

Basic Advocacy: NFIP Flood Insurance Claims October 2017

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Basic Advocacy: NFIP Flood Insurance Claims

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Basic Advocacy: NFIP Flood Insurance Claims

- After Sandy hit in October 2012, NYLAG mobilized a legal aid disaster relief program to help victims of the storm:
 - Intake hotline and email account
 - On-site assistance in partnership with local community organizations.
 - Mobile Legal Help Center (law office on wheels)
- Assisting clients in NYC and on Long Island:
 - More than 13,000 legal matters
 - More than \$59,000,000 in monetary benefits to clients
- Services are comprehensive:
 - FEMA applications, appeals and recoupments; SBA loans; other disaster relief
 - Landlord-tenant and other housing
 - Homeowner's and flood insurance
 - Mortgage foreclosure prevention
 - Consumer matters
 - CDBG-DR Programs (Build it Back and NY Rising)

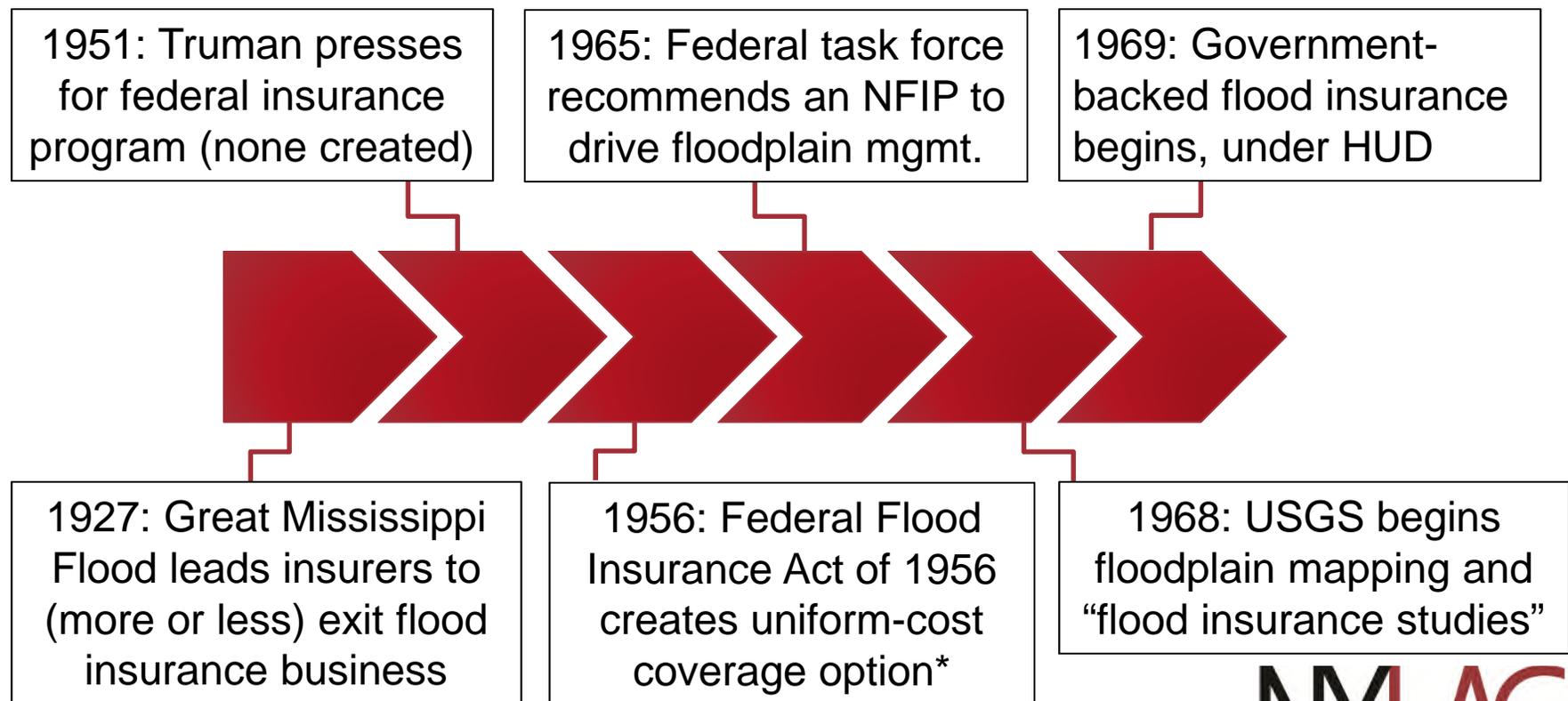


BASICS OF FLOOD INSURANCE COVERAGE IN THE U.S.

A Quick History of the NFIP to Help
Understand Some of Its Idiosyncrasies

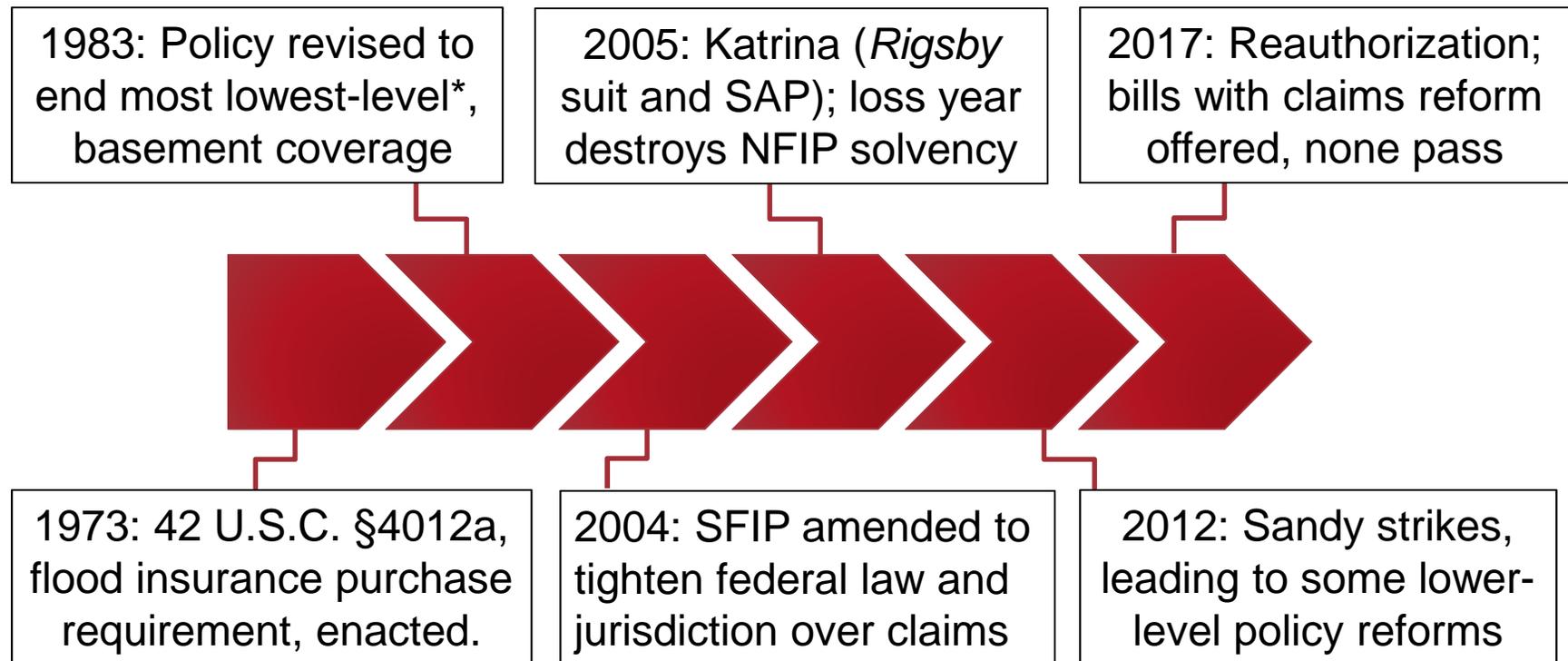
Basics of Flood Insurance Coverage in the U.S.

A 60-Second History of Flood Insurance (for claims purposes)



Basics of Flood Insurance Coverage... cont'd.

A 60-Second History of Flood Insurance . . . (cont'd.)



Basics of Flood Insurance Coverage... cont'd.

- National Flood Insurance Program (NFIP) policies are only available to individuals when their community's government opts in to the program (see 44 CFR § 59.22; Monroe County has special requirements)
- Most flood insurance policies issued in the U.S. are written under the NFIP, a federal program administered by FEMA
 - Corollary: **NOT ALL** policies are NFIP policies. One should always check, through a declaration page usually, if a policy has been issued under the NFIP.
 - This overview **only applies** to NFIP policies. Frequently coverage is the same, but not always. Check the contract!

Basics of Flood Insurance Coverage... cont'd.

- NFIP is part of FEMA
 - Over 99 percent of residential flood insurance policies are NFIP
 - 95 percent of NFIP policies are for homes; 68 percent for SFHAs
 - Policy terms set by federal regulation (three Standard Flood Insurance Policies (SFIPs) for various types of property)
- Policies are mostly written and administered by private insurers (e.g., Travelers, Allstate), called Write Your Own (WYO) insurers
 - NFIP retains a Direct Servicing Agent (DSA), which services some policies, including all Severe Repetitive Loss (SRL, or RL_____ policies)



THE STRUCTURE OF NFIP COVERAGE

The SFIP and SFIP Types, Who Can
Purchase, Insurance Caps, ACV and RCV

The Structure of NFIP Coverage

- As stated, all NFIP policies are federal regulation
 - 44 CFR Part 61, Appendices A(1)-A(3)
- Three types of policies are available for coverage:
 1. Dwelling Form, for 1-4 family homes and personal contents in a non-residence
 2. General Property Form, for business property (detached garage with non-residential units, grain silos, lube shops), some types of commercial stock, and owners of five-plus-unit residential spaces
 3. RCBAP Form, for condominium-owned (not cooperative!) real and personal property where 75% or more of the square footage is for residential use

The Structure of NFIP Coverage, cont'd.

- An SFIP provides coverage for one building per policy.
- The only exception is 10% coverage for a detached garage (at actual cash value). The garage coverage can only be used for parking and storage (not a workshop, rental, etc.); any other use voids coverage
- Total payment for flood damage to the detached garage and the house together (including ICC and loss mitigation measures) cannot exceed the building policy limit
- Policy limits for structural coverage for **residential properties** are \$250,000 and \$500,000 for commercial properties
- Contents coverage (Coverage B) is not included unless requested in a certain amount; no separate policy is required
- Policy limits for **contents** are \$100,000 for residential policies and \$500,000 for commercial properties
- For structural coverage, with the exception of certain items, either replacement cost value (RCV) or actual cash value (ACV) can be paid

The Structure of NFIP Coverage, cont'd.

Dwelling Form

- The SFIP Dwelling Form is what we most commonly deal with in providing lower-income New Yorkers with flood insurance claims advice and representation.
- Insured(s) include an owner's spouse, if a resident of the same household, and any mortgagee or loss payee determined to exist at the time of loss must have its interest noted.
- Make sure that you know who the insured (your client), and who his/her/their/its representative(s) are!
- This should be done by checking the policy declaration page in force at the time of the loss and comparing it with the deed as necessary.

The Structure of NFIP Coverage, cont'd.

Actual Cash Value & Repair Cost Value

- SFIP Loss Settlement is generally about Actual Cash Value (ACV) and Replacement Cost Value (RCV) (see, e.g., Dwelling Form at § VII(V))
- **ACV** is the cost to repair or replace an insured item of property at the time of the loss, less physical depreciation
- The value of physical depreciation is based on the age and condition of the item in relation to its expected life and general depreciation rate
- Personal property, i.e. contents, is always paid at ACV
- **RCV** is the cost to repair or replace an insured item of property at the time of the loss **without** a deduction for physical depreciation
- Available when the insured property is the primary residence and the amount of coverage is equal to 80% or more of the replacement cost of the building e.g., Dwelling Form at § VII(V)(1)(a); this is referred to by NFIP as being “insured to value”
- Special rules apply to mobile homes (§ VII(V)(4))

The Structure of NFIP Coverage, cont'd.

- RCV will cover amounts for the building limit of liability the insured purchased at the *lesser* of 1) the policy limit, 2) repair cost based on “materials of like kind and quality and for like use,” or 3) the amount actually spent
- ACV pays for 1) repair cost above, with a depreciation deduction, or proportional loss settlement, based on the insurance actually purchased and the 80% insured-to-value amount (as determined by NFIP). **Beware proportional loss settlement for homes in good repair!**
- **Keep in mind in both circumstances that this is based on a repair of the same quantity and like kind and quality** (e.g., Dwelling Form at § VII(V)(2)(a)((2)) for RCV and implied in § VII(V)(4)(a)((1)))

The Structure of NFIP Coverage, cont'd.

Further RCV Considerations

- If a dwelling is rebuilt at a new location, the cost is limited to the cost that would've been incurred if the dwelling was rebuilt at old location
- If full repair cost is more than \$1,000 or more than 5 percent of the insurance in force, NFIP will not be liable for any loss under V.2.a. or V.4.a. (2) of the Dwelling Form until repair is complete. This is extremely harsh, but is never really observed (although it could be in litigation) in our experience.

Further ACV Considerations

- In addition to all personal property (Coverage B), these following property is only paid based on ACV (or possibly proportional) loss settlement:
 - Detached garages
 - Appliances, carpets and carpet pads
 - Outdoor equipment (awnings, outdoor antennas/aerials)
 - Any property covered under the policy that is abandoned after a loss and remains as debris (at the insured location)
 - A dwelling that is not the owner's principal residence



THE SCOPE OF NFIP SFIP COVERAGE

Cause Limitations, Item Limitations, and
Supplemental Coverage for Loss Avoidance
and Increased Cost of Compliance

The Scope of NFIP Coverage

Cause Limitations

- “We only pay for direct physical loss by or from flood.” (e.g., SFIP Dwelling Form, § V(A))
- “Direct” = there must be physical changes to the property. Beyond that, it’s a bit nebulous.
- Damage to property caused by “earth movement” is NOT covered, even if the earth movement results from the flooding (§ V(C))
 - This includes: earthquakes, landslides, land subsidence, sinkholes, destabilization, gradual erosion
 - Exceptions: mudflows, land subsidence as a result of erosion from floodwater
- Misc. exclusions: sewer backup; wind; loss of revenue or profits; additional living expenses (ALE) (see § V)

The Scope of NFIP Coverage, cont'd.

Item Limitations (under Structure Coverage (Cov'g A))

- By Space

- Coverage for items in a basement or an enclosure below the lowest elevated floor of an elevated post-FIRM building (in Special flood Hazard Areas (A and V zones)):
 - Basement: level below grade on all four sides. Even if just an inch! SFIP § II(B)(5)
 - Special requirements for mobile homes in SFHAs: § III(A)(6)
 - What is an elevated building? § II(B)(14): “a building that **has no basement** and has its lowest elevated floor raised above ground by foundation walls, shear walls, posts, piers, pilings and columns”
 - Checking an SFHA: Declaration page, FEMA Map Service Center

- By Type

- Note § III(A)(7): items that only can be covered via A.
- Note that 17-item list at § III(A)(8) that is all that can be paid for items in basement or above type enclosure

The Scope of NFIP Coverage, cont'd.

Item Limitations (under Personal Property Coverage)

- Note that certain items are only under coverage (SFIP § III(B)(2)): portable A/C units, carpeting if installed over finished floor and rugs, washers and dryers, freezers and food therein, and portable microwaves and dishwashers
- If there is a basement or lowest-level issue, only freezers, A/C and washers and dryers are covered (§ III(B)(3))
- Antiques: functional value only (§III(B)(6))
- Up to \$2500 for the following specialty items: artwork, photographs, etc.; rare books; autographed items; jewelry; furs; personal property used in any business (§ III(B)(5))
- Walkways and driveways outside of the home, aside from steps needed to access entry points and 16 sf of landing space (§ IV(9))
- Nothing for cash, cash equivalents, “valuable papers,” and similar property (§ IV(7))
- Pools and spas that are not bathroom fixtures are excluded (§ IV(14))

The Scope of NFIP Coverage, cont'd.

Loss-Avoidance Measures Coverage (Coverage C)

- Sandbags, supplies, labor = up to \$1,000
 - This covers reasonable expenses to purchase these items, as well as your labor
- Insured property moved to safety = up to \$1,000
 - Covered for up to 45 days; must be reasonably protected from elements
 - Also must be above ground and outside of the SFHA

The Scope of NFIP Coverage, cont'd.

Increased Cost of Compliance (ICC) Coverage (Cov'g D)

- Provides homeowners up to \$30,000 to implement mitigation measures that will reduce flood risk
- Building must be:
 - Substantially damaged (50% of building's value), or
 - Repetitive loss structure
- Types of mitigation:
 - Elevation, Floodproofing, Relocation, Demolition
- Policyholder may assign funds to community mitigation project
 - FEMA will count as non-Federal matching funds
 - Community required to provide funding to any property owner whose ICC payment counted toward matching funds



NATIONAL FLOOD INSURANCE PROGRAM CLAIMS

What Is a Claim?, How to File an NFIP Claim, How to Fulfill NFIP Policy Requirements, ACV and RCV

National Flood Insurance Program Claims

What is a claim?

- One definition: “a formal request to an insurance company asking for a payment based on the terms of the insurance policy” (from... Investopedia!)
- This is true. But: a claim, meaningfully defined, is a formal request for engagement with the insurer’s representatives according to the terms of that policy and using best practices, and that (hopefully!) will lead to fair settlement according to those same terms
- Thus, a claim practically speaking is the word used to describe a process involving contractually and practically required steps to realize a fair settlement
- Many advocates inexperienced in flood insurance claims were surprised by the stringency of these requirements, and the ways \otherwise in which claims were underpaid

NFIP Claims, cont'd.

Three basic steps to fulfilling policy obligations

Step #1: Tell your insurer that you are claiming a right to payment; in first-party policies such as property insurance, this is known as filing a “notice of loss”

- This means under [44 CFR 61, App'x A\(1\)](#), §J(1):

J. Requirements in Case of Loss

In case of a flood loss to insured property, you must:

1. Give prompt written notice to us;
- To whom or what does the notice go? Does it have to be in writing? How specific must it be (time, extent, cause)?

NFIP Claims, cont'd.

Step #2: Tell your insurer according to the terms of the policy what your loss is: file a 'proof of loss'. Under Dwelling Form §J(4) et seq., this means many things!

“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 . . . and the interest, if any, of others in the . . . 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;**
- g. Names of mortgagees or anyone else having a lien, charge, or claim against the covered 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.**”

NFIP Claims, cont'd.

- Step #2: Most of what is required in §J(4) is submitted by filling out the [FEMA Proof of Loss](#) form (086-0-9)
- As an aside, FEMA/NFIP does not in its other materials (and adjuster inspections) state clearly that:
 - A. This form is only a cover sheet that does not meet all of the Proof of Loss requirements
 - B. This form is only one of a few cover sheets that are required depending on the claim
 1. There is a [Replacement Cost Proof of Loss](#) form for policies that pay RCV
 2. There is an [Increased Cost of Compliance \(ICC\) Proof of Loss](#) form required for that claim

The Practicalities of NFIP Claims (cont.)

The Proof of Loss deadline

- §J(4): [60 days from the date of loss](#)
- This [deadline can be extended for all claimants, as it was for Sandy three times](#) to eventual final deadline of 2 years from date of landfall in New York/New Jersey (Oct. 29, 2012)
- It can also be waived in individual cases if a post-deadline settlement is reached; see for some brief remarks [in this blog post](#)
- If you are non-compliant, this is an invitation for any insurer to deny your claim in full, whether you have sued or not
- There are dozens of district court cases where summary judgment is granted because of non-compliance with the proof of loss requirement

NFIP Claims, cont'd.

Remember that there is more to filing a claim that does not fit into noticing of and proving a loss: see more of § VII(J), or Step 3:

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;
- ...
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
in the investigation of the claim. . . .

NFIP Claims, cont'd.

There is a one year statute of limitation for filing in federal court: see more of § VII(R):

- You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within 1 year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.
- Obviously there is a lot here that we're not covering (e.g., what is a “denial of all or part of the claim”?)



THE PRACTICALITIES OF NFIP CLAIMS

Adjuster Visits, Advance Payment,
Requesting an Engineer

The Practicalities of NFIP Claims, cont'd.

Adjuster visits

- Adjusters set initial appointments by phone, and frequently communicate by phone (this is why a log is so important, and email follow-ups cementing content of conversation useful), especially after business hours.
- Adjusters' reports are considered only a recommendation for payment, but basically items are never really added on review, just removed. It is therefore extremely important to work with the adjuster and make sure everything is reviewed and documented.
- Problem areas include crawlspaces, the exterior, detached garages.
- Point out unusual, higher-end items.
- Provide access, etc. per policy requirements

The Practicalities of NFIP Claims, cont'd.

Adjuster visits, cont'd.

- Unfortunately, there is conflicting policy on an adjuster's obligations on behalf of the NFIP
- There is a general obligation to have the program adjust all losses with the policyholder/insured/homeowner/ survivor (SFIP § VII(M)(1))
- In our minds this includes the obligation to investigate and document the loss, as explained, among other sources, in the NFIP *Adjuster Claims Manual*, pp. II-3–II-7 (updated Sept. 2, 2013)

The Practicalities of NFIP Claims, cont'd.

Adjuster visits, cont'd.

- In contrast, much adjuster/claims examiner work is a “courtesy to the policyholder”; in the eyes of NFIP; most notably, if an adjuster helps complete a POL, even if that is the basis for payment, that is **NOT** compliance with the POL requirement (§ VII(J)(7))
- And, commonly this courtesy mentality can pervade the adjuster’s work; be prepared for fights on whether or not an adjuster is following NFIP policy, in other words, whether the NFIP is really meeting their obligations under the contract (or alternatively, the CFR)

The Practicalities of NFIP Claims, cont'd.

Advance Payments

- Insureds are entitled to advance payments, in some cases multiple advance payments. These can be critical to getting contractors in the door to mitigate damage, return a home to habitability and reduce temporary housing costs, and avoid extended repair period
- For Irma, refer to WYO Bulletin W-17037 (September 12) for Irma, which references W-17024 and W-17031a
 - Pre-inspection payments up to \$10,000 with notice of loss and proof of repair expenses
 - Pre-inspection payments up to 50% of a contractor's estimate if the estimate is properly itemized and an adjuster has inspected.
 - Policy says this is *ideally* drawn from contents coverage, but that doesn't mean it *has* to be!

The Practicalities of NFIP Claims, cont'd.

Advance Payments, cont'd.

- NFIP has additionally rolled out a Building Valuation Loss Assessment (BVLA) program. It is based on 4-foot or higher losses and pays standard amounts with basic inputs
- (We are not big fans of this, but as a method of advance payment it could be very helpful)
- This was not in place for Sandy and is brand new. Refer to WYO Bulletin W-17037 for more information.

Engineering Requests

- If a homeowner suspects foundation or major structural damage, request in writing to the adjuster and the claims examiner an engineering inspection
- It is highly, highly, highly likely that a homeowner will need to fight to get paid anything on an engineer's report, even when it comes from the insurer's side
- It is highly, highly, highly likely a homeowner will want his/her own engineer



BASIC TIPS ON ADVISING SURVIVORS ABOUT NFIP CLAIMS

Overcoming Common Limitations, Helping with
Documentation, Fostering Communication

Tips on Advising Survivors ... cont'd.

- Important Documents to Request from a Client:
 - Full policy (for NFIP this means declaration page for disaster period; this normally means a full contract, including definitions, conditions, exclusions and endorsements)
 - Insurer's reports (adjuster's report(s), engineer's reports(s))
 - Insurer correspondence, especially settlement determination letters (i.e., denial letters), in full
 - Check stubs
 - Any and all receipts or estimates of repairs
- Basic checks:
 - Is there evidence that 'covered causes' created damage?
 - What is the scope of damage? Covered repairs?
 - What are policy limits? Client's goals?

Tips on Advising Survivors on NFIP Claims

Most NFIP claims founder on three issues:

1. Not filing a compliant proof of loss at all
2. Not providing any estimates and/or invoices (ideally with proof of payment) to back up the particular demand, and having contractors and insurance company representatives who are unwilling to sit down and reach agreement on a claim (scope of work and price of work)
3. For personal property and structural claims alike, not submitting line-by-line estimates describing the item, providing a quantity of the item lost, providing a replacement cost, and providing a best guess of depreciation, with the resulting actual cash value (ACV) of that item

Tips on Advising Survivors ... cont'd.

- For many the primary limitation of the claim process is the POL submission requirement (so it doesn't get done)
 - Helping clients fill out these POL cover forms and assemble documentation can therefore be critical
 - The first step is a master list of repairs or purchases to make
 - Refer to United Policyholder's depreciation guides for structural work and personal property for setting depreciation and resulting ACV; remember that depreciation varies by item, owner
 - One should keep in mind that this is not a substitute for working with adjusters and repair professionals on a claim (indeed, any time that we have simply submitted a POL, we receive basically automatic rejection letters from a WYO), and that denial of a POL does not mean that a new one must be submitted

Tips on Advising Survivors ... cont'd.

- Document, document, document the loss, for the POL and for the actual adjustment work. This means, ideally, individual photos of damaged property, whether personal or structural. If you can preserve evidence, do so.
 - Example: an insured claims she lost a brand-name raincoat because her home's entry closet was flooded. What photos do you need to substantiate the loss?
 - A photo of the raincoat, a photo of the label if significant (and the receipt), and a photo of the item in the closet, with a reference point for the flood line (the line itself if obvious, or a reference point such as a door knob or wall outlet if not).
 - Another example: how do you distinguish between identical sweaters, one wool and one cashmere?
 - A third example: an insured claims she was paid for wood laminate flooring but actually lost oak flooring. What photos do you need?

Tips on Advising Survivors ... cont'd.

Providing Estimates and Receipts

- This means 1) proving what was damaged, and 2) proving the replacement cost (RCV)
- For personal property (or “contents,” or Coverage B) this means fulfilling the explicit § J(3) demand to remain compliant under the policy, but also to prove particular models of items, especially higher-value items
- For structural coverage (“building coverage,” Coverage A) this is explicitly required under §J(4)(f)
- For both, the documentation requirement both for pre-loss purchases and post-loss repair costs dovetails, strongly and unfortunately, with the line-by-line, room-by-room requirement

Tips on Advising Survivors ... cont'd.

The Hidden Line-By-Line NFIP Claim Requirement

- This means the practical rule that NFIP will not pay insureds based on actual costs unless those costs are documented equivalently to claims adjustment software
- For personal property (“contents”) this means along the lines of §J(3): “Prepare an inventory of damaged property showing the quantity, description, [ACV], and amount of loss . . .” This practically is a line-by-line, multiple-column (item, quantity, RCV, sales tax, depreciation, ACV) spreadsheet
- For structural (“building property”), while the policy does not actually say this at § J(4)(f), [this by NFIP policy](#) still means line-by-line, room-by-room estimates and, ideally, invoices

Tips on Advising Survivors ... cont'd.

- Strive for regular communication between all parties involved in the repairs and the claim adjustment
 - Ideally, an adjuster, the insured (or his/her representative) and the repair professionals should work together (by phone, by email, in person) to resolve scope of work and pricing issues
 - Does this happen? Probably, but we basically never saw it, especially when a professional (attorney, public adjuster) was not involved (sometimes an adjuster called a contractor without the insured, and this unsurprisingly did not help him)
 - Are adjusters willing to have these conversations? If you push them to do so and show them that it will be more efficient to do so

Tips on Advising Survivors ... cont'd.

- Be persistent but polite with all parties.
 - Have action plans, *with deadlines*, every time you communicate.
 - Adjusters working after a disaster are generally overloaded; one should not be afraid to follow up right after deadlines to make sure that things get done
 - Otherwise homeowners can wait 6 months for any sort of structural repairs settlement, and years for contents payment
- Be judicious in doing so, but don't be afraid to escalate
- Keep a log of who you spoke, who they work for, when you spoke with them, and the important points in the conversation.
 - If you are communicating at all electronically, organize your communications.

Tips on Advising Survivors ... cont'd.

- Keep policyholder obligations in mind, and help the client abide by them
 - Segregate damaged items for inspection and allow access
 - Comply with other reasonable requests (document multiple requests for the same information, or multiple access requests)
 - Be mindful of insurer's right to appraisal, rebuild, etc.
- Have client's deadlines and policy appeal/litigation deadlines in mind
- Consider retaining own professionals
 - If there is foundation damage, this is usually basically required
 - A good, experienced public adjuster can pay for itself with documentation and advocacy, but like with any contractor, look for experience in flood claims, check references, and oversee



COMMON ISSUES IN RESOLVING (ADJUSTING) NFIP CLAIMS

Problems with Adjuster Reports, Problems with Engineering Reports, Wind vs. Water, Access to Claim Files

Particularities of Sandy NFIP Claims

Four Significant Issues Have Arisen During Sandy NFIP Claims Adjustment

1. Massive discrepancies between New York City metropolitan area pricing (as well, [a post-disaster demand surge for home repair labor and materials](#)).
2. General dissatisfaction with claims adjustment, leading to [the Sandy Claims Review](#).
3. Engineering fraud ([Raimey v. Wright \(In Re Sandy\)](#), [Hi-Rise Engineering indictment](#)).
4. Claims-adjustment class actions ([sales tax against Selective, e.g.](#)).

Common Issues in Resolving NFIP Claims

The Limitations of Adjuster's Reports

- Adjusters all use software programs developed to write itemized estimates on repair of structures. Xactimate and Simsol are the two most common.
- These estimating programs price various building work based on national data which is continuously updated with material and labor costs in different areas of the country.
- These programs produce reports that break down repairs into line items. In the right hands, this can produce fine-grained repair reports that accurately describe a particular home's needs
- In the wrong hands, especially when those on the policyholder side are not experienced in this area or don't have the resources to match reports, this can mean tremendous (30% to 70%) underpayment

Common Issues in Resolving... Claims, cont'd.

The Limitations of Adjuster's Reports, cont'd.

- Discrepancies arise between contractors' price for repairs and an insurance adjusters estimate for many reasons:
 1. The adjuster may have missed damaged during the inspection process or damage was hidden from view, and which may require a second inspection (a second inspection is highly unusual).
 2. The adjuster may have used the wrong quality of material in a line item (i.e., recommended a vinyl countertop when the damaged item was tile, or put a price in for the removal of dry insulation, when the insulation was soaked with Category 3 water and the removal price is roughly double).
 3. The adjuster may not understand the software fully, and only authorize a portion of the line items that a complete repair would actually require (see, e.g., Jeffery Major report).
 4. Adjusters routinely forget the addition of up to 20% (it basically is always 20% or 0%) general contractor overhead and profit (O&P) and sales tax per state law

Common Issues in Resolving... Claims, cont'd.

Concerns with Engineering Reports

- **Fraud:** engineering companies altered/falsified reports to minimize structural damage and prevent HOs from receiving full insurance payments
 - Draft reports: not present in Sandy claim files; FEMA's FOIA office asserts it doesn't have access to them and cannot obtain them from third-party WYOs and engineering firms
 - Current flood survivors **do** have access ([Updated policy here](#))
- **Homeowner's (Insured's) Engineering Reports**
 - NFIP rarely meaningfully considers any reports, but especially neglects those that fail to match the WYOs' in length and depth
 - MUST show causes of damage clearly and unequivocally, e.g., for flood, hydrodynamic forces, hydrostatic forces, buoyancy, etc.
 - SHOULD be written in similar format and include pictures
 - If there is wind and flood damage, the report MUST attribute percentages to both and should explain the methodology used to arrive at this conclusion

Common Issues in Resolving... Claims, cont'd.

Wind Damage v. Flood (Water) Damage

- Water damage is covered under the SFIP; wind damage is not
- Documenting flood line is really important – things above the line typically aren't covered without a fight, whereas things impacted by the line (outlets, windows) will be covered absent the other issues
 - (Adjusters are taught in the *Adjusters Claims Manual* (p. IX-1) that “in those instances where wind is coupled with the flood loss, the adjuster typically has little difficulty . . . in separating the flood from the wind damage. A flood leaves a clearly visible watermark and/or debris line on the exterior and in the interior of buildings. Damage at and below that watermark is attributable to flood. Damage above that watermark is attributable to wind, in this example.”)
- There are many exceptions to this general rule.
 - Wicking: “When [water, moisture, mildew, or mold 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 [it]. . . If such damage is the result of wicking, it is covered.” (FEMA, WYO Memorandum W-13009, Water, Moisture, Mildew, or Mold Damage, Feb. 15, 2013.)

Common Issues in Resolving... Claims, cont'd.

Getting Access to Claim Files

- Is there a general right to a claim file, as under state laws? No! There is only the Privacy Act, 5 USC § 552a
- You can request the claim file from the carrier, but as the Privacy Act applies to the federal government, there is no right. In general, you should also not expect that you'll find great information, unless you are looking for basics about POL compliance, etc. (no notes)
- We have had big problems with obtaining files under the Privacy Act. NFIP's general position is that even though third-party contractors are working on behalf of the NFIP and there is a section of the Privacy Act that at least arguably makes their work 'discoverable,' if it does not have in its own systems these documents, it cannot or will not compel production from the WYOs
- However, for those without access to for-profit experts that can reconstruct claims from scratch to provide the necessary documentation, these files can be very useful in figuring out what went wrong a claim, and what a fair settlement would be

Common Issues in Resolving... Claims, cont'd.

Getting Access to Claim Files, cont'd.

- Once you have access to the 'complete' NFIP claim file, it's not easy to wade through
 - Usually takes an extremely long time to receive complete file in the first place
 - Not ever clear if you've received everything, despite FEMA's assurances
 - Email correspondence and other data internal to adjuster's firm?
 - Email correspondence, etc., between adjuster and insurer?
 - Email correspondence and other data internal to insurer's firm?
 - Policyholder communication with adjusters and insurers?
 - No coherent order to documents
 - Redactions of all names throughout document, except the policyholder and government employees. This includes engineers, adjusters, examiners, and you.

Common Issues in Resolving... Claims, cont'd.

Sales Tax and Overhead and Profit (O&P)

- Sales tax is a tremendous problem. It appears to be almost always incorrectly calculated for our claims
 - This of course varies by state law. In New York, sales tax can be 8.875%. For most people, who are not buying their own supplies and using their own labor but hiring contractors, NYS policy is to charge full tax on “repairs, maintenance or installation[s]” to real property
 - There apparently are big disagreements about when repairs are repairs, and when they are capital improvements, which can be taxes at a lower rate
 - The only way around this is to either purchase the software and double-check the calculations, or to access for screenshots to show the tax is being appropriately added
- Overhead and Profit: on estimates, if a GC is expected to be hired, or if a GC is actually hired as demonstrated by invoices/contracts, 20% O&P at minimum should be applied for any adjustment-software pricing
 - Residential supervision can also be provided at 10%. Please see the old and new policy on the next slides

Common Issues in Resolving... Claims, cont'd.

Sales Tax and Overhead and Profit (O&P), cont'd

- Older policy from FEMA NFIP (*Adjuster Claims Manual*) stated:

VII. Basic Adjustment Issues

H. OVERHEAD AND PROFIT

The overhead and profit percentage must be applied to the depreciation total and reflected in the ACV loss figure. Overhead and profit is not applied to the following items:

- Carpeting
- Insured's own labor
- Outside service charges such as plumber, electrician, or appliance service calls
- Repairs made by the insured (However, an allowance can be made for the insured's time and expense in purchasing materials, not to exceed 10 percent.)

Overhead and profit is warranted only if a general contractor has been hired to make repairs. The adjuster must document the general contractor's involvement. The NFIP Servicing Agent or the WYO company has the option of withholding the overhead and profit until the repairs are completed or until a contract is signed.

Common Issues in Resolving... Claims, cont'd.

Sales Tax and Overhead and Profit (O&P)

- This section was extensively revised in April 2010 to read:

N. OVERHEAD AND PROFIT

An allowance for General Contractor Overhead and Profit may be added to the adjuster's building estimate when:

The nature of the work requires the supervision and scheduling of unrelated trades and;

The complexity of the work to be performed supports the charge.

In the case of No. 2 above, the complexity that warrants the charge must always be fully explained and documented when unrelated trades are not supervised. The typical charge is 10 percent of the gross building estimate added as Overhead, and 10 percent of the same gross building estimate added as Profit. In extraordinary circumstances, additional charges may be allowed when fully explained.



REFERENCES AND RESOURCES FOR FURTHER UNDERSTANDING

- NFIP Resources:
 - NFIP, *Adjuster Claims Manual* (6th ed.; revised 2013)
 - NFIP, *Flood Insurance Manual* (revised October 2017), especially Section 15 (claims), Section 7 (Lowest Floor Guide, for determining what NFIP considers an elevated building) Section 3 (general rules, including more on what can be covered) and Section 23 (definitions)
 - NFIP, Write-Your-Own memoranda, available via NFIP iService at https://nfip-iservice.com/nfip_docs.html
- Some resources from the plaintiff's (policyholder's) bar:
 - Jeffery S. Major (public adjuster, Canopy Claims), [Major Differences Report for: NFIP Flood Claims](#) (June 2015)
 - United Policyholders' [Claims Guidance Library: Flood](#), especially the "NFIP Proof of Loss, Damage Estimates and Supplemental Claims," "Samples of Damage and Proof of Loss Documentation," and "The Scoop on 'Scope' (of loss)" pages
 - Merlin Law Group, [Property Insurance Coverage Law Blog](#) (for some pointers on analyzing specific issues)
 - [NYLAG fact sheets on various issues related to NFIP claims and insurance](#)

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