

# TEXAS WATCH

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*Via electronic mail* ([Brian.Ryder@tdi.state.tx.us](mailto:Brian.Ryder@tdi.state.tx.us) & [Melissa.Burkhart@tdi.state.tx.us](mailto:Melissa.Burkhart@tdi.state.tx.us))

Texas Department of Insurance  
Attn: Mr. Brian Ryder & Ms. Melissa Burkhardt  
Property and Casualty Program  
P.O. Box 149104  
Austin, TX 78714

Re: Informal comments on rules related to HB 3 (82<sup>nd</sup> Legislature, First Called Session)

Mr. Ryder and Ms. Burkhardt:

Texas Watch is a non-partisan, non-profit citizen advocacy group that works on behalf of policyholders. We opposed HB 3 (82<sup>nd</sup> Legislature, First Called Session) on the grounds that it punished coastal policyholders for the sins of their provider, the Texas Windstorm Insurance Association (TWIA), and our opposition has not lessened by virtue of its passage.<sup>1</sup> With this legislation, lawmakers have enacted a scheme that strips vulnerable citizens of important consumer protections, effectively impairs their ability to be made whole, and ultimately relegates them to second-class status in the eyes of the law. In short, the process HB 3 establishes for TWIA to handle claims is fatally flawed.

The bill professes to build a better technocratic mousetrap, a misguided endeavor that erodes the proper role of our justice system in resolving disputes and threatens to function as well as other administrative schemes where citizens are left to fend for themselves, such as our worker's compensation system or the now-defunct Texas Residential Construction Commission, which is to say not well at all. Using the history of these broken systems as a guide, the result of HB 3's claims handling framework will likely be that coastal policyholders will be left to bear the brunt of future storms, upending lives and endangering our regional and state economies.

The Texas Department of Insurance (TDI) has solicited informal comments on rules related to the expert panel, alternative dispute resolution process, and appraisal process that will be used by TWIA. Given the fundamental flaws in the framework within which the Department has to

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<sup>1</sup> See "Witness List," House Committee Report, HB 3 (82<sup>nd</sup> Legislature, First Called Session), 6/7/11, <http://www.capitol.state.tx.us/tlodocs/821/witlistbill/html/HB00003H.htm>.

work, our comments are focused on key public policy areas that we believe can be improved somewhat by the rule-making process.

Expert Panel: The so-called “expert” panel established in the legislation is given inordinate power and outcome-determinative authority, especially with regard to dictating claims settlements.<sup>2</sup> Given the amount of power that is concentrated in just a few hands, and the fact that they are unaccountable for their acts,<sup>3</sup> it is imperative that the members of this panel be completely impartial and independent. Any association with the insurance industry whatsoever, whether financial or otherwise, should automatically disqualify any candidate from consideration.

When people are displaced from their homes, businesses, and places of worship after a catastrophe, time is of the essence. Therefore, all delays should be reduced to the greatest extent possible.

Since the expert panel is to weigh in on whether losses were caused by “wind vs. water,” the highest possible confidence intervals should be used if they make the determination that “water” was the cause, as such a finding takes a policyholder out from under their TWIA coverage.

Transparency is of the utmost concern, and all records and proceedings of the panel should, by rule, be subject to all of the requirements of the Public Information Act<sup>4</sup> and the Open Meetings Act.<sup>5</sup>

Alternative Dispute Resolution: All delays should be minimized to the greatest extent possible in any Alternative Dispute Resolution (ADR) processes. Any mediators on the Commissioner’s roster should have a background that indicates professional balance and a total lack of bias. If bias, unprofessional, or abusive behavior is demonstrated by the third party neutral during the ADR process, a mechanism for reporting this must be established and publicized to the participants.

Any roster runs the risk of a “repeat player” phenomenon occurring, whereby the “neutral” may come to value their paycheck in future disputes over their impartiality to the parties in the dispute before them. This dynamic can be a function of the neutral seeing the policyholder only once but seeing the insurance provider on a regular basis across a multitude of cases. Care should be taken to ensure neutrals do not feel pressure, whether explicit or implicit, to settle

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<sup>2</sup> See TEX. INS. CODE §§ 2210.578(e), (f), & (h).

<sup>3</sup> See TEX. INS. CODE § 2210.578(g).

<sup>4</sup> TEX. GOV’T CODE § 552.001, et seq.

<sup>5</sup> TEX. GOV’T CODE § 551.001, et seq.

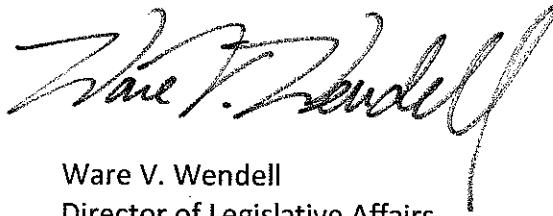
cases on terms advantageous to TWIA as a condition of maintaining their membership on the roster. Selection of a mediator on the roster should be on a random, blind basis.

Because a policyholder may be forced into ADR as a prerequisite to bringing suit,<sup>6</sup> thereby impeding their constitutional right to trial by jury, it is imperative that the costs to the policyholder be minimized to the greatest extent possible and socio-economic status should be considered.<sup>7</sup> This should be the guiding principle in adopting a fee schedule for the payment of mediators.

Appraisal: Our comments on the appraisal process are substantially similar to those for the ADR process outlined above. Furthermore, TDI should not interfere with a policyholder's ability to select a "competent and independent" appraiser or to challenge an appraisal decision in district court.

If you have any further questions, please do not hesitate to contact us.

Sincerely,



Ware V. Wendell  
Director of Legislative Affairs

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<sup>6</sup> See TEX. INS. CODE § 2210.575(b).

<sup>7</sup> For example, a payment of \$200 can be better absorbed by a family making \$50,000 than one near or below the poverty line. A sliding scale and hardship exemption should be utilized. The upper range of the sliding scale should be capped at the average amount that private litigants pay for such ADR services in that locality.