




FEMA

W-13069

November 21, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the National Flood Insurance Program (NFIP) Direct Servicing Agent

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

SUBJECT: **Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R, Suit Against Us)**

Questions have been presented to FEMA concerning how the granting of the extension of the Proof of Loss deadline for National Flood Insurance Program (NFIP) policyholders damaged by Meteorological Event Sandy (ME Sandy) established by FEMA by regulation in the Standard Flood Insurance Policy (SFIP) interplays with the 1-year statute of limitations for an insured to bring a lawsuit established by Congress in 42 U.S.C. § 4072. FEMA is providing this Bulletin as an explanation to insurers of how the extended Proof of Loss deadline interacts with the 1-year statute of limitations established by statute. A brief review of the factual background is provided to put FEMA's guidance in context.

The SFIP is itself a Federal regulation promulgated by FEMA, which has three forms. The Dwelling form is found at 44 C.F.R. § 61, Appendix A(1); the General Property form is found in Appendix A(2); and the Residential Condominium Building Association Policy (RCBAP) form is found in Appendix A(3). In these regulations, FEMA established the 60-day Proof of Loss deadline. See Section VII(J) of the Dwelling and General Property forms and Section VIII(J) of the RCBAP form. The Associate Administrator of the Federal Insurance and Mitigation Administration (FIMA, a division of FEMA) has the authority to grant waivers of and extend the Proof of Loss deadline pursuant to 44 C.F.R. § 61.13(d). See also 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(D), and Appendix A(3), Section VIII(D).

Congress, in enacting the National Flood Insurance Act of 1968, as amended, (42 U.S.C. § 4001, *et seq.*) enacted a 1-year statute of limitations for an NFIP policyholder to bring a lawsuit after denial/disallowance or the partial denial/disallowance of the policyholder's claim. See 42 U.S.C. §

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4072. This 1-year statute of limitations was incorporated into the SFIP by FEMA. See 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(R), and Appendix A(3), Section VIII(R).

On November 12, 2012, FEMA issued Bulletin w-12092. Bulletin w-12092 did several things, but two items are primarily relevant for this Bulletin.

First, Bulletin w-12092 granted a limited waiver of the Proof of Loss requirement to allow payment of an undisputed amount based solely on an adjuster's report and insurer's approval without the SFIP-required Proof of Loss. In the event the insured disagreed with the payment received, the policyholder was (and is) required to send a Proof of Loss meeting the requirements of the SFIP with documentation supporting the additional amounts sought.

Second, Bulletin w-12092 waived the 60-day deadline to submit the SFIP-required Proof of Loss and granted a 1-year extension from the date of loss to send the Proof of Loss for the additional dollar amount(s) sought to the insurer. The insurer then evaluates the Proof of Loss and documentation and may pay the entire amount, partially pay and partially disallow/deny the amount, or entirely disallow/deny the amount sought for the items submitted in the Proof of Loss. The denial or disallowance, in whole or in part, must be in writing from the insurer. The insurer's letter should clearly state it is denial or disallowance and alert the insured of the remedies available, including litigation within 1 year from the date of the letter.

More recently, in FEMA Bulletin w-13060a, FEMA issued an additional extension of the Proof of Loss deadline, allowing an additional 6 months for an insured to submit the SFIP-required Proof of Loss with supporting documentation for any additional amounts sought. In total, FEMA extended the Proof of Loss deadline from 60 days to 1 ½ years for ME Sandy. This is an unprecedented action by FEMA that reflects FEMA's commitment to facilitating the ability of individuals insured by the NFIP to seek payment.

Unlike the SFIP Proof of Loss deadline, which is a regulation created by FEMA, FEMA cannot extend the time limit for NFIP-insureds to bring a lawsuit. The applicable time limit to file a lawsuit was set by statute, not FEMA. Although FEMA has the administrative authority to extend the Proof of Loss deadline it established by regulation, FEMA lacks the authority to extend the time limit to file a lawsuit established by statute. This statute of limitations has never been extended.

It is important to understand that the Proof of Loss is not the claim. The claim is the assertion by the insured that they are entitled to be paid for a covered loss under their SFIP (i.e., the demand for money). An NFIP policyholder whose insured property is damaged by an event such as ME Sandy only has one claim arising from that event, regardless of the number of Proofs of Loss that the insured may submit in support of that claim.

Even in the instance of an Increased Cost of Compliance (ICC) claim under Coverage D of the SFIP (which is not an indemnity claim because the coverage is not triggered by the physical loss from the flood but by a determination by the NFIP community that the building has been substantially damaged and must be brought up to the community's current floodplain management guidelines),

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there is only one claim that arises from that substantial damage determination regardless of the number of Proofs of Loss submitted by the insured.

The SFIP sets forth the process that the insured has to follow in supporting his or her claim in the General Conditions section of each form of the SFIP (which is Section VII for the Dwelling and General Property SFIP forms and Section VIII for the Residential Condominium Building Association Policy or “RCBAP” SFIP form). For example, Section VII(J)(1) of the SFIP requires prompt written notice of the loss. Also, Section VII(J)(4) and its subparts set forth what information must be included for the Proof of Loss (which is the policyholder’s statement of the amount of money demanded and submitted in support of their claim) and indicate that it must be sent within 60 days after the loss.

NFIP court rulings hold that if the insured does not comply with “all” of the terms and conditions of the SFIP prior to filing a lawsuit (including the Proof of Loss requirements), then the necessary conditions for the insured to be able to bring a lawsuit have not been met. What this means is that, in those instances in which a denial letter has been issued such that the statutory 1 year to bring the lawsuit will run before the Proof of Loss extended deadline runs, the insured has to both file the lawsuit and have the required Proof of Loss requirements completed within 1 year of the date of the denial or partial denial of the claim. This situation will typically arise when the insurer has determined that the insured has not suffered a “direct physical loss by or from flood” and there is no coverage under the SFIP. For example, if the insurer has determined that flood waters did not reach the insured building, a denial letter will be sent because there is no insured loss and no coverage under the SFIP.

In any event, FEMA requires NFIP insurers to continue to work with their insureds. The Program can pay additional amounts if properly supported, even if the formal Proof of Loss deadline has passed. FEMA does this through the granting of the insured’s request of an individual waiver of the Proof of Loss deadline through the insurance company. The NFIP makes every possible effort to insure that a proper claims payment and resolution of the claim are achieved in every instance.

The limited waiver and extension of the Proof of Loss deadline recognizes the difficulties insureds damaged by ME Sandy experienced evaluating damage and supporting their flood insurance claim. The typical dispute arises after an insured has received payment based on an adjuster’s report and the insurer’s approval and later believes there is additional uncompensated damage. The 1 year to sue typically will not be triggered until the required Proof of Loss for the additional amount sought is submitted and there is a complete or partial disallowance/denial of the amount sought. However, as discussed above, there are instances when the claim may be denied for reasons that do not require an adjuster’s report or Proof of Loss from the insured. Even in those claims where a denial letter was issued within the first 6 months after ME Sandy, the insured still had a full year from the date of that denial letter to collect all required documentation, file the proof of loss, and then file a lawsuit if such is believed necessary.

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The extended time to file the Proof of Loss is an effective mechanism that allows insureds to fully present their claims. For the majority of claims, disputes will not arise until after the submission of the Proof of Loss and formal denial of the amount sought. While FEMA does the most it can to assist NFIP insureds, it cannot and does not waive or extend the applicable statute of limitations.

Conclusion:

We ask for your full support. Any questions or comments should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at Russell.Tinsley@fema.dhs.gov.

cc: Vendors, IBHS, and Government Technical Representative

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