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## After Ida, A Look At Sandy's Flood Insurance Lessons

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Hurricane Ida once again exposed our nation's severe vulnerability to natural disasters. One-hundred-year storms are now pummeling us on what seems to be an annual basis. The breadth of Ida's impact was unique, however, leaving a swath of destruction from the Gulf Coast to the East Coast.

While floods are the nation's most common natural disaster, less than 1 in 10 Americans are adequately insured against flooding, according to a study conducted by ValuePenguin.com in 2019. That same study revealed that although 91% of homeowners have homeowners insurance, only 7% have flood insurance.

But, those are just broad averages. The residents of those states most prone to flooding are much better protected. For example, as might be expected, homeowners in Louisiana and Florida are insured for floods at far greater rates than the average — 44% and 36%, respectively.

Unfortunately, that means that homeowners in other states are insured at rates much lower than the average. For example, homeowners in Pennsylvania and New York — two of the states hit hardest by Ida — are insured only at the rate of 1.7% and 4.6%, respectively.

### **The National Flood Insurance Program**

Damage resulting from floods is typically excluded under standard property insurance issued to home and business owners. Those seeking insurance must purchase a separate flood insurance policy. Flood insurance is available through the National Flood Insurance Program, or NFIP, administered by the Federal Emergency Management Agency, and from many private insurers.

Congress created the NFIP in 1968. It makes federally backed flood insurance available in communities that agree to adopt and enforce floodplain management ordinances.

For the most part, flood insurance policies under the NFIP are issued by private insurers through the Write Your Own, or WYO, program, started in 1983. As of September 2020, 60 insurance companies participated in the WYO program. Those private insurers issue flood insurance policies and adjust flood claims on behalf of the federal government. In 2019, 88% of NFIP policies were issued through the WYO program.

### **Flood Insurance Claims Are Undervalued**

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Unfortunately, even those with flood insurance may still be up the proverbial creek without a paddle. FEMA publishes statistics that reveal systematic underpayments of flood insurance claims.

Using Superstorm Sandy as an example, nearly 144,400 policyholders filed flood insurance claims. When numerous problems, including fraud, were uncovered in connection with the adjustment of those claims, FEMA offered those policyholders an opportunity to have their claims re-reviewed.

Over 19,000 Sandy claimants took advantage of that opportunity. As of January 2018, 17,854 of those re-reviewed claims were resolved with the policyholder agreeing to accept the amount as adjusted by the insurer. Of those resolved claims, nearly 85% of the claimants received additional payments totaling \$258,648,226 — or nearly \$14,500 for each underpaid Sandy claimant.

Take a moment to reflect on those statistics. FEMA's own internal re-review process revealed initial underadjustments in 85% of the flood insurance claims that were submitted in the aftermath of Superstorm Sandy. Based on that large sample, if every one of the 144,000 Sandy claimants had sought a re-review, the underpayments could have approached \$2 billion.

But the evidence of underadjustments does not end there. If a Sandy claimant was not satisfied with the FEMA re-review, they were entitled to a third-party neutral review by, for example, a retired judge. Approximately 2,500 Sandy claimants requested a third-party neutral review. As of Dec. 14, 2017, 2,082 third-party neutral reviews had been completed.

In nearly 11.5% of those cases, additional payments were deemed due and owing. Total additional payments of \$44,603,756 were paid in connection with those third-party neutral reviews or approximately \$187,000 for each underadjusted claim.

But, there is still more. Sandy claimants that remained dissatisfied with the FEMA processes, including the re-review and third-party neutral review, were able to pursue litigation. Nearly 2,000 Sandy-related flood insurance cases were filed against NFIP insurers in the federal district courts of New York and New Jersey. As of February 2018, 1,631 have been settled, with checks issued totaling \$164,320,515, or approximately \$100,000 per claimant.

### **Lessons Learned**

Those that have suffered, or may in the future suffer, a flood loss can learn several valuable lessons from the experience gained in connection with Superstorm Sandy, Ida and other recent natural disasters. Those lessons can be employed both before and after the next storm.

### **Before the Storm**

Every homeowner, renter, business owner, nonprofit and public entity should reevaluate its need for flood insurance. Flood risks that were not apparent just a few years ago are all too real in today's climate. You can determine if you are located in a high-risk flood zone by looking up your address on the FEMA Flood Map Service Center.

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Even if your home or entity is not located in a high-risk zone, the purchase of flood insurance should be considered. No property has zero risk of flooding. Indeed, 25% of all flood insurance claims are made in low-to-moderate flood risk areas.

### **After the Storm**

If loss is sustained by those who have not purchased stand-alone flood insurance, all is not lost. Often flooding is accompanied by other causes of loss that may be covered under more commonly purchased property insurance policies that otherwise exclude flood losses. All available insurance should be examined for potential coverage.

For example, much of the damage caused by Ida in the Northeast was by reason of wind as opposed to flood. Wind damage is typically covered under standard form property insurance policies, including homeowners policies.

By way of further example, after Hurricane Katrina, many businesses argued that flooding was not the cause of their losses. Rather, those businesses contended that their losses were caused by the failure of a negligently constructed levy system. While that argument was ultimately rejected in 2007 by the U.S. Court of Appeals for the Fifth Circuit in *In re: Katrina Canal Breaches Litigation* after extensive proceedings, it reveals how some creative thinking may uncover coverage where none was perceived initially.

When multiple causes of loss are at issue, however, anti-concurrent causation, or ACC, clauses are often implicated. ACC clauses typically provide that when a loss is caused by a combination of covered and excluded causes, the resulting loss will not be covered.

A typical ACC clause states: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

Insurers often take the position in denying coverage that ACC clauses remove coverage for wind damage if a flood happens at about the same time, which will likely be a serious issue in property damage claims resulting from Hurricane Ida.

Policyholders that suffer a loss after purchasing flood insurance should anticipate and be prepared for FEMA, NFIP insurers and private flood insurers to initially undervalue their claims. While that shouldn't be the case, the experience after Sandy proves once again that insurers have a strong financial incentive to undervalue claims.

The experience after Sandy reveals further that an insurer's initial adjustment should never be accepted without a critical review. Policyholders should remain vigilant in the face of an initial undervaluation of their flood insurance claim. Any avenue for further review and reconsideration should be pursued.

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The most common issues of dispute in the adjustment flood insurance claims concern the scope of necessary repairs, the actual costs of those repairs and whether the claimed damage was preexisting.

While it shouldn't be the case, often maximizing insurance recoveries can only be accomplished with the threat of, or the commencement of, litigation. Certainly, that was the lesson learned from Sandy, where successful litigants received an additional \$100,000 on average.

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