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THE INSURANCE NEWSLETTER

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Problems with Flood Insurance

Spring is here, and for most of us that means rain and wet weather; for some of us it may mean floods. By now almost everyone with a pulse understands that flood damage is not covered in standard property insurance policies. If you own a property not in a known flood zone you may be able to add coverage for flood to your policy by endorsement, but for properties in known flood hazard areas, your options will start (and maybe end) with the NFIP.

The National Flood Insurance Program (NFIP), is a federal program that will provide insurance for exposed flood prone properties, subject to stringent limitations and strict rules. If you are in or near a flood zone, it pays to understand how the NFIP works.

Understanding the NFIP

The National Flood Insurance Program (NFIP) was started in 1968, and is administered by the Federal Insurance and Mitigation Administration (FIMA). FIMA (which is part of FEMA) makes federally subsidized flood insurance available to communities who participate in NFIP; most do, over 20,000 at last count.

FIMA identifies Special Flood Hazard Areas (SFHA) on Flood Insurance Rate Maps (FIRM). (This is a government program; acronyms are a fact of life.) SFHA are those areas with a greater likelihood of being subject to flooding. Areas identified zone "A" or variants are those in the so-called 100 year flood zone. A zone "A" designation does not mean that you can expect a flood every 100 years; it means you have at least a 1% chance, or greater, of flooding

every year. Zone "B" areas, the 500 year flood zone, have a .2% annual chance of flooding. Areas outside Zone "B" have a less than .2% chance of flooding every year; that's not the same thing as saying there is no chance of flooding, and in fact the NFIP estimates that over a quarter of all flood losses hit properties not located in an "A" or "B" flood zone.

If you own a building or structure in a flood zone, you know the headaches it brings. You cannot buy primary flood insurance for dwellings at any reasonable cost (if at all) outside of the NFIP. Businesses may find some coverage available, but subject to a high deductible, usually a minimum of \$500,000 (NFIP policy limits for commercial structures are \$250,000 on buildings and \$250,000 on contents). Another problem is getting contingent loss coverage (business income and extra expense), which is not offered by NFIP. On the other hand, flood coverage is much more widely available for properties not located in flood zones A or B, available limits are higher, and deductibles are lower, typically in the range of \$25,000 to \$50,000. Normal policy provisions usually apply, including contingent loss coverage.

The problems? There are two. The first has to do with inherent inaccuracies in the flood zone identification process.

Problems with Identifying Flood Risk

Property owners, lenders and insurers have an obvious interest in wanting to know if a property is in a flood zone. A new industry of over (at last estimate) 200 firms sprang up to provide flood zone identification services to interested parties. Banks, insurance

companies and others typically contract for identification of flood zones to these companies.

NFIP regulations establish specific guidelines for determining the actual flood zone of a particular structure. However, if you look at a FIRM (Flood Insurance Rate Map, remember?), you'll see a very general document, portraying flood zones over broad geographic areas, with no regard to the physical location or characteristics of actual structures, which are not even shown on the FIRM.

Virtually all flood zone determination companies rely on FIRM's to establish flood zone designations. They might typically charge their customers an average of \$10 per address for a flood zone determination. In order to produce flood zone determinations within the constraints of their cost structure, they have streamlined and automated the process. Rather than manually reviewing the different types of relevant property information needed to produce an accurate flood zone determination unique to a specific structure, they run addresses through a geo-coder, which takes that address and turns it into a latitude and longitude, and cross reference it with a digital FIRM.

But isn't an address just an address? After all, if the mailman can find the right building, can't a computer? Unlike the mailman, a computer can't see a building. It uses a complex process called address standardization. It will try to get an exact match, but errors or inaccuracies in the address (i.e., street versus avenue) could result in an inaccurate geo-code, and an incorrect flood zone interpretation. And the address the computer locates might physically be the mailbox on the street, and in a flood zone, while the structure on the property itself might be that building up on the hill, well away from the danger of any flooding.

Speed and cost effectiveness increase from this process; accuracy suffers. There is no easy fix for this, since the information that must be reviewed for an accurate determination is not readily available in digital form, and there is no central database for the relevant information. The result: a significant rate of inaccuracies in assignment of flood zone designations.

The Map Modernization Program

The other problem has to do with the fact that many FIRM's are as much as thirty years old; most flood maps have become outdated or inaccurate over time from development or changing conditions. NFIP commenced a program in 2004 to update all FIRM's, which is targeted for completion by the end of 2010. They also established a goal to update each map every five years going forward.

Property owners who were near a flood zone under an old map could be in one now on a revised map, or you could be in a zone A where they were in an B before. This has the obvious potential to impact insurance coverage, loan covenants and other contractual requirements, in addition to the obvious increase in flood risk you need to know about. Most worrisome is the very minimal notice requirements when new maps are published. Affected property owners cannot be sure they will be noticed of potentially adverse changes in flood zone designations.

What to Do?

You need to know if you are in a flood zone. The first step is to check the FIRM for your area. If you are not in a flood zone, and if the FIRM for your area is a recent one that was updated as part of the Map Modernization Program, you're good; all you have to do is check back at five year intervals to see if anything has changed.

If you are still looking at an old FIRM, don't count on seeing any public notice of changes when its updated; check again at least annually.

If you are in a zone A or B, on either an old or new FIRM, take a closer look. One company in the business of auditing flood zone determinations says that up to 90% of the high risk flood zone evaluations they reviewed were factually wrong. The fix: a specific review and determination of flood zone status.

Should a preliminary review indicate an inaccurate flood zone determination, we can advise you on how to proceed with a correction of the error, and the cost and benefit of doing so. A completed flood zone

correction process will result in a Letter of Map Amendment (a LOMA, and our last acronym for today), which is a document issued by FEMA removing a specific property from a high risk flood zone.

Give us a call if you would like to discuss this further.

Insurance and the Economy

Companies and businesses in all corners of the country are coming to grips with current economic conditions. The slowdown in the economy will affect your insurance program in myriad ways. Throw in a new president and an administration committed to "change", and we can reasonably expect a double handful of new insurance issues to pop up in the coming months and years.

We'll do our best to keep you posted on these developments as they occur. For starters, here are a few current issues specifically applicable to Employment Practices Liability:

Job Cutbacks: Layoffs, cutbacks, and closings create new possibilities for employment related lawsuits. Insurance companies have always been cautious about the coverage they offer for this exposure; almost every EPL policy has exclusions for claims arising from violations of the Worker Adjustment and Retraining Notification Act (WARN), and COBRA. That won't change, although some coverage for COBRA related claims might be found elsewhere, in either a fiduciary liability policy or employee benefits liability policy.

With a downsizing economy, they're also very concerned about age discrimination and class action claims that are related to downsizing. Coverage for discrimination claims is a basic EPL coverage, but treatment of class actions could vary. Remember, these are all non standard policies, every insurance company writes their own form.

Lilly Ledbetter: This Alabama woman sued her employer alleging wage discrimination in that she was paid less than male workers doing the same job. Without addressing the complaint, the Supreme Court ruled she could not sue because the complaint

was filed more than the statutory 180 days after the first "alleged unlawful employment practice".

The very first piece of major legislation passed by congress and signed by President Obama was the Lilly Ledbetter Fair Pay Act. It prohibits sex discrimination in the form of unequal pay for equal work, but now says the clock starts ticking to file a claim each time a discriminatory wage is paid, even though the original alleged discriminatory pay-setting decision might have been made many years ago. Each paycheck starts a new clock.

There is one bright spot; the Ledbetter Act does not require employers to repay employees for decades of discriminatory pay differentials. It limits the amount of lost income that an employee can recover to no more than back pay for two years prior to when the employee filed the discrimination claim.

EPL policies have seen a slow but consistent growth in claims over the years regardless of economic conditions. This new law will not change that. Attorneys specializing in employment practices law predict that the Ledbetter Act is likely to trigger a surge in pay discrimination claims.

The New ADA: While we can thank President Obama for Lilly, let's also give former President Bush equal credit for another law guaranteed to make life more difficult for employers. The Americans with Disabilities Act Amendments Act of 2008 (the ADA) was signed into law by President Bush on Sept. 25, 2008 and became effective Jan. 1, 2009.

The details of this act and likely implications for employers demand more space than we can devote in this issue, and will be the subject of a future article. For now, just take this as one more reason why you should be taking a closer look at the limits and coverage in your EPL policy this year.

Wage and Hour Claims: There have been a handful of widely publicized wage and hour class action settlements over the past couple of years. These suits are usually in the form of class actions, cover dozens, hundreds, or even thousands of current and former employees, and are very, very expensive to both litigate and settle.

EPL and Director's and Officers policies have always offered either very limited or (in most cases) no coverage for class actions like these, but a handful of policies had begun at least offering wage and hour defense coverage. Under current conditions, we would expect this small coverage improvement to be among the first to go.

How Long Should You Keep Your Policies?

The short answer is, forever, at least (and specifically) for most liability insurance policies. Here's one reason why, courtesy of the Connecticut Supreme Court.

A Connecticut company was sued by numerous claimants for injuries allegedly sustained over a 45 year period. The company claimed it had purchased liability insurance on occurrence policy forms throughout the entire period, but that several policies had been lost or destroyed.

Four insurance companies that had provided some coverage throughout the period agreed to defend,

but one sued the policyholder, contending that they should only be responsible for a pro-rata share of the cost of defense, equal to the years they had written insurance. The policyholder argued that the insurance company was jointly and severably liable for all defense costs.

The court agreed with the insurance company. They reasoned that the insurance company had never agreed to pay for defense costs arising from losses that occurred outside of its own policy period, and to compel it to do so would constitute a windfall to the policyholder. Legal experts note that Connecticut now joins several other states in saying that each insurance company only has to pay its share of costs with respect to the actual period of coverage.

In this time of electronic data storage, it makes sense to convert as much old policy information as you can find to electronic records. Keep the original policies and preserve them in a safe place, but scan them and back them up with electronic copies.