THE LONG ROAD HOME: MASS SETTLEMENT OF KATRINA HOMEOWNERS INSURANCE CLAIMS IN FEDERAL COURT

Judge Joseph C. Wilkinson, Jr.[*]

I. INTRODUCTION

Just as Hurricane Katrina caused unprecedented property damage, loss of life, and injury to a community's sense of stability and standing, the enormous volume of resulting litigation in the courts of the Gulf Coast region was similarly singular. Like other federal district and state courts of coastal Alabama, Mississippi

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and Louisiana, the United States District Court for the Eastern District of Louisiana experienced substantially increased lawsuit filings, owing to its location at the epicenter of the controversy over the cause of the wide-spread and massive flooding accompanying the storm. Against a backdrop of longstanding philosophical debate about the best mode of dispute resolution in the courts—specifically, the degree of judicial emphasis on settlement as opposed to decision-making and trial—the federal trial court in New Orleans, using the case management tools provided by the Federal Rules of Civil Procedure, brought tens of thousands of Katrina-related insurance claims to resolution with balance, order, and relative speed and economy, given the extent of the challenge. This Article outlines some of the litigation history and settlement aspects of the court's process, with hope that that process will never have to be replicated to address any similar future disaster.

II. BACKGROUND

A. THE SETTING

As a topographical and meteorological matter, the New Orleans area is not, strictly speaking, the sub-sea level bowl existing under constant, imminent threat of destruction by hurricane sometimes depicted in popular myth.[1] As to weather, while powerful hurricanes certainly batter the New Orleans area and will again in the future, these perils and their resulting consequences are not annual events, having usually been separated historically by decades of relative tropical peace.[2] As to topography, Professor Richard Campanella has explained that "[c]ontrary to popular perceptions, half of New Orleans is at or above sea level. . . . Starting in the early 1700s, when the local land surface lay entirely at or above sea level, humans radically altered the topography of New Orleans. They shored up the Mississippi [River]'s natural levees with earthen embankments" and added "the sophisticated municipal drainage system installed

1. *See* RICHARD CAMPANELLA, CTR. FOR BIOENVIRONMENTAL RESEARCH, ABOVE-SEA-LEVEL NEW ORLEANS: THE RESIDENTIAL CAPACITY OF ORLEANS PARISH'S HIGHER GROUND 1, 6 (2007) *available at* http://richcampanella.com/assets/pdf/study_Campanella%20analysis%20on%20Above-Sea-Level%20New%20Orleans.pdf.

2. For example, forty years separated the City's severe damage caused by Hurricane Betsy in 1965 from the even worse destruction wrought by Hurricane Katrina in 2005. *See Hurricanes Rita, Katrina, Betsy, Juan: 2015 Year of Key Storm Anniversaries in Louisiana*, TIMES-PICAYUNE (Sept. 23, 2015, 9:59 AM), http://www.nola.com/hurricane/index.ssf/2015/09/hurricanes_rita_katrina_betsy.html.

around 1900."[3] Other "human manipulations of the topographic surface (levees, drainage canals, navigation canals, transportation corridors) have subdivided the city's natural hydrological basins into about a dozen sub-basins."[4] Thus, in the New Orleans area, "[l]and that once sloped gradually from 10–12 feet above sea level to sea level in 1700 today forms a series of topographic bowls both above and below sea level, with the artificial levees forming the highest earthen surfaces."[5]

These "artificial levees" are of two types: (a) broad-based earthen mounds covered in grass and other natural green growth of the type lining most of the Mississippi River as it winds through South Louisiana; and (b) steel and concrete floodwalls found along the area's drainage and navigation canals and occasionally built into parts of the river's earthen levee works.[6] The "drainage [and] navigation canals" are decades-old structures with familiar names made infamous by Hurricane Katrina.[7] They include the 17th Street and London Avenue Canals, two enhanced drainage ditches constructed to transport excess rain and flood water from the City into Lake Pontchartrain;[8] the Industrial Canal, a hub of maritime navigational commerce and industrial activity connecting the Mississippi River and Lake Pontchartrain through the city's Ninth Ward;[9] and the Mississippi River Gulf Outlet (MRGO), formerly "a shipping channel between New Orleans and the Gulf of Mexico" envisioned by Congress and the U.S. Army Corps of Engineers (the Corps) in the 1940s and 1950s as a means "to make the Port of New Orleans more accessible for maritime and military use."[10] The MRGO "was built to its full dimensions by 1968 and afforded a shorter shipping route between the Gulf of Mexico and New

3. CAMPANELLA, *supra* note 1, at 1–2.

4. *Id*. at 3.

5. *Id*. at 2.

6. *See* RICHARD CAMPANELLA, GEOGRAPHIES OF NEW ORLEANS: URBAN FABRICS BEFORE THE STORM 7, 24 (2006); STEPHEN A. NELSON, WHY NEW ORLEANS IS VULNERABLE TO HURRICANES: GEOLOGIC AND HISTORICAL FACTORS, TUL. U. 11–13 (Dec. 2012) *available at* http://www.tulane.edu/~sanelson/New_Orleans_and_Hurricanes/vulnerability.pdf.

7. CAMPANELLA, *supra* note 1, at 3.

8. *See In re* Katrina Canal Breaches Consol. Litig., 533 F. Supp. 2d 615, 618 (E.D. La. 2008).

9. *See* RICHARD CAMPANELLA, BIENVILLE'S DILEMMA: A HISTORICAL GEOGRAPHY OF NEW ORLEANS 210–11 (2008).

10. *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 441 (5th Cir. 2012) [hereinafter *In re Katrina Canal Breaches*].

Orleans,"[11] principally through the former marshes of St. Bernard Parish. Before its post-Katrina closure,[12] the MRGO was "a navigational channel whose design, construction, and maintenance cannot be characterized as flood-control activity."[13]

On the day Hurricane Katrina made landfall, the U.S. District Court for the Eastern District of Louisiana (Eastern District) or its territorial predecessors had been headquartered in New Orleans for more than 200 years. The court had twelve district judges, six magistrate judges and two bankruptcy judges.[14] The court's caseload had declined from 5,016 cases in 1990 to 3,320 cases in 2004; the average number of annual filings over that period was just under 4,000.[15] In addition to its ordinary caseload, however, the Eastern District had become a frequent transferee court of the U.S. Judicial Panel on Multidistrict Litigation (MDL),[16] and several of its judges had earned reputations as expert managers of complex litigation based upon their MDL experience.[17] Like the vast majority of

11. *In re Katrina Canal Breaches*, 696 F.3d at 441.

12. The MRGO was closed by "construction of a rock closure structure" following the Corps's recommendation to Congress in July 2009. *MRGO Deep-Draft De-Authorization Study*, U.S. ARMY CORPS OF ENG'RS, http://www.mvn.usace.army.mil/Missions/Environmental/MRGOEcosystemRestoration/MRGODeAuthorization.aspx (last visited Aug. 31, 2016).

13. *In re Katrina Canal Breaches*, 696 F.3d at 444.

14. *See* 28 U.S.C. §§ 133(a), 152(a)(2) (2012).

15. *See* ADMIN. OFFICE OF THE U.S. COURTS, FED. JUDICIAL WORKLOAD STATISTICS, DECEMBER 31, 1990 28 tbl.C-1 (1991) (5016 filings); ADMIN. OFFICE OF THE U.S. COURTS, FED. JUDICIAL WORKLOAD STATISTICS, DECEMBER 31, 1991 30 tbl.C-1 (4524 filings); ADMIN. OFFICE OF THE U.S. COURTS, FED. JUDICIAL CASELOAD STATISTICS, MARCH 31, 1994 20 tlb.C-1 (1994) (4106 filings); ADMIN. OFFICE OF THE U.S. COURTS, FED. JUDICIAL CASELOAD STATISTICS, MARCH 31, 1995 34 tbl.C-1 (1995) (3973 filings); ADMIN. OFFICE OF THE U.S. COURTS, FED. JUDICIAL CASELOAD STATISTICS, MARCH 31, 1996 35 tbl.C-1 (1996) (4176 filings); ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 1997 25 tbl.C-1 (1998) (3863 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 1998 25 tbl.C-1 (1999) (3701 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 1999 25 tbl.C-1 (2000) (3893 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 2000 26 tbl.C-1 (2001) (3702 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 2001 26 tbl.C-1 (2002) (3670 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 2002 26 tbl.C-1 (2003) (3782 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 2003 26 tbl.C-1 (2004) (3551 filings); U.S. COURTS, STATISTICAL TABLES FOR THE FED. JUDICIARY, DEC. 31, 2004 26 tbl.C-1 (2005) (3320 filings). No statistics were published for 1992.

16. *See* 28 U.S.C. § 1407(a) (2012) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

17. *See*, Alejandro de los Rios, *Experts Shed Light on How Judicial Panels of*

residents of the New Orleans area, the personal lives of the Eastern District's judges and staff were disrupted by Hurricane Katrina, and many of their homes were destroyed or suffered substantial damage. Judges and staff evacuated and worked in temporary quarters provided by other agencies in Baton Rouge, Lafayette, Alexandria, Houma, and Gretna, Louisiana, with several judges and staff members also working in Houston, Texas. The courthouse in New Orleans remained closed for more than eight weeks, reopening for use by those who were able to return home on November 1, 2005, after repairs to the building and surrounding infrastructure.

Although immediate governmental relief undertakings were largely inadequate,[18] the community's massive displacement and property damage subsequently prompted extraordinary restoration and assistance efforts. Among the most significant publicly funded of those efforts was the Louisiana Road Home Program, the purpose of which was to provide money grants "to help homeowners rebuild after hurricanes Katrina and Rita[19] . . . . The program is administered by the Office of Community Development (OCD) of the State of Louisiana," following "its predecessor, the Louisiana Recovery Authority."[20] Congress funded the program through special appropriations to the Community Development Block Grant program administered by the Department of Housing and Urban Development.[21]

MDLs Select Venue, LA. RECORD (Dec. 13, 2010, 2:57 AM), http://louisianarecord.com/stories/510580682-experts-shed-light-on-how-judicial-panels-of-mdls-select-venue (noting that Judge Eldon Fallon presided over the Chinese drywall and Vioxx MDLs).

18. *See* Freeman v. United States, 556 F.3d 326, 332, 343 (5th Cir. 2009) ("As we all witnessed and as has been amply documented in the reports of various congressional committees . . . the federal government was unprepared for Hurricane Katrina, and its response was universally criticized as inadequate, unorganized, and flawed. . . . The tragedies that gave rise to this [Katrina-related] litigation were compounded by the well-documented inability of all levels of government to provide timely relief to the hurricane's victims. The federal government has publicly admitted that it made many mistakes . . . .").

19. Within about a month of the destruction to Southeast Louisiana and eastward along the Gulf Coast wrought by Hurricane Katrina, a similarly powerful storm, Hurricane Rita, caused massive wind and flooding damage in the coastal parishes of Southwest Louisiana and the counties of East Texas. *See* Nat'l Oceanic & Atmospheric Admin., *Hurricane Rita*, NAT'L WEATHER SERV. WEATHER FORCAST OFFICE., http://www.srh.noaa.gov/lch/?n=rita_main (last visited Aug. 31, 2016).

20. Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078, 1079 (D.C. Cir. 2011).

21. *Id*. at 1080 (D.C. Cir. 2011); *The Road Home Program Overview*, ROAD HOME, http://www.road2la.org/ (last visited Aug. 31, 2016).

Specifically, "[t]he program is supported by three special appropriations of Community Development Block Grants by Congress in 2005, 2006, and 2007."[22] The grant amounts paid to individuals were calculated using a multi-factor formula that included pre-storm property value, subtracted by "insurance proceeds received by the homeowner," and were capped at $150,000.[23] "As of March 24, 2011, [the Road Home program] had given 117,744 Louisiana homeowners almost $8 billion in grants for rebuilding."[24] By October 2014, a state website was reporting that "over 130,000 residents across the Louisiana coastal region have received more than $8.9 billion to rebuild and protect their homes and rental properties from future storm damage."[25]

At the closing of each approved Road Home grant, owners of hurricane-damaged property receiving money were required, as a condition of receipt of the funds, to execute a Subrogation/Assignment Agreement in favor of the State, which provided in pertinent part:

> In consideration of my/our receipt of funds under The Road Home program for Hurricane Katrina/Hurricane Rita victims (the "Program") being administered by the Office of Community Development, Division of Administration, State of Louisiana, *subject to the provisions below* I/we hereby assign to the State of Louisiana, Division of Administration, Office of Community Development (the "State"), to the extent of the grant proceeds awarded or to be awarded to me under the Program, all of my/our claims and future rights to reimbursement and all payments hereafter received or to be received by me/us (a) under any policy of casualty or property damage insurance or flood insurance on the residence, excluding contents ("Residence") described in my/our application for Homeowner's Assistance under the Program ("Policies") . . . .
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> . . . .
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> If I/we hereafter receive any insurance payments for physical damage to the Residence (not including contents) caused by Hurricane Katrina or Hurricane Rita, I/we agree to promptly pay such amount to the State if that amount would have

22. *Greater New Orleans Fair Hous. Action Ctr.*, 639 F.3d at 1080.
23. *Id.* at 1080–81.
24. *Id.* at 1080.
25. *The Road Home Program Overview*, *supra* note 21.

> reduced the amount of my Program grant had I/we received such insurance payments prior to my receipt of grant proceeds. I/We hereby authorize and instruct my insurance carrier to issue any future payments for such damage jointly to me and to "La. Division of Administration/DRU". . . .
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> I/We agree that rights to insurance proceeds assigned to the State herein shall be paid from any insurance payments I/we may receive, whether through unconditional tender by the insurance carrier, through settlement, or through judgment adverse to the insurance company, with preference and priority over any other party entitled to any portion of such proceeds, up to the amount of my/our grant received under the Program for which the State has not been reimbursed from other sources . . . .[26]

Significantly for purposes of the mass settlement process later undertaken by the parties under court supervision in connection with thousands of individual homeowners' insurance claims against their insurers, this agreement signed by grant recipients also provided:

> I/We hereby agree that *the State's written consent shall be required to settle any claim* which would result in the State's recovering less than one hundred (100%) percent of the amount of my/our grant received under the Program. Request [sic] for such consent shall be directed to the Division of Administration, Office of Community Development, Legal Counsel for Disaster Recovery Unit.[27]

Thus, throughout the subsequent Katrina litigation, the State asserted that the Road Home Subrogation/Assignment Agreement granted it the right, not only to assert its own claims against insurance companies to recover portions of the grants made to insureds, but also to review and approve or disapprove settlements between Road Home grant recipients and their private homeowners policy insurers.[28]

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26. Order and Reasons at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669.

27. *Id.* (emphasis added).

28. Initially, the State also took the position, later abandoned, that this agreement gave it the right to assert claims and approve or disapprove of settlements made between Road Home grant recipients and their *flood* policy insurers, extending to policies issued pursuant to the National Flood Insurance Program (NFIP). However, consistent with 31 U.S.C. § 3727 and *Diamond v. Federal Emergency Management Agency*, 689 F. Supp. 163 (E.D.N.Y. 1988), FEMA addressed

B. THE LITIGATION

On August 29, 2005, the combination of Katrina's massive storm surge, including the funnel effect of the deteriorating MRGO, and the collapse or overtopping of several floodwalls built by the Corps began the inundation of eighty percent of New Orleans, almost all of St. Bernard Parish, parts of Jefferson, Plaquemines and St. Tammany Parishes, and other low-lying areas of Southeast Louisiana.[29] After the catastrophe, 15,554 civil lawsuits arising from Hurricane Katrina and its aftermath, including dozens of putative class actions,[30] were filed in the Eastern District. Even this near quintupling of the average of civil lawsuits filed in the court during the preceding fifteen years was a pale reflection of the actual extent of the court's Katrina-related litigation.

Among the 15,554 individual Katrina-related complaints, scores asserted claims on behalf of numerous plaintiffs. For example, many of these lawsuits were filed by lawyers who simply joined *all* of their clients—sometimes a handful,[31] sometimes dozens,[32] sometimes hundreds[33]—asserting individual

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the Louisiana Road Home Assignment claims as follows: "It is FEMA's position that all claims arising from coverage under the terms of [NFIP policies] . . . may *not* be assigned by the policyholder. . . . FEMA has determined that it will *not* issue a temporary waiver for assignments made to The Road Home program for Hurricane Katrina and Rita claims in the State of Louisiana. Without such a waiver, each WYO Company and the NFIP Servicing Agent should *not* honor these assignments." Memorandum from David Maurstad, Fed. Ins. Adm'r, Nat'l Flood Ins. Program, to Write Your Own (WYO) Company Principal Coordinators and the National Flood Insurance Program (NFIP) Servicing Agent, at 1 (Mar. 27, 2008) *available at* http://www.nfipiservice.com/Stakeholder/pdf/bulletin/w-08019.pdf (emphasis added).

29. *See Katrina Fact-Check: Guesstimate of Katrina's Flooding in New Orleans was Correct*, LENS (July 20, 2015, 9:35 AM), http://thelensnola.org/2015/07/20/katrina-fact-check-guesstimate-of-katrinas-flooding-in-new-orleans-was-correct/; *see also* Dan Swenson, *Flash Flood: Hurricane Katrina's Inundation of New Orleans,* August 29, 2005, TIMES-PICAYUNE, http://www.nola.com/katrina/graphics/flashflood.swf (last visited Aug. 31, 2016) (displaying the timing and extent of the flooding as an animated graphic).

30. *See, e.g.*, Transcript of Motion to Remand Hearing app., *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Nov. 16, 2007), Record Doc. No. 9066-1 (listing sixteen separate putative class action member cases concerning the common homeowners/flood insurance coverage issue).

31. *See, e.g.,* Vanderbrook v. State Farm Fire & Cas. Co., No. 05-cv-6323 (E.D. La. filed Dec. 2, 2005) (eight plaintiffs).

32. *See, e.g.,* Allen-Perkins v. State Farm Fire & Cas. Ins. Co., 07-cv-5204 (E.D. La. filed Aug. 29, 2007) (168 plaintiffs); Kiefer v. Lexington Ins. Co., No. 06-cv-5370 (E.D. La. filed Aug. 29, 2006) (forty-five plaintiffs); Chehardy v. State Farm Fire & Cas Co., Nos. 06-cv-1672, 06-cv-1673, 06-cv-1674 (E.D. La. filed Mar. 28, 2006) (thirty-one plaintiffs).

Katrina-related property damage claims against their various homeowners' policy insurers. The case selected by the court and counsel for bellwether trial concerning the cause and effect of flooding involving the MRGO was chosen in part because it included six plaintiffs asserting claims relating to their separate properties and/or businesses in several different geographic locations.[34] A single complaint asserting Federal Tort Claims Act (FTCA) claims against the United States by persons who had first timely filed administrative claims of the type required by 28 U.S.C. § 2675, together with related causes of action against the Corps's subcontractors and others, arising from flooding caused by breaches or overtopping of canal floodwalls, includes an exhibit listing about 3,200 plaintiffs acting "*on their own behalf*, and on behalf of a class of complainants similarly situated."[35] At one point, the Corps provided the court with a database on compact discs containing the names of persons and the street addresses of their Katrina-damaged properties reflected in "about 83,000 separate entries, including about 72,300 distinct administrative claim number entries (when duplication of claim numbers is accounted for)" who had filed "SF Form 95" administrative claims against the United States as required precursors to lawsuits.[36] Although the Clerk of Court in the Eastern District has no means readily available to calculate with certainty the precise number of claimants in the court's Katrina cases, without duplicating plaintiffs named in more than one suit, the author's estimate is that there were as many as 300,000

33. *See, e.g.,* Adams v. Allstate Ins. Co., No. 07-cv-5206 (E.D. La. filed Aug. 29, 2007) (about 390 plaintiffs); Allen v. State Farm Fire & Cas. Co., No. 07-cv-5111 (E.D. La. filed Aug. 29, 2007) (about 900 plaintiffs); Abadie v. Aegis Sec., No. 06-cv-5164 (E.D. La. filed Aug. 28, 2006) (about 4,600 plaintiffs).

34. *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 441 (5th Cir. 2012).

35. Amended Second Supplemental and Amending Class Action Complaint at 1, 4–90, *In re* Katrina Canal Breaches Consol. Litig. (*Levee: Brock v. Boh Bros. Constr. Co.*), No. 05-cv-4182 (E.D. La. Oct. 16, 2007), Record Doc. No. 8405-1.

36. Order at 1, *In re* Katrina Canal Breaches Consol. Litig. (*MRGO*), No. 05-cv-4182 (E.D. La. Mar. 15, 2010), Record Doc. No. 19665. For a series of motions and orders that outline the significance of these materials and limit counsels' access to them and the potential litigation uses to which they might be put, including in amended or new complaints, see Motion to Lift Stay, *In re* Katrina Canal Breaches Consol. Litig. (*MRGO*), No. 05-cv-4182 (E.D. La. Jan. 8, 2010), Record Doc. No. 19556; Minute Entry, *In re* Katrina Canal Breaches Consol. Litig. (*MRGO*), No. 05-cv-4182 (E.D. La. Feb. 24, 2010), Record Doc. No. 19638; Minute Entry, *In re* Katrina Canal Breaches Consol. Litig. (*MRGO*), No. 05-cv-4182 (E.D. La. Mar. 22, 2010), Record Doc. No. 19674; Order, *In re* Katrina Canal Breaches Consol. Litig. (*MRGO*), No. 05-cv-4182 (E.D. La. Mar. 26, 2010), Record Doc. No. 19681; Order, *In re* Katrina Canal Breaches Consol. Litig. (*MRGO*), No. 05-cv-4182 (E.D. La. Mar. 26, 2010), Record Doc. No. 19682.

distinct plaintiffs.[37]

From the 15,554 individually filed complaints, the court over time identified and ultimately transferred 1,447 cases, including dozens of putative class actions, into a single matter entitled *In Re Katrina Canal Breaches Consolidated Litigation*[38] for consolidated case management, discovery, dispositive motion practice, bellwether trials, and settlement proceedings, in the manner most familiarly employed by federal courts in MDL matters and using techniques suggested by the Federal Judicial Center's *Manual for Complex Litigation*.[39] While the other judges of the court retained and conducted the remaining 14,000 cases, some using similar complex litigation techniques in their own cases,[40] a single district judge was assigned to conduct the consolidated canal breaches litigation, assisted by a single magistrate judge, both from the Eastern District.[41] The two judges worked together in close concert, and on several occasions collaborated on and jointly signed case management and other

37. Part of the difficulty in performing this calculation is that many plaintiffs were named in more than one suit.

38. *In re* Katrina Canal Breaches Consol. Litig., 05-cv-4182 (E.D. La. filed Sept. 19, 2005).

39. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIG. §§ 11.1–.67, 20.1–.32 (Judge Stanley Marcus et al. eds., 4th ed. 2004).

40. *See, e.g.*, Scheduling Order No. 1, Plaintiffs v. State Farm Fire & Cas. Co., No. 06-cv-4155 (E.D. La. Apr. 2, 2007), Record Doc. No. 13 (addressing eighty-nine Katrina cases against one major insurer for purposes of establishing modified disclosure requirements and separate litigation tracks for cases pursuing early settlement, common issue discovery, and expedited trial schedules for individual cases without issues common to the others); Case Mgmt. Order No. 2 at 11, Plaintiffs v. Allstate Ins. Co., No. 06-cv-4562 (E.D. La. Apr. 24, 2007), Record Doc. No. 18 (addressing dozens of Katrina cases then pending and subsequently allotted to that single judge against two major insurers through use of an appointed plaintiffs' liaison counsel and assigning individual cases "according to the preference of individual plaintiffs" to one of three tracks: settlement, fast track to trial and common issue discovery track); Case Mgmt. Order No. 1, at 11, Plaintiffs v. Allstate Ins. Co., No. 06-cv-4562 (E.D. La. Feb. 12, 2007), Record Doc. No. 13 (appointing a special master who the parties were "encouraged to jointly consult with and seek the assistance of . . . in connection with facilitating the consensual resolution of any discovery or case management issues as well as ultimate resolution or settlement of these cases").

41. Attempts by some defendants to obtain recusal not only of the two assigned judges but also of all judges of the Eastern District were denied by both judges of the trial court and by the Fifth Circuit. *In re* Bd. of Comm'rs, 06-30351 (5th Cir. May 23, 2006) (per curiam); Order and Reasons at 18, *In re* Katrina Canal Breaches Consol. Litig. (*Berthelot v. Boh Bros. Constr. Co.*), No. 05-cv-4182 (E.D. La. May 4, 2006), Record Doc. No. 285 (Duval, J.); Minute Entry at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Berthelot v. Boh Bros. Constr. Co.*), No. 05-cv-4182 (E.D. La. Apr. 19, 2006), Record Doc. No. 132 (Wilkinson, Mag. J.).

orders.

On March 1, 2007, the court entered Case Management and Scheduling Order No. 4 (CMO No. 4) in the consolidated litigation.[42] CMO No. 4 stated that the consolidated litigation had been formed to collect cases that "appear to include common issues of law and fact involving the cause and effect of the inundation by water of the Greater New Orleans area during Hurricane Katrina on August 29, 2005 and immediately thereafter."[43] The consolidated cases were classified into several categories, one of which was labeled "Insurance."[44] These were cases brought by "insureds who allege, among other things relating principally to individual adjusting and coverage issues, that the efficient proximate cause of the surface water damage to their property in the New Orleans Metropolitan area was the neglect of the same parties made defendants in the [separate] Levee and MRGO" categories of the consolidated litigation.[45] The federal appellate court later summarized the common and ultimately dispositive liability issue linking the cases in the Insurance category as follows:

> Each plaintiff . . . is a policyholder with homeowners, renters, or commercial-property insurance whose property was damaged during the New Orleans flooding. Despite exclusions in their policies providing that damage caused by "flood" is not covered, plaintiffs seek recovery of their losses from their insurers. Their primary contention is that the massive inundation of water into the city was the result of the negligent design, construction, and maintenance of the levees and that the policies' flood exclusions in this context are ambiguous because they do not clearly exclude coverage for an inundation of water induced by negligence. The plaintiffs maintain that because their policies are ambiguous, we must construe them in their favor to effect coverage for their losses.
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> . . . .
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> The plaintiffs . . . attempt to inject ambiguity into the term "flood" by asserting that a reasonable interpretation of the

42. Case Mgmt. & Scheduling Order No. 4, *In re* Katrina Canal Breaches Consol. Litig. (*Levee*, *MRGO*, *Insurance*), No. 05-cv-4182 (E.D. La. Mar. 1, 2007), Record Doc. No. 3299.

43. *Id.* at 1.

44. *Id.* at 3.

45. *Id.*

> term is that it refers only to inundations of water with "natural" causes, not those with a "non-natural" cause . . . . [such as] the alleged negligent design, construction, or maintenance of the levees as being the cause of the flood, and . . . their allegation that the canals' flood waters would not have reached their property had the negligence not occurred.
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> . . . .
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> The plaintiffs finally contend that the reasonable expectations of homeowners insurance policyholders would be that damage resulting from man-made floods would be covered.[46]

The vast majority of cases in the Insurance category combined plaintiffs' claims that their property damage had been caused by both Katrina's winds and flooding and that their homeowners policies provided coverage for both. Recognizing the critical importance of expedited determination of plaintiffs' claim that homeowners policies also covered their Katrina flood damage and that an appeal was inevitable, regardless of which side prevailed in the trial court, the presiding district judge fast-tracked motion practice and briefing concerning defendants' position that the flood coverage claim should be dismissed. On November 27, 2006, four months before entry of CMO No. 4 and only 15 months after the storm itself, the district judge issued his own in-depth opinion finding some of the policies' flood exclusion clauses valid and others ambiguous.[47] Notice of appeal swiftly followed.[48]

Given this background, CMO No. 4 made three special provisions for cases in the Insurance category. First, it altered the disclosure requirements of Fed. R. Civ. P. 26(a) to require (a) plaintiffs to identify all policies, including National Flood Insurance Program (NFIP) policies, covering their property on the date of the storm, together with the complete names of the insureds and their insurers, policy and claim numbers, address of

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46. *In re* Katrina Canal Breaches Litig. (*Vanderbrook*, *Humphreys*, *Xavier Univ.*, *Chehardy*), 495 F.3d 191, 196, 214–15, 219 (5th Cir. 2007).

47. *See In re* Katrina Canal Breaches Litig. (*Insurance: Vanderbrook*, *Humphreys*, *Xavier Univ.*, *Chehardy*), 466 F. Supp. 2d 729, 750–51, 765 (E.D. La. 2006) (Duval, J.), *aff'd in part, vacated in part*, 495 F.3d 191 (5th Cir. 2007).

48. *See, e.g.*, Notice of Filing of Petition for Permission to Appeal, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance: Vanderbrook v. Unitrin Preferred Ins. Co.*), No. 05-cv-4182 (E.D. La. Dec. 11, 2006), Record Doc. No. 2210.

the damaged property, and then-current address of the insureds, many of whom had been displaced from their damaged homes; and (b) defendants to produce their claim files, including non-privileged loss reports and damage assessments, and the policy itself.[49]

Second, CMO No. 4 provided a "bifurcation" mechanism by which parties to a particular insurance lawsuit could opt to have their individual case removed from the consolidated litigation so that it could move to resolution on the court's ordinary trial schedule.[50] The rationale supporting this option recognized that the dispute in some cases was based more on typical kinds of "individualized adjusting issues; bad faith claims handling; total amount of damages from wind, including water damage from wind; total amount of damage from water; and whether there is total loss," than on the disputed "flood" coverage claim.[51] The court contemplated that parties choosing this option would be given a schedule "to facilitate the trial of the bifurcated issues and/or settlement of such individual cases as a whole, where possible, within nine (9) months of entry of any individual insurance case scheduling order,"[52] and that the court and parties in other cases could benefit from these bellwether trials or settlements that might provide early guidance on judgment and settlement values. Ultimately, the bifurcation option was selected by the parties in only twelve cases.[53] All but one of the bifurcated Insurance cases eventually were resolved by settlement.[54] The single case that was tried resulted in a jury

49. Case Mgmt. & Scheduling Order No. 4, at 21, *In re* Katrina Canal Breaches Consol. Litig. (*Levee*, *MRGO*, *Insurance*), No. 05-cv-4182 (E.D. La. Mar. 1, 2007), Record Doc. No. 3299.

50. *Id.* at 48.

51. *Id.*

52. *Id.*

53. *See* Order, *In re* Katrina Canal Breaches Consol. Litig. (*Katz v. State Farm Fire & Cas. Co.*), No. 05-cv-4182 (E.D. La. Sept. 6, 2007), Rec. Doc. No. 7463 (bifurcation order). The dozen cases were Lawrence v. Fed. Ins. Co. (No. 07-cv-6454); Thomas v. Hanover Ins. Co. (No. 07-cv-5815); Voth v. State Farm Fire & Cas. Ins. Co. (No. 07-cv-4393); Flowers by My Sister & Me v. Md. Cas. Co. (No. 06-cv-9246); Barard v. Lexington Ins. Co. (No. 06-cv-7939); Robichaux v. Lexington Ins. Co. (No. 06-cv-7173); Pecquet v. Standard Fire Ins. Co. (No. 06-cv-4718); Katz v. State Farm Fire & Cas. Co., (No. 06-cv-4155); Goodman v. Fidelity Nat'l Ins. Co. (No. 06-cv-3799); Lundy Enters., L.L.C. v. Wausau Underwriters Ins. Co. (No. 06-cv-3509); Holbrook v. AAA Ins. Agency, Inc. (No. 06-cv-2617); Rault v. Encompass Ins. Co. (No. 06-cv-1734).

54. *See* Order of Dismissal, Rault v. Encompass Ins. Co., No. 06-cv-1734 (E.D. La. Nov. 7, 2011), Record Doc. 59; Order of Dismissal, Lundy Enters., L.L.C. v. Wausau Underwriters Ins. Co., 06-cv-3509 (E.D. La. Feb. 4, 2010); Order of Dismissal,

verdict in favor of the defendant insurance company.[55] Although the bifurcation option did not result in more bellwether trials within the consolidated litigation, enough homeowners and NFIP insurance Katrina cases were tried by judges working outside the consolidated litigation to provide the court and the parties with a framework within which to evaluate possible settlement and judgment values in their own cases.[56]

Goodman v. Fidelity Nat'l Ins. Co., 06-cv-3799 (E.D. La. Sept. 8, 2009); Order of Dismissal, Barard v. Lexington Ins. Co., No. 06-cv-7939 (E.D. La. June 9, 2008); Order of Dismissal, Voth v. State Farm Fire & Cas. Ins. Co., 07-cv-4393 (E.D. La. Mar. 2, 2009); Order of Dismissal, Lawrence v. Fed. Ins. Co., No. 07-cv-6454 (E.D. La. Nov. 25, 2008); Joint Motion to Dismiss with Prejudice, Thomas v. Hanover Ins. Co., 07-cv-5815 (E.D. La. Aug. 20, 2008); Joint Motion to Dismiss, with Prejudice, Flowers by My Sister & Me v. Md. Cas. Co., No. 06-cv-9246 (E.D. La. June 21, 2008). The settlement dates for Robichaux v. Lexington Ins. Co. (No. 06-cv-7173), Holbrook v. AAA Ins. Agency, Inc. (No. 06-cv-2617), and Pecquet v. Standard Fire Ins. Co., (No. 06-cv-4718) are unavailable.

55. Katz v. State Farm Fire & Cas. Co., 06-cv-4155 (E.D. La. May 26, 2009), Record Doc. No. 122; *see also* Minute Entry at 2, Katz v. State Farm Fire & Cas. Co., No. 06-cv-4155 (E.D. La. May 16, 2008) (deconsolidation and severance order), Record Doc. No. 47; Order, *In re* Katrina Canal Breaches Consol. Litig. (*Katz v. State Farm Fire & Cas. Co.*), No. 05-cv-4182 (E.D. La. Sept. 6, 2007), Rec. Doc. No. 7463 (bifurcation order).

56. A less than exhaustive review of the court's record in the Eastern District of Louisiana identifies thirteen such cases tried to verdict. Of these cases, one was a clear defense verdict. Katz v. State Farm Fire & Cas. Ins. Co., No. 06-cv-4155 (E.D. La. May 26, 2009). Three resulted in verdicts for plaintiffs that were so modest that they should probably be considered favorable to the defendant insurers. Richmond v. Horace Mann Ins. Co., No. 07-cv-5086 ($14,000), *aff'd*, No. 09-30706 (5th Cir. Aug. 16, 2010); Loughlin v. USAA Cas. Ins. Co., No. 06-cv-2339 (Apr. 4, 2008) ($5,395.76); Voisey v. State Farm Fire & Cas. Co., No. 06-cv-7635 (E.D. La. Apr. 2, 2008) ($8,258.92). Four were clear plaintiffs' verdicts, one of which was modified favorably to plaintiffs on appeal. Davis v. Teachers Ins. Co., No. 07-cv-4202 (E.D. La. Mar. 23, 2009) ($74,112); Paulsen v. State Farm Ins. Co., No. 06-cv-9546 (E.D. La. May 1, 2008) ($39,000); Grilletta v. Lexington Ins. Co., No. 06-cv-4333 (E.D. La. Sept. 11, 2007) ($3,626,089.26), *aff'd in part, rev'd in part, and remanded*, 558 F.3d 359 (5th Cir. 2009) (increasing statutory penalties); Weiss v. Allstate Ins. Co., No. 06-cv-3774 (E.D. La. May 2, 2007) ($1,313,100). Two were verdicts for plaintiffs that were modified favorably to defendants on appeal. Kodrin v. State Farm Ins. Co., No. 06-cv-8180 (E.D. La. Nov. 21, 2007) ($356,317.96), *aff'd in part, vacated in part and remanded*, 314 F. App'x 671 (5th Cir. 2009) (vacating award of bad faith penalties, bad faith damages, and attorney fees); Dickerson v. Lexington Ins. Co., No. 06-cv-8056 (E.D. La. July 17, 2007) ($122,362), *aff'd in part, rev'd in part, and remanded*, 556 F.3d 290 (5th Cir. 2009) (reversing award of attorney fees). One was a modest plaintiffs' verdict that was modified in favor of plaintiffs on appeal. Bradley v. Allstate Ins. Co., No. 07-cv-3748 (E.D. La. Dec. 19, 2008) ($7,200), *aff'd in part, vacated in part, and remanded*, 620 F.3d 509 (5th Cir. 2010) (remanding for trial court to use alternative basis for calculating damages and to consider statutory penalties). Two were trial verdicts in favor of plaintiffs that were reversed in defendants' favor on appeal. Dwyer v. Fid. Nat'l Prop. & Cas. Ins. Co., No. 06-cv-4793 (E.D. La. July 1, 2010) ($56,963.19), *rev'd and rendered*, No. 10-30708 (5th Cir. May

Third, CMO No. 4 also included a stay provision.[57] It noted that a stay had been issued by the Fifth Circuit, almost simultaneously with entry of CMO No. 4, in the pending appeal of the trial court's decision concerning the dispositive "flood" coverage claim.[58] It noted, however, that "the precise extent of the stay" was unclear.[59] It therefore directed liaison counsel to confer and "discuss what effect the stay has on this Case Management Order," to proceed where there was agreement, and to bring any dispute relating to the stay's effect on CMO No. 4's schedule and procedures by motion to the magistrate judge "for clarification and determination."[60]

Six months after entry of CMO No. 4, a unique matter arising from the Road Home Program was assigned to the Insurance category in the consolidated litigation. In *Louisiana v. AAA Insurance*,[61]

> The Attorney General of Louisiana filed a class action, naming the State and numerous Louisiana citizens as Plaintiffs. The class action alleged that the Defendant insurance companies [numbering about 225] failed to pay covered insurance claims following Hurricanes Katrina and Rita and as a result breached the insurance contracts to which the State is a partial assignee. . . . all under state law.[62]

The suit had originally been filed in the state trial court in Orleans Parish and was based upon the State's interest obtained from recipients of Road Home Program grants by virtue of the Subrogation/Assignment Agreement set out above.[63]

16, 2011); Monistere v. State Farm Fire & Cas. Co., No. 06-cv-5431 (E.D. La. Nov. 13, 2007) ($86,787.34), *rev'd and rendered*, No. 07-31149 (5th Cir. Feb. 17, 2009).

57. Case Mgmt. & Scheduling Order No. 4, at 50–51, *In re* Katrina Canal Breaches Consol. Litig. (*Levee*, *MRGO*, *Insurance*), No. 05-cv-4182 (E.D. La. Mar. 1, 2007), Record Doc. No. 3299.

58. *Id.* at 50.

59. *Id.*

60. *Id.* at 50–51.

61. Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. removed Sept. 11, 2007). Although the case was originally allotted to Section "K" of the court where Judge Duval presided, it was later transferred to Section "J" where Judge Carl Barbier presided after Judge Duval assumed senior status. The magistrate judge assignment remained unaltered.

62. *In re* Katrina Canal Breaches Litig. (*Road Home*), 524 F.3d 700, 702 (5th Cir. 2008).

63. *See* Certain Defendants' Notice of Removal, Louisiana v. AAA Ins. Co., No. 07-cv-5528 (E.D. La. Sept. 11, 2007), Record Doc. No. 1; *see also* discussion, *supra*

The insurance company defendants removed the case to the New Orleans federal court under the fairly new provisions of the federal Class Actions Fairness Act of 2005 (CAFA).[64] Like most legislative and judicial actions, CAFA has both its proponents and its detractors.[65] As plaintiff in the Road Home putative class action, the State of Louisiana quickly established itself as a vigorous CAFA detractor by launching exhaustive and persistent jurisdictional motion practice in an attempt to return to its own court system. After the presiding district judge initially upheld the federal court's jurisdiction by orally denying the State's motion to remand,[66] the Fifth Circuit affirmed, rejecting the State's contention that "Louisiana enjoyed sovereign immunity from involuntary removal to federal court in that it was suing in its state court to enforce state law."[67] The appellate court determined, however, that it "ought to rest our decision on the most narrow of grounds"—that the State had waived immunity by bringing a suit with private citizens:

> We are persuaded that the State cannot pull these citizens under its claimed umbrella of protection in frustration of a congressional decision to give access to federal district courts to defendants exposed to these private claims, presumably for reasons not far removed from those that led the first Congress to confer diversity jurisdiction—known then and now to the trial bar as "home cooking."[68]

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notes 18–28.

64. 28 U.S.C. §§ 1711–1715 (2012).

65. *See* William Branigan, *Congress Changes Class Action Rules*, WASH. POST (Feb. 17, 2005, 3:55 PM), http://www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html ("A major proponent of the legislation, the American Tort Reform Association, hailed the congressional action[, but] . . . . [t]he Association of Trial Lawyers of America, a leading opponent of the bill denounced it as 'a shameful attack on Americans' legal rights."); *compare* Letter from R. Bruce Josten, Exec. Vice Pres., U.S. Chamber of Commerce, to Members of the U.S. Senate (Feb. 7, 2005) *available at* https://www.uschamber.com/letter/letter-senate-support-class-action-fairness-act (urging senators to support the act) *with* Press Release, Consumer Fed'n of Am., House Passage of Class Action Bill Signals Loss for Consumers (Feb. 10, 2005) *available at* http://www.consumerfed.org/press_release/house-passage-of-class-action-bill-signals-loss-for-consumers (opposing the act).

66. Transcript of Hearing at 82–90, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Nov. 14, 2007), Record Doc. No. 9066.

67. *In re* Katrina Canal Breaches Litig. (*Road Home*), 524 F.3d 700, 702 (5th Cir. 2008).

68. *Id.* at 711.

Despite this decision, the State later filed additional attempts to have the case remanded to the state court in Orleans Parish.[69] All were rebuffed.[70]

In that same decision, the Fifth Circuit also rejected the State's severance suggestion of "splitting the action in two, leaving the Plaintiff citizens to pursue the class action in federal court and allowing Louisiana to remand its portion of the case to state court, perhaps staying the federal case to await the decision of the Louisiana courts . . . ."[71] In language that foreshadowed the future course of resolution of the suit, the Fifth Circuit stated:

> We trust that given our caution in this matter of state sovereignty, the district court will explore the possibility of returning Louisiana to the state court while retaining the class suit—perhaps with new class representatives drawn from its membership. *We express no opinion regarding either the permissible or the practicable segmenting of this case. We make these observations against the backdrop of the settled power of the district courts.* We will affirm the decision not to remand and will remand the case to the district court. *That court is the able manager of this complex litigation* and we will not extend these appellate hands into that endeavor.[72]

This jurisdictional decision and its reaffirmation of the case management power of the New Orleans federal trial court provided a critical basis for the exercise of authority that ultimately facilitated the Road Home settlement approval protocol and resulting settlement of thousands of individual insurance claims, while also foretelling certain resistance to that authority described below.[73]

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69. *See* Motion to Remand to State Court, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 14, 2011), Record Doc. No. 145; Louisiana's Motion to Remand Subrogated Claims to State Court, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 2, 2009), Record Doc. No. 80.

70. *See* Order and Reasons, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Oct. 28, 2011), Record Doc. No. 196; Minute Entry, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Oct. 19, 2011), Record Doc. No. 169; Order and Reasons, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 30, 2009), Record Doc. No. 106; Order and Reasons, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 16, 2009), Record Doc. No. 21.

71. *In re* Katrina Canal Breaches Litig. (*Road Home*), 524 F.3d 700, 711 (5th Cir. 2008).

72. *Id.* at 712 (emphasis added).

73. *See* disscussion, *infra* Section V.

C. THE LEGAL FRAMEWORK

The favored and encouraged status of settlement of civil lawsuits has long been the stated policy of American courts.[74] State courts across the nation have consistently endorsed the judicial policy of settlement encouragement in language that sounds a consistent and frequently stated theme:

> Public policy favors settlement of litigation. It is well-settled public policy that settlement agreements are highly favored and will be enforced whenever possible. . . . This view is applicable in courts of equity as well as in courts of law. The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims [and] . . . . as a means of resolving [litigation] uncertainties.[75]

The federal courts have long viewed settlement in the same positive and preferential way. As the Fifth Circuit stated more than forty years ago, "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits."[76] In an extensive publication on the subject, the Federal Judicial Center has pronounced: "Settlements are desirable, not just because trials are costly to litigants and court systems, but because settlements allow parties to 'manage their own disputes' and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases."[77]

In 1983, the case law that had been the principal source of

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74. *See Compromise and Settlement*, US LEGAL, http://compromiseandsettlement.uslegal.com (last visited Aug. 31, 2016).

75. *Id.* (citing Haderlie v. Sondgeroth, 866 P.2d 703 (Wyo. 1993); Clark v. Kawasaki Motors Corp., U.S.A., 490 S.E.2d 852 (W. Va. 1997); Sanders v. Roselawn Mem'l Gardens, 159 S.E.2d 784 (W. Va. 1998); Joel v. Valley Surgical Ctr., 80 Cal. Rptr. 2d 247 (Cal. App. Ct. 1998); M.H. Detrick Co. v. Century Indem. Co., 701 N.E.2d 156 (Ill. App. Ct. 1998); Leary v. Julian, 484 S.E.2d 75 (Ga. Ct. App. 1997)).

76. D.H. Overmyer Co., Inc. v. Loflin, 440 F.2d 1213, 1215 (5th Cir. 1971); *accord* Williams v. Phillips Petroleum Co., 23 F.3d 930, 935 (5th Cir. 1994); Mass. Cas. Ins. Co. v. Forman, 469 F.2d 259, 261 (5th Cir. 1972); Theatre Time Clock Co., Inc. v. Motion Picture Advert. Corp., 323 F. Supp. 172, 174 (E.D. La. 1971) ("The Court begins by recognizing the principle that voluntary settlements of civil controversies are highly favored by courts and a valid settlement agreement once reached, cannot be repudiated by the parties . . . .").

77. D. MARIE PROVINE, FED. JUDICIAL CTR., SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 1 (1986).

the doctrine favoring and encouraging settlements was formally incorporated into the Federal Rules of Civil Procedure. The 1983 amendments to "Rule 16 of the Federal Rules of Civil Procedure, which for the first time list settlement as a subject for pretrial conferences, implicitly endorse greater judicial sensitivity to settlement possibilities."[78] The Advisory Committee Notes to the 1983 Amendments described the Rule 16 changes as:

> [R]ecogniz[ing] that it has become common-place to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, *settlement should be facilitated* at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16[] to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussion of the subject might foster it.[79]

In the 1990s, Congress enacted two statutes that expressed its own goal of enhancing settlement procedures in the federal courts as a means of reducing cost and delay for civil litigants and that also spurred expansion of settlement procedures available to federal judges through further amendments to Rule 16. In the Civil Justice Reform Act of 1990 (CJRA),[80] Congress required that "[t]here shall be implemented by each United States district court . . . a civil justice expense and delay reduction plan."[81] The Act required:

> In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court . . . shall consider and may include . . . : a requirement that each party be represented at each pretrial conference by an attorney who has authority to bind that party regarding all matters previously identified by the court for discussion at the conference [and] . . . a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference . . . .[82]

Eight years later, Congress enacted the Alternative Dispute

78. PROVINE, *supra* note 77, at 2.

79. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment (emphasis added).

80. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (2012).

81. 28 U.S.C. § 471 (2012).

82. 28 U.S.C. § 473(b)(2), (5) (2012).

Resolution Act of 1998 (ADRA).[83] The congressional findings and declaration of policy supporting the ADRA included that "alternative dispute resolution, when supported by the bench and bar, . . . has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and *greater efficiency in achieving settlements* . . . ."[84]

The current version of Rule 16 makes clear the district court's broad case management authority in a variety of aspects. Matters for the court's consideration and "appropriate action" at any Rule 16 pretrial case management or scheduling conference expressly include:

> [A]mending the pleadings if necessary or desirable; . . . referring matters to a magistrate judge . . . ; settling the case and using special procedures to resolve the dispute when authorized by statute or local rule; . . . adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; [and] ordering a separate trial under Rule 42(b) of a claim, . . . or particular issue. . . . After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it. [85]

Appellate courts afford substantial deference to such orders. "The Civil Rules endow the trial judge with formidable case-management authority,"[86] and "[c]onsistent with the text and Advisory Committee Notes, we have interpreted Rule 16 as vesting a trial court with 'wide discretion and power to advance

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83. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 1, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658).

84. Alternative Dispute Resolution Act of 1998 § 2 (emphasis added).

85. FED. R. CIV. P. 16(c)(2)(B), (H), (I), (L), (M), (d). *See* E.D. La. Civ. R. 16.3.1, 16.3.3 (providing for various alternative dispute resolution alternatives, including private mediation, non-binding mini-trial or non-binging summary jury trial and imposing a duty upon counsel to "conduct serious settlement discussions in time to avoid the expense to the public and litigants, and the inconvenience to jurors and witnesses, occasioned by settlements made on the eve, or at the outset, of trial").

86. Rushing v. Kan. City S. Ry. Co., 185 F.3d 496, 508 (5th Cir. 1999) (citing Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1st Cir. 1998)), *superseded by statute*, FED. R. EVID. 103(a), *as recognized in* Mathis v. Exxon Corp., 302 F.3d 448, 459 n.16 (5th Cir. 2002).

causes . . . .'"[87] Thus, "[d]istrict court judges have wide latitude in formulating orders governing trial proceedings, and such orders only can be modified upon a showing of manifest injustice."[88]

This broad discretion and formidable case management authority extends to settlement activities. Rule 16 now expressly includes the power to participate in and oversee settlement discussions.[89] It incorporates post-CJRA and ADRA amendments designed to "eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed . . . to facilitate settlement."[90] Rule 16 now clearly provides that "[i]n any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: . . . *facilitating settlement*."[91] The Rule states that "[i]f appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."[92] Finally, the Rule provides that the court may impose sanctions against a party who fails to participate in a pretrial settlement conference in good faith by, for example, "pretending to support settlement while never intending to settle the case."[93]

In the Eastern District, both district judges and magistrate judges wield Rule 16's settlement oversight authority by involving themselves in settlement conferences and other settlement encouragement procedures. It is the magistrate judges, however, who shoulder most of the responsibility for conducting court-supervised settlement conferences, thus freeing the court's Article III judges to concentrate on trial and dispositive motions. Half of the court's district judges currently include requirements in their standard Rule 16 scheduling orders that counsel in most civil cases must schedule a settlement conference to be conducted by the assigned magistrate judge, usually shortly before the final pretrial conference. The rest offer

87. Lassiter v. City of Philadelphia, 716 F.3d 53, 55 (3d Cir. 2013) (quoting Buffington v. Wood, 351 F.2d 292, 298 (3d Cir. 1965)).

88. Eason v. Fleming Cos., No. 92-cv-1390, 1993 WL 360736, at *5 (5th Cir. Aug. 24, 1993) (citing Book v. Nordrill, Inc., 826 F.2d 1457, 1460 (5th Cir. 1987)).

89. FED. R. CIV. P. 16(a)(5).

90. FED. R. CIV. P. 16 advisory committee's note to 1993 amendment.

91. FED. R. CIV. P. 16(a)(5) (emphasis added).

92. FED. R. CIV. P. 16(c)(1).

93. Guillory v. Domtar Indus., Inc., 95 F.3d 1320, 1334 (5th Cir. 1996) (citing FED. R. CIV. P. 16(f)).

the opportunity for a court-conducted settlement conference upon request. Unquestionably, when a magistrate judge conducts a settlement conference in the Eastern District, he is acting not as a mediator or private neutral but as a judge of the court with all of the authority stemming both from Rule 16 and the applicable case law that judicial power entails:

> Although Congress considered magistrate judges to be "adjunct[s] of the United States District Court, appointed by the court and subject to the court's direction and control," the fact is that when magistrate judges exercise their authority . . . in civil cases, they are exercising the essential attributes of "judicial Power." . . . They do not function as mere adjuncts. They are puisne[94] judges acting as courts.[95]

Not all judges, commentators, and litigants are enamored of the emphasis many courts and Rule 16 now place on settlement, as opposed to trial, as the prevailing means of resolving civil cases. One much-respected federal appellate judge, who coincidentally later authored the key jurisdictional opinion noted above in the Road Home State class action, has lamented the small and declining number of trial and other court disposition—as opposed to settlement and ADR—in federal district courts.[96] He has publicly worried that the combination of rules amendments and congressional action facilitating both discovery and ADR has deleteriously affected the "need" for open, public trials, "and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs."[97] In this judge's view, "[T]he effect of the civil rules today is less facilitation of settlement and more the fueling of flight from courts," all resulting in "the indeterminacy of normative rules" to "a level of generality that erodes predictability of results and produces random outcomes."[98] He expressed "the nagging fear that in the long haul the vision ADR offered the federal trial

94. Puisne, from French *puisné* meaning "later born," refers to "[a] junior judge; a judge without distinction or title," and was "the title formerly used in English common-law courts for a judge other than the chief judge." *Judge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

95. Brown v. United States, 748 F.3d 1045, 1057–58 (11th Cir. 2014) (citations omitted).

96. *See* Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002).

97. *Id*. at 1423.

98. *Id*. at 1417, 1419.

courts may be a mirage and a dangerous one with a high price tag," as "trial judges have embraced ADR on the federal side" and "Congress has also pushed it, and federal judges see magistrate[] [judges] as always available" to conduct settlement activities, at the sacrifice of normative, rule-setting trial outcomes.[99]

Another distinguished federal trial judge has publicly struck similar themes.[100] Noting with regret the decline in the number of federal civil jury trials, he expressed his disfavor of "mandatory mediation in every case" or "bare-knuckled settlement conference[s] with the judge," in part because it poses a threat of "unwarranted nuisance value settlements" and in part because "a world without trial gives us no benchmarks or standards."[101] Similarly, in the context of MDL proceedings and other complex case management challenges involving numerous lawsuits arising from a single factual scenario, yet another federal district judge has noted that "the pursuit of settlement without offering trial is both unwise—and a defense ploy."[102] He extols the approach taken by an experienced Eastern District of Louisiana MDL transferee judge, and ultimately employed by the New Orleans federal court as a whole in addressing its Katrina litigation, of "*trying* representative cases and letting their outcomes *in court* set a price tag" for settlement.[103]

III. ROAD HOME SETTLEMENT APPROVAL PROTOCOL FOR HOMEOWNERS INSURANCE CLAIMS

On August 2, 2007, less than two years after Katrina's landfall, the federal Fifth Circuit resolved the common liability claim in the Insurance category of cases in the consolidated litigation against plaintiffs and in favor of the insurers:

> We conclude . . . that even if the plaintiffs can prove that the levees were negligently designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery. Regardless of what caused the failure of flood-control structures that were put in place to prevent

99. Higginbotham, *supra* note 96, at 1420.

100. Joseph F. Anderson, *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99 (2010).

101. *Id*. at 106–07, 109.

102. Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006) (Young, J.).

103. *Id*. at 157 (emphasis in original).

> such a catastrophe, their failure resulted in a widespread flood that damaged the plaintiffs' property. This event was excluded from coverage under the plaintiffs' insurance policies . . . . Accordingly, we conclude that the plaintiffs are not entitled to recover under their policies.[104]

Although the federal Fifth Circuit had reached this conclusion by making an "*Erie* guess,"[105] its prediction of state law was confirmed in all respects eleven months later by the Louisiana Supreme Court, which cited the Fifth Circuit approvingly and specifically noted that "our analysis is supported by" the federal court decision.[106] In resolving that the policies' flood exclusion clauses unambiguously excluded the coverage sought by plaintiffs, the court held:

> The plain, ordinary and generally prevailing meaning of the word "flood" is the overflow of water causing a large amount of water to cover an area that is usually dry . . . . [T]his definition does not change or depend on whether the event is a natural disaster or a man-made one. . . . [T]he parties intended the word "flood" to have its plain, ordinary and generally prevailing meaning . . . regardless of its cause.[107]

These decisions broke the principal legal barrier that had blocked widespread settlement negotiations of cases in the Insurance category of the Eastern District's consolidated litigation. By then, however, it had become apparent that another obstacle to free-flowing settlements must also be addressed. Specifically, although the Subrogation/Assignment

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104. *In re* Katrina Canal Breaches Litig. (*Insurance*), 495 F.3d 191, 196 (5th Cir. 2007).

105. In its seminal decision in *Erie R.R. Co. v. Tompkins*, the United States Supreme Court held that

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. Thus, [i]n a diversity jurisdiction action, federal courts are required to apply the law of the state . . . as if it were a state court of the state in which it sits. In interpreting state law, it first considers any pertinent decisions of the state's highest court.

304 U.S. 64 (1938); *see* Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1625–26 (2010) ("However, when there is no case directly on point, a federal court . . . [will] make what is informally referred to as an '*Erie* guess.' An '*Erie* guess' is an attempt to predict what a state's highest court would decide if it were to address the issue itself.").

106. Sher v. Lafayette Ins. Co., 2007-2441, p. 10 (La. 4/8/08); 988 So. 2d 186, 196 (citing *In re* Katrina Canal Breaches Litig., 495 F.3d 191, 214 (5th Cir. 2007)).

107. *Id*. at p. 7, 988 So. 2d at 194.

Agreement signed by Road Home grant recipients required the State's approval and consent before grant recipients could bind any settlement with their homeowners insurers, no clear cut system or procedure for applying for and obtaining the State's approval and consent had been put in place.[108]

Counsel for both sides in the Katrina consolidated litigation had already begun settlement negotiations and reached tentative agreement in some individual cases. On November 30, 2007, however, plaintiffs' liaison counsel advised the court in writing that "issues . . . with regard to [the] Road Home [Program] arising out of subrogation agreements executed in connection with the receipt of Road Home grants" had stalled finalization of the settlements.[109] Plaintiffs' counsel indicated:

> [T]hat we are formally making requests to the Road Home for approval of these settlements and for further guidance as to how to proceed. This step [of requesting court involvement in the settlement process] has become necessary for the reason that despite our numerous requests for input from the Road Home for guidance in this regard, we have not received any indication as to how we should proceed.[110]

He proposed a group of tentative settlements involving two major insurers as "a guinea pig" for court involvement in crafting a protocol for Road Home Program consent/approval of private insurance settlements.[111]

The court's role in response to this request was principally to exercise Rule 16's codification of the "power to convene," a "tool available . . . to address complex problems that cannot be resolved without shared responsibility and joint action" in a "forum or place where key interests or stakeholders can participate in a collaborative problem-solving process."[112] The court did so initially by conducting a series of five conferences in which counsel for the parties in individual cases and for the State and its Road Home Program, by virtue of their presence as

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108. *See, e.g.*, Order and Reasons at 3, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669.

109. Letter from Joseph M. Bruno, Plaintiffs' Liason, to Hon. Joseph C. Wilkinson, Magistrate Judge, Eastern District of Louisiana 1, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Dec. 7, 2007), Record Doc. No. 9434.

110. *Id.*

111. *Id.*

112. Chris Carlson, *Using Political Power to Convene*, 2006 NAT'L CIVIC REV. 57, 57 (Fall 2016).

parties in the consolidated litigation through *Louisiana v. AAA Insurance*, were required to attend. At each conference, counsel reported on the status of their negotiations and drafting efforts concerning a Road Home Program consent/approval process, and conducted settlement discussions concerning particular cases before the magistrate judge. After each conference, the court entered orders setting deadlines for the exchange of additional information and settlement approval protocol proposals, finalizing some "guinea pig" settlements, and scheduling follow-up conferences.[113]

Principal credit for the successful Road Home settlement approval procedure that was ultimately adopted must be attributed to Daniel A. Rees, then legal counsel to the State of Louisiana, Division of Administration, Office of Community Development, Disaster Recovery Unit; Joseph M. Bruno, court-appointed plaintiffs' liaison counsel in the consolidated litigation; Seth A. Schmeeckle, chief deputy to defendants' court-appointed liaison counsel in the consolidated litigation, Ralph S. Hubbard, III; Charles L. Chassaignac, IV, member of the court-appointed insurer defendants' litigation committee in the consolidated litigation; and Frank C. Dudenhefer, Jr., counsel for the State. Counsel conducted the bulk of the negotiations outside the court's conferences, determined the types, form, and volume of information concerning proposed settlements that should be submitted to the State, drafted and redrafted proposals and

113. *See* Minute Entry, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*, *Insurance*), No. 05-cv-4182 (E.D. La. Dec. 6, 2007), Record Doc. No. 9395 ("Counsel for the Road Home program advised the court that a protocol proposed by the Road Home program concerning [its consent/approval for settlements in test cases] will be provided to counsel and the court on December 7, 2007."); Order, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*, *Insurance*), No. 05-cv-4182 (E.D. La. Dec. 10, 2007), Record Doc. No. 9416 (scheduling a December 20, 2007 "settlement conference/hearing" in the test cases at which "an authorized representative of the State of Louisiana, with actual authority to bind the State of Louisiana/Road Home Program and execute (a) the written consent to settlement described in the fifth paragraph of 'The Road Home Limited Subrogation/Assignment Agreement' and (b) any appropriate release of the settled claims, MUST APPEAR IN PERSON"); Order, Exhibits A–B, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*, *Insurance*), No 05-cv-4182 (E.D. La. Dec. 21, 2007), Record Doc. No. 9979 (release form and settlement data summaries); Minute Entry, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*, *Insurance*), No. 05-cv-4182 (E.D. La. Jan. 11, 2008), Record Doc. No. 10383 (reporting the progress of additional settlements); Minute Entry, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*, *Insurance*), No. 05-cv-4182 (E.D. La. Jan. 25, 2008), Record Doc. No. 10793 (continuing a status conference in order for the Road Home Program to have thirty days to process consents for 400 initial proposed settlements using the new protocol).

counter-proposals for a written Road Home settlement consent/approval protocol, and crafted the application forms, releases, and related documents that were ultimately used as the principal tools for submission of proposed settlements to the State and their finalization. It was counsel who ultimately succeeded in finalizing the protocol itself and making it work in practice.

Two issues, however, posed obstacles to finalizing an agreed-upon protocol for Road Home settlement consent/approval and could not be resolved through negotiation by the parties without court action. First, as part of their negotiation of the terms of an agreed protocol, counsel had drafted two forms for use in the process. One was a "Request for Consent Form" to be completed by the grant recipient and submitted to the Louisiana Division of Administration Disaster Recovery Unit.[114] In addition to basic identification and contact information about the grant recipient, the affected property and his flood and homeowners insurance policies, the form also contained spaces for information about their claims, including amounts received under the policies for various types of coverage (structure, contents, alternative living expenses, other expenses or property damage), identification of the insurer's attorney and adjuster, and whether the recipient had sued regarding the hurricane claim.[115] The second form, to be completed and submitted to the State by the insurer, also included identification information, policy limit and dollar amounts of prior payments, and the proposed final settlement for which consent was being sought, all broken down to indicate how the amounts had been allocated to each type of coverage.[116]

On December 5, 2007, the parties filed a "Joint Motion for Entry of a Protective Order Governing Road Home Applicant and Recipient Information *Subject to the Court's Resolution of Two Disputed Issues*."[117] The insurance companies asserted that they would "not participate in submitting this information to the State unless the information was subject to a stringent protective

114. Order and Reasons at 21–28, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669.

115. *Id.* at 22–24.

116. *Id.* at 29.

117. Joint Motion for Entry of a Protective Order Governing Road Home Applicant and Recipient Information Subject to the Court's Resolution of Two Disputed Issues, at 1, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Dec. 5, 2007), Record Doc. No. 9347 (emphasis added).

order."[118] The insurers argued and submitted evidence indicating that they had proprietary and trade secret interests in the information contained in the forms because "compilations" of such information were used by them for product design, marketing and evaluation purposes, customer and agent relations, and underwriting policy, procedure, formula, and decision making.[119] They asserted that disclosure of the information would permit competitors and others to make their own calculations that would put them at competitive disadvantage in the same areas.[120] The State opposed entry of any protective order, arguing that a "Voluntary Privacy Protocol" it had developed would be sufficient to protect certain private information about the grant recipients, as well as their policies and claims numbers, which were private data identifiers.[121]

The court denied the insurers' request for a protective order, finding that the "good cause" required to support such an order[122] had not been shown, in part because the "competitive impacts postulated in the insurance companies' submissions are mostly speculative" and the "data that the insurers are asked to furnish . . . is purely factual, mostly innocuous and, with the exception of identifiers such as claim numbers and policy numbers, implicate no strong competitive or proprietary interests."[123] The court also rejected the insurers' arguments that revealing information about the settlements would somehow "impede future settlements of unrelated claims because a settlement might be construed as an admission of liability."[124] Finally, the court found a "strong public interest in the transparency of the State's decision-making process," as the State evaluated applications for approval of and consent to proposed settlements:

> The Road Home grants come from public money that is *not*

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118. Order and Reasons at 3, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669.

119. *Id*. at 9–10.

120. *Id*. at 10–11.

121. *Id*.; Response by the State of Louisiana, Etc. to the Supplemental Memorandum in Support of Defendant's Motion for Protective Order Filed March 3, 2008, at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Mar. 10, 2008), Record Doc. No. 11592. *See* FED. R. CIV. P. 5.2 (requiring privacy protections in court filings for certain kinds of data about individuals).

122. FED. R. CIV. P. 26(c)(1).

123. Order and Reasons at 11, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669.

124. *Id*. at 12.

> intended as a subsidy to insurance companies, and the State's decisions on how it determines settlement approval requests, with its ultimate impact on public funds, is a matter of strong public interest.
>
> . . . .
>
> The State, by inserting itself into the settlement process and filing the . . . class action against the insurance companies, has converted what would ordinarily be private contractual disputes between insurers and their insureds into matters that involve governmental decision-making. The core of the Road Home subrogation agreements and the settlement approval process is the State's attempt to recover public funds. In our democratic republic, such decisions cry out for transparency.
>
> . . . .
>
> [T]he numerous individual disputes between insurer[s] and their insureds implicate the public's interest in the post-hurricane recovery process, and those otherwise private disputes are imbued with a public interest. . . . [I]f these cases came to trial . . . , the factual data [in the forms] would likely be introduced into evidence [and] . . . become a public record of this court that probably would not be sealed. A settlement process that involves a government agency making decisions based on the same facts and having a substantial impact on public funds should be no less accessible.[125]

The court noted its "dislike" for "reaching a conclusion that may, in the short run, delay settlements," while also making clear

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125. Order and Reasons at 14–16, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669. The court drew an analogy to cases invoking Freedom of Information Act ("FOIA") policies, since the same concerns are equally vital in Road Home cases involving disbursement of billions of dollars in public funds through state administration to disaster victims. *See id.* at 14–15 ("The Eleventh Circuit balanced the public and private interests and held that news media could obtain from FEMA, pursuant to . . . FOIA, data concerning FEMA's disbursements of disaster relief following four hurricanes that hit Florida in 2004. 'The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" (citing News-Press v. U. S. Dep't of Homeland Sec., 489 F.3d 1173, 1190 (11th Cir. 2007))); *see also id.* at 15 ("FOIA is often explained as a means for citizens to know what the Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.").

its general satisfaction with the overall structure of the proposed settlement consent and approval procedure, "but without the secrecy sought by the insurers."[126]

Despite the court's rejection of the proposed protective order, the parties reached agreement about one month later on the consent and approval procedure, using essentially the same request and data forms, but substituting the less restrictive and more appropriately limited voluntary privacy protocol proposed by the State.[127] At that point, however, the second issue requiring court intervention arose. The parties disagreed over whether their agreement should be simply a voluntary protocol, as the State preferred, or adopted and entered as a court order, as the insurance companies preferred, with all of the formal court oversight and enforcement mechanisms that would accompany such an order.[128]

On May 30, 2008, the insurance companies filed a "Motion for Entry of Case Management Order Establishing Road Home Settlement Protocol."[129] The insurers argued that a court order was needed because "the State's review and approval of insurance settlements has been a very slow process," requiring "many months" for each approval and resulting in "a substantial backlog of unapproved settlements . . . with new requests coming in at the rate of 10 to 15 a day. These delays are preventing policyholders from receiving settlement proceeds and are also standing in the way of the Court's ability to close and dismiss resolved insurance lawsuits."[130] Relying on Federal Rules of Civil Procedure 16(a)(1), (2) and (5), 16(c)(2)(I) and (P), and 23(d), the insurers urged the court to adopt their agreed-upon procedures as a court order, essentially so that the parties would be subject to the court's authority and processes to facilitate and speed settlements to conclusion.[131]

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126. Order and Reasons at 19–20, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Apr. 21, 2008), Record Doc. No. 12669.

127. Minute Entry at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. May 16, 2008), Record Doc. No. 13202.

128. *Id*.

129. Defendant's Motion for Entry of Case Mgmt. Order Establishing Rd. Home Settlement Protocol, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. May 30, 2008), Record Doc. No. 13348.

130. Memorandum in Support of Defendant's Motion for Entry of Case Mgmt. Order Establishing Rd. Home Settlement Protocol 3, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. May 30, 2008), Record Doc. No. 13348-1.

131. *Id*. at 5.

The State's objections began with its persistent reassertion that the federal court lacked jurisdiction and advised that it intended again to seek remand to the state court, despite the Fifth Circuit's recent rejection of its initial attempt to do so.[132] "The fact that remand . . . has not yet happened . . . does not in any way diminish the absence of jurisdiction."[133] The State refused to take exclusive blame for delays in Road Home settlement approvals, citing delay by insureds or their counsel in submitting requests for approval and "incomplete approval packages."[134] It viewed the prospect of court orders requiring attendance of a State representative at court-ordered settlement conferences in instances in which particular proposed settlements had not been approved or timely reviewed as usurping its own Road Home "administrative appeal procedures" with "another layer of appeal, all of which is unnecessary and not cost effective."[135] Although the consent and approval requirement was of its own making and in furtherance of its own subrogation and assignment interest, the State also sought to require that insurers, not the State, should "furnish the Approval Request Form to the settling party."[136]

The court overruled the State's objections, granted the insurers' motion, and entered its "Case Management Order Re: Road Home Settlement Protocol" on June 23, 2008.[137] Using the State's own putative class action as the basis for its authority, the court made the order applicable to settlements involving "any insurance company defendant in that lawsuit as well as to any claim that involves a Road Home grant from the State."[138] The materials to be used to request Road Home consent and approval of proposed settlements, a one-page form to be completed and submitted by the insurer and a six-page form to be completed and submitted by the insured or his counsel were attached as exhibits

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132. *See* State's Memorandum in Opposition, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. June 5, 2008), Record Doc. No. 13437.

133. Opposition to Defendants' Motion for Entry of Case Mgmt. Order Establishing Rd. Home Settlement Protocol at 2, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. June 5, 2008), Record Doc. No. 13437.

134. *Id*. at 2–3.

135. *Id*. at 3.

136. *Id*.

137. Case Mgmt. Order Re: Rd. Home Settlement Protocol, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. June 23, 2008), Record Doc. No. 13598.

138. *Id*. at 3.

to the order.[139] The privacy protocol was also attached as an exhibit, but the order provided that "the Court does not hereby adopt or enter this Privacy Protocol as part of this Case Management Order."[140]

The court-approved protocol required that the process commence when a settlement was reached by the insurance company submitting its completed form to counsel for the policyholder, who must then complete the policyholder's form and send it to the State Disaster Recovery Unit at a specified address within ten days.[141] The State was to make its decision within thirty days and transmit it to both sides.[142] If the State refused to consent to the settlement or failed to respond within thirty days,

> then the insurance company defendant or the policyholder shall have the right to file a motion requesting a settlement conference with the Magistrate Judge assigned to a particular case . . . . The policyholder's counsel and the policyholder shall attend the settlement conference with a copy of their file. Dan Rees [counsel for the Louisiana Disaster Recovery Unit], or a designee of his choosing with full authority, shall attend the conference on behalf of the State with its file. Counsel for the insurance company defendant shall attend the settlement conference with a copy of counsel's file.[143]

A similar procedure involving a settlement conference with the court was provided if the policyholder rejected the terms of the State's consent.[144] The State was given the authority "at its sole and uncontrolled discretion" to amend the form of request and approval to be submitted by the policyholder, "so long as any such amendment or modification . . . [would] make completion . . . less onerous and burdensome."[145]

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139. Case Mgmt. Order Re: Rd. Home Settlement Protocol, Exhibits A–B, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. June 23, 2008), Record Doc. No. 13598.

140. *Id.* at 7.

141. *Id.* at 3–4.

142. *Id.* at 4.

143. *Id.* at 4–5.

144. Case Mgmt. Order Re: Rd. Home Settlement Protocol at 6, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. June 23, 2008), Record Doc. No. 13598.

145. *Id.*

As an additional measure, reflecting perhaps some softening of its opposition to federal court involvement and intended to advance both the Road Home settlement consent and approval process and resolution of the State's own putative class action based on the subrogation/assignment claims, Dan Rees proposed that the case management order also include the following provision:

> In any case pending in this Court in which the Road Home Program may have subrogation or assignment rights, the parties may request, either orally or in connection with a settlement conference or in writing if no settlement conference has been conducted, that the assigned magistrate judge make a finding as to the reasonableness of a proposed settlement. The request or motion should be based upon information of record and/or submitted by the parties sufficient to support an order that will take essentially the following form:
>
> > This matter came on for a review of the settlement for reasonableness of the amount of the settlement paid on the structure, the plaintiff having received a Louisiana Road Home grant funded by the United States Department of Housing and Urban Development which grant is subject to a prohibition on duplication of benefits under the Stafford Act, 42 U.S.C. 5151, et seq. The Court has been provided information regarding the parties' positions, as may be relevant to the case, on the causation and extent of damages claimed, payments made to date, coverage issues and claims administration, and anticipated litigation expenses. The parties have further submitted for in camera review the executed Road Home Carrier Settlement Communication, which shall not form a part of the court record.
> >
> > The Court, considering the information submitted to it finds that the amount agreed to be paid as a final settlement on the primary structure, specifically $_____, is a reasonable one *and this Order can be accepted by the Louisiana Road Home Program under its issued settlement protocols as prima facie evidence of the reasonableness of the settlement*.
> >
> > Within 10 days of the date of this Order, counsel must forward a copy [to the State Disaster Recovery Unit] for the State to issue a determination of that portion of the primary structure settlement which is a duplication of

> benefits of Road Home grant for remittance to the State of Louisiana.[146]

Thus, through this provision, the court began to provide the State with a mechanism to help streamline its duplication of benefits analysis for settlement approval purposes.

Principally through the practical, public-spirited and tirelessly conscientious efforts of Dan Rees and his undermanned legal staff at the Louisiana Disaster Recovery Unit, the Road Home settlement consent and approval process accelerated, insurance settlement funds began to flow more readily into the hands of homeowners who needed that money in their recovery efforts, and the court's process of bringing the thousands of individual insurance claims pending before it to conclusion was greatly advanced. The follow-up settlement conference and approval order procedures in the case management order were employed with frequency, and Dan Rees became practically a fixture—and a welcome one—in the halls of the federal courthouse in New Orleans and elsewhere, since the process also became used in the state courts and other federal districts affected by both Hurricanes Katrina and Rita.

IV. MASS SETTLEMENT OF INSURANCE CASES IN THE KATRINA CONSOLIDATED ACTION

Nothing produces settlement more reliably than a firm, looming trial date, with its attendant risks, uncertainty of result, costs and time requirements. Entry of the Road Home settlement protocol case management order had removed a substantial barrier to settlement finalization. What was needed at that point to advance ultimate resolution of the thousands of individual homeowners claims pending against insurers in the New Orleans federal court's Katrina consolidated litigation was a firm, looming deadline that included trial—or at least a case management occurrence that would replicate its attendant effects.

Settlement efforts had accelerated after the *Sher* decision of the Louisiana Supreme Court,[147] some ten weeks before the Road Home settlement protocol order was entered. On June 13, 2008, the federal trial court in New Orleans formally recognized the

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146. Case Mgmt. Order Re: Rd. Home Settlement Protocol at 7–8, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. June 23, 2008), Record Doc. No. 13598 (emphasis added).

147. Sher v. Lafayette Ins. Co., 2007-2441 (La. 4/8/08); 988 So. 2d 186.

case management effect of *Sher*, which confirmed the Fifth Circuit's earlier "*Erie* guess" that the flood exclusions in homeowners policies were valid.[148] "The Insurance umbrella of the . . . consolidated litigation was established because all of the cases included the common flood coverage claim. . . . The flood coverage issue that was the reason for consolidation no longer exists."[149] At that time, about 900 individual cases were included in the Insurance category of the consolidated litigation. In that group, however, were twenty-two "mass joinder cases" asserting claims by about 21,000 named plaintiffs concerning about 16,000 damaged properties against scores of insurance companies.[150] Before simply deconsolidating the cases and/or severing the misjoined claims for reassignment and individualized handling throughout the other sections of the court, including what might have been thousands of trial settings, the court again used the powerful instrument of Rule 16 to provide the parties with one final effort at across-the-board settlement.

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148. Post-*Sher* Insurance Umbrella Case Mgmt. Order, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. June 13, 2008), Record Doc. No. 13521.

149. *Id.* at 2.

150. *Id. See* Anderson v. State Farm Fire & Cas. Ins. Co., No. 07-cv-6737 (E.D. La. filed Oct. 11, 2007) (forty-three plaintiffs); Robert v. Allstate Ins. Co., No. 07-cv-6162 (E.D. La. filed Sept. 27, 2007) (twenty plaintiffs); Alexander v. Allstate Ins. Co., No. 07-cv-5768 (E.D. La. filed Sept. 21, 2007) (about 400 plaintiffs); Call v. Allstate Ins. Co., No. 07-cv-5769 (E.D. La. filed Sept. 21, 2007) (twenty plaintiffs); Ansardi v. Allstate Ins. Co., No. 07-cv-5767 (E.D. La. filed Sept. 21, 2007) (forty-four plaintiffs); Acevedo v. AAA Ins., No. 07-cv-5208 (E.D. La. filed Aug. 29, 2007) (about 500 plaintiffs); Adams v. Allstate Ins. Co., No. 07-cv-5206 (E.D. La. filed Aug. 29, 2007) (about 390 plaintiffs); Allen-Perkins v. State Farm Fire & Cas. Ins. Co., No. 07-cv-5204 (E.D. La. filed Aug. 29, 2007) (about 170 plaintiffs); Acevedo v. AAA Ins., No. 07-cv-5199 (E.D. La. filed Aug. 29, 2007) (about 500 plaintiffs); Abadie v. Aegis Sec. Ins. Co., No. 07-cv-5112 (E.D. La. filed Aug. 29, 2007) (about 4,600 plaintiffs); Allen v. State Farm Fire & Cas. Ins. Co., No. 07-cv-5111 (E.D. La. filed Aug. 29, 2007) (about 930 plaintiffs); Aguilar v. ALEA London, No. 07-cv-4852 (E.D. La. filed Aug. 28, 2007) (about 900 plaintiffs); Abram v. AAA Ins., No. 07-cv-5205 (E.D. La. filed Aug. 27, 2007) (about 430 plaintiffs); Alexander v. Auto. Club Family Ins. Co., No. 07-cv-4538 (E.D. La. filed Aug. 27, 2007) (about 6,000 plaintiffs); Adams v. State Farm Fire & Cas. Ins. Co., No. 07-cv-4459 (E.D. La. filed Aug. 27, 2007) (about 100 plaintiffs); Aucoin v. Allstate Ins. Co., No. 07-cv-4458 (E.D. La. filed Aug. 27, 2007) (about 90 plaintiffs); Aguda v. State Farm Fire & Cas. Ins. Co., No. 07-cv-4457 (E.D. La. filed Aug. 27, 2007) (about 90 plaintiffs); Alexander v. Allstate Ins. Co., No. 07-cv-4455 (E.D. La. filed Aug. 27, 2007) (about 150 plaintiffs); Austin v. Allstate Fire & Cas. Ins. Co., No. 06-cv-5383 (E.D. La. filed Aug. 29, 2006) (twenty-eight plaintiffs); Kiefer v. Lexington Ins. Co., No. 06-cv-5370 (E.D. La. filed Aug. 29, 2006) (about forty-five plaintiffs); Abadie v. Aegis Sec. Ins. Co., No. 06-cv-5164 (E.D. La. filed Aug. 28, 2006) (about 4,600 plaintiffs); Aaron v. AIG Centennial Ins. Co., No. 06-cv-4746 (E.D. La. filed Aug. 25, 2006) (about 1,850 plaintiffs).

In its "Post-*Sher* Insurance Umbrella Case Management Order," the court began with an order dismissing with prejudice

> all claims asserted by plaintiffs in this consolidated litigation against any insurer alleging failure of the defendant to provide plaintiffs with flood damage coverage under an insurance policy that excludes such coverage, including all allegations that a class action should be certified concerning such a flood claim. . . . Any defendant who contends that a final judgment of dismissal should be entered in any particular case because no other claims are asserted in the particular case must file a motion for entry of judgment . . . .[151]

The order then excluded the twenty-two mass joinder cases from the remainder of its requirements, finding that they "may benefit from separate consolidated treatment" and imposed a special procedure for the remaining cases "in a final effort to permit the parties . . . one last opportunity to settle their cases in an efficient and cost-effective manner before the cases are deconsolidated and set for trial."[152] Specifically, plaintiffs were required to submit to defendants within thirty days a "written settlement offer" and were "encouraged to attach to their settlement offer" supporting information, including a contractor's estimate of the claimed damage, a list with value of damaged contents, receipts showing claimed additional living and/or extra business expenses, a statement concerning the status or amount of any Road Home application or grant and/or Small Business Administration loan, and identification of any applicable flood insurance policy and/or amounts paid under it.[153] Defendants were then required to respond within thirty days with a written settlement counterproposal and "encouraged to attach . . . their adjustors' or contractors estimate of damage and any other documentation supporting their position."[154] Within thirty days of this exchange of settlement offers, the parties were required to "confer with each other and advise [the court] in writing whether the case presents a strong likelihood of settlement."[155]

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151. Post-*Sher* Insurance Umbrella Case Mgmt. Order at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. June 13, 2008), Record Doc. No. 13521.

152. *Id*. at 2–3.

153. *Id*. at 3.

154. *Id*. at 3–4.

155. *Id*. at 4.

At that point, the court's role in this particular process was not to apply the kinds of directive or facilitative techniques a presiding judicial officer may employ in a judge-conducted individual case settlement conference.[156] Instead, the court's function was more organizational and as an active monitor of compliance with the order by individual counsel, especially when they were listed either as counsel for numerous plaintiffs or as defense counsel for a particular insurer defending numerous individual cases. Specifically, the order required that upon receipt and evaluation of the report of counsel, the court "will determine on the papers or through whatever conference, hearing or other process . . . deem[ed] appropriate, whether a court-conducted settlement conference or a private mediation should be scheduled or whether the case should be deconsolidated, separated from the Insurance umbrella, reallotted to the originally assigned district judge and magistrate judge, and set for trial."[157]

The court supervised this process by using a list compiled by liaison counsel of the names and civil action numbers of all 900 cases in the Insurance category, and then adding for internal purposes the telephone contact information for lead counsel and identifying individual counsel who represented numerous plaintiffs or a single defendant as to numerous claims. In late September 2008, the court received and reviewed the reports of counsel. Many reported that their cases had settled,[158] and those were quickly conditionally dismissed without prejudice to permit

156. Judges use a variety of techniques reflecting their own philosophies and personalities in conducting settlement efforts. These range from expressing their own views of settlement values, strengths and weaknesses of cases and positions taken by the parties, more in the role of instructor of what may constitute an appropriate compromise; to passively encouraging the parties to come to an agreement based upon the parties' own views and inclinations through a purely facilitative, intermediary approach; or requiring alternative dispute resolution techniques other than a judge-conducted settlement conference, including mini-trial, private mediation or third-party neutral evaluation. *See generally* PROVINE, *supra* note 77, at 21–42. Thus, "[t]he judge becomes a diagnostician of litigation pathology who has at hand several procedures that can be applied to enhance settlement prospects in cases where some form of intervention appears to be worthwhile." *Id.* at 14.

157. Post-*Sher* Insurance Umbrella Case Mgmt, Order at 4, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. June 13, 2008), Record Doc. No. 13521.

158. *See, e.g.*, Letter from Scot P. Koloski to Hon. Joseph C. Wilkinson, Magistrate Judge, Eastern District of Louisiana (Sept. 23, 2008), *In re* Katrina Canal Breaches Consol. Litig. (*Held v. Republic Fire & Cas. Ins. Co.*), No. 05-cv-4182 (E.D. La. Sept. 25, 2008), Record Doc. No. 15355.

the parties to consummate their agreements and then follow up with motions to dismiss with prejudice when the settlements were completed.[159] In some instances, counsel failed to provide the court with the ordered written report, and they were contacted directly and required either to submit the report immediately or jointly to provide an oral report. When counsel's reports advised that substantial settlement progress had been made presenting a strong likelihood of settlement, the court conducted further settlement discussions by telephone or through in-person conferences, and most of those cases settled. When no report was submitted or when counsel reported little settlement progress, an order was issued severing the case from the consolidated litigation and reassigning it either to the section of court from which it had been transferred, or randomly reallotting it to another section of the court for further proceedings, including imposition of a scheduling order setting trial and associated deadlines.[160] Of the approximately 900 cases in the Insurance category at the time of entry of the Post-*Sher* mass settlement procedure, about 700 settled, while about 200 were deconsolidated and set for further proceedings. Of those 200 cases, all ultimately settled, the vast majority within months of their severance from the consolidated litigation.[161]

The twenty-two mass joinder cases presented special settlement difficulties, owing principally to the sheer volume of individual claims asserted in them. The obvious motivation for the parties to attempt to reach sweeping settlements was the prospect of having to prosecute, defend, or prosecute and defend thousands of severed individual cases, with the time and expense involved in such an enormous litigation undertaking. The court's perspective was to balance the desirability of encouraging and

159. *See, e.g.*, Minute Entry, *In re* Katrina Canal Breaches Consol. Litig. (*Turner v. Republic Fire & Cas. Ins. Co.*), No. 05-cv-4182 (E.D. La. Sept. 24, 2008), Record Doc. No. 15422 (advising Judge Duval of a settlement "so that he may enter an appropriate 90-day conditional dismissal order").

160. *See, e.g.*, Order, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Sept. 25, 2008), Record Doc. No. 15505 (deconsolidating *Tardo v. State Farm Ins. Co.*, No. 08-cv-1166); Order, Gabb v. Allstate Ins. Co., No. 07-cv-3431 (E.D. La. Sept. 23, 2008), Record Doc. No. 9; Order, Adams v. Allstate Ins. Co., No. 07-cv-3429 (E.D. La. Sept. 19, 2008), Record Doc. No. 7.

161. *See, e.g.*, Joint Motion to Dismiss, Tardo v. State Farm Ins. Co., No. 08-cv-1166 (E.D. La. Oct. 14, 2010), Record Doc. No. 30; Joint Motion for Voluntary Dismissal with Prejudice, Gabb v. Allstate Ins. Co., No. 07-cv-3431 (E.D. La. Mar. 16, 2009), Record Doc. No. 13; Joint Motion for Voluntary Dismissal with Prejudice, Adams v. Allstate Ins. Co., No. 07-cv-3429 (E.D. La. Nov. 13, 2008), Record Doc. No. 10.

offering the parties an opportunity to settle, while also recognizing that trial is both the court's principal mission and also a strong motivator in and of itself of settlement.

The court and counsel addressed the mass joinder cases methodically, but with "no broad-sweeping case management order."[162] In an order entered on July 8, 2008, the court stated that it:

> [W]ill conduct a series of status conferences, grouping the cases for conference purposes as . . . deem[ed] appropriate, to determine how further proceedings in these matters might best be conducted. After the conferences and further evaluation of the status of the cases, . . . the court will determine whether the cases are progressing satisfactorily toward settlement or other resolution by continued mass management, or if some or all of the claims of individual plaintiffs against their particular insurers should be severed, assigned individual civil action numbers and reallotted so that trial dates and associated deadlines might be set.[163]

The effect of the order was to notify counsel that they should undertake their own settlement efforts in these cases, and they did so.

The court conducted its management role principally by addressing the cases in groups in which plaintiffs' counsel was the same on more than one case for joint handling. For example, Joseph M. Bruno, plaintiffs' court-appointed liaison counsel, who was invaluable in his practical approach and overall assistance to the court in all aspects of management and organization of the consolidated litigation, was also counsel of record for about 10,000 plaintiffs in three of the mass joinder cases;[164] another local law firm represented about 1,800 plaintiffs in one of these cases;[165] and an out-of-town law entity that had established a temporary local presence (which no longer exists) employing Louisiana lawyers represented about 3,500 plaintiffs in fourteen

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162. Order at 1, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. July 8, 2008), Record Doc. No. 13740.

163. *Id.* at 1–2.

164. *See, e.g.*, Complaint—Class Action at 154, Abadie v. Aegis Sec. Ins. Co., No. 06-cv-5164 (E.D. La. Aug. 28, 2006), Record Doc. No. 1-1.

165. *See* Complaint for Damages at 38, No. 06-cv-4746 (E.D. La. Aug. 25, 2006), Record Doc. No. 1. The local firm was Jim Hall & Associates.

of the mass joinder cases.[166] All twenty-two cases were then scheduled for status conferences on December 19, 2008, at which the court would determine which individual claims in each case had been settled; whether additional mass handling presented a substantial likelihood of settlement in the short term; and, if not, when and how to sever the misjoined claims for reassignment around the court and further individualized procedures, including trial settings.

During the December 19th status conferences, counsel in most of the cases reported substantial settlement progress, including final or tentative agreement as to more than 10,000 individual claims. For those cases, the court set a docket call about three weeks later on January 8, 2009, in two separate sessions "to determine the settlement status of the various claims asserted in these cases *with finality* so that those misjoined claims that will not settle in the short term without further court action may proceed to resolution."[167] At or before the January 8th docket call, counsel were required to report "plaintiff-by-plaintiff, on an individual basis, the status of the claims of each plaintiff whose claims have not yet formally been dismissed, so that [the court] may determine whether each claim should immediately be severed and reallotted for trial scheduling purposes."[168] Based upon the reports of counsel, the court noted that "many of the claims have been settled, *conditioned* upon approval of the Road Home Program. Many such claims appear also to form the basis of the claims asserted by the State of Louisiana . . . in [its] putative class action Road Home case."[169] Thus, legal counsel for the State's Disaster Recovery Unit was required to appear in person at the January 8th call docket sessions.[170] As to those cases in which little or "virtually no settlement progress" had been made, severance orders of the type

166. *See, e.g.*, Allstate Insurance Company's Notice of Removal, Exhibit A (Petition for Damages) at 6, Ansardi v. Allstate Ins. Co., No. 07-cv-5767 (E.D. La. Sept. 21, 2007), Record Doc. No. 1. The firm was the Hurricane Legal Center.

167. Minute Entry at 1, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 19, 2008), Record Doc. No. 16822 (emphasis added); *see* Order at 1, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 17, 2008), Record Doc. No. 16762.

168. Minute Entry at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 19, 2008), Record Doc. No. 16822; *see* Minute Entry at 1–3, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 19, 2008), Record Doc. No. 16823.

169. Order at 1, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 17, 2008), Record Doc. No. 16762.

170. *Id*. at 2.

described below were immediately issued.[171]

At two open court and on-the-record January 8, 2009, call docket sessions, the settled claims of thousands of named individuals were identified and dismissal orders were subsequently entered.[172] One major insurer conducting extensive, across-the-board and largely successful settlement efforts requested and received a supplemental call docket hearing that resulted in finalization of dozens of additional claims.[173] As to all twenty-two of the mass joinder cases, a deadline in late January 2009 was set for counsel to file individualized amended complaints, curing the misjoinder problems, for all claims that had not been settled, followed by another deadline about two weeks later, on which the parties were advised that the court would dismiss the twenty-two mass joinder cases.[174]

The severance orders formally terminated the post-*Sher* settlement evaluation process. They set a late January 2009 deadline by which:

> [A]ny plaintiff in the [mass joinder] cases whose claims have not been settled or dismissed . . . must . . . file an individualized amended complaint for each plaintiff or set of related plaintiffs asserting claims against only the appropriate insurer defendant. . . . on paper, not electronically. The caption of the amended complaint must contain only the plaintiff(s) and defendant that are the subject of that specific claim. . . . [T]he Clerk will assign a new docket number and will allot the case at random among the judges of the court. . . . The newly filed cases will proceed separately and will *not* be consolidated with the [consolidated Katrina litigation], so that they may proceed to

171. Minute Entry at 2, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 19, 2008), Record Doc. No. 16283.

172. *See, e.g.*, Order, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record Doc. No. 17110 (concluding *Austin* because all but one of the plaintiffs had settled); Order, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record. Doc. No. 17108 (adopting the Magistrate Judge's order dismissing duplicative claims); Order, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Jan. 12, 2009) (concluding *Abadie I*, *Abadie II*, and *Allen*), Record Doc. No. 17107.

173. *See* Supplemental Call Docket Order, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Mar. 11, 2009), Record Doc. No. 18106.

174. *See, e.g.*, Order at 2–4, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record Doc. No. 17107.

resolution independently.[175]

The post-*Sher* settlement process had also revealed three peculiar problems that were addressed by the court and counsel. First, dozens of plaintiffs were found to have been named in several different mass joinder cases prosecuting the same claims concerning the same property against the same insurer, but represented by different counsel.[176] The court subjected these cases to a series of status conferences, sorted out the conflicting claims of representation and required dismissal of duplicative claims.[177]

Second, about two dozen of the insurers named in the twenty-two mass joinder cases were not only homeowners policy insurers but also "Write Your Own" (WYO) carriers, "insurance companies that participate in the . . . . NFIP pursuant to . . . 24 U.S.C. § 4001."[178] During the post-*Sher* evaluation and settlement process, it was determined that many individual claims against these insurers were actually based on plaintiffs' NFIP—not their homeowners—policies and that they had erroneously been included in the consolidated litigation. Because the defenses, settlement considerations and insurer decision makers applicable to NFIP policies differed from those involved in the homeowners claims, the NFIP suits were separately

175. Order at 2–4, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record Doc. No. 17107 (specifically thanking plaintiffs' counsel Joseph M. Bruno and Scott Joanen "for the thoroughness of their reports and . . . strenuous efforts [that] have resulted in the settlement of thousands of claims in these cases"); *see* Order, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record Doc. No. 17110 (noting the "extraordinarily successful" settlement efforts of counsel in that *all* of the claims in *Austin* had been settled, except those of *one* plaintiff, whose claims needed to be severed); Order, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record Doc. No. 17108 (dismissing duplicative claims); HLC/State Farm Severance Order, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 30, 2008), Record Doc. No. 16868 (entering a severance order for the mass joinder cases filed by the Hurricane Legal Center); HLC/Allstate Severance Order, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Dec. 22, 2008), Record. Doc. No. 16834 (same).

176. *See, e.g.*, Allstate's Supplement to Its Motion to Dismiss Duplicate Claims, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Dec. 16, 2008), Record Doc. No. 16734.

177. *See, e.g.*, Order, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Jan. 12, 2009), Record Doc. No. 17125 (dismissing duplicative claims without prejudice).

178. *See, e.g.*, Order Regarding Jim S. Hall & Associates/WYO Carriers Severance at 1–2, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D. La. Jan. 7, 2009), Record Doc. No. 16994.

severed from the mass joinder cases and consolidated litigation, reallotted among the court's judges and set for further proceedings on their own.[179]

Third, more than 100 of the severed claims that had been included among the mass joinder cases were identified as "claims by individual plaintiffs against insurance carriers whose policies were force placed by the plaintiff's mortgage companies."[180] The court found that these forced place claims would benefit from "specialized case management,"[181] principally in the form of consolidated motion practice addressing common defense issues, including that the named plaintiffs had no standing or were neither insureds nor third-party beneficiaries under the policies that had been placed by their mortgage holders and should therefore be dismissed.[182] In a subsequent series of orders, these cases were mostly dismissed, although a few were required to proceed independently, later ending either in settlement or dismissal on motion.[183]

At the end of this process, which was largely accomplished in about six months from its commencement, the vast majority of individual claims had been settled and the twenty-two mass joinder cases dismissed. Of the particularized claims in the mass joinder cases involving about 16,000 properties and 21,000 plaintiffs, only about 1,955 individual cases were subsequently

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179. *See, e.g.*, Order, Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D La. Jan. 13, 2009), Record Doc. No. 17130; Order Regarding Jim S. Hall & Associates/WYO Carriers Severance, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance*), No. 05-cv-4182 (E.D La. Jan. 7, 2009), Record Doc. No. 16994.

180. Order at 1, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance/Forced Place*), No. 05-cv-4182 (E.D La. Jan. 12, 2009), Record Doc. No. 17105; *see* Baxter v. PNC Bank Nat'l Ass'n, 541 F. App'x 395, 396 n.1 (5th Cir. 2013) ("Force-placed insurance is the insurance that a lien holder places on a property to provide coverage in the event the borrower allows the coverage to lapse or when the borrower's coverage actually lapses. It ensures that the property remains insured, protecting both the property owner and the lien holder. Costs of the insurance are typically paid up-front by the lien holder, but then added to the balance of the lien.").

181. Order at 1, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance/Forced Place Docket*), No. 05-cv-4182 (E.D La. Jan. 12, 2009), Record Doc. No. 17105.

182. Defendant's Motion to Dismiss, *In re* Katrina Canal Breaches Consol. Litig. (*Insurance/Forced Place Docket*), No. 05-cv-4182 (E.D. La. Mar. 11, 2009), Record Doc. No. 18100.

183. *See, e.g.*, Amending Order to Doc. 19694, *In re* Katrina Canal Breaches Consol. Litig. (*Forced Place Docket*), No. 05-cv-4182 (E.D. La. Apr. 16, 2010), Record Doc. No. 19729; Order and Reasons, *In re* Katrina Canal Breaches Consol. Litig. (*Forced Place Docket*), No. 05-cv-4182 (E.D. La. Apr. 1, 2010), Record Doc. No. 19694; Order, *In re* Katrina Canal Breaches Consol. Litig. (*Forced Place Docket*), No. 05-cv-4182 (E.D. La. Feb. 2, 2010), Record Doc. No. 19612.

severed and docketed after amended complaints focused on specific claims were filed in early 2009. All of the rest had been settled. Of the subsequently filed amended complaints, some were set for jurisdictional briefing, some were set for individualized settlement conferences, some were assigned comprehensive scheduling orders, including trial dates usually within nine months. The vast majority were settled.[184] Some were ultimately dismissed on motion or for lack of jurisdiction.[185] None were tried.

V. SETTLEMENT OF THE ROAD HOME PUTATIVE CLASS ACTION ASSIGNMENT/SUBROGATION CASE

Although thousands of individual homeowners' claims were resolved through the process described above, about 150,000 additional claims remained through the Assignment/Subrogation Agreement between Road Home grant recipients and the State of Louisiana. All of these claims had been asserted in the single action described above that had been filed in 2007 by the State as a putative class action in one of its own courts and then removed to the federal court.[186]

On November 20, 2008, about 225 insurance company defendants named in the case filed a comprehensive motion to dismiss the State's claims, arguing a variety of grounds,[187] including "that the State has no standing to sue because the assignments to the State from homeowners are invalid, . . . [and] the State has not adequately alleged that the various homeowners have given their claims to the State or that the homeowners have fulfilled the conditions precedent to file a claim against Insurers."[188] The trial court granted the insurers' motion

184. *See, e.g.*, Order of Dismissal, Massenburg v. State Farm Fire & Cas. Ins. Co., No. 09-cv-624 (E.D. La. Jan. 29, 2010), Record Doc. No. 35; Unopposed Motion and Incorporated Memorandum In Support of Motion to Enter a 90 Day Dismissal with Prejudice, Green v. Nat'l Sec. Fire & Cas. Co., No. 09-cv-2451 (E.D. La. May 17, 2010), Record Doc. No. 11; Joint Motion to Dismiss, Moten v. Scottsdale Ins. Co., No. 09-cv-324 (E.D. La. Oct. 23, 2009), Record Doc. No. 10.

185. *See, e.g.*, S.A.L., Inc. v. State Farm Fire & Cas. Ins. Co., No. 09-cv-724 (E.D. La. Mar. 26, 2010), Record Doc. No. 25 (voluntary dismissal); Sims-Gale v. Republic Grp. Fire & Cas., No. 09-cv-1829 (E.D. La. Apr. 6, 2010), Record Doc. No. 15 (Rule 12(b)(6) dismissal in part, settlement in part).

186. *See*, discussion, *supra* notes 18–28, 61–73.

187. Defendant's Motion to Dismiss, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Nov. 20, 2008), Record Doc. No. 16493.

188. Order and Reasons at 6–7, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Mar. 5, 2009), Record Doc. No. 18033.

in part, dismissing with prejudice the State's "extracontractual claims, including claims of bad faith and breach of fiduciary duty, all claims premised upon the denial of coverage for flood damage due to levee breaches under homeowner insurance policies, and all claims under Louisiana's Valued Policy Law."[189] In all other respects, however, including the insurers' argument that the assignment/subrogation was invalid as a matter of law, the motion was denied.[190] The insurers' subsequent motion for reconsideration was also denied, but the court certified its orders for immediate interlocutory appeal under 28 U.S.C. § 1292(b),[191] and the Fifth Circuit granted leave for the interlocutory appeal on June 5, 2009.[192]

The appeal was pending for more than two years. Its extended history and frustrating result were succinctly explained by the Fifth Circuit on June 28, 2011:

> In this interlocutory appeal, over 200 insurance companies challenge approximately 151,000 homeowners' insurance claims based upon policyholders' purported assignments of policy rights to the State. Previously, we determined that no controlling Louisiana Supreme Court precedent had determined whether an insurance contract's anti-assignment clause prohibited post-loss assignments of policy rights. *See In re Katrina Canal Breaches Litig.*, 613 F.3d 504 (5th Cir. 2010). Because that issue appeared to be case-dispositive, we certified the following question to the Louisiana Supreme Court:
>
> > 1) Does an anti-assignment clause in a homeowner's insurance policy, which by its plain terms purports to bar any assignment of the policy or an interest therein without the insurer's consent, bar an insured's post-loss

189. Order and Reasons at 34, *In re* Katrina Canal Breaches Consol. Litig. (*Road Home*), No. 05-cv-4182 (E.D. La. Mar. 5, 2009), Record Doc. No. 18033; *see id.* at 24–29 (explaining that any argument that the Louisiana Valued Policy Law, LA. STAT. ANN. § 22:1318 (Supp. 2016) applied to hurricane damage claims under homeowners policies had been authoritatively addressed by the Louisiana Supreme Court in *Landry v. La. Citizens Prop. Ins. Co.*, 2007-1907 (La. 5/21/08); 983 So. 2d 66).

190. *Id.* at 7–22, 34.

191. Order and Reasons at 9–10, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182, (E.D. La. Apr. 16, 2009), Record Doc. No. 18601; Motion for Reconsideration, *In re* Katrina Canal Breaches Consol. Litig., No. 05-cv-4182 (E.D. La. Mar. 19, 2009), Record Doc. No. 18207.

192. Louisiana v. Am. Nat'l Gen. Ins. Co., No. 09-20 (5th Cir. June 5, 2009), Record Doc. No. 19071.

> assignment of the insured's claims under the policy when such an assignment transfers contractual obligations, not just the right to money due?

Id. at 512. The Louisiana Supreme Court accepted the certified question and answered it as follows:

> There is no public policy in Louisiana which precludes an anti-assignment clause from applying to post-loss assignments. However, the language of the anti-assignment clause must clearly and unambiguously express that it applies to post-loss assignments, and thus *it must be evaluated on a policy by policy basis*.

In re Katrina Canal Breaches Litig., No. 2010-CQ-1823, at *1 (La. May 10, 2011). Without contradicting this court's analysis, however, the Louisiana Supreme Court also observed that "any contradiction or ambiguity in the contract must be strictly construed against the insurer . . . ." *Id.* at *12.

> In light of the Louisiana Supreme Court's decision, we are unable to resolve the parties' dispute in this appeal, *and the statute of limitations issues*. We VACATE the district court's judgment and REMAND for further proceedings consistent herewith.[193]

Given this mandate that these key issues "must be evaluated *on a policy by policy basis*,"[194] especially when coupled with the insurers' prior arguments that individual homeowners had not fulfilled certain conditions precedent to filing the now-assigned claims, the district court was faced with what appeared to be the daunting necessity of addressing the State's 150,000 assignment/subrogation claims one claim at a time.

At a status conference on August 11, 2011, the State announced its intention to withdraw its class action allegations and file yet another motion to remand the case to the state court. The court set a deadline for the motion to remand and ordered the parties to brief "the Court's continuing subject-matter jurisdiction . . . and, if continuing subject-matter jurisdiction exists, the Court's discretion to remand the matter to state

193. *In re* Katrina Canal Breaches Litig. (*Road Home*), 645 F.3d 703, 705–06 (5th Cir. 2011) (emphasis added) (quoting *In re* Katrina Canal Breaches Litig., 2010-1823, p. 1 (La. 5/10/11); 63 So. 3d 955, 957).

194. *Id.*

court."[195] The State's motion was ultimately denied.[196]

Defendants filed Rule 12 motions to dismiss "or, in the alternative, motions for a *Lone Pine* Order."[197] In their primary argument, the insurers relied upon the U.S. Supreme Court's recently announced heightened pleading requirements, arguing that the State had failed "to allege sufficient facts to support its only remaining claim for breach of tens of thousands of insurance policies . . . pursuant to *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009)," by "alleging only boilerplate and conclusory breach of contract allegations, utterly bereft of facts."[198] In its alternative argument, the insurers sought an order requiring the State, "under the *Lone Pine* doctrine, to come forward with some basic *prima facie* evidence to support its remaining claims before further litigation."[199]

A *Lone Pine* order is nothing more than a particular type of case management order. Named for a decision of a New Jersey superior court,[200] "*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation. In federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16."[201] *Lone Pine* orders have been justified as a means to

> (1) assist the District Court in managing [a] large number of cases and the complex issues involved in [such] litigation; (2) to allow meritorious cases to move to trial or settlement properly; and (3) to avoid unnecessary burdens on

195. Minute Entry at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Aug. 11, 2011), Record Doc. No. 136.

196. Order and Reasons, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Oct. 28, 2011), Record Doc. No. 196; Minute Entry, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Oct. 19, 2011) (denying motion to remand), Record Doc. No. 169; Louisiana's Motion to Remand to State Court, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 14, 2011), Record Doc. No. 145.

197. Defendant's Rule 12(C) Motion for Judgment on the Pleadings or, in the Alternative, Motion for a *Lone Pine* Order at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 2, 2011), Record Doc. No. 218.

198. Defendants' Memorandum of Law in Support of their Rule 12 Motions or, in the Alternative, Motion for a *Lone Pine* Order at 2–3, 7–8, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 2, 2011), Record Doc. 218-1.

199. *Id*. at 2, 18–22.

200. Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986).

201. Acuna v. Brown & Root, Inc., 200 F.3d 335, 340 (5th Cir. 2000).

> defendants by requiring plaintiffs to provide certain . . . information at the outset of the case.[202]

While use of a *Lone Pine* order has been approved in appropriate cases as a case management tool "within the court's discretion,"[203] such orders are in no way required, even in the most complex of litigation.[204] Indeed, some courts and commentators have expressed deep concerns about and strong opposition to *Lone Pine* orders.[205]

The court denied the insurers' motion for a *Lone Pine* order, but without prejudice to its later reurging.[206] Two months later, the insurers filed a motion for a status conference "to discuss the potential for rescheduling a hearing on the[ir] *Twombly/Lone Pine* Motion so that the Insurer Defendants may break inertia on a case that remains at the pleading stage four and one-half years after it was filed."[207] The motion was referred to the magistrate

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202. *In re* Asbestos Prods. Liab. Litig. (No. VI), 718 F.3d 236, 240 (3d Cir. 2013).

203. *Acuna*, 200 F.3d at 340.

204. *See, e.g.*, Abner v. Hercules, Inc., No. 14-cv-0063, 2014 WL 5817542, at *2 (S.D. Miss. Nov. 10, 2014) (citing *Acuna*, 200 F.3d at 340; *In re* Vioxx Prod. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008)) (emphasizing that "courts have noted that a *Lone Pine* order is not appropriate in every case or suitable at every stage of litigation" and that "the Fifth Circuit does not require, nor does it prohibit, lower courts from considering the five-part test" sometimes suggested for making the discretionary determination of whether to enter a *Lone Pine* type of case management order).

205. *See* Strudley v. Antero Res. Corp., 350 P.3d 874, 878 (Colo. App. 2013) (finding that while *Lone Pine* orders may be appropriate "in some extraordinary cases . . . such a requirement is generally disfavored" under Colorado law), *aff'd*, 347 P.3d 149 (Colo. 2015); Manning v. Arch Wood Protection, Inc., 40 F. Supp. 3d 861, 864, 868 (E.D. Ky. 2014) ("Generally, courts have been reluctant to grant *Lone Pine* motions before any meaningful discovery has been conducted. . . . The nature of Plaintiffs' claims do not command bypassing the procedures set forth in the federal rules in favor of imposing the extraordinary procedure compelled by a *Lone Pine* order . . . ."); John T. Burnett, Comment, Lone Pine *Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. LAND USE & ENVTL. L. 53, 85 (1996) (arguing that *Lone Pine* orders are "unnecessary" to address the concerns that have been used to justify them and "depart from mandated procedural rules . . . diminish the legitimacy of the legal process by adding uncertainty and inconsistency to an otherwise regimented system. . . . [and] negate the checks and balances and safeguards that are inherent in properly promulgated rules of procedure"); Paul D. Rheinhold & Laura Pitter, Lone Pine *Orders: An Abused Remedy?*, MASS TORTS, Fall 2009, at 1.

206. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 8, 2011), Record Doc. No. 243.

207. *Ex Parte* Motion for Status Conference at 3, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Jan. 17, 2012), Record Doc. No. 264.

judge, who immediately granted it,[208] conducted the conference and issued a preliminary order "pursuant to Rule 16" that outlined the future case management procedures that would ultimately bring the matter to its conclusion.[209]

At the requested status conference, counsel for both sides voiced differing views on how the case should proceed. The court stated its intention to "enter a case management order requiring the initial exchange of information and settlement evaluation and claim resolution efforts" and ordered counsel to confer and draft a proposed case management order for the court's consideration.[210] The court ordered, however, that:

> At a minimum, the proposed case management order must include: (a) Production by the State to defendants of information specifically identifying the alleged assignors/subrogors of claims, the insurer for each that allegedly provides coverage, Road Home grant/settlement approval or denial and related information, damage supports and other relevant information that counsel determine may be readily available for provision to defendants concerning all claims to be pursued by plaintiffs in this matter. . . . (b) A deadline by which the State must provide all such information. (c) A reasonable time period thereafter during which each defendant must evaluate the disclosed information for settlement evaluation and other case preparation purposes. (d) A reasonable time period thereafter during which mass settlement efforts, perhaps defendant-by-defendant, supervised by the court, must be conducted, with the parties' proposal as to how these efforts will proceed. (e) As an attachment to the case management order, a list in alphabetical order of all named defendants against whom plaintiffs will be pursuing claims, with an accompanying motion to dismiss with prejudice all originally named defendants against whom plaintiffs will <u>not</u> be pursuing claims.[211]

The court also required that the proposed case management order include a deadline by which the State must provide the

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208. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Jan. 19, 2012), Record Doc. No. 266.

209. Minute Entry at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Feb. 2, 2012), Record Doc. No. 277.

210. *Id*. at 1–2.

211. *Id*. at 2 (emphasis in original).

court and defendants with a straightforward

> three-column list containing (line-by-line) (a) in Column (a) the name of each person(s) upon whose behalf the State pursues a claim, (b) in Column (b) the name of that person's insurer against whom the claim is asserted, and (c) in Column (c) the address of the subject property. The State must begin now to accumulate that list.[212]

Finally, this preliminary order provided that "[a]ll discovery in this matter is STAYED at this time, pending completion of the initial disclosure and settlement efforts outlined above to be addressed in the upcoming case management order."[213]

The parties then submitted competing proposed case management orders, in which the State emphasized its desire for a period of intensive settlement efforts, while the insurers stressed their request for evidence of the type sometimes required in *Lone Pine* orders.[214] During this period, the State also filed a motion to "dismiss [its] class allegations nunc pro tunc," which the court granted,[215] thus eliminating any vestige of putative class action status and posturing its single case as a mass joinder of about 150,000 individual assignment/subrogation claims against about 225 defendants.

On April 13, 2012, the court entered its "Road Home Assignment/Subrogation Claims Case Management Order," which blended the approaches suggested by the parties.[216] The order noted the five-year history and basic premise of the case, the large number of Road Home grant recipients who had assigned and/or subrogated to the State their claims against the

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212. Minute Entry at 3, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Feb. 2, 2012), Record Doc. No. 277.

213. *Id.*

214. State of Louisiana's Reply to Defendant's Response to Plaintiff's Proposed Case Mgmt. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 5, 2012), Record Doc. No. 290; Response to Plaintiff's Proposed Case Mgmt. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Mar. 21, 2012), Record Doc. No. 285-2; Joint Status Report and Proposed Case Mgmt. Order at 5–7, 11–13, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Mar. 16, 2012), Record Doc. No. 284 (defendants' proposal and State's proposal).

215. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 10, 2012), Record Doc. No. 292 (dismissing class allegations "as of December 3, 2010 *nunc pro tunc*"); Motion to Dismiss Class Allegations *Nunc Pro Tunc*, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 5, 2012), Record Doc. No. 289.

216. Rd. Home Assignment/Subrogation Claims Case Mgmt. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 13, 2012), Record Doc. No. 293.

more than 200 defendants, and the dismissal of all class action allegations.[217] The court indicated that "[t]he prospect of misjoinder requiring severance looms large."[218] The order set a May 31, 2012, deadline by which the State must provide the court and defendants with the three-column list described in its preliminary order, a list in alphabetical order of the defendants against whom it would be pursuing claims, and a motion and order to dismiss with prejudice all originally named defendants against whom it would *not* be pursuing claims.[219] Another deadline of June 29, 2012, was established by which

> the State must deliver to each insurer, in a uniform electronic format to be agreed upon by the parties, the following information relative only to those claims the State will pursue against the insurer, or for each or any of the following categories for which the State has no responsive information or materials in its possession, custody or control, a verified statement clearly saying so.
>
> (a) The insurance policy number for each person listed in the disclosures . . . ;
>
> (b) The date of the loss, including specifically whether the claim includes alleged damages from Hurricane Katrina or Rita or both;
>
> (c) Total amount of insurance proceeds paid to insured/grant recipients from flood insurer, homeowners insurer or other property damage insurer;
>
> (d) Total amount of actual repair costs, if property repaired, or if property unrepaired, total estimate for repairs, including copies of repair estimates;
>
> (e) Reports regarding or description of damages to the insured property, including identification of any alleged unpaid damages, the cause of those damages, identification of any other persons or entities against whom claims were made for damages, and facts supporting coverage under the policy for the damages being claimed;
>
> (f) Amount of Road Home grant;
>
> (g) Date of closing of Road Home grant;

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217. Rd. Home Assignment/Subrogation Claims Case Mgmt. Order at 1–2, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 13, 2012), Record Doc. No. 293.

218. *Id.* at 2.

219. *Id.* at 2–3.

> (h) Date of application for Road Home grant;
>
> (i) Specific policy provision of insurance contract for each policyholder allegedly breached by insurer;
>
> (j) Whether Road Home consent was granted or denied for any settlement between the insured/grant recipient and insurer;
>
> (k) Any amount(s) reimbursed by insured/grant recipient to Road Home from insurance settlement proceeds;
>
> (l) The total amount being claimed by the State with respect to this insurance claim;
>
> (m) Copies of reports prepared by the Road Home program with respect to the grant containing any or all of the information outlined above, including, but not limited to, property appraisals and summaries showing the factors and information used to determine the grant paid for each policyholder; and
>
> (n) A copy of each "The Road Home Limited Subrogation/ Assignment Agreement" allegedly executed by each grant recipient.[220]

The order required each defendant insurer thirty days later to deliver to the State, in a uniform electronic format agreed upon by the parties:

> (a) A list of all Road Home grant recipients as identified by the State . . . with open litigation against the Defendant Insurer relative to a homeowners policy for a loss caused by Hurricanes Katrina or Rita; and
>
> (b) A list of all Road Home grant recipients as identified by the State . . . who have settled lawsuits or claims with the Defendant Insurer relative to a homeowners policy for a loss caused by Hurricanes Katrina or Rita and executed a release of claims, including the date of such release.
>
> The above lists must include the damaged property address and the applicable Road Home grant application number (i.e., 06HHxxxxxx), or a clear verified statement in writing that the defendant has no such responsive information in its

220. Rd. Home Assignment/Subrogation Claims Case Mgmt. Order at 3–4, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 13, 2012), Record Doc. No. 293.

possession, custody or control.[221]

The order then provided that, after this exchange of information, the parties must engage in "settlement procedures."[222] Specifically, each insurer was required to notify the State in writing by September 14, 2012, whether it has "sufficient information to evaluate the value of the Road Home claims against it, and whether it wishes to participate in immediate settlement discussions."[223] The State was given a deadline of October 26, 2012, to "deliver a settlement proposal" to the insurers to "resolve all of that insurer's claims in the litigation."[224] The order then required insurers, by November 16, 2012, to "respond in writing to the State's settlement proposal" or to

> decline to respond to the State's proposal. If an Insurer Defendant declines to respond or to participate in further settlement discussions, it must inform [the magistrate judge] of its decision in writing so that he may schedule a status conference thereafter to discuss and set, if appropriate, a case management path for the claims against that Insurer Defendant by the State, including the possibility of dismissal and/or severance and reallotment of those claims.[225]

The order provided that any party may file a motion no later than December 1, 2012, for a settlement conference to be conducted by the magistrate judge.[226] The stay of discovery already in effect was confirmed and all pending motions were dismissed without prejudice to later refiling, "pending the foregoing disclosure/settlement procedures and until further order of the court."[227]

The process established in this case management order commenced with the voluntary dismissal with prejudice, upon the State's motion, of all claims against eighty-five named

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221. Rd. Home Assignment/Subrogation Claims Case Mgmt. Order at 5, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 13, 2012), Record Doc. No. 293.

222. *Id.* at 5–6.

223. *Id.* at 5.

224. *Id.*

225. *Id.* at 6.

226. Rd. Home Assignment/Subrogation Claims Case Mgmt. Order at 6, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 13, 2012), Record Doc. No. 293.

227. *Id.*

defendants.[228] Thus, the number of insurers involved was swiftly reduced to less than 150.

The information exchange and evaluation phase, however, proceeded haltingly. Two extensions of deadlines were requested and granted.[229] In early September 2012, two status conferences were conducted on consecutive days during which defense counsel "expressed their disappointment with the State's production of materials"[230] and struck a generally "discouraging tenor."[231] Nevertheless, counsel reported "that about one-half of the individual claims underlying the State's subrogation/assignment claims have now been dismissed, and that an overall settlement involving at least one insurer has been reached, leaving *only* about 60,000 underlying individual claims remaining."[232] The court "encourage[d] good faith participation" in the CMO process, which it described as the "final opportunity either to settle or to voluntarily dismiss these old, lingering Hurricane Katrina claims en masse," not as "an insurance adjusting process but a lawsuit settlement opportunity involving good faith evaluation of further *litigation* risk, time and expense."[233] The court plainly notified the parties that at the end of the process it would

> employ all ordinary processes applicable to such cases [] including but not limited to . . . (a) possible severance and reallotment of individual misjoined claims, (b) sua sponte re-examination of the basis for this court's jurisdiction over the case as a whole and/or severed individual claims, (c) dispositive motion practice, and/or (d) trial settings, as appropriate.[234]

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228. Order at Exhibit A, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. June 5, 2012), Record Doc. No. 300 (granting motion to dismiss and listing the insurer defendants to be dismissed); Motion to Dismiss with Prejudice, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. May 31, 2012), Record Doc. No. 296.

229. Order Re: Unopposed Motion for Extension of Time to Make Disclosures as Set Forth in Section (B) of the Rd. Home Assignment/Subrgoation Claims Case Mgmt. Order By the Insurer Defendants, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Aug. 6, 2012), Record Doc. No. 306; Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. July 3, 2012), Record Doc. No. 303.

230. Minute Entry at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 5, 2012), Record Doc. No. 309.

231. Minute Entry at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 5, 2012), Record Doc. No. 310.

232. Minute Entry at 1–2, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 5, 2012), Record Doc. No. 309.

233. Minute Entry at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 5, 2012), Record Doc. No. 310.

234. *Id.* at 1–2.

The parties' joint motion to extend the deadlines imposed in the CMO was then denied.[235]

In November and December 2012, forty-three defendant insurance companies filed fifteen motions as permitted by the CMO requesting settlement conferences conducted by the court.[236] The settlement conferences were all conducted in late 2012 and early 2013, numerous settlement agreements were reached between the State and particular insurance companies as to all claims asserted against them, and the court began to enter partial conditional-dismissal orders based on those settlements. On March 13, 2013, the court conducted a docket call to determine the status of the State's claims against defendants who had not requested settlement conferences, and counsel informed the court that settlements had been reached as to nineteen additional insurers.[237] On the following day, the court issued

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235. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 20, 2012), Record Doc. No. 320 (denying motion); Joint Motion to Amend Rd. Home Assignment/Subrogation Claims Case Mgmt. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 4, 2012), Record Doc. No. 308.

236. Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Dec. 13, 2012), Record Doc. No. 364; Motion for Settlement Conference by Republic Fire and Cas. Insurance Co., Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 350; Motion for Settlement Conference by Am. Nat'l Prop. and Cas. Co., Am. Nat'l Gen. Ins. Co., and ANPAC La. Ins. Co., Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 348; Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 347; Ex Parte Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 345; Ex Parte Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 344; Motion for Settlement Conference by Auto Club Family Ins. Co., Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 343; Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 342; Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 341; Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 27, 2012), Record Doc. No. 338; Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 20, 2012), Record Doc. No. 332; Ex Parte Motion for Conference with Magistrate Judge Authorized by Rd. Home Assignment/Subrogation Claims Case Mgmt. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 19, 2012), Record Doc. No. 329; Ex Parte Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 16, 2012), Record Doc. No. 326; Ex Parte Motion for Conference with Magistrate Judge Authorized by Road Home Assignment/Subrogation Claims Case Mgmt. Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 15, 2012), Record Doc. No. 324; Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 15, 2012), Record Doc. No. 323.

237. Minute Entry, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Mar. 13, 2013), Record Doc. No. 408.

another call docket order, requiring counsel to appear for purposes of informing the court of the status of claims against forty-seven insurer defendants which had "neither been dismissed from this case by settlement or otherwise, nor . . . scheduled a settlement conference" pursuant to the CMO.[238]

At this final call docket conducted on April 16, 2013, the court determined that all claims had been resolved, either by settlement or by voluntary dismissal, except those asserted against twenty insurers, some of whom were affiliated companies whose representation and settlement discussions were being handled as single defense units.[239] As to one defendant and six other affiliated insurers represented by one lawyer, counsel reported substantial progress in ongoing settlement negotiations, and settlement conferences with the court were scheduled for them.[240] As to the nine remaining defendants, consisting of three separate groups of affiliated insurers, counsel reported that little progress had been made and that settlement appeared unlikely. Thus, the court ordered that these defendants would be "subject to a severance order concerning further proceedings . . . so that they may proceed as independent, individualized cases, randomly reallotted among the judges of this court to conduct further proceedings, including scheduling of trial and other deadlines in the severed cases."[241]

The court entered a severance order, which provided "that the court-conducted settlement process concerning [the nine remaining insurers] is terminated" and set a deadline about five weeks later for the State to file a "separate amended complaint asserting whatever rights the State has obtained from a particularly identified individual insured/assignor/subrogor concerning the relevant specific insurance policy claims against the appropriate . . . defendant only."[242] Shortly thereafter, the two insurance groups that had continued in active settlement

238. Call Docket Order at 1, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Mar. 14, 2013), Record Doc. No. 409.

239. Minute Entry at 1–2, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 16, 2013), Record Doc. No. 449. At this hearing, insurance defense liaison counsel Seth Schmeeckle, Chase Chassaignac, and Ralph Hubbard requested to be relieved of their liaison counsel responsibilities, and the court did so, expressing "its sincere appreciation and respect . . . for their outstanding work and service provided to their individual clients, all defendants and the court in this case." *Id.* at 4.

240. *Id.* at 3–4.

241. *Id.* at 3.

242. Severance Order at 1–2, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 22, 2013), Record Doc. No. 453.

efforts and six of the nine remaining insurers, who previously had reported little settlement progress, all reached settlement agreements.[243] Thus, the severance order remained in effect as to only three insurers, a group of affiliated companies whose defense was being jointly handled as one (hereinafter the lone insurer). Counsel for the State advised that a total of 1,504 separate severed complaints would be filed against the appropriate affiliate of the lone insurer by the May 31, 2013 deadline.

Through the foregoing year-long process, almost 150,000 individual assignment/subrogation claims against all but the lone insurer defendants had been either voluntarily dismissed or settled. As to the settlements, agreements between the State and the vast majority of individual insurers were ultimately reached within a fixed and relatively narrow range of dollar amounts that can only be described as nuisance values, calculated on an aggregate basis without per-claim individualized damage evaluation. The negotiation of each settlement amount began with the State's reckoning of the total number of claims it asserted against that particular insurer. That number was sometimes reduced during settlement negotiations, however, for a variety of reasons, including for example that the underlying policy was determined to be a NFIP policy, the insurer had already paid its full policy limits of structure coverage or the circumstances of a particular claim established a clear prescription bar. Although the settlements involved individual nuisance values, the overall size of the undertaking resulted in the State's recovery of millions of dollars in settlement money to re-invest in the State's disaster recovery.[244]

Faced with the prospect of defending 1,504 severed cases, the lone insurer launched a vigorous round of unsuccessful challenges and appeals concerning the severance order on various grounds.[245] From the court's perspective, the severance order

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243. *See* Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. June 21, 2013), Record Doc. No. 491; Minute Entry; Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. May 13, 2013), Record Doc. No. 467; Minute Entry, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. May 13, 2013), Record Doc. No. 466; Minute Entry, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. May 9, 2013), Record Doc. No. 464.

244. *See* Robert McClendon, *In Post-Katrina Legal Fight, a Single Insurance Company Continues to Hold Out Against the State*, TIMES-PICAYUNE (Apr. 1, 2014, 10:41 PM), http://www.nola.com/news/index.ssf/2014/04/in_post-katrina_legal_fight_a.html.

245. *See* Motion to Enforce Severance Order to Dismiss All 1,504 Non-Conforming Amended Complaints, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. July 23, 2013), Record Doc. No. 519; Motion for Expedited Stay of Severance Order Pending

was nothing more than a type of case management order involving amending pleadings and separate trials, as specifically contemplated by Rule 16(c)(2)(B) and (M),[246] that was necessary to comply with the "policy by policy" evaluation mandate issued by the Louisiana Supreme Court and the federal Fifth Circuit to address both the validity of the assignment/subrogation and the claim specific prescription defense.[247] From the lone insurer's view, however, the severance order was a violation of its constitutional right to Due Process: a taking of its money in the form of additional litigation expenses it then expected to incur in defending 1,504 separate cases without the due process it argued should be afforded through a different kind of case management order.[248] Although it had fully participated in the information exchange and settlement evaluation process provided by the court's case management order, including requesting and participating in a settlement conference and follow-up settlement discussions,[249] it now argued, among other things, that the process had exposed it to *sua sponte* reexamination of the court's subject matter jurisdiction,[250] deprived it of a *Lone Pine* order and

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Disposition of Petition for Writ of Mandamus, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. July 23, 2013), Record Doc. No. 517; Reply Memorandum in Support of Appeal and Objections to Magistrate Judge's April 22, 2013 Severance Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. May 22, 2013), Record Doc. 478; Motion for Appeal and Objections to Magistrate Judge's April 22, 2013 Severance Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 25, 2013), Record Doc. No. 456.

246. FED. R. CIV. P. 16(c)(2)(B), (M).

247. *In re* Katrina Canal Breaches Litig. (*Road Home*), 645 F.3d 703, 705–06 (5th Cir. 2011); *In re* Katrina Canal Breaches Litig., 2010-1823, p. 1 (La. 5/10/11); 63 So. 3d 955, 957.

248. *See* Reply Memorandum in Support of Appeal and Objections to Magistrate Judge's April 22, 2013 Severance Order at 3–4, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. May 22, 2013), Record Doc. No. 478; Memorandum in Support of Appeal and Objections to Magistrate Judge's April 22, 2013 Severance Order at 1–2, 11, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 25, 2013), Record Doc. No. 456-1.

249. *See* Minute Entry, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Feb. 22, 2013), Record Doc. No. 387 (recording insurer's attendance at settlement conference); Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Dec. 10, 2012), Record Doc. No. 359 (granting insurer's motion for settlement conference); Motion for Settlement Conference, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Nov. 30, 2012), Record Doc. No. 348.

250. This argument was asserted in the face of the State's persistently reiterated position that the federal court lacked jurisdiction over these matters, the Fifth Circuit's recognition that the State's jurisdictional argument presented a "difficult question" prompting decision "on the most narrow of grounds," *In re* Katrina Canal Breaches Litig., 524 F.3d 700,706, 711 (5th Cir. 2008); and the clear requirement that a federal court, as a court of limited jurisdiction, must reexamine the basis and

violated its "procedural due process rights guaranteed by the Fifth Amendment" because the severance order "will require unprecedented and undue expense, extraordinary consumption of human and technological resources, and an unduly prejudicial interruption of [its] business operations," all resulting in an "unconstitutional deprivation of defendants' protected property rights without due process of law," namely "a fair and complete hearing and decision on the insufficiency and futility of the State's pleadings" under *Twombly* and *Iqbal*.[251]

The lone insurer's novel arguments[252] were wholly

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continuously assure itself of the propriety of its jurisdiction at every stage of the proceedings. Federal courts "are not free to pretermit the [subject matter jurisdiction] question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." Ashcroft v. Iqbal, 556 U.S. 662, 671 (2009). Subject matter jurisdiction "is nonwaivable and delimits federal-court power . . . . Subject-matter limitations on federal jurisdiction . . . keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998); FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")); *accord Iqbal*, 556 U.S. at 671. Even if "neither party raises the issue of subject matter jurisdiction, this court must consider jurisdiction *sua sponte*." Equal Emp't Opportunity Comm'n v. Agro Distrib., LLC, 555 F.3d 462, 467 (5th Cir. 2009) (citing Howery v. Allstate Ins. Co., 243 F.3d 912, 919 (5th Cir. 2001)).

251. Memorandum in Support of Appeal and Objections to Magistrate Judge's April 22, 2013 Severance Order at 1, 11–12, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Apr. 25, 2013), Record Doc. No. 456-1.

252. Due process rights, of course, are of two types. Procedural due process promotes fairness in government decisions "[b]y requiring the government to follow appropriate procedures when its agents decide 'to deprive any person of life, liberty or property.'" Daniels v. Williams, 474 U.S. 327, 331 (1986). "Substantive due process, 'by barring certain government actions regardless of the fairness of the procedures used to implement them, [] serves to prevent government power from being "used for purposes of oppression."'" John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000) (quoting *Daniels*, 474 U.S. at 331). Both standards are obviously daunting, but particularly so in the context of a Rule 16 case management order. The lone insurer's due process argument focused principally on the alleged deprivation of a *Lone Pine* order and a full *Twombly/Iqbal* evaluation. At the time of this writing, no court has characterized a *Lone Pine* order as a due process requirement. Instead, as outlined in the text above, *Lone Pine* orders are merely case management orders over which federal district courts possess vast discretion and for which federal appellate courts grant substantial deference to the lower court. The enhanced Rule 8 "plausibility standard" announced by the Supreme Court in *Twombly* and *Iqbal* was framed exclusively as a pleading decision, based on "sense" and considerations of "practical significance," including controlling anticipated litigation costs. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–60 (2007). The *Iqbal* decision is clear that the Supreme Court's *Twombly* decision was "a construction of Rule 8" that "announces" a "pleading standard." *Iqbal*, 556 U.S. at 678, 680 (2009).

unpersuasive both to the district judge, who reviewed the magistrate judge's severance order,[253] and to the Fifth Circuit, where defendant sought review of the severance order by filing a petition for a writ of mandamus.[254] The district judge spent no more than three paragraphs on the lone insurer's challenge, finding the magistrate judge's severance order "not 'clearly erroneous or contrary to law'" under 28 U.S.C. § 63(b)(1)(A) and Fed. R. Civ. P. 72(a).[255] The Fifth Circuit swiftly and perfunctorily rejected the lone insurer's arguments with the single word "denied" hand-written in a blank on a preprinted form of the order.[256]

On September 24, 2013, the underlying Road Home case, which had begun in state court six years earlier as a putative class action, was dismissed because all of its individual constituent claims had either been settled, voluntarily dismissed, or severed and reallotted for further proceedings on their own.[257] Through its 1,504 severed vestiges, the State and the lone insurer engaged in another jurisdictional skirmish, ending in a consolidated appeal to the Fifth Circuit, after two district judges separately remanded their severed cases to state court for lack of federal subject matter jurisdiction.[258] Shortly after the Fifth Circuit held in those cases that CAFA continued to provide federal jurisdiction over the severed individual cases, despite the dismissal of all class allegations and even in the absence of jurisdictional amount in the individual cases,[259] the State and the

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Neither *Twombly* nor *Iqbal* relies upon the Due Process Clause as the basis for its announcement of the new Rule 8 pleading standard or indicates in any way that the Supreme Court's pleading decision in this regard was based on a new constitutional due process imperative.

253. *See* Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. July 3, 2013), Record Doc. No. 505.

254. Petition for Writ of Mandamus or Prohibition Under 28 U.S.C. § 1651 and Rule 21, FED. R. APP. P., *In re* Am. Nat'l Gen. Ins. Co., No. 13-30767 (5th Cir. July 23, 2013).

255. Order at 2, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. July 3, 2013), Record Doc. No. 505 (citing 28 U.S.C. § 636(b)(1)(A) (2012); FED. R. CIV. P. 72(a)).

256. *In re* Am. Nat'l Gen. Ins. Co., No. 13-30767 (5th Cir. Aug. 2, 2013); *see* Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Aug. 7, 2013), Record Doc. No. 561 (filing the Fifth Circuit's denial of August 2, 2013).

257. *See* Order, Louisiana v. AAA Ins., No. 07-cv-5528 (E.D. La. Sept. 24, 2013), Record Doc. No. 586.

258. Order and Reasons, Louisiana *ex rel.* Pillittere v. Am. Nat'l Prop. & Cas. Co., No.13-cv-4163, 2013 WL 5230688 (E.D. La. Sept. 11, 2013), Record Doc. No. 16; Order and Reasons, Louisiana *ex rel.* Lee v. Am. Nat'l Prop. & Cas. Co., No. 13-cv-3868 (E.D. La. Sept. 12, 2013), Record Doc. No. 14.

259. Louisiana v. Am. Nat'l Prop. & Cas. Co., 746 F.3d 633 (5th Cir. 2014).

lone insurer ultimately reached a settlement agreement as to all of the remaining 1,504 cases, which were either dismissed without prejudice or administratively closed and stayed,[260] bringing the Road Home assignment/subrogation litigation to an end.

VI. CONCLUSION

Post-Katrina, the federal trial court in New Orleans faced a daunting litigation resolution challenge that mirrored the enormous task of rebuilding and community renewal confronted by the district it serves. Exclusive reliance on trial and dispositive motion practice to bring the court's thousands of Katrina spawned claims to a conclusion probably would have required decades and multiples of the litigation costs actually expended to bring these matters to an end. By most measures, the combination of dispositive and settlement procedures employed by the court should be credited with the relatively efficient—though not always psychically satisfying—results. Opinion among the parties concerning the court's use of Rule 16 to foster and facilitate settlement was not unanimously positive. However, as Professor Robert G. Bone, a leading scholar in law and economics, has insightfully observed:

> Procedure is much more than a set of rules or a technical exercise in litigation management. The design of a procedural system implicates complicated questions of prediction and evaluation and at times deep philosophical puzzles.
>
> . . . .
>
> The strategic nature of the [litigation] environment makes simple predictions highly unreliable.
>
> . . . .
>
> It is not possible to design a procedural system that gives everyone the relief they deserve. Even avoidable error has to be tolerated in a world of scarce resources. At some point, individuals must suffer their losses despite their substantive entitlements so that enough resources are left to pursue other worthy social goals. . . . [T]his is a matter of balancing costs and benefits, although the balance can be very difficult

260. *See, e.g.*, Order, Louisiana *ex rel.* Insured(s)/Assignor(s)/Subrogor(s) v. Am. Nat'l Prop. & Cas. Co., No. 13-cv-3066 (E.D. La. Oct. 8, 2013), Record Doc. No. 19 (staying and administratively closing the case).

> to strike. . . . For those who focus on fairness and recognize strong procedural rights, the problem is, in some ways, even more difficult. . . . [O]ne of the trickiest aspects is how to reconcile protecting rights as utility trumps with limiting social costs.[261]

The view of the much less intellectually sophisticated author of this Article is that, given the litigation challenges presented by Hurricane Katrina, the mass settlement procedures addressing homeowners insurance claims described above advanced the goal of the Federal Rules of Civil Procedure of "just, speedy and inexpensive determination"[262] of these actions, especially when viewed against the comparative backdrop of what would have occurred in the absence of the court's use of these case management and settlement tools.

261. ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 299–300 (2003).

262. FED. R. CIV. P. 1.