

# National Flood Insurance Program - Not Your Average Claims

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The National Flood Insurance Program (“NFIP”) requires strict compliance with its rules and regulations and the United States District Courts for the District of South Carolina uphold this requirement. In a recent decision, the district court resolved a dispute between a Write-Your-Own (“WYO”) carrier participating in the NFIP and commercial insureds involving claims under a Standard Flood Insurance Policy. The district granted summary judgment to the WYO carrier because the insureds failed to strictly comply with all the requirements of the policy.

Briefly, the insureds operated a gas station and convenience store. During a severe storm in 2016, the insured gas station suffered storm damage to pumps, equipment, inventory and a canopy. The WYO carrier’s adjuster inspected the storm loss and recommended a payment covering both the damage to the building and damages to contents. The insureds signed a proof of loss form prepared by the adjuster and the WYO carrier issued payment for the amount recommended and set forth in the proof of loss. Thereafter, the insureds made a claim for additional loss. The insured submitted the second claim more than 60 days after the loss. The adjuster conducted a second inspection and prepared a second proof of loss, which the WYO carrier paid after receiving a waiver of the 60-day requirement for submitting proofs of loss. The waiver specified it covered only the damages outlined in the second proof of loss and did not waive the proof of loss or any other requirement under the policy. Following the second proof of loss, the WYO carrier did not receive any additional proofs of loss or waiver requests.

The insureds brought a lawsuit against the insurer, alleging that the insurer refused to pay the balance of the insureds’ claim. After dismissing the insureds’ bad faith failure to pay and punitive damages claims, the court turned to the sole remaining claim for breach of contract of the policy.

The district court began its analysis with the NFIP regulations, as the terms and conditions of a policy under the NFIP are specified by regulation. The court noted the policy states that the policy, and all disputes arising under it, are governed exclusively by the flood regulations issued by FEMA, the

National Flood Insurance Act of 1968 and federal common law. The district court then found that under the terms of the policy, when an insured has suffered loss, the insured is expressly required to, among other things, send the WYO carrier a proof of loss waiver within 60 days of the loss. Absent express written consent from the Federal Insurance Administration, the policy cannot be changed, nor can any provision be waived. The district court then found the policy states an insured may not sue the insurer to recover money under a Standard Flood Insurance Policy unless the party has complied with all the requirements of the policy. The district court then cited a case from the U.S. Court of Appeals for the Fifth Circuit holding a sworn proof of loss to be a condition precedent to bringing the instant litigation.

In support of its motion, the WYO carrier argued the insureds did not file a proof of loss for the additional amounts sought under this lawsuit. The insureds could not point to any specific evidence showing they had submitted a proof of loss, and actually conceded the proofs of loss they submitted had omitted the unpaid loss which was the subject of the lawsuit. Instead, the insureds argued the adjuster and the WYO carrier were notified of the unpaid loss, such that the unpaid loss “should have been included in the proof of loss”. The district court rejected this argument because the insureds provided no factual support for their statement. Moreover, the district court found the insureds failed to submit a proof of loss for the items subject to the lawsuit within 60 days following the loss, and, lacking a waiver from the Federal Insurance Administration, failed to meet the pre-suit requirements under their policy. As a result of their failure to meet the requirements of the policy, the district court held the insureds were prohibited from seeking additional payments.

This decision emphasizes a critically important difference for policies under the NFIP. Like other non-NFIP policies, individuals and entities insured under the NFIP must comply with all requirements of the policies regulated by the NFIP. However, those requirements include much shorter deadlines and much more onerous compliance than traditional insurance policies in South Carolina. Insureds, including lenders who are considered additional insureds under NFIP policies, must be aware of these strict and onerous requirements.

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