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DISPUTE RESOLUTION, INSURANCE, AND POINTS OF CONVERGENCE

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No one who has consistently read the articles, notes, and comments published in the *Journal of Dispute Resolution* through the years needs an explanation of the remarkable trajectory of the field of dispute resolution, the increased use of alternative dispute resolution processes throughout the conflict resolution landscape, the revolutionary embrace of mediation by courts and governmental agencies in both the state and federal systems, the maturation of the academic study of the process and substance of dispute resolution, and the rapidly growing recognition in the profession and the academy that the study of dispute resolution better prepares law students to assume the awesome responsibilities of client representation upon their admission to the bar. What may be less well understood is how the field of dispute resolution intertwines with the principles, doctrines, and practices of particular fields of law, excepting those subject matter areas into which the lawyer or academic has had the opportunity to delve with some degree of special emphasis.

Interestingly, the field of insurance law has experienced a trajectory not unlike that of the field of dispute resolution. In the preface to the first edition of *Understanding Insurance Law*, published over a quarter-century ago, I wrote that "[f]ew subjects as important as insurance law are so neglected by American law schools and law students," but I noted that academic attention to insurance law was showing signs of growth.[1] Twenty-five years later in the preface to the fifth edition, Douglas Richmond and I would write that "[i]nsurance law casebooks and treatises are now abundant," and that "[i]nsurance law courses are now popular, as law students recognize the practical importance of the subject," and that "educators and students have come to understand what practicing lawyers have long known – that insurance law is a critically important subject."[2] Professors Kenneth Abraham and Daniel Schwarz observed in 2015 in the sixth edition of their case-

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1. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW vii (1st ed. 1987).
2. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW v (5th ed. 2012).

book,[3] first published by Professor Abraham in 1990,[4] that "[o]nce an obscure specialty, the issues that arise in modern insurance law have become part of the mainstream, and a mature body of legal doctrine has grown up around them."[5] The increased stature of the field of insurance law was evident in the initiation by the Council of the American Law Institute in 2010 of the *Principles of the Law, Liability Insurance* drafting project; the significance and influence of this project expanded in 2014 when the Council converted it into the drafting of the first *Restatement of the Law, Liability Insurance*.[6]

This essay explores the intersection of these two fields. I come to the intersection from the perspective of insurance law, where statutes, administrative rules, and common law regulate the industry and the policyholder-insurer relationship. At its core, the business of insurance offers individuals, businesses, and other kinds of organizations a risk management alternative which enables them to acquire some measure of control over an uncertain future. But when a loss occurs, the business of insurance becomes the business of claims processing and, when disagreements arise, dispute resolution. Surprisingly, the academic study of insurance law has not borrowed heavily from the body of understandings acquired through the years in the academic study of dispute resolution. Thus, the field of dispute resolution is a largely untapped resource for deepening our understandings of how insurance claims are resolved and how existing insurance dispute resolution processes might be improved in the future.[7] Given the importance of the insurance industry, the intersection of insurance and dispute resolution is a promising space for further exploration.

This essay is largely descriptive; it identifies and briefly examines four areas where dispute resolution plays a determinative role in whether insurance can deliver the value it promises. Before taking up these examples, however, this essay provides for those more familiar with dispute resolution than insurance an overview of the scope, importance, and purpose of the business of insurance.

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3. KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION: CASES AND MATERIALS (6th ed. 2015).

4. KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS (1st ed. 1990). In the first edition, Professor Abraham wrote:

> The law school curriculum has been slow to recognize the importance of insurance in modern law. Insurance was a staple in the curriculum until thirty years ago, but it was largely a course in advanced contracts and some obscure concepts such as the insurance warranty and insurable interest requirements. At that point interest in even these issues diminished . . . . Recently there has been a resurgence of interest that can be ascribed to a number of forces.

Id. at xxi.

5. ABRAHAM & SCHWARCZ, *supra* note 3, at v.

6. RESTATEMENT OF LIABILITY INSURANCE, AMERICAN LAW INSTITUTE ix (Preliminary draft No. 2, Oct. 9, 2015).

7. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS (1970) (for a notable example of a significant early effort to meld principles of dispute resolution and insurance law). Professor Ross observed that the vast bulk of bodily injury claims arising out of automobile accidents were settled by negotiation and outside the framework of formal legal proceedings, and he undertook to study these settlements in order to advance an explanation of informal lawmaking, or "law-in-action." He noted that "[t]he advantages of negotiation over adjudication in terms of lower cost and the possibility of compromise are apparent in the fact that more than 95 per cent of all bodily injury claims made against insured automobile drivers are settled by negotiation." *Id.* at 141.

I. THE BUSINESS OF INSURANCE: SCOPE, IMPORTANCE, AND PURPOSE

Although appreciation that insurance has a large presence in our lives is widespread, less well understood is how insurance is connected either directly or indirectly to virtually every aspect of our daily existence. Insurance, at its most fundamental level, is a tool for the management of risk, and risk is an immutable feature of the human existence. In the first edition of *Understanding Insurance Law,* I began Chapter 1 with two sentences that summarize this fundamental premise: "Life is uncertain. We cannot predict with confidence what the future holds."[8] It is correct to observe that life's events are not completely random, and we can shape the probabilities of occurrences and the course of their outcomes in many situations. But information about the future is insufficiently clear to allow us to say that we are certain whether, when, or how future events will unfold. It is this inherent uncertainty surrounding future events that defines the essence of risk. As explained by Peter Bernstein in his important book *Against the Gods*,[9] the breakthrough that distinguishes modern times from the preceding millennia is the recognition that risk can be managed to the ends of maximizing economic growth, technological advancement, and quality of life. Our ability to imagine what might happen in the future and to choose among alternative courses in the context of predictions about the future – in other words, our ability to understand and manage risk – is fundamental to the organization of modern society. Indeed, how we manage risk provides a lens through which the history of humankind can be explained, and it also shapes how the future will unfold.

The risks that concern us the most in the world are negative risks, meaning, those risks that carry with them potential adverse consequences. Individuals and organizations respond to these risks with an array of risk management tools – taking action that limits the probability of loss; taking action that reduces the effects of loss should it occur; diversification strategies that hedge against the consequences of loss; and retention strategies that set aside reserves or deploy other alternative mechanisms to deal with future loss should it occur.[10] When these tools are fully utilized, become too expensive to pursue further, or are unavailable for some other reason, we have two remaining choices: to ignore risk and hope for the best, or to transfer risk to others so that the risk is either shared among partners or is distributed by third parties in markets where risk is bought and sold. The transfer and distribution of risk when other risk management strategies are exhausted or fail is the essence of the business of insurance.

The insurance business is monumentally large, as a brief excursion into some numbers reveals. In 2013, total insurance premiums paid in the U.S. in the life/health insurance sector (which does not include insurers whose only product is health insurance) and the property/casualty insurance sector totaled $1.26 trillion, which equates to approximately 7.5 percent of U.S. gross domestic product and

8. JERRY, *supra* note 1, at 9.
9. PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 1-2 (1996).
10. *See* JERRY & RICHMOND, supra note 2, at 8-10; JAMES W. DELOACH, ENTERPRISE-WIDE RISK MANAGEMENT: STRATEGIES FOR LINKING RISK AND OPPORTUNITY (2000) (providing more information on the matrix of overarching risk management strategies).

nearly $4,000 for every person living in the country.[11] Net premiums totaled $1.04 trillion,[12] and on the compensation side of the equation, $879 billion in proceeds and benefits were paid.[13] In addition, of the $2.9 trillion in national health care expenditures in 2013,[14] approximately one-third – $962 billion – were funded by private health insurance.[15] If the importance of a jurisprudential field were measured solely by the compensatory impact of the resources that flow through its various rules and procedures, the world of insurance would completely overwhelm the world of tort.[16]

Other metrics put an exclamation point on the observation that the insurance industry is large and important. In 2013, the 6,086 companies that make up the industry[17] directly employed 2.4 million people, or 2.1 percent of the U.S. non-farm workforce.[18] More than 2.3 million persons hold more than 6 million licenses to sell insurance or represent buyers in its purchase.[19] The amount of assets held and invested by U.S. insurers make the industry a major participant in domestic and global financial markets. As of the end of 2013, the life/health and property/casualty insurance sectors held $7.3 trillion in total assets, an amount approximately one-half the size of all assets held by all insured depository institu-

11. INSURANCE INFORMATION INSTITUTE, THE INSURANCE FACT BOOK 1, 2 (2015) [hereinafter FACT BOOK].

12. *Id.* at 13. The largest offset from gross premiums is reinsurance, which is essentially insurance an insurer purchases from another insurer (the reinsurer) in order to shed some of the risk of the insurer's pool of assumed risks, or some specific portion thereof.

13. See *id.* at 34, 56.

14. *NHE Fact Sheet*, CENTERS FOR MEDICARE & MEDICAID SERVICES (July 28, 2015) https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet.html.

15. *Id.*

16. The 2011 Towers Watson study on the costs of the civil tort system in the U.S. calculated total insured and self-insured tort costs in the U.S. in 2010 at $264.6 billion, or about 1.82% of gross domestic product. Towers Watson, *U.S. Tort Cost Trends: 2011 Update*, CASUALTY ACTUARIAL SOCIETY 5 (2012), http://www.casact.org/library/studynotes/Towers-Watson-Tort-Cost-Trends.pdf. This figure included benefits paid (including those funded by liability insurance) or expected to be paid, defense costs, and administrative expenses incurred by insurers or self-insured entities in administering tort claims. Administrative costs accounted for 24% of insured tort costs. *Id.* at 8.

The law of torts and the business of insurance are intertwined in a deeply symbiotic relationship. *See, e.g.*, David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L. REV. 857 (2001) ("many commentators have observed that tort law cannot be understood if the business of insurance and the law regulating it is ignored, and that insurance law cannot be understood if tort law is ignored"); DAN B. DOBBS, THE LAW OF TORTS 43 (2000) ("No one will understand tort law in the United States without understanding that liability insurance fuels the system, limits its capacity for compensation and deterrence, shapes the litigation, and affects the costs and choices in the system as a whole"). Although tort law was not recognized as a separate field of law until the mid-19th century, it has long been a staple of the first-year law school curriculum, a prominence that is well deserved in that tort doctrines carry forward fundamental social judgments about civil order and the norms that define the boundaries of reasonable human behavior and interaction. See W. PAGE KEETON, PROSSER AND KEETON ON TORTS 1-2 (W. Page Keeton et al. eds., 5th ed. 1984). Insurance law is not a required law school course; if economic significance of the compensatory framework were the principal criterion for inclusion in the required first-year curriculum, the case for insurance law taking the place of torts would be strong. I do not advocate or endorse that standard, but I raise it as one way to illustrate the importance of insurance law.

17. FACT BOOK, *supra* note 11, at 23.

18. *Id.* at 17.

19. Federal Insurance Office, *Annual Report on the Insurance Industry*, U.S. DEPARTMENT OF THE TREASURY 5 (June 2013),http://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/FIO%20Annual%20Report%202013.pdf [hereinafter *2013 FIO Report*].

tions in the country.[20] These are primarily premiums held in reserve, but $6.8 trillion of this amount is reinvested,[21] and approximately $5 trillion is reinvested directly in the U.S. economy,[22] primarily in the form of corporate, state, and local bonds where the industry is among the largest of all purchasers.[23] The $17.4 billion in premium taxes paid at the state level by insurance companies in 2013 accounted for approximately two percent of all taxes collected by the states.[24] Similar observations can be made about the global insurance industry, which has unquestioned importance to the world economy. Total 2013 world insurance premiums of $4.64 trillion[25] represented approximately 6.3 percent of global gross domestic product.[26] Insurance is becoming much more important in developing economies; microinsurance projects have helped millions of low-income individuals in emerging markets set up businesses and purchase homes. By some estimates, more than 500 million people now have microinsurance,[27] and this number is rapidly increasing.

Yet numbers alone do not explain adequately the important role insurance plays in our socio-economic order. Without insurance, commerce as we know it would not exist. This is because the transfer and distribution of risk that occurs through insurance mechanisms enables entrepreneurs to convert potential losses that would otherwise deter investment into predictable costs that are manageable within a budget. When losses occur, the proceeds paid through insurance arrangements enable these entrepreneurs to obtain the facilities, goods, and services needed to rebuild and restore their business activities. For some industries (the obvious ones are auto repair, auto parts, building supplies, and construction), insurance proceeds are indispensable to the balance sheet.[28] For individuals, households, and families (and some organizations), insurance enables the management of risks that threaten our most cherished interests and assets. Indeed, it is hard to

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20. *Id.*
21. *Id.*
22. FACT BOOK, *supra* note 11, at 31, 50 (indicating $3.5 trillion in life/health; $1.5 trillion in property/casualty).
23. *Id.* at 17. In 2013, the industry invested approximately $740.6 billion in state and local municipal bonds and loans, thereby supporting a vast number of public projects.
24. *Id.* at 24.
25. *Id.* at 2.
26. *Id.* at 1.
27. *See generally The State of Microinsurance: Insider's Guide to Understanding the Sector*, MICROINSURANCE NETWORK (2015) http://www.microinsurancenetwork.org/sites/default/files/MiN_State%20of%20Microinsurance.pdf.
28. In 2013, insurance proceeds paid for $41.8 billion in physical damage to private passenger automobiles and $3.3 billion in physical damage to commercial automobiles. *Auto Repair Industry*, INS. INFO. INST., http://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/fostering-innovation-in-key-industries/auto-repair-industry (last visited Aug. 12, 2015). Some portion of these amounts would have paid for total losses of vehicles which went to salvage, and these proceeds would have been used to purchase replacement vehicles, thereby supporting the motor vehicle retail sales industry. The remainder would have been used to make repairs, thereby supporting the auto repair and auto parts industries. A small residual that covered losses neither replaced nor repaired most likely would have made its way into the economy through other purchases by the insureds, and some small amount would have been placed in savings. In 2013, $35.5 billion was paid as proceeds under homeowners insurance and $110 billion under commercial property insurance nationally and a significant portion of these amounts would have paid businesses in the construction industry to make repairs to or replace damaged or destroyed property. *Construction Industry*, INS. INFO. INST., http://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/fostering-innovation-in-key-industries/construction-industry (last visited Aug. 12, 2015).

imagine living in a world where we could not insure the financial consequences of dying, living longer than one's years of earning capacity, suffering an illness or injury (including both the expenses of the health care system and the loss of income when disability prevents one from working), having one's property damaged or destroyed (or losing income due to damage to property upon which one's income depends), incurring liability to a third party (and the expenses of defending against claims of liability), or suffering an injury or loss in circumstances where the financial consequences cannot be shifted to the person or entity who caused it.

Thus, the business of insurance is, first and foremost, the business of providing financial security against the risk of loss. *But when loss occurs, the business of insurance becomes the business of resolving claims.* Because the insurance business is vast, the number of claims to be managed in resolution processes is immense. The structures of insurance claim processing stress dispute avoidance, and most claims are settled smoothly and without controversy. The sheer volume of claims run through the insurance system is so large, however, that even a small percentage of claims where insurer and insured disagree on the appropriate resolution translates into a massive number of disputed claims.[29] Thus, it is hard to imagine an industry where dispute avoidance is more highly valued, dispute resolution rules and processes matter more, or the number of occasions in which dispute resolution procedures are invoked is larger.

With the insurance world being so vast, the points at which insurance and dispute resolution converge are numerous. The next four sections discuss a few of the more prominent ones.

II. DISPUTE RESOLUTION AFTER MASS DISASTERS

How government, business, and the general citizenry should prepare for and respond to mass disasters is an extremely significant and complex public policy issue. The essence of the problem is obvious: in mass disasters, the number of persons and businesses suffering insured loss is extremely large, and the usual insurance mechanisms for digesting claims in the aftermath of a disaster are put under great stress. Recent history provides a narrative that documents the importance of finding ways to improve insurance claims processing and dispute resolution methods when mass disasters strike – which *will* happen in the future.

The devastating effects of hurricanes, earthquakes, volcanic eruptions, floods, tsunamis, tornadoes, and other natural disasters are well publicized when they occur. The same is true of large-scale terrorism events.[30] How deeply these past experiences have penetrated social memory is a concern; government agencies' readiness to respond and citizens' preparedness for future disasters are widely

29. *See infra* notes 47-48, 103-10 and accompanying text.

30. All terrorism events are major, as it is impossible for any observer of decency not to be moved by the human tragedies that invariably accompany these events. The focus here is on terrorism events that are so large that they place stress on insurer's claims processing systems. The terrorist attack on the World Trade Center and the Pentagon on 9/11/01 is an example of such a disaster. Fortunately, the U.S. has not experienced a terrorist attack on this scale since 9/11, but the risk of such a catastrophe is ever present.

believed to be deficient.[31] Mass disaster exposures in the U.S. are substantial; although only 1.1 percent of the total land area of the United States is considered at "high mortality risk" due to exposure to two or more natural disaster hazards simultaneously, more than one-third of the U.S. population lives in these areas.[32] It is likely that more than 90 percent of the U.S. population is exposed to at least one major natural disaster hazard that has the potential for widespread destruction of property, loss of life, and physical injury.[33] When one adds the risk of terrorist attack to the mix, it is difficult to think of any area of the country, portion of the population, or sector of the economy that is not exposed to some kind of catastrophic risk.

The timing of future mass disasters is, of course, unknown, but that these catastrophes will occur in the future is certain. Almost all of them are beyond our control,[34] even if they are subject to some kinds of risk management through strategies that reduce the loss and damage when the events occur. The frequency of earthquakes, tsunamis, volcanoes, and meteor strikes is relatively static, but in the future some weather-related mass disasters – in particular, hurricanes – are expected to increase intensity and perhaps frequency due to changing climate patterns.[35] An area of acute risk is the U.S. coastline from New York to Texas, a vast distance where the hurricane risk is highest and where population and property is highly concentrated for its entire distance. According to census data, 123.3 million people, or 39 percent of the nation's population, lived in coastal shoreline counties in 2010, a figure which increased 39 percent from 1970 to 2010 and is expected to increase more when the next census is taken in 2020.[36] In Florida, the

31. *See* Kathryn Schulz, *The Really Big One*, THE NEW YORKER (July 20, 2015), http://www.newyorker.com/magazine/2015/07/20/the-really-big-one (discussing the status of current preparedness for an earthquake in the coastal Pacific Northwest); Nathan Gilles, *The First Four Minutes: A Timeline of Portland's Upcoming Cataclysmic Quake*, PORTLAND MERCURY (Mar. 15, 2012), http://www.portlandmercury.com/portland/the-first-four-minutes/Content?oid=5766214 (same).

32. Maxx Dilley et al, *Natural Disaster Hotspots: A Global Risk Analysis*, THE WORLD BANK 9 (2005), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/11/23/000160016_20051123111032/Rendered/PDF/344230PAPER0Na101official0use0only1.pdf.

33. *See id.*, at 35-46 (showing maps for single-hazard exposures worldwide).

34. Designing and implementing anti-terrorism strategies to further public safety and protect national security will be major government activities indefinitely; inasmuch as terrorism is a human activity, it is subject to prevention by anti-terrorism efforts. In the realm of natural disasters, one possible exception to the proposition that these are outside our control is the risk of an asteroid hitting the earth. This is not a hypothetical risk to be casually disregarded; although the odds of a strike are small, the number of people who would be killed is so high that the risk is not de minimis. *See* Space Science Institute, *Impact: Earth*, KILLER ASTEROIDS, http://www.killerasteroids.org/impact.php (last visited Aug. 20, 2015) (website has a "risk game" that enables the risk of asteroid impact to be compared to other common risks). Governments are investing in researching and discovering strategies that might alter the path of an asteroid on track to hit the earth. *See Near-Earth Object Survey and Deflection Analysis of Alternatives*, NASA (March 2007), http://www.nasa.gov/pdf/171331main_NEO_report_march07.pdf; European Space Agency, *AIDA: Asteroid Impact and Deflection Assessment study*, YOUTUBE (Sept. 22, 2014), https://www.youtube.com/watch?v=OQ8vp-u-9A4.

35. Jerry M. Melillo, Terese Richmond, & Gary W. Yohe, *Climate Change Impacts in the United States: The Third National Climate Assessment*, U.S. NATIONAL CLIMATE ASSESSMENT 20 (2014) http://s3.amazonaws.com/nca2014/low/NCA3_Climate_Change_Impacts_in_the_United%20States_LowRes.pdf?download=1.

36. National Oceanic and Atmospheric Administration, *National Coastal Population Report: Population Trends from 1970 to 2020*, DEPARTMENT OF COMMERCE 3 (March 2013)http://stateofthecoast.noaa.gov/features/coastal-population-report.pdf.

state most vulnerable to hurricanes, 79 percent of total insured property was located on the coasts in 2013.[37] As for the rest of the U.S. coastline, the catastrophic 2011 Tohoku, Japan earthquake and tsunami[38] is a stark reminder of the tsunami risk facing Pacific coastline counties, where more than 32 million people live.[39] Moreover, the risk of loss on the coasts also increases in most long-term forecasts because of sea-level rise,[40] putting aside the more controverted possibility that climate change is actually increasing the frequency of the formation of such storms.[41] One example will summarize the basic point: If the hurricane that made landfall in Miami in 1926, crossed the Gulf, and made landfall again on the Alabama coast were to occur in 2015, it would produce losses of approximately $132 billion in current dollars, a sum larger than the combined loss (measured in dollars at the date of occurrence) from the seven most costly catastrophes ever to occur in the U.S.[42]

The history of using special mediation systems to deal with claims resolution in the mass disaster setting dates back to Hurricane Andrew, which struck the Florida coast just south of Miami in August 1992. Prior to Andrew, the most significant[43] hurricane to make landfall in the U.S. was Hurricane Camille, which struck the Mississippi Gulf coast in 1969. In terms of total economic loss, Camille was unprecedented at the time it occurred; it caused estimated total losses of $1.42 billion (or $9.2 billion in 2015 dollars).[44] But as an *insured loss* event, Hurricane Camille was relatively minor when compared to the hurricanes of the twen-

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37. FACT BOOK, *supra* note 12 at 99.

38. *See* Becky Oskin, *Japan Earthquake & Tsunami of 2011: Facts and Information*, LIVESCIENCE (May 7, 2015) http://www.livescience.com/39110-japan-2011-earthquake-tsunami-facts.html.

39. Steven Wilson & Thomas Fischetti, *Coastline Population Trends in the United States: 1960 to 2008*, U.S. CENSUS BUREAU: CURRENT POPULATION REP. APPENDIX TABLE A24(May 2010), https://www.census.gov/prod/2010pubs/p25-1139.pdf.

40. *Sea Level Rise Tool for Sandy Recovery*, U.S. GLOBAL CHANGE RESEARCH PROGRAM, http://www.globalchange.gov/browse/sea-level-rise-tool-sandy-recovery (last visited Aug. 17, 2015) ("Sea level rise increases the frequency and severity of coastal flooding in human and natural systems, even if storm patterns remain the same.").

41. *See Hurricanes and Climate Change*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, http://www.c2es.org/science-impacts/extreme-weather/hurricanes (last visited Aug. 17, 2015) (finding "[t]he connection between climate change and hurricane frequency is less straightforward"; summarizing recent studies).

42. *Compare* FACT BOOK, *supra* note 12, at 148 (providing 2011 dollars; number in the text adjusted to 2015 dollars), *with id.* at 144 (10 most costly catastrophes in the U.S.).

43. Hurricane Camille was not the worst hurricane in history as of 1969; the 1926 Miami hurricane was larger and more deadly, and the 1900 Galveston hurricane killed between 6,000 and 12,000 people. But the southeast was relatively undeveloped in 1926 and the confluence of factors that preceded the Galveston disaster was unusual. Thus, the pre-1969 hurricanes were not deeply embedded in social memory. In addition, in terms of economic impact, Camille was, as of 1969, the most serious weather event to have ever occurred. *See generally* Roger A. Pielke, Jr., et al, *Thirty Years After Hurricane Camille: Lessons Learned, Lessons Lost*, HURRICANE CAMILLE PROJECT REPORT (July 12, 1999), (http://sciencepolicy.colorado.edu/about_us/meet_us/roger_pielke/camille/report.html) (writing in 1999 that Hurricane Camille was "perhaps the most significant economic weather event in the world's history"); *Galveston Storm of 1900*, NOAA HISTORY: A SCIENCE ODYSSEY (Feb. 4, 2004) http://www.history.noaa.gov/stories_tales/cline2.html; *Memorial Web Page for the 1926 Great Miami Hurricane*, NATIONAL WEATHER SERVICE WEATHER FORECAST OFFICE MIAMI, FLORIDA (Sept. 16, 2014) http://www.srh.noaa.gov/mfl/?n=miami_hurricane.

44. *1969- Hurricane Camille*, HURRICANES: SCIENCE AND SOCIETY, http://www.hurricanescience.org/history/storms/1960s/camille/ (last visited Oct. 11, 2015) (dollar figures updated to 2015 values).

ty-first century.[45] Thus, when Hurricane Andrew became the first major hurricane to hit a highly developed coastline in U.S. history, it was both the largest economic catastrophe in the nation's history[46] and the most complicated insurance event that had ever occurred.

More than 600,000 insurance claims were filed in the aftermath of Hurricane Andrew,[47] and approximately 25,000 of these entered the local court system as unresolved insurance disputes.[48] It became apparent to state officials in the Florida Department of Insurance (FDOI) that the number of unresolved insurance claims was so large that the inevitable delays associated with moving these claims through litigation would impede recovery and rebuilding and cause great hardship to a large number of policyholders.[49] Concern also existed that widespread prelitigation involvement of attorneys would cause claims resolution to become excessively adversarial, with consequent delays and added expense.[50] Some familiarity in Florida with mediation of automobile insurance claims already existed, and the idea emerged in FDOI to create a mechanism that would reduce litigation by processing large numbers of unresolved claims through mediation. FDOI had been in close communications with representatives of the insurance industry since the first days after the storm, and these conversations became the setting in which a voluntary mediation system was first discussed.[51] As the discussions unfolded, a decision was made to seek the advice of the American Arbitration Association for the system's design.[52]

What emerged in November 1992 was an emergency rule titled "Alternative Procedures for Resolution of Disputed Claims from Hurricane Andrew."[53] Under the program created by this rule, approximately 2,400 claims were filed and approximately 92 percent were resolved successfully through mediation.[54] The ap-

45. For example, in 1969 the National Flood Insurance Program was only a year old and its implementation was barely underway. No NFIP flood insurance policies applied to the Hurricane Camille losses. Moreover, only 20 percent of the total damages resulting from the hurricane were covered by private flood insurance. Pielke, Jr., et al, *supra* note 43 (citing KATHLEEN R. LEYDEN, RECOVERY AND RECONSTRUCTION AFTER HURRICANE CAMILLE: POST STORM HAZARD MITIGATION ON THE MISSISSIPPI GULF COAST 32 (1985).

46. Like Hurricane Camille, if Hurricane Andrew had followed a slightly different track and made a direct hit on Miami, instead of essentially leveling Homestead, the economic losses would have been stunningly higher, perhaps four times greater. *See* Ryan Yousefi, *100-Year Hurricane Could Cost $250 Billion if It Hit Miami*, MIAMI NEW TIMES (Apr. 16, 2015), http://www.miaminewtimes.com/news/100-year-hurricane-could-cost-250-billion-if-it-hit-miami-7572520.

47. Adrian Sainz, *Ten years after Hurricane Andrew, effects are still felt*, MIAMI SUN SENT., Sept. 8, 2002, at A13, available at https://news.google.com/newspapers?nid=1876&dat=20020908&id=ODMfAAAAIBAJ&sjid=JtAEAAAAIBAJ&pg=6776,2657357&hl=en

48. Cindy Fazzi, *Disaster: When it Strikes, ADR Can Come to the Rescue in Resolving Mass-Tort Claims*, 53 DISP. RESOL. J. 16 (1998).

49. *See* Elliott Mittler, *A Case Study of Florida's Homewoners' Insurance Since Hurricane Andrew*, UNIV. OF COLORADO NATURAL HAZARDS CENTER (1997) http://www.colorado.edu/hazards/publications/wp/wp96.html (providing a chronology of the response of the Florida Department of Insurance to Hurricane Andrew).

50. *See* Fazzi, *supra* note 48, at 16-17 (quoting Tom Terfinko, Consumer Assistance Bureau Chief of Florida's Department of Insurance, citing need for "a non-intimidating environment for resolving complaints").

51. *See* Mittler, *supra* note 49 at 96; Fazzi, *supra* note 48, at 17.

52. *See* Fazzi, *supra* note 48, at 17.

53. *Id.* at 17.

54. Fazzi, *supra* note 48, at 17.

parent success of the program led the Florida legislature to enact a mediation law in 1993 for disputed property insurance claims,[55] and in 1994 the FDOI promulgated a permanent rule, which remains in force today with some amendments, for general mediation of property insurance claims.[56] Substantially the same claims resolution framework was used in 2004 and 2005 when eight hurricanes of smaller size but with total economic impact exceeding that caused by Hurricane Andrew[57] made landfall in Florida. These eight hurricanes resulted in 2.7 million claims being filed under property insurance policies, 95 percent of which were settled. More than 17,000 claims were mediated, with 15,154 of those cases being closed for a settlement rate of 91 percent.[58]

After Hurricane Andrew, the voluntary mediation system developed in Florida was adapted and used in other states to resolve property insurance claims in the wake of natural disasters. These included Hawaii (Hurricane Iniki in September 1992),[59] California (the Northridge earthquake in 1994),[60] Louisiana (Hurricanes Katrina and Rita in 2005),[61] Mississippi (Hurricanes Katrina and Rita in 2005),[62]

55. Insurance – General Amendments, 1993 FLA. SESS. LAW SERV. Ch. 93-410, § 20 (West) (codified as amended at Alternative Procedure for Resolution of Disputed Property Insurance Claims, FLA. STAT. § 627.7015 (2015)).

56. FLA. ADMIN. CODE. ANN. r. 69J-166.031 (2015).

57. Hurricanes Charley, Frances, Ivan, and Jeanne reached Florida mainland in 2004, and Hurricanes Dennis, Katrina, Rita, and Wilma did so in 2005. Charley was the strongest hurricane to hit the U.S. since Andrew. The eight hurricanes, plus four tropical storms during those two years, resulted in $35 billion in total insured losses, which cumulatively was more the losses caused by Hurricane Andrew.
Presentation on the Recommendations of the Task Force on Long-Term Hurricane Solutions, OFFICE OF INSURANCE REGULATION, STATE OF FLORIDA (Mar. 15, 2006), http://www.floir.com/siteDocuments/LongTermHurricaneSolution03152006.pdf.

58. *95 Percent of Florida's 2.7M Hurricane Claims Settled*, INSURANCE JOURNAL (July 5, 2006), http://www.insurancejournal.com/news/southeast/2006/07/05/70023.htm.

59. This hurricane caused $1.8 billion in damage in Hawaii. Meghan Mussoline, *Hurricane Iniki: The Most Powerful Storm Ever to Hit Hawaii*, ACCUWEATHER (September 11, 2013), http://www.accuweather.com/en/weather-news/hurricane-iniki-the-most-power/72515. The Hawaii Department of Insurance created the "Hurricane Iniki Mediation Mechanism," which was administered by the American Arbitration Association, but the state did not continue it as a permanent program. *Id.*

60. In 1995, the California legislature authorized the Department of Insurance to establish a pilot program for mediation of certain claims arising out of the Northridge earthquake. S.B. 882, 1995 Legis. Reg. Sess. (Cal. 1995). *See* Lisa Leff, *State Offering Mediation Services to Settle Disputed Quake Claims*, L.A. TIMES (June 11, 1996), http://articles.latimes.com/1996-06-11/local/me-13799_1_mediation-program (visited Aug. 22, 2015). This became a permanent program later. *See infra* note 66 and accompanying text.

61. *See infra* notes 70-76 and accompanying text; Susan Zuckerman, *Mediation Program Helps Miss. And La. Rebuild After Katrina and Rita*, 61 DISP. RESOL. J. 12 (2006) (providing a contemporaneous summary of both programs).

62. The AAA administered the program in Mississippi, which was announced by Regulation No. 2005-2. It required a non-refundable $100 fee payable to the AAA, reserved a right to the Department of Insurance to attend, required a post-mediation report within 5 days of the mediation, and preserved the insured's right to proceed by appraisal if the mediation was unsuccessful. *See* MISS. DEP'T OF INS. REG. NO. 2005-2, SPECIAL MEDIATION PROGRAM FOR PERSONAL LINES RESIDENTIAL INSURANCE CLAIMS RESULTING FROM HURRICANE KATRINA, http://www.mid.ms.gov/legal/regulations/20052dreg.pdf (last visited Sept. 6, 2015). According to AAA figures, over 5,000 cases were mediated in the Hattiesburg, Mississippi mediation center with an 82% settlement rate, and over 400 cases were ordered to mediation through the AAA in a Mississippi federal court program with a 54% success rate. *See Mass Claims ADR Programs and Federal ADR Programs*, AM. ARBITRATION ASS'N 4, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004209 (last visited Sept. 6, 2015).

New Jersey (Superstorm Sandy in 2012),[63] New York (Superstorm Sandy in 2012),[64] and North Carolina (flooding in 2006 and other occasions since).[65] In addition, in California[66] and North Carolina,[67] a state statute authorizes the state department of insurance to create or initiate a mediation program in certain situations, including mass disasters. Such a program was considered in Texas in the aftermath of Hurricane Ike but was not enacted.[68] Also, in North Dakota what is described as a grass-roots mediation program emerged in 1998 to deal with flooding during the melt of the large snowfalls of late 1997 and winter 1998.[69]

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63. See *infra* discussion accompanying notes 77-82.

64. See *infra* discussion accompanying notes 77-80, 83-86.

65. Under a statute enacted in 2006, North Carolina authorizes the state Department of Insurance to activate a disaster mediation program following the declaration by the President or the Governor of a state of disaster in a portion of the state. N.C. GEN. STAT. ANN. §§ 58-44-70 to -120 (West 2015). This authority was invoked immediately for two counties damaged by Tropical Storm Ernesto. *See Bulletin No. 06-B-06*, N.C. DEP'T OF INS. (Oct. 23, 2006), http://www.ncdoi.com/ls/documents/bulletins/2006/06-b-06%20-%20disaster%20mediation%20program%20interim%20administrator;%20disaster%20declaration%20for%20jones%20and%20duplin%20counties.pdf (visited Aug. 22, 2015). It was invoked in subsequent years for tornado and hurricane damage. *See Bulletin No. 14-B-06*, N.C. DEP'T OF INS. (May 19, 2014), http://www.ncdoi.com/LS/Documents/Bulletins/2014/14-B-06%20-%20Disaster%20Mediation%20Program.pdf (responding to tornadoes that touched down in four counties on April 25, 2014); *Commercial Bulletin*, AM. ARBITRATION ASS'N, https://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda4/~edisp/adrstg_008052.pdf (last visited Aug. 22, 2015) (activation of program for April 2011 tornadoes and Hurricane Irene in August 2011).

66. *See* CAL. INS. CODE § 10089.70 (West 2015). Under the California statute, the insurance department shall establish a program of mediation between complainants and insurers when a loss occurs due to a fire for which the Governor has declared a state of emergency (a provision that responds to the wildfire risk in California), an earthquake that has led to such a declaration, and certain claims arising under automobile collision or comprehensive coverage.

67. See N.C. GEN. STAT. ANN. §§ 58-44-70 to -120.

68. A state program was reported to have commenced in Houston in the wake of Hurricane Ike. *See* City of Houston, *Hurricane Ike Mediation Program*, HOUSTONTX.GOV, http://www.houstontx.gov/ikemediation.html (last visited Aug. 22, 2015) (referring readers to the website of a private psychologists firm). It is clear that the Texas Department of Insurance seriously considered a program. *See* Chad Hemenway, *Texas Looks to Start Mediation Program for Hurricane Ike Claims*, CRAVENSWARREN.COM (Jan. 12, 2009), http://www.cravenswarren.com/insurance/texas-start-mediation-program-hurricane-ike-claims/subpage244.html#.VhvYxkKprzJ; s*ee also* David L. Lane, *The Storm is Just Beginning When the Hurricane Finally Ends: Applicability of Mediation to Settlement of Insurance Claims in Mass Disasters*, AM. JOURNAL OF MEDIATION (2009), http://www.americanjournalofmediation.com/docs/The%20Storm%20is%20Just%20Beginning%20When%20The%20Hurricane%20Finally%20Ends.pdf ("Texas is currently examining implementation of such a program."). That no formal program exists, however, is implicit in the absence of any mention of mediation existed on the Texas Department of Insurance website, or any kind of statutory authorization in the Texas legislative record. *See* TEX. DEP'T. INS., http://www.tdi.texas.gov (last visited Aug. 22, 2015).

69. This program was organized by the American Arbitration Association in cooperation with civic organizations in North Dakota. *See* Fazzi, *supra* note 48 at 18. In a slightly different twist on state support of mediation in the mass disaster setting, the North Dakota Mediation Service provided assistance to North Dakota farmers applying for federal disaster funds for drought-related losses suffered since 2011. N.D. Dep't of Agriculture, *Mediation service can help with disaster aid paperwork*, ND.GOV (April 10, 2014), http://www.nd.gov/ndda/news/mediation-service-can-help-disaster-aid-paperwork.

Of these mediation programs, the one created in Louisiana by Emergency Rule 22[70] on the day of Hurricane Katrina's landfall is arguably the most significant due to the fact that Hurricane Katrina is, as of 2015, the most costly insured loss catastrophe in U.S. history.[71] Although Emergency Rule 22 did not by its own terms set a termination date for the program, its effective duration was two years, as this was the length of time insureds could file Katrina and Rita property insurance claims after the storms.[72] On November 1, 2007, the Louisiana Commissioner of Insurance issued an advisory letter extending the mediation program for all claims in which there was pending litigation.[73] When completed, the program handled 12,241 cases, and; 9,719, or 80 percent, were settled successfully.[74] As impressive as these numbers are, when viewed in isolation they understate the vastness of the world of policyholder-holder disputes in the aftermath of Katrina. Although lawsuits by policyholders against their insurers are relatively rare, 6,600 such lawsuits were filed in the federal district court in New Orleans alone, many thousands more were filed in state courts, thousands of formal complaints were filed with the Louisiana Department of Insurance (LDI) (4,700 in 2006 alone), and for over six months after the storm, calls to the LDI reached 20,000 per month.[75] Although the Louisiana program was not renewed, one would expect the LDI to activate a mediation program in the event another mass disaster were to visit the state. In fact, the LDI appears to support creating an insurance mediation program that would apply to all property insurance claims, without regard to whether they arise in a mass disaster setting. A bill that mandates such a program and calls

70. Alternative Procedures for the Resolution of Disputed Residential Insurance Claims Arising From Hurricane Damage, 32 La. Reg. 60 (Jan. 20, 2006) available at https://www.adreducation.org/media/5047/louisiana%20declaration%20of%20emergency.pdf.

71. Katrina's $47.6 billion insured property loss (in 2013 dollars) is more than twice the amount of the second-most expensive mass disaster, the September 2001 terrorist attacks on the World Trade Center and the Pentagon. FACT BOOK, *supra* note 11, at 144. The insured property losses in the September 11 terror attacks are estimated at $29.9 billion. *Id.* Of the 1.7 million insurance claims filed for Katrina-caused loss, 1.2 million were for personal property loss; more than one-half of the claims came from losses in Louisiana. *Catastrophes: Insurance Issues*, INS. INFO. INST. (Aug. 2015), http://www.iii.org/issue-update/catastrophes-insurance-issues. Hurricane Katrina crossed the tip of Florida before entering the Gulf of Mexico, where it grew into a Category 5 hurricane before weakening to a Category 3 before making landfall in southeast Louisiana near the Louisiana-Mississippi border. Storm surge damage occurred from central Florida to Texas, devastating loss occurred in Mississippi's coastal counties, Mobile Bay and the Florida panhandle suffered twelve to sixteen foot storm surges, and inland areas from the landfall zone through Georgia suffered rain and wind damage, but a preponderance of the claims and loss arose in Louisiana.

72. A standard provision in property insurance policies requires claims under the policies to be made within one year after the loss. In Louisiana, two statutes extended this limitations period to two years following the dates of the storms. La. Stat. Ann. § 22:868 (2006) (involving claims period for Hurricane Katrina); Acts 2006, No. 802 (involving claims period for Hurricane Rita). *See* State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In State, 937 So. 2d 313 (La. 2006) (a declaratory judgment action brought by the State Attorney General, the Supreme Court of Louisiana held that these statutes were constitutional, rejecting challenges based on state and federal contract clauses, due process, and the Supremacy Clause of the federal Constitution).

73. Louisiana Dep't of Ins., Advisory Letter No. 07-05 (Nov. 1, 2007).

74. Warren Byrd, LA Dep't of Insurance, LA Mediation Program: Development and Structure,, address at Property Insurance Law Committee Annual Spring Meeting, Tort Trial & Insurance Practice Section, American Bar Ass'n: Resolution of Property Insurance Claims in the Modern Age: Appraisal, Mediation, and Arbitration (April 24-26, 2014).

75. *See* Leslie Eaton & Joseph Treaster, *Insurance Woes for Hurricane Katrina Victims*, N.Y. TIMES (Sept. 2, 2007), http://www.nytimes.com/2007/09/02/business/worldbusiness/02iht-orleans.4.7353442.html?_r=0.

upon the LDI to implement it was filed in the latter parts of the 2015 Louisiana legislative session with the support of the LDI, but was not fully considered in that session.[76]

The mediation programs created in New Jersey and New York in the aftermath of Superstorm Sandy mark the most recent experience with post-disaster dispute resolution programs. Superstorm Sandy formed as a tropical storm on October 22, 2012, became a Category 3 hurricane as it tracked north, and then moved west onto the coast near Atlantic City, New Jersey on October 28 as a post-tropical cyclone.[77] Because Sandy made landfall close to the time of high tide and during a full moon, it produced record tide levels along coastal regions from New Jersey to Connecticut, including New York City and Long Island.[78] Although winds at landfall were only 80 miles per hour, the unprecedented breadth of the storm,[79] the angle of its path, and its timing made it the third most devastating hurricane in history after Katrina and Andrew.[80]

Both New Jersey and New York implemented mediation programs within months after the storm. On March 26, 2013, the New Jersey Commission of Banking and Insurance issued Order No. A13-106 which "temporarily" established a mediation program for unresolved first-party claims involving homeowners, automobile, and commercial insurance policies for losses caused by Sandy.[81] Assessments of whether the New Jersey program had significant successes vary. In January 2014, Governor Christie's administration announced that the mediation program had recovered $3.42 million for consumers in seven months, yet only 764 requests for mediation were received, 521 were completed, 216 produced recoveries for insureds, and the amount recovered by insureds amounted to 16 percent of the amounts claimed. [82]

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76. S.B. 195, 2015 S., Reg. Sess. (La. 2015) (filed April 2, 2015).

77. *Hurricane/Post-Tropical Cyclone Sandy, October 22-29, 2012*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. 12 (May 2013), http://www.nws.noaa.gov/os/assessments/pdfs/Sandy13.pdf.

78. *Hurricane Sandy*, NAT'L WEATHER SERV., http://www.weather.gov/okx/HurricaneSandy (last visited Aug. 15, 2015).

79. *See* Jeffrey B. Halverson & Thomas Rabenhorst, *Hurricane Sandy: The Science and Impacts of a Superstorm*, WEATHERWISE.ORG (Mar.-Apr. 2013) http://www.weatherwise.org/Archives/Back%20Issues/2013/March-April%202013/hurricane-sandy-full.html (Sandy was the largest Atlantic hurricane on record measured by diameter, with winds reaching 1,100 miles).

80. Total losses are estimated at more than $50 billion. *See Hurricane Sandy*, *supra* note 78, at 12. Insured property losses are estimated at approximately $18.7 billion. FACT BOOK, *supra* note 11, at 144.
See also Halverson & Thomas, *supra* note 79.; Tim Sharp, *Superstorm Sandy: Facts About the Frankenstorm*, LIVESCIENCE.COM (Nov. 27, 2012), http://www.livescience.com/24380-hurricane-sandy-status-data.html.

81. N.J. Dep't of Banking and Ins., In the Matter of the Establishment of a Mediation Program to Aid in the Resolution of Claims Related to Storm Sandy, Order No. A13-106 (March 26, 2013), *available at* http://www.state.nj.us/dobi/orders/a13_106.pdf. This program excluded claims under $1,000, claims were fraud was "suspected," losses unrelated to Sandy, or claims under policies that the insurer alleged did not exist or were invalid. It provided a form notice for insurers to provide. It set out procedures and provided for the mediator's power to adjourn the mediation, and it provided a competitive bidding process to administer the program, out of which the AAA was selected. *Id.* at 4.

82. *N.J.'s Sandy Claims Mediation Program Recovered $3.42M Since May*, INS. J. (Jan. 13, 2014), http://www.insurancejournal.com/news/east/2014/01/13/316885.htm; Michael L. Diamond, *NJ Mediation Gets Sandy Victims 16 Cents on the Dollar from Insurers*, APP (Jan. 11, 2014), http://archive.app.com/article/20140110/NJBIZ/301100102/Sandy-mediation; Martin Bricketto, *Sandy Mediation Sees Modest Turnout but Promising Results*, LAW 360 (Aug. 2, 2013),

The New York program, which was announced on February 25, 2013,[83] applied to Sandy-related real and personal property claims (but not automobile, flood insurance, and claims under excess and surplus lines policies claims) arising out of ten New York counties.[84] Participation in the New York program was also modest, although reportedly larger than in New Jersey.[85] From the perspective of a policyholder advocate, homeowners in both states "used these programs with some success . . . but the results can be fairly deemed a learning experience rather than a resounding success."[86]

One of the difficulties confronted in modern hurricane disasters is that wind and rain damage are under the purview of whatever coverage exists in personal and commercial property insurance coverages, but flood damage is excluded under these policies.[87] Flood damage is covered under separate flood insurance policies issued by private insurers under the auspices of the National Flood Insurance Program (NFIP), which has special rules for coverage terms, pricing, and claims resolution.[88] The complexities of this program and its coverage are beyond the scope of this discussion, but it is important to understand that many insureds with homeowners, renters, or commercial property policies do not understand the limitations of their coverage, which leads to disputes that need to be resolved in what are essentially no-pay situations under the standard flood insurance forms. Disputes under the separate flood policies were outside the scope of the mediation

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http://www.law360.com/articles/461691/sandy-mediation-sees-modest-turnout-but-promising-results (discussing "smaller than expected participation" in mediation program).

83. *N.J., N.Y. to Offer Mediation Program for Sandy Claims Disputes*, INS. J. (Feb. 26, 2013), http://www.insurancejournal.com/news/east/2013/02/26/282732.htm.

84. Unfair Claims Settlement Practices and Claim Cost Control Measures, 11 N.Y. Comp. Codes R. & Reg. tit. 64 § 216 (July 30, 2015), *available at* http://www.dfs.ny.gov/insurance/r_emergy/re64a15t.pdf. The filing deadline for mediations under this program was June 22, 2015. *See Consumer Alert: Storm Sandy Mediation Program*, N.Y. DEPT. OF FIN. SERVS., http://www.dfs.ny.gov/consumer/alert_sandy_mediation_program_deadline.htm (last visited Sept. 6, 2015).

85. *See* Ed Beeson, *Slack Demand, But Big Promise Still Seen for Hurricane Sandy Insurance Mediation*, NJ.COM (Aug. 11, 2013 6:07 AM), http://www.nj.com/business/index.ssf/2013/08/hurricane_sandy_mediation_demand.html (reporting that New York post-Sandy mediation requests were approximately 2,300 compared to 488 in New Jersey).

86. Dan Wade, *Storm Sandy Mediation Program: A Learning Experience*, UNITED POLICYHOLDERS, http://uphelp.org/blog/advocacy-and-action/storm-sandy-mediation-program-learning-experience (last visited Sept. 6, 2015) A different United Policyholders report gave a more critical assessment: In addition, anecdotal reports cited by policyholder advocates have called into question whether past mediation programs have produced "fair settlements through a fair process overseen by competent, experienced and neutral mediators or whether vulnerable policyholders are being pressured or intimidated into under-settling." *Best Practices for Post-Disaster Insurance Claim Mediation Programs*, UNITED POLICYHOLDERS 5 (2013), http://www.uphelp.org/sites/default/files/FINAL%20Best%20Practices%20for%20Post-Disaster%20Insurance%20Claim%20Mediation%20Programs%202-26-13.pdf (last visited Sept. 4, 2015). The report cited "[a]necdotal accounts by mediation participants" relating "stories of lowball offers, inadequate resources to prepare for and assist in the mediation proceeding, and failure by insurers to participate in good faith." *Id.* The report went on to articulate a set of recommendations for a "Model Program" of post-disaster mediation assistance. *See id.* at 7-20.

87. *Which Disasters are Covered by Home Insurance?*, INS. INFO. INST., http://www.iii.org/article/which-disasters-are-covered-by-homeowners-insurance (last visited Sept. 21, 2015); National Flood Insurance Program, *About The National Flood Insurance Program*, FLOODSMART.GOV, https://www.floodsmart.gov/floodsmart/pages/about/nfip_overview.jsp (last visited Sept. 21, 2015).

88. *See* National Flood Insurance Program, *supra* note 87.

programs in both New York and New Jersey; this, in and of itself, limited how effective the state mediation systems could be. Then, in the dispute resolution processes under the federal insurance program, many insureds encountered severe challenges when presenting their claims.

Under the formal provisions of the NFIP, the only dispute resolution mechanism available to an aggrieved policyholder is to appeal through a FEMA process and then, if still dissatisfied, file a lawsuit in federal court within one year of the claim.[89] The processes through which flood insurance claims were handled in Hurricane Katrina were criticized by the General Accounting Office (GAO) in a 2006 report,[90] and the large number of complaints about post-Sandy flood insurance claims adjustment strongly suggests that fundamental deficiencies remain today. In March 2015, in the midst of allegations of fraud during claims settlement and thousands of altered engineering reports,[91] FEMA took the drastic step of opening all Hurricane Sandy flood insurance settlements to review.[92] A comprehensive review by majority staff on the U.S. Senate Committee on Banking, Housing, and Urban Affairs of the NFIP claims process in the aftermath of Sandy identified numerous points of deficiency[93] and recommended that FEMA "consid-

89. See *How to Handle the FEMA Flood Insurance Claims Process*, FEMA.GOV (July 1, 2015) https://beta.fema.gov/news-release/2015/07/01/how-handle-fema-flood-insurance-claims-process (last visited Sept. 21, 2015) (explaining process in aftermath of 2015 flooding in Oklahoma); U.S. S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, 114TH CONG., MAJORITY STAFF REP.: ASSESSING AND IMPROVING FLOOD INSURANCE MANAGEMENT AND ACCOUNTABILITY IN THE WAKE OF SUPERSTORM SANDY 23 (2015) ("there has hitherto been no provision in the NFIP for meditation of claims per se – though FEMA may be in the process of establishing a mediation program on an *ad hoc* basis for Sandy claims that are *reopened* pursuant to the procedures announced by FEMA in May 2015") (emphasis original). *See also* Christopher French, *Insuring Floods: The Most Common and Devastating Natural Catastrophes in America*, 60 VILL. L. REV. 53, 68 (2015) (stating that:

> [u]nlike insurance policies issued by private insurers, FEMA and the private insurers who sell NFIP policies and then adjust the claims on FEMA's behalf are not subject to liability for underpaying claims, handling claims poorly, or even acting in bad faith, because NFIP does not allow for recover for such misconduct and preempts state laws that do provide such relief. If it becomes necessary to sue under an NFIP policy in order to collect, the policyholder can only file a lawsuit in federal court and must do so within one year. Failure to file the lawsuit within a year results in the forfeiture of the claim.).

90. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-0-169, NATIONAL FLOOD INSURANCE PROGRAM: NEW PROCESSES AIDED HURRICANE KATRINA CLAIMS HANDLING, BUT FEMA'S OVERSIGHT SHOULD BE IMPROVED (2006) *available at* http://www.gao.gov/assets/260/254481.pdf. With regard to identification of payment errors, supplemental payment claims, and appeals of denials of coverage, "[t]here is much room for improvement." *Id.* at 4. "There were too many claimants, too few adjusters, and too few engineers available to handle claims in the aftermath of Sandy without significant problems." *Id.* at 57.

91. Catherine Dunn, *Hurricane Sandy Victims Sent Altered Engineering Reports Could Number up to 10,000*, INT'L BUS. TIMES (Feb. 19, 2015 4:36 PM), http://www.ibtimes.com/hurricane-sandy-victims-sent-altered-engineering-reports-could-number-10000-1822210.

92. David Chen, *FEMA to Review All Flood Damage Claims From Hurricane Sandy*, N.Y. TIMES (Mar. 12, 2015), http://www.nytimes.com/2015/03/13/nyregion/fema-to-review-hurricane-sandy-flood-claims-amid-scandal-over-altered-reports.html?_r=0. The deadline for insureds to file a request for review is September 15, 2015. The deadline for insureds to file a request for review is September 15, 2015. *See Hurricane Sandy National Flood Insurance Program Claims Review*, FEMA, https://www.fema.gov/hurricane-sandy-national-flood-insurance-program-claims-review (last visited Sept. 4, 2015).

93. Majority Staff Report, *supra* note 89, at 64 ("NFIP policyholders deserve a more robust and accountable system for bringing supplemental information to the fore"); *id.* at 66 ("our discussions with FEMA officials have revealed significant *structural* inadequacies with the claims appeal process. . . . To put it mildly, this approach is hard to reconcile with the idea of an 'appeals procedure' at all") (emphasis original).

er whether and how to allow more of a role for mediation or arbitration in claims cases."[94]

The safety net for property damage in the absence of adequate private insurance or flood insurance purchased under the auspices of the National Flood Insurance Program exists in the form of public assistance – *i.e.,* disaster relief – provided by the federal government. The unprecedented losses after Hurricane Katrina led to an enormous backlog of applications for assistance awaiting initial determinations, appeals of denials of applications, and appeals of various determinations made in connection with partial awards of assistance.[95] To help clear this backlog, in 2009 FEMA created a system of arbitration procedures for public assistance projects over $500,000 related to Hurricanes Katrina and Rita.[96] In addition, in 2013 in the aftermath of Superstorm Sandy, FEMA established the "Dispute Resolution Pilot Program" where applicants in a dispute with FEMA over public assistance equal to or exceeding $1,031,000 could choose to arbitrate in lieu of submitting a second appeal.[97]

Now that insurance regulators, the insurance industry, and consumers have had more than two decades of experience with mass disaster mediation programs, this is an appropriate time for a careful evaluation of these efforts and an inquiry into how they should be adapted for the future, given that their activation in the future is certain. The differences among these programs and the frequency of their past activation creates a set of experiences that may make it possible to identify a set of "best practices" for post-disaster mass dispute resolution efforts.[98] As Elizabeth Murrill observed in 2007 in the aftermath of Hurricane Katrina, there is a need "to think more carefully about the process design so that safeguards are in place that will protect process integrity, decrease the imbalance of power between bargaining parties, and increase mediator awareness of special risks posed by mass disaster situations."[99]

Insurance law is one of many subjects deeply intertwined with the broader topic of how U.S. disaster policy should be reformed to respond to the increasing

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94. *Id.* at 75. The Report urged that this "be done with care, however" given that although arbitration or mediation "offers a fast and relatively inexpensive means for dispute resolution for resolving small flood claims than are the formalities of courtroom litigation, it might be . . . that the NFIP's structure makes compromise settlements more difficult than might otherwise be the case." *Id.*

95. *See* Arb. for Pub. Assistance Determinations Related to Hurricanes Katrina and Rita, Fed. Reg. 74, 44761, at 44765 (Aug. 31, 2009) (reporting that as of July 17, 2009 FEMA had 2,188 "project worksheets" that had not received an initial determination and 44 pending appeals for projects over $500,000); *Process for Requesting Public Assistance Arbitrations Related to Hurricanes Katrina and Rita*, FEMA, http://www.fema.gov/process-requesting-public-assistance-arbitrations-related-hurricanes-katrina-and-rita (visited Sept. 25, 2015).

96. *Id.* at 44761.

97. See Dispute Resolution Pilot Program, 44 C.F.R. § 206.201 (2013); *Process for Requesting Public Assistance Arbitrations through the Dispute Resolution Pilot Program*, FEMA, http://www.fema.gov/process-requesting-public-assistance-arbitrations-through-dispute-resolution-pilot-program-drpp (last visited Sept. 6, 2015).

98. This kind of analysis has already been done from a policyholders perspective. *See* Wade, *supra* note 86. This is an important contribution to the conversation, but bringing to the discussion a dispute resolution expertise grounded in a neutral perspective on how insurer and policyholder interests should be balanced would be a new and important contribution to the discussion.

99. Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative, ADR, or a Lion's Den?*, 7 PEPP. DISP. RESOL. L.J. 401, 402-03 (2007).

risk of future mass disasters.[100] Obviously, the stakes in this broader topic are very high; the implications of sea-level rise for human activity in coastal environments are huge – almost unimaginable – and insurance will play a critical role in the strategies developed to respond to these changes, which are likely to be organized around a massive retreat of population and property from the coasts. But in the meantime while these enormously important, extraordinarily complex issues are (hopefully) addressed, mass disasters – especially on the coasts – will continue to occur with increased frequency. Thus, the dispute resolution issues raised by the prospect of catastrophes are imminent, urgent, and real,[101] and they are most deserving of increased attention in not only all venues where public policy is debated and made but also the scholarship of dispute resolution and insurance.

III. APPRAISAL AND PROPERTY INSURANCE

Appraisal provisions have been common in property insurance policies for over a century. Today, appraisal provisions are found in many of the standard Insurance Service Organization (ISO) forms (including the personal[102] and business[103] auto policies, the homeowners forms,[104] the businessowners form,[105] and the standard building and personal property coverage form,[106] all of which are widely used by insurers in the U.S.), the standard "165 line" fire insurance policy[107] (which is fairly described as the root of all property insurance in the U.S.), and the standard flood insurance policy forms offered under the National Flood Insurance Program.[108]

100. *See Bracing for the Storm: How to Reform U.S. Disaster Policy to Prepare for a Riskier Future*, SMARTERSAFE.ORG (April 2015) http://www.smartersafer.org/wp-content/uploads/Bracing-for-the-Storm.pdf (providing a concise discussion of this broader topic).

101. Although this discussion has focused on mass disasters, climate change will be accompanied by increased frequency of "nuisance losses." For example, sea level rise is already associated with increased occasional, and damaging, flooding in coastal areas. *See Sea Rise Slowly Swallowing St. Augustine, America's Oldest City*, WEATHER CHANNEL (May 12, 2015) http://www.weather.com/science/environment/news/st-augustine-flooding-sea-level-rise (waters from the Atlantic regularly flood the city, but residents and officials agree that it is getting worse); Coral Davenport, *Miami Finds Itself Ankle-Deep in Climate Change Debate*, N.Y. TIMES (May 7, 2014), http://www.nytimes.com/2014/05/08/us/florida-finds-itself-in-the-eye-of-the-storm-on-climate-change.html (referencing flooding that "never used to happen" but now happens "all the time").

102. *See* INS. SERVS. OFFICES, INC., MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, Personal Auto Policy PP 00 01 01 05, PP 03 11 01 05, & PP 03 21 01 05(7th ed.), Westlaw.

103. *See* ISO Properties, Inc., *Business Auto Coverage Form CA 00 01 03 06*, INDEPENDENT AGENT, https://www.independentagent.com/Education/VU/SiteAssets//Documents/ISO/CA/CA00010306.pdf (visited Sept. 25, 2015).

104. *See, e.g.*, INS. SERVS. OFFICE, INC., MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, Homeowners HO 00 02 05 11 & HO 00 03 05 11 (7th ed.),Westlaw.

105. *See* INS. SERVS. OFFICES, INC., MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, Businessowners and Special Multi-Peril BP 00 03 01 06 & BP 01 59 08 08 (7th ed.), Westlaw.

106. INS. SERVS. OFFICES, INC., MILLER'S STANDARD INSURANCE POLICIES ANNOTATED,, Building and Personal Property Coverage Form and Standard Property Policy, CP 00 10 04 02 & CP 00 99 04 02 (7th ed.), Westlaw.

107. *See* INS. SERVS. OFFICES, INC., MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, Standard Fire Policy, pg. 1 (Insuring Agreement) & Standard Fire Policy, pg. 2, (7th ed.), Westlaw.

108. *See* Nat'l Flood Ins. Program, *Dwelling Form Standard Flood Insurance Policy*, FEMA (June 2014), http://www.fema.gov/media-library-data/1398950546439-c78022cefaa410c9f902076846a0a5a5/F-122_NFIP_DwellingForm_June2014.pdf (last visited Sept. 25, 2015). *See also* Nat'l Flood Ins. Program, *General Property Form, Standard Flood Insurance Policy*, FEMA (June 2014), http://www.fema.gov/media-library-data/1398951603975-

The appraisal provision in Part D in the ISO's Personal Auto Policy (PAP), which pertains to property damage to the insured's auto, is representative of the appraisal provisions that appear in all of these forms. Under its terms, if the insurer and insured do not agree on the amount of loss, either party may demand an appraisal of the loss.[109] Each party selects "a competent and impartial appraiser,"[110] and together these two appraisers select an "umpire."[111] The appraisers state separately the actual cash value and amount of loss; if they fail to agree, they submit their differences to the umpire.[112] A decision agreed to by any two of the two appraisers and umpire is binding.[113] Each party pays its chosen appraiser and splits the expenses of the appraisal and the umpire equally.[114]

The importance of the appraisal provision and how it operates in practice is revealed by a look at the two largest insured assets in the consumer property lines. In 2013, 95 percent of the nation's 75 million owner-occupied homes were insured,[115] and 4.8 percent of these were the subject of a claim.[116] Thus, the appraisal provision became relevant as a process that was invoked or could be invoked between three and four million times. The other major asset in most household's portfolios is one or more motor vehicles. In 2012, approximately 254 million trucks and automobiles were registered in the U.S.[117] and 192 million of these were insured.[118] Approximately 88 percent of all motorists were insured for liability,[119] and about three-fourths of this group purchased some form of property coverage for their vehicles.[120] A total of 9.9 million vehicles were involved[121] in 5.6 million property damage crashes in 2012 (1.6 million of which involved an injury to one or more persons).[122] From this, one can extrapolate that somewhere between seven and eight million insured vehicles were involved in crashes that

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04f011c3053b856e36eab23ba0bdb662/F-123_NFIP_GenPropertyForm_June2014.pdf (last visited Sept. 25, 2015); Nat'l Flood Ins. Program, *Residential Condominium Building Association Policy, Standard Flood Insurance Policy* (June 2014), http://www.fema.gov/media-library-data/1398952549283-ea652daa2df3f5fbfad99f950820ddfa/F-144_NFIP_RCBAPForm_June2014.pdf (last visited Sept. 25, 2015).

109. *See* Personal Auto Policy, *supra* note 102, at line D8A.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at lines D8A1, D8A2.

115. *Homeowners and Renters Insurance*, INS. INFO. INST. (2015), http://www.iii.org/fact-statistic/homeowners-and-renters-insurance (stating that a 2015 Insurance Information Institute poll conducted by ORC International found that 95 percent of homeowners had homeowners insurance); *Housing Characteristics: 2010*, US CENSUS BUREAU (2010) (finding that there were nearly 76 million owner occupied housing units in the United States); *Quick Facts: Resident Demographics*, NAT'L MULTIFAMILY HOUSING COUNCIL (Sept. 2015) http://nmhc.org/Content.aspx?id=4708#Rent_and_Own (reporting that there are nearly 74 million owner occupied households in the United States).

116. *Id.*

117. Bureau of Transportation Statistics, *Table 1-11: Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances*, U.S. DEP'T TRANSP., http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_11.html (visited Aug. 12, 2015).

118. FACT BOOK, *supra* note 11, at 76.

119. *Id.* at 79.

120. *Id.* at 70 (76% purchase comprehensive coverage and 71% purchase collision coverage).

121. Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts 2012*, U.S. DEP'T TRANSP. 77, http://www-nrd.nhtsa.dot.gov/Pubs/812032.pdf (visited Aug. 12, 2015).

122. *Id.* at 63.

produced property damage claims where an appraisal was or could have been invoked. If one were to add the other policies that include appraisal provisions to this analysis, it is fair to say that appraisal, even accounting for the many claims that are processed easily and smoothly, is a relevant consideration in claims resolution more than ten million times each year, either as a process that is invoked to resolve the claim or as the default process that will be invoked if insurer and policyholder are unable to agree upon the settlement of the claim.

That appraisal provisions are designed to resolve disputes about the amount of loss is uniformly understood. But because it is binding and has the purpose of avoiding litigation, appraisal resembles arbitration, and this has led to inconsistency in how appraisal is understood and treated by courts in different jurisdictions. In some jurisdictions, appraisal has a more limited purpose (e.g., appraisers determine valuation but do not decide coverage) and other differences between appraisal and arbitration are recognized and respected, but elsewhere appraisal provisions are treated as arbitration agreements subject to regulation by state and federal arbitration statutes. Significant jurisdictional variation also exists with regard to the scope of the appraisers' authority and the circumstances in which the right to an appraisal is waived. Beyond these areas of uncertainty in the applicable law, the appraisal process has many points at which the lawyers' skills and exercise of judgment are highly relevant and potentially of great significance to the outcome of the appraisal for either the insurer or insured. These include selecting an appraiser, choosing the order of appraisal and coverage determination, determining how the panel of appraisers and umpire are instructed at the start of the process with regard to scope of authority and issues to be resolved, and deciding what response, if any, to make to a panel's decision. In short, that appraisal is worth serious interdisciplinary study (and improvement where possible) as a dispute resolution process is apparent.

IV. ARBITRATION AND INSURANCE (AND REINSURANCE)

The use of arbitration in insurance has a long history. The roots of insurance rest in the maritime industry;[123] in England until at least the seventeenth century, disputes arising out of marine insurance contracts typically were resolved through arbitration.[124] Some of the U.S. arbitration cases in the nineteenth century involved contracts of marine insurance,[125] and a number of the cases from this era reveal that arbitration was sometimes incorporated into policies in other lines of

123. *See* JERRY & RICHMOND, supra note 2, at 16-17.

124. *See* New England Mut. Marine Ins. v. Dunham, 78 U.S. (11 Wall.) 1, 31 (1871) ("it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A.D. 1601, when the statute of 43 Elizabeth was passed . . . .").

125. *See* Carli N. Conklin, *A Variety of State-Level Policies, Practices, and Procedures: Arbitration in Early America*, 2016 J. DISP. RESOL. (forthcoming); Cobb v. New England Mut. Marine Ins. Co., 6 Gray 192 (Mass. 1856) (two policies of marine insurance each contain provision that insured cannot obtain action against the company until he has offered to submit the claim to arbitration); McDermott v. The United States Insurance Company, 1818 WL 503, *1 (Pa. 1818) (policy of marine insurance for cargo refers "all matters in dispute between them to three persons therein named, whose decision should be final").

insurance.[126] Notwithstanding these examples, the use of arbitration in modern insurance dispute resolution outside the important area of reinsurance is not robust, but signs exist that arbitration clauses are appearing with greater frequency in modern insurance contracts.

Most general liability policies in the commercial and personal lines do not have arbitration clauses, but an arbitration endorsement is available for the standard ISO Commercial General Liability policy form, which is the general liability coverage form relied on by tens of millions of businesses in the U.S., and arbitration clauses are appearing with greater frequency in commercial liability policies.[127] In addition, arbitration clauses are also being found in larger numbers in specialty liability policies, including directors and officers (D&O), employment liability, cyber liability, and errors and omissions (E&O) policies.[128]

Two important exceptions exist to the proposition that arbitration clauses are generally absent in the personal lines, and both of these are found in automobile insurance. The first is the Part B Medical Payments coverage in the ISO PAP. Under the arbitration provision included in Part B, if the insurer and "insured person" (who can be either the named insured or a third party who claims entitlement to medical payments coverage under the policy) disagree whether the claimant is entitled to recover for medical services or whether the medical services result from a covered accident, or disagree about the nature, frequency, or cost of the medical services, either the person claiming benefits or the insurer "may demand that the issue be determined by arbitration."[129] The second exception is in Part C of the PAP, which contains the uninsured motorist insurance coverage and sometimes an underinsured endorsement (which otherwise is placed in an endorsement to the policy as a whole).[130] Part C provides that if the insurer and an insured do not agree on whether the insured is legally entitled to recover damages or do not agree as to the amount of damages, "then the matter may be arbitrated,"[131] but "disputes concerning coverage under this Part may not be arbitrated."[132] Under the Part C arbitration provision, both parties must agree to arbitration;[133] in that event, the PAP has provisions outlining how the arbitration panel is selected,[134]

126. *See* Conklin, *supra* note 125; Reed v. Washington Fire & Marine Ins. Co., 138 Mass. 572 (1885) (fire insurance policy provision calling for referral of disagreement on amount of loss to arbitrators); Wallace v. German-Am. Ins. Co., 2 F. 658 (C.C.D. Iowa 1880) (fire insurance policy for building requiring "differences . . . touching any loss or damage . . . shall . . . be submitted to impartial arbitrators" for determination of amount of loss but not liability of the company); Mayhew v. Phoenix Insurance Co., 23 Mich. 105 (1871) (fire insurance policy calling for arbitration for disputes about the amount of loss).

127. Darren Teshima et al, *Closing the Courthouse Door to Insurance Disputes: Mandatory Arbitration Clauses in Insurance Policies Gain Traction*, ORRICK POLICY HOLDER INSIDER (May 27, 2015) http://blogs.orrick.com/insurance/2015/05/27/closing-the-courthouse-door-to-insurance-disputes-mandatory-arbitration-clauses-in-insurance-policies-gain-traction/.

128. *Id.*

129. *See* Personal Auto Policy, *supra* note 102, at line B5.

130. *See id.*, at line C; *id.* at lines CU0 to CU9 (providing an example of the endorsement); *id.* at line CU5 (the arbitration provision in this underinsured form).

131. *Id.* at line C5A2.

132. *Id.* at line C5A2a.

133. *Id.* at line C5A2b.

134. *Id.* at line C5A2b (each party selects one arbitrator, and those two arbitrators select a third; if there is no agreement on the third within 30 days, either may request a judge of a court with jurisdiction make the selection).

how the expenses of arbitration are divided,[135] where the arbitration occurs,[136] the rules of procedure and evidence to be applied,[137] and the binding effect of a decision agreed to by at least two of the arbitrators.[138]

An important but largely overlooked category of insurance, at least outside the agriculture industry, is crop insurance. This may be changing; the significance of this line of insurance has increased to the point that crop insurance is now the most expensive of the federal government's agricultural commodity programs and has arguably become the most important pillar of U.S. national agriculture policy.[139] In 2013, federal crop insurance policies numbered more than 1.2 million, covered more than $110 billion in crop value on over 294 million acres, and paid $6.0 billion in crop insurance proceeds to agricultural producers (after reaching a peak of $14.1 billion in 2012).[140] The standard crop insurance policy forms used in the program administered by the Federal Crop Insurance Corporation of the U.S. Department of Agriculture contain an arbitration provision calling for disputes arising under the policy to be resolved in that manner.[141] To be more specific, if a dispute arises between agricultural producer and insurer about a claim, mediation may be used to settle the dispute. If mediation does not resolve the dispute, it must be submitted to non-binding arbitration under the rules of the American Arbitration Association, except that a dispute over a "good farming practice" determination can be resolved in a court proceeding.[142] Either party may seek judicial review of the decision rendered in the arbitration proceeding, but failing to complete the arbitration process bars a plaintiff from doing so.[143] Even if a plaintiff completes arbitration and seeks judicial review, before the plaintiff can recover damages or attorneys' fees a determination must be obtained from the Federal Crop Insurance Corporation Corporation (FCIC)[144] that the private insurer failed to comply with the terms of the policy or FCIC procedures and that the failure resulted in the producer receiving less than it was entitled.[145]

Arbitration is the near-exclusive means of resolving disputes that arise under contracts of reinsurance. Reinsurance is essentially "insurance for an insurer"; although insurers are in the business of assuming risk, the reality is that insurers,

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135. Personal Auto Policy, *supra* note 102, at lines C5A3 & C5A4 (each party pays its own expenses and bears an equal share of the expenses of the third arbitrator).

136. *Id.* at line C5B ("in the county where the 'insured' lives").

137. *Id.* at line C5B1 ("local rules").

138. *Id.* at line C5B, CbB1, & C5B2 (decision is binding as to insured's legal entitlement to damages and the amount of damages, subject to some limitations).

139. *See* ROBERT H. JERRY, II, *Crop Insurance, in* 1-56 APPLEMAN ON INSURANCE § 56.06 (2015) (discussing the role of crop insurance in national agriculture policy).

140. *See* Dennis A. Shields, *Federal Crop Insurance: Background*, CONG. RES. SERVICE, Report No. R40532, i, 1, 3 (June 16, 2015) http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R40532.pdf.

141. See Risk Management Agency, *Summary of Changes for the Common Crop Insurance Policy Basic Provisions – Reinsured Version (11-BR)*, U.S. DEP'T AGRIC. 31 (April 2010) http://www.rma.usda.gov/policies/2011/11-br.pdf.

142. *Id.* at 32, Par. 20(d).

143. *Id.* at 32, Par. 20(b)(2).

144. The Federal Crop Insurance Corporation was created in 1938 when the Federal Crop Insurance Act was passed, and this administrative agency is charged with administering the federal crop insurance program. *See* JERRY, *Crop Insurance supra* note 139, at § 56.04.

145. *See* J. Grant Ballard, *A Practitioner's Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 DRAKE J. OF AGRIC. L. 531 (2013) (providing a discussion of mediation and arbitration in the crop insurance context).

like the policyholders whose risk they assume, are also risk averse. Thus, it is common for an insurer to "cede" a portion of the risk it assumes to a reinsurer, so that the insurer has protection against the risk of excessive losses in its pool of insureds. Reinsurance is not the only tool available to insurers to diversify their risks, but it is the most important; without the ability to engage in their own patterns of risk management, insurers face the risk of catastrophic losses that could impair or destroy their economic well-being. In addition, reinsurance makes it possible for global insurance markets to digest and manage the largest, most complex risks on the planet, which otherwise would present themselves as impediments to economic growth. In mid-2014, one estimate placed the amount of global reinsurance capital at $570 billion, a sum that serves as a vital backstop for the $4.2 trillion in global insurance capital held around the world.[146]

Although the near-exclusive reliance on arbitration in reinsurance may seem odd given the relative absence of arbitration in insurance more generally, the prevalence of arbitration as the method to resolve reinsurance disputes becomes understandable when one examines the history and somewhat unique culture of reinsurance. The modern insurance industry has its roots in marine insurance, and one can trace those roots back to the risk-distribution mechanisms that existed in the maritime practices of ancient traders in the Mediterranean.[147] These mechanisms that addressed the risks of loss of hulls and cargoes in basic mercantile trade date back as far as the Babylonians and were well known and practiced by the Greeks and Romans.[148] They were embraced and enhanced by a small but vigorous insurance industry in the maritime states of Italy in the twelfth century, and merchants from northern Italy known as the Lombards in turn introduced the insurance business to England.[149] The Lombards founded trading houses in London ("Lombard Street" in London marks where these first houses were located), and by the late seventeenth century London was established as the central venue for the insurance business, with a considerable portion of these transactions being conducted at an inn known as "Lloyd's Coffee House" (which was initially located on Tower Street but moved to Lombard Street in 1692).[150] At least initially, almost all of the insurance business conducted in the London market was marine insurance, which reflected the underwriting needs of the times.[151]

The first known contract of reinsurance appears in this narrative in 1370 in Italy, when an insurer, who had promised to indemnify an insured shipper in the event of its loss of or untimely delivery of cargo but, as was customary, allowed itself to own the cargo and sell it as salvage if the insurer became obligated under the policy. The insurer, in turn, made an arrangement with a third party who promised to buy up the entire cargo in the event the insurer became obligated on its insurance contract with the shipper.[152] This forward contract between insurer and third party was, for all essential purposes, a contract of reinsurance. In these early times, the insurer's risk could be managed by arranging other insurers to

146. *Reinsurance Market Outlook*, AON BENFIELD THOUGHTFUL LEADERSHIP 5 (June & July 2015) http://thoughtleadership.aonbenfield.com/sitepages/display.aspx?tl=509.
147. *See* JERRY & RICHMOND, supra note 2, at 15-19 (providing a more detailed discussion).
148. *See* WILLIAM R. VANCE, HANDBOOK OF THE LAW OF INSURANCE 9 (2d ed. 1930).
149. *Id.* at 14.
150. *Id.* at 18-19.
151. *Id.* at 18.
152. KYRIAKI NOUSSIA, REINSURANCE ARBITRATIONS 6 (2013).

share the risk through the issuance of other direct insurance (i.e., coinsurance), but an insurer's forward contract with a third party could accomplish the same risk management purpose. Over time, the demand for reinsurance arrangements increased as the capacity of coinsurance partners was exhausted.[153] As the insurance business moved to and became established in London, the reinsurance business did also; and the spread of insurance to other European cities was similarly accompanied by the spread of reinsurance.[154]

The early insurance business in seventeenth century Lloyd's and similar trading houses was an intimate, informal affair largely conducted among merchants and shippers of substantial means who were engaged in international trade and were well acquainted with each other personally. The business of insurance was conducted by assurances written on the bottom of slips of papers that described risks on which insurance was sought (hence the term "underwriters").[155] In this small world of intimate business relationships, disputes were resolved as informally as contracts were formed.[156] As the business of direct insurance became more atomistic, the culture of dispute resolution changed, so that in modern times more formal dispute resolution systems in direct insurance are the norm.[157] But in the world of reinsurance, where the entities engaged in this business remained relatively small in number (at least compared to the business of direct insurance), affinity for private, amicable dispute resolution systems survived. A life reinsurance industry insider described this culture as follows:

> In some ways, the arbitration section is the heart of the reinsurance agreement in that it summarizes the degree of trust and good faith inherent in reinsurance. The ceding company and reinsurer agree to act in the highest good faith toward each other. They agree to attempt to resolve any dispute amicably and without resort to technical arguments not founded on normal insurance and reinsurance practices. If they are unable to resolve their difference they agree in advance that there will be no resort to litigation at any point in the process. Rather, each party will participate in the choice of a panel of arbitrators, usually three, who will listen to the problem and resolve it. The arbitrators are not professionals at resolving disputes, but are executives of the life insurance industry who are much more familiar with the workings and expectations of the insurance industry than would be any judge or jury. The arbitrators are directed not to worry about technical legal principles but to attempt to fairly and even-handedly put the ceding company and the reinsurer in the positions they should occupy. There is a great deal of idealism embodied in this arbitration process, and this idealism has worked extremely well in practice.[158]

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153. *Id.*
154. *Id.* at 7.
155. WILLIAM R. VANCE, HANDBOOK OF THE LAW OF INSURANCE 19 (2d ed. 1930).
156. *Id.*
157. *Id.*
158. JAMES V. SCHIBLEY, *The Life Reinsurance Contract*, *in* TORT AND INSURANCE PRACTICE SECTION, AMERICAN BAR ASSOCIATION, RESOLVING REINSURANCE DISPUTES: CONTRACTS, ARBITRATION, LITIGATION 15 (2d ed. 1989).

Professor Noussia attributes the use of arbitration in reinsurance to this unique culture:

> Reinsurance business initially was done on a handshake with written contracts that were brief and arcane. . . . Reinsurance business was negotiated among closely knit groups that maintained long-term relationships, so that all the parties to the reinsurance agreement intimately understood the custom and practice of the industry. Because all sides were interested in maintaining amicable relations, if and when a dispute arose, it usually would be handled with an eye to maintaining the relationship. This eliminated much of the need for a carefully constructed commercial contract. Resolution of claims was subsumed into the over-all, usually profitable, relationship of the reinsurer and reinsured. This practice allowed the relationship between the parties to remain congenial, and it also enabled its continuation. It is no wonder that the traditional reinsurance relationship has often been compared to that of a marriage. . . . [T]he traditional reinsurance relationship is the reason why arbitrations occur in the reinsurance industry. . . .[159]

Reinsurance is frequently described as a "secret" or "mysterious" world. This has something to do with the fact that reinsurance operates on an international platform that is both out of sight and mind of the U.S. marketplace. In 2013, 62 percent of reinsurance purchased by U.S. insurance companies was sold by foreign companies and another 30 percent was sold by U.S.-based companies owned by foreign companies;[160] thus, unlike the other parts of the U.S. insurance industry, a significant part of the reinsurance industry operates outside the glare of domestic regulation. The larger reason, however, is that for decades arbitration clauses have been standard in reinsurance contracts and the absence of binding arbitration in a reinsurance dispute has been extremely rare. The confidentiality surrounding the resolution of reinsurance disputes through arbitration has contributed to the relative opaqueness of this realm of insurance. Although the near-universal use of arbitration in reinsurance has caused reported cases involving reinsurance to be few relative to other kinds of insurance, from the reported cases that do exist it seems clear that reinsurance arbitration raises many of the same issues that arise in arbitration generally, including ambiguity of the scope of issues subject to arbitration, choice of law, selection and replacement of arbitrators, consolidation of proceedings, and judicial confirmation of awards.[161]

Professor Strong's thoughtful and detailed Response[162] inquires into a number of unresolved legal issues in international insurance and reinsurance arbitration,

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159. NOUSSIA, *supra* note 152 at 14-15.

160. FACT BOOK, *supra* note 11 at 3.

161. *See, e.g.,* Allstate Ins. Co. v. Onebeacon Am. Ins. Co., 989 F.Supp. 2d 143 (D. Mass. 2013) (involving dispute over umpire selection protocol); Emp'rs Ins. Of Wausau v. First State Ins. Grp, 324 F.Supp. 2d 333 (D. Mass. 2004) (involving dispute over consolidation); Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.2d 462 (8th Cir. 2003) (involving replacement of arbitrator and impact on prior proceeding); R&Q Reinsurance Co. v. Utica Mut. Ins. Co., 18 F.Supp. 3d 389 (S.D.N.Y. 2014) (involving disagreement over whether panel's ruling was a final award subject to confirmation).

162. S.I. Strong, *The Special Nature of International Insurance and Reinsurance Arbitration: A Response to Professor Jerry*, 2015 J. DISP. RESOL. 283, (2015).

and charts multiple paths for further study in this area. The importance of these issues will increase in future years, for as Professor Noussia observes

> [i]n recent years, reinsurance contracts focus more on the realities of the bottom line. While most of the industry's historic customs and practices remain, nevertheless, the relationship between the parties has changed fundamentally. No longer is it the norm for parties to work out their differences in the boardroom, but more the exception. Indeed, the reinsurance industry has seen an increase in formal reinsurance disputes, whether in the form of arbitration or litigation.[163]

Reflecting the changing times and the evolving culture of the reinsurance industry, some commentators have urged that major reforms of reinsurance arbitration are needed,[164] and others have noted that arbitration may be becoming less prevalent when reinsurance is sold in heavily negotiated and intensely documented transactions, as opposed to reinsurance provided under a standard form.[165] Given the vital importance of the reinsurance industry, it is apparent that all of these topics and questions merit further study.

Outside the specialized world of reinsurance, legislative and judicial reactions to insurance arbitration are inconsistent. Some state statutes clearly prohibit arbitration clauses in insurance contracts, and litigation has ensued in a number of states about whether state statutory language has this effect. In jurisdictions where the state statute prohibits arbitration to resolve disputes under insurance agreements, another insurance law question arises with regard to whether the McCarran-Ferguson Act,[166] which as a general proposition protects state insurance regulation from the preemptive effects of many federal laws, shields a state anti-arbitration statute from the preemptive effect of the Federal Arbitration Act.[167] How these statutes interact is an important legal question, but at the core of this dispute is the larger question of whether binding arbitration provisions make good sense as a matter of public policy in insurance arrangements – and whether the answer changes depending on whether the insurance contract in question is a standardized form purchased by an ordinary consumer or a manuscript policy negotiated by sophisticated parties through their lawyers. Moreover, where a contested coverage case turns on an untested, novel question of law, as opposed to a close question of disputed fact, a public policy question exists as to whether the dispute is best resolved in a confidential arbitration proceeding shielded from

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163. NOUSSIA, *supra* note 152 at 14-15.

164. *See, e.g.*, Robert M. Hall, *How Reinsurance Arbitrations Can Be Faster, Cheaper and Better (Revised)*, ROBERT M HALL (2011), http://www.robertmhall.com/articles/CheaperFaster_Revisited.pdf; Linda Dakin-Grimm & Mark B. Cloutier, *Coming of age: arbitration—the reinsurance industry's method of settling contract dispute—is no longer effective and needs an update*, BEST'S REV. (Sept. 1, 2003); Robert M. Magino & Anne M. Flynn, *Alternative Dispute Resolution: A Reinsurance Perspective*, *in* TORT AND INSURANCE PRACTICE SECTION, AMERICAN BAR ASSOCIATION, RESOLVING REINSURANCE DISPUTES: CONTRACTS, ARBITRATION, LITIGATION 75 (1989) ("Reinsurance arbitration . . . is becoming increasingly adversarial, and has assumed many of the negative attributes of litigation. As a result, there has been a great deal of dissatisfaction with reinsurance arbitration, and reinsurers have begun to search for and experiment with other methods of dispute resolution").

165. *See* Victor Fornasier, *What the future holds for reinsurance arbitration clauses*, GLOBAL REINSURANCE (Aug. 14, 2014) http://www.globalreinsurance.com/what-the-future-holds-for-reinsurance-arbitration-clauses/1409529.article.

166. 15 U.S.C. §§ 1011-1015 (2012).

167. 9 U.S.C. §§ 1-16 (2012).

judicial review, or whether justice is better served by a decision in a public proceeding, which enables a market to operate in which policy forms can be sharpened and greater clarity achieved for insurers and insureds alike, along with the possibility of mistaken legal judgments being corrected through judicial review. In short, all of these issues are important, and all need further research and review.

V. DISPUTE RESOLUTION AND HEALTH INSURANCE

Health care finance and access in the U.S. is a subject of enormous scope and complexity. The massive government presence in health care as both a provider and insurer makes this field of insurance different from any other, and the risks insured differ in many ways from those covered in other lines of insurance. To illustrate, much health insurance covers non-fortuitous services, such as preventive care, unlike other lines of insurance where an accidental loss of some kind is a predicate for coverage. Yet, as noted earlier,[168] private insurance plays a huge role in financing health care services, and private health insurance is itself the largest sector among all insurance products. In addition, the contractual arrangements among hospitals, physicians, physician groups, insurers, billing companies, laboratories, pharmaceutical companies, medical equipment companies, nursing homes and other residential care facilities, and networks of all or some of the above are exceptionally complex. With historic changes sweeping through the health care landscape, it should surprise no one that disputes between and among these parties are increasingly common.[169] Similarly, with concerns about the costs of litigation looming large in health care, it should surprise no one that mediation, arbitration, and other alternative dispute resolution processes are becoming favored dispute resolution mechanisms throughout the health care industry.[170] With

168. See *supra* text accompanying note 15.

169. Some commentators noticed this trend ten to fifteen years ago. *See, e.g.*, Karl Polzer, *Emerging Issues in the Use of Binding Arbitration to Resolve Disputes between Individuals and Health Plans*, NAT'L HEALTH POLICY FORM 5 (Nov. 2000) http://www.nhpf.org/library/details.cfm/2300 (citing "evidence that [binding arbitration's] use has grown robustly in some areas of the country"). In 1998, the Commission on Health Care Dispute Resolution, whose members were appointed by the American Arbitration Association, the American Bar Association, and the American Medical Association, issued recommendations to assist managed care organizations and regulatory bodies in designing ADR programs for health care. *See Healthcare Due Process Protocol, Final Report*, AM. ARBITRATION ASS'N (July 27, 1998) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAAahUKEwj2rMeepozJAhXESiYKHVT6Ah4&url=https%3A%2F%2Fwww.adr.org%2Fcs%2Fidcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTAGE2025859%26RevisionSelectionMethod%3DLatestReleased&usg=AFQjCNFbx80N5ad-IfwmRGn4WZrCUtI_Aw&sig2=J4X9HnsMpAKp5RAbJYKlmw.

170. *See, e.g.*, *Mediating and Arbitrating Healthcare Disputes*, 2005 NAT'L ARBITRATION FORUM 1, 1 ("providers and insurers are increasingly turning to alternative dispute resolution ('ADR') processes—primarily mediation and arbitration—as a way to address rising legal costs"); Alan D. Lash, *Recent Developments and Trends in the Alternative Resolution of Healthcare Payor-Provided Disputes: A Brave and Uncertain New World, in* ALICE G. GOSFIELD, HEALTH LAW HANDBOOK (2014) (stating that "arbitration is an increasingly favored means of dispute resolution. Arbitration clauses are routinely found in a variety of commercial healthcare relationships from relocation agreements to physician employment agreements and to service provider agreements. In particular, arbitration clauses are prevalent in contracts between payors, such as health maintenance organizations, indemnity insurers, and the like, and providers, including physicians, hospitals, and health systems. With new and complex business relationships on the rise between payors and providers to deliver care in alternative ways, ADR appears poised to continue to play a prominent role in the resolution of future disagreements.");

respect to the relationship between patient and insurer, disputes can involve a denial of coverage for medical care received, a refusal to authorize a procedure or referral, or an incorrect charge for services received. Inefficient dispute resolution systems, regardless of where in the health care system they operate, add costs to the health care system, and increased costs ultimately compromise access to and quality of health care, or both. Thus, here, too, is a space where the fields of insurance and dispute resolution converge and where the issues are primed for interdisciplinary exploration.

VI. A CONCLUDING THOUGHT

In every area of law, justice promised by substance is meaningless if it cannot be delivered through process. The business of insurance is first and foremost the business of providing financial security against the risk of loss, but when loss occurs, the business of insurance becomes the business of resolving claims. The core of the bargain in an insurance contract is security, but without efficient and effective dispute resolution processes, security is lost and the important functions of insurance fail. Many issues of law and jurisprudence deserve our serious study and attention, but there can be no doubt that the points at which insurance and dispute resolution converge are among them.

Katherine Benesch & Geoff Druker, *Arbitration and Mediation in the New Health Care Universe*, HEALTHLAWYERS.ORG https://www.healthlawyers.org/Events/Programs/Materials/Documents/PHLI14/ff_benesch_drucker.pdf (visited Sept. 2, 2015). *See generally* Shawna Benston, *Symposium Issue: Bioethics, Healthcare Policy, and Alternative Dispute Resolution in the Age of Obamacare*, 15 CARDOZO J. CONFLICT RESOL. 359 (2014). Many observers believe that the Affordable Care Act will increase the incentives to use alternative dispute resolution procedures to resolve health care disputes. *See, e.g.*, Chris Poole, *Experts Predict ADR Will Help Resolve ACA Claims*, JAMS ADR BLOG (Sept. 25, 2014) http;//jamsadrblog.com/2014/09/25/experts-predict-adr-will-help-resolve-aca-claims).