

# WATER LOG

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## Flooding and Flood Insurance

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## • UPCOMING EVENTS •

### 6<sup>th</sup> Annual HBCU Climate Change Conference

New Orleans, LA  
September 20-23, 2018

<http://www.dscej.org/events>

### 2018 American Planning Association Annual Conference – Mississippi & Alabama Chapters

Oxford, MS  
October 10-12, 2018

<http://www.apamississippi.com/conference>

### 2018 Alabama-Mississippi Bays & Bayous Symposium

Mobile, AL  
November 28-29, 2018

<http://bit.ly/2018bayous>

# After the Deluge: The National Flood Insurance Program

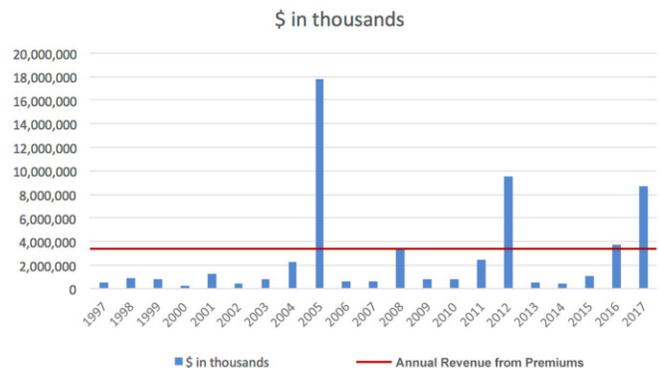
Kristina Alexander

It is a truth universally acknowledged that a homeowner in possession of a coastal property is in need of flood insurance. Insurance is typically a state-by-state, insurer-by-insurer enterprise. However, the National Flood Insurance Program (NFIP) was created in 1968 as a “reasonable method of sharing the risk of flood losses ... making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection.” (P.L. 90-448, as amended; 42 U.S.C. §§ 4001-4084.) When enacting the law, Congress found that it was “uneconomic for the private insurance industry alone to make flood insurance available ... on reasonable terms and conditions.” The theory was that the scale of participation offered by the federal government would make the insurance affordable.

## Problems Facing the National Flood Insurance Program

However, revenue from insurance premiums have not kept up with the payouts for losses. The scale of recent catastrophes forced the agency managing the flood insurance program, the Federal Emergency Management Agency (FEMA), to borrow \$30.425 billion, its statutory maximum. (42 U.S.C. § 4016(a).) The NFIP is before Congress for reauthorization and possibly amendment. Congress must weigh the fact that homeowners in areas with frequent flooding are finding they cannot afford the premiums, against how much taxpayers should give to people who live where there are frequent floods, especially beachfront properties.

According to FEMA, policy holders pay \$3.32 billion a year in premiums.<sup>1</sup> Paid losses range from a 20-year low of \$251,721,000 (2000) to a 20-year high of \$17,770,443,000 (2005).



## Homeowners and Insurance

It is not just FEMA that has struggled with the numbers. Many homeowners have found the NFIP model unsustainable. The NFIP authorizes FEMA to issue the standard flood insurance policy (SFIP). The maximum covered loss under the SFIP for a home is \$250,000, plus an additional \$100,000 for damaged contents. In May 2018, the average price of a new home in the United States was \$368,500.<sup>2</sup> While older construction is generally cheaper, the \$250,000 cap also applies to coastal properties where prices are higher. Those who can afford additional coverage buy from private insurers.

Many homeowners are trapped because they cannot afford to move and so must pay rising insurance costs to live in a home that likely will suffer more flood damage. In one case, the homeowner acquired an SFIP, but when his mortgage was purchased by another bank, the new bank required additional flood insurance to equal the replacement value of the home, far above the \$250,000 SFIP cap. The additional policy was expensive for the homeowner, whose property was located in a special flood hazard area. The court held the bank had the right to require additional private insurance.<sup>3</sup>

It is a myth often repeated that the NFIP has prevented private insurers from entering the flood insurance market. In fact, private insurance companies issue 88 percent of all SFIPs,<sup>4</sup> but those policies are underwritten by the federal government (meaning it covers the losses) and the terms and coverages are the same as if issued directly from FEMA. Under the NFIP, FEMA is authorized to set rates based on operating costs and reasonable estimates, including the transfer of risk,<sup>5</sup> which is consistent with how a private insurer would calculate rates. Instead of being blocked from the market, insurance companies have the opportunity to offer insurance policies that they underwrite. The fact that there is an impression that these policies do not exist may be due to the cost of issuing policies without the full faith and credit of the U.S. government acting as the underwriter, claims payer, and sustainer of losses.

### Repetitive Loss Properties and Premiums

According to FEMA in 2008, 25 to 30 percent of all flood insurance claims come from “Repetitive Loss Properties” (RLP), which are properties that have had at least two flood claims in a 10-year period.<sup>6</sup> As of January 2016 FEMA had identified 150,000 structures as RLP, representing just one percent of properties insured by FEMA, despite accounting for more than a quarter of its payouts.<sup>7</sup> In more manageable terms, this is as if the first person in line for a 100-person buffet took 30 percent of the food. It is not a sustainable business model.

While homeowners complain about SFIP premiums rising, their premiums do not represent the true market rate. Yet the NFIP restricts FEMA from raising premiums beyond a congressionally-set point. Conversely, FEMA reduces premiums for certain properties constructed and not substantially improved prior to 1975. The theory is that because the flood maps were issued December 31, 1974, those properties could not have avoided building in a flood-prone area. The premium subsidy means just over 16 percent of properties in flood plains have not paid an actuarially-sound premium rate for over 40 years.<sup>8</sup> Thus, those properties’ premiums do not represent the true risk of a loss due to flooding. Despite phasing out the premium subsidy for those properties, it will be years before that portion of the NFIP books are balanced. To extend the 100-person buffet analogy, premium payments are a pot-luck buffet where everybody brings a dish. The first person in line (representing RLP) takes 30 of the 100 dishes. The next 16 people (the reduced-premium properties) brought only 10 dishes total, but they still take 16.

### Congressional Response

It appears that Congress has also found the program unsustainable, but it has not come up with a solution. The program was set to expire most recently on July 31, 2018, and bills were proposed to overhaul the program. Instead, Congress chose to give it some more thought and passed a short-term extension of the program. Reportedly, it is the 41st time in 20 years that Congress has reauthorized the program on a short-term (meaning one year or less) basis; in all but three times the extension did not make any changes to the program.

Congressional attempts at improving the NFIP have addressed RLP. For example, under a pilot program authorized by the Flood Insurance Reform Act of 2004, 28,000 properties were bought out or physically elevated to avoid future flood damage. None of the properties in the pilot program were in Alabama or Mississippi.<sup>9</sup> Notably, according to the Natural Resources Defense Council (NRDC), 75 percent of all current RLP homes are valued at less than \$250,000, the maximum payout,<sup>10</sup> perhaps presenting an opportunity to buy out more properties. However, the law was eliminated by the Biggert-Waters Flood Insurance Reform Act of 2012.

### Community Rating System

The Community Rating System (CRS) is another attempt by the federal government to limit catastrophic losses from flooding. CRS targets communities with flood zones to help them develop preventative measures and gives incentives to reduce the impacts from flooding. Communities’ participation is rewarded by reductions in NFIP insurance premiums for homes and businesses. Floodplain mapping is one way to participate, resulting in Flood Insurance Rate Maps (FIRMs). Those FIRMs identify Special Flood Hazard Areas (SFHA) for areas with a higher risk of flooding, specifically, where there is at least a one percent chance of flooding each year. The CRS gives incentives to communities to address the problems. There are four main conditions required of communities to participate. The community must:

- Require permits for development,
- Require the lowest floor of new residential buildings to be elevated at or above the Base Flood Elevation (which varies based on local conditions),
- Restrict development in floodplains, and
- Require construction materials and methods to minimize future flood damage.

Only 5 percent of eligible communities participate in the CRS as of last summer, according to the Congressional Research Service, although 69 percent of all flood policies are from CRS communities. Notably, a FEMA document with RLP frequently asked questions states that 25 percent of flood claims were for properties outside of the SFHA, frequently because flooding was caused by stormwater due to inadequate local drainage.

### NFIP Limits

The NFIP imposes some limitations on claims. The NFIP requires that a proof of loss be filed within 60 days. However, following wide scale natural disasters, that deadline is frequently extended, to allow for the fact that homeowners are frequently displaced by the loss. For example, following Hurricane Sandy, FEMA allowed proofs of loss to be filed for two years. Following Hurricane Katrina, the deadline was one year. Courts will dismiss claims for coverage for failing to file the proof of loss in time:

- **Reine v. State Farm Ins. Co.**, 2015 WL 770423 (E.D. La. Feb. 23, 2015): Following Hurricane Isaac the proof of loss time was extended to 240 days, but the homeowners could not demonstrate that they submitted a timely proof of loss.
- **LCP West Monroe LLC v. Selective Ins. Co. of Southeast**, 2018 WL 2292534 (W.D. La. May 18, 2018): Following a March 2016 flood the proof of loss deadline was extended to 120 days. The insured filed several proofs of loss over time, with the latest being more than 120 days after the loss. The insurer denied the one submitted after the deadline. The court dismiss the claims as untimely.
- **Marseilles Homeowner Condominium Ass'n, Inc. v. Fidelity National Ins. Co.**, 542 F.3d 1053 (5th Cir. 2008): Following Hurricane Katrina, the court of appeals held that an insurer cannot waive the NFIP requirement of filing a signed proof of loss. Because no proof of loss was filed, the condo association's suit to recover \$642,000 for damages was dismissed.

If the proof of loss was timely, and the insurer denies coverage completely or in part, suits challenging the denial or amount of coverage must be brought in federal court. Typically, federal courts are slower to resolve disputes than state courts. However, jurisdiction in federal court means that the parties likely are before a court that is familiar with

the program and that cases from around the country are handled uniformly. If the insurer denies the claim, the homeowner must file suit within one year of when the insurer *mails* the denial of the proof of loss (42 U.S.C. § 4072):

- **Choleankeril v. Selective Ins. Co. of America**, 2016 WL 3769352 (D.N.J. July 14, 2016) Following Hurricane Sandy, the claim is dismissed for being filed too late. One year is counted from when the insurer mails the claim denial, and not when the homeowner receives it.
- **Woodson v. Allstate Ins. Co.**, 855 F.3d 628 (4th Cir. 2017): Following Hurricane Irene, the homeowner filed suit in state court within one year of denial of coverage, but NFIP claims must be filed in federal court. The homeowner could not recover over \$200,000 in damages because it did not file in time in the right court, even though the insurance company knew of the claim and the suit.

The NFIP limits what types of claims may be brought. Claims against the insurance company for not getting the policy right are excluded, as are punitive damages, state law claims, and also expenses for relocation and temporary housing. Examples of homeowners who found their SFIP policy did not cover flood-caused damage to their property are described in *Read the Fine Print: Flood Insurance Details and Deceptions*, later in this edition of *Water Log*.

Other owners are surprised when damage from a boat smashing into structures on land is not covered by insurance, no doubt believing insurance should cover expenses for occurrences outside of the control of the homeowner. In New York, one such case was excluded under a private insurance policy's "surface water exclusion." Discussion of what happened when casino barges demolished property in Mississippi following Hurricane Katrina is in the article, *The Expert's Magic Words: Exploring Outcome-Determinative Testimony in Hurricane Katrina Recovery Cases*, later in this edition. Here are some other examples of coverage limitations:

- **Collins v. First Community Bank**, 2018 WL 1404289 (S.D.W.V. March 19, 2018): Following a June 2016 flood, the court held that the NFIP limited the damages sought by the homeowner to direct physical losses from flood and debris removal, and dismissed the claims for reimbursement for loss of use and attorneys' fees.

- **Avery v. American National Property & Casualty**, 2012 WL 12894806 (S.D. Tex. Feb. 2, 2012): Following Hurricane Ike the homeowner learned it was not covered “down to the bottom” of the home as a pre-FIRM property, because the insurance agent was wrong about the home’s being pre-FIRM. The suit was sent to state court for review because it was not a covered claim under SFIP.

**Conclusion**

While the NFIP appears to please neither the covered homeowners, the federal budget, nor the public in general, it is a system that provides insurance to people, many of whom would face catastrophic financial damages without it. According to the Congressional Research Service, as of February 2018, the NFIP had issued more than 5 million flood insurance policies guaranteeing nearly \$1.28 trillion in coverage. Increased severe weather and a larger population in coastal counties means claims for flood damage will continue to outpace the premiums collected. Congress will have to legislate the solution, but it has indicated it prefers to avoid the question. In fact, it had created a program to remove the most flood-prone properties from the books, under the Flood Insurance Reform Act of 2004, but a subsequent Congress ended the program less than a decade later. While Congress may continue to avoid accountability, ignoring the problem will not change the fact that flooding will continue and homes likely will be underinsured, leaving

the repairs to the taxpayers, or the unrepaired property as blight on its neighbors. 🌩

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**Endnotes**

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4. Diane P. Horn and Jared T. Brown, *Introduction to the National Flood Insurance Program (NFIP)*, p. 13 (R44593) (Congressional Research Service, April 30, 2018) (hereinafter *CRS Report*).
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9. FEMA, *Hazard Mitigation Assistance Severe Repetitive Loss (SRL) data – FEMA Hazard Mitigation Assistance (HMA) Grant Programs* (excel chart).
10. NRDC Press Release, *Report: Homeowners Trapped by Repeated Flooding Under Troubled Flood Insurance Program* (July 25, 2017).
11. Spindler v. Great Northern Ins. Co., 2016 WL 921646 (E.D.N.Y. Feb. 2, 2016) (following Hurricane Sandy).



**IN SUM.**

A Summation of the Facts and Figures of Interest in this Edition

★ Number of years after Hurricane Katrina swept casino barges into houses and docks that the Mississippi courts were still reviewing the cases:	11
★ Maximum reimbursement for residential real property damage under Standard Flood Insurance Policy (SFIP) issued under the National Flood Insurance Program:	\$250,000
★ Average cost of a new home in 2018:	\$368,500
★ Percentage of SFIPs issued by insurance companies and not the Federal Emergency Management Agency (FEMA):	88
★ Maximum statutory borrowing limit for FEMA to pay for flood claims:	\$30,425,000,000
★ Amount FEMA has borrowed:	\$30,425,000,000
★ Percent of eligible communities participating in the FEMA flood impacts reduction program, the Community Rating System:	5

# Exploring the Core Components of Floodplain Management

Stephen Deal

**Flooding is the costliest type of natural disaster in the United States**, but it may also be one of the most commonly misunderstood areas of disaster planning. The circumstances and situations that give rise to a flood can vary greatly, even within a specific place or region. For example, along the Gulf Coast, many communities are susceptible to coastal flooding from storm surge, which is brought about by hurricanes. Riverine flooding is also a major concern due to the region's large river systems and high annual rainfall. Flooding may also be attributable to the failure of manmade systems, such as dams, levees, or city drainage systems. Lack of proper maintenance within a city's stormwater system can result in significant flooding if blockages occur in a drainpipe or spillway, thereby causing water to back up and overflow. Naturally this makes flood mitigation a considerable undertaking for any local government and difficult to plan for in a timely and predictable manner. However, with the aid of innovative mapping and federal guidance programs such as the Federal Emergency Management Agency (FEMA) Community Rating System, communities can begin to tackle flooding hazards in a systematic and proactive way.

## The Value of Mapping

In order to get a better sense of the risks associated with flooding, it is first imperative to review the ways in which flood risk is evaluated. For local communities, flood risk is most commonly evaluated through comprehensive mapping of the floodplain. A floodplain may be broadly defined as an area that provides temporary storage space for floodwaters and sediment produced by a watershed.<sup>1</sup> While the vast majority of floodplains typically occur around water channels such as rivers and streams, the size of a floodplain can vary greatly from region to region. For example, within the Northern Gulf of Mexico, there are many oxbow lakes and swamps, which can occur well beyond the main water channel and can significantly expand the scale of the floodplain in question.

Given the variability of the floodplain, most local floodplain managers opt to delineate flood risk using one of two different measurements: the 100-year floodplain, or

the 500-year floodplain. In the 1960s, when the National Flood Insurance Program (NFIP) was established, the United States government used the one percent annual exceedance probability (AEP) as the major regulatory measure for the program.<sup>2</sup> Because the one percent AEP has an average recurrence interval of 100 years, local policymakers generally use the term 100-year flood. However, as flood damages continue to mount across the country, many communities are now organizing their planning endeavors around the 500-year flood instead. The 500-year flood corresponds to a flood event that has a 1 in 500 chance of occurring within a given year. It should be noted that these terms refer to the probability of a flood event occurring, but a probability is not always an accurate predictor of future events, and it is not uncommon for major flood events to be clustered together.

These two categories are the primary risk factors depicted on Flood Insurance Rate Maps, otherwise known as FIRMs.<sup>3</sup> Many of the FIRMs used by local municipalities are incredibly detailed and provide a wealth of information on the general risk profile within a given floodplain. As good as FIRMs are, they aren't without their flaws, and one significant drawback to the maps is that a FIRM is merely a snapshot in time and is not a good predictor for future conditions. To get a sense of future conditions, one needs to go beyond the base requirements of the NFIP to develop local models that can evolve and change with enough frequency to capture the ways in which a floodplain can change over time.

One example of a region which recalibrated its floodplain mapping approach is the City of Charlotte, North Carolina. In response to a series of devastating storms which struck the region in the mid-1990s, local government officials in conjunction with Mecklenburg County instituted a comprehensive mapping initiative to get a better grasp on the potential scope and scale of future flood events. Charlotte and Mecklenburg County adopted a floodplain management guidance document that was premised on assuming ultimate build-out land use conditions for floodplain mapping.<sup>4</sup> When final build-out conditions are built into a model,

the floodplain takes on new boundaries to account for space taken up by buildings. For the Charlotte-Mecklenburg County area, the average base flood elevations based on an ultimate build-out scenario were 4.3 feet higher than the 1975 maps. These conditions were the basis of a series of updated maps for Charlotte and the greater Mecklenburg County area. The fully digitized maps were first completed in 2003, and they continue to be updated by the local engineering firms that first designed them.<sup>5</sup>

### The Value of Maintenance

While mapping may be a complicated undertaking for some small towns and governments when addressing flood management, regular maintenance of stormwater infrastructure is not. Even though many communities have laws and ordinances in place requiring detention ponds and other stormwater management measures in major new developments, it is not always a guarantee that those structures will be maintained adequately. One simple tool communities can employ to encourage stormwater maintenance is to have developers sign a maintenance agreement as part of the permitting process. In the City of Kings Mountain, North Carolina, city staff created a simple four-page form to ensure that local developers complied with basic maintenance measures on their stormwater infrastructure.<sup>6</sup>

Maintenance agreements are not the only tools available to aid and assist communities with their stormwater infrastructure. In fact, a number of sound procedures may be found within FEMA's Community Rating System program (CRS). The CRS was introduced into the NFIP in 1990<sup>7</sup> as an incentives program for communities to earn a premium discount on flood insurance that can be passed on to its citizens. The discounts are achieved by engaging in flood mitigation activities that go beyond the base requirements prescribed by the NFIP.

One process communities can engage in under the CRS program is known as Activity 540, which covers drainage system maintenance activities. This activity prescribes basic measures related to drainage systems to help reduce flooding impacts. Such measures include: annually inspecting the city drainage system; maintaining a comprehensive inventory of the entire system; and maintaining basic information such as ownership, location, and whether the infrastructure item in question is subject to the city maintenance program.<sup>8</sup>

Another Activity 540 task involves ongoing maintenance for natural water features like creeks or streams. Cities should ensure that water flow is not obstructed. In certain situations, cities may have statutory authority to order private entities to clear creek debris if the creek is visually prominent and can easily be inspected annually from an off-site location such as a bridge. It is also advisable for local governments to look into establishing maintenance easements with private entities to conduct regular inspection and maintenance of a creek on private property.

While ongoing maintenance of city drainage and sewer systems is not enough by itself to protect a community from flood concerns, it does provide simple benchmarks that communities can implement. A community's drainage infrastructure cannot be expected to work at its full design capacity if careful steps are not taken to remove debris and provide regular maintenance. Having maintenance agreements in place with permit applicants is a plus, and if communities are looking for additional guidance on this issue, the Community Rating System is a great resource that covers additional initiatives communities can undertake to keep their drainage infrastructure in good working order.

### Using Zoning to Preserve Floodplain Functions

It should be noted though that not every aspect of flood prevention is neatly within the jurisdiction of a community floodplain manager. Zoning, for example, is a powerful tool when it comes to protecting and conserving the floodplain; this is where the knowledge of a community's land use planner becomes paramount. The primary way in which zoning serves as a regulatory tool for floodplain management is by capping the amount of development that can be conducted within the floodplain. Capping or inhibiting the amount of development inside a floodplain is one of the chief tasks a planner carries out with regards to flood mitigation.

One example of zoning being employed in this manner is in the City of Biloxi, Mississippi, where city staff implemented an agricultural restricted zoning category with a minimum lot area per dwelling unit of 217,800 square feet.<sup>9</sup> An agricultural restricted zoning category is the least dense residential zoning category, with agricultural district as the second least dense residential zoning category. An agricultural district's minimum lot area per dwelling unit is significantly smaller at 43,560 square feet. Biloxi implemented agricultural

restricted zoning in parcels that were within floodways or contained a significant amount of wetlands. This minimum lot area represents a major deterrent to new high density development that will have more impervious surfaces impacting waterflow. By restricting density within the floodplain, local governments can ensure that the development impacts on the floodplain are kept to a minimum.

Restricting density is not the only choice for planners to avoid negative impacts on floodplains. Another technique commonly applied by planning officials is to develop a flood overlay zone. An overlay zone is an easy way of imposing additional regulatory requirements on top of existing zoning categories.<sup>10</sup> Since many communities have grown adjacent to large harbors and waterways, it is quite common for a wide variety of land uses to exist in or around a floodplain, which is why a single zoning category may not always work best.

One example of a flood overlay zone is Lancaster County, Virginia's waterfront residential overlay. The county is part of the Chesapeake Bay watershed. The waterfront residential overlay district applies to all parcels of land recorded on or after May 11, 1988, that are residential in nature and located within 800 feet of tidal waters and wetlands.<sup>11</sup> Many of the regulatory goals and intentions expressed by the agricultural restricted zone are shared by Lancaster County's overlay zone. For example, it restricts the minimum lot size: the minimum lot size is 87,120 square feet, or two acres. Also, only one main building and an accessory structure may be erected on any lot. In addition, there is a 100-foot setback from tidal wetlands and a 50-foot setback from the edge of nontidal, isolated wetlands.

Property setbacks, such as the ones referenced above, are another good technique for further circumscribing the development footprint within a flood sensitive area. Setbacks, lot sizes, and restrictions on the number of allowable structures are all good examples of the wide variety of floodplain management issues that can be addressed through the zoning code. Because zoning is responsible for setting the regulatory envelope in which development can be pursued, it is no surprise that any sound flood mitigation strategy will have to consider the role zoning can play in curbing development within the floodplain.

## Conclusion

Flooding is a major concern for many communities, and it is unlikely that this will change in the foreseeable future.

However that does not mean that cities are deprived of any agency in addressing the problem. Through comprehensive mapping and basic maintenance of existing stormwater infrastructure, communities can make great strides towards addressing flooding concerns. A local floodplain manager can pursue many of these mapping and maintenance activities, but a sound flood mitigation plan will invariably require a multi-disciplinary approach. For example, planners play a role in flood mitigation by crafting zoning categories and building envelopes, which keep development inside the floodplain to a minimum. Also, as the example from Charlotte demonstrates, cooperation between different sectors of government, such as city and county, can help when it comes to building a more complete picture of flood risk. Neighborhood associations and local citizens can also play a role by establishing maintenance easements with local authorities, allowing access to government staff in order to clear clean creeks and streams of debris. In short, a robust floodplain management program must employ a wide array of tactics and strategies that can evolve and adapt almost as rapidly as floodplains do. 🐼

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## Endnotes

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# Read the Fine Print: Flood Insurance Details and Deceptions

Rachel Buddrus

**Coverage details can be crucial in flood insurance.** Simply because something gets wet or ruined from flood water does not necessarily mean the loss will be covered. Flooding, especially of coastal cities, has become more prevalent in the last sixty years. Consequently, flood insurance is crucial for those who live near water. Insurance is meant as a protective measure for you or your property, but often what is and what is not covered by insurance policies is different from what the insured expects. The most important aspects of any given insurance policy lie in the details of the policy's provisions, which describe what is truly covered.

## The NFIP and the SFIP

The National Flood Insurance Act of 1968 created the National Flood Insurance Program (NFIP).<sup>1</sup> The goal of the program is to reduce the impacts of flooding by making flood insurance more affordable, especially for those who need flood insurance the most. 42 U.S.C. § 4012 describes the NFIP and specifies a priority for residential properties, churches, and small businesses. Flood insurance policies issued under the program are referred to as a Standard Flood Insurance Policy (SFIP). There are three types of SFIPs: dwelling form; general property policy; and residential condominium association building policy.<sup>2</sup> While there are many “write-your-own” insurance companies, the provisions of each SFIP are strictly governed and controlled by FEMA, which administers the NFIP. The NFIP in effect “guarantees and subsidizes flood insurance.”<sup>3</sup> Due to the location of the properties that need flood insurance the most, a SFIP may be the only policy the insureds are able to afford.

## Summary Judgment in a Nutshell

While all of the cases discussed in this article involve SFIP coverage, three of them reached a conclusion via summary judgment. Summary judgment is a final ruling by a court in which the party moving for summary judgment is entitled to a judgment as a matter of law because there is no genuine issue of fact present in the case. A genuine issue of fact would be a

core fact that is not agreed upon by both parties, so a jury would be necessary to resolve the dispute. If summary judgment is granted in favor of the moving party, then the case is over.

These cases illustrate how important the details are, especially when it comes to a flood insurance policy. In each case, the insurance company, or insurer, seems to be the one holding all the cards. The insurers are keenly aware of the details of the policy, while the insureds are repeatedly unaware of what their insurance policy truly covers or they misunderstand the wording of the policy. The courts do not seem to recognize any imbalance of power, rather they rule with the strict and specific language of the standard flood insurance policies present in each of these cases.

## Coverage for Flooded Basement or Below-Grade Areas

Water rises from the ground up, so logic would follow that your flood insurance would cover the first area of your house that would flood, the basement. In fact, the opposite is true. FEMA's SFIP does not cover below the lowest elevated floor, meaning anything below the ground floor. This limitation proves to be an issue for many homeowners. Consider, for example, the case of Ali Ekhlassi in Houston.<sup>4</sup> In May 2015, a severe storm caused Ekhlassi's basement to flood with five to six feet of water for two days. Ekhlassi's insurer denied payment for “all non-covered items located below the lowest elevated floor of [Ekhlassi's]...building.” Subsequently, Ekhlassi sued the insurer for breach of contract, violations of Texas Insurance Code, and violations of the Deceptive Trade Practices Act. The insurer moved for summary judgment.

The issue before the court was one of statute of limitations. The statute of limitations in a standard flood insurance policy, like the one Ekhlassi had, specifies that if you wish to bring a suit against the insurer, then you must file suit within one year after the first written denial is dated. The insurer sent the first dated denial letter in October 2015, and they later sent another denial letter in January 2016, which explicitly referenced the October letter. The court agreed with the insurer that the October

2015 denial letter initiated the statute of limitations period. Subsequently, Ekhlasi's suit in January of 2017 was not timely since the statute of limitations had run. The court made it out to be quite simple, but it was not clear to Ekhlasi, who thought the damage was covered and that he followed the appropriate steps to recover damages by filing within one year of the most recent denial letter.

Jefferson Beach House Condominium Association (the Association) experienced difficulties with its flood insurance coverage after Hurricane Sandy.<sup>5</sup> The Association was insured under a "write your own" SFIP by Harleysville Insurance Company of New Jersey (the insurer). Due to Hurricane Sandy, the parking garage sustained flood damage. Specifically, glass block window panels and masonry block required replacing at an estimated cost of \$33,264. The Association filed a timely claim and an independent adjuster inspected the property. The insurer paid part of the claim, but not all, so the Association sued the insurer for breach of contract.

The issue here arises from the categorization of the damage to the parking garage. The Association claims that the damage constitutes damage to the exterior of the enclosure, which would be covered damage under its SFIP. Based on the independent adjuster's report, the insurer contends that the damage to the parking garage was not exterior damage and occurred below the lowest elevated floor of the enclosure; therefore, the damage is not covered by the policy. The insurer sought to dismiss the Association's claim for failure to state a claim as well as dismiss the Association's claim for recovery of attorney's fees and costs. The court denied the insurer's motion to dismiss the claim for coverage. The court found that the Association did in fact adequately state a claim in their complaint, that the damaged wall was insured property. The court concluded that, based on the information before it, had the independent adjuster categorized the damage as damage to the exterior of the enclosure, the insurer would likely have paid the claim. This goes to show that not only is the language of the policy important, but how those involved interpret that language is also crucial.

### Coverage for Erosion Damages from Flooding

The next case, *Nixon v. Nationwide Mutual Insurance Company*, also highlights the importance of knowing the coverage of a SFIP.<sup>6</sup> Crawford Nixon filed suit against Nationwide Mutual Insurance Company (the insurer) alleging that his insurer had breached the flood insurance contract it had with him. In the Spring of

2014, heavy rains flooded the Black Warrior River in Alabama. The river rose so high that it came within feet of Nixon's home. After the waters receded, Nixon noticed that the flood caused the ground to shift and damaged his home. Nixon notified the insurer of the damage in a timely manner, which triggered an assessment of the property by an agent and an independent engineer.

Nixon was insured under a SFIP that had inflexible codified provisions. The independent engineer's report indicated the damage was caused by earth movement. Earth movement is not covered by a standard flood insurance policy because it constitutes land damage, and the insurer denied Nixon's insurance claim in May 2014. This suggests that the policy did not cover flood damage as might have been considered by the owner when water eliminated his ability to safely use his home. Nixon's father (Wilson) retained a geotechnical engineer to evaluate the property and an excavating company to stabilize the home. Wilson came to the conclusion that it would be a better long-term solution to move the home rather than try to repair it in its current location, so the excavating company also prepared a new home pad. Nixon appealed the insurer's denial of his claim to FEMA and provided photographs of the property, the geotechnical engineer's report, and a proof of loss form. FEMA affirmed the insurer's denial of Nixon's claim.

Nixon's proof of loss form contributed to the insurer's denial of his claim. A proof of loss form is a requirement under the SFIP. The SFIP mandates that a proof of loss form must be submitted to the insurer within sixty days of the loss incurred in order to recover from the insurer. The proof of loss should describe the amount claimed under the policy and specific information about the covered property. In Nixon's case, the proof of loss form was signed, but not dated when it was returned to the insurance agent.

The insurer claimed several bases for denying coverage. First, in January 2015, the insurer sent a letter stating that its previous denial letter, dated May 2014, was still in force. Further, the proof of loss was submitted to FEMA instead of the insurer. Finally, the proof of loss was received more than sixty days after the loss. For these reasons, the insurer stated that it would deny any further payment. Immediately following the January 2015 denial letter, Nixon filed suit against the insurer.

Ultimately the court granted the insurer's request for summary judgment, but for reasons not based on the proof of loss's filing. Instead, the court granted summary judgment in regard to land damages and relocation damages. Nixon argued

that these damages were covered under his flood insurance policy. However, based on the precise definitions of “dwelling” and “building” in the SFIP, the court found that the insurer was entitled to summary judgment for land damages from earth movement because the policy does not cover land damages, specifically land that is not part of the insured dwelling. The court also decided that summary judgment should be granted for the insurer in regard to the relocation damages because Nixon’s policy did not cover “the costs to construct a home pad and move the home to a new site.” This may lead some to question, if the policy negates the coverage reasonably expected by the insured then is it a fair contract between the insured and the insurer?

### Coverage for Removing Debris from Flooding

One would think that flood insurance covers damage caused by a flood, but as *Nixon v. Nationwide Mutual Insurance Company* showed, that can depend on a variety of factors. If an insured does not follow the precise provisions of the SFIP, then the insurer denies coverage. Hurricane Sandy devastated the East Coast, and the Torres were two of the nearly 62,000 people affected in New Jersey.<sup>7</sup> FEMA estimates that as a result of Hurricane Sandy, there were about \$3.5 billion in flood insurance payments in New Jersey alone.<sup>8</sup> The Torres, husband and wife, were insured by Liberty Mutual Fire Insurance Company (the insurer) under a SFIP.<sup>9</sup> The Torres’ property sustained significant damage, and the insurer initially paid the Torres upwards of \$235,000 for the covered damages to their property. In addition to this payment, the Torres later sought about \$15,500 for the removal costs of sand and debris from their property. The Torres and the insurer disagreed on the definition of “insured property.”

Therefore, the core issue before the court was one of contractual interpretation of the SFIP on whether it covered costs for removing debris carried in by a hurricane to their land surrounding their house. The SFIP contained debris removal provisions that used the term “insured property.” Unfortunately, the SFIP did not define insured property, so the court had to interpret the term. The Court of Appeals interpreted the term “insured property” as it relates to debris removal and came to the conclusion that “insured property,” as FEMA intends, means property that is insured. Under the SFIP, land is not insured, so “insured property” is solely the described building. If the debris in question had entered the Torres’ house, then the insurer could potentially pay for the cost of removing the debris. However, since the debris for which the Torres sought reimbursement was on the land that the insured building was on, they could not

recover those costs. The court maintained that insured property clearly meant the property that was insured under the policy, which did not include the land. Therefore, the court affirmed the judgment of the District Court and denied the Torres’ motion. This case serves as another example of how the specific language of a SFIP determines what is covered. These specific provisions are clearly up for interpretation as shown by the large number of insureds who have misunderstood what their policies covered.

### Conclusion

A few overarching issues are clear based on the cases above. The predominant common theme is that the details of the provisions in an SFIP can make or break an insured’s claim for recovery of damages. Predicting the outcome of a case involving a flood insurance claim can be difficult. As shown by these cases, courts can go either way because the facts dictate the decision as well as whether the procedures required by a policy are followed precisely. However, that is not helpful for homeowners that depend on their SFIP to cover damages from flooding. Additionally, how the independent adjuster or engineer describes the loss in their report can dictate whether the insurer will approve or deny an insured’s claim. Homeowners rely on these policies, so SFIPs ought to be reliable and predictable. Unfortunately, many insureds have experienced the opposite. Flood insurance policies reinforce the idiom that the devil is in the details and it definitely pays to pay attention to those details. 🦋

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### Endnotes

1. Gary Knapp, *National Flood Insurance Risks and Coverage*, 81 A.L.R. Fed. 416 (1987).
2. Carolann Jackson Dougherty, *National Flood Insurance Coverage in General*, 2 *Insuring Real Property* § 11.01.
3. *Jefferson Beach House Condo. Ass’n v. Harleysville Ins. Co.*, No. 13-6480 2014 WL 4681074 (D.N.J. Sep. 22, 2014) (quoting *Brusco v. Harleysville Ins. Co.*, No. 14-914, 2014 WL 2916716, at 1 (D.N.J. June 26, 2014)).
4. *Ekhlassi v. National Lloyds Ins. Co.*, 295 F. Supp. 3d 750 (S.D. Tex. 2018).
5. *Jefferson Beach House Condo. Ass’n v. Harleysville Ins. Co.*, No. 13-6480 2014 WL 4681074 (D.N.J. Sep. 22, 2014).
6. *Nixon v. Nationwide Mutual Ins. Co.*, 244 F. Supp. 3d 1245 (N.D. Ala. 2017).
7. FEMA, *Hurricane Sandy by the Numbers* (Oct. 9, 2015).
8. *Id.*
9. *Toree v. Liberty Mutual Fire Ins. Co.*, 781 F.3d 651 (3d Cir. 2015).

# The Expert's Magic Words: Exploring Outcome-Determinative Testimony in Hurricane Katrina Recovery Cases

Grace M. Sullivan

On August 29, 2005, Hurricane Katrina struck the coasts of Louisiana, Mississippi, and Alabama with winds up to 125 mph and a storm surge of 25-28 feet.<sup>1</sup> Not all of Hurricane Katrina's destruction came directly from its impressive storm surge or powerful winds alone. Cherri Porter lost her Biloxi home to a casino barge,<sup>2</sup> which broke free from the Grand Casino of Mississippi and destroyed her beachfront house on impact. Another of Grand Casino's barges, ironically dubbed *The Lady Luck*, broke free from its moorings and destroyed K.R. Borries's construction site on the nearby Schooner Pier.<sup>3</sup>

Borries sued Grand Casino for negligence in mooring its barge. Porter sued Grand Casino for negligence and sued her insurer for a bad faith denial of coverage. Lower courts granted summary judgments in favor of the casinos in Porter and Borries's claims, as well as the insurance company in Porter's case. This means that the court believed there were no disputed facts, and there was no need to have a trial in order for the court to find in favor of the defendants.

Eleven years after the hurricane, Borries and Porter's cases finally came before the Supreme Court of Mississippi. The Court had precedent, from the case of *Eli v. Silver Slipper*, of allowing similar claims to be decided by a jury, and it followed suit by remanding Borries's case back to the trial court for a jury trial. With respect to *Porter*, however, the Court almost inexplicably affirmed all of the lower courts' summary judgments.<sup>4</sup> Although a barge destroyed Porter's house, the Court held that the barge owner was not to blame and that Porter's insurance provider was not accountable either. Effectively, there was no legal recovery for Porter for Hurricane Katrina damages.

## An Act of God?

The pivotal question in each of these cases was whether Hurricane Katrina's massive storm surge amounted to an "Act of God" that, under law, freed the casino owners from liability. Those who use the phrase colloquially would certainly say the storm was

some divine event, an uncontrollable force of nature. However, the Mississippi court system took nearly a decade to solidify its position on whether Hurricane Katrina was *legally* an Act of God. That is, whether use of reasonable precaution could have prevented its damage.

In 2010, the Court of Appeals of Mississippi held that Hurricane Katrina was an Act of God.<sup>5</sup> This meant it would be nearly impossible for victims to bring negligence claims because the court said that the storm was unforeseeable and even the highest standard of care could not have prevented property from causing damage. In 2013, however, the case of *Eli v. Silver Slipper* brought the issue before the Supreme Court of Mississippi.<sup>6</sup> The Court distinguished the appellate judgment and instead held that whether Hurricane Katrina was an Act of God depended on a question of fact: whether or not reasonable care could have prevented foreseeable damage. Thus, the court in *Eli* found that the casino owner was not entitled to a summary judgment just for raising an Act of God defense and sent the case back to trial to determine whether the casino was negligent.

When the Court heard Porter's case less than three years later, the majority opinion did not discuss the Act of God defense by name, but the Court made clear that it decided the case on the issue of foreseeability. Porter argued that she established a battle of the experts similar to that which led the Court in *Eli* to determine that there was a genuine issue of fact as to whether the casino could have anticipated Hurricane Katrina's storm surge and whether it employed a reasonable amount of care to prevent damage. The Court disagreed and concluded that no material issues of fact existed and ruled in Grand Casino's favor.

Two months after *Porter*, in March 2016, the Supreme Court of Mississippi heard Borries' negligence claim. In that case, the casino-defendant raised the Act of God defense, and the Court held that the parties' experts presented genuine issues of fact. The Court remanded the case to trial for a jury

to determine whether the storm should be called an Act of God, but the parties settled in 2017, just before trial.

### The Experts' Magic Words

How is it possible that two seemingly identical claims related to the same storm and against the same casino came out of the Supreme Court of Mississippi with vastly different results? Based on the Court's opinions, the somewhat unsatisfactory answer is that Porter's expert's language may not have been precise enough, or he may not have included all of the information at his disposal to address the key issue of whether the casino should have foreseen a storm of Hurricane Katrina's magnitude. A closer look at these testimonies alongside the defendants' arguments provides clarity.

#### Borries v. Grand Casino

Borries' expert claimed that, while the barge's mooring was designed to withstand up to a fifteen-foot storm surge, a reasonable engineer for the casino should have used the known surge height of Hurricane Camille, which was around twenty-four feet. Grand Casino's experts responded that the barge's mooring could withstand up to a seventeen-foot storm surge, which exceeded the Mississippi Gaming Commission's minimum licensure requirement and was dispositive of reasonable care.

#### Porter v. Grand Casino

Porter's expert presented evidence that Grand Casino of Mississippi had failed to submit to annual structural inspections of their mooring system or develop a heavy storm-mooring plan, which was industry standard. Notably, the expert did not testify to the foreseeability of the storm surge. Grand Casino responded with expert testimony that it met and exceeded the minimum regulatory requirements from the gaming commission and therefore met its standard of care.

The Supreme Court made it clear in each case that the casinos had a duty to prevent foreseeable damage to nearby property owners in the event of a hurricane. The court held that, as in *Eli*, Borries presented a genuine issue of material fact as to the element of foreseeability, while Porter pointed to evidence of the casino's negligence without discussing whether the casino should have foreseen Hurricane Katrina's destruction. The difference that resulted in Borries's success was the expert testimony as to foreseeability. The appellate court

decision on *Porter*, which the Supreme Court of Mississippi affirmed, notes that Porter's failure to directly tie her evidence to foreseeability was "outcome determinative" in the court's eyes.<sup>7</sup>

### Insurance Claims

Cherri Porter, her home left in rubble after Hurricane Katrina, also tried to recover from her insurer, State Farm Fire and Casualty Co. After all, what is insurance for if not to cover an Act of God? Porter held an all-risk policy, meaning that any damage would be covered, unless it was specifically excluded. State Farm denied her initial claim for coverage, citing an exclusion for both wind and water damage. Porter sued for bad faith denial of coverage, wielding expert evidence that a casino barge destroyed her home, not wind or water. For her argument, Porter again relied on a prior Hurricane Katrina case in which the Supreme Court of Mississippi interpreted a common policy clause to favor the insured.

In that case, *Corban vs. USAA Insurance Agency*, a homeowner suffered major wind and water damage to her house during Hurricane Katrina. Corban's insurer denied that it was required to pay for the loss based on her all-risk policy's water damage exclusion and the "anti-concurrent cause (ACC) clause." This type of provision means that an insurance policy only provides coverage when damage is *directly* caused by a covered peril, not when there is a chain of events leading to the loss. The insurer in *Corban* claimed that the ACC barred recovery where water damage was involved, regardless of any other damage or the order in which it occurred.<sup>8</sup> The Supreme Court of Mississippi held that the ACC clause in Corban's policy was only applicable where an excluded peril and a covered peril acted in conjunction to cause the same damage. The case was sent back for a jury trial to determine the factual question of how much damage was caused by water, an excluded event, versus how much damage was caused by wind, a covered event.

Porter argued that her home was at least partially destroyed by a covered event, as in *Corban*, and a jury should sort out the damage. In her case, Porter contended, the insurance policy covered damage from debris like the casino barge. The Supreme Court gave less discussion to the anti-concurrent cause language and instead pointed to a phrase within Porter's policy that refused coverage for any damage that would not have happened in the absence of an excluded event. Accordingly, as Porter's policy excluded wind and water damage, the Court held that the casino barge could not have caused damage without either of these excluded events.



### Another Expert's Shortcoming

The dissenting justice in *Porter* expressed that the majority made a mistake by not using *Corban* as precedent. He pointed out that a home destroyed by detached casino barge did not fit any commonly held understanding of water or wind damage and a jury should have determined the causes of Porter's damage.

A look at the 2014 appellate court decision in Porter's case may shed light on why the majority in the highest court held there were no factual issues as there were in *Corban*. Porter presented expert testimony that the proximate cause of her damages was the casino barge. In his testimony, the expert stated that the casino barge allided with Porter's house. The appellate opinion notes that "allided" is a nautical term that is used to describe something propelled by water crashing into something stationary. Therefore, the court saw the expert opinion's use of that word as a concession that the barge would not have destroyed Porter's house but for the storm surge, which was water damage excluded from coverage by her insurance policy. Again, one could speculate that the outcome of Porter's claim turned on her expert's precise word choice.

### Conclusion

The legal aftermath of Hurricane Katrina is still evident in Mississippi's court system. Claims are still coming to review and parties are still settling a storm of litigation over a decade after the wind and waves devastated the Gulf Coast. For K.R. Borries, the courts kept his claim afloat long enough to have leverage to

reach a settlement, perhaps recovering some percent of the value of his lost construction site. In the case of Cherri Porter, the legal system offered no recovery, although her home was destroyed. A close look at the court's decision reveals the significance of the expert's testimony, including the importance of precise language, in reaching a determination, even where cases with seemingly identical facts resulted in opposite outcomes. 🐟

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### Endnotes

1. NOAA.
2. In Mississippi pre-Katrina, gambling businesses were only allowed to operate on offshore barges, as a compromise to groups that opposed legal gambling in the state. Most of the casinos were permanently moored just off the coast. *See*, Rick Lyman, *Mississippi May Move Its Casinos Ashore*, The New York Times (Sept. 28, 2005).
3. *Borries v. Grand Casino of Mississippi, Inc.*, 187 So. 3d 1042 (Miss. 2016).
4. *Porter v. Grand Casino of Mississippi, Inc.*, 181 So.3d 980 (Miss. 2016).
5. *Bay Point High and Dry, LLC v. New Palace Casino, LLC*, 46 So. 3d 821 (Miss. Ct. App. 2010).
6. *Eli Investments, LLC v. Silver Slipper Casino Venture, LLC*, 118 So.3d 151 (Miss. 2013).
7. *Porter v. Grand Casino of Mississippi, Inc.*, 138 So. 3d 952 (Miss. Ct. App. 2014).
8. *Corban v. USAA Ins. Agency*, 20 So. 3d 601 (Miss. 2009).



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