

# 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. 🦋

*Rachel Buddrus is Legal Intern at the Mississippi-Alabama Sea Grant Legal Program as well as a rising third year law student at the University of Mississippi School of Law.*

### 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).