



FEMA

W-14038

July 11, 2014

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

A handwritten signature in black ink, appearing to read "David L. Miller".

FROM: David L. Miller
Associate Administrator
Federal Insurance and Mitigation Administration

SUBJECT: Guide for Write Your Own Counsel

In light of the numerous lawsuits stemming from Superstorm Sandy claims, the Federal Emergency Management Agency (FEMA) is reissuing its March 26, 2001 Guide for Write Your Own Counsel (Guide). Please refer to the Guide and this bulletin when litigating all NFIP claims.

Based on issues that have been brought to FEMA's attention, I would like to highlight several requirements of the Guide.

- FEMA expects WYO companies to handle NFIP litigation "as carefully as they do litigation in other lines of insurance where their own assets are at risk." Guide at 2. FEMA expects WYO counsel "to observe the highest ethical standards and to comply with all applicable laws, rules, and regulations governing ethical conduct and conflicts of interest." Id. (emphasis added).
- FEMA "seeks the most expeditious resolution of legal matters at the lowest practicable cost, while maintaining the integrity of both the WYO Company's defense and of the program. Consistent with those goals, [FEMA] expects WYO counsel to carefully manage time and costs." Id.
- WYO "counsel who address the public orally or in writing on topics pertaining to the NFIP or laws and regulations affecting it must prominently disclose to the audience that he or she is making the presentation on his or her own behalf and not on behalf of the NFIP." Id.

- “Under the Arrangement, [Federal Insurance Administration] FIA and FEMA do not retain and are not responsible for payment of counsel representing WYO Companies. The WYO Company is responsible for paying its counsel without delay and for seeking reimbursement under the Arrangement. FIA [FEMA] reimburses WYO Companies for the costs the Companies incur defending NFIP litigation, including the cost of reasonable attorney’s fees paid by the WYO Company.” Id. at 4.
- Inappropriate litigation costs “include, but are not limited to, excess expenses, redundant work done within one firm or by different firms handling the case, and multiple/redundant depositions.” Id. at 6.
- “Travel costs must be reasonable. Counsel may wish to refer to the Government rate website to determine reasonable travel costs. Air travel will be reimbursed at not more than the coach rate for the subject flight. When possible, counsel should explore the availability of advance airfare purchase to control expense. Where possible, the FIA recommends that WYO Companies hire experienced NFIP attorneys located in the state in which the lawsuit originates to minimize costs.” Id. at 7.
- “The FIA and the FEMA OGC [now known as the Office of Chief Counsel] expect an approach that is aggressive, forthright, and consistent with the overall objectives of protecting the integrity of the NFIP while resolving litigation in an expeditious and cost-effective manner. Counsel should avoid extreme advocacy positions that are not likely to have a substantive impact on the outcome of litigation or further NFIP objectives. Where appropriate, motions to dismiss, for judgment on the pleadings, or summary judgment should be employed to resolve or refine the issues in dispute. Lengthy interrogatories, requests for extensive document production, or multiple and other necessary discovery should also be avoided.” Id. at 8.
- “By regulation (44 C.F.R. § 62.23(d)) and the terms of the Arrangement, the WYO Company is obligated to arrange for the defense of claims arising under the NFIP, including settlement when appropriate. Accordingly, the settlement options for each matter should be identified and considered at the outset of any NFIP-related litigation and at each state thereafter.” Id. at 8.
- “When considering settlement options, the WYO Company should act in a manner consistent with its fiduciary obligations as a ‘fiscal agent’ of the Federal government, and the propriety of a settlement will be considered on that basis. The WYO Company is responsible for settlement. FEMA’s OGC [Office of Chief Counsel] expects to be consulted on potential settlement only in extraordinary cases, e.g., when it involves areas of conflict within the program, or when proposed settlement exceeds the limits of exposure under the SFIP [Standard Flood Insurance Policy].” Id. at 8–9.

- “[T]he WYO Company is required to notify, and where appropriate, to assist law enforcement officials, including FEMA’s Office of the Inspector General, in investigating conduct that may constitute a violation a criminal or civil fraud.” Id. at 10.

As the Fiscal Agents for the NFIP, we expect WYO Companies and counsel to treat NFIP policyholders, plaintiffs’ counsel, and FEMA officials with respect and courtesy throughout the entire claims process, including litigation. WYO counsel should refrain from ad hominem attacks and unnecessary vitriol when representing WYO Companies in NFIP litigation.

If you have any questions, please contact Ramoncito deBorja, Deputy Associate Chief Counsel, Federal Insurance & Mitigation Legal Division, FEMA/DHS via email at ramoncito.deborja@fema.dhs.gov or by phone at (202) 646-2906.

Attachment: NFIP Guide for Write Your Own Counsel (Mar. 26, 2001)



Federal Emergency Management Agency

Washington, D.C. 20472

MEMORANDUM FOR: Write Your Own Companies

FROM: Howard Leikin
Acting Federal Insurance Administrator
Federal Insurance Administration

Michael D. Brown
General Counsel
Federal Emergency Management Agency

SUBJECT: Guide for Write Your Own Counsel

DATE: March 26, 2001

We are pleased to transmit to you the Federal Insurance Administration's ("FIA") new *Guide for Write Your Own Counsel*. This *Guide* provides important information on the policies and procedures to be followed by Write Your Own Companies ("WYO Companies") and their counsel in litigation involving the National Flood Insurance Program ("NFIP"). The *Guide* supplements the requirements in the Financial Assistance/Subsidy Arrangement ("Arrangement") between the Federal Insurance Administration and WYO Companies.

Over the history of the NFIP, case law has developed regarding the Standard Flood Insurance Policy ("SFIP"). In addition to this *Guide*, and as part of our mutual interest in defending litigation under the NFIP, FIA and the Federal Emergency Management Agency Office of General Counsel have developed and made available to you last year a *Digest and Guide on Litigation Concerning the National Flood Insurance Program* to facilitate research and defense of SFIP lawsuits.

Since the inception of the WYO Program in October 1983, defense of lawsuits based on the SFIP has generally been handled smoothly and effectively. We stand ready to continue to offer support to WYO Companies in all litigation matters concerning the NFIP in our ongoing spirit of partnership.

National Flood Insurance Program

Guide for Write Your Own Counsel

March 26, 2001

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2. Sample Case Management & Budget Reporting Forms
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This *Guide for Write Your Own Counsel* (“*Guide*”) has been developed by the Federal Insurance Administration (“FIA”) and the Federal Emergency Management Agency (“FEMA”) Office of General Counsel (“OGC”) to assist Write Your Own (“WYO”) Companies and their counsel defending National Flood Insurance Program (“NFIP”) litigation. The *Guide* does not replace the Financial Assistance/Subsidy Arrangement (“the Arrangement”; Appendix 1.), but is supplementary to it. To the extent that the *Guide* is inconsistent with the current or subsequent Arrangements, the terms of the Arrangement are considered primary. All days referenced in this Guide are working days.

I. National Flood Insurance Program Litigation

A. Federal Role

The FIA is a component of FEMA, a Federal Agency. Pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001 *et seq.* (“Act”), the FIA administers the NFIP, a Federal program that provides flood insurance to the general public in participating communities that adopt and enforce floodplain management ordinances in a manner consistent with the requirements of the Act.

Pursuant to the Act and its implementing regulations, found at 44 C.F.R., Subchapter B, flood insurance may be provided to the public either directly through the FIA (“Direct Program”) or by private sector WYO insurance companies. The following are FIA’s responsibilities under the NFIP:

- Defining, by regulation, the terms and conditions under which flood insurance may be sold
- Guaranteeing and reviewing payments from Federal funds to pay losses incurred by the WYO Companies
- Monitoring WYO Company underwriting, claims, and financial practices to assure compliance with applicable laws, regulations, and policies

Specifically, the FIA does the following to discharge its duties under the Act:

- Establishes the three Standard Flood Insurance Policies, which are codified at 44 C.F.R. Pt. 61, Appendices A (1)-A (3)
- Specifies the risk classes and premiums for covered property
- Issues policy statements and interpretations

The FIA is authorized to establish and maintain the National Flood Insurance Fund (“Fund”) in support of the NFIP. The Fund consists of Federal monies, including premiums. It is maintained by the United States Treasury and is available for payment of programmatic expenses and insurance claims. The FIA, in its role as guarantor, has a fiduciary responsibility to ensure the proper use of the Fund. To assist WYO Companies in their defense of NFIP related litigation the FIA has designated a legal liaison. (A point of contact list is provided at Appendix 3.)

B. WYO Companies' Roles

WYO Companies are private insurance companies that elect to participate in the NFIP and that meet the criteria in 44 C.F.R. Pt. 62 and appendices thereto. All Federal flood insurance policies offered through the NFIP must be sold and administered in accordance with the Act, implementing regulations, and policies developed by the FIA.

The relationship between the FIA and the WYO Companies is established in the Arrangement (44 C.F.R. Pt. 62, App. A). As consideration for their sale and administration of Federal flood insurance in their own name, WYO Companies retain from premiums various expense allowances and receive reimbursements as set forth in the arrangement, but take no insurance risk. Funds received from policyholders above the approved expense allowance are Federal funds, and WYO Companies serve as fiscal agents of the United States.

WYO Companies have a fiduciary obligation to the FIA as stewards of the Federal funds that are received in premiums and that are paid on claims from flood insurance losses. The Arrangement and the WYO Financial Control Plan (44 C.F.R. Pt. 62, App. B) specify the financial procedures and documentation that the WYO Company must maintain as a condition for reimbursement, including the processing requirements for invoicing, receipt, recording, control, and the disbursement of monies from the Fund.

In the course of underwriting policies and administering claims on NFIP insurance policies, WYO companies may be sued by insurance policyholders and others aggrieved by actions of the WYO Company. The Arrangement requires WYO Companies to notify FIA of NFIP litigation, and allocates the responsibility for costs arising from NFIP litigation. WYO Companies should handle NFIP litigation as carefully as they do litigation in other lines of insurance where their own assets are at risk. Pursuant to the Arrangement and 44 C.F.R. §62.23, the WYO Company is solely responsible for the defense of litigation arising from policies sold by the company, and FEMA is not a proper party to any such suit.

C. WYO Company Counsel

1. Counsel Qualifications

Legal counsel retained by WYO Companies to handle flood insurance litigation will be litigating issues arising under the National Flood Insurance Act and related Federal laws and regulations. All legal service providers for WYO Companies should be thoroughly familiar with Federal practice, the National Flood Insurance Act, the Federal regulations implementing the NFIP, the terms and conditions of the SFIP, the substantial body of legal precedent involving the NFIP, and the terms and conditions of the Arrangement.

2. Counsel Conflicts of Interest

WYO Company counsel must be free of any actual or apparent conflict of interest involving the NFIP or WYO Companies. "Conflict" includes representation, by counsel or any attorney in counsel's firm, on behalf of clients in litigation adverse to FIA, FEMA, or a WYO Company with respect to the NFIP. WYO Company counsel may be requested to provide

FIA information about its system for tracking conflicts and its policy regarding the resolution of conflicts.

Failure to disclose promptly actual or potential conflicts of interest, or matters that may present the appearance of a conflict, may result in disallowance in whole or in part of fees for services rendered, and/or other corrective actions. A WYO Company should contact FEMA OGC for guidance and/or a waiver as soon as it becomes aware of a potential conflict between its counsel and the NFIP.

If a WYO Company terminates representation by counsel due to conflict of interest, it should immediately inform the FIA Legal Liaison of the conflict and termination. Failure to promptly notify the FIA Legal Liaison properly may result in delay and/or non-reimbursement of attorney costs charged by the terminated counsel and/or the successor counsel.

3. Other Ethical Considerations

FIA expects WYO counsel to observe the highest ethical standards and to comply with all applicable laws, rules, and regulations governing ethical conduct and conflicts of interest. Neither WYO Company counsel nor any person associated with WYO Company counsel shall provide or seek reimbursement for any gift, gratuity, favor, entertainment, loan, or other thing of monetary value provided to any employee of FIA or FEMA or its contractors, and/or the WYO Company.

FIA seeks the most expeditious resolution of legal matters at the lowest practicable cost, while maintaining the integrity of both the WYO Company's defense and of the program. Consistent with those goals, FIA expects WYO counsel to carefully manage time and costs.

4. Equal Employment Opportunity

Federal law prohibits unlawful discrimination in all Federal programs, including the NFIP.

D. Contacts with the Media and the Public

WYO Company counsel shall not discuss NFIP litigation with representatives of the media. If media representatives contact WYO counsel concerning cases that the firm is handling on behalf of the NFIP, the inquiry should be forwarded immediately to the FIA Legal Liaison. FIA will assume responsibility for responding to such an inquiry. Under no circumstances shall WYO Company counsel comment to the media on the specifics of a case including potential appeals or settlements, or on more general matters involving the policies and procedures of the NFIP or decision-making pursuant to the Program.

Counsel who address the public orally or in writing on topics pertaining to the NFIP or laws and regulations affecting it must prominently disclose to the audience that he or she is making the presentation on his or her own behalf and not on behalf of the NFIP.

II. Litigation Coordination and Case Management

Under the Arrangement, this *Guide*, and other FIA guidance documents, WYO Company counsel has an affirmative obligation to keep FIA and FEMA OGC informed about material aspects of a NFIP-related lawsuit. Failure by a WYO Company and its counsel to comply with this obligation will delay or jeopardize actions on applications for reimbursement for litigation expenditures. In some cases, failure to consult with FIA and FEMA OGC on key litigation decisions could result in a denial of reimbursement. Repeated failure to promptly notify the FIA of all NFIP-related lawsuits as required will trigger referral of the non-compliance for review by the Standards Committee or denial of reimbursement under the Arrangement. Points of contact are included with this *Guide* as Appendix 3.

The FIA and WYO Company share a unique and common interest in the defense of cases related to the NFIP. Among other factors that give rise to this shared interest are the fiduciary responsibilities of the Company, the statutory and regulatory basis for the NFIP, the Federal government's administrative and oversight responsibilities for the program, the need to share privileged information, and the fact that Federal funds are at risk. Accordingly, through the Arrangement, the FIA and the WYO Company have entered into a joint defense agreement to implement FEMA's oversight responsibilities for the purpose of any litigation related to or arising under the NFIP to enable the free flow of information between the FIA, FEMA OGC, the WYO Company, and its legal counsel.

A. Initial Notification Requirements

Within forty-five (45) days of service of process of any lawsuit involving the NFIP, a WYO Company must provide the FIA Legal Liaison: 1) three copies of all initial court documents, and 2) a Case Plan and Budget for the case (See Appendix 2 for a sample Case Plan and Budget). Supplying these documents to other than the FIA Legal Liaison may result in a failure to achieve sufficient notice within the required time period.

The Case Plan should summarize the WYO Company's defense strategy and projected schedule for preparing and trying the case. Complex or time-consuming activities should be divided into subparts. FIA must be provided with sufficient information to determine the basis of a claim. The Budget should translate the case plan into financial expectations. At a minimum, the budget should reveal major assumptions, conform to the case plan, identify specific phases of the case, and estimate the cost of each phase.

A WYO Company and its counsel may use other formats for its Case Plan and Budget submissions, but must provide all of the information requested in the sample.

B. FEMA Office of General Counsel

After receipt of the initial notification from a WYO Company, FEMA's OGC will assign an OGC attorney to monitor the case and to provide assistance in connection with the litigation. FEMA OGC is required by the Arrangement to review claims in litigation and determine whether it believes a claim is grounded in actions that do not comply with the Arrangement, the National Flood Insurance Act, the NFIP's implementing regulations, or involve issues of insurer/agent negligence. Reimbursement and the propriety of the use of

Federal funds to pay a settlement or judgment under the Arrangement will be determined by the FIA in consultation with the FEMA OGC.

The FEMA OGC also is a resource for technical legal and programmatic assistance. FEMA OGC has extensive experience litigating NFIP cases, and has access to recent NFIP case law and the FIA's position on coverage and underwriting issues. Also, although the FIA does not anticipate that government employees will generally be witnesses in cases where the WYO Company is the proper party, on rare occasions the FIA may agree that a case raises issues of sufficient importance that an FIA employee may be authorized to appear as a witness. All requests for FIA witnesses or related information such as declarations by FIA employees should be coordinated through the FEMA OGC attorney assigned to the particular case.

C. Ongoing Informational Support

The initial case management plan and budget must be supplemented in a timely manner as the lawsuit proceeds. The WYO Company counsel should also submit to the FEMA OGC attorney assigned to the case significant pleadings or other documents, such as dispositive motions, which might reflect significant changes in the legal nature of the case. Routine items, such as address changes or discovery requests, need not be forwarded.

In the normal course of business, WYO Companies are required to supply the FEMA OGC attorney assigned to their case updates of significant activities, changes in strategy and other adjustments to the Case Plan and/or Budget. In the event of changes to the case strategy that may affect the NFIP, including issues affecting precedent, the concept of Federalism, and/or issues of agent error, WYO Companies have an affirmative duty to notify the FEMA OGC attorney assigned to the case.

D. Appeals

WYO Company counsel must promptly notify the FEMA OGC of any adverse ruling involving the NFIP so a decision can be made regarding appeal. Outside counsel is expected to take all steps necessary to protect the interests and preserve all rights of the NFIP pending a decision to appeal.

E. Closure/Disposition

All WYO Companies must notify the FEMA OGC of case closure within forty-five (45) days of their notice of closure. This includes closure through settlement and by court order.

III. Legal Reimbursement of WYO Company Defense Expenses

Under the Arrangement, FIA and FEMA do not retain and are not responsible for payment of counsel representing WYO Companies. The WYO Company is responsible for paying its counsel without delay and for seeking reimbursement under the Arrangement. FIA reimburses WYO Companies for the costs the Companies incur defending NFIP litigation, including the cost of reasonable attorney's fees paid by the WYO Company.

Bills for NFIP-related legal defense submitted by the WYO Company are reviewed for, among other things, accounting accuracy, legal sufficiency, and efficiency as prerequisites for reimbursement from the Fund.

A. Legal Billing

Counsel providing legal services to WYO Companies must submit invoices for legal services and expenses to the WYO Company that hired him/her, and not to the FIA or OGC.

WYO Companies must submit legal bills to the NFIP Claims Coordinator on at least a quarterly basis if any costs are incurred during that time period. Bills may be submitted on a monthly basis, if incurred on a monthly basis, to ensure prompt reimbursement. (Points of contact are provided in Appendix 3.) Attorney inquiries concerning legal bills should be directed to the WYO Company that will then forward such inquiry to the NFIP Bureau and Statistical Agent Claims Coordinator. Failure to follow these instructions may result in a delay in the payment process. Any billing amount claimed as past due should be clearly designated as such. The FIA Legal Liaison will review legal bills to determine the eligibility of all inquiries and/or charges not submitted pursuant to this procedure.

All documentation submitted by counsel to the WYO Company should clearly itemize billing information in at least fifteen-minute segments. The WYO Company will forward all documentation to the NFIP Claims Coordinator. Submission of inappropriate charges or erroneous bills may result in a review of past billing by the NFIP. If the matter is significant and/or deliberate, it may be referred to the Standards Committee and/or the FEMA Office of the Inspector General.

FIA may ask a WYO Company to submit additional documentation to verify legal billing. The FIA may disallow, in whole or in part, legal fees that are unsupported or that otherwise do not conform to FIA policies and procedures. Inappropriate costs include, but are not limited to, excessive expenses, redundant work done within one firm or by different firms handling the case, and multiple/redundant depositions. FIA does not approve expenses for excessive time for attorneys to familiarize themselves with the NFIP, Federal practice, the required removal of NFIP-related lawsuits to Federal Court, and other general legal matters that should be familiar to experienced counsel in defending a SFIP lawsuit. The WYO Companies may deviate from these standards only with prior approval from the FIA. WYO Company Counsel are encouraged to use paralegal assistance when appropriate and cost effective.

WYO Company litigation expenses are subject to independent audit by the NFIP or by the FEMA Office of the Inspector General. For audit purposes, WYO Companies must retain

copies of all NFIP-related bills and original underlying support documentation, including time sheets and time and expense adjustment records, for at least four years after final payment. The FIA reserves the right to obtain additional information upon review of any bill or supporting documentation submitted to the NFIP.

B. Fees and Expenses

1. Legal Fees

FIA will reimburse approved expenses for legal services on an hourly basis. Customary charges, such as overhead, ordinary office supply costs and local telephone costs, should be included in the hourly rate. If fees begin to exceed budgeted costs, a new budget with a clear explanation of the changes in cost should immediately be submitted to the FIA Legal Liaison. Failure to do so may effect reimbursement.

2. Approved Litigation Costs

Reasonable copying costs may be reimbursed separately. Long distance telephone charges and facsimiles will be reimbursed at actual costs but must have supporting documentation included in the billing. Any extraordinary charges for litigation supplies must be pre-approved. No “markups” of supplies or services procured by WYO Company counsel should be charged. The FIA will consider for payment only actual costs for services rendered or supplies provided in the course of representation.

Absent explicit pre-approval, the FIA will not reimburse WYO Companies for expenses incurred by a second law firm on a case. The burden is on the WYO Company to demonstrate that a secondary attorney is necessary, that specific legal work is not duplicated, and/or that a second firm’s expertise is needed.

3. Travel Expenses

Travel costs must be reasonable. Counsel may wish to refer to the Government rate website to determine reasonable travel costs. Air travel will be reimbursed at not more than the coach rate for the subject flight. When possible, counsel should explore the availability of advance airfare purchase to control expenses. Where possible, the FIA recommends that WYO Companies hire experienced NFIP attorneys located in the state in which the lawsuit originates to minimize costs.

4. Documenting Expenses for Reimbursement Authorization

FIA will approve NFIP-related WYO Company defense costs after a full financial reporting is made, including the prompt submission of applicable bills and legal documents. If documents are not submitted promptly, or demonstrate inefficient and unreasonable costly legal practices, reimbursement will be delayed, reduced or disallowed. Offensive litigation by the WYO Company is not covered under this reimbursement process. Nor are settlement monies, which are considered a portion of claims activities. Under extraordinary circumstances, or if the WYO Company is concerned about the potential denial of reimbursement authorization, the WYO Company must seek prior approval of proposed expenses.

IV. LITIGATION STRATEGIES

A. Litigation Philosophy

The FIA and the FEMA OGC expect an approach that is aggressive, forthright, and consistent with the overall objective of protecting the integrity of the NFIP while resolving litigation in an expeditious and cost-effective manner. Counsel should avoid extreme advocacy positions that are not likely to have a substantive impact on the outcome of litigation or to further NFIP objectives. Where appropriate, motions to dismiss, for judgment on the pleadings, or for summary judgment should be employed to resolve or refine the issues in dispute. Lengthy interrogatories, requests for extensive document production, or multiple and other unnecessary discovery should also be avoided.

B. Discovery

FEMA reviews any requests for the production of documents or deposition of its employees in cases where FEMA is not a named party. See 44 C.F.R. Part 5; *Touhy v. Ragen*, 340 U.S. 462 (1951). Federal employees may not be available for deposition. *Id.* If WYO Company counsel receives notices of depositions of employees of FEMA, or other Federal agencies, or subpoenas or requests for production of documents that were generated by any Federal entity, he or she must immediately contact the FEMA OGC to discuss discovery options. Similarly, WYO counsel should consult with FEMA's OGC prior to contacting employees of the Federal government, for obtaining documents generated by a Federal entity, or when requesting documentation, affidavits or other assistance from FEMA employees.

C. Alternative Dispute Resolution

The Federal government encourages the use of alternative dispute resolution ("ADR") in appropriate cases, such as issues of quantum of damages or engineering disputes over causation. These techniques potentially are less costly and a more effective means of facilitating negotiated settlements prior to litigation. Throughout the course of a lawsuit, WYO Company counsel should consider also whether ADR is appropriate and explore opportunities for utilizing non-judicial dispute resolution approaches. At the litigation stage, FEMA does not utilize binding ADR, preferring non-binding approaches.

D. Settlement

By regulation (44 C.F.R. § 62.23(d)) and the terms of the Arrangement, the WYO Company is obligated to arrange for the defense of claims arising under the NFIP, including settlement when appropriate. (See Appendix 1.) Accordingly, the settlement options for each matter should be identified and considered at the outset of any NFIP-related litigation and at each stage thereafter. The settlement strategy should be noted in the Case Plan and Budget submitted to the FIA Legal Liaison.

When considering settlement options, the WYO Company should act in a manner consistent with its fiduciary obligations as a "fiscal agent" of the Federal government, and the propriety of a settlement will be considered on that basis. The WYO Company is

responsible for settlement. FEMA's OGC expects to be consulted on potential settlement only in extraordinary cases, e.g., when settlement relates to a matter that presents a potentially adverse precedent; when it involves areas of conflict within the program, or when proposed settlement exceeds the limits of exposure under the SFIP.

E. Subrogation

The Standard Flood Insurance Policy provides that the FIA has the right of first recovery in the event of any subrogation claim under the NFIP.

If the WYO Company learns of a potential subrogation related to a flood insurance policy, it must notify FEMA OGC's Associate General Counsel for Litigation to discuss potential costs and strategies. They must also advise the FEMA OGC regarding the company's intent to pursue the potential subrogation or tender the potential subrogation to FEMA.

F. Defenses

Counsel should be aware that legal defenses that otherwise may not be available to a private sector insurer may be asserted due to the Federal nature of the NFIP. Various defenses are discussed in the *Digest and Guide on Litigation Concerning the National Flood Insurance Program*. The *Digest* may be available to WYO Company counsel subject to the joint defense of NFIP-related litigation.

G. Matters of Special Interest

The NFIP requires participating communities to adopt various land-use requirements and flood plain management regulations before Federal flood insurance will be available. These local ordinances may impact on litigation under the NFIP, and the attorney handling an NFIP matter should be aware of local ordinances.

A number of legal issues are of special interest to the NFIP, either because they are uniquely related to Federal and/or FIA activities and rights or because of the continuing need for a uniform, nationwide approach. Some of these "special issues" include the following:

- Extra-contractual damages
- Federal Common Law versus State law
- Proper party defendants
- Notice of loss or the failure to notify
- Class actions
- Floodplain management.

Counsel should pay special attention to legal precedent on these matters and should ensure that, if requested by FEMA's OGC, all major activities are coordinated with OGC and/or the FIA Legal Liaison. The OGC should be consulted on these and other issues that do not normally arise under commercial property and casualty insurance law.

H. Referral of Criminal and Civil Misconduct

Fraudulent activities undertaken in connection with NFIP flood insurance policies administered by a WYO Company constitute fraud against the Federal government and subject the perpetrator to a range of criminal and civil penalties under Federal criminal and civil anti-fraud statutes, including the False Claims Act, 31 U.S.C. §3729.

FEMA's OGC, FIA, and the WYO Company are required to notify, and where appropriate, to assist law enforcement officials, including FEMA's Office of the Inspector General, in investigating conduct that may constitute a violation of criminal or civil fraud statutes. The WYO Company's counsel must immediately forward any information that suggests possible criminal or fraudulent behavior to their OGC contact. If necessary, the attorney and/or WYO Company may be required to submit supporting information regarding the misconduct. In the event WYO counsel is called upon to prepare and gather such information, the costs will be reimbursed as NFIP legal expenses.

National Flood Insurance Program
Guide for Write Your Own Counsel

Appendix 1.
The Arrangement

Is available on the Internet at
<http://www.fema.gov/nfip/Wyoarg.pdf>

March 26, 2001

This sample Case Plan and Budget has been developed to assist in the submission of documentation related to NFIP litigation.

To assist in the review and processing of National Flood Insurance Program NFIP-related litigation conducted by Write Your Own (WYO) Companies, please provide the following preliminary information within 30 days. Please submit that report to the FIA at the following address, telephone calls should be directed to the Liaison at (202) 646-4350:

Legal Liaison
FEMA/FIA
Room 441
500 C St. SW
Washington, DC 20472

Please note that the FIA does not reimburse WYO Companies for the cost of education regarding the NFIP and its policies, related Federal Regulations, activities in Federal Practice and related subjects.

CASE PLAN FOR NFIP-RELATED LITIGATION
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CASE NAME:

Initial Filing Date:
Date Notice to FIA Achieved:
Expected End Date:

WYO INSURER:

Policy #:
Insured Name:
Claim #:
Property Location:
Date of Loss:

ATTORNEY/FIRM AUTHORIZED TO DEFEND:
DATE AUTHORIZED:

POTENTIAL LITIGATION-RELATED ACTIVITIES

PLEADINGS: Briefly discuss all allegations in the complaint that might require your consideration as well as the affirmative defenses that would be raised.

JURISDICTION AND VENUE: Please remember that all NFIP-related Litigation should be removed to Federal Court in the District where the property is located. If available, please provide comments regarding known past NFIP-related litigation in the locale, and other pertinent information.

DEFENSE THEORIES: Briefly describe all affirmative defenses that may be raised.

REGULATORY DEFENSES: Have you reviewed the regulations to determine whether there are regulatory defenses.

LIABILITY: How do you assess the defendant's liability. Please include an assessment of the strength and weakness of the opposition's claim.

DAMAGES: Please discuss the potential damages (or specific damages sought). Please note your estimate regarding the value of the case, both potential settlement value and potential verdict scope.

POTENTIAL FOR SETTLEMENT: Is settlement likely? If so, can you set a potential range for settlement?

DEFENSE/LITIGATION PLAN: What is your suggested course of action for this lawsuit. Please include comments on your anticipated discovery requests and any potential depositions.

ALTERNATIVE DISPUTE RESOLUTION OPTIONS: Is mediation possible?

INVESTIGATION: Has any investigation been conducted prior to this date? What investigation do you expect to conduct, and at what stage in the litigation?

DEFENSE BUDGET: While you are not expected to anticipate all variables, please estimate all expected defense costs? Those costs should include the cost of preparation of pleadings, written discovery and subpoenas; the cost of depositions; and note any additional defense expenses consistent with your defense plan. *Please note that you will be expected to report any extreme changes in this assessment prior to and including closure.*

DEPOSITIONS OF FEDERAL EMPLOYEES: Do you anticipate the deposition of any Federal Employees, either from the Federal Emergency Management Agency (FEMA) or of the Federal Insurance Administration (FIA).

AGENT ERROR: is this an instance of pure agent error, i.e. the facts do not relate to the issuance, content or other areas of the Standard Flood Insurance Policy (SFIP).

ADDITIONAL INFORMATION:

BUDGET FOR NFIP-RELATED LEGAL ACTIVITIES

INITIAL HANDLING

File Review: Initial pleading preparation, reports, papers (Answers, Motions, Interrogatories, Deposition Notice, legal fee estimate, etc.)

_____ Hours \$ _____

Other Expected Costs: (Please describe.)

_____ Hours \$ _____

Total _____ **Hours** **\$** _____

DISCOVERY

Depositions (Estimate #): _____

_____ Hours \$ _____

Other Discovery (Research, motions, etc.)

_____ Hours \$ _____

Other Discovery Costs: (Please describe.)

_____ Hours \$ _____

Total _____ **Hours** **\$** _____

OTHER PRETRIAL ACTIVITIES

Pretrial Motions, conferences, research, etc.:

_____ Hours \$ _____

Other (Mediation, non-binding arbitration, etc., if applicable):

_____ Hours \$ _____

Total _____ **Hours** **\$** _____

PRETRIAL ATTORNEY FEES

(Please describe all expected activity at this stage.)

_____ Hours \$ _____

TRIAL STAGE ATTORNEY FEES

(Please describe all expected activity at this stage.)

_____ Hours \$ _____

NON-ATTORNEY FEES & OTHER EXPENSES

(Please describe all expected activity at this stage.)

_____ Hours \$ _____

TOTAL EXPECTED TRIAL COSTS

(Please describe all expected activity at this stage.)

NFIP LEGAL CLAIMS (SAE TYPE 3)

Where to seek assistance:

Legal Claims and Billing Information:

The NFIP Claims Coordinator
7700 Hubble Drive
Lanham, MD 20706

Telephone # 1 800-426-6347, extension 729
Fax # 301-918-1476

Basic NFIP Background Information

FIA Legal Liaison
FEMA/FIA – Room 441
500 C St SW
Washington, DC 20472

Telephone # 202-646-4350
Fax # 202-646-3689
email – susan.bernstein@fema.gov

Litigation Support and Legal Information

Associate General Counsel for Litigation
FEMA/OGC
500 C St SW
Washington, DC 20472

Telephone # 202-646-4112
Fax # 202-646-4532
Email – jordan.fried@fema.gov