurer"); *Tayler v. Travelers Ins. Co*., 183 F.R.D. 67, 70 (N.D.N.Y. 1998) ("where there is a disagreement between the property owner and the insurance carrier as to the amount of the fire loss, the property owner/insured/plaintiff is entitled to discovery of the carrier/defendant's file and depose adjusters") (collecting cases).

sampling of site inspections to be conducted in an effort to explore the issue raised. Counsel shall work together to identify thirty (30) properties upon at which the defendants may conduct site inspections, provided such inspections shall be completed by May 1, 2014.[6] The results of all site inspections will be shared with plaintiffs' counsel on or before May 15, 2014.

Exemplary Mediation Cases

As discussed at the March 27, 2014 conference with Liaison Counsel, the members of the Committee, as well as Magistrate Judge Levy (who has graciously and generously agreed to assist the Committee in helping establish and manage the mediation process), will each hold settlement conferences in five Hurricane Sandy cases in advance of the broader mediation effort. The purpose of these settlement conferences – in addition to attempting to facilitate resolution of these individual cases – will include identifying common issues and approaches which may be shared with the panel of mediators who will handle other cases. As such, Liaison Counsel is hereby directed, after communication with other counsel in the case, to recommend twenty cases in total in which settlement conferences may be scheduled forthwith -- consisting four sets of five cases each from those matters assigned to Magistrate Judges Brown, Levy, Pollak and Reyes. Counsel should work together to select an assortment of exemplary cases that seem likely to involve issues that may be common to many of the cases currently before the Court. This list should be provided on or before April 30, 2014.

[6] Defendants Liaison Counsel also seeks the names of appraisers from public adjusting firms who prepared certain estimates. *See* 14-CV-635 (ADS), DE [29]. Plaintiffs' counsel should provide such information if available. Defendants may also seek such information directly from the public adjusting firms via subpoena, however, this should not provide a basis to delay completion of the site inspections within the time frame prescribed herein.

Mediation Training

The parties are hereby directed to identify among themselves, and in collaboration with one another, those issues that they believe will be the most important and likely to serve as the focus of negotiations during the mediation process. As indicated at the March 27, 2014 conference, the parties will be permitted to participate in the training of mediators through Liaison Counsel, although the precise scope of such participation is yet to be determined at this time. The mediation training program is currently scheduled for May 22, 2014.

Extension of Mediation/Arbitration Commencement

CMO#1 provides that within 14 days of the expedited discovery procedure, each party is to submit a Notice of Arbitration or a mediation stipulation. At the request of counsel, this period will be extended to thirty (30) days, which will allow the parties additional time to attempt to resolve cases on their own, and permit the Court to make arrangements for mediation and arbitration, including completion of training procedures. Mediations and arbitrations will commence beginning in late May. ***In order to assist the Court in managing the Hurricane Sandy docket, and to avoid unnecessary Court proceedings, the parties are directed to file a notice or stipulation of discontinuance in any case that has been resolved within five days of resolution.***

Timing of Automatic Discovery Exchanges Regarding Severed Cases

In CMO#1, the parties were directed to complete the automatic discovery exchanges within 60 days of that Order for all cases that were filed at that time. Subsequently filed cases were given until 60 days following the filing of an answer to exchange the automatic discovery. At the same time, that Order directed the severance and refiling of misjoined "mass joinder" as individual cases. One attorney has raised a question as to whether the automatic discovery procedures should apply to cases refiled under this procedure, particularly in instances in which the cases have been refiled but service has not been perfected or an answer has not been filed. Furthermore, Liaison Counsel for defendants has requested that for cases in which service has recently been effected, the deadline be extended until 60 days following the filing of an answer. *See* 14-CV- 635 (ADS), DE [29].[7]

Because these formerly-misjoined cases represent hundreds of individual cases – indeed, these matters likely comprise the majority of the nearly 1,000 cases currently pending -- it was the assumption of the Committee that counsel were, in fact, preparing discovery submissions for all of these cases in anticipation of the April 22 deadline. However, to eliminate any question on the subject, counsel are hereby advised that the April 22 deadline contained in CMO#1 applies to any cases which were filed at the time of the issuance of CMO#1, even if those cases were subsequently dismissed and refiled to correct misjoinder, and whether or not service has been

[7] In that same letter, counsel requests that the Committee issue an Order directing that all communications between and among counsel for plaintiffs and between and among counsel for defendants are subject to common interest privilege and not subject to discovery. While such communications may well be protected by a common interest privilege, because there are exceptions to said privilege, the Court is not in a position to issue an advisory ruling to this effect.

perfected as to the refiled cases.[8]

CONCLUSION

Based on the foregoing, and as further described above, it is hereby ORDERED as follows:

1. The motion for reconsideration and/or modification of CMO#1 by the NFIP carriers is DENIED;

2. Parties with a good faith basis to believe that information outside the scope of CMO#1 must be provided in a particular, exceptional case shall, consistent with the directive set forth on page 9 of CMO#1, shall attempt to informally obtain that information from opposing counsel. Upon failure of good faith efforts to resolve a dispute, counsel shall, rather than engage in formal motion practice, serve a letter upon opposing counsel to preserve its rights.

3. For avoidance of doubt, any expert reports that have been created must be provided as part of the automatic discovery process prescribed in CMO#1.

4. Defendants may conduct a sample of no more than thirty (30) site inspections, provided such inspections shall be completed by May 1, 2014, the results of which shall be provided to plaintiff's counsel no later than May 15, 2014.

5. On or before April 30, 2014, counsel shall identify a total of twenty (20) cases from those assigned to Magistrate Judges Brown, Levy, Pollak and Reyes to be scheduled for settlement conferences.

6. The 14-day period to file a Notice of Arbitration or mediation stipulation has been extended to 30 days; thus, parties must file these documents on or before May 22, 2014. For any cases that are independently settled or otherwise resolved, the parties are directed to file a stipulation or notice of discontinuance within five days of resolution.

[8] This order shall not affect the Court's earlier directive excepting cases filed directly against FEMA.

7. The April 22 deadline contained in CMO#1 applies to any cases which were filed at the time of the issuance of CMO#1, even if those cases were subsequently dismissed and refiled to correct misjoinder, and whether or not service has been perfected as to the refiled cases.

Dated: Central Islip, New York
April 7, 2014

/s/ CHERYL L. POLLAK
Cheryl L. Pollak
United States Magistrate Judge

/s/ GARY R. BROWN
Gary R. Brown
United States Magistrate Judge

/s/ RAMON E. REYES. JR.
Ramon E. Reyes, Jr.
United States Magistrate Judge