

INSURANCE CHECKLIST #2

Flood Insurance **Proof of Loss and Statute of Limitations**

Homeowner (Non-Flood) Insurance **Proof of Loss and Statute of Limitations**

Additional Tips

This is the second checklist that we have produced for **homeowners** affected by Superstorm Sandy. It is intended to provide practical and plain-English information, focusing on the following areas:

- Two critical flood insurance deadlines: the “**proof of loss**” **deadline**; and the “**statute of limitations**” to file a lawsuit afterward.

All Sandy victims who may still be owed flood insurance proceeds are strongly advised to **act now in order to comply with these deadlines**.

- What these deadlines are for **homeowner (non-flood) insurance**.
- **Additional tips**.

Please call **Touro Law Center’s hotline** for Sandy victims at (631) 761-7198.

Flood Insurance Proof of Loss

1. What is “proof of loss” and why is it important?

Homeowners affected by Superstorm Sandy will need to comply very soon with an upcoming “proof of loss” requirement under the flood insurance program. You will **not** be able to sue your insurer if you do not comply on time.

We advise victims to (1) submit the three forms listed below on time, (2) sign them and complete them fully, and we recommend that they each be notarized, (3) state specific dollar amounts on the forms and not “to be determined” or something of that nature, (4) state what you believe to be the full value of your claim, (5) attach all supporting documentation, and (6) meet all requirements in section VII(J) of the flood policy.¹ The three forms, available at <http://www.fema.gov/forms-0>, are:

- The **standard “Proof of Loss,”** used to support the full value of your claim.² Even if an insurance adjuster asked you to sign a Proof of Loss, the policy states that this is for “courtesy only.” Chances are that if you are reading this, it also undervalued your loss. Therefore, you will need to submit another Proof of Loss on time that complies with all of the items enumerated above.
- The **“Increased Cost of Compliance Proof of Loss,”** used to claim up to \$30,000 for eligible “elevation, floodproofing, relocation, or demolition.”³
- The **“Statement as to Full Cost of Repair or Replacement,”** used to claim your full actual or estimated costs to rebuild, repair, or replace the property.⁴ Although this third form does not state “Proof of Loss” in its title, this checklist will refer to it as part of the proof of loss forms and requirement.

2. What is the deadline to comply?

We advise submitting all proof of loss forms with supporting documentation so that they are received by October 26, 2013, earlier whenever possible.

We are advising the October 26, 2013 “received by” date stated above, and earlier whenever possible. **First**, FEMA has identified the “date of loss” for New Yorkers as

¹ The flood policy (Dwelling and General Property Forms) are at <http://www.fema.gov/national-flood-insurance-program/standard-flood-insurance-policy-forms#1>.

² Proof of Loss, FEMA Form #86-0-9.

³ Increased Cost of Compliance Proof of Loss, FEMA Form #86-0-10.

⁴ Statement as to Full Cost of Repair or Replacement, FEMA Form #86-0-12.

early as October 28, 2012.⁵ We have seen some victims who have been informed that their date of loss is October 28, 2012. Do not trust a later date of loss stated by an insurance adjuster or your insurance agent or broker. Even if you have correspondence in writing by the insurer identifying the date of loss as October 29, 2012, use an earlier date to minimize risk and for the reasons discussed below.

Second, the flood policy states that policyholders need to “send” proof of loss within the deadline. We are advising that the proof of loss forms and supporting documentation be “received by” October 26, 2013, and earlier whenever possible, to minimize risk of dispute about interpretation, timeliness, and last-minute problems.

Third, please bear in mind that October 27, 2013 falls on a Sunday. As a practical matter, it also may not be possible to confirm receipt of the submission with the insurer on a weekend, nor until the insurer enters these documents into its system.

We advise submitting proof of loss as early as possible before the deadline for all of these reasons. The possibility of FEMA extending the deadline should not be relied on at this time, but visit our website at www.tourolaw.edu/tlcheart for any updates.

3. Who needs to comply?

Comply on time if you have not received all flood insurance money that you feel you are owed. **Comply on time even if your claim, supplement, or other paperwork is still pending with the insurer.** For example, comply on time if you have:

- received an **insurance denial**;
- received **insurance payments for less** than what you feel is owed;
- sought additional money but not yet been paid, such as by submitting a **claim, supplement, or other paperwork** like contractor estimates, etc. – resubmit this and all other documentation that you have (see #4 below) as “supporting documentation” attached with the proof of loss forms listed above;
- worked with a **public adjuster**, in which case you will still need to ensure that your public adjuster will comply on time, because you will still lose your claim based on his or her error or omission with your proof of loss;
- filed a **FEMA appeal** – a FEMA appeal does not extend the proof of loss

⁵ FEMA Bulletin W-13008, at www.nfipiservice.com/Stakeholder/pdf/bulletin/w-13008.pdf.

deadline, and it does not extend the statute of limitations below to file suit;

- received a “**Proof of Loss**” form from the insurance adjuster – this is a “courtesy only” and does not suffice for the reasons stated above; or
- been led to believe for any reason that you will get the insurance money you feel is owed – **do not trust anyone who tells you that the insurer will pay your claim in the future or that your check is in the mail or will be soon.**

Even if you would rather not file a lawsuit later on, your insurer may close your file and not continue to review your claim if you do not comply on time.

4. What “supporting documentation” do we advise submitting?

Courts have found this to be a question of fact based on the circumstances. It has been a basis, however, for insurers to argue that the proof of loss is defective. As described below, we advise submitting:

- a line-itemized room-by-room report of the loss and damage, including unit prices and measurements, by a **building consultant**;
- receipts, bills and invoices, and estimates of repair costs from **contractors**;
- a report by a **licensed engineer** if there is any dispute about what caused the loss, such as when there is damage to a foundation or any structural issue that the insurer states is preexisting or caused by erosion, subsidence, or “earth movement,” or about whether the “basement” exclusion applies;
- where possible, **photographs** from before the damage, with the damage and water line, and during or after repair (for instance, this may help to distinguish between damage caused by Hurricane Irene versus Sandy);
- for **personal property**, a room-by-room “contents list” attaching all of the available information above (photographs of the room or specific items if you have them, etc.), in addition to receipts for replacement or website printouts showing the same or near-identical item with a photograph and price; and
- any **additional documentation** that you may have.

A **building consultant** line-itemizes your loss with unit prices and measurements. It may be a contractor or another consultant with insurance expertise. A consultant

can help identify and line-itemize Sandy-related losses that the naked eye may miss, such as damage behind walls and below floors, costs to repair or replace property damaged by an oil spill, costs needed to match household fixtures, flood cleanup costs, and contractor overhead and profit. We have gradually been making a list of building consultants with experience, and we have given this list as it continues to grow to victims who contact our hotline. If you have not been helped by a building consultant in this way, call our hotline now (our hotline is listed on the cover).

When you engage a building consultant to review and line-itemize your claim, he or she may advise that you also use a **licensed engineer**. We advise using an engineer whenever there is any dispute about what caused the loss, such as foundation damage or any structural issue with the home, or about whether the basement exclusion applies, or if the insurer has ever used an engineer to limit or deny coverage. To have weight, the report should say that his or her findings are “to a reasonable degree of engineering certainty.” If you need help getting an engineer, call our hotline now.

For the **Increased Cost of Compliance Proof of Loss**, we are working on preparing a fuller list of supporting documentation that should be submitted, but FEMA advises submitting the community’s determination that your home has been substantially or repetitively damaged, signed contracts for the work, and work permits.⁶ Please check www.tourolaw.edu/tlcheart for information and updates.

5. How do I complete and submit everything?

Tactically, it would be better to submit proof of loss as best you can and defend it later if necessary, than to submit proof of loss more than one year after the date of loss. Whether or not the proof of loss is compliant can be a fact issue for the judge. But from our research, missing FEMA’s deadline will be fatal.

If you have a private insurer (such as Fidelity, Travelers, Liberty Mutual, Allstate, etc.), FEMA advises contacting the insurer “to find out the proper address for **submitting your Proof of Loss** with supporting documentation.” Request this in writing, and document all calls. But if your policy is issued by FEMA through “NFIP Direct,” FEMA has different addresses for regular mail and for overnight delivery.⁷ Submit everything with tracking to ensure proof of delivery, and seek confirmation from the insurer, documenting all calls.

⁶ Increased Cost of Compliance Coverage, FEMA Brochures #F-300 & F-663, at <http://www.fema.gov/media-library/assets/documents/12170?id=3010> and <http://www.fema.gov/media-library/assets/documents/12164?id=3009>.

⁷ FEMA, Proof of Loss, at <http://www.fema.gov/media-library/assets/documents/9343?id=2545>.

We understand that this is complicated. We and other legal services providers are collaborating and working with building consultants to explore if and how we can help with additional practical guidance, including how to complete these three forms. Please check our website regularly at www.tourolaw.edu/tlcheart.

Flood Insurance Statute of Limitations

6. What is the statute of limitations and why is it important?

We advise filing suit with an experienced insurance lawyer within one year from the date of your first insurance check, your first letter from your insurer notifying you of any payment, or your first denial letter – whichever is earliest.

The statute of limitations is another critical deadline, and it generally refers to how long you have to properly file suit in federal court. The flood policy states that this deadline is one year “after the date of the written denial of all or part of the claim.”⁸ The underlying statute states that this deadline is one year “after the date of mailing of notice of disallowance or partial disallowance” of the insurance claim.⁹

Although we believe that this should be interpreted as within one year after the date of the insurer’s partial payment or written denial on a valid and timely proof of loss, it can be argued as one year from the date of your first insurance check, your first letter from your insurer notifying you of any payment, or your first denial letter – whichever is the earliest. Therefore, we advise that you file suit by the earliest possible interpretation. This date will vary from person to person, but it could be as early as December 2013 and perhaps even November 2013 for some.

An experienced insurance lawyer should be consulted about filing suit in federal court in order to meet all requirements for a timely and proper filing, pleading, and service. You will **not** be able to sue your insurer if you do not comply on time.

Homeowner (Non-Flood) Insurance Proof of Loss and Statute of Limitations

7. Do deadlines for proof of loss and for filing suit also apply to homeowner (non-flood) insurance under NY law?

There are different deadlines for claims outside of the flood insurance program.

⁸ Dwelling Form § VII(R); General Property Form § VII(R); see also FEMA Bulletin W-12092a, at www.nfipiservice.com/Stakeholder/pdf/bulletin/w-12092a.pdf.

⁹ 42 U.S.C. § 4072.

Here are the related deadlines for homeowner insurance under New York law:

- **Proof of loss** with supporting documentation is due to the homeowner insurer within 60 days “after receipt of ... [written] notice” from the insurer that it desires a “proof of loss” including “a suitable blank form,” or longer if the insurer’s notice allows. However, submit the proof of loss and supporting documentation so that it is received within 60 days of the date of the insurer’s notice.¹⁰ It is important to read insurer correspondence. You will not be able to sue your insurer if you do not comply on time.
- For the **statute of limitations**, New York law also allows insurers to limit the deadline for filing suit as stated within the policy to two years “after inception of the loss.”¹¹ Generally, insurers have written in this two-year deadline to file suit (and no longer than that), however we have seen that some homeowner policies state there is a one-year deadline to file suit.

Although we question whether a one-year deadline is lawful, we advise anyone with a one-year deadline to submit a proof of loss on the homeowner insurer’s form, with supporting documentation, and then file suit within the one-year deadline stated in the policy.

You will always need to submit a proof of loss with supporting documentation, even if not requested, before you sue. An experienced insurance lawyer should be consulted about filing suit (but here, in state court) in order to meet all requirements for a timely and proper filing, pleading, and service.

In late February 2013, Governor Cuomo and Department of Financial Services (DFS) Superintendent Benjamin Lawskey announced an emergency regulation directing homeowner insurers to submit to **mediation** at their expense for Sandy-related claims when requested by a policyholder. Mediation is voluntary. DFS and the American Arbitration Association (AAA), which will administer the program, have not yet stated a deadline for requesting mediation to our knowledge. It should be initiated once it appears that the insurer will not provide the payments sought, and well before the time to file suit, in order to allow the process to conclude.

¹⁰ NY Ins. Law §§ 3404, 3407.

¹¹ NY CPLR 213; NY Ins. Law § 3404.

Additional Tips

8. What other issues have we seen Sandy victims encounter?

We have listed below some additional tips based on the evolving set of issues that we have seen Sandy victims encounter. Please call our hotline with any questions.

- We advise that you consult with a **flood insurance broker** about premiums, which can **increase significantly for some homeowners**. A complex set of variables may significantly affect the cost of your future flood insurance **premiums** – such as changes in the law, how your policy is “rated,” whether you have an updated elevation certificate and what it says (such as what your “base flood elevation” is), the flood zone in which your house is located (which FEMA is currently redrawing for some areas), **how you rebuild and whether you elevate your home**, and other individual circumstances.

For instance, if your home has been **50% damaged** or more – based on what local officials have determined as the cost to rebuild your home to its pre-Sandy value, and possibly the amount of loss calculated in your **proof of loss** – that may **affect whether you elevate, and in turn your premiums**. Other requirements may apply, such as getting an elevation certificate before and after elevating. We know a flood insurance broker who has consulted with victims on these issues. Please contact our hotline for more information.

- Review your flood policy declarations. If there is **any question about whether you are adequately insured** against another disaster, we advise that you speak with a **flood insurance broker** about this issue as well. For instance, this applies if your declarations state that you have a “basement” and you dispute that designation, if you have less than the maximum coverage available under the standard flood policy of \$250,000 for the structure and \$100,000 for personal property, if you wish to consider buying “excess” coverage, or if you are uncertain about what your coverage is.
- Generally, most **flood insurance** policyholders should receive **replacement cost value, or “RCV”** – that is, the insurer should not hold back any “depreciation” and should instead pay you for your full cost to rebuild, replace, or repair your home. This applies to single-family homes used as principal residences (you or your spouse lived there at least 80% of the time). Review the insurance adjustment, which is the report that shows how the insurance adjuster line-itemized your claim. Towards the end, it usually states some “bottom lines” for what the replacement cost or RCV is. If you have not received RCV money from your insurer, see Insurance Checklist #1, available

at www.tourolaw.edu/tlcheart and submit the “Example A” form letter. **Again, you will also need to submit proof of loss as described above.**

Keep **records of your repairs** in case the insurer requests them. For instance, we are aware of one instance in which the insurer required proof of repairs before even providing RCV, which we believe goes against FEMA guidance, but which we advised complying with while also submitting the “Example A” form letter above giving notice of intent to recover RCV payment.

Some **homeowner insurance policies** have a deadline in order to recover RCV money, such as requiring you to submit proof that you have made repairs within a certain time, but policy deadlines can vary. We have developed a form letter requesting a waiver or extension if needed. When in doubt see Insurance Checklist #1, available at www.tourolaw.edu/tlcheart and submit the “Example C” form letter. Please contact our hotline with questions.

- There is a **disaster case manager** from FEGS who is located onsite and dedicated to people who call our hotline. Please call our hotline if you have any social services needs, or would like more information about grants.

Related to **grants**, we are exploring setting up an informational session about **NY Rising**, including information about the timing and eligibility of grant funds, and restrictions. Although a **disaster case manager** from a nonprofit such as FEGS is not responsible for these grant programs, he or she may be able to provide more information from experience in working with victims who have applied for state and federal grants and perhaps other programs, such as the elevation program just reported in Newsday on September 3, 2013. Visit our website for any updates at www.tourolaw.edu/tlcheart.

- You may wish to consult a **tax advisor** for information about any tax deductions, credits, or other relief based on Sandy-related losses.

Disclosures

Please check this website for any updates and for additional resources.

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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