

# Carrier Management

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## Potential Flood of Flood Insurance Lawsuits Looming

Everyone in the insurance industry knows that the National Flood Insurance Program is on its deathbed, notwithstanding the recently passed extension, and many are prepared to step in. Insurers are already approved to write flood policies.

While the number of flood policies written by private insurers is an infinitesimal part of the overall private market today, carriers are salivating at the potential revenue. After all, published reports predict that flood insurance is a \$40 billion market, once the private market is firmly entrenched.

This revenue surge will not be without its drawbacks. Namely, lawsuits will increase dramatically, once the public adjuster community and the trial lawyers who steer anti-business litigation realize what they have on their hands. In fact, we can be sure that somewhere, a savvy plaintiffs' property insurance lawyer is monitoring flood insurance policy data from regulators, waiting until the number of policies in-force reaches critical mass before pouncing with an aggressive advertising campaign.

The reason for the increase is simple, and Florida provides an instructive historical exemplar for the path that lies ahead. Primarily, lawsuits against the NFIP and NFIP surplus carriers are currently not profitable for plaintiff lawyers because Florida's one-way attorney fee statute does not apply. However, there is no prohibition on the statute applying to suits against private insurers. The NFIP also prohibits lawyers and public adjusters from being named on checks; attorney's fee statutes have no such prohibitions. Where plaintiff's lawyers see dollar signs, we can be assured that lawsuits will arise.

Forget about the extension of the NFIP and recent efforts to extend the program for another six years. The private flood market is not going anywhere. In Florida, at the end of 2017, there were 22 private

### Executive Summary

*As insurers dive head first into the private flood insurance market, are they ready for the flipside of a revenue surge—a flood of new lawsuits made more likely by one-way attorney fee statutes in a state like Florida, where private insurers also have been dealing with the AOB crisis? Attorney Jason Wolf advises insurers to anticipate the oncoming flood of flood litigation by marrying their legal teams with their claims-handling units and through simple practices like clear and active communications with insureds.*

insurers approved to write flood policies—an increase from 10 a year earlier. Only 1,796 flood claims were filed after Hurricane Irma, a tiny portion of the nearly 823,733 Irma claims filed statewide. (This data is from the Florida Office of Insurance Regulation and encompasses claims filed through June 12, 2018.) The obvious reason so few flood claims were filed is that flooding was not prevalent, as it was in Houston when Hurricane Harvey wreaked havoc.

Florida's current crisis with Assignment of Benefits lawsuits is the model that insurance companies hope not to replicate. In the early part of this decade, plaintiff lawyers, public adjusters and water mitigation companies figured out that AOBs were a profitable method of piggybacking onto legitimate—and also dubious—claims and lawsuits. These days, it is not uncommon to see up to six lawsuits from a single claim. For example, the water dryout company, roofer, tarp installer, mold remediator and even the architect will have the homeowner sign an AOB, thereby giving license for a savvy plaintiff lawyer to get paid fees on six suits. It is nothing more than a holdup.

The federal government solved the AOB problem for NFIP policies, but the private sector will not have the same remedy. When FEMA declared that lawyers and others could not be named on checks, the agency cited an obscure 76-year-old law, the Assignment of Claims Act, to preempt plaintiff attorneys, public adjusters and other lienholders—such as water mitigation companies—from clawing their way into being named on indemnity payments. Unfortunately, no such remedy is available to private insurers.

For six years in a row, the Florida legislature has failed to cure the AOB crisis, although industry watchers are hopeful that the 2019 session will bring about meaningful change. Meanwhile, insurers have no clear path to win these suits. Insurance companies were caught off guard when the AOB suits blew up and it took years to mobilize. To put this in stark terms, insurance companies have been two steps behind the plaintiffs' bar ever since the AOB crisis started, and they keep falling farther behind.

Fortunately, at least in Florida, if the legislature ever passes the bills to lessen AOB litigation, that could ensure that flood insurance lawsuits are at least limited to those brought by policyholders, instead of suits by the policyholder and a small army of assignors.

Lessons learned from the AOB world can be applied to the looming flood lawsuit crisis. The most self-evident way to be prepared for flood insurance lawsuits is to simply know that it is coming.

Just as all insurers have catastrophe plans in place, they should also have something similar in place for defending and resolving lawsuits. This does not start with the legal department or outside counsel. This starts with the claims department and those who formulate strategies on the front end, to avoid lawsuits on the back end.

Do you have a team in place to manage the lawsuits in-house? Do you have defense counsel identified, even on an informal basis, who have expertise in this area? What is your appetite for aggressively defending flood insurance lawsuits, as compared with trying to resolve most of them? Scorched earth litigation is crushingly expensive.

It always shocks me when I am assigned to defend a lawsuit and I see a decision that was made by the desk adjuster and subsequently approved by management that could have avoided a lawsuit. I know my position as defense counsel affords the benefit of hindsight, but the fact remains that every decision in

the chain can affect the amount of money paid out in a lawsuit, no matter how attenuated the day-to-day workings of a claim seem to be, as compared with the lawsuit.

Simple Claims Handling 101 tactics such as active communication with the insured or his representation, clear and concise letters, thoroughly reviewing submitted documentation, and bending over backward to investigate claims will all help ensure that people have fewer gripes about their claims and are less likely to bring suit. These things happen because the hard-working employees in the field and on the claims floor are often unaware of what happens in litigation. This costs the company money.

Ultimately, developing a cohesive strategy, marrying your legal team with the claims-handling unit and planning ahead is the only way to combat the future of flood insurance lawsuits in order to ensure that it does not emerge into a full-blown crisis.

## CONTRIBUTOR



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