

INSURANCE CHECKLIST #1

Replacement Cost Value Notice

Notice of Loss and Damage

Getting Your Policy

This checklist is the first in a series with practical information for victims of Superstorm Sandy. It covers:

- Notices and related requirements for upcoming insurance deadlines concerning “replacement cost value,” or “RCV.”
- Notice of loss and damage that might be covered by flood or homeowner policies.
- How to get your policy, and how to request your claims file.

The checklist includes sample language for notices to insurers, and other tips, based on how we have advised our clients.

For insurance questions generally, please contact **Touro Law Center’s HEART Hotline** for Sandy victims at (631) 761-7198.

Replacement Cost Value Notice

1. What is replacement cost value (RCV)?

Insurance policies may allow recovery of costs to rebuild, repair, and replace covered property. This is sometimes abbreviated as “RCV,” for “replacement cost value.” RCV is generally higher than “actual cash value,” or “ACV.” Depreciation is a common difference between ACV and RCV. The standard flood policy dwelling form defines ACV as the “cost to replace an insured item of property at the time of loss, **less the value of its physical depreciation.**”¹

2. Why is this relevant?

It is possible that some insurers might pay you ACV by default and holdback the higher RCV differential (eg, depreciation), unless you specifically request RCV.

3. Does RCV apply in both flood and homeowner policies?

The standard flood policy “dwelling” form (which may be referred to as “structure” coverage in flood policy declarations) allows recovery of RCV.² The policy caps RCV to the lesser of: your coverage limits; any “necessary amount actually spent”; and costs associated with “materials of like kind and quality, and for like use.”³

There is no RCV provision in the standard flood policy “general property” form (which may be referred to as “contents” coverage in flood policy declarations).⁴

Homeowner policies very often provide for RCV recovery. But homeowner policies are not “standard” in their provisions, including policyholder requirements. **Your own homeowner policy needs to be reviewed for limits and conditions on RCV.**

4. What do I need to do to get RCV?

Requirements vary depending on whether it is under your flood versus homeowner policy; and for homeowner policies, this also depends on your policy. As discussed below, there are certain **deadlines** to be addressed as soon as possible, even if late.

¹ Dwelling Form section II(B)(2).

² Dwelling Form section VII(V)(2).

³ Dwelling Form section VII(V)(2)(a)-(c).

⁴ General Property Form section VII(V)(2).

Standard flood policy dwelling form

See **Example A** for an RCV notice to flood insurers based on what the Disaster Relief Clinic has used for its clients. Also see below on **Method of Notice**. We are also advising our clients to mail a copy to the Federal Insurance Administrator as indicated in the “cc” line on this notice.

Note: The second paragraph expresses intent to rebuild, repair, and replace covered property. Although the flood policy does not clear state it requires this, we tend to err on the side of inclusiveness where possible. Your notice should accurately reflect your intent. Consult an experienced insurance lawyer with any questions.

The 180-day RCV notice deadline stated in the flood policy is close under any calculation. Send as soon as possible, even if late.

The standard flood policy dwelling form states that you may “make claim” for RCV as an “additional liability” owed to you, “provided you **notify us of your intent to do so within 180 days after the date of loss.**”⁵ FEMA has identified the date of loss in New York as early as October 28 (and as late as November 6;⁶ a date after October 28 should not be relied on).

A 2004 FEMA bulletin states “there is no longer any requirement [for insurers] to hold back the recoverable depreciation,”⁷ and FEMA extended a separate deadline for Sandy claims concerning “proof of loss” from within 60 days after the loss, to one year from the date of loss.⁸ However, the standard flood policy still states an RCV notice deadline. Accordingly, we are advising our clients to provide notice in writing as soon as possible, even if late, as indicated in **Example A**.

Homeowner policies

For any homeowner policy that has a 180-day deadline related to RCV, that deadline is close under any calculation. Send as soon as possible, even if late.

Your homeowner policy needs to be reviewed for its own RCV coverage and notice deadlines and other requirements. See below on **Getting Your Policy**. Homeowner policies in New York are not “standard” in this and other respects. We are aware of a number of policies with certain notice requirements for RCV within 180 days of the date of loss. The NY State Department of Financial Services (DFS)

⁵ Dwelling Form section VII(V)(2)(d).

⁶ FEMA Bulletin W-13008 at www.nfipiservice.com/Stakeholder/pdf/bulletin/w-13008.pdf.

⁷ FEMA Bulletin W-04020 at www.nfipiservice.com/pdf/bulletin/w-04020.pdf.

⁸ FEMA Bulletin W-12092a at www.nfipiservice.com/Stakeholder/pdf/bulletin/w-12092a.pdf.

has identified Sandy-related losses as occurring as early as October 26 (and as late as November 15;⁹ be as conservative as possible in calculating this deadline; note that some insurers have identified a date of loss in correspondence with our clients).

If the policy is clear that notice alone (and nothing else, such as proof of repair, etc.) is required, we are advising our clients to provide notice as indicated in **Example B**. When that notice is due within 180 days of the date of loss, provide it as soon as possible, even if late. When that notice is permitted later on, provide it within deadline, and be sure to meet any related policy requirements.

Read your policy carefully to verify that these notices, which are based on what we have done for our clients, are consistent with any different or additional requirements in your own policy. Consult an experienced insurance lawyer with any questions.

But if the policy suggests in any way that rebuilding, repair, or replacement also needs to be completed within that deadline, or seeks any documentation to that effect, we are advising our clients to provide notice in writing as soon as possible, even if late, as indicated in **Example C**. This is because most clients have not performed all work. We also provide this for clients when we lack the policy to confirm its requirements.

Example C provides the same notice as above, but it additionally requests a waiver or extension, and includes available documentation related to RCV.

See **Example B** for an RCV notice to homeowner insurers based on what the Disaster Relief Clinic has used for its clients when the policy ***is clear*** that rebuilding, repair, or replacement ***does not*** need to be performed when RCV notice is due. Also see below on **Method of Notice**.

Note: The second paragraph expresses intent to rebuild, repair, and replace covered property. Some policies may require notice of this intent. Your notice should accurately reflect your intent.

See **Example C** for an RCV notice to homeowner insurers based on what the Disaster Relief Clinic has used for its clients when the policy ***might require*** that rebuilding, repair, or replacement ***does*** need to be performed when RCV notice is due, ***or any documentation*** to that effect. Also see below on **Method of Notice**.

Note: The second paragraph expresses intent to rebuild, repair, and replace covered property. Enclose any receipts or invoices for post-damage work and purchases, estimates from estimators, contractors, and engineers, and the like. If you have a public adjuster, include his/her documents if possible, and regardless state all documents from your public adjuster are “incorporated by reference.” Include itemized lists that you have made of your covered property and estimated RCV.

⁹ DFS regulation at www.dfs.ny.gov/about/press2013/re64-amend15th.pdf.

Notice of Loss and Damage

5. What is a notice of loss?

Read your flood policy and homeowner policy concerning your **duties after loss**. The standard flood policy references giving the insurer “prompt written notice” of loss. Similar prompt notice requirements are typical in homeowner policies.

Where we suspect that the insurer has not considered or adjusted for damaged property or other expenses that our clients have sustained, we provide written notice of claim as to those items as soon as possible, as indicated in **Example D**.

See **Example D** for language based on what the Disaster Relief Clinic has used for its clients to provide written notice of a claim for loss and damage not yet adjusted for.

Note: List and enclose any documents that show additional covered loss and damage.

In your notice, identify any covered property or expense that you believe the insurer has not yet considered or adjusted for, as soon as possible.

Importantly, when in doubt about whether loss or damage is caused

by flood versus wind/rain, **submit a claim for all loss and damage to both the flood and homeowner insurers**. It is better to have the claim in and causation issues settled later on (generally, it is the insurer’s burden to prove causation).

Some examples of categories of coverage that we have seen omitted from insurer’s adjustments include:

- **Increased cost of compliance** coverage – eg, for elevating your house.
- **Additional living expenses and loss of use** – included in many homeowner policies.
- **Clean-up and debris-removal** – included in the standard flood policy and many homeowner policies.
- A variety of additional **coverages** – review the coverage sections of your flood and homeowner policies.

Additional or Different Deadlines

6. Can my homeowner policy have different deadlines for these RCV notices?

For homeowner policies, the answer is yes because there is no statutorily imposed “standard” requirement in New York for RCV notice. For example, we are aware of

at least two policies that require RCV notice within 180 days after ACV payment. (See **Question 12** below on getting your flood policy.)

By contrast, the flood policy is “standard,” unless you have an “excess” policy for coverage beyond maximum policy limits, or your flood insurer received FEMA’s authorization to vary from the standard form. (See **Question 11** below on getting your flood policy.)

7. Can my policy have additional or different deadlines or requirements?

Yes. Importantly, **we have seen homeowner policies with additional or different deadlines and other requirements.** For instance, one policy requires 90-days advance notice to the insurer before commencing what the policy refers to as “alterations or additions.” As another example, a different policy requires the policyholder to “notify us within 30 days after the work has been completed.”

These are a just few examples of an important caveat: policies differ. Get and read thoroughly a complete copy of your full policy. Consult an experienced insurance lawyer with questions. There may be different requirements – such as additional notices for rebuilding, repair, and replacement – that need to be addressed.

Generally, policies also require that policyholders cooperate with their flood and homeowner insurers. If the insurer is making a reasonable demand (eg, to inspect your damaged property, etc.), it is important that you comply with it. You have a contractual obligation to cooperate, and failure to do so is a basis for denial.

Document all of your correspondence showing cooperation with the insurer.

8. Are there any other deadlines I need to be aware of?

Yes. There are a variety of other deadlines associated with policies of all kinds. These are outside this checklist’s scope, although we anticipate future checklists addressing some of them. Examples include:

- **Supplementing your claim** when an adjustment undervalues loss and damage, which often involves having a special contractor (eg, an estimator or public adjustor) creating a line-itemization, and the role of an engineer.
- **Mediation** of homeowner insurance claims, which homeowner insurers are mandated to submit to at their expense if requested by the policyholder.¹⁰
- **Appeals** to the Federal Insurance Administrator concerning flood policy

¹⁰ DFS regulation at www.dfs.ny.gov/about/press2013/re64-amend15th.pdf.

claims, due 60 days from the date of the “final claim determination.”¹¹

- **Proofs of loss and supplemental proofs of loss** that meet policy and statutory deadlines and other requirements. **This is important** because courts have construed deadlines and requirements strictly. They have precluded suits for failure to comply. If you receive correspondence from your insurer referencing a proof of loss, take this seriously and consult an experienced insurance attorney about whether this triggers a 60-day deadline under NY Ins. Law § 3407 for supplying a proof of loss. This highlights the importance of reviewing carefully all correspondence.
- **Statutes of limitations**, including statutory and policy-based time limitations on filing suit. **This is equally important for the same reasons.**
- Other deadlines and requirements, such as the sections in your policies detailing your **duties after loss.**

Method of Notice

9. How do I find out where to send notice?

Simply finding the right person or place to send correspondence in order to preserve your rights can be a challenge. This issue is silent in the standard flood policy. By contrast, it is possible that a homeowner policy might specify to whom and how correspondence should be submitted, and that provision would need to be followed at minimum. In any event, contact the **insurer’s claims representative** (not the insurer’s adjuster, and not your insurance agent or broker) and document your call including the person you spoke with, in order to verify:

- (1) that he or she is still the person handling your claim on behalf of your insurer and a proper recipient of these notices;
- (2) anywhere else to which they should be sent; and
- (3) the address and fax number for sending them.

10. What does the Disaster Relief Clinic do for sending notice?

If the policy directs correspondence to a particular place or to use a particular method, we follow that. We generally additionally send notices by mail and fax to:

- (1) **the insurer’s own corporate office** listed in policy documentation, if the policy does not specify an address for correspondence (this is not the insurance agent’s or broker’s address, nor the insurer’s adjuster’s address);

¹¹ 44 CFR § 62.20.

- (2) **the insurer's claims representative** based on written correspondence (as with above, this is not the insurance agent's or broker's address, nor the insurer's adjustor's address);
- (3) **the adjustor that the insurer used** based on written correspondence;
- (4) **anywhere else as told by the insurer's claims representative** from the call with that person as mentioned above; and
- (5) for requests or required notices under the flood policy, we also send to the **Federal Insurance Administrator** as indicated in *Example A*.

We send correspondence to all of these places at the same time. While duplicative, it is better to cover bases. **We send notices so that they are received within deadline, but we send even if we receive the file late.**

We send via certified mail return receipt requested, or express mail overnight service with tracking if the deadline is close, in addition to sending by fax at the same time wherever possible. Keep records of your submission.

Note that these people are different from the insurance agent or broker.

Getting Your Policy

11. How do I get my flood policy to review, and my claims file?

Your policy declarations may state that the policyholder has the "standard" flood policy. The standard flood policy (there are separate forms for dwelling and contents coverage) is available at www.fema.gov/national-flood-insurance-program/standard-flood-insurance-policy-forms. The notice to the insurer in *Example E* is relevant to getting your declarations, any insurer variations from the standard flood policy form, and to request your claims file. There is a separate form for residential condominium associations outside this checklist's scope.

12. How do I get my homeowner policy to review, and my claims file?

See *Example E* for a sample letter based on what the Disaster Relief Clinic has used to request our clients' homeowner policies. It also requests the claims file, and can be used for both flood and homeowner insurers.

Note: Because regular mail can take some time, you may also specify a fax number and email to receive the documents if you like.

Homeowner policies have multiple incorporated documents, including the declarations page, the body of the policy containing its central provisions, and additional documents such as endorsements and notices (often but not always the declarations list them).

Send a request to your insurer (not the agent or broker) as indicated in **Example E**. Check the documents listed on the declarations (or a list provided by the insurer) with what is complete and up-to-date. **Example E** also requests your claims file, such as adjustments, engineering reports, and the like performed by or on behalf of your homeowner insurer. You can also use this notice to request your claims file from your flood insurer.

Disclosures

Please check this website for any updates to this checklist and for additional resources. Other **deadlines and requirements** are outside this checklist's scope, such as **proof of loss** deadlines and requirements, and the **statutes of limitations**, including statutory and policy-based time limitations on filing suit.

The nature and scale of this disaster has required the careful exercise of judgment in responding to insurance questions, reflecting individual circumstances based on client consultations and in-depth review of each person's unique facts and varying provisions in individual insurance policies. These variables inform the many types of insurance disputes relating to this disaster, such as over the scope of what is covered or excluded, whether wind/rain or flood caused the damage, how much policyholders are owed, the extent of damage and the cost to repair or replace covered property, what the policy's provisions mean in practice, whether the policyholder has complied with his or her obligations under the policy, and generally whether any insurer itself is meeting its obligations.

This checklist is for general information only. It is not legal advice, is not intended to provide legal advice in any individual situation, and does not create an attorney-client relationship. There may be different or additional provisions in your policies that alter this general information. It is impossible to assess any given situation or to advise you without an experienced insurance lawyer understanding your facts, reviewing your policies, and speaking with you. If you have a problem with your insurer or a question about your claim, consult an experienced insurance lawyer.

We do not provide tax advice. You may wish to consult a tax advisor to evaluate your circumstances for lawful deductions, credits, or otherwise in connection with this disaster. To ensure compliance with IRS disclosure requirements, this checklist is not to be used to avoid tax penalties or for promoting, marketing or recommending to another person any tax-related matter.

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Disaster Relief Clinic
Touro Law Center
Contact: Ben Rajotte

In collaboration with

Greenblatt & Agulnick, PC

David L. Singer, PC