UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE HURRICANE SANDY CASES

REPORT OF PLAINTIFFS' LIAISON COUNSEL IN RESPONSE TO DEFENDANTS' REPORT AND LIST OF COMMONLY OCCURRING LEGAL ISSUES

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THIS DOCUMENT APPLIES TO:

ALL RELATED CASES

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The undersigned Plaintiffs' Liaison Counsel, Tracey Rannals Bryan of Gauthier, Houghtaling & Williams and Javier Delgado of Merlin Law Group, P.A. hereby submit Report of Plaintiffs' Liaison Counsel in Response to the Report of Defense Liaison Counsel for the NFIP Cases (Doc. 269) and Defendants' List of Commonly Occurring Legal Issues (Doc. 273). Plaintiffs' Liaison Counsel has conferred with counsel representing Plaintiffs in Superstorm Sandy cases pending before this Court. The following law firms assisted in the legal research and analysis contained in this response:

1. Gauthier, Houghtaling & Williams
2. Merlin Law Group, P.A.
3. Leav & Steinberg, LLP;
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6. Wolff & Samson, PC;
7. The Rain Law Firm;
8. Nesenoff & Miltenberg LLP;
9. Lerner, Arnold & Winston, LLP;
10. Ellis Ged & Bodden, P.A.;
11. Fensterstock & Partners LLP; and
12. Touro Law Center
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INTRODUCTION

A windstorm/hurricane such as Superstorm Sandy by its very nature results in a wide range of damage caused by different covered and potentially excluded perils at different times during the storm. These perils include wind, flood, storm surge, fire, power outage, sewage back-up, etc. The difficulty for the Court, as experienced by prior courts[1], is determining how to decide whether an insurance policy that covers wind damage but excludes flood damage, or vice versa will provide insurance coverage when the property is damaged by a covered peril and damage also occurs from an excluded peril.

In the analysis of the circumstance presented above, a clause that is now standard in almost every insurance policy known as the anti-concurrent causation (ACC) clause will emerge as one of the most hotly debated clauses between the insured and the insurance carrier in Superstorm Sandy cases. It is important to consider that the ACC clause is a fairly new provision that was not tested in the context of a hurricane loss until Katrina, resulting in an Erie-guess by the Fifth Circuit that was later criticized by the Mississippi Supreme Court.[2] The burden of proof required under a flood policy versus a wind policy will be equally important. A wind policy is often written as an "all risk" insurance policy, and flood policy is written as a named peril policy. Special attention should also be given to the interpretation of insurance policies and the reasonable expectations doctrine in New York, as this doctrine will guide the analysis of legal issues involving policy interpretation, policy exclusions, and cases involving errors and omissions between consumers and insurance agents/brokers.

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[1] *Leonard v. Nationwide Mutual Insurance Company*, 499 F.3d 491 (5th Cir. 2007) (making an "Erie" guess on Mississippi law) criticized by *Corban v. United Services Automobile Association*, 20 So.3d 601 (Miss. 2009) (applying the proper analysis under Mississippi Law in determining how to evaluate insurance coverage in Hurricane Katrina cases where the damages stem from both the covered peril of wind and the excluded peril of flood, and assessing whether or not the ACC clause applied in a Hurricane case).

[2] *Id.*

For ease of reference, Plaintiffs' counsel are submitting their legal authority with the same format and phraseology used by Defendants.

RESPONSE TO DEFENDANTS' LIST OF COMMONLY OCCURRING LEGAL ISSUES

A. Fortuity

The burden of proving causation differs in first-party property insurance cases depending on whether the policy is a specified peril policy or an "all risk" policy. Under a specified peril policy, the insured has the burden of proving that the loss was caused by a specifically enumerated peril.[3] Alternatively, under an "all risk" policy, by contrast, "the insurer has the burden of proving that the cause of the loss is an excepted cause."[4]

Under an all risk policy, the insured has the burden to establish a *prima facie* case for recovery. The insured need only prove the existence of the all risk policy, and the loss of the covered property.[5] The very purpose of an all risk policy is to protect the insured in cases where it is difficult to explain the damage to the property; thus, the insured need not establish the cause of the loss as part of its case.[6]

Where an insured has met its burden of showing that a valid insurance policy was in full force and effect and that the insured incurred a presumptively covered loss, the burden of proof shifts to the insurer to demonstrate that an exclusion contained in the policy defeats the claim.[7] To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, that it is subject to no other reasonable interpretation and applies

[3] *Strubble v. United Services Auto. Assn.*, 35 Cal. App. 3d 498, 504, 110 Cal. Rptr. 828, 831 (Cal Ct App 1973).
[4] *Mission Nat'l Ins. Co. v. Coachella Val. Water Dist.*, 210 Cal App. 3d 484, 492, 258 Cal Rptr 639, 643 (Cal Ct App 1989). *Accord, Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 406, 257 Cal. Rptr. 292, 298, 770 P.2d 704, 710 (1989).
[5] *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.*, 505 F.2d 989, 999 (2d Cir.1974).
[6] *Atl. Lines Ltd. v. Am. Motorists Ins. Co.*, 547 F.2d 11, 13 (2d Cir.1976); *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F.Supp. 1460, 1463 (S.D.N.Y.1983).
[7] *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66, 671 N.Y.S.2d 66 (1st Dep't 1998).

in the particular case, and that its interpretation of the exclusion is the only construction that could fairly be placed thereon.[8]

Under an all-risk policy, the insurance carrier has a difficult burden to meet once the policyholder demonstrates a loss was sustained during the policy period. An essential purpose of all-risk insurance policies is to provide coverage when the exact cause of the loss cannot be established. "All risk insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the loss or damage to property."[9]

One New York Court noted that under an all-risk policy, losses caused by *any* fortuitous peril not specifically excluded under the policy will be covered. According to the Court:

> An insured making a claim under an all-risk policy has the initial burden to establish a *prima facie* case for recovery. An insured meets this burden by showing: "(1) the existence of an all-risk policy, (2) an insurable interest in the subject of the insurance contract, and (3) the fortuitous loss of the covered property. ***This burden has been characterized as "relatively light."***[10]

Thus, an insured under an all-risk policy needs only to show fortuitous loss and once that burden is met, the burden shifts to the insurer to establish that an exclusion applies.[11] The insurer's burden is a "heavy one" to negate coverage by virtue of exclusions in an all-risk policy.

B. Insurable Interest

To insure property against a risk of loss, the insured must have an insurable interest in that property; without an insurable interest, the insured could suffer no loss. However, once an insurable

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[8] *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66, 671 N.Y.S.2d 66 (1st Dep't 1998); *Salimbene v. Merchants Mut. Ins. Co.*, 217 A.D.2d 991, 629 N.Y.S.2d 913 (4th Dep't 1995); *General Acc. Ins. Co. of America v. Idbar Realty Corp.*, 163 Misc. 2d 809, 622 N.Y.S.2d 417 (Sup 1994), order aff'd as modified on other grounds, 229 A.D.2d 515, 646 N.Y.S.2d 138 (2d Dep't 1996).

[9] *Formosa Plastics v. Sturge*, 684 F. Supp. 359, 366 (S.D. N.Y. 1987)

[10] *Channel Fabrics, Inc. v. Hartford Fire Ins. Co.*, 2012 WL 3283484 (S.D. N.Y. August 13, 2012).

[11] *Id.*

interest has been established at the inception of the policy, it is not invalidated by a later transfer of the policy by assignment to a person who lacks a direct insurable interest in the property. [12]

In Tiemann v Citizens' Ins. Co., the plaintiffs were the owners of the insured property. The defendant had agreed to insure the plaintiffs "against all direct loss or damage by fire to the amount of six thousand dollars to the following described property." When the fire occurred the property was damaged in the amount of $1,050. The fact that the plaintiffs had offered to sell the property before the fire at the price they subsequently obtained, notwithstanding the impairment of its value by the fire, did not release the defendant from liability.[13]

C. Rules of Construction For Interpreting Insurance Policies

As stated above, a policyholder bears the initial burden of showing that the insurance contract covers the loss and that a loss of property occurred.[14]

Under New York law, the ordinary rules of contract interpretation apply to insurance policies.[15] Contract interpretation is a legal question for the court to decide.[16]

An insurance policy, like most contracts, is to be read in light of common speech and the reasonable expectations of a businessperson.[17] A written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the clear language of the contract.[18]

Courts generally adhere to the rule that when an insurance policy is clear and unambiguous, the language of the policy controls – and courts are bound to enforce the express terms as they are

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[12] 31 N.Y. Prac., New York Insurance Law § 14:3 (2013-2014 ed.) (citing *Taylor v. Allstate Ins. Co.*, 214 A.D.2d 610 (2d Dep't 1995).
[13] 76 AD 5, 9-10 [1st Dept 1902]
[14] *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 423-425 (1985); *Roundabout Theatre Co. v. Continental Cas. Co.*, 302 A.D. 2d 1, 751 N.Y.S.2d 4, 7 (1st Dep't. 2002)(emphasizing that the policyholder bears the affirmative burden of proving coverage; burden remains the same under an "all risk" policy); *Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873 (1974).
[15] *Accessories Biz, Inc. v. Linda & Jay Keane, Inc.*, 533 F.Supp.2d 381, 386 (S.D.N.Y. 2008).
[16] *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir.2002).
[17] *Gen. Motors Acceptance Corp. v. Nationwide Ins. Co.*, 4 N.Y.3d 451, 796 N.Y.S.2d 2 (2005); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383, 763 N.Y.S.2d 790 (2003).
[18] *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir.1992).

written.[19] Contract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.[20]

Where the policy language is ambiguous, "the court must interpret the language in context with regard to its purpose and effect in the policy and the apparent intent of the parties."[21] Only if the ambiguity remains unresolved, then it will be construed in favor of the insured.[22]

While the insured has the burden of proving that a valid policy was in existence on the relevant date and that a loss of property occurred, the insurer has the burden of showing that a claim falls within a policy exclusion.[23] In addition, "[t]he ambiguities in an insurance policy are construed against the insurer, particularly when found in an exclusionary clause."[24] To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case."[25]

Policy exclusions cannot be extended by interpretation or implication, but must be given a strict and narrow construction.[26] Whether an ambiguity exists in an insurance policy is a question of law for the Court.[27]

D. An Insured Person Is Presumed to Understand the Terms of Their Policy

Some New York courts have held that once an insured has received his or her policy, the insured is presumed to have read and understood it and cannot rely on the broker's representations[28]

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[19] *Accessories Biz*, 533 F.Supp.2d at 386.
[20] *Am. Home Assur. Co. v. Hapag Lloyd Container Linie, GMBH*, 446 F.3d 313, 316 (2d Cir.2006).
[21] *Rainbow*, 72 N.Y.2d at 106.
[22] *Id.*
[23] *Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873 (1974).
[24] *Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 469 N.Y.S.2d 655, 457 N.E.2d 761 (N.Y. 1983).
[25] *Cont'l Cas. Co. v. Rapid–Am. Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (N.Y. 1993).
[26] *Inc. Vill. of Cedarhurst v. Hanover Ins. Co.*, 89 N.Y.2d 293, 298, 653 N.Y.S.2d 68 (1996).
[27] *U.S. Underwriters Ins. Co. v. Tauber*, 604 F.Supp.2d 521, 527 (E.D.N.Y. 2009).

that the policy covers what is requested.[29] Other courts, including the New York Court of Appeals, have not strictly followed this rule and do not find it a bar to recovery. These courts have held that an insured can maintain an action for breach of contract and negligence to procure adequate insurance coverage.[30]

In *American Building Supply*, a recent Court of Appeals decision, the insured sued the broker for failure to procure general liability coverage for the insured's employees in case of injury, which was a requirement of the insured's commercial lease agreement.[31] Although the insured informed the broker of its coverage requirements the policy was issued with a cross-liability exclusion that barred coverage for injury.[32] The insured did not read the policy upon receipt, nor did the broker.[33]

The court held that receipt and presumed reading of the policy does not automatically bar an action for negligence against the broker where the insured requested specific coverage, and that an insured may look to the expertise of its broker for insurance matters.[34] The court observed the split of authority on this issue, but considered the facts of the case similar to those in which the appellate courts did not enforce the presumption if specific coverage was requested.[35]

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[28] Insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage. *See Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371 (1997). To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy. *See Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 155 (2006). A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage. *Id.* at 158.

[29] *Busker on Roof Ltd. Partnership Co. v. Warrington*, 283 A.D.2d 376, 377, 725 N.Y.S.2d 45 (1st Dept. 2001).

[30] *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 736, 955 N.Y.S.2d 854 (2012); *Kyes v. Northbrook Prop. & Cas. Ins. Co.*, 278 A.D.2d 736, 737-738, 717 N.Y.S.2d 757 (3d Dept. 2000)(finding existence of viable question of fact pertaining to whether insured had right to rely upon broker's presumed obedience to insured's instructions in procuring proper coverage); *Reilly v. Progressive Ins. Co.*, 288 A.D.2d 365, 366, 733 N.Y.S.2d 220 (2d Dept. 2001)(observing that insured made specific request for coverage, thus failure to read policy does not preclude broker's potential liability).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

E. An Insured Has Constructive Knowledge of the Terms of the Policy

The insured's receipt of the insurance policy at issue may, in some cases, provide a complete defense to the insured's action against an agent or broker for failing to procure coverage. This argument does not provide a defense in all cases. As noted in the authorities above, where the evidence establishes that the insured made specific requests for coverage, this rule may not apply as an absolute bar to coverage.[36] Moreover, where the evidence demonstrates that the insured made specific requests for the missing coverage after receipt of the policy, the broker has a renewed duty to obtain the requested coverage or to inform the client of its inability to do so.[37]

F. Exclusions

a. Applicable Burden of Proof between Insured and Insurer

As stated above, the burden of proving an affirmative defense on an insurance policy is upon the insurer; conversely, the burden to establish coverage and a duty to indemnify lies with the insured.[38]

b. Anti-Concurrent Causation (ACC) Clause

The analysis should first begin with the question: Is the ACC clause applicable to a Superstorm Sandy case where the property was damaged by covered and excluded perils? This analysis has been applied in Hurricane Katrina cases, as further explained below. It is also important to understand the ACC clause and its origins.

This Court's ruling on the ACC clause will impact every insured that suffered damage from wind and water to the insured property. As explained by William F. "Chip" Merlin, Jr., *in Corban v. USAA: A Case for Providing Far too Little Because It was Rendered Far too Late*, the United States Fifth Circuit Court of Appeals' "Erie guess" on Mississippi law resulted in over two years of

[36] *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 736, 955 N.Y.S.2d 854 (2012).
[37] *Page One Auto Sales v. Brown & Brown of New York, Inc.*, 921 N.Y.S.2d 749, 750, 83 A.D.3d 1482, 1483 (4th Dept. 2011).
[38] *Acerra v. Gutmann*, 294 A.D. 2d 384 (2d Dep't 2002).

underpaid insurance claims and forced settlements that would otherwise not have been accepted by policyholders who had spent thousands on insurance premiums.[39]

In response to the concurrent causation doctrine[40] relied upon by the courts as the default rule in insurance coverage litigation[41], insurance companies began inserting the ACC clause into property policies in the 1980s and 1990s to prevent court decisions requiring the insurance carrier to provide insurance coverage where the damage to the property was caused by both a covered and an excluded peril.[42]

There are typically two forms of ACC clauses.[43] In response to these new forms, courts initially found the ACC Clause valid and enforceable.[44]

Throughout the years, different theories interpreting the ACC clause have evolved. The more conservative approach is to find that there is no coverage for any portion of the loss so long as the damage was caused by both a covered and non-covered event. The liberal approach states that

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[39] 79 Miss. L.J. Supra 129 (2009).

[40] *37 A.L.R. 6th 657*, citing Lertner, Simpson, Bjrokman Law and Practice of Insurance Coverage Litigation §52.9, construction and application of Anti Concurrent Causation (ACC) clauses and insurance policies (2014). Before the advent of the ACC clause the courts routinely relied on the concurrent cause doctrine to find that the insurance company was responsible for paying the damages resulting from the entire event whenever two of more perils appreciably contributed to the loss and at least one of the perils was covered under subject insurance company.

[41] In 1973, the California Supreme Court decided in *State Farm Mut. Auto Ins. Co. vs. Partridge*, 514 P.2d 123, 131 (Cal. 1973), finding that a loss was covered by an insurance policy, even if other excluded causes combined to produce the loss. *Eric S. Knutsen*, *Confusion about Causation in Insurance: Solutions for Catastrophic Losses*, 61 Ala. L Rev. 957, footnote 67, the California Supreme Court later restricted the liberal concurring causation approach to cases involving only liability insurance in *Garvey vs. State Farm Fire and Casualty Company*, 48 Cal 3d 395, 770 P.2d 704, 714 (Cal. 1989), and instead adopted the dominant or proximate cause approach for property insurance cases involving concurrent causation. *Id.* at footnote 67.

[42] David Rossmiller, *"ACC Clauses at the Heart of Wind vs. Wave Debates"* Claims Journal, March 14, 2013.

[43] The first ACC clause is the short form that states: "we do not cover loss to any property resulting directly or indirectly from any of the following. Such loss or damages excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."[43] 37 A.L.R 6th 657 (2014).
The second ACC clause is referred to as the long form which states: "we do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure proofs of loss regardless of: (a) the cause of the excluded event; or (b) other causes of loss; or (c) whether other causes acted concurrently or any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involved isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these."[43] *Id.* at 37 A.L.R. 6th 657, §3 Standard ACC Clauses

[44] One of the first cases that held the ACC Clause in the insurance policy valid was the District Court of Nevada in 1991 applying Nevada law. *See Shroader vs. State Farm Fire and Cas.*, 770 F.Supp. 558 (D. Nev. 1991). See also, 37 A.L,R. 6th 657 II Validity of ACC Clause §4 ACC Clause held valid (2014).

if property is damaged by both a covered and non-covered peril, then coverage exists for the entire amount of the loss. Finally, the majority approach to concurrent causation is to determine the efficient or dominant proximate cause. This approach validates the insurers' contractual rights and obligations as well as the insured's reasonable expectation of coverage, requiring courts to determine the covered dominant or efficient proximate cause.[45] This approach is in line with the reasonable expectations of the consumer, and does not provide either side with a windfall.[46]

The issue of whether the ACC clause applied in a hurricane case (Hurricane Katrina) was hotly debated by the parties and ultimately decided by the Mississippi Supreme Court in *Corban v. United Services Auto. Assn.*[47]

The Corban home sat several hundred feet from the Mississippi Gulf Coast and was significantly damaged, along with personal property inside after Hurricane Katrina.[48] After receiving the maximum flood coverage afforded by the NFIP, the Corbans were left with over $1 million in uncompensated losses.[49] The lower court concluded that pursuant to the earlier decision of the United States Fifth Circuit Court or Appeals in *Leonard*[50] and *Tuepker*[51], the Corbans could not recover for the wind damage under their homeowner's policy.[52]

After an interlocutory appeal, the Mississippi Supreme Court framed the issues:

(1) Whether the court erred in finding that "storm surge" is included in the "water damage" exclusion.
(2) Whether the court erred in finding that the ACC clause applicable.

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[45] See *Peter Nash Swisher, Why Won't My Homeowners Insurance Cover My Loss?*: Reassessing Property Insurance Concurrent Causation Coverage Disputes, 88 Tul. L. Rev. 515 (page 533-534 Feb 2014).
[46] Peter Swisher argues that the dominant or efficient concurrent causation approach is justified not only because it honors the reasonably expectation of the policyholder's coverage, is supported by the well established insurance rationale of liberally resolving any ambiguity in insurance coverage disputes in favor of the insured (the non-drafting party), and strictly construing such ambiguities against the insurer (the drafting party). *Id.* at 534-535; citing to Robert E. Keeton and Alan Widiss, Insurance Law 553-59 (1988); William Mark Lashner, note, a common law alternative to the doctrine to reasonable expectation in the construction of insurance contracts 57 NYU L Rev. 1175 (1982).
[47] 20 So.3d 601 (Miss. 2009).
[48] *Id.* at 605-06.
[49] *Id*. at 606-07.
[50] *Leonard v. Nationwide Mut. Ins. Co*., 499 F.3d 419 (5th Cir. 2007).
[51] *Tuepker v. State Farm Fire & Cas. Co*., 507 F.3d 346 (5th Cir. 2007).
[52] *Id*. at 607-08.

(3) Which party bears the burden of proof? (a discussion on the court's ruling on this topic can be found under the burden of proof section).

In answering the first issue, the Court concluded that "storm surge" was contained unambiguously within the "water damage" exclusion of the policy.[53]

In deciding whether the lower court erred in finding that ACC clause applicable, the Mississippi Supreme Court reasoned that a hurricane includes a number of weather conditions, elements, and/or forces, at times acting dependently, at other times independently.[54] The Court reasoned in accord with the U.S. District Court for the Southern District of Mississippi, in *Dickinson v. Nationwide Mut. Fire Ins. Co.*,[55]

> It is clear to me that storm surge flooding cannot be a cause (directly or indirectly) of damage that occurs before the storm surge flooding reaches the insured property, i.e. before the excluded peril of flooding occurs….
> Wind damage that precedes the arrival of the storm surge and damage that happens after the storm surge arrives are separate losses from separate causes, and not concurrent causes or sequential causes of the same loss[.]…
> Wind damage that precedes the flood damage happens in a sequence of events, but the wind damage is not caused, directly or indirectly, by storm surge flooding, and the damage done by the wind is therefore not a part of "'the loss"' the ACC refers to. Since the ACC does not apply to this separate wind damage, the wind damage is a covered loss. The insurance benefits that apply to this covered loss vest in the insured at the time the loss occurs.[56]

The *Corban* court did not agree and could not find support for the Fifth Circuit's "Erie-guess" in *Tuepke*r and *Leonard* and stated: "only when facts in a given case establish a truly "'concurrent"' cause, i.e., wind and flood simultaneously converging and operating in conjunction

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[53] *Id*. at 608.
[54] *Id.* at 614 -16. The court examined the term "concurrently" in the ACC clause, defined as 1. occurring at the same time. 2. Operating in Conjunction. 3. Meeting or tending to meet at the same point: Convergent. An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs after a covered loss but cautioning that the same principle applies in reverse, in the case of an excluded loss caused by an excluded peril.
The Court also examined the term "in any sequence" in the ACC clause, to mean "sequentially" defined as, 1. Forming or marked by a sequence, as of notes of or units." Webster's II New College Dictionary at 1008. See also Garner, A Dictionary of Modern Legal Usage at 795 ("'sequential' means 'forming a sequence or consequence.'") and found that the term conflicts with other provisions of the USAA policy thereby creating an ambiguity allowing the provision most favorable to the insured to stand.
[55] 2008 WL 1913957, at 2-4 (S.D. Miss.2008).
[56] *Id*. at 617, citing *Dickinson v. Nationwide Mut. Fire Ins. Co*., 2008 WL 1913957, at 2-4 (S.D. Mass. 2008); see also; *Pitts v. Am. Sec. Life Ins. Co*., 931 F.2d 351, 358 (5th Cir. 1991); *Bland v. Bland*, 629 So.2d 582, 589 (Miss. 1993).

to damage the property, would we find, under Mississippi law, that there is an "'indivisible"' loss which would trigger application of the ACC clause.[57] These are issues of fact for jury determination.[58]

Other states, in addition to Mississippi, have dealt with the same or similar issues resulting from a hurricane loss and the ACC clause in the standard insurance policy.[59] In addition, more recent decisions applying Mississippi law have applied the analysis and conclusion of *Corban*.[60] Other states have interpreted the ACC clause to require an analysis of efficient proximate cause to determine coverage.[61]

In New York, the efficient proximate cause doctrine has been applied for over 100 years, even in situations involving hurricane or high wind[62]. In *The G.R. Booth*, the United States

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[57] *Id*. at 618.
[58] *Id.*
[59] In Florida, a recent opinion from the Second District Court of Appeal held that the efficient proximate cause theory should be applied to a hurricane loss where the insurance policy has an ACC clause, disagreeing with the concurrent causation standard set in place by Florida's Third District Court of Appeals. *American Home Assur., Inc. vs. Sebo*, 2013 WL 5225271 (Fla. 2d DCA 2013). In *Sebo*, in October 2005 Hurricane Wilma struck Naples and caused damage to the Sebo residence. In April 2006, the insurer denied coverage for most of the claimed losses, relying on the ACC clause, and claiming that damage to the home were due to more than one cause of loss including several excluded causes such as defective construction, rain, and wind. Thus the carrier claimed no coverage existed. The *Sebo* court did not accept the insurer's position, and found that causation of the loss should be examined under an efficient proximate cause analysis.
[60] *Hoover vs. United Services Automobile Association*, 125 S.3d 636 (2013), (finding that the *Hoovers* satisfied the burden required by *Corbin and* were entitled to payment unless the insurer could prove that the causes of the losses are excluded by the policies in this case of flood damage. The ultimate allocation of wind and water damage is a question of fact. *Penthouse Owners Association, Inc. vs. Certain Underwriters at Lloyds London*, 612 F. 3d 389-390 (U.S. Ca. 5th 2010).
[61] In North Carolina, Courts have applied the dominant or efficient proximate cause doctrine in cases involving loss from hurricane. *Harrison vs. Insurance Co*., 11 N.C. App. 367, 181 S.E. 2d 253 (1971); *Wood vs. Insurance Company*, 245 N.C. 383, 96 S.E. 2d 28 (1957); and *Miller vs. Insurance Association*, 198 N.C. 572, 152 S.E. 684 (1930). See also *Erie Insurance Exchange vs. Bledsoe*, 141 N.C. App. 331 (N.C. C.A. 2000), (although not a hurricane loss, the court reasoned the homeowner's policy provide coverage for property loss so long as a non-excluded cause is either the sole or the concurrent cause of the injury giving rise to liability; the excluded cause must be the sole cause in order to exclude coverage).
In Georgia, the standard in the presence of an ACC clause is the Efficient Proximate Cause Doctrine. *Burgess v.. Allstate Ins. Co.*, 334 F.Supp. 2d 1351(N.D.Ga. 2003)(in evaluating whether there is coverage for a water leak, the efficient proximate cause doctrine applies when two or more identifiable causes contribute to a single property loss.
[62] *Protzman v. Eagle Fire Co. of New York*, 272 A.D. 319 (1st Dep't 1947); *The G.R. Booth*, 171 U.S. 450 (1898).

Supreme Court examined several early first party insurance cases where the doctrines of proximate cause and efficient proximate cause were relied upon to evaluate coverage.[63]

The Court noted that generally, in determining the cause of loss, the proximate cause to which the loss is attributed is or may be the dominant or efficient cause.[64] More recent cases in New York have also applied the efficient proximate cause doctrine.[65]

While New York courts have upheld certain ACC clauses if the nature of the damage is truly "*concurrent*" within the definition of the clause,[66] it is undisputed that the ACC clause in the context of a hurricane loss has not been analyzed by a Court in New York.

Any discussion of the ACC clause in New York must begin with the public policy that the ACC clause can result in harsh results to policyholders. Assemblyman Phil Goldfeder has introduced a bill in the New York State Assembly, A07455, which provides that "when a flood event not covered under a policy or specifically excluded is a contributing factor in or occurs simultaneously as a covered event or peril, the insurer shall not deny or exclude coverage for the loss or damage caused by the covered event or peril."[67]

In sum, a strong case exists for New York courts to adopt an efficient proximate cause analysis in reviewing Superstorm Sandy cases.

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[63] 171 U.S. 450 (1898) citing *Waters vs. Insurance Company*, 11 PET. 312; *Insurance Company vs. Tweed*, 7 WALL. 44; *Insurance Company vs. Transportation Co.*, 12 WALL. 194; and *Insurance Co. vs. Boon*, 96 US 117.

[64] 31 New York Practice, New York Insurance Law Section 15:4 (213-214 Ed.) citing *Toncin vs. California Insurance Company of San Francisco*, 294 N.Y. 326, 62 N.E.2d 215, 160 A.L.R. 944 (1945).

[65] In *Kosich v. Metro. Prop. & Cas. Ins. Co.*, 214 A.D.2d 992, 626 N.Y.S.2d 618 (1995), the Court concluded that plaintiffs' losses were caused by asbestos contamination, coverage for which was specifically excluded under the policy issued. Here, the contractor's cutting into vinyl flooring with a chain saw set in motion a chain of events that ultimately resulted in plaintiffs' losses. Plaintiffs' losses, however, were proximately caused by asbestos contamination and losses caused by "contamination" are specifically excluded from coverage. *Gravino v. Allstate Ins. Co.*, 73 A.D.3d 1447, 1449, 902 N.Y.S.2d 725, 726 (2010); *Ocean Partners, LLC v. N. River Ins. Co.*, 546 F. Supp. 2d 101, 115 (S.D.N.Y. 2008).

[66] See Doc. Number 273;14-mc:0041-CLP-GBR-RER, *Jahier v. Liberty Mut. Group*, 64 A.D.3d 683, 883 N.Y.S.2d 283 (2d Dept. 2009).

[67] This bill passed the assembly but died in the Senate and was returned to the Assembly's insurance committee on January 22, 2014.

c. Weather Conditions Exclusion

Defendants assert that some insurers' policies contain a "weather conditions" exclusion which may apply to bar coverage for loss caused by water damage. Defendants rely on *Hamm v. Allstate Prop. & Cas. Ins. Co.*,[68] to support their contention that weather conditions that contribute in any way with a cause of event excluded by the policy should additionally be excluded. While this case supports Defendants' argument, other federal courts have not agreed with such blanket exclusion.

Two decisions by judges presiding over Hurricane Katrina cases are instructive regarding the "weather conditions" exclusion and the application of such an exclusion to the cases before this Court will be an issue of fact for the Court.

First, in *Leonard v. Nationwide Mut. Ins. Co.*,[69] an exclusion in a homeowners' insurance policy for loss resulting directly or indirectly from "weather conditions," if another excluded peril contributed to loss, was held to be ambiguous. The policy as a whole provided explicitly for windstorm coverage, and then purported to exclude same coverage if windstorm was viewed as a weather condition, and an excluded peril, such as a flood, occurred at approximately the same time. Therefore, the Court found that coverage would have been illusory for insureds who faced a risk of flood damage.

Second, in *Buente v. Allstate Ins. Co.*,[70] policyholders alleged that damage to their property was caused by "hurricane, wind, rain, and/or storm surge" from Hurricane Katrina. The insurer relied upon a weather condition exclusion. The policy also contained a hurricane deductible endorsement which would require a higher deductible payment by the policyholders in the event of hurricane damage and provided that it would "cover damages sustained in a hurricane because of

[68] 908 F. Supp. 2d 656, 659 (W.D. Pa. 2012).
[69] 438 F. Supp. 2d 684 (S.D. Miss. 2006). *aff'd but criticized*, 499 F.3d 419 (5th Cir. 2007).
[70] 422 F. Supp. 2d 690 (S.D. Miss. 2006).

the effects of rain, hurricane winds, and objects that might be carried by those winds."[71] The Court found "the policy is ambiguous and its weather exclusion therefore unenforceable in the context of losses attributable to wind and rain that occur during a hurricane." [72]

d. Wear & Tear & Faulty Workmanship Exclusions

Plaintiffs' Liaison Counsel refers the Court to the prior discussion on insurance policy interpretation.

G. Damages and Valuation

RCV or ACV:

Most policies of insurance state the insured must set forth an *intention* to rebuild within 180 days as a condition precedent to receiving the replacement value of the insured's property. Under such a policy, a letter sent to the carrier within six months of the loss expressing the insured's intention to seek this recovery should suffice. Policies requiring that the insured *complete* the repair or rebuild within 180 days of receiving the actual cash value payment have been upheld by New York courts.[73] However, New York courts have also taken into consideration that insureds may be financially unable to repair or replace their property without first receiving replacement costs.[74]

The *Zaitchick* court awarded the insureds the full replacement cost of their house and reasoned that "plaintiffs were refused any monies under the insurance contract. Not surprisingly, they were unable to replace their home. This conduct by defendant made it impossible for plaintiffs

[71] *Id*. at 696.
[72] *Id*. at 696.
[73] In *Woodhams v. Allstate Fire and Casualty Company*, 453 Fed.Appx. 108 (2d Cir. 2010), the insureds brought a class action arising out of the insurers' practice of requiring insureds who suffer real property losses due to fire to replace or complete their repairs within a 180-day window to receive reimbursement for the cost of the replacement or repair. The Court held that the policy did not violate New York state law and that the insurer did not breach the terms of the policy. (*See also, Sher v. Allstate Insurance Co.*, 947 F.Supp.2d 370 (S.D.N.Y. 2013).
[74] In *Zaitchick v. American Motorists Ins. Co.*, 554 F.Supp.209 (S.D.N.Y. 1982), *aff'd without opinion*, 742 F.2d 1441 (2d Cir. 1983), *cert. denied*, 464 U.S. 851, 104 S.Ct. 162, 78 L.Ed.2d 148 (1984), there was a dispute over damages arising from a fire that destroyed a house. The insurance policy, allowed for either payment of actual cash value or replacement cost. The policy required the insured to actually replace the house before receiving an award of replacement costs. The court found that the defendant insurance company wrongfully refused to pay the insured the actual cash value of the house, and because of this wrongful denial, the insureds did not have the funds to finance the replacement of their home.

to fulfill the condition precedent, and therefore, excuses plaintiffs from performance of the replacement condition." *Id*. at 217.

Furthermore, New York courts have held that while actual replacement of the property is a condition precedent to collecting replacement proceeds, it is not a condition precedent to valuing a hypothetical replacement cost.[75]

Accordingly, although New York courts have upheld provisions requiring the completion of repairs within 180 days of the loss, they will also look to the insured's specific situation in determining whether it is wrongful for an insurer to refuse to pay the insured more than the actual cash value basis prior to the completion of the repairs.[76]

Off-Set/Credit Under Homeowners Policy for Amount Paid Under Flood

Plaintiffs acknowledge Defendants' briefing on this issue, however each case should be reviewed separately based on the applicable facts and circumstances.

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[75] In *Woodworth v. Erie Ins. Co.*, 743 F.Supp.2d 201 (W.D.N.Y. 2010), the insured brought an action against the insurer for breach of contract after the insureds' home was completely destroyed by an explosion and fire. Specifically, the insureds' breach of contract claim was based on the insurer's failure to engage in an appraisal process with respect to replacement cost. The policy at issue stated "in the event of a loss, [the insurer] will pay [the insureds] either the actual cash value of the property or, if [the insureds] replace or rebuild the property, the cost of replacing or rebuilding." *Id*. The court expressly stated that its previous analysis in stating "the amount of loss, if any, attributable to repairing or replacing the home cannot be determined until the repair or replacement is completed" was incorrect. Instead, the Court followed the analysis set forth by Judge Mukasey in *SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties, LLC*, 445 F.Supp.2d 320, 333 (S.D.N.Y. 2006). This more accurate interpretation of New York law was as follows:

> Although actual replacement is a condition precedent to *collecting* replacement proceeds, it is not a condition precedent to *valuing* hypothetical replacement cost…To the contrary, the facts underlying several cases demonstrate that hypothetical replacement cost is routinely calculated prior to the determination of whether a policyholder is entitled to recover replacement cost. *See, e.g., D.R. Watson Holdings, LLC v. Caliber One Indem. Co.*, 15 A.D.3d 969, 969, 789 N.Y.S.2d 787, 787 (4th Dept. 2005); *Harrington v. Amica Mut. Ins. Co.*, 223 A.D, 222, 224, 645 N.Y.S.2d 221, 222 (4th Dept. 1996); *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 130, 627 N.Y.S.2d 185 at 186 (4th Dep't 1995)… This timing makes sense because the early calculation of hypothetical replacement cost informs the insured of the upper limit on the funds available for rebuilding and can thus influence the insured's decision as to whether and how to rebuild.

The court also noted that "[w]hile rebuilding the house may be a condition precedent to payment, it is not a condition precedent to valuation of the loss." *Woodworth* at 212.

[76] Id. refer to footnotes 36-37.

H. Policy Conditions

Duty to Cooperate

An insured's claim cannot be invalidated or diminished for failure to submit a proof of loss unless the insurer after the loss or damage provides the insured with written notice that it desires a proof of loss to be furnished and provides a suitable blank form or forms. The insured is deemed to have complied with the insurer's proof of loss request if the proof of loss form is provided to the insurer within 60 days after the receipt of the notice and forms, or within any longer period of time specified in the notice by the insurer.[77]

An insurer may, by waiver or estoppel, lose its right to defeat a recovery because of the insured's failure to comply with policy provisions as to notice or proofs of loss.[78]

Whether or not the insured complied with a condition in the insurance policy is determined on a case by cases basis and usually presents a genuine issue of material fact for a jury. [79] [80]

I. Extra Contractual Claims

The CMO ordered Plaintiffs "to voluntarily withdraw [extra-contractual and consequential damages] claims, or if not, submit a letter to the assigned judge, explaining the legal basis for continuing to pursue such claims in any particular action." As such, the CMO anticipates that Plaintiffs in many cases will have extra-contractual or consequential damages claims.

The decisions upon which the CMO's "voluntary withdrawal" direction was based,[81] both anticipate that some Plaintiffs will have extra-contractual or consequential damages claims. Indeed, these decisions dismissed fraudulent misrepresentation and inducement, breach of the implied

[77] N.Y. Ins. Law § 3407 (McKinney)
[78] *Co. v. New York Susquehanna and Western Ry.* Corp., 275 A.D.2d 977, 713 N.Y.S.2d 624 (4th Dep't 2000); S*anta v. Capitol Specialty Ins., Lt*d., 96 A.D.3d 638, 949 N.Y.S.2d 15 (1st Dep't 2012).
[79] *Gulf Ins. Co. v. Stradford*, 873 N.Y.S.2d 713 (2d Dep't 2009) (genuine issues of material fact as to whether an insured violated a policy's cooperation clause precluded summary judgment for an insurer.)
[80] 29 N.Y.Prac., Sum. Jdgmt. & Rel. Term. Motions § 1:16
[81] *Funk v. Allstate Ins. Co.*, No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013) and *Dufficy v. Nationwide Mut. Fire Ins. Co.*, No. 13 CV 6010 (SJF) (AKT) (E.D.N.Y. Dec. 2, 2013).

covenant of good faith and fair dealing, bad faith denial of coverage, and New York General Business Law claims *only because* the specific allegations in those complaints did not allege duties or misconduct outside of the breaches of the express terms of the insurance contract. For these reasons, any conclusion about the potential viability of extra-contractual or consequential damages claims is fact-intensive and specific to each case.

The Equal Access to Justice Act ("EAJA") provides for the award of attorney fees and other expenses to eligible individuals and small entities that are parties to litigation against the government.[82] Certain District Courts have awarded attorney's fees to successful plaintiffs in NFIP cases under EAJA.[83]

In 2009, a Fifth Circuit decision reversed a District Court decision, holding that attorney fees are not recoverable under the EAJA from WYO carriers.[84] Interestingly, the Court confirmed that attorney fees are recoverable from FEMA in regard to direct issue policies.[85] Prior to this ruling, a majority of the Federal District Courts which considered the issue construed the regulation's definition of "federal agency" broadly to include any entity or instrumentality of the Executive Branch, holding that the WYO carrier fell within the regulation's parameters and was subject to EAJA attorney's fee awards.[86] The Second Circuit has not ruled on the issue.

In order to obtain an award of EAJA attorney's fees, the Court must find that the position of the United States is not substantially justified or that there are no special circumstances that would

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[82] 28 U.S.C. § 2412.
[83] *Dwyer v Fidelity National Property and Casualty Insurance Company*, Civ. 06-4793, 2007 WL 2265036 (E.D. La. August 3, 2007); *Berger v USAA General Indemnity Company*, Civ. 06-11151, 2008 WL 1730533 (E.D. La. April 10, 2008); *St. Claude Bywater Properties, L.L.C. v Fid. Nat. Prop. and Casualty Ins. Co.*, 2008 WL 294549 (E.D. La. February 1, 2008); *Grisaffi v Audubon Ins. Co.*, Civ. 06-11179, 2008 WL 695375 (E.D.La. March 13, 2008); *Wolfe v Fidelity National Property and Casualty Insurance Company*, 2008 WL 89643 (E.D.La. January 7, 2008); *American Restaurant, Inc. v Fid. Nat. Prop. and Cas. Ins. Co.*, 2008 WL 2906523 (E.D.La. July 24, 2008); *Zucconi v Lib. Mut. Fire Ins.* Co., 2008 WL 3975604 (E.D. La. August 22, 2008).
[84] *Dwyer v Fid. Nat. Prop. and Cas. Ins. Co.*, 565 F.3d 284, 289 (5th Cir. 2009).
[85] *Id*. at 290.
[86] *Zucconi v Liberty Mutual Fire Insurance Company, supra*.

make an award unjust.[87] In *Pierce v Underwood*,[88] the Supreme Court construed "substantially justified" to mean "justified to a degree that could satisfy a reasonable person". Furthermore, the burden of proving substantial justification falls to the government.[89]

J. Lender Placed Policies

Contrary to the implication in Greisman's Report, plaintiff homeowners who are not the "named insureds" under a lender-placed insurance policy have standing to sue. While New York courts have not been confronted with this precise question, the courts that have looked at this issue often conclude that homeowners are third-party beneficiaries to the lender-placed insurance policies, and as such have standing to sue for its breach.[90] This is especially so where the lender-placed policy names the homeowner as the "borrower" or "mortgagor," or the lender-placed policy covers losses in excess of the mortgagee's loss.[91] The New York-based authority in Greisman's Report does not address this issue.

RESPONSE TO REPORT OF DEFENSE LIAISON COUNSEL FOR NFIP CASES

Issues for Preparation of Mediators as to the Nature of Risk for a WYO Carrier

On pages five through ten of this response (Doc. 269), Defendants have set forth twelve specific common legal issues and defenses in NFIP cases. Plaintiffs will address these legal issues and defenses as follows:

1. Is the suit time barred?

Federal Emergency Management Agency ("FEMA") has extended the proof of loss deadline to eighteen months from the date of Sandy, which is still a month and a half away. Policyholders have more than a month to present a final, comprehensive proof of loss, which should mean that no

[87] 24 U.S.C. § 2412.
[88] 487 U.S. 552, 565 (1988),
[89] *Davidson v Veneman*, 317 F.3d 503, 506 (5th Cir. 2003); *Herron v Bowen*, 788 F.2d 1127,1130 (5th Cir. 1986).
[90] *Fawkes v. Balboa Ins. Co.*, 2012 WL 527168 (M.D.Fla. Feb. 17, 2012) (*reconsideration* denied); *Conyers v. Balboa Ins. Co.*, 935 F. Supp. 2d 1312 (M.D.Fla. 2013); *Lee v. Safeco Ins. Co. of America*, 2008 WL 2622997 (E.D. La. July 2, 2008) (collecting cases after Hurricane Katrina); *Lumpkins v. Balboa Ins. Co.*, 812 F. Supp. 2d 1280 (N.D.Ok. 2011).
[91] *See id.*

suits are yet time-barred. FEMA and the Write-Your Own Program ("WYO") Carriers continue to frame the analysis as a function of FEMA not having the authority to "extend" the statute of limitations. Ultimately, the issue is when the one-year lawsuit deadline begins to run. The deadline to file a lawsuit has already been decided by the Eastern District of Louisiana, squarely rejecting FEMA's position, beginning with the Hurricane Katrina case, *Qader v. FEMA*,[92] which states there can be no "denial" if there is no "claim," and proof of loss is required to present a claim – a fact which FEMA appears to have acknowledged when it granted policyholders eighteen months to "present their claims" by sending one or more proofs of loss during the extended eighteen-month process.[93] The one-year lawsuit deadline is codified in the National Flood Insurance Act ("NFIA") as one year starting from the mailing of notice of "disallowance or partial disallowance" of the "*claim*."[94] Proof of loss in this context serves as a key policyholder protection for presenting a claim. The policy describes proof of loss as "your statement of the amount you are *claiming* under the policy signed and sworn to by you."[95] The proof of loss form asks for the "full cost of repair or replacement" and the "net amount *claimed*."[96] FEMA cannot make up the rules as it goes along and erase the policyholder protections with which it disagrees.

Effectively, FEMA's and the WYO carriers' position is that the deadline to file a lawsuit may expire before its own extended, eighteen-month proof of loss deadline to present a claim.[97] This position is inconsistent with FEMA's proof of loss extension and has caused significant public confusion. It is challenging to explain to anyone in "plain English."[98] Moreover, it has led to many

[92] 543 F. Supp. 2d 558 (E.D. La. 2008).
[93] *Id.*; FEMA Bulletin W-13060a.
[94] 42 U.S.C. § 4072 (emphasis added).
[95] SFIP art. VII(J)(4) (emphasis added).
[96] Proof of Loss, FEMA Form 086-0-9.
[97] (For instance, FEMA states that a homeowner with a "denial" on some aspect of his or her claim dated December 10, 2012 must have both sent proof of loss and filed a lawsuit by one year of that date – nearly five months before the proof of loss deadline for presenting the claim.)
[98] One example is the way that Touro Law Center's Disaster Relief Clinic has attempted to explain these deadlines. Touro Law provides public information, and in some cases representation, for Long Island households. A typical

cases being filed in this Court in order to avoid the added time and expense of being argued as time-barred. Federal Courts in the Eastern District of Louisiana and the Southern District of Texas have already rejected FEMA's and the WYO carriers' position on this very issue. FEMA has made the deliberate decision to resurrect its same argument with this Court and the District Court of New Jersey.

In *Qader*, Judge Feldman of the Eastern District of Louisiana, facing this exact topic in Hurricane Katrina, rejected the same position that FEMA is repeating in this Court.[99] This process is identical for Superstorm Sandy flood insurance claims.

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conversation is along these lines: If you have what FEMA or the insurer would consider to be a "denial" for purposes of starting your lawsuit deadline, and it is dated April 28 or 29, 2013 or earlier, FEMA requires you to submit proof of loss to your flood insurer, and then file a lawsuit in Federal Court, within one year of the date of the denial. What constitutes a "denial" requires reviewing your file. Be sure to fax a request to your insurer to ask for your file including any "denials." Because receiving this paperwork may take a number of weeks, also be sure to review any paperwork that you have and to call or email the claims representative at the insurer in the interim to ask if you have been sent a "denial." Please do not fail to submit proof of loss by the April 28 or 29, 2014 deadline just because you may be doing so more than one year from the date of what the insurer may argue constitutes a "denial." If you do not have a "denial" dated April 28 or 29, 2013 or earlier, your proof of loss must be received by the insurer by April 28 or 29, 2014, depending on your date of loss. You would then have one year from the date of "denial" to file a lawsuit in Federal Court. This "denial" may be based on your proof of loss, or FEMA states that it may be based on its own adjuster's report. For instance, you may have a "denial" letter dated sometime in May 2013. Depending on what the letter says, according to FEMA you would have until April 28 or 29, 2014 for the insurer to receive your proof of loss, but you would also need to file a lawsuit to preserve your rights promptly after sending your proof of loss. (This usually requires more clarification. Discussing what may be required for proof of loss and how to complete the paperwork, and the potential need to file a lawsuit, requires a longer conversation.)

[99] FEMA's submissions overlook the significant modification FEMA made to the NFIP in the aftermath of Hurricane Katrina. Before that storm, policyholders were required to submit a sworn proof of loss to their NFIP insurer within sixty days of a loss to initiate a claim. [SFIP art.] VII(J)(4). On August 31, 2005, however, the Federal Insurance Administration (a component of FEMA), partially waived the proof of loss requirement to expedite the processing and payment of Katrina flood claims. The modification authorized NFIP insurers to inspect, adjust, and make payments on flood claims even before they received a sworn proof of loss. Under this change, if a policyholder agrees with the insurer's determination of benefits, the claim is settled and no proof of loss is required. If a policyholder disagrees with the determination of benefits, then:

> [The] policyholder may submit to the insurer a proof of loss within one year from the date of the loss.... The insurer will then process the policyholder's proof of loss in its normal fashion. If the insurer rejects the proof of loss in whole or in part, the policyholder may file a lawsuit against the insurer within one year of the date of the written denial of all or part of the claim.

In short, under the modification, NFIP insurers can now disallow or partially disallow flood claims even before receiving proof of loss. But in such cases, the mailing of notice of disallowance does not trigger the one-year filing period in [42 U.S.C.] § 4072 or Article VII(R) of the SFIP. The statute permits a claimant to sue within one year "upon the disallowance by the Director of any *such* claim." 42 U.S.C. § 4072 (emphasis added). "Such claim" refers back to "any claims for proved and approved losses." *Id.* The one-year filing period begins to run when FEMA denies a claim that is accompanied by a proof of loss, unless proof of loss is waived. The FEMA modification contemplates and creates a two-step model. The one year time-bar does not begin, as the government claims, one year from the date FEMA denies a claim based on an adjuster's report. Indeed, the government's interpretation of § 4072 would render the

Qader owned two properties that sustained flood damage as a result of Hurricane Katrina, and the cases were assigned to different judges. Summary judgment motions were filed in each case. On February 26, 2008, three days before Judge Feldman's decision, Judge Beer granted FEMA's motion in his case in a brief unpublished opinion.[100] Judge Feldman was aware of Judge Beer's decision when he rendered his decision.[101] Shortly thereafter, when Judge Barbier, who sits in the same district, was presented with the same issue in *Willis v. State Farm Fire and Casualty Company*, Judge Barbier agreed with Judge Feldman's decision.[102]

> ("[B]ecause the August 9, 2006 [denial] letter was not generated as a result of a claim accompanied by a signed Proof of Loss, it failed to serve as the statutory notice of denial described in section 4702 and as a result, failed to trigger the one year time limitation.").

By contrast, the brief line of reasoning in the unpublished *Qader* case disposes of this issue in no more than a few sentences and has been rejected by the same court in an extended published opinion, and it has not yet been followed by any court.

Two cases in addition to *Willis* and outside the Eastern District of Louisiana have also cited the published *Qader* opinion favorably.[103] Although the "default" proof of loss deadline under the policy is sixty (60) days after the loss, FEMA issued an NFIP bulletin within two weeks of

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August 31, 2005 modification to the NFIP meaningless, in that the modified procedures allow policyholders to submit proof of loss as a means of challenging FEMA's initial notice of disallowance or partial disallowance….; 543 F. Supp. 2d at 561-62.

[100] *Qader v. FEMA*, 2008 WL 544225 (E.D. La. Feb. 26, 2008). The extent of the opinion's discussion on this issue is as follows: "The statute is clear that as a federal agency, FEMA's limited waiver of sovereign immunity allowing suit provides that a plaintiff must sue within 1 year after the date of the written denial of all or part of the claim. *See* 42 U.S.C. § 4072; *see also* 44 C.F.R. § 62.22(a). While the statute and the case law provide that a proof of loss is required, the SFIP requires that compliance with all the terms of the policy is a prerequisite to bringing the lawsuit." 2008 WL 544225, at *1.

[101] *Qader*, 543 F. Supp. 2d at 560 n.2.

[102] 2008 WL 793514 (E.D. La. Mar. 24, 2008); *Id.* at *3.

[103] *Altman v. Napolitano*, Case No. 3:10-MC-3004, at *3 (S.D. Tex. Mar. 1, 2013) (Judge Froeschner holding: "After carefully considering the facts, the language of the applicable regulations and the SFIP, the Parties' numerous submissions and arguments, and the relevant case law, I have concluded that Judge Feldman's Opinion in [*Qader*] is correct. The one-year filing period begins to run when FEMA denies a claim that is based upon the insured's sworn proof of loss, not from the date FEMA denies a claim based upon an adjuster's report. Until the insured submits a sworn proof of loss, FEMA has no 'statement of the amount (the insured) is claiming under the policy.'"); *Wolfe v. Am. Bankers Ins. Co. of Fla.*, Case No. 3:10-CV-0578 (S.D. Tex. Mar. 1, 2013) (identical holding by Judge Froeschner).

Superstorm Sandy extending the proof of loss deadline to one year, in order "[t]o allow enough time for [policyholders] to evaluate their losses and have the opportunity to seek additional … payments."[104] This bulletin authorized insurers to issue initial, undisputed payments based on reports by insurance adjusters working on behalf of FEMA or the WYO's cariers, without proof of loss by policyholders.[105] FEMA expected that policyholders would seek additional insurance proceeds.[106] It encouraged policyholders to accept these initial payments without prejudice to their rights to indemnification for covered losses.[107] On October 1, 2013, FEMA issued a second NFIP bulletin further extending the proof of loss deadline to eighteen (18) months.[108] The NFIP bulletin states that a proof of loss must be received by April 29, 2014 if the date of loss is October 29, 2012, or by April 28, 2014 if the date of loss is October 28, 2012.[109] FEMA granted this extension in order to "enable policyholders to timely *present their claims*."[110]

FEMA issued a third bulletin more than a month and a half later, on November 9, 2012, however, indicating that the one-year lawsuit deadline starts from the insurer's written "denial," regardless of its extended proof of loss deadline or whether the "denial" was based on the policyholder's proof of loss.[111] There is a clear inconsistency if the lawsuit deadline expires before the deadline to present the claim through the policy's proof of loss process. This sequence of deadlines is fundamental to the statutory scheme of indemnification for proved and approved losses through a fair and consistent process for presenting and handling claims.[112] Interpreting the lawsuit deadline as trumping the proof of loss deadline is the opposite of how this process is supposed to

[104] FEMA Bulletin W-12092a
[105] *Id.*
[106] FEMA Bulletin W-13027a.
[107] FEMA Bulletin W-12092a; *see, e.g.*, 42 U.S.C. §§ 4002(a)(6), 4019, 4072.
[108] FEMA Bulletin W-13060a.
[109] *Id.*
[110] *Id.* (emphasis added)
[111] FEMA has stated that "[t]he insurer's letter should clearly state it is [a] denial or disallowance and alert the insured of the remedies available, including litigation within 1 year from the date of the letter." FEMA Bulletin W-13069.
[112] *See, e.g.*, 42 U.S.C. §§ 4002(a)(6), 4019, 4072.

work, and it has contributed to the volume of cases continuing to be filed with this Court and the District of New Jersey.

Notably, there does not appear to be a consistent process for issuing a "denial," and such letters often serve to punish policyholders for trying to find out if certain items are covered. There are a wide variety of letters for various forms of asserted coverage from November 2012 to present, many for *de minimis* amounts relative to the overall claim that would be documented through proof of loss. FEMA cannot insist that policyholders submit a proof of loss as a prerequisite to presenting a claim and filing a lawsuit, but then maintain that a proof of loss has no legal significance for presenting the claim on which the lawsuit is based. Ultimately, FEMA is challenging its own proof of loss requirement. FEMA cannot have it both ways. Its position that any of its 84 different WYO insurers can short-circuit this deadline by issuing an ad hoc "denial" – essentially, *denying itself* before the policyholder even presents the claim through a final, comprehensive, and timely proof of loss – goes against the clear authority on this issue and undermines not only the statute and the policy, but also its own proof of loss extension.

2. Were all damages from a prior flood event, for which an NFIP claim was paid, completely repaired?

Plaintiffs acknowledge Defendants' recognition of this issue, however each case should be reviewed separately based on the applicable facts and circumstances.

3. Did Plaintiff comply with all conditions precedent to the filing of the lawsuit before filing suit?

On November 9, 2012, FEMA published a bulletin W-12092a, to respond to their perceived need to "rapidly process claim payments to SFIP policyholders" in response to Sandy. In this bulletin, FEMA granted a conditional and partial waiver of the requirements of Section VII J (4) and (9) (which did not constitute a "blanket waiver" of the Proof of Loss requirement), that extended the deadline for filing a proof of loss from 60 days to one year from the date of loss and

invoked J (9), "permit[ting] the insurer to adjust and pay a loss based on the evaluation of damage in the adjuster's report instead of the signed Proof of Loss or insured-signed adjuster's report."

Then, in the bulletin of October 1, 2013,[113] FEMA further extended the time requirement for filing a proof of loss under SFIP another 6 months in order to give policyholders more time "to submit a complete, signed and sworn to proof of loss (with all documentation to fully support the claim attached)."

When read together, the November 9, 2012 bulletin extends the deadline one year and allows the adjuster's evaluation to serve as the proof of loss, while the October 1, 2013 bulletin seems to only extend the deadline another 6 months in order for claimants to submit a sworn and signed proof of loss with *all* required documentation.

4. FEMA's supporting documentation requirement

Requirements for an adequate "Proof of Loss" are found in 44 C.F.R. Pt. 61, App. A(1), Art. VII(J) which reads as follows:

> J. Requirements in Case of Loss
> In case of a flood loss to insured property, you must:
> 1. Give prompt written notice to us;
> 2. As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that we may examine it;
> 3. Prepare an inventory of damaged property showing the quantity, description, actual cash value, and amount of loss. Attach all bills, receipts, and related documents;
> 4. Within 60 days after the loss, send us a proof of loss, which is your statement of the amount you are claiming under the policy signed and sworn to by you, and which furnishes us with the following information:
> a. The date and time of loss;
> b. A brief explanation of how the loss happened;
> c. Your interest (for example, "owner") and the interest, if any, of others in the damaged property;
> d. Details of any other insurance that may cover the loss;
> e. Changes in title or occupancy of the covered property during the term of the policy;
> f. Specifications of damaged buildings and detailed repair estimates;

[113] FEMA Bulletin W-1306(a)

> g. Names of mortgagees or anyone else having a lien, charge, or claim against the insured property;
> h. Details about who occupied any insured building at the time of loss and for what purpose; and
> i. The inventory of damaged personal property described in J.3. above.
> 5. In completing the proof of loss, you must use your own judgment concerning the amount of loss and justify that amount.
> 6. You must cooperate with the adjuster or representative in the investigation of the claim.
> 7. The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you complete it. However, this is a matter of courtesy only, and you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it.
> 8. We have not authorized the adjuster to approve or disapprove claims or to tell you whether we will approve your claim.
> 9. At our option, we may accept the adjuster's report of the loss instead of your proof of loss. The adjuster's report will include information about your loss and the damages you sustained. You must sign the adjuster's report. At our option, we may require you to swear to the report.
>
> Courts will rigidly apply the proof of loss requirements as set out in the statute, unless

FEMA has waived the proof of loss requirements.

There are several reasons why the carriers' contention that plaintiffs' estimates do not conform to W-13027a is incorrect: 1) The exact language of the bulletin prefaces the list of potential supporting evidence with "such as." Therefore, the list is *not*-all inclusive. Just because a contractor's estimate is listed as acceptable, does not mean that a non-contractor's estimate is *un*acceptable. Thus, the assertion from the carriers that "a valid proof of loss does not include your public adjuster's estimate" is fallacious. 2) The adjusters employed by insurers to evaluate losses are frequently not contractors either, so the carriers' assertion that plaintiffs can only use contractor's estimates is doubly incorrect. 3) A policyholder is not required to rebuild after a loss. So to require a contractor's estimate or receipts for repairs, both of which would only be obtained by a policyholder while rebuilding, is inappropriate. 4) Many of plaintiffs' estimates are generated using Xactimate, the same program, that the insurance companies use to generate their estimates,

using the same pricing/labor tables. If the insurance industry chooses to use Xactimate as a tool to evaluate losses, it should not preclude plaintiffs from using the same tool.

In *Sun Ray Village Owners Assoc. v. Old Dominion Ins. Co.*, [114] the Court discussed what proof must be attached and stated: "The language of the SFIP indicates, however, that at a minimum insureds must identify the components of the insured building which have been damaged ('specifications of damaged buildings') and then estimate the cost of repairing each damaged component ('detailed repair estimates'). These estimates may consist of contractors' estimates or the insured's own valuation of the cost of repair based on its personal knowledge or research. Regardless of the method used to obtain the estimates, however, the insured must also provide some means by which the insurer can verify the amount claimed." (Emphasis added.)[115]

5. Limited Scope of Coverage

In order for FEMA to prevail on its contention that Plaintiffs' damages do not fall within the scope of the SFIP's coverage, it must demonstrate that the undisputed facts reveal one of the following: (1) that Plaintiffs' alleged damages are not a "direct physical loss by or from [a] flood," as defined by the SFIP; or (2) that, even if Plaintiffs' damages are a "direct physical loss by or from [a] flood," such damages are specifically excluded from the coverage of the policy.[116]

In response to Defendants' reference to the earth movement exclusion of the SFIP, Plaintiffs refer the Court to the discussion in paragraph number twelve below.

In *Corban v. United Services Auto. Ass'n* ,[117] the insureds brought an action against their insurer, which had issued a homeowners' insurance policy, asserting contract and tort claims regarding the insurer's failure to pay for majority of property damage that was caused by a hurricane. In this case, the Court addressed the parties' burden of proof. The policy at issue

[114] 2008 WL 846123, at *5 (N.D. Fla. 03/28/08)
[115] *Eichaker v. Fidelity National Prop. and Cas. Ins. Co.*, 2008 WL 2308959 (E.D. La. June 3, 2008).
[116] *Id*. at 504.
[117], 20 So. 3d 601 (Miss. 2009).

provided "all-risk" coverage as to "Coverage A – Dwelling" and "Coverage B – Other Structures," and "named perils" coverage as to "Coverage C – Personal Property." With respect to the "all-risk" coverage of "Coverage A – Dwelling" and "Coverage B – Other Structures," the court held that the insureds had to prove a "direct, physical loss to property described."[118] However, once the insureds have satisfied their burden of proof, the burden then shifts to the insurer to prove, by a preponderance of the evidence, that the causes of the losses (i.e., flood damage) are excluded by the policy. In *Corban*, the court held that "USAA is obliged to indemnify the Corbans for all losses under "Coverage A - Dwelling" and "Coverage B - Other Structures" which USAA cannot establish, by a preponderance of the evidence, to have been *caused or concurrently contributed* to by '[flood] damage.'" [119]

The Eastern District of Louisiana, in *Williams v. State Farm Fire and Cas. Co.*,[120] discussed the law on burden of proof where a homeowner had suffered flood damage:

> With regard to the parties' respective burdens of proof, the Court, in the absence of contrary precedent from the Fifth Circuit regarding Louisiana insurance law, follows the decisions in *Hyatt v. State Farm Ins. Co.*, Civ. Action No. 06-8792, 2008 WL 544182, *2 (E.D.La.2/25/08) (Vance, J.); *Broussard v. State Farm Ins. Co.*, Civ. Action No. 06-8084, 2007 WL 2264535, *3 (E.D.La.8/02/07) (Vance, J.); *Wellmeyer v. Allstate Ins. Co.*, Civ. Action No. 06-1585, 2007 WL 1235042, *3 (E.D.La.4/26/07)(Feldman, J). As stated in *Hyatt*, with insurance provided on a "named peril" basis:
>
> > Plaintiffs' contents coverage is provided on a "named peril" basis, pursuant to which plaintiffs carry the burden of proving that damage to their contents was caused by a named peril. [ ] If plaintiffs are able to prove that a covered peril, such as wind, caused the damage to their personal property, then the burden of showing an exclusion under the policy shifts to the insurers. Should defendants meet their burden of proving the losses were cause by an excluded peril, the burden will shift back to plaintiffs once again to prove the amount of segregable damage caused by the covered peril.[121]

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[118] *Id.*
[119] *Id.*
[120] 2008 WL 4960425 (E.D. La. 2008)
[121] *Williams* at 3, citing *Hyatt*, 2008 WL 544182 at *3 (internal citations omitted).

6. The Loss Settlement Clause

Plaintiffs view Defendants' reference and discussion of FEMA's Loss Settlement Clause as a non-issue in flood insurance cases.

7. Mass produced estimates

Each case should be reviewed separately based on the applicable facts and circumstances. Defendants' generalization of each case for the Plaintiffs' bar is unfair and counterproductive to what this Court has requested from the parties. Plaintiffs' bar respectfully declines the invitation of NFIP's Liaison Counsel to engage in counter-productive finger pointing and baseless generalizations regarding the flood carrier's failure to properly adjust flood claims.

8. Appraisal

Appraisal Under the Standard Flood Insurance Policy[122]

- The appraisal provision is found in the SFIP within Section VII(P) in the Dwelling and General Property Forms and Section VIII (P) in the Residential Condominium Building Association Policy (RCBAP). The text of the appraisal provision states the following:

> If you and we fail to agree on the actual cash value or, if applicable, replacement cost of your damaged property to settle upon the amount of loss, then either may demand an Appraisal of loss. In this event, you and we will each choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the State where the covered property is located. The appraisers will separately state the actual cash value, the replacement cost, and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of actual cash value and loss.
>
> Each party will:
>
> 1. Pay its own appraiser; and
> 2. Bear the other expenses of the Appraisal and umpire equally.

[122] Excerpts from Chapter 12 ("Appraisal Under the Standard Flood Insurance Policy") of *The Law and Procedure of Insurance Appraisal*, by Jonathan J. Wilkofsky (2nd ed. 2003).

- Appraisal is available only when the dispute between the parties involves the price to be paid for an SFIP-covered flood-damaged item.

- Appraisal can be invoked once a timely proof of loss has been filed by the insured and the insurer's response establishes the existence of only appraisable disagreements.

- If any issue has been the subject of a FEMA appeal, that issue is no longer eligible to be appraised.

- Amounts payable under a successful appraisal award should be paid within the 60 days allowed by Section VII (m) of the SFIP.

- The FEMA policy states that once invoked, the appraisers selected "by you and we" must be "competent and impartial".

- One distinguishing element of appraisal under a FEMA flood policy is the fact that it is not binding on the insured, whereas, as a general proposition in other policy contexts other than flood, appraisal is binding.

9. FEMA Waivers

Plaintiffs recognize that FEMA states that they have no more power to waive or not enforce a rule of the WYO Program than do the courts.

10. Exclusion for Post-FIRM elevated buildings

Plaintiffs acknowledge Defendants' briefing on this issue, however each case should be reviewed separately based on the applicable facts and circumstances**.**

11. Basements

Plaintiffs' acknowledge Defendants' briefing on this issue and citation to three cases. However, each case should be reviewed separately based on the applicable facts and circumstances**.**

12. Earth Movement

Section V, Article C, (the Exclusions section), of the NFIP's SFIP Dwelling Form, states:

> We do not insure for loss to property caused directly by earth movement even if the earth movement is caused by flood. Some examples of earth movement that we do not cover are: (1) Earthquake; (2) Landslide; (3) Land Subsidence; (4) Sinkholes; (5) Destabilization or movement of land that results from accumulation

> of water in subsurface land area; or (6) Gradual erosion. ***We do however, pay for losses from mudflow and land subsidence as a result of erosion that are specifically covered under our definition of flood***. (See II.A.1.c. and II.A.2.).[123] (Emphasis Added.)

As indicated above, certain types of flood-related erosion are covered under the SFIP, including, "[c]ollapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood."[124] A plain language reading of the SFIP would allow coverage for flood-related earth movement, including mudflow and land subsidence, so long as the mudflow or land subsidence was caused by flood-related erosion.

As a result of the flooding during Superstorm Sandy, many homeowners are facing damage to their homes including damage to the foundation consisting of cracking in the walls and floors. This coverage is routinely denied by the insurance carriers utilizing the earth movement exclusion in the SFIP.[125]

In *Plywood Property Associates v. National Flood Insurance Program*, following flooding, owners of real property and a warehouse building suffered extensive damage.[126] The property owners submitted Proofs of Loss which were denied by the FEMA.[127] Subsequently, the property owners filed suit and FEMA brought a motion for summary judgment stating Plaintiff's damages were not covered, citing the earth movement exclusion of the SFIP.[128] In reviewing the issues, the Court noted that:

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[123] http://www.fema.gov/media-library-data/20130726-1730-25045-6388/f122dwellingform0809.pdf. (Emphasis added).
[124] *Id.* Flood is defined in Section II.A.1. as: A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (at least one of which is your property) from: (a) Overflow of inland or tidal waters; (b) Unusual and rapid accumulation or runoff of surface waters from any source; (c) Mudflow.
[125] http://www.newsday.com/long-island/flood-insurance-law-hurting-sandy-victims-1.5739065
[126] 928 F.Supp. 500, 502 (D.N.J. 1996).
[127] *Id.*
[128] *Id.* at 503.

> In order for FEMA to prevail on its contention that Plaintiffs' damages do not fall within the scope of the SFIP's coverage, it must demonstrate that the undisputed facts reveal one of the following: (1) that Plaintiffs' alleged damages are not a "direct physical loss by or from [a] flood," as defined by the SFIP; or (2) that, even if Plaintiffs' damages are a "direct physical loss by or from [a] flood," such damages are specifically excluded from the coverage of the policy.[129]
>
> The Plaintiff's further argued, "any damage to their property was caused by earth movement, which, in turn was caused by the flood," and provided an expert who opined that: "due to the recent flooding, water covered the rear area of the building. Thus the earth under the footings was washed away. Therefore, the footing of the foundation walls settled causing the cracking of structure of the perimeter walls."[130]

While this was a matter of first impression of the U.S. District Court for the District of New Jersey, numerous courts have addressed the very same issue, and some courts including the Ninth Circuit have held, "that damages resulting from earth movement not caused by a mudslide or erosion are not covered by the SFIP, even if the earth movement would not have occurred but for the flood."[131]

In contradiction, the Eleventh Circuit in *Quesada v. Director, Federal Emergency Management Agency* accepted a 'but for' causation approach and "held that the SFIP provided coverage for damages caused by earth compaction that 'would not have occurred but for the flooding and did in fact occur simultaneously herewith[,]' whether or not the earth compaction was caused by flood-related erosion or mudslide."[132] In *Quesada*, the "majority found that damages caused by earth movement which was proximately caused by flooding, regardless of whether the earth movement was caused by other than a mudslide or erosion, were covered under the policy."[133]

In *Plywood*, the District Court for the District of New Jersey held, "the damages to Plaintiffs' property are only covered by the SFIP if such damages were caused by earth movement which is the

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[129] *Id.* at 504.
[130] *Id.*
[131] *Id.* at 505 *citing Wagner v. Director, Federal Emergency Management Agency*, 847 F.2d 515, 522 (9th Cir. 1988).
[132] *Plywood* at 505 *citing Quesada v. Director, Federal Emergency Management Agency*, 753 F.2d 1011, 1014 (11th Cir.1985).
[133] *Id.*

result of flood-related erosion, or "erosion as is covered under the peril of flood," or mudslide."[134] Cited by the court, the SFIP further defines flood-related erosion as follows:

> The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding.[135]

Additional questions were raised in *Plywood* concerning whether flood-related erosion was the cause of Plaintiff's damages including, FEMA's attempt to argue that because the Plaintiff's property was not along a shore of body of water that any earth movement could not be the result of flood-related erosion. Ultimately, the Court denied FEMA's motion for summary judgment on coverage issues, and held: "a reasonable fact-finder could conclude that the alleged damage to Plaintiff's property w[ere] the result of flood-related erosion,"[136] based on the following reasoning:

> "the following genuine issues of material fact exist[ed]: (1) whether the alleged damages to Plaintiffs' property were caused by the storm …; (2) whether, in fact, Plaintiffs' property is on the shore of a brook, or other natural body of water; and (3) whether the earth movement which the Plaintiffs contend caused alleged damage to their property was caused by an unusually high level of water in that body of water."[137]

The question of whether the earth movement which caused damage to a policyholder's home or business was flood-related or caused by erosion or mudslide or subsidence is not an easily answered one. Experts will be needed to explain the causes of the damage, and unless wholly unsupported, these questions should go to the fact-finder.

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[134] *Plywood* at 505-06.
[135] *Plywood* at 506 *citing* 44 C.F.R. § 59.1.
[136] *Plywood* at 507.
[137] *Id.* at 506.

RESPONSE TO DEFENDANTS' COMMONLY OCCURRING LEGAL ISSUES IN CLAIMS AGAINST INSURANCE AGENTS

LIABILITY OF BROKERS AND AGENTS FOR UNCOMPENSATED SANDY DAMAGE

1. Generally

New York law with respect to broker liability appears to be in transition. Two recent Court of Appeals decisions signal a more liberal approach in broker negligence for property owners to make claims which resulted in unpaid Superstorm Sandy damage.

In *American Bldg. Supply Corp. v Petrocelli Group, Inc.*,[138] the Court of Appeals held that the plaintiff/policyholder was not barred from making a claim against his broker for failure to procure requested coverage, even when the policyholder was in possession of the policy, and presumably could have read it.[139] Further, "[w]hile it is certainly better practice for an insured to read its policy, an insured should have the right 'to look to the expertise of its broker with respect to insurance matters.'[140] Thus, possession of a policy, along with the presumptive opportunity to review its contents, will not bar a broker negligence claim.

In a more recent holding, *Voss v. Netherlands Ins. Co.*[141], the Court of Appeals once again broadened the scope of potential broker negligence noting that "[w]here a special relationship develops between the broker and client..the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage." The *Voss* court revisited the requisite elements that may give rise to a special relationship, thereby creating an additional duty:

> (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over

[138] 19 N.Y.3d 730, 955 N.Y.S.2d 854 (2012).
[139] *Id.* ("receipt and presumed reading of the policy does not bar an action for negligence against the broker").
[140] *Id.* at 736, quoting *Baseball Off. of Commr. v. Marsh & McLennan*, 295 A.D.2d 73, 82, 742 N.Y.S.2d 40.
[141] 2014 WL 696528 (2014); See also *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 158 (2006); *Murphy v. Kuhn*, 90 N.Y.2d 266, 272-273 (1997).

> an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.[142]

Thus, "where the insured relied on the expertise of the agent, or there was a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on, the agent could be found to have a duty to advise because of a special relationship with the insured."[143]

Finally, an insurance agent or broker may be held liable for negligently failing to procure insurance, with the liability limited to the insurer's responsibility had the policy been in force.[144] Moreover, an insurance agent or broker may also be held liable on a breach of contract theory for failing to discharge the duties imposed by an agreement to obtain insurance.[145] "The fact that an agent acts for a disclosed principal does not relieve the agent of liability for its own negligent acts."[146]

2. In the Flood Context Specifically

Seeking flood coverage does not involve the interpretation or management of an active NFIP, and therefore involves procurement and not policy handling.[147] Thus, no federal question exists. [148] Thus, in *Landry*, plaintiff insureds' motion to remand from federal court to state court was granted.[149] Claims for handling of an NFIP policy, on the other hand, present federal questions because federal funds are implicated in their disposition.[150]

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[142] *Id.*
[143] *South Bay Cardiovascular Associates, P.C. v. SCS Agency, Inc.*, 105 A.D.3d 939, 963 N.Y.S.2d 688 (2d Dep't 2013).
[144] *Gorgone v.Regency Agency, Inc.*, 238 A.D.2d 265, 656 N.Y.S.2d 622 (First Dept., 1997).
[145] *Bedessee Imports, Inc. v. Cook, Hall & Hyde, Inc.*,45 A.D.3d 792, 847 N.Y.S.2d 151 (2d Dep't, 2007).
[146] *Id.*, quoting *American Ref-Fuel Co. v. Resource Recycling*, 281 A.D.2d 574, 722 N.Y.S.2d 571 (2d Dep't,2001).
[147] *Landry v. State Farm Fire & Cas. Co.*, 428 F.Supp.2d 531, 535 (E.D.La. 2006).
[148] *Id.*
[149] *Id.* at 532.
[150] *Id*. at 535.

In *Campo v. Allstate Ins. Co.*,[151] the court held that an insurance agent breached its legal duty to provide the correct information to the insured. In that case, the insurance agent repeatedly represented to the insured that he was fully covered without raising its later position that his policy had expired.[152] The court found that those representations "certainly had a material bearing on his understanding that he had coverage during the crucial time period."[153] According to the court, "[u]nder the circumstances here, [the insurance agent] held itself out to be...an insurer with a policy in place at the time of the...misrepresentations."[154] The court found that the insurance agent had a duty to provide accurate information and not to provide misinformation to the insured, and it breached that duty.[155]

The Northern District of Ohio has found that an insurance agency owes a general duty to its customer to exercise good faith and reasonable diligence in obtaining insurance that its customer requests.[156] If an agent knows that the client is relying upon his expertise, then the agent owes a further duty to exercise reasonable care in advising the client.[157]

In general, an insurance agent who undertakes to procure insurance for another owes an obligation to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he has failed to obtain the requested insurance.[158] The Eastern District of Louisiana has also recognized broader duties than merely procuring insurance on the part of an insurance agent, depending on what service the agent holds himself out as performing and the nature of the specific relationship between agent and client.[159]

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[151] 727 F.Supp.2d 495, 500 (E.D. La. 2010).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Continental Cas. Co. v. Auto Plus Ins. Agency, LLC*, 676 F.Supp.2d 657, 664 (N.D. Ohio 2009).
[157] *Id.*
[158] *Campo*, 727 F.Supp.2d at 499.
[159] *Id.*

In the *City of New York v. General Star Indem. Co.*,[160] the court held there were genuine issues of material fact as to existence of coverage under the insurance policy and timeliness of insurer's disclaimer of coverage precluded summary judgment for insured as to whether insurer was obligated to defend and indemnify insured in underlying action.)[161]

ADDITIONAL LEGAL ISSUES NOT ADDRESSED BY DEFENDANTS' LIAISON COUNSEL

1. Consequential Damages

The following is a typical affirmative defense filed by Defendants in cases pending in this Court: "[B]ecause the SFIP only pays for damages caused directly by or from flood, no consequential damages are allowed."

The CMO ordered Plaintiffs "to voluntarily withdraw [extra-contractual or consequential damages] claims, or if not, submit a letter to the assigned judge, explaining the legal basis for continuing to pursue such claims in any particular action." As such, the CMO anticipates that Plaintiffs in many cases will have extra-contractual or consequential damages claims.

The decisions upon which the CMO's "voluntary withdrawal" direction was based[162], both anticipate that some Plaintiffs will have extra-contractual or consequential damages claims. Indeed, these decisions dismissed fraudulent misrepresentation and inducement, breach of the implied covenant of good faith and fair dealing, bad faith denial of coverage, and New York General Business Law claims *only because* the specific allegations in those complaints did not allege duties or misconduct outside of the breaches of the express terms of the insurance contract. For these reasons, any conclusion about the potential viability of extra-contractual or consequential damages claims is fact-intensive and specific to each case.

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[160] 45 A.D.3d 430, 846 N.Y.S.2d 125 (1st Dep't 2007)
[161] 29 N.Y.Prac., Sum. Jdgmt. & Rel. Term. Motions § 1:16
[162] *Funk v. Allstate Ins. Co.*, No. 13 CV 5933 (JS) (GRB) (E.D.N.Y. Dec. 13, 2013) and *Dufficy v. Nationwide Mut. Fire Ins. Co.*, No. 13 CV 6010 (SJF) (AKT) (E.D.N.Y. Dec. 2, 2013)

2. Coverage for Interior Damages

The following is a typical affirmative defense filed by Defendants in cases pending in this Court: "[I]nterior damages are not covered because there was no physical damage to exterior roofs or walls."

During a hurricane, it is not unusual to have water damage to the interior of a building without any actual physical damage to the exterior of the building. For example, wind driven rain can seep into a home or business around balconies, doors and windows even though there was no physical damage to the building that caused an opening.

Some insurance policies contain water exclusions or limitations of coverage to the interior of the building, or the property contained in the interior of the building, unless a windstorm damages the exterior roof or walls of the structure through which the water enters. This policy limitation/exclusion is often referred to as the wind-driven rain exclusion.

An example of the typical wind-driven rain policy limitation/exclusion is:

> "We will not pay for loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sleet, sand or dust whether driven by windstorm or not, unless the direct force of Hurricane, other Wind, or Hail damages the building or structure causing an opening in the roof or wall and the rain, snow, sleet, sand or dust enters through this opening."

Therefore, the important inquiry is not whether the rain damage occurred but whether that damage was the result of physical damage caused by the wind. Undoubtedly, an expert will be needed to establish proximate cause that the interior damage was caused by the wind and that the resultant interior damages are covered despite the absence of a clear opening.

In *Granchelli v. Travelers Ins. Co.*,[163] the Court set forth a rule that "direct loss is equivalent to proximate cause." The Appellate Division interpreted whether a windstorm was the direct cause of damage to the interior of The Palace Theater in Lockport, New York. The policy insured against

[163] 167 A.D.2d 839 (4th Dept. 1990).

direct loss "by windstorm or hail." In February 1985, the theater sustained water damage to the interior of the property causing approximately $116,000 in damages. A windstorm had blown open a door on the roof, and subzero air entered the building, causing a pipe to freeze and burst, resulting in water damage. The insurer denied coverage on the ground that the theater's loss was not a direct loss caused by the windstorm within the meaning of its policy. Burst water pipes were an excluded cause under the policy.

The trial court granted the insurer's motion for summary judgment and found that, while the windstorm was a link in the chain of events leading up to the loss, it was too remote to be the direct cause of the loss. The appellate court disagreed, holding that direct loss is equivalent to proximate cause. The court concluded that the burst water pipe could have been proximately caused by the windstorm. The court overturned the judgment for the insurer and remanded the case to the trial court.

Plaintiffs are aware that some courts have barred recovery for interior damage where there is not an exterior opening.[164] It is evident that in cases where there is interior damage without an

[164] In *Kennel Delites, Inc. v. T.L.S. NYC Real Estate, LLC*, 49 A.D.3d 302 (1st Dept. 2008), the First Department dismissed a portion of the plaintiff's claim for recovery of the policy for interior property damage and business income losses. The policy in effect barred recovery for interior property damage and business income losses caused by rain. Plaintiff contended that the damage was due to debris and mortar that fell from a neighboring building, which then clogged its roof drain, causing the rainwater to accumulate and later enter the building. The Court held that a reasonable person would conclude that the damage occurred from the rainwater that fell from the previous evening's storm and would look no further for alternate causes. The insured was allowed to continue their claim for roof damage.
In *Fernandes v. Allstate Ins. Co.*, 305 A.D.2d 1065 (4th Dept. 2003), the Appellate Division granted an insurer's motion for a directed verdict. The policy provided coverage for property damage caused by windstorm. The provision excluded any loss caused by "frost, cold weather, ice, snow or sleet, whether wind driven or not… as well as any loss inside a dwelling caused by rain, snow, sleet, unless the wind first damages the roof and the wind forces rain, sleet, snow, through the opening."
The homeowner in the case claimed that her roof collapse on January 17, 1999 was proximately caused by a windstorm that occurred on Labor Day weekend in 1998. Plaintiff's expert was precluded from offering his opinion at trial because it was not based on facts in the record or personally known to the witness. The Court was deliberate to note that "there was simply no valid line of reasoning and permissible inferences" which could possibly lead a trier of fact to see the causal connection.
In *A&B Furniture, Inc. v. Pitrock Realty Corp.*, 16 Misc.3d 1131, 847 N.Y.S.2d 900 (Sup. Ct. Kings Cnty. 2007) the trial court dismissed plaintiff's complaint against the insurer's following a storm that caused a roof to collapse and cause further damage to plaintiff's inventory. Investigation revealed that the collapse occurred from accumulating water on the roof and not from windstorm.

exterior opening, or a question of what caused the exterior damage that allowed for the interior damage, proximate cause will need to be established by expert testimony in a manner that allows for a reasonable inference to be drawn by the trier of fact.

3. Mitigation of Damages

"If any of the Plaintiffs' damages are a result of failure by the Plaintiffs to take reasonable steps to mitigate the loss, those damages are not recoverable."

In *Royal Indemnity Co. v. Grunberg*[165], the insurer brought a declaratory judgment action when the insured sought indemnification for costs to prevent an imminent collapse of the insured dwelling. The policy expressly covered a "collapse" or "partial collapse" due to defective materials or methods of construction and the risk of imminent collapse had been caused by substandard foundation materials and improper site preparation and construction. The Court, in holding that the insured was entitled to recovery, refused to interpret the language of the policy insuring against loss as a result of "collapse" to require that an actual complete collapse must have occurred in order to permit recovery, finding that the mandate to make necessary repairs to protect the property from further damage permitted recovery for the costs of repair where the degree of proven structural impairment was sufficient to constitute a "collapse" in most jurisdictions and created the imminent danger of total collapse. [166]

In *Klein's Moving & Storage, Inc. v. Westport Ins. Corp.,*[167] the insured sustained damages to its warehouse storage facility following a fire and sought the costs of the direct physical damage and the costs of what insured believed to be a "mitigation" of further losses. The policy contained a

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The court held "thus, since it has been demonstrated that the building did not first sustain actual damage to its roof and fall by the direct force of the wind which caused water damage due to water entering the building through openings made by the wind (*see Protzmann v. Eagle Fire Ins. Co. of NY*, 272 App.Div. 319, 320 [1947]) and that wind was not the proximate, efficient, and dominant cause of the water damage (*see Album Realty Corp.*, 80 N.Y.2d at 1010) or the direct cause of the damage to plaintiff's property (compare *Mawardi v. New York Prop. Ins. Underwriting Assn.*, 183 A.D.2d 756, 757 [1992]), plaintiff's claim was not covered under the subject policy issued by Tower (*see Litrenta v. New Hampshire Ins. Co.*, 203 A.D.2d 261, 262 [1994])."

[165] 155 A.D.2d 187, 553 N.Y.S.2d 527 (3d Dep't 1990).

[166] *Royal Indemnity Co.*, 155 A.D.2d at 189-90, 553 N.Y.S.2d at 529.

[167] 196 Misc. 2d 735, 766 N.Y.S.2d 495 (Sup. Ct. Kings Co. 2003).

provision spelling out the insured's duties in the event of a loss, and required the insured to "[t]ake all reasonable steps to protect the Covered Property from further damage and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of this claim".[168] Following the fire, the insured believed it necessary to move and manipulate the remaining contents in the warehouse while the damaged portions of the facility were cleaned, repaired and repainted, which amounted to $30,851.25.[169] The insurance company made payments for the direct physical losses sustained, but refused to pay for any of the costs associated with moving and manipulating the warehouse contents despite the insured's demand.[170] The court determined that the insurance company had no obligation under the policy to compensate the insured for the costs incurred in moving property within its warehouse so as to permit cleaning, painting and restoration of the premises because it did not consider painting and repairs "covered causes of loss", nor did such activities prevent further direct loss to covered property.[171]

4. Depreciation

In a first party property insurance policy, depreciation is the difference between the replacement cost value (RCV) and actual cash value (ACV). The important issue to consider is whether or not depreciation should be applied. If it is determined that depreciation should be applied, then what is the proper rate of depreciation?[172] Depreciation should not apply to intangibles such as labor, depreciation is physical deterioration applied to materials.[173] Several

[168] *Klein's Moving & Storage, Inc.*, 196 Misc. 2d at 736, 766 N.Y.S.2d at 497.
[169] *Id.*
[170] *Id.*
[171] *Klein's Moving & Storage, Inc.*, 196 Misc. 2d at 740, 766 N.Y.S.2d at 500.
[172] Don Wood, P.A. and, John Wood, J.D., "Insurance Recovery After Hurricane Sandy: Correcting the Improper Depreciation of Intangibles Under Property Insurance Policies", NYSBA Tort, Insurance & Compensation Law Section Journal (Winter 2013 Vol.42, No.1. p. 19.
[173] *Id*. at 22.

jurisdictions including New York follow the principle that partial losses requiring repair are never depreciated.[174]

In *Goorland v. New York Property Ins. Underwriting Ass'n*[175] the court examined the depreciation issues cited as follows:

> In *Lazaroff v Northwestern National Insurance Company of Milwaukee, Wis.*, (121 N.Y.S.2d 122 [Sup Ct, New York County], affd 281 App Div 672, 117 N.Y.S.2d 690 [1st Dept 1952]) the court found that the insurer's obligation was to "reimburse the plaintiff for the cost of repairs with materials of the kind and quality damaged without deduction for depreciation." *Id.* at 123, 117 N.Y.S.2d 690; *Eshan Realty Corporation v Stuyvesant Insurance Company* (25 Misc.2d 828, 202 N.Y.S.2d 899, supra)(same); see also *Boskowitz v. Continental Insurance Company*, 175 App Div 18, 161 N.Y.S. 680 (1st Dept 1916)(court called for insurer to pay cost to repair or replace with materials of like kind and quality, and did not require consideration of depreciation).

In other cases, after the Court's reading of the policy, depreciation was properly considered.[176]

5. Overhead and Profit

The following is a typical affirmative defense filed by Defendants in cases pending in this Court:

> "In an abundance of caution, Defendant asserts as an affirmative defense that if the subject property has been sold prior to repairs being made, Plaintiffs are not entitled to overhead and profit. Further, Defendant asserts as an affirmative defense that FEMA Claims Manual regarding overhead and profit and FEMA's Bulletins."

Under New York law, costs to replace damaged buildings or structures include "profit and overhead whenever it is reasonably likely that a general contractor will be needed to repair or replace the damage."[177] In fact, an insurance company must provide coverage for profit and

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[174] *Id.* at 20, citing to *Am. Reliance Ins. Co. v. Perez*, 689 So.2d 290 (Fla. 3d DCA 1997); *Eshan Realty Corp. v. Stuyvesant Insurance Co. of New York*, 202 N.Y.S.2d 899, aff'd, 12 A.D.2d 818, 210 N.Y.S.2d 256 (1961), aff'd, 11 N.Y.2d 707 (1962); *Thomas V. Am. Family Mut. Ins. Co.*, 233 Kan. 775 (1983).
[175] 2011 WL 1456287 (Slip Opinion, Unpublished).
[176] *Id.*; See also *Incardona v Home Indemnity Company, 60* AD2d 749 (4th Dept 1977); *Sebring v. Firemen's Insurance Company of Newark, N.J.*, 227 App Div 103, 237 N.Y.S. 120 (4th Dept 1929).
[177] *Mazzocki v. State Farm Fire &. Corp.*, 766 N.Y.S.2d 719, 722 (App. Div. 2003).

overhead even if the replacement work is never performed, so long as the work is of the type that would require the services of a general contractor.[178] One court, interpreting a policy that covered "the cost to repair or replace property with new materials of like kind and quality," determined that since overhead and profit are "well-recognized types of costs," a policy that does not explicitly exclude such costs will be deemed to cover them.[179] Unless an insurance company can show that it has provided "the only fair construction of the policy" *in question,* the policy will be read in the policyholder's favor to include any reasonable costs that are not explicitly excluded.[180] New York's stance aligns with the vast majority of other jurisdictions that have considered the issue.[181]

The general rule in adjusting insurance claims with respect to overhead and profit is if there are three trades or more required to fix the damaged property, then overhead and profit should be included in the estimate.[182]

In homeowners' insurance policies which provided that until damaged property was actually repaired or replaced, the insurer would pay actual cash value of damage not to exceed replacement cost or policy limits, the policies were reasonably interpreted to include contractor's profit and overhead whenever it was reasonably likely that contractor would be needed to repair or replace damage, regardless of whether repairs or replacement actually occurred.[183]

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[178] *Id.* at 722-23.
[179] *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1305 (11th Cir. 2008).
[180] *Mazzocki supra.*.
[181] See, e.g., *Mills*, 511 F.3d at 1305; *Tritschler v. Allstate Ins. Co*., 144 P.3d 519, 529 (Ariz. Ct. App. 2006); *Salesin v. State Farm Fire &. Co*., 581 N.W.2d 781, 786 (Mich. Ct. App. 1998); *Mee v. Safeco Ins. Co. of Am*., 908 A.2d 344, 350 (Pa. Super. Ct. 2006); *Gilderman v. State Farm Ins. Co*., 649 A.2d 941, 945 (Pa. Super. Ct. 1994).
[182] Markham, "Property Loss Adjusting", AIC 35 2nd Ed., American Institute for CPCU, Insurance Institute of America (p.8-9.): "As a general rule, the contractor's markup is justified if restoring the loss requires three or more trades."
[183] *Mazzocki,* supra.

OBSERVATIONS CONCERNING THE CURRENT CMO

Although the Court recognized in the CMO that there is no universal approach and the parties' interests are being fairly balanced, Defense liaison counsel for the flood carriers insist on seeking ways to change the process.[184]

The flood carriers provide generalizations that will derail the current CMO and efforts to move the cases toward resolution. The insureds/consumers are already at a disadvantage since flood carriers have the power to write the benefit checks in these cases. In addition, the insureds may not have statutory provisions providing for attorney fees in cases involving WYO carriers, although there exists an arguable issue as to attorney fees under the Equal Justice Act in cases involving NFIP/FEMA. It is not in the insureds' interests to engage in costly litigation and delay as is suggested by the flood carriers because, in the end, the insureds may be left with nothing after legal fees and expenses.

According to the flood carriers, the current 800 cases represent only 1% of all the flood cases, since 99% have been resolved. For purposes of this report, if we accept this to be true, then 1% of the cases were not properly adjusted by the flood carriers and, for this reason, it is imperative that the flood carriers engage in alternative dispute resolution as required by the current CMO. The flood carriers' implicit argument that they properly adjusted 100% of the flood claims (taking into account 80,000 claims adjusted), and the pending 1% of claimants are just people who are seeking benefits they have not properly documented or that they are not entitled to incomprehensible.[185]

Plaintiffs' Liaison Counsel's concern is that the flood carriers have unilaterally decided to only go through the motions of complying with the procedures set forth by the CMO.

The flood carriers suggest they cannot negotiate settlements in good faith unless the insured has made all repairs and has receipts to prove it, or unless there is a signed contract with a general

[184] Document 243, p.2, para. 2 case 1:14-mc-0041-CLP-GBR-RER filed 3/07/14.
[185] Document 269, p.11, para. 2 case 1:14-mc-0041-CLP-GBR-RER filed 3/07/14

contractor that has already been hired to perform the work. Yet, the purpose of the flood insurance policy is to compensate flood victims for flood damage, and that is why flood adjusters are dispatched immediately after a storm.

The codes require the following:

> A WYO company issuing flood insurance coverage shall arrange for the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the Program, based upon the terms and conditions of the standard flood insurance policy.[186]
>
> In carrying out its function under this subpart, a *WYO Company shall use its own customary standards*, staff and independent contractor resources, *as it would in the ordinary and necessary conduct of its own business affairs, subject to the Act and regulations prescribed by the Federal Insurance Administration under the Act*.[187]

The flood carriers have taken the word "verifies" out of context and have attempted to somehow impose a definition that is not contained within the regulations and adjustment practices set forth by the National Flood Insurance Program or the Code of Federal Regulations[188] cited by the flood carriers:

> To facilitate the adjustment of flood insurance claims by WYO Companies, the following procedures will be used by WYO Companies.
> (1) Under the terms of the Arrangement set forth at appendix A of this part, *WYO Companies will adjust claims in accordance with general Company standards, guided by NFIP Claims manuals*."[189]
> (2) The WYO Company may use its staff adjusters, independent adjusters, or both. It is important that the Company's Claims Department *verifies* the correctness of the coverage interpretations and reasonableness of the payments recommended by the adjusters.[190]

In fact, the very same code regulations referring to the general Company standards, and NFIP Claims manual [National Flood Insurance Program Adjuster Claims Manual] specifically require

[186] 44 C.F.R. 63-23(d).
[187] 44 C.F.R. Sec. 62.239(e).
[188] 44 C.F.R. Sec. 62.23(i)(2).
[189] 44 C.F.R. Sec. 62.23(i)(1).
[190] 44 C.F.R. Sec. 62.23(i)(2). (Emphasis added).

the flood adjuster to use "*discretion*" and "*flexibility*" in estimating damages, further explained below.[191]

As required in 44 C.F.R. Sec. 62.23(i)(1) above, general company standards allow the insurance adjuster and insured or public adjuster to sit down at mediation and resolve their differences between the scope and value of the claim. This is in fact the manner in which first party claims are frequently resolved. In addition, the NFIP Claims Manual, pertinent portions of which are attached as Exhibit A, provide for the flood adjuster to prepare an estimate as follows:

> E. Repair Estimating and Pricing Guidelines- *We expect that the repair estimate be based on current local prices and that the pricing guidelines are used with discretion and flexibility*.[192]
>
> Repair estimates and corresponding settlements are always to be adjusted in accordance with special conditions of the Standard Flood Insurance Policy[?](e.g., the requirement for repair or replacement with material of like kind and quality), local pricing, and actual costs as provided by the policyholder and the selected contractor.[193]

The flood adjuster is free to rely on any one of these items and only where the insured has actually hired a contractor or made the repairs is the estimate from the contractor relevant.

> F. Unit Cost and File Documentation- We expect unit costs to include all materials, sales tax, disposable equipment, rented equipment, and any overhead and profit of the contractor…. These are standard practices within the insurance industry. When actual documented costs for items of like kind and quality, such as repair invoices from service contractors, receipts, and replacement quotes differ from this standard practice, reasonable additional costs should be considered."[194]

In fact, the very same code that flood carriers cite as prohibiting them from sitting down at a mediation to allow the flood adjuster and insured or public adjuster to settle their differences is the

[191] National Flood Insurance Program, Adjuster Claims Manual, Exh. 14, Wind vs. Water-Adjusting Process (W-10017), B-41, pages 1-9 revised in June 2010.
[192] Id. (Emphasis added).
[193] Id. at. P. 8-9.
[194] Id. at p. 9.

same one that actually instructs the flood adjusters to *use discretion and be flexible, and apply standard practices in the insurance industry*.[195]

CONCLUSION

Plaintiff Liaison Counsel will encourage all policyholder attorneys to follow the current CMO so as to promote more efficient and expedient resolution of the pending flood and wind claims. Although there are some concerns, based on flood liaison counsel's submission, we look forward to working together to assist all parties in jointly resolving these claims.

Respectfully Submitted,

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[195] Id. at p. 8-9.

EXHIBIT A

U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

FEMA

W-10017

March 4, 2010

MEMORANDUM FOR: Write Your Own (WYO) Company Principal Coordinators, the National Flood Insurance Program (NFIP) Servicing Agent, and Selected Adjusting Firms

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program
DHS/FEMA-MT-RN-CA

SUBJECT: Wind vs. Water – Adjusting Practice

In previous bulletins, FEMA discussed wind and flood investigative tips and a logical approach in addressing claims that involve both perils. Attached for your review are previous bulletins that address adjusting practices: WYO Bulletins W-08008, dated February 25, 2008 "Wind/Water Investigative Tips"; and W-08070, dated September 25, 2008 "Flood Insurance Claims Guidance."

The following will not ask adjusters to do much more than they currently do when approaching any flood or wind damaged building. There is no requirement for the flood adjuster to estimate the wind damage.

When adjusting wind/water losses the, adjuster should use established and proven investigative methods when documenting flood and wind damage to buildings and/or contents occurring during hurricane or storm events. "Wind/Water Investigative Tips" can be helpful.

The adjuster is asked to record the process they always use when approaching a wind/water claim. In addition to looking for signs of flood damage and/or a General Condition of Flood and documenting the exterior water line, the adjusters should note any exterior wind damage, such as missing shingles, turbine or fascia damage. The adjuster should also photograph this damage and mention what was observed in the narrative report.

Remember, **the Standard Flood Insurance Policy (SFIP) Pays Only For Direct Physical Loss by or From Flood to Insured Property.** Once inside the building, the adjuster should always document the flood water line. Damage below this line is typically flood damage (exceptions like wicking should be noted in the narrative report). Damage above the flood water line is typically wind damage, such as water-stained ceilings or water damage at broken windows or exterior doors. This damage should also be photographed and mentioned in the narrative report.

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 1 of 9

Auditors of the NFIP have asked that adjusters explain their rationale or the adjuster's basis for identifying the separation of wind and water damage. Typically, this rationale is as simple as:

- Shingles damaged at the right front of roof;
- Interior water line three feet;
- Damage below the water line is caused by flood;
- Damage above the water line is caused by wind to include water-stained ceiling in the area of roof damage.

As this separation becomes narrower, the basis may be more detailed, but it should be kept concise. When the cause of damage overlaps, the basis must be clearly explained in the narrative report; otherwise, the adjuster may approach the insurer to request an engineer to provide a professional opinion on causation.

As always, any known unusual circumstances should be recorded in the narrative report.

Again, we ask for your full support. Any questions or comments regarding the wind verse water adjusting practices should be directed to James A. Sadler, CPCU, AIC, Director of Claims, National Flood Insurance Program. Mr. Sadler may be reached by email at James.Sadler@dhs.gov.

cc: Vendors, IBHS, FIPNC, Government Technical Representative

Suggested Routing: Claims, Training, Underwriting, Adjusting Firms, Independent Flood Adjusters

Attachments

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 2 of 9

U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

FEMA

W-08008

February 25, 2008

MEMORANDUM TO: Write Your Own (WYO) Company Principal Coordinators
National Flood Insurance Program (NFIP) Servicing Agent

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program

SUBJECT: *Wind/Water Investigative Tips*

Hurricanes and other severe storms may result in damage caused by both wind and flood. When handling these claims, adjusters should use proven investigative methods such as those provided in the attached document, which was adapted from the 1998 NFIP pamphlet, *Wind/Water Investigative Tips*. These tips will be included in the revised *NFIP Claims Adjuster Manual*, when published.

Attachment

cc: Vendors, IBHS, Government Technical Representative

Suggested Distribution: Claims Department, Adjusting Firms, Independent Adjusters, and Staff Adjusters Handling NFIP Claims

www.fema.gov

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 3 of 9

Wind/Water Investigative Tips

Important Things to Do When Investigating a Claim

- Research local newspapers and/or check with the local weather service, the U.S. Weather Bureau, or other agencies to determine the specific data relative to the storm.

- When damage is caused by a hurricane, tropical storm, nor'easter, or other event that may cause both wind and flood damage, determine and record the following (*check and record the timing and duration for each*):

Data Element	Measurement	Timing	Duration
Highest Wind Speed	_____	_____	_____
Barometric Pressure	_____	_____	_____
Amount of Rainfall	_____	_____	_____
Tidal Heights	_____	_____	_____
Storm Surge	_____	_____	_____
Wave Heights	_____	_____	_____

- Record the distance and direction of the insured risk relative to the eye of the storm. Remember that the waves are higher to the right of the storm's path.

- Research and record site conditions:

  - Original ground elevation
  - Distance from body of water
  - After-storm ground elevation or other indications of scour
  - Amount and type of storm debris

- Canvas the neighborhood for eye-witnesses and take their recorded or signed statements. Be certain to identify where each witness was at the time of the storm, the amounts or descriptions of wind and flood each witness saw, and the time of day that each saw it. Record in the claims files only what each witness actually says—not hearsay or your opinion.

- Check for and photograph the debris line. Measure and record how many feet the debris line is from the shoreline and from the insured risk. Be sure to describe the topography in detail.

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 4 of 9

- Check for and photograph houses and objects adjacent to the insured risk. If damage appears to be different from that of the insured risk, determine why and record the reason in the claim files. Usually, the damage is different for one of two reasons:

  - Different cause of damage (e.g., a tornado can cut a relatively narrow path, leaving neighboring buildings relatively undamaged).

  - Different building construction and anchoring. Look for connectors or tie-down straps for elevated buildings and enclosures beneath elevated buildings. Check the pilings for evidence of scouring. Photograph the remaining pilings, showing patterns of the leaning pilings. Determine how deep the pilings were installed and measure the distance between pilings.

- Determine and record in the claim file a complete description of the damaged or demolished building, including the type of construction; whether elevated (if elevated with an enclosure, be sure to indicate the type of enclosure – breakaway walls, open lattice work, vents, etc.); number of floors (including basement); roof covering and pitch; windows, carports, etc.; and the building's relative position to the wind. It is also important to include a description of the foundation type (slab, piles, piers, etc.) and damage.

- Photograph (close-up) the remains of connectors or tie-downs. Be sure to describe the size, type, brand, method of installation, and if possible the brand name.

- Make a notation in the initial report where evidence suggests the insured risk was not built as securely as neighboring buildings. The flood insurer or coastal plan, for example, may want to check the local building codes to determine if a building construction violation has occurred and document the claim files, both with copies of the code and the evidence of a violation. The age of the building and the effective dates of the building codes need to be documented.

- Check for and photograph any wind-caused openings in the building and/or missing roof shingles.

- Check for and photograph all possible wind-related water marks or stains visible on both the exterior and interior walls and ceilings of the building.

- Check for and photograph all possible flood-related water marks or stains visible on both the exterior and interior of the building.

- Check for and photograph any water marks visible on nearby trees or fence posts, or other buildings.

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 5 of 9

- Check for and photograph any uprooted trees or trees snapped off at a high level.

- Check for, photograph, and note in the claim files any evidence of severe erosion such as leaning pilings or houses "nosed down" in the ground. Leaning or bent pilings can occur both as a result of flooding and as a result of a building being pushed over by wind forces or blown off its pilings.

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 6 of 9

U.S. Department of Homeland Security
500 C Street SW
Washington, DC 20472

FEMA

W-08070

September 25, 2008

MEMORANDUM FOR: Write Your Own (WYO) Company Principal Coordinators, Vendors, NFIP Servicing Agent, and Selected Adjusting Firms

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program
DHS/FEMA-MT-RN-CA

SUBJECT: Flood Insurance Claims Guidance

In areas affected by **both** Hurricane Gustav and Hurricane Ike, FEMA has learned of many instances in which a claim caused by Gustav could not be inspected prior to the arrival of Ike. Therefore, the following claims guidance is issued for the benefit of policyholders, claim adjusters, WYO companies, and the NFIP Servicing Agent.

1. **Policyholders:**

   Should report all flood damage from either or both of the hurricanes to their carrier. Whether or not insured against flood, property owners and renters who need assistance in addition to or other than that provided by the NFIP should be referred to the Disaster Support Resources area of the FEMA Website at http://www.fema.gov/business/nfip/disaster_res.shtm.

2. **Claim Adjusters:**

   A. Must address prior losses, particularly from Hurricanes Katrina and Rita.

   B. Where possible, should separate, itemize, and document the damages from each hurricane.

   C. Must recognize and avoid duplication of coverage and payment for overlapping damage from prior losses or Hurricanes Gustav and Ike.

   D. Should use proven investigative methods to document windstorm damage to building or contents. See WYO Bulletin W-08008, dated February 25, 2008, for a discussion of Wind/Water Investigative Tips.

   In approaching a flood claim that may also include wind damage, an adjuster should continue to recognize any excluded damages. If there is wind and flood damage, the adjuster should comment on the rationale of his/her decision regarding the separation of wind and flood

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 7 of 9

damage. Most of the time this is simple – water line and below is flood; above the waterline is wind. However, when a building has been heavily damaged or destroyed by storm forces, an engineer may be needed to determine causation. Adjusters should photograph the wind damage generally. Photos of wind damage do not have to be exhaustive, unless necessary to document that flood damage is minor or absent.

3. WYO Companies and the NFIP Servicing Agent – Ike and Gustav Overlap:

A. If damages resulting from Hurricane Ike exceed the Hurricane Gustav damages, and the combined damages do not exceed the policy limit of liability, the Hurricane Gustav claim should be closed without payment. All covered damage should be considered under the Hurricane Ike claim.

B. If the covered damage from either event exceeds the policy limit of liability, the adjuster should, to the best of his/her ability, separate and document the damage.

C. The policy limits reinstate after each occurrence.

D. Each claim will be subject to the deductible(s) applicable in the policy.

E. This guidance is applicable to both building and personal property losses.

4. Existing Guidance for Adjusters and Carriers:

A. Coverage of Connected Heating Machinery – Heating machinery, in a building, connected to and servicing the insured building, is covered. Reminder: air conditioning compressors in the open, connected to and servicing the building, are covered.

B. Replacement Cost Loss Settlement – When insured property is eligible for replacement cost loss settlement, there is no longer any requirement to hold back the recoverable depreciation.

C. Water, Moisture, Mildew, or Mold Damage – When this damage occurs in connection with a covered direct physical loss by or from flood, it will be covered unless there is clear evidence of the policyholder's failure to inspect and maintain the insured property, where it was feasible to do so. If such damage is the result of wicking, it is covered.

D. Determination of the Lowest Elevated Floor – Full coverage for Post-FIRM elevated buildings begins at the lowest elevated floor. This is the lowest floor raised above ground, even if the pilings extend beyond it.

E. Repair Estimating and Pricing Guidelines – We expect that the repair estimate be based on current local prices and that the pricing guidelines are used with discretion and flexibility. Repair estimates and corresponding settlements are always to be adjusted in accordance with

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 8 of 9

special conditions of the Standard Flood Insurance Policy[?] (e.g., the requirement for repair or replacement with material of like kind and quality), local pricing, and actual costs as provided by the policyholder and the selected contractor.

F. Unit Cost and File Documentation – We expect unit costs to include all materials, sales tax, disposable equipment, rented equipment, and any overhead of the contractor. Additionally, we expect estimated costs of personal property to include any delivery costs, setup fees, and sales tax. These are standard practices within the insurance industry. When actual documented costs for items of like kind and quality, such as repair invoices from service contractors, receipts, and replacement quotes differ from this standard practice, reasonable additional costs should be considered.

cc: IBHS, FIPNC, Government Technical Representative

Suggested Routing: Claims, Underwriting, Data Processing, Marketing

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 9 of 9