
Mediation and Arbitration in Weather and Climate Disputes

R. Wayne Thorpe

In early summer 2012, news reports focused on early-season drought-driven wildfires erupting across the West, threatening the U.S. Air Force Academy and the nearby city of Colorado Springs, Colorado. Meanwhile an early summer Hurricane Debby deluged north Florida and south Georgia with rainfall of up to 30 inches. Important recent case law also has focused on weather and climate issues. Hurricane Katrina, in 2005, gave rise to an important decision by the Fifth Circuit limiting immunity for the Army Corps of Engineers. *In Re Katrina Canal Breaches Litigation*, 673 F.3d 381 (5th Cir. 2012). Several courts, including the U.S. Supreme Court, have rendered important decisions in the developing jurisprudence of climate change law. See, e.g., *Am. Elec. Power Co. v. Connecticut*, ___ U.S. ___, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011) (Clean Air Act displaces federal common law right to bring public nuisance claim; state law claims and preemption issues not addressed).

The result of these snapshots is this: weather- and climate-related events are oft-occurring big news events, and those events can spawn a great variety of legal disputes. This article discusses the ways in which many climate- and weather-related legal disputes are uniquely well suited to mediation or arbitration.

To set the stage for this discussion, the reader should consider that a wide array of weather and climate events and circumstances can produce legal disputes. These events range from those with national or even global implications to isolated storm events that may impact only a single individual or a small piece of property. They include, for example, (1) one-time events so massive in scale that they change the long-term social, economic, and even geophysical structure of a city, state, or region—think Hurricane Katrina, the costliest natural disaster in American history, which made landfall in Louisiana in August 2005 causing damage from Florida to Texas, or Japan's March 11, 2011, Tohoku Earthquake and Tsunami, the costliest natural disaster in world history; (2) "routine" hurricanes, floods, earthquakes, blizzards, and tornadoes, and weather/climate driven fires (which, of course, are anything but "routine" to those most directly and adversely affected); (3) relatively "modest" localized storm events producing flooding, wind damage, and storm runoff issues, often confined to a small site; (4) droughts, wildfires, and pestilence allegedly brought on by specific weather events and changes in weather patterns; and (5) alleged climate change impact as fundamental as melting of the polar ice cap.

Many types of very basic and typical legal disputes can arise from weather- and climate-related events. Most obvious and common are first-party property insurance coverage claims for damage to homes and businesses from such causes

as storms and weather-driven wildfires. In addition, when an injured party sues an alleged tortfeasor for contributing to the fire or the extent of the posthurricane flooding, then, of course, that tortfeasor is likely to make a casualty insurance claim for defense and indemnity. Parties to merger and acquisition or other common business contracts may find that their seemingly ordinary indemnities cover potential weather- and climate-related risks. Contract disputes in agriculture, transportation, construction, manufacturing, and other business sectors may result from weather events and/or climate change (e.g., "Defendant breached by not delivering the wheat as promised," versus "But the drought killed the wheat" or "The storms prevented the trucks/trains from delivering the wheat."). In addition to these somewhat more "mundane" types of legal disputes, contentious, politically sensitive legal disputes over allocation of resources may be affected by weather and climate considerations. For the most part high-profile water rights disputes have been less prevalent in the East and South than in the Western United States. Nonetheless, droughts, population growth, and other factors of water scarcity have resulted in a long-running, seemingly intractable dispute between the states of Alabama, Florida, and Georgia over water rights in the Chattahoochee, Flint, and Apalachicola River basins. *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F. 3d 1160 11th Cir. 2011) ("The decisions of the District Court and the Corps were based on a clear error of law—the determination that water supply was not an authorized purpose of the [Rivers and Harbors Act Pub.L. No. 79-525, 60 Stat. 634 (1946)].") Subsequent petitions to the Supreme Court for writs of certiorari were denied in June.

Some lawyers facing client problems driven by weather or climate issues may be commercial or tort litigators with substantial prior mediation and arbitration experience, but many others will be environmental or business lawyers with much more limited exposure to alternate dispute resolution (ADR). To be sure all readers are "on the same page," a brief overview of how mediation and arbitration of legal disputes ordinarily work in civil disputes in the United States is in order.

In mediation, a disinterested and impartial third party assists parties and counsel in effectively communicating positions to one another and in attempting to negotiate an agreed-upon resolution to the dispute. As appropriate, the mediator may provide questions, comments, observations, or opinions about parties' positions and may make suggestions or proposals about how to settle the dispute. Any agreement reached in mediation typically is documented in a binding contract that is enforceable in court.

In arbitration, a disinterested and impartial third party makes binding decisions resolving a dispute and enters an award that is enforceable in court. Arbitrators' decisions can be overturned in court only in very unusual circumstances.

Mr. Thorpe has been a full-time ADR neutral with JAMS since 1998. He is the Immediate Past Chair of the ABA Section of Dispute Resolution. He may be reached at wthorpe@jamsadr.com.

See, e.g., *Federal Arbitration Act*, 9 U.S.C. § 10 (limited grounds for *vacatur* of awards).

Some variations on these themes may arise in the context of mass torts, other large groups of claims, or even stand-alone disputes. In one scenario a mediation settlement agreement or privately negotiated settlement agreement (approved by the court(s) when necessary) may provide for some or all of the participating claimants to present claims in binding arbitrations or similar adjudicative forums, sometimes simplifying or eliminating proof of liability and sometimes imposing limitations on recoverable damages. As a variation on that approach, the arbitration might be nonbinding, in the sense that the claimant (or possibly both parties) might be permitted to reject the nonbinding award and go to court if dissatisfied with the outcome.

ADR processes can address particular needs of disputants in various ways. First, any form of ADR must be fundamentally fair *and* accepted as such in the eyes of the participants. In both mediation and arbitration a truly impartial, unbiased neutral should assist parties in exchanging sufficient information to make the process informed and fair. In addition, ordinarily such a process must also be (1) quicker to resolution, (2) at materially reduced cost, and (3) with greater finality than disputes in the judicial system. While some readers will no doubt think of a “war story” about a mediation that took too long or an arbitration that cost too much, almost every such story has its root in an ill-designed process or one that was poorly executed by one or more of the neutrals, parties, or counsel—and every such war story has at least one corollary in a court case that took too long, cost too much, and left everyone dissatisfied when it ended.

If all parties truly want a fair, faster, cheaper, and final resolution, and they engage a competent neutral and counsel, there is almost no legitimate reason why they should not be able to achieve that goal with an ADR process. In most instances mediation or arbitration should enable parties and counsel to resolve their disputes with greater satisfaction than in the courts or other standard dispute resolution settings; indeed, whether and how to use these processes must be analyzed against that important, fundamental goal.

Use of ADR in Weather- and Climate-Related Disputes

Most weather and climate disputes are especially well suited for resolution through mediation or arbitration because of certain dynamics uniquely present in those disputes. Foremost among them is urgency. Catastrophic weather events often establish a real and immediate need for financial assistance for victims who are potential claimants against insurers, tortfeasors, government agencies, and others. Mediations and arbitrations can be set up, conducted, and concluded literally in days if desired and in any case typically many months sooner than a dispute can be resolved in the courts. In the aftermath of a catastrophic loss to one or many possible claimants, all parties can derive benefits from rapid resolution of disputes. Though controversial in certain respects, the Gulf Coast Claims Facility created in response to the BP/Deepwater Horizon oil spill, was intended to act in response to this need for immediate relief.

Most fundamentally, a properly designed dispute resolution approach to emergency claims (including input from claimants and their counsel) should ultimately enhance party satisfaction both procedurally and substantively, in a way that benefits both claimants and payers. Perhaps the most significant factor

favoring a quick resolution of emergency claims is that often rapid payment of certain kinds of claims, including for personal injury, physical damage to homes and businesses, and lost business income may reduce the loss of claimants by ameliorating further losses. And, further in some dire circumstances, severely damaged businesses that are not revived by financial assistance at once may forever lose the chance for revival. In most circumstances those potentially responsible for paying for such losses should share in the desire to avoid that outcome.

Various considerations of business continuity may also compel businesses involved in weather and climate disputes to make an effort to resolve those disputes more rapidly than other comparable legal problems. Weather- and climate-related legal disputes often get more public attention than comparable environmental, tort, or commercial problems that businesses routinely face—perhaps due to the news media attention to underlying weather and climate events. This level of attention may impact the manner in which the parties manage their disputes. A viable ADR approach to early resolution of such claims can help a potential defendant to manage important relationships with investors, lenders, employees/staff, customers, vendors, and other business “partners,” as well as with financial analysts and the media. Public perceptions that those potentially responsible for weather or climate losses are not responding to them quickly and appropriately can be at least as devastating as the losses themselves.

Potential tortfeasors (and their insurers) also may have an opportunity, when claims are vast in potential number or cost, to resolve disputes in a way that reduces the possibility of a litigated outcome that could threaten the existence of the tortfeasor’s (or its insurer’s) business. And, finally, for both claimants and those they claim against, early, effective handling of claims can also reduce business and personal distractions among management, legal, and scientific personnel who truly “have better things to do” than spending months or years in a litigated resolution and who are better suited to spend their time, energy, and skills trying to work towards solutions to other business challenges.

Another factor that typically promotes settlement in almost any kind of legal dispute is uncertainty about outcome or certain aspects of the outcome—with the important qualifier that, occasionally, uncertainty causes parties to litigate to conclusion to find the answer to the unknown question. As the number of weather and climate disputes increases and the nature evolves, there may be a greater number of disputes in which outcomes and other aspects of the dispute are even more uncertain than usual. In potentially high-stakes climate change nuisance cases, for example, the law is still unsettled, following the Supreme Court’s decision last year in *AEP*. Other similar nuisance cases remain pending, including *Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. Nov. 5, 2009). See also *AES Corp. v. Steadfast Ins. Co.*, S. Ct. Va. Record No. 100764, Apr. 20, 2012 (insurer has no duty to defend climate change case brought by Village of Kivalina because no occurrence within meaning of CGL policy).

One can argue persuasively that the potential devastating consequences for defendants in losing such claims calls for early efforts to provide some kind of agreed relief. Industry advocates, however, may well see such claims as presenting “bet the company,” “win at all cost” situations that render such cases uniquely unsuited for ADR. Defendants in such cases may under all circumstances be unwilling to pay money to settle those cases in more traditional “money for release and

dismissal” deals. That is not necessarily to say, however, that such defendants might not be able to resolve these difficult cases through mediation or other ADR settings aimed at other forms of relief, such as some form of public or private relief for claimants that defendants might not necessarily directly pay for or only pay for partially.

ADR processes also allow for party selection of dispute resolution neutrals, which translates to engagement of dispute resolution professionals with relevant expertise to a greater extent than is typical in the court system. Weather- and climate-related disputes may involve a host of complex environmental, scientific, commercial, and insurance issues (not to mention legal issues). Thus, the need for a “subject-matter expert,” or at least a neutral who knows or can learn relevant technical information as quickly as possible, is particularly heightened. In the ADR context, such an option is available to participants. In the court system, litigants are typically left to the random assignment of judges.

One of the most compelling reasons to try to mediate or settle certain weather- and climate-related legal disputes is the ability to create solutions that are not available in court. A common analogy comes from environmental and toxic tort cases involving polluted property. For example, an owner may be relatively innocent of causing the pollution and relatively unable to and ignorant about how to address remediation obligations if any. Whether under tort law or various federal and state statutory schemes, defendants will often want to argue a litany of defenses (e.g., I did not cause the pollution, not much pollution there, no need to remediate, cost to remediate if required is not high). The relatively innocent property owner is not interested in owning polluted property, in remediating it, or in running the legal risk that remediation is not required—and may be unable to remediate effectively or evaluate the legal need for remediation in any case. In these circumstances defendants often will “put their money where their mouth is,” buy the polluted property, and then deal with the legal and economic consequences. Similar solutions can be available for weather- or climate-damaged properties, where again, defendants may want to argue an array of liability-, causation-, and damages-related defenses—and those potentially responsible for economic loss to damaged properties may agree to acquire the properties and then handle them appropriately as legal and economic factors may require.

A related feature of ADR processes is the ability to involve multiple participants who might not always be parties to the same lawsuit. Parties sometimes rush to multiple and differing courthouses for a variety of reasons related to convenience, differences in law applied, and differences in judges applying it. It is thus easy enough even with a small number of claims arising from a single weather or climate event for a number of parties to square off in multiple forums, with less than all parties present in any of them. This factor may limit the ability of any one court to provide full and effective relief to all parties to a dispute. But a single mediation, by agreement (or even by orders from affected courts), can rise to that challenge by putting all

affected parties and their counsel in the same forum for purposes of settling a complex dispute.

Privacy and confidentiality concerns also can be a motivating factor. All parties, particularly claimants, may prefer resolving disputes in mediation or arbitration, because both processes can provide a forum with a high degree of privacy and confidentiality with respect to many issues, including especially personal ones such as medical and financial matters. Claimants may prefer not to have their health history, tax-paying history (or lack thereof), or business profitability (or lack thereof) made public in a court proceeding. Similarly, in some instances defendants may be motivated to engage in an ADR process to avoid public knowledge and scrutiny of their conduct.

The mirror image of these privacy and confidentiality issues can provide the fuel for one of the most vigorous objections to use of ADR in certain circumstances, especially where multiple claimants are involved. One person’s privacy and confidentiality can be someone else’s lack of transparency. Where there are multiple, similarly situated claimants they may want basic data about payments to other claimants, whether adjudicated or negotiated, including underlying health information in personal injury disputes and economic data in property damage or business loss disputes. That concern might be addressed by providing the relevant data in “sanitized” form, protecting the real privacy interests at stake while making the process much more open and transparent.

Finally, mediation is well suited for providing an opportunity for thoughtful resolution of emotional and highly charged disputes generally, which is particularly important in the context of sudden and catastrophic losses possibly needing a relatively quick remedy. Mediation is often a useful tool for allowing “venting,” especially by those who have suffered losses, sometimes in effect providing a “hearing” in lieu of a court trial.

Although it seems trite at times to say, mediation quite literally allows parties and counsel, assisted by a mediator, to explore “win-win” solutions in which all parties come out better off than if they continued their dispute in court. It is, of course, especially effective at giving claimants an opportunity to evaluate rationally who may be responsible for their loss and how much the loss really amounts to, and for those responsible to evaluate in a similarly rational way the risks involved in a dispute, the financial costs, and the indirect, harder to define “costs” in public perceptions and other similar factors. Where claimants have suffered sudden and catastrophic losses, which often may be best remediated by very prompt compensation, all parties may benefit in using a process that allows for them to approach possible joint solutions in this less adversarial process.

Weather and climate disputes may arise from a host of events ranging from storms of historical proportion to mundane events that impact a very small number of people. Ensuing legal disputes vary all over the map. By focusing on some of the underlying reasons why mediation and arbitration are effective, we see that many such disputes are uniquely suited to mediation and arbitration. 🌳