

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division**

THOMAS L. MOFFETT, II, ET AL.)	
)	
Plaintiffs,)	Civil Action No. 8:05-CV-01547
)	Hon. Peter J. Messitte
v.)	
)	
COMPUTER SCIENCES CORPORATION, ET AL.)	
)	
Defendants.)	
)	
)	
)	

**DEFENDANTS’ MEMORANDUM IN RESPONSE TO THIS
COURT’S ORDER OF APRIL 23, 2007**

COMES NOW, the Federal Defendants, Federal Emergency Management Agency (“FEMA”), Department of Homeland Security, and Michael Chertoff, Secretary of Homeland Security, by and through the undersigned attorneys, and on behalf of all of the remaining Defendants herein,¹ respectfully submit this Motion in response to this Court’s Order of April 23, 2007.

I. FACTUAL BACKGROUND

On April 23, 2007, at the hearing on Defendants’ Motion for Partial Summary Judgment, this Court ordered FEMA to file a brief within 45 days explaining:

1. The general criteria used to determine whether an insured is entitled to an individual waiver of the proof of loss requirement after a claim has been paid in full when the insured seeks reimbursement for additional loss;
2. The specific criteria used in responding to such claims for additional loss in the case of claims arising out of Hurricane Isabel; and
3. An example of a prototype individual waiver given in connection with Hurricane Isabel.

¹ Pursuant to the Court’s Order of November 7, 2006, defendants have agreed that FEMA, as the Federal agency responsible for the administration of the National Flood Insurance Program, should file the joint motion for partial summary judgment on their behalf.

As stated in Defendants' Motion for Partial Summary Judgment, on October 28, 2003, Anthony Lowe, the then-Director of the Mitigation Division and the Federal Insurance Administrator, issued a written notice extending the deadline for filing a proof of loss ("POL") for Hurricane Isabel claims involving damage that occurred between September 17 and 19, 2003, for an additional sixty days beyond the normal sixty-day deadline set forth in the Standard Flood Insurance Policy ("SFIP"). (A copy of the October 28, 2003 notice is attached hereto as Exhibit A.) The notice expressly stated that "all other terms and conditions of the SFIP remain in effect." (Ex. A at p. 2.)

On April 16, 2004, Administrator Lowe issued another notice announcing that FEMA had "implemented a claims review process to ensure that NFIP policyholders who filed claims following Hurricane Isabel received an equitable loss settlement." (A copy of the April 16, 2004 notice is attached hereto as Exhibit B). This notice included information to be sent to policyholders regarding the review process that stated, *inter alia*, "[i]f you have not received compensation equal to your maximum policy coverage, you are being given the option to request a claim review." *Id.* at p. 2. It went on to inform policyholders that they should complete a request for review form and return it to the NFIP if they wanted their claim to be reviewed. *Id.* The notice further explained the review process as follows:

As the reviews are completed, some flood insurance claims settlements will be found to be correctly evaluated. In those cases, policyholders will receive a detailed written explanation. If some claim settlements were incorrect, and more dollars should be paid, an adjustment will be made and policyholders will receive additional funds along with a detailed written response.

Id. Notably, the document does not mention the POL requirement or refer to any waiver of SFIP requirements.

Prior to requesting this Task Force review, any policyholder who had failed to submit an initial POL within the extended 120 day deadline (or any additional extension granted to an individual insured) was required to seek an individual waiver of the POL deadline following the standard procedures for submission of a waiver as outlined below. *See* Declaration of Sue Woods attached as Exhibit C at ¶ 15.

II. GENERAL CRITERIA FOR AN INDIVIDUAL WAIVER OF THE POL DEADLINE

Generally, when an insured seeks additional compensation after a POL has been submitted and paid in full, the insured must document the newly-discovered damages and submit a supplemental POL to their insurer or, for direct side cases, to the NFIP. *Id.* at ¶ 5. The insurer or, for direct side policies, the NFIP servicing agent, adjusts the supplemental claim. *Id.* If an insured submits a supplemental POL to a Write Your Own ("WYO") insurer after the POL deadline, the insurer sends the supplemental POL, along with its recommendation as to payment, to the Federal Insurance Administrator. *Id.* The procedure for requesting a waiver is the same for direct side policyholders, except the request for the individual waiver is made directly to the NFIP. *Id.* at ¶ 5.

The question of whether a waiver would be granted in regards to any given NFIP claim, has always turned on three distinct considerations: First, are the additional damages sought actually covered by the SFIP? Second, has the insured submitted detailed line-item

documentation supporting the particular additional amounts being sought for those covered damages? Third, has the insured established that he or she has proceeded in good faith and with a reasonable explanation for the delay? Those are the criteria that FEMA utilized before Hurricane Isabel, during Hurricane Isabel, and subsequent to Hurricane Isabel. *Id.* at ¶ 7.

III. SPECIFIC CRITERIA USED IN RESPONDING TO CLAIMS FOR ADDITIONAL LOSSES IN CASES ARISING OUT OF HURRICANE ISABEL

The Federal Insurance Administrator established the Hurricane Isabel Task Force to conduct an internal review of claims resulting from the storm, so as to ensure “[e]quitable loss settlements.” *See* Ex. B at p. 2. FEMA managed the entire Task Force process. *See* Ex. C at ¶ 11. James Shortley and Sue Woods, FEMA employees, oversaw the daily functions of the Task Force. *Id.* Sue Woods was responsible for reviewing and approving the work of the individual Task Force examiners including the recommendations for payment or denial of additional compensation. *Id.*

Upon receipt of a request for review of a timely submitted claim, the Task Force assigned an adjuster to the claim. *Id.* at ¶ 17. In some circumstances, the Task Force conducted an on-site inspection of the damaged property. *Id.* The Task Force considered all relevant information, including, the original claims file, reports issued after reinspection of the damaged property, contractors’ estimates, and invoices of completed repairs. *Id.* at ¶ 18.

IV. EXAMPLE OF A PROTOTYPE INDIVIDUAL WAIVER GIVEN IN CONNECTION WITH HURRICANE ISABEL

At the conclusion of the claims review process by the Hurricane Isabel Task Force, FEMA sent each insured that had requested Task Force review a letter explaining the results of the review. *Id.* at ¶ 19. If the Task Force determined an insured was eligible for additional compensation, it wrote to the insured informing him or her that additional amounts would be paid, subject to submission of an enclosed supplemental POL, which the insured was authorized to submit after the deadline. *Id.* The letters did not provide any further relief from compliance with any other policy provision. *Id.* Insureds were not permitted to modify the supplemental POL. *Id.* FEMA sent another letter to the insurer or, for direct side cases, to the NFIP servicing agent, notifying them that an additional payment was authorized. When the insurer or NFIP servicing agent received the signed supplemental POL from the insured, payment was authorized solely for that amount. *Id.* The letter to the insured and provided to the insurer or NFIP servicing agent permitted the insurer to accept the supplemental POL and release payment for the amount granted by the Task Force. *Id.*

V. ARGUMENT

The Task Force was created as an internal review process to ensure that “NFIP policyholders who filed claims following Hurricane Isabel received an equitable loss settlement.” *See* Exhibit B. The Task Force was created by the Federal Insurance Administrator. *Id.* It was run directly by NFIP personnel as an internal process. *See* Ex. C at ¶ 11. Sue Woods and James Shortley, Senior FEMA Claims Examiners, oversaw the day-to-day operations of the Task Force, including the approval or denial of additional compensation. *Id.* They were both delegated authority by the Federal Insurance Administrator to waive provisions of the SFIP. *Id.*

Policyholders who had failed to submit a timely POL prior to the establishment of the Task Force were required to seek a waiver from the Federal Insurance Administrator through their insurer or, for direct side policyholders, through the NFIP. *Id.* at ¶ 15. Other than the initial 60-day extension granted by Administrator Lowe on October 28, 2003, no blanket extension or waiver of the POL provision was granted. The Task Force provided an extraordinary additional quality assurance review beyond the normal claims review process.

The NFIP Direct claims currently before this Court fall into two categories. In the first category, a POL was submitted in a timely manner and a partial denial was issued. *Id.* at ¶ 20. Consistent with the requirements of 42 U.S.C. § 4072, these individuals were notified by letter that they could file a lawsuit within one year of the date of the letter. *Id.* There are three claims on the direct side of the NFIP (the claims within the possession of and reviewed by FEMA for this litigation) that fall into this category, and in all three cases, the lawsuits were not filed within one year of the date of the denial letter and are untimely. *Id.*

The second category is exemplified by the remaining seven direct side policyholder plaintiffs, who submitted a POL within the 120-day POL deadline and received full payment of the amount requested on their timely POLs. *Id.* All seven Plaintiffs' files were reviewed by the Task Force, and the Task Force granted four of these insureds additional compensation. *Id.* FEMA sent these four Plaintiffs a letter notifying them of the additional compensation and providing a supplemental POL for the amount approved by the Task Force. *Id.* Plaintiffs signing the supplemental POL received the additional payment authorized by the Task Force. *Id.*

FEMA respectfully submits the following: At no time during this lengthy and expensive litigation process have any of the Plaintiffs submitted an explanation to FEMA providing any of the information set forth above. This is despite the fact that throughout this litigation, Defendants have asked repeatedly for Plaintiffs to produce the required documentation. As of this juncture, FEMA does not possess information from Plaintiffs establishing the additional claims of these Plaintiffs are in fact covered, that Plaintiffs possess actual detailed documentation supporting that additional amounts are owed, that these Plaintiffs have a reasonable basis for having not come to FEMA much earlier, and why it was reasonable of them to not come to FEMA, and to instead pursue this lengthy and expensive litigation without providing FEMA the opportunity on the front end, to examine their documentation.

VI. CONCLUSION

For the foregoing reasons and as stated in Defendants' Motion for Partial Summary Judgment, this Court should make a determination that the POL deadline provision for Hurricane Isabel claims was not waived. Accordingly, Plaintiffs' breach of contract claims should be barred to the extent Plaintiffs failed to submit a supplemental POL for any compensation beyond the amount they previously claimed and were paid for on their timely POL.

Respectfully submitted this ____ day of June, 2007.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Memorandum in Response to this Court's Order of April 23, 2007 was served by first-class U.S. Mail, postage prepaid, this ____ day of June, 2007 to Plaintiffs' attorney:

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