

U.S. court panel: Why are Sandy flood claims still unpaid 2 years later?

Newsday

Thousands of property owners across the metropolitan area who thought their federally funded flood insurance would cover damage from superstorm Sandy were bitterly disappointed when it did not, and many sued for more money. So far, few of those cases have been settled or resolved, even though federal courts are encouraging mediations to avoid costly and protracted litigation. Now the courts want to find out why.

The committee of three magistrate judges overseeing more than 1,000 cases filed in the U.S. District Court for the Eastern District of New York alone has called for a conference of attorneys Tuesday to discuss why, as one defense attorney wrote, “the mediation process . . . is failing.” Of 1,287 cases filed in the Eastern District from Long Island, Queens, Staten Island and Brooklyn, 1,075 were still open as of Thursday.

It comes amid intensified scrutiny over insurer practices after a judge harshly criticized an engineering report he said was improperly rewritten to deny coverage for a damaged foundation, a practice he suggested might be widespread. All four U.S. senators from New York and New Jersey have called for an inquiry. In the meantime, thousands of homeowners still must depend on aid from federally funded housing recovery programs such as New York Rising to complete repairs two years after superstorm Sandy.

Reasons for delay debated

The Federal Emergency Management Agency, which funds the National Flood Insurance Program, and the lawyers defending the private carriers who administer the policies, say they are unable to comment on pending litigation.

The property owners’ lawyers, however, are emphatic about why they think mediation results have been meager. Long Beach attorney Denis Kelly, co-counsel for 240 Long Island homeowners, said of the insurance companies and their counsel, “You’re not giving us what we’re entitled to under the [flood insurance] policy and you’re just stringing us out, trying to wear us out.” Kelly said many of his clients

were still waiting to finish repairs and move home. “I have people who are at their wits’ end. They were traumatized by Sandy and now they are being traumatized by their own government.”

Louisiana-based Gerald Nielsen, a leading defense lawyer for the flood insurance carriers, vigorously defended their approach in an early filing to the court. He wrote that FEMA, which ultimately pays carriers’ attorney fees and expenses, could be hit with bills nearing \$100 million unless plaintiffs quickly complied with demands on how to document damage and costs. Without that, he wrote, the plaintiffs and their contractors and suppliers would be questioned in a lengthy discovery process. “Federal payment [to policyholders] that cannot be paired with documentation that supports it is an illegal payment,” Nielsen wrote. “. . . Why not produce that documentation now to avoid the cost of a trial for the plaintiffs?”

Benjamin R. Rajotte, assistant law professor and director of the Disaster Relief Clinic at Touro Law in Central Islip, questions the right of insurers’ attorneys to make their specific documentation demands, because they are not written out in flood insurance policies, and are not an official part of FEMA’s regulatory code. “All of these receipt standards were thrown on people a long time after the disaster,” he said. Even if homeowners had sufficient notice, he said, the receipt standard is “impossible, unfounded in the policy and regulation governing FEMA’s actions, and unfair to begin with.” Many of these receipts are difficult for homeowners to provide, either because they no longer have them or they are entangled amid many purchases from many sources. Contractors who have done the work often don’t itemize in the form demanded by the defense attorneys, said Rajotte, whose clinic is representing eight Long Island families pro bono. A ninth case was successfully mediated.

Payouts falling short

In many cases, disputes occur over what damage and repairs are covered by the policies and how much repairs should cost, both for completed and future work. Homeowners also face difficulties pairing receipts to covered repairs when reconstruction differs from how the house was before being flooded, he said, including cases where homes were elevated to comply with floodplain regulations.

Long Beach attorney Kelly asserted many payouts fell far short of what repairs would cost in this area, especially with high demand for material and labor after a disaster. The fact that a homeowner quickly and cheaply made repairs with whatever settlement was given doesn’t prove the settlement was fair, he said. “They want full reimbursement for their actual losses and damages for what they had in the house before the flood.”

Jonathan J. Wilkofsky, a Manhattan attorney representing flood insurance policyholders, said that FEMA has tightened its audits and constraints on the private carriers administering the National Flood Insurance Program policies since Hurricane Katrina in 2005, when payouts for flood damages were more generous. “Now the operative word is stingy,” he said. Because private insurance carriers who administer

the policies can be audited by FEMA, which has the right to demand reimbursements for what it considers overpayments, “the end result is that the carriers will never come close to overpaying a claim because they’ll be held responsible for repaying it,” he said. “So they default in the opposite direction and wind up underpaying the claim.”

Finding gaps in coverage

And, beyond the underpayments for covered damage, homeowners were often dismayed to discover their coverage had gaps, for example limited coverage for flooded first floors deemed a basement, even if their kitchen and living room were located there, and the so-called “earth movement” exclusion. In those cases, insurers deny coverage because they say a foundation was damaged by a pre-existing condition, or by the structure sinking or subsiding, rather than by floodwaters pushing against the house. Joseph and Patricia Giovinco of Lynbrook sued over denial of coverage for foundation damage in the bungalow they own on Michigan Street in Long Beach. Coverage was denied based on an engineering report by U.S. Forensic LLC, the same firm lambasted in a court decision earlier this month. A judge said the firm improperly rewrote, and reversed, a draft report so as to deny coverage to the owners of another Michigan Street house in a case known as *Raimey v. Wright Home Insurance Co.* Pointing to that decision, the Giovincos hope their suit will hold insurers “accountable,” Patricia Giovinco said. “I’m feeling cautiously optimistic that we will finally not be just brushed off anymore and this madness will stop,” she said. “. . . I pray that we are finally being heard.”

Over the weekend, attorneys for insurers and FEMA filed court papers challenging the judge’s order in the *Raimey* case that insurers produce all stages of documentation, including draft reports, as evidence in Sandy flood insurance litigation.

Advantages for FEMA

Assistant law professor Rajotte said that while the state regulates private carriers’ homeowner insurance, FEMA, an agency of the U.S. Department of Homeland Security, is responsible for regulating its own flood insurance policies. “You have a fox guarding the henhouse situation,” he said. A suit against them “essentially pits an individual homeowner against the full weight of the United States government in a federal lawsuit.”

FEMA was “unable to comment” on pending litigation, according to spokeswoman Brittany Trotter. Amy Bach, executive director of United Policyholders, a consumer advocacy group based in San Francisco, said that the court would give a lot of deference to the national flood insurance program “because it’s a partially taxpayer-funded program.” The reality, she said, is that the program had some “real nitpicky rules to get a settlement from the policy that you would not expect from the sales material you get when you buy one” and that the program had broad discretion on how much or how quickly to

pay out on a claim. It might be the job of defense lawyers like Nielsen to be “a stickler and make sure NFIP does enforce every single technical rule against the policy holder,” she said. But, “the bottom line [is] I don’t think it will serve the NFIP and the taxpayers or the homeowners of Long Island if Nielsen nickel and dimes people who have filed lawsuits and looks for ways to drag it out as opposed to looking for ways to resolve it.” On the other hand, she said, some big issues — such as the exclusion eliminating coverage for loss from earth movement — needed to be litigated and settled through court decisions once and for all.

Wilkofsky said flaws in FEMA’s approach were counterproductive to restoring flooded communities. “If you look at the terms of the coverage, it doesn’t tend to return businesses and homeowners to their pre-loss condition,” he said. “The gaps in coverage are so substantial that homeowners and business people can’t rebuild. “Misleading advertising for flood insurance policies can lead homeowners to believe they will be completely protected, while brokers and insurance agents, he said, are often “woefully inadequate in explaining them and in writing policies free of underwriting errors.” In some cases, he added, property owners are not guided to the appropriate coverage in the first place.

State getting more involved

Wilkofsky has urged the State Legislature to enact measures holding brokers and agents to higher standards of conduct, and supports giving New York consumers more rights. In the months after the Oct. 29, 2012, storm, state Assemb. Kevin Cahill D-Kingston) and the insurance committee he chairs held hearings and roundtables for Sandy victims to recount their experiences with insurance. He, like Wilkofsky, found many hadn’t really known what was in their flood policies. An Assembly legislative package would have called for making policy coverage clearer to consumers, Cahill said.

Ellen Melchionni, president of New York Insurance Association, an industry trade group, encouraged policy holders to read their policies and discuss them with their agent or company representative. “Greater education of New Yorkers about insurance is essential, but more paperwork being added to policies under the guise of a disclosure will only create confusion,” she said. These types of requirements being proposed in the legislature will make the process of buying insurance more complicated and will not help New Yorkers to be better prepared for severe storms and other possible risks, she said. But Cahill said, “It’s my view that where federal policies fall short we should step up to the plate to fill the gaps.” Insurance policies’ arcane language “allows insurers to take advantage of the technicalities and the ambiguous interpretations that can come from a particular clause,” Cahill said. “It’s those ambiguities that force people to be in court, people who should be thinking of Sandy as a bad memory and not something they should have to deal with still to this day.”

By the numbers



1,287 were cases filed in the U.S. District Court for the Eastern District, 1,075 were still open as of Thursday. Source: U.S. District Court for the Eastern District