

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE HURRICANE SANDY CASES

REVISED
CASE MANAGEMENT
ORDER NO. 2
(PROOF OF LOSS ISSUES
IN NFIP CASES)

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THIS DOCUMENT APPLIES TO
ALL NFIP CASES

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It has come to the attention of the Court that there is an unknown (though potentially large) number of Hurricane Sandy cases brought pursuant to the National Flood Insurance Program (“NFIP”) that may be subject to a procedural defect as a result of a failure or purported failure to submit a proof of loss consistent with regulations promulgated by the Federal Emergency Management Agency (“FEMA”). As a result of an extraordinary 18-month extension of the deadline by FEMA to file a proof of loss -- now set to expire in less than one month -- policyholders may correct this defect by filing a proof of loss by late April. The purpose of this Order is to establish a mechanism by which affected cases may be timely identified, allowing homeowners to avoid forfeiting their rights through procedural error, helping FEMA fulfill its expressed, laudable goal of providing victims of Hurricane Sandy with the opportunity to have their claims fairly evaluated and, where appropriate, aiding the Court by permitting voluntary dismissal of cases in favor of administrative review and resolution.

* This revised version of CMO#2 differs from the original only insofar as footnote number 2 has been withdrawn.

Procedural History

Pursuant to Case Management Order No. 1 (“CMO#1”), entered on February 21, 2014, defendants’ liaison counsel provided a submission detailing “commonly occurring legal issues and defenses that defendants anticipate, from experience, may arise in a number of these cases,” and plaintiffs’ liaison counsel was directed to provide a response thereto. CMO 1 at 10-11, Docket Entry (“DE”) [243]. These submissions highlight, *inter alia*, issues surrounding the submission of a proof of loss in NFIP cases.

In CMO#1, the Committee directed provision of information about proof of loss by plaintiffs, *see* CMO#1 at 8 (directing plaintiffs to provide “with respect to flood damage claims, all documents relied upon by plaintiff as satisfying Proof of Loss requirements and documentation required by SFIP 44 C.F.R. Pt. 61, App.A(1), Art. VII(J)(3),(4)”) within 60 days of the date of CMO#1, which means such documents are due on or about April 22, 2014. CMO#1 further provides for simultaneous automatic disclosure of documents and information by defendants, including “all non-privileged documents contained in the claims file” and “any other legal basis on which coverage has been denied.” *Id.* at 8-9. While these categories could, and perhaps should, reasonably be construed as requiring defendants’ disclosure of proof of loss documents or the absence thereof, CMO#1 does not contain an explicit requirement to this effect.

Based on the upcoming deadline for policyholders to file a proof of loss, discussed further below, and the proof of loss issues raised by liaison counsel in their submissions, there is reason to question whether the automatic disclosures ordered will be sufficiently detailed and, equally important, timely to protect the interests of the insured in these cases, serve the policy objectives expressed by FEMA and effectively manage the Court’s docket of Hurricane Sandy cases.

The Proof of Loss Requirement in NFIP Cases

As the Second Circuit has observed:

The National Flood Insurance Program (“NFIP”) . . . is administered by the Federal Emergency Management Agency (“FEMA”) and supported by the federal treasury, which pays for claims that exceed the revenues collected by private insurers from flood insurance premiums. Congress has authorized FEMA to “prescribe regulations establishing the general method or methods by which proved and approved claims for losses may be adjusted and paid for any damage to or loss of property which is covered by flood insurance.” The resulting regulatory scheme is set out at 44 C.F.R. §§ 61.1–78.14.

Pursuant to 42 U.S.C. § 4081(a), FEMA created the Write–Your–Own Program (“WYOP”), which allows private insurers, sometimes called “WYO companies,” to issue and administer flood-risk policies under the Government Program. Although FEMA may issue policies directly under the Government Program, more than 90% are written by WYO companies. These private insurers may act as ‘fiscal agents of the United States,’ 42 U.S.C. § 4071(a)(1), but they are not general agents. Thus they must strictly enforce the provisions set out by FEMA and may vary the terms of a Policy only with the express written consent of the Federal Insurance Administrator.

Palmieri v. Allstate Ins. Co., 445 F.3d 179, 183-84 (2d Cir. 2006) (internal alterations omitted).

In order to successfully recover under the NFIP directly from FEMA or a WYO carrier, an insured must comply with a number of regulatory provisions, some of which represent conditions precedent to filing an action. Strict compliance with FEMA procedures is required by congressional mandate and by the Constitution. *DeCosta v. Allstate Ins. Co.*, 730 F.3d 76, 83 (1st Cir. 2013) (“the Constitution mandates strict compliance with the [Standard Flood Insurance Policy]”). The Second Circuit has upheld that strict construction of FEMA insurance policy requirements even where such construction “create[s] ostensibly inequitable results.” *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 176 (2d Cir. 2012)

The filing of a proof of loss has consistently been construed as a condition precedent to filing

an action. *See, e.g., DeCosta*, 730 F.3d at 84 (“compliance with the proof-of-loss provision serves as a ‘condition[] precedent to a waiver by the federal government of its sovereign immunity’”). In *Jacobson*, the Second Circuit resoundingly upheld the proof of loss requirement, rejecting the argument that “a defendant insurance company can sometimes waive the filing of a proof of loss (or become estopped from enforcing a proof-of-loss requirement) by repudiating a policy.” *Jacobson*, 672 F.3d at 176 (upholding summary judgment against policyholder who submitted a proof of loss but left the total damages line blank on the form).

The timing of filing a proof of loss changed dramatically in connection with Hurricane Sandy. While the SFIP requires the submission of a proof of loss within sixty days, “FEMA extended the Proof of Loss deadline from 60 days to 1½ years for [Hurricane] Sandy.” *See* FEMA Memorandum entitled “Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy,” November 13, 2013 (“FEMA Memo”), DE [269-1] at 2. According to FEMA, the “extension of the Proof of Loss deadline recognizes the difficulties insureds damaged by ME Sandy experienced evaluating damage and supporting their flood insurance claim.” *Id.* at 3. The agency characterized this action as “an unprecedented action by FEMA that reflects FEMA’s commitment to facilitating the ability of individuals insured by the NFIP to seek payment,” and notes that “the extended time to file the Proof of Loss is an effective mechanism that allows insureds to fully present their claims.” *Id.* at 2, 5.

While the law is clear that proof of loss is a prerequisite for recovery, issues abound with respect to its proper application. FEMA’s website defines a “Proof of Loss” as “a form used by the policyholder to support the amount they are claiming under their policy,” and provides a copy of that form designated as FEMA Form 086-0-9. *See* www.fema.gov. Yet courts have grappled with exactly what constitutes a proof of loss. *See, e.g., Decosta*, 730 F.3d at 26 (finding that the

contemporaneous submission of a written estimate as to disputed sums along with two properly completed proof of loss forms for stipulated losses did not constitute a proper proof of loss). That state law concerning proof of loss differs dramatically from FEMA requirements only adds to the confusion.¹ Similarly, conflicting guidance exists as to the proper application of the one-year statute of limitations for filing an action vis-à-vis the proof of loss requirement, particularly following the time extension and expedited procedures afforded to victims of Hurricane Katrina and Sandy. Compare *Qader v. Fed. Emergency Mgmt. Agency*, 543 F. Supp. 2d 558, 562 (E.D. La. 2008) (“[t]he 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”) with FEMA Memo at 3 (“when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured . . . the insured []still had a full year from the date of that denial letter to [] file a lawsuit”); cf. Plaintiffs’ Report at 20 (“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”).

It is impossible to ascertain at this juncture the number of cases before this Court in which defendants will assert a failure to file proof of loss, but one may infer that it is likely substantial. Based on data gathered from counsel prior to the filing of CMO#1, of the more than 900 Hurricane Sandy cases filed in this district, in excess of 600 are flood claims. While some may relate to private

¹ In its Report, plaintiffs’ liaison counsel argues that “[a]n 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.” DE [280] at 17, citing N.Y. Ins. Law § 3407 (McKinney). While this may be an accurate statement of New York Insurance Law, FEMA regulations provide precisely the opposite:

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 sixty days after the loss even if the adjuster does not furnish the form or help you complete it.

44 C.F.R. Part 61, App. (A)(1) Art. 9(J).

flood insurance, FEMA represents the primary, and in certain markets exclusive, flood insurer. *Jacobson*, 672 F.3d at 174 (“many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions”). According to plaintiffs’ liaison counsel, uncertainty surrounding the interplay between the proof of loss requirement and the statute of limitations has “contributed to the volume of cases continuing to be filed with this Court,” and “led to *many* cases being filed in this Court in order to avoid the added time and expense of being argued as timebarred.” DE [280] at 20, 24 (emphasis added). In its submission on common defenses and issues affecting these cases, counsel for defendants characterize the proof of loss rule as the “most notable of [FEMA’s] requirements.” DE [269] at 6.

The reasonable inference is that a large percentage of these cases are subject to the NFIP proof of loss rule, and the purported non-compliance of property owners with this rule will be the subject of litigation in these cases. One can posit that such litigation may arise in (1) cases in which plaintiffs have failed to submit a proof of loss; (2) cases in which plaintiffs submitted a proof of loss which was not received by the insurers and (3) cases in which plaintiffs have submitted a proof of loss which they believe to be sufficient, but that the insurers do not recognize as such. In each situation, a plaintiff faces a potentially fatal defect in their claims, which may be cured due to the extension of the proof of loss deadline, but that extension expires on or about April 29, 2014. CMO#1, which provides for disclosures by April 22, 2014, may not provide adequate notice to allow counsel to reasonably correct the jurisdictional defect by filing a proof of loss less than a week later.

Given that in certain cases property owners may be unaware of or confused by the proof of loss requirement and related rules, fairness and efficiency dictate that some action be taken to address this critical issue. Such action would serve the interest of all parties, by ensuring that

plaintiffs do not unwittingly forfeit potentially valuable rights while helping fulfill FEMA's stated mission to "make[] every possible effort to insure that a proper claims payment and resolution of the claim are achieved in every instance." FEMA Memo at 2. Furthermore, in instances in which plaintiffs file initial or supplemental proofs of loss prior to the deadline, the parties should give serious consideration to dismissing those cases without prejudice or other appropriate disposition, as administrative resolution of the claims may avert the need for further litigation. Thus, by identifying cases in which the filing of proof of loss is at issue, this mechanism can serve the interests of the parties and the Court, by reducing unnecessary litigation and related expenses.

One way to address this issue would be to accelerate the disclosures set forth in CMO#1. However, this wholesale approach seems potentially burdensome, carrying the risk of many unintended consequences to counsel who have been diligently working to timely comply. A more targeted approach is in order.

Thus, on or before April 10, 2014, counsel for defendants in each case involving an NFIP policy shall disclose to opposing counsel in writing whether that defendant intends to contest the receipt, form or amount of the proof(s) of loss submitted by plaintiff in that case. Thereafter, on or before April 15, 2014, counsel for plaintiffs in each case involving an NFIP policy which defendant has identified a proof of loss issue shall disclose in writing to opposing counsel (a) whether plaintiff contends that it has filed one or more proof(s) of loss, (b) the approximate submission dates of such proofs of loss, and (c) the total amount of losses identified therein. This schedule should allow policyholders sufficient notice to endeavor to remedy any defect before the 18-month deadline imposed by FEMA.

This extremely limited disclosure falls well within this Court's discretion in managing the profusion of cases associated with this matter. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d

65, 69 (2d Cir. 2003) (“the federal rules give district courts broad discretion to manage the manner in which discovery proceeds”); *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (a court has a vast “case-management arsenal” to regulate and control pre-trial proceedings, conferences, scheduling orders, and “adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems” in a “flexible process”). Moreover, this process should impose only a minimal burden upon counsel and the parties, who presumably have been preparing to submit such information as part of the CMO#1 disclosures by April 22.

CONCLUSION

Based on the foregoing, it is hereby ORDERED as follows:

1. On or before April 10, 2014, counsel for defendants in each case involving an NFIP policy shall disclose to opposing counsel *in writing* whether that defendant intends to contest the receipt, form or amount of the proof(s) of loss submitted by plaintiff in that case;
2. On or before April 15, 2014, counsel for plaintiffs in each case involving an NFIP policy which defendant has identified a proof of loss issue under paragraph 1 above shall disclose *in writing* to opposing counsel (a) whether plaintiff contends that it has filed one or more proof(s) of loss, (b) the approximate submission dates of such proofs of loss, and (c) the total amount of losses identified therein;
3. In any case in which counsel identify instances in which one or more proofs of loss are to be filed prior to the FEMA deadline, counsel shall confer as to whether the case should be dismissed without prejudice or subject to other disposition.

4. This Order applies to any and all Hurricane Sandy NFIP cases that have been filed in this district and upon which counsel have appeared on or before the date of this Order, whether or not an answer has been filed or service has been perfected.

Dated: Central Islip, New York
March 28, 2014

/s/ CHERYL L. POLLAK
Cheryl L. Pollak
United States Magistrate Judge

/s/ GARY R. BROWN
Gary R. Brown
United States Magistrate Judge

/s/ RAMON E. REYES. JR.
Ramon E. Reyes, Jr.
United States Magistrate Judge