

By: Eiland

H.B. No. 2539

A BILL TO BE ENTITLED

AN ACT

relating to a disaster recovery insurance claims mediation program.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 542, Insurance Code, is amended by adding Subchapter H to read as follows:

SUBCHAPTER H. DISASTER RECOVERY INSURANCE CLAIMS MEDIATION PROGRAM

Sec. 542.351. PURPOSE. This subchapter establishes a nonadversarial mediation program to promote effective, fair, and timely handling of unresolved residential property insurance claims arising from damage caused by hurricanes, cyclones, tornados, or other disasters in an area designated a disaster area by the president of the United States.

Sec. 542.352. GENERAL DEFINITIONS. In this subchapter:

(1) "Administrator" means the department or its designee.

(2) "Business day" means a day other than a Saturday, a Sunday, or a holiday recognized by this state.

(3) "Insurer" has the meaning assigned by Section 801.001.

(4) "Mediator" means an individual designated by the administrator to mediate disputes under this subchapter.

(5) "Party" means an insured or insurer that participates in mediation under this subchapter.

(6) "Program" means the disaster recovery insurance

1 claims mediation program established under this subchapter.

2 (7) "Residential property insurance" has the meaning
3 assigned by Section 2301.002, and includes coverage under:

4 (A) an industrial fire insurance policy, as
5 described by Section 912.310;

6 (B) a residential windstorm and hail insurance
7 policy under Chapter 2210; and

8 (C) a policy issued by the Texas FAIR Plan under
9 Chapter 2211.

10 Sec. 542.353. CLAIMS. (a) For purposes of this subchapter,
11 "claim" means a first-party insurance loss that is disputed or for
12 which the insurer has denied payment.

13 (b) A claim is limited to a loss that is:

14 (1) covered under a residential property insurance
15 policy that is in effect at the time of the loss; and

16 (2) incurred as a result of a declared disaster.

17 (c) The total amount of a loss under Subsection (b) must be
18 at least \$1,000. The difference between the positions of the
19 parties must be at least \$500 after any applicable deductible is
20 applied.

21 (d) A claim includes a dispute regarding the cause of a loss
22 that may be resolved through a forensic mediation conference in
23 which experts on meteorology, engineering, geography, and
24 construction present information regarding:

25 (1) the extent of damage caused by wind or other peril;

26 (2) the structural soundness of the property before
27 and after the disaster; and

1 (3) the cost of repairs.

2 Sec. 542.354. APPLICABILITY OF SUBCHAPTER; EXCEPTIONS. (a)

3 This subchapter applies only to first-party claims resulting from
4 damage to property located in this state that is covered under
5 residential property insurance issued by:

6 (1) an insurer;

7 (2) an eligible surplus lines insurer;

8 (3) the Texas Windstorm Insurance Association; or

9 (4) the Texas FAIR Plan.

10 (b) This subchapter does not apply to:

11 (1) a policy issued under the national flood insurance
12 program;

13 (2) a commercial insurance policy;

14 (3) a private passenger automobile insurance policy;

15 or

16 (4) liability coverage under a residential property
17 insurance policy.

18 Sec. 542.355. GENERAL POWERS AND DUTIES OF DEPARTMENT AND
19 COMMISSIONER; RULES. (a) The department may designate and
20 contract with a person to serve as its administrator to develop and
21 oversee the program.

22 (b) The commissioner may adopt rules as reasonable and
23 necessary to implement this subchapter.

24 (c) The commissioner shall enforce this subchapter.

25 Sec. 542.356. REPORTING REQUIREMENTS. (a) In the biennial
26 report submitted to the governor and the legislature under Section
27 32.022, the commissioner shall report regarding the status of the

1 program, including:

2 (1) statistics about the number of cases suitable for
3 mediation, the number sent to mediation, the number of mediations
4 accepted, and the number of mediations rejected; and

5 (2) other similar information concerning the
6 operation of the program.

7 (b) At three-month intervals, the department shall collect
8 from any administrator with which it contracts for services under
9 this subchapter information regarding:

10 (1) the number of persons to whom mediation was
11 offered;

12 (2) the number of insurers that accepted and declined
13 mediation;

14 (3) the number of settlement offers;

15 (4) the number of completed settlement agreements and
16 the amounts initially claimed and ultimately settled;

17 (5) the number of settlement agreements offered but
18 rescinded during the rescission period; and

19 (6) any other information required by the
20 commissioner.

21 (c) Not later than the fifth day after the conclusion of a
22 mediation conference, the mediator shall file with the
23 administrator a status report indicating whether the parties
24 reached a settlement. If the parties reached a settlement, the
25 mediator shall include a copy of the settlement agreement with the
26 status report. The settlement agreement is subject to the
27 confidentiality requirements of Section 542.371.

1 Sec. 542.357. PROGRAM IMPLEMENTATION. (a) After a
2 disaster is declared by the president of the United States, the
3 commissioner, by order, may implement the disaster recovery
4 insurance claims mediation program under this subchapter.

5 (b) The program is available to a party only after the party
6 has had adequate time, as determined by the commissioner, to
7 inspect the damaged property, assess the damage, obtain
8 information, and attempt to resolve a claim without resorting to
9 the program.

10 (c) Mediation is not required under the program with regard
11 to a claim that:

12 (1) based on agreed facts between the parties
13 concerning the cause of the loss, is not covered under the policy;
14 or

15 (2) the insurer has alleged to be fraudulent and has
16 reported as fraudulent to the department.

17 (d) The commissioner's order must include a termination
18 date for requests for mediation regarding losses incurred because
19 of the declared disaster. The commissioner may extend the
20 termination date by order.

21 Sec. 542.358. NOTICE TO INSUREDS OF RIGHT TO MEDIATION. (a)
22 Each insurer shall provide, in the manner prescribed by
23 commissioner rule, notice to its insureds of their right to mediate
24 claims following an order of the commissioner under Section
25 542.357.

26 (b) The insurer shall send the notice to a policyholder:

27 (1) whose reported loss under a policy issued by the

1 insurer has not been paid as of the effective date of the order; or
2 (2) who has disputed a denial or partial denial of a
3 claim during the mediation period established by the commissioner's
4 order.

5 (c) Notice under this section must be in the form prescribed
6 by the commissioner by rule, and must include instructions about
7 how to request mediation, including the address, telephone number,
8 fax number, and Internet website for requesting mediation through
9 the administrator. The notice must state that, except as provided
10 by Section 542.363, the administrator may schedule a mediation
11 conference not earlier than the 21st day after the date of the
12 notice.

13 (d) The commissioner may by rule require additional
14 information to be included in the notice.

15 Sec. 542.359. REQUEST FOR MEDIATION. (a) An insured may
16 request mediation by completing a request form prescribed by the
17 department for that purpose and delivering the form to the
18 administrator.

19 (b) The insured must include in a mediation request form:

20 (1) the name, mailing address, and telephone numbers
21 of the insured, including a cell phone number, if any;

22 (2) the location of the property that is the subject of
23 the dispute, if different from the mailing address provided;

24 (3) the name of the insurer, the claim number, and the
25 policy number of the insured; and

26 (4) a brief description of the dispute.

27 (c) If an insurer receives a request for mediation from an

1 insured, the insurer shall:

2 (1) instruct the insured to call the department's
3 toll-free number as established by Section 521.051; or

4 (2) provide the insured with the mediation request
5 form not later than one business day after receiving the request for
6 mediation.

7 (d) The administrator shall notify the parties on receipt of
8 a completed mediation request form that mediation has been
9 requested. The administrator shall use an electronic notification
10 process to inform insurers of mediation requests, mediation
11 conference schedules and locations, and statistics relating to
12 participation in mediation. The administrator shall provide
13 parties notice of the date, time, and location of a mediation
14 conference not later than the 14th day before the date on which the
15 conference is scheduled.

16 (e) An insurer may reject a mediation request if the dispute
17 does not involve a claim as described by Section 542.353. If the
18 insurer rejects the request, the insurer shall notify the insured
19 and the administrator in writing of the rejection and specify the
20 reasons for the rejection.

21 Sec. 542.360. FEES. (a) Except as provided by Subsection
22 (c), the insurer shall pay reasonable fees for scheduled mediation
23 conferences. The total fee for mediation under this subchapter is
24 \$350, with \$300 paid as the mediator fee and \$50 as the
25 administrator fee.

26 (b) The administrator shall bill insurers separately for
27 mediation fees and administrative fees. The administrator shall

1 bill insureds for mediation fees as provided by Subsection (e) and
2 Section 542.365.

3 (c) If the parties reach an agreement before the mediation
4 conference is scheduled, no mediation fee is owed.

5 (d) If the mediation conference is canceled for any reason
6 by the insured or the insurer after the conference has been
7 scheduled, the insurer shall pay the mediator \$100 as the mediator
8 fee and the administrator the entire \$50 administrator fee, except
9 as provided by Subsection (e).

10 (e) If the insured fails to appear at the mediation
11 conference and does not show good cause for the failure to appear,
12 the mediation conference shall be considered to have been held, and
13 the insurer shall pay the fees in accordance with Subsection (d).
14 If the insured wishes to schedule a new conference after failing to
15 appear without good cause, the insured shall pay the fees for the
16 new mediation conference. A new mediation conference may be
17 rescheduled only on the insured's payment of the mediation fees in
18 the amounts specified under Subsection (a).

19 Sec. 542.361. PAYMENT OF EXPENSES. Except as provided by
20 Section 542.365, any expenses associated with participation in a
21 mediation conference, such as travel, telephone, postage, meals,
22 lodging, facilities, and other related expenses, shall be borne by
23 the party or other person incurring the expense.

24 Sec. 542.362. SELECTION OF MEDIATOR. (a) The
25 administrator shall select mediators from a list created by the
26 administrator of qualified mediators. To be qualified, a mediator:

27 (1) must meet the requirements under Section 154.052,

1 Civil Practice and Remedies Code;

2 (2) must follow the standards provided by the ethical
3 guidelines for mediators promulgated by the supreme court;

4 (3) may not be the subject of an administrative action
5 by another agency or governmental entity, regardless of whether the
6 action relates to mediation; and

7 (4) may not have been found guilty of or have plead
8 nolo contendere to a felony or a crime punishable by imprisonment
9 for one year or more under a law of any state or country, without
10 regard to whether a judgment or conviction has been entered by the
11 court having jurisdiction of the case.

12 (b) The administrator, in the administrator's sole
13 discretion, may remove a mediator from the list of qualified
14 mediators. The circumstances in which the administrator may remove
15 a mediator from the list include:

16 (1) alleged instances of dishonest, incompetent,
17 fraudulent, or unethical behavior on the part of the mediator;

18 (2) an instance in which the mediator allegedly failed
19 to respond promptly and completely to requests from the
20 administrator, or in which the acts or omissions of the mediator are
21 counter to the standards provided by this chapter; or

22 (3) a determination that the mediator does not meet
23 the requirements of Subsection (a)(3) or (4).

24 (c) Each mediator shall be selected in a manner determined
25 by the administrator. In the notice regarding the scheduling of a
26 mediation conference sent under Section 542.359(d), the
27 administrator shall provide biographical information about the

1 mediator to the parties. In selecting a mediator, the
2 administrator shall consider the costs associated with travel to
3 the mediation conference for the mediator and the parties. A
4 mediator serves at the sole discretion of the administrator.

5 (d) Each party may object once to the appointment of a
6 mediator without showing cause why the mediator should not serve.
7 If a party objects to the appointment of a mediator, the
8 administrator shall dismiss that mediator and appoint a replacement
9 mediator.

10 (e) A party may request that a mediator be disqualified for
11 good cause without exhausting the party's right to object to a
12 mediator under Subsection (d). A request under this subsection
13 must be submitted to the administrator in writing at any time before
14 the conclusion of the mediation conference. A party may show good
15 cause by demonstrating that:

16 (1) there is a conflict of interest between a party and
17 the mediator;

18 (2) the mediator cannot competently handle the
19 mediation conference; or

20 (3) other reasons exist why the mediation conference
21 would be impaired under the continued service of the mediator.

22 (f) A complaint regarding a mediator must be submitted to
23 the administrator in writing.

24 Sec. 542.363. SCHEDULING OF MEDIATION CONFERENCE;
25 RESOLUTION PERIOD BEFORE CONFERENCE. (a) Not later than the 30th
26 day after the date the administrator receives a request for
27 mediation, the administrator shall contact the parties and schedule

1 a mediation conference. If practicable, the administrator shall
2 schedule the conference to occur not later than the 45th day after
3 the date on which the administrator receives the mediation request
4 form.

5 (b) If a residential property insurance claim remains
6 unresolved, the administrator shall notify the parties that the
7 dispute will be referred to a mediation conference if the parties do
8 not resolve the dispute not later than the 21st day after the date
9 of the administrator's notice. The administrator, for good cause,
10 may extend the resolution period under this subsection for an
11 additional seven days.

12 Sec. 542.364. MEDIATION CONFERENCE LOCATION. To the extent
13 practicable, the mediation conference shall be located in or near
14 the area that was the subject of the disaster declaration by the
15 president. The administrator may designate within a particular
16 county multiple locations for mediation conferences.

17 Sec. 542.365. DUTIES OF PARTIES; EFFECT OF FAILURE TO
18 APPEAR. (a) Each party to a mediation conducted under this
19 subchapter must negotiate in good faith and must have the authority
20 to settle claims, subject to the rescission period under Section
21 542.367.

22 (b) An insurer that fails to appear for a scheduled
23 mediation conference at which the insured appears shall pay:

24 (1) the insured for the insured's actual expenses
25 incurred in attending the conference, plus the value of any lost
26 wages; and

27 (2) the total fees for the rescheduled conference.

1 (c) An insured who fails to appear for a scheduled mediation
2 conference for good cause may reschedule once for a time set by the
3 administrator. If the insured subsequently fails to appear, that
4 insured loses the insured's right to mediate the claim under this
5 subchapter, and shall pay all the fees charged by the administrator
6 up to the time of the conference at which the insured failed to
7 appear.

8 Sec. 542.366. CONDUCT OF MEDIATION CONFERENCE. (a) An
9 insured is not required to retain counsel to participate in a
10 mediation conference. The insured or the insured's representative
11 shall inform the administrator if the insured will be represented
12 by counsel at the mediation conference not later than the seventh
13 day before the date the mediation conference is scheduled to occur.

14 (b) The administrator shall inform the insurer as soon as
15 practicable if the insured will be represented by counsel. If the
16 insured is represented by counsel at the mediation conference, the
17 insurer's counsel may also be present. If the insured is not
18 represented by counsel, the insurer's counsel may not be present.

19 (c) A party may have the assistance of persons at the
20 mediation conference who may assist in the presentation of the
21 claim, including public insurance adjusters, contractors,
22 engineers, and interpreters. A party who wishes to use the
23 assistance of such a person must notify the administrator not later
24 than the seventh day before the date the mediation conference is
25 scheduled to occur.

26 (d) Representatives from the department may be present to
27 observe the mediation conference but are not parties to the

1 conference.

2 (e) Video and audio electronic recordings of mediation
3 conferences are prohibited.

4 Sec. 542.367. MEDIATION NONBINDING; RESCISSION PERIOD. (a)
5 Except as provided by Subsection (c), mediation conducted under the
6 program is nonbinding, and the insured and the insurer are not
7 required to accept an agreement proposed during the mediation.

8 (b) If the parties agree to a settlement for the disputed
9 matters resolved as a result of the mediation, the insured may
10 rescind the agreement until the end of the third business day after
11 the date of the settlement if the insured has not, in relation to
12 the settlement agreement:

13 (1) cashed or deposited any check or draft disbursed
14 to the insured; or

15 (2) agreed in writing to accept an electronic funds
16 transfer.

17 (c) If counsel for the insured is present at the mediation
18 conference and the parties concur in a settlement agreement that is
19 signed by the insured's counsel, the agreement is immediately
20 effective on the insured and may not be rescinded.

21 (d) If the insured rescinds a settlement agreement, the
22 agreement may not be admitted in evidence or disclosed unless the
23 insured and all other parties to the agreement expressly agree to
24 its disclosure.

25 (e) If the settlement agreement is not rescinded by the
26 insured, the agreement acts as a release of all specific claims for
27 damages that were known at the time of the mediation and were

1 presented and agreed to at the mediation conference.

2 (f) This section does not affect rights under existing law
3 for residential property insurance claims for damage that was
4 undetected as of the date of the mediation conference.

5 Sec. 542.368. OTHER DISPUTE RESOLUTION. If the insured
6 elects not to participate in mediation, or, if after participating
7 in the program the parties do not resolve the claim, the parties may
8 proceed:

9 (1) under the appraisal process, if applicable, in the
10 insured's insurance policy;

11 (2) by litigation;

12 (3) by any other dispute resolution procedure
13 available under the laws of this state; or

14 (4) by unmediated private negotiation.

15 Sec. 542.369. EFFECT OF INSURER REFUSAL TO MEDIATE. (a) In
16 addition to any other remedy available under Chapter 82, the
17 commissioner, on a determination that an insurer has engaged in an
18 arbitrary or unreasonable refusal to mediate, may enter an order
19 requiring that the insurer participate in mediation in all cases
20 determined by the commissioner to be appropriate for mediation
21 under this subchapter.

22 (b) An insurer that the commissioner has ordered to
23 participate in mandatory mediation under Subsection (a) may seek
24 judicial review of the order not later than the 30th day after the
25 date the order was entered by the commissioner. The commissioner's
26 order to participate in mediation may not be stayed during the
27 pendency of a judicial proceeding for more than 60 calendar days

1 after the date the order was entered. The basis of the
2 commissioner's decision to require an insurer to mediate may not be
3 made public unless judicial review is sought.

4 (c) An arbitrary or unreasonable refusal by an insurer to
5 participate in mediation under this subchapter is a deceptive trade
6 practice under Chapter 541 and an unfair claims settlement practice
7 under Subchapter A.

8 Sec. 542.370. EFFECT ON LITIGATION. (a) Referral to
9 mediation or the pendency of mediation under this subchapter does
10 not operate as a basis to prevent or stay the filing of civil
11 litigation arising wholly or partly out of the facts that are the
12 basis of the mediation.

13 (b) Any applicable statute of limitations or limitation on
14 the insured's right to sue is tolled, beginning on the date the
15 insurer was notified of the mediation conference under Section
16 542.363 and ending on the date:

17 (1) mediation is completed or declined;

18 (2) the insured loses the right to mediate because of a
19 failure to appear; or

20 (3) if a settlement agreement is completed, the
21 rescission period established under Section 542.367 expires.

22 Sec. 542.371. CONFIDENTIALITY REQUIREMENTS. (a)
23 Statements made by the parties, negotiations between the parties,
24 and documents produced during a mediation conducted under this
25 subchapter are confidential.

26 (b) Mediation documents, including settlement agreements,
27 obtained by the department are confidential and are not subject to

1 disclosure under Chapter 552, Government Code. This subchapter
2 does not affect the discoverability or admissibility of documents
3 that are otherwise discoverable or admissible.

4 (c) The confidentiality required under this section does
5 not restrict department access to documents or other information
6 the department seeks in order to evaluate the program or to comply
7 with reporting requirements.

8 SECTION 2. This Act takes effect immediately if it receives
9 a vote of two-thirds of all the members elected to each house, as
10 provided by Section 39, Article III, Texas Constitution. If this
11 Act does not receive the vote necessary for immediate effect, this
12 Act takes effect September 1, 2009.