



FEMA

W-13007

February 12, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the
National Flood Insurance Program (NFIP) Direct Servicing Agent

A handwritten signature in black ink, appearing to read "James A. Sadler".

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program

SUBJECT: **Ability of a Write Your Own (WYO) Program-Participating
Insurance Company to Pursue Legal Action to Recover an
Improper Payment**

This Bulletin is issued by the Federal Emergency Management Agency (FEMA), as an exercise of its oversight authority over the National Flood Insurance Program (NFIP), a Federal insurance program administered by FEMA pursuant to the National Flood Insurance Act of 1968 (the "NFIA"), as amended, 42 U.S.C. §§ 4001 *et seq.* The NFIP currently is administered as a Government Program with Industry Assistance under Subchapter II, Part B of the NFIA, 42 U.S.C. §§ 4071 – 4072, with the Standard Flood Insurance Policies (SFIPs) (codified at 44 C.F.R. Part 61, Appendices A (1-3)) sold and administered directly by the Federal government and by participating Write Your Own (WYO) Program insurance companies that are signatories to the Financial Assistance/Subsidy Arrangement (the "Arrangement") with FEMA. See 42 U.S.C. §§ 4071, 4081; 44 C.F.R. § 62.23 and 44 C.F.R. Part 62, App.A.

Under the authority of 44 C.F.R. §§ 61.13(d), 62.23(k), General Conditions part D of the SFIPs (44 C.F.R. Pt. 61, App.A(1, 2) VII. D, and App.A(3) VIII. D), and 44 C.F.R. Part 62, App. A, Sections II(G) and IV(B), FEMA issues Bulletins to clarify and, when necessary, to grant exceptions or waivers to Program requirements or terms of the SFIPs.

WYO companies selling the SFIPs are fiscal agents of the United States responsible for Federal funds maintained in the National Flood Insurance Fund, 42 U.S.C. § 4071. The WYO Companies also have a fiduciary duty to FEMA to ensure that any taxpayer funds are accounted for and appropriately expended. See 44 C.F.R. § 62.23(f). Consistent with their fiduciary obligations, WYO Companies may pursue legal action against an insured to recover an improper payment made under an SFIP when appropriate.

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We recognize that there has been discussion in the WYO community that the decision in *Florida Farm Bureau Gen. Ins. Co. v. Voncille Jernigan*, 3:09CV145/MCR/EMT, 2010 WL 3927816 (N.D. Fla. Sept. 30, 2010) (finding that a WYO Company could not bring an action for unjust enrichment against an insured because of Federal pre-emption) precludes affirmative litigation to recover improperly paid claims, including ICC advances. We do not see the *Jernigan* decision as a bar to properly plead affirmative litigation, and WYO Companies have the ability to pursue legal action against insureds for improper payments made under an SFIP. Indeed, the same Court, four years prior to *Jernigan*, agreed that a WYO Company may bring suit against an insured to recover improper payment of U.S. Treasury funds and that the WYO Company was a proper party to bring such action. See *Fidelity National Property & Cas. Ins. Co. v. Tibbs*, Civil Action No. 3:05-cv-421 (N.D. Fla. June 12, 2006). In any event, a WYO Company remains liable to FEMA for improper claim payments, notwithstanding decisions on whether to pursue affirmative litigation against a policyholder.

Conclusion

We ask for your full support. Any questions or comments should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at: Russell.Tinsley@fema.dhs.gov.

Authority: 44 C.F.R. § 61.13(d); 44 C.F.R. §§ 61, Appendices A(1), A(2) and A(3), General Condition (D); 44 C.F.R. § 62.23(k); 44 C.F.R. § 62, Appendix A(1), Articles II(G) and IV(B); 42 U.S.C. § 4019.

cc: Vendors, IBHS, and Government Technical Representative

Suggested Routing: Claims, Underwriting