



NYLAG
NEW YORK LEGAL ASSISTANCE GROUP

Post-Disaster Legal Issues and Best Practices October 2017

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Storm Response Unit



Goals

- Review major federal disaster relief programs, including filing applications and appealing adverse determinations:
 - FEMA for individuals and households (FEMA IA – IHP);
 - Applications, appeals and recoupment defense;
 - Small Business Administration disaster loans;
 - Disaster Unemployment Assistance; and
 - Disaster SNAP benefits (D-SNAP).
- Other significant potential legal issues:
 - Consumer, housing (L/T and mortgages), insurance, longer-term recovery programs generally funded through a HUD CDBG-DR grant.
- Best practices and lessons learned

NYLAG's Storm Response Unit

- After Sandy hit in October 2012, NYLAG mobilized a legal aid disaster relief program to help victims of the storm:
 - Intake hotline and email account.
 - On-site client assistance in partnership with local community organizations.
 - Mobile Legal Help Center (law office on wheels).
- Assisting clients in NYC and on Long Island:
 - More than 13,000 legal matters.
 - More than \$59,000,000 in monetary benefits to clients.
- Services are comprehensive:
 - FEMA applications, appeals and recoupments; SBA loans; other disaster relief;
 - Landlord-tenant and other housing;
 - Homeowner's and flood insurance;
 - Mortgage foreclosure prevention;
 - Consumer matters; and
 - CDBG-DR Programs (Build it Back and NY Rising).

Federal Disaster Relief

- To be eligible for federal disaster relief benefits, people must have suffered specific types of losses in an area that has been declared a major disaster by the President.
- Federal disaster relief programs are intended to be utilized as a “last resort” after an applicant has exhausted insurance proceeds or other funds to which they are entitled, and accounting for any charity/volunteer assistance received.
- These programs are authorized under the Stafford Act, which also provides at 42 USC § 5155(d) and implementing regulations for a duplication of benefits test (we will discuss).
- Currently, refer to the June 2013 (v. 2.0) FEMA *Disaster Operations Legal Reference* for agency policy on implementing the Stafford Act: [DHS Digital Library](#).

Federal Disaster Relief, cont'd.

Immediate federal disaster relief assistance is available through:

- FEMA – The Federal Emergency Management Agency, a federal agency within the Department of Homeland Security
 - Administers a variety of disaster recovery programs including:
 - Individual Assistance (IA) – Individuals and Households Program (IHP) under Stafford Act Section 408:
 - Housing Needs Assistance (HA)
 - Other Needs Assistance (ONA)
 - Public Assistance for critical governmental agencies and certain non-profits
- SBA – The Small Business Administration
 - Disaster assistance programs in the Small Business Act include:
 - Home and Personal Property Disaster Loans
 - Business Disaster Loans

Federal Disaster Relief, cont'd.

Longer-term federal disaster relief assistance comes from:

- HUD – Department of Housing and Urban Development
 - Community Development Block Grants for Disaster Recovery (CDBG-DR) are going to be the most significant source of long-term recovery funding for homeowners
 - Grants are administered by the state, or in NY's case for Sandy, a combination of the city (Build It Back) and state (NY Rising).
 - This dual administration was of course better for survivors.
 - As grants are administered by the state, the state retains a significant amount of discretion in determining (for example, in determining the duplication of benefits policy for CDBG-DR funds: see [“Clarification of Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant \(CDBG\) Disaster Recovery Grantees,”](#) 71 FR 71060 (November 2011)).

Federal Disaster Relief, cont'd.

Especially as disaster relief funding becomes available and survivors' needs become clear, it is important to keep in mind the duplication of benefits prohibition under the Stafford Act (42 USC § 5155), and FEMA's hierarchy of assistance, which is most relevant for immediate disaster recovery (44 CFR 206.191(d)(2)):

- i. Volunteer agencies' emergency assistance (except expendable items such as clothes, linens, and basic kitchenware); insurance (including flood insurance);
- ii. Housing assistance pursuant to section 408 of the Stafford Act.
- iii. Small Business Administration and Farmers Home Administration disaster loans;
- iv. Other Needs assistance, pursuant to [Stafford Act] section 408. . . .
- v. Volunteer agencies' "additional assistance" programs; and
- vi. The "Cora Brown Fund."

(Note that HUD CDBG-DR is not on this list!)

FEMA policy is also relevant (e.g., *DOLR*, p. 6-54).

FEMA Individuals and Households Program (IHP)

- FEMA IHP awards are based on *households*
 - A household can be a single individual.
 - Everyone living together is presumptively part of the household, even if not related to each other.
 - However, applicants can demonstrate that they lived separately – for example, by showing they pay for their own utilities and food.
- Maximum FEMA IHP award is now \$33,300.
- Being conversant in the IHP Regulations at 44 CFR 206, et seq. is important for issues such as eligibility criteria (206.113) and terms definitions (e.g., “adequate, alternate housing” at 206.111).
 - Familiarity with the *DOLR* and the [IHP Unified Guidance](#) (*IHPUG*; yes, really) is also very important for specific ONA coverage questions, for example, and many other issues.
- IHP assistance is not income (42 USC § 5155(d)).

Before Applying for FEMA IHP

- Before applying, applicants should gather as much of the following information as possible:
 - Social Security number of someone in household who is eligible for benefits
 - Current and pre-disaster addresses
 - A reliable telephone number, email and mailing address
 - A description of losses that were caused by the disaster
 - Insurance information
 - Total household annual income
 - A routing and account number from a bank for direct deposit

Applying for FEMA IHP

- Register online, by phone or at a FEMA Disaster Recovery Site (www.DisasterAssistance.gov; 800-621-3362) within 60 days following the disaster declaration date, unless the regional administrator extends the deadline, as frequently occurs in major disasters. 44 CFR 206.112.
 - For Sandy the deadline was extended (44 CFR 206.112 (c)) to April 13, 2013.
- After registration is completed, the applicant will receive a registration number. This number, along with the registered Social Security Number, is critical for future communications with FEMA (and should be included in all subsequent written communication).
- Get a signed Authorization for Release of Information/File Request and Appointment of Representative form from client whenever possible.
 - An information release is governed by the Privacy Act, 5 USC § 552a, and therefore must include certain information to be effective. See *IHPUG* p. 37 (ch. 3, § III(C)). As far as we know there is no FEMA-approved form to utilize.
- We had constant problems getting FEMA to accept these requests, regardless of their sufficiency. As with all other IHP matters, 'hang up and call again' is a real strategy.

Special Issues for Immigrant Households

- The applicant or one household member must be a U.S. Citizen, Non-Citizen National or Qualified Alien to receive federal disaster benefits.
 - For example, undocumented parents can apply on behalf of U.S. citizen children.
 - Households containing an undocumented member should consult an immigration attorney.
- The applicant or member of the household must have a valid Social Security Number and qualifying immigration status.
 - Qualified Aliens include: Lawful Permanent Residents (green card holders), refugees and asylees, battered spouses and children with VAWA self-petitions filed or pending, U visa holders.
- Local programs often have different immigration eligibility rules and risks for immigrants.

IHP Housing – Temporary Housing Assistance

- Housing Assistance (HA) Program: grants to households where primary residence has been damaged or destroyed (and insurance doesn't cover losses). This can take several forms (42 USC § 5174):
 1. Temporary Housing Assistance – Financial Assistance ((c)(1)(A))
 - “Financial assistance . . . to rent alternate housing accommodations, existing rental units, manufactured housing, [RVs], or other readily fabricated dwellings.” Can include utilities costs except phone service.
 - Available to homeowners and renters.
 - Initial rental assistance **of 1-3 months** can be given very shortly post-disaster if the primary residence is uninhabitable. (See *DOLR* p. 6-9.)
 - **Continued Temporary Rental Assistance** available if there is no “adequate, alternate housing” (defined in 44 CFR 206.110).
 - Reimbursement rate varies by location and size of apartment. (See *DOLR* p. 6-31.)
 - Rental assistance maxes out at 18 months (44 CFR 206.110(e)).
 - FEMA housing portal
 - Moving and storage expenses are provided under Other Needs Assistance in limited circumstances.

IHP Housing – Temporary Housing Assistance, cont'd.

- Temporary Housing Assistance – Direct Assistance ((c)(1)(B)):
 - FEMA trailers and other housing units provided directly by FEMA (this can include direct leases of vacant housing, and repairs for future leasing).
 - Not utilized in New York, so we do not have much experience.
- Transitional Sheltering Assistance (TSA) (§ 5170b(a)(3), technically Section 403 Emergency Assistance (Response)):
 - Allows disaster victims unable to return to their homes because of disaster-related damage to stay in hotels or motels until more suitable housing accommodations are available.
 - Short-term, but often extended for several months when the stock remains slim (as it remained in the case of Sandy; TSA ended May 29, 2013).
- Note that FEMA policy is to provide THA and TSA, along with ONA funeral assistance, before providing repair assistance. See *DOLR*, p. 6-54.

IHP Housing – Repair and Replacement

- Available to homeowners only, not tenants
- Home Repair Assistance ((c)(2)):
 - Financial assistance for repair of disaster-caused damage to primary residence, and replacement of disaster-damaged essential household appliances, **when not covered by insurance** (applicants can also use IHP as a bridge loan for NFIP).
 - FEMA inspection required:
 - Usually takes place within 10 to 15 days.
 - Decision will be made about 10 days after the inspection; electronic payment will be deposited within 3 days.
 - For damages less than IHP max, FEMA pays homeowner based on itemized list of repairs prepared by inspector.
 - Homeowner receives only lump sum payment, no breakdown (without Privacy Act request)
 - Can also try to get itemized list of what award is for by calling FEMA IHP Helpline
 - FEMA only reimburses for items that are necessary for people to create a “safe and sanitary” living environment (42 U.S.C. § 5174(c)(2)(A)(i)).
- Home Replacement Assistance ((c)(3)):
 - Grants to replace homes entirely, or buy new home

IHP Other Needs Assistance (ONA)

- Basic authority: 42 USC §§ 5174(e)-(g), 44 CFR 206, Subpart D
- ONA covers select other expenses caused by the disaster, including:
 - Medical and dental expenses;
 - Funeral and burial expenses;
 - Personal Property – clothing, household items (room furnishings, some basic appliances), tools (specialized or protective clothing and equipment) required for a job; necessary educational materials (computers, school books, supplies);
 - Fuel for primary heat source (heating oil, gas);
 - Clean-up items (wet/dry vacuum, dehumidifier);
 - Damage to a vehicle;
 - Moving and storage (temporary relocation of personal property while repairs are made to primary residence so it can be re-occupied by applicant).

IHP ONA, cont'd.

- ONA is divided into mandated (44 CFR 206.119(c)) and state-discretionary (see 206.119(b)(2)(ii) and (c)(6)(ii)) categories, and categories that don't or do require an SBA loan application.
- As an SBA loan can cover personal property replacement, transportation replacement, and storage and moving expenses, applicants with needs for these types of assistance must first apply for an SBA loan, and either be denied a loan OR have need exceeding amount of loan.
 - NB: 206.119(a) says all loans; see *DOLR* p. 6-61 for FEMA policy.
 - May be rejected for SBA loan without having to fill out application if FEMA sees that the applicant will fail the SBA income test.
- All ONA expenses must be disaster-caused and be for “necessary expenses” to meet a “serious need” (see 44 CFR 206.111 definitions).

FEMA Public Assistance

- FEMA Public Assistance provides grants for debris removal, emergency protective measures and the repair, replacement, or restoration of disaster-damaged, as well as hazard mitigation.
- For publicly owned facilities and certain Private Non-Profit (PNP) organizations.
 - PNPs can include: educational, medical and custodial care facilities, community centers, senior centers and other facilities that provide services of a governmental nature
 - Primarily religious facilities are excluded from eligibility.
 - Specific requirements about allowable uses and openness to the general public.
- Administered through state office of emergency management.
- Also covered in FEMA *Disaster Operations Legal Reference* (Chapter 5).

Important Future Eligibility Issue – Flood Insurance Purchase Requirement

- Hurricane Irma’s status as a declared major disaster (DR-4337) unlocks FEMA IA funds, but it also triggers an overlooked and misunderstood requirement. As explained by *DOLR* (6-26):
 - “A flood insurance ‘obtain and maintain’ requirement is generated when disaster assistance for flood-damaged real and personal property is provided to applicants whose flood-damaged property is located within an SFHA.” This is 42 USC § 4012a, and affects:
 1. Recipients of Small Business Administration disaster loans;
 2. Recipients of IHP assistance;
 3. Recipients of HUD Community Development Block Grant Disaster Recovery funds, which will likely be the major source of funding; and
 4. Property owners with federally insured (Fannie, HUD, VA) mortgages.
- Non-compliance will **PRECLUDE RECEIPT OF ANY FUTURE FEDERAL ASSISTANCE.**
 - Big issue after Sandy for people who received FEMA IHP assistance following Hurricane Irene.

Flood Insurance Purchase Requirement – cont'd

- How much insurance is required ([see also NYLAG NFIP community education flyers](#))?
 - For SBA loan recipients, *including renters*, insurance must be purchased for the lesser of the loan value, the “insurable value” of the property covered by the loan, or the NFIP maximum ([SBA Standard Operating Procedure 50 30 8](#) (Disaster Assistance Program), § 7.14.G).
 - For FEMA IHP/IA recipients, *including renters*, insurance must be purchased for the value of assistance provided to replace real and personal property that an NFIP policy will actually insure (44 CFR 206.110)(k)(3)). The requirement runs with real property in perpetuity.
 - For future CDBG-DR funding recipients, insurance must be purchased for the lesser of the property grant amount or the NFIP maximum. The requirement runs with the property in perpetuity, and assistance agreements require the buyer to notify future purchasers. Always check the program grant agreement (or mortgage for below!) that you signed.
 - For mortgages, the requirement under § 4012a is the lesser of the principal balance, the NFIP maximum, and the cost to rebuild the insured structure (see [Fannie Mae factsheet](#)).
 - **Note also the duty to notify under 42 USC § 5154a.**

Other FEMA Programs for Individuals

- Other FEMA relief programs (42 U.S. Code Subchapter IV—Major Disaster Assistance Programs, 44 CFR 206 Subpart F—Other Individual Assistance, and *DOLR* ch. 6 subch. IX) include:
 - Crisis counseling (42 USC § 5183, 44 CFR 206.171)
 - Disaster legal services (42 USC § 5183, 44 CFR 206.164)
 - Emergency grants to assist low-income migrant and seasonal farmworkers (42 USC § 5177a)
 - Disaster Case Management Program (42 USC § 5189d)
 - Income tax assistance for filing casualty losses through FEMA DRCs and IRS Field Offices
 - Disaster Unemployment Insurance, D-SNAP and DHAP, which we will discuss more
 - Various other smaller-scale programs

FEMA IHP – Application Problems

- If a FEMA problem cannot be resolved quickly, obtain a full copy of the applicant's FEMA file by submitting a request that satisfies both the Privacy Act and FOIA identity-verification and request requirements.
 - No specific FEMA file request form; request **must** include the:
 - Applicant's full name;
 - Applicant's damaged address; and
 - Applicant's date and place of birth (see *DOLR*, p. 9-9);
 - Comprehensive description of records being requested (the more specific the better);
 - An address for the where file will be mailed; and
 - Be signed and notarized, OR include a copy of applicant's photo identification, OR include the language "I declare under penalty of perjury that the foregoing is true and correct," with applicant's signature (this is the 28 USC § 1746 [alternative to notarized statements](#), which is also useful for completing NFIP flood insurance claim documents).
 - The request **should** also include the:
 - Applicant's Mailing Address;
 - Applicant's Phone Number;
 - Applicant's Last Four Digits of SSN;
 - Applicant's FEMA Application ID; and
 - FEMA Disaster Number.

Appealing a FEMA IHP Denial or Inadequate Grant

- Decision letter is generally sent within 30 days of application
 - If approved for some assistance, notice should specify which categories of assistance (THA, TSA, HA, etc.), but it will not, or has not traditionally, specified in the vast majority of cases what assistance exactly (e.g., how many months of rental assistance, what personal property) FEMA is providing.
- If denied, notice should specify a reason (listing a denial code) and contain information about where and how to appeal
 - Denial codes: www.fema.gov/why-am-i-not-eligible-assistance
 - Common reasons for denials:
 - Applicant is insured (even if no insurance settlement received yet)
 - Another member of household is already being assisted by FEMA
 - Insufficient damage or not storm related
 - Non-primary residence

FEMA IHP Denial Due to Property Insurance Coverage

- If an applicant has property insurance, has not received a settlement in excess of the IHP maximum at the time of an application denial, and the denial ground is that coverage, the denial is best seen as an opportunity to reapply with clarifying information about the lack of a (disqualifying) settlement. See 44 CFR 206.113(a)(3).
 - FEMA presumes that applicants with insurance will have all of their Home Repair/Replacement needs met by insurance and will therefore be ineligible for IHP assistance.
 - However, if the insurance claim is denied, or if the applicant receives an insurance settlement less than the FEMA IHP max and still has unmet need, the FEMA IHP denial can be appealed.
 - Applicants have 12 months to submit information to FEMA about the result of their insurance claim.
 - Applicants can also get FEMA IHP funds while their insurance claim is being processed.
 - Applicants should consider this type of payment a loan, to be paid back once insurance proceeds are received
 - Duplication of insurance proceeds was one of the main grounds for FEMA seeking recoupment of IHP grants to Sandy survivors.

FEMA IHP Appeals

- Applicants have 60 days from the date on the decision letter to file an appeal (44 CFR 206.115(a)).
 - FEMA generally considered Sandy survivors' late appeals when a reason was offered for the delay, even though the above regulation says that one "must file their appeal within 60 days after the date that [FEMA] notif[ies]" him/her of the decision.
- Advocates should contact FEMA by phone first and if the issue cannot be resolved quickly, submit a letter-brief.
 - Appeals are considered by non-lawyers, so overly legalistic appeals were generally not successful.
- NB: 206.115(b) requires a signed representation letter for third parties' submissions (often we included this in file request form).
- Work with local FEMA VAL (Voluntary Agency Liaison) on close cases, persistent problems.

FEMA IHP Appeals, cont'd.

- Check that the applicant has appeal rights! 44 CFR 206.115(a).
- 206.115(b) requires that the appeal include a statement by the applicant describing why FEMA's decision was wrong.
 - The appeal should include an affirmation/affidavit or other statement by the applicant that is notarized OR sworn-to under 28 USC § 1746.
 - In practice, this was not always enforced initially, but was enforced more as time went on.
- 206.115(f): a decision “will” (might) be given within 90 days.
- FEMA policy, from the Policies and Procedures Manual (PPM), is to consider 3 administrative appeals, then close the case.
 - In practice, FEMA considered supplemental information and multiple appeals.
 - Appeals were considered for 18 months after the Sandy disaster declaration date (see 44 CFR 206.110(e)).

FEMA IHP Appeals, cont'd.

- Include all relevant evidence you want considered, well organized and in the best form available. Supporting documentation can include:
 - Contractor's itemized estimate of repair costs. If an estimate is submitted, provide contractor's contact information so FEMA can reach the contractor if necessary
 - Pictures
 - Receipts of expenditures
 - Insurance correspondence
- The appeal must be submitted either by mail or fax. **Faxing appeals and confirming receipt by phone worked best.** Assuming that the National Processing Service Center is again handling IHP appeals, these should be sent to:

FEMA-Appeals Officer
National Processing Service Center
P.O. Box 10055
Hyattsville, MD 20782-8055
Fax: 1-800-827-8112
- After this, an applicant's recourse is an APA claim.

FEMA IHP Recoupments

- FEMA, like all agencies, is required to look for overpayments, and may seek repayment or recoupment of a specific IHP grant if FEMA believes that the:
 - Grant was provided erroneously/applicant was ineligible (regardless, as with many government assistance programs, if the fault lies with the applicant, a third party, or FEMA itself);
 - Applicant spent the funds for an unauthorized purpose;
 - IHP funds were duplicative of other benefits, for example, property insurance proceeds.
- We began to see significant post-Sandy recoupments in September 2014, 22 months after the storm.
- Some may be familiar with The Disaster Assistance Recoupment Fairness Act of 2011 (DARFA), which provided a time-limited hardship waiver to a claim. No similar law has been passed for Sandy.

FEMA IHP Recoupments, cont'd.

- Common Recoupment Issues:
 - Duplication of benefits (44 CFR § 206.110);
 - Damaged dwelling was not primary residence (206.111 for definition and 206.113(b)(1));
 - Failure to prove occupancy;
 - Failure to utilize alternative rent-free housing (206.113(b)(2)-(3));
 - Flood insurance purchase requirement (44 CFR § 206.110(k));
 - Overpayment;
 - Replacement housing to a renter;
 - Misspent or fraudulently obtained funds (206.116(b))
- Note that there is no statute of limitation on FEMA efforts to recoup allegedly improperly paid funds (see 31 USC § 3716 (e)(1) and *DOLR*, p. 6-106).

FEMA IHP Recoupment Appeals

FEMA recoupment policy is set forth generally in DHS (6 CFR Part 11) and Treasury (31 CFR Part 901) regulation.

- Treasury has specific and publicly available formal policy ([Bureau of the Fiscal Service Treatise on Federal Nontax Debt Collection Law](#)); FEMA does not (*DOLR* is not helpful, etc.).
- FEMA first sends “Notice of Debt” to recipient with basic information about reason for of recoupment (see 6 CFR 11.3, referencing 31 CFR 901.2, for general standards):
 - 60 days to appeal.
 - 1% interest after 30 days; 6% penalties after 90 days (see 6 CFR 11.10, referencing 31 CFR 901.9, for general standards).
 - Can get more information about reason for recoupment by calling Recoupment Helpline and/or submitting File Request.
- Recoupment Appeals:
 - Must include statement of recipient made under “penalty of perjury.”
 - Include any documents recipient wants considered.
 - Can include letter “brief” from advocate/attorney.

FEMA IHP Recoupment Appeals, cont'd.

- If appeal is denied through a formal Notice of Decision, recipient can still submit a “Request for Compromise” (6 CFR 11.11, 31 CFR Part 902).
 - Can obtain full or partial waiver of debt and/or extended repayment plan.
 - Special consideration for age, disability or any other special circumstances; applicant should submit sworn statement.
 - Can choose to only submit Request for Compromise without appeal.
 - Recipient should be prepared to disclose all financials.
 - Potential tax consequences for forgiven debts.
- Recipient can also argue that FEMA/DHS should suspend or terminate collection activity for specified reasons, e.g., cost of would exceed debt (see 6 CFR 11.12, 31 CFR Part 903).
- If recipient does not appeal NOD or submit Request for Compromise, FEMA Finance Department sends “Letter of Intent” to refer to U.S. Treasury. This is something to be avoided.

FEMA IHP Recoupment Appeals – Treasury collection

- Once a file is sent to the Treasury Department for collection, a 28% fee is imposed on the account.
 - The debt can only be returned from FEMA, and the associated fee removed, if the recipient can show good cause why they did not respond to the Letter of Intent.
- Treasury can intercept tax refunds, government benefits (e.g., Social Security benefits are protected, but only up to \$750 monthly (31 USC 3716(c)(3)(a)(ii) or 31 CFR 285.4(e)(1)(ii)), potentially salary, and other payments to offset the debt.
- Treasury can also refer to a private debt collector to garnish wages, freeze bank accounts, etc.

Small Business Administration (SBA) Disaster Loans

- SBA provides low-interest disaster loans to homeowners, renters and businesses to “repair, rehabilitate or replace property, real or personal, damaged or destroyed by or as a result of natural or other disasters. . . .” 15 USC § 636(b)(1)(A).
- Additionally, the amount of the loan may be increased by up to 20% of “the aggregate costs of such damage or destruction” if SBA finds an increase appropriate or necessary to extend a loan to build retaining walls and sea walls, grade land, relocate utilities, and modify structures. Id.
- SBA may also refinance mortgages or other secured debts up to the value of the physical damage suffered if the property will be repaired and no credit is available elsewhere. § 636(b)(1)(B).
- SBA should work with FEMA to coordinate application deadlines. § 636(b)(4)(A).
- SBA loans are issued by SBA directly or by approved lenders.
- Apply for SBA disaster loans:
 - By Phone: 1-800-659-2955
 - Online: <https://disasterloan.sba.gov/ela>

SBA Disaster Loans, cont'd.

- SBA Personal Property Loans:
 - For repair or replacement of “ordinary household contents, such as furniture, appliances, clothing, etc., including eligible vehicles, which the applicants would normally take if they moved.” [SBA SOP 50 30 8](#) (July 2015), § 3.16(A)(1).
 - Maximum loan amount is \$40,000 (13 CFR 123.105(a)(1)).
 - Open to both homeowners and renters (13 CFR 123.100(a)(1)-(2)).
- SBA Home Loans:
 - Includes basically any structure (§ 3.12(A)), vacant land (§ 3.14), indirect costs like design fees and initial insurance premiums (§ 3.12(B)(2)), and landscaping and “recreational improvements” up to \$5,000 (§ 3.15).
 - Generally, maximum loan amount is \$200,000; like flood insurance increased cost of compliance (ICC), 20% for mitigation is included in cap.
 - Available to homeowners for damage to a *primary* residence (see § 3.10 in particular for this and § 3.9 for ownership proof).
- SBA Business Loans (15 USC § 636(b)(1) and (b)(2)):
 - Physical (see 13 CFR Subpart C) and economic injury (D).
 - Limit of \$2 million unless “major source of employment”

SBA Disaster Loans, cont'd.

- Keep in mind basic eligibility criteria at 13 CFR 123.100-101 (no incarcerated persons eligible for loans, e.g.), which apply to any disaster loan.
- The terms of an SBA loan depend on whether an applicant has credit available elsewhere ((15 USC § 636(d)(4)), or meets the Credit Elsewhere Test (CET). Applicants failing the CET get lower interest rates and longer repayment terms (id.; [SBA SOP 50 30 8](#) § 7.9 and App'x 16).
- SBA has statutory authority to determine for specific loan and case types if an applicant has credit available elsewhere, and has turned that and other authority into a broad mandate for all cases.
- See Appendix 16 for more information. Generally the CET is based on applicant meeting two out of three tests for creditworthiness, cash flow and asset liquidation to determine if the applicant could obtain sufficient credit for disaster recovery from private sources.

SBA Disaster Loans, cont'd.

- Even if an applicant meets the CET and gets comparatively unfavorable terms, hardship in meeting them, based on any other circumstances, can be argued. [SBA SOP 50 30 8](#) § 7.9(B).
- Terms are determined on a case-by-case basis, as SBA determines one's ability to repay, and then sets the term. Id. at § 7.10(A). Repayment ability is usually strictly based on cash flow. Id. at § 6.1, see Id. at § 6.5 for methodology for home loans, Fixed Debt Method.
- Remember that insurance proceeds impact the loan amount because of the Stafford Act; any insurance settlement provided for the same purpose as the SBA loan is deducted from SBA loan amount (see slide 7 and 44 CFR 206.191(d)(2)).
 - One way to deal with this issue is to ensure that SBA is paying for things that NFIP and FEMA do not, e.g., landscaping.
- SBA requires available collateral for loans over \$14,000 (SOP at § 7.11).
- Repayment period is generally long-term, up to 30 years for home loans and 7 years for business loans. Id. at § 7.10(B).

SBA Disaster Loan Disputes

- If approved, financial terms as well as the allowed uses for the loan should be spelled out in the loan authorization letter
 - This won't be repair item by repair item like an insurance adjuster's report or the IHP inspection report, but will be broken down by category ('landscaping,' 'personal property,' etc.).
 - Misuse of SBA loan funds can result in SBA seeking to recover 1 ½ times the dispersed amount (also possible criminal penalties).
 - If this occurs, applicant is of course notified in writing, 30 days to respond. 13 CFR 123.9. Note that somehow SBA considers "non-use" to be a misuse, and threatens the same penalty.
 - We have received virtually no intakes from Sandy survivors on this.
- Two main reasons for denial of SBA disaster loan:
 - Credit history: applicants must have a credit history acceptable to SBA (see [SBA SOP 50 30 8](#) ch. 5).
 - Repayment: applicants "must show" the ability to repay (see [id.](#) at ch. 6).
- Refer to App'x 18 for more information on denial reason(s), but call SBA to get more info for appeal.

SBA Disaster Loans – Reconsideration/Appeal

- If an applicant for an SBA loan wants to challenge a denial, they ask for *reconsideration*:
 - Reconsideration requests must be filed within 6 months of the denial date.
 - SBA looks at credit history, but should not consider anything but a narrow class of medical expenses (SOP at § 6.5(C)(2)(e)).
 - If client's poor credit is due to medical debt, can seek reconsideration.
- Two levels of reconsideration:
 - First level appeal is to the Disaster Assistance Processing and Disbursement Center (DAPDC) in Fort Worth, TX
 - Must be made within 6 months of the denial letter.
 - Application will be assigned to a new loan processor.
 - Second level appeal is to the DAPDC Director, same location
 - Second level appeal must be made within 30 days of first reconsideration decision, unless a new denial reason is included, then can be 90 days.
 - Another loan processor will assess application.
- Note that some clients will **want** SBA a denial in order to seek an increase in their FEMA ONA grant.
 - Can advocate for denial; see SOP at § 4.3(C)(3)-(5) some helpful for policies.

SBA Disaster Loans – Other Considerations

- Refusal of or failure to draw down a loan is not the same as a denial. SBA loan **offers** may also be considered a “Duplication of Benefits” with CDBG-DR grants and result in a lower award, even if the applicant does not accept the SBA loan.
- Loan modifications are possible but appear to be infrequent, especially if the request is for something other than an increase in funds or a request to delay the repayment start date.
 - It is possible, however, to modify to maximize benefits/avoid DOB (see SOP at ch. 8 and § 9.18).
 - In our experience this is an extraordinary request, and one should be prepared for a lot of runaround, follow-up and patience.

Disaster Unemployment Insurance (DUA)

- DUA is authorized by the federal government under 42 USC § 5177 and administered by local agencies.
 - In New York State, the Department of Labor.
- DUA is not available to those already receiving or eligible for regular unemployment benefits (§ 5177(a)).
- Benefits are capped at 26 weeks and should be calculated as under the state's existing formula (id.; 20 CFR 625.6(a)).
 - In New York this was 27 weeks (October 31, 2012 – May 5, 2013).
- Eligibility contingent upon unemployment being “as a result of a major disaster” (id.).
 - Examples: commute impossible, injured due to disaster, workplace damaged.
- More people are eligible for DUA than regular unemployment benefits, including:
 - Self-employed (20 CFR 625.2(s)), those who could have started working but for the disaster (625.2(t)).

DUA, cont'd.

- DUA is authorized under the Stafford Act but FEMA has delegated management (44 CFR 206.141) to the Department of Labor.
- Implementing regulations are at 20 CFR Part 625.
- Application must be made within 30 days of the declaration date, unless good cause for a delayed application can be shown (625.8(a)).
- Basic eligibility requirements at 625.4.
- Generally any other assistance payment during this time will result in a one-to-one DUA reduction (see 625.13).

Disaster SNAP Benefits (D-SNAP)

- Disaster Supplemental Nutritional Assistance Program benefits are also authorized under the Stafford Act (42 USC § 5179).
- D-SNAP benefits are primarily for those households whose income is usually above a state's SNAP limit, and/or whose income has decreased due to the disaster.
- D-SNAP benefits are based on a state's application to USDA Food and Nutrition Service (it does not appear as of September 21 that these have been activated for Florida).
- Income limits could but may not vary by state (e.g., benefits for [Texas/Harvey](#) and [New York's current plan](#) (p. 33) are identical).
- Check for state guidance on eligibility and applications procedures.
- Note that for current SNAP recipients the state will probably seek waivers that will expedite benefit issuance, delay/waive recertification and reporting deadlines, and allow the purchase of hot meals.

Disaster Housing Assistance Program (DHAP)

- DHAP is an interagency program between Department of Housing and Urban Development (HUD) and FEMA to extend federal rental assistance to displaced families that are not yet able to return home or transition to a new safe, sanitary and affordable residence.
- DHAP is based on an interagency agreement (IAA) between HUD and FEMA for a particular disaster (Katrina, Ike, etc).
- DHAP is not a statutory or regulatory creature, at least for Sandy; DHAP-Sandy was based on the IAA itself and [the policy notice posted by HUD](#).
- Offered 12 months of rent subsidy (based on 30% standard), and security deposit and utility deposit assistance, through 2014.
- Referrals for Sandy survivors occurred only during a three-month window (mid-March to mid-June).
- Eligibility verification was done by FEMA, and in practice it was very difficult to dispute decisions or determine rationale for referrals/non-referrals.

Other Possible Significant Issues

- **Insurance**: Sandy implicated homeowner's insurance for wind damage (regulated by state) and the National Flood Insurance Program (NFIP), part of FEMA, for flood damage.
- **Mortgage** issues and foreclosure prevention.
- **Landlord-tenant** disputes: repairs; abatements for inhabitability or lack of essential services; vacature of leases; and return of security deposits.
- **Consumer** issues: contractor/home improvement contract disputes and debt management.
- **CDBG-DR** programs: in New York State these were the Build it Back (NYC) and NY Rising (outside NYC) programs.

Property Insurance – Homeowner's and Flood

- Most homeowners will have homeowner's insurance and be filing insurance claims;
 - Varies by policy, but will generally cover wind-, rain- or fire-based damage.
 - For water damage, be mindful of the difference between rain (wind-driven rain) and an NFIP flood (e.g., SFIP Dwelling Form, § II(A)). Generally adjusters make an above/below waterline differentiation.
 - Check hurricane deductibles and anti-concurrent causation clause.
- Flood insurance (generally NFIP, some private policies)
 - Limited number of households outside of SFHAs carry insurance.
 - Standard policy (SFIP) makes capacity-building a little easier.
 - Frequently shorter SoL for suit, and requires federal court filing.
- Document, document, document; be mindful of claim (POL) deadlines; remember that funds must be disclosed to all grant/loan programs.

Mortgage Issues Following a Natural Disaster

- Temporary Forbearances
 - Fannie Mae, Freddie Mac, FHA – 90 days, extendable for up to 1 year. (Note that there can be state efforts too, e.g., [recent NJ bill](#).)
 - Private entities' approaches varied significantly (Chase offered 90 days, others (BofA and Wells Fargo) wouldn't commit, e.g.).
 - Temporary means temporary – long-term recovery planning is key.
- Held Insurance Funds
 - Mortgages often given the lender the right to 'steward' insurance proceeds. Mostly this means delay receipt of funds and mess up contractor payment demands without a good reason.
 - Insurance checks made out to homeowner and mortgage servicer; servicer will require homeowner to sign over check
 - Mortgage servicer might place terms or restrictions on the release of funds (e.g., require inspection first, release in (strange) portions).
 - Mortgage might give servicer right to apply funds to principal balance. We saw this infrequently, though servicers frequently wanted a right to exist. If there is no right but funds are used, can create DOB issue.

Landlord/Tenant

- Heavily dependent on state law
 - Example: NY Real Property Law § 227: “Where any building, which is leased or occupied, is destroyed or so injured by the elements, ... as to be untenable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred w/o his/her fault or neglect, quit & surrender possession of the premises ... and he or she is not liable to pay the lessor or owner rent for the time subsequent to the surrender. Any rent paid in advance or which may have been accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender.”
 - Further, NYS appellate courts had held that any waiver of RPL Sec. 227 per lease is unenforceable as against public policy.
 - Similarly, the exact terms of a statutory warranty of habitability will vary by state.

Consumer Issues

- Financial management and debt collection
- Contractor disputes and fraud
 - Licensing of contractors (in NY, an contractor unlicensed by the relevant authority loses right to recover in law and equity, regardless of survivor's knowledge of license status)
 - Mechanic's liens (state law)
 - Written contracts and receipts are essential, though many end up paying in cash and with oral agreements.
 - Clear itemization of work and costs (this is also extremely, extremely, extremely important for NFIP), construction timeline, and payment timelines absolutely should be included. State law may have more rules.
 - Sandy survivors had a tremendous problem with contractors who wrote vague and/or general contracts, who demanded significant funds upfront, and who pegged prices to insurance/grant funds.
 - Many survivors are still dealing with lawsuits, lost funds, mortgage arrears, and ruined credit.

CDBG-DR-Funded Recovery Programs

- There is a maximum FEMA award, a limit to charitable assistance, and not all homes have insurance coverage (or can actually obtain fair payment).
- Traditionally, CDBG-DR is the mechanism for additional money to flow to major disaster areas to help cover these funding deficits for homeowner survivors.
- Controlled by HUD, but implemented by state or local governments.
- Basic authority for CDBG appropriations is 42 USC Chapter 49, but CDBG-DR authority also primarily is derived from the appropriations bill(s), which contain specific conditions and other information related to a particular disaster (see, e.g., P.L. 113-2 for Sandy).
- Would be eliminated under White House's proposed budget.

CDBG-DR-Funded Recovery Programs, cont'd.

- CDBG-DR grantees (state and local government) must submit Action Plans to HUD outlining how they will be using money in compliance with law and regulation (e.g., [Sandy](#), at § VI(A)). As recovery progresses, these can be helpful in understanding how grantee policy is developing.
- Grantees submit annual plans and plan amendments to describe policy changes; it's important to keep an eye on these too over the months and years.
- While there standard non-discrimination protections in disaster recovery in the Stafford Act and for HUD apply, note that grantees have a lot of discretion in developing plans and making significant choices (for Sandy for example, basically refusing funding for individual property mitigation and making DOB arguments based on contractor fraud impossible for a long period).

Lessons Learned

- **Be organized**. Document deadlines, follow-up dates, etc. etc.
- Thoroughly document damages through photos and videos, and retain records.
 - Most of our disputes now, whether related to NFIP claims or contractor lawsuits or CDBG programs, involve/persist because of documentation holes.
- Thoroughly document repair efforts on an on-going basis, keep and organize receipts, retain records.
 - Future insurance recovery, future IHP funding, etc. depends on this.
- Call FEMA and the SBA first to try to resolve problems (and HUCA if you talk to someone who seems less than wise).
 - Know the regulations and don't rely on the first answer you receive.
 - Work with your VALs to resolve unique disputes and persistent issues.
- For IHP specifically, file as many FEMA appeals as necessary.
- Have clients sign Privacy Act releases and representative forms early (at a clinic or recovery site).

Lessons Learned, cont'd.

- Be prepared for substantial insurance and contractor disputes.
 - Five years later, we have plenty of clients who are still suing or being sued.
 - As many know, the NFIP Sandy Claims Review is still ongoing to address major problems, problems that will persist with new survivors' claims, in claim adjustment and so disaster recovery financing.
- Clients will have multiple, interacting issues.
 - Facility with as many areas of the law that we have discussed as possible will generally lead to the best outcomes.
- Plan now for addressing long-term legal needs.
 - This includes, as feasible, integrating duplication of benefits rules into a recovery funding plan to maximize benefits, education/advice on rebuilding for resiliency (elevating utilities, using flood-damage-resistant materials, changing landscaping), thinking proactively about local legislation to ease the recovery.
- (If applicable) make programmatic decisions early and revisit them often.
 - Scope of issues to be handled.
 - Length of program, and representation rules based on that.

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