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New York Department of Financial Services Adopts New Mandatory Mediation Program for Hurricane Sandy Losses

On February 25, 2013, the New York Department of Financial Services promulgated a significant new Hurricane Sandy-related regulation that will affect nearly all insurers doing business in the State of New York. Specifically, the Department adopted the [Fifteenth Amendment \(entitled "Mediation"\) to 11 NYCRR 216 et seq.](#), a part of the New York Code, Rules and Regulations entitled "Unfair Claims Settlement Practices and Claim Cost Control Measures," but more commonly known as Regulation 64. We will refer to this amendment as the "Mediation Amendment" in this update.

Adopted as an emergency measure, the Mediation Amendment grants any insured that disputes or contests the outcome of a Hurricane Sandy claim an opportunity to mediate that dispute with its insurer. As explained below, the Mediation Amendment imposes specific notice requirements upon insurers, and makes mediation mandatory if requested by an insured. A summary of the key features of the Mediation Amendment follows.

EFFECTIVE DATE

According to the Department of Financial Services, the effective date of the Mediation Amendment is February 25, 2013.

APPLICABILITY

The requirements of the Mediation Amendment apply to the following:

- Any claim for loss or damage to real property or personal property (other than motor vehicles and other than losses under a policy issued under the National Flood Insurance Program), where the loss occurred:
 - During the period October 26, 2012, to November 15, 2012;
 - In the counties of Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk, and Westchester.
- Both personal lines and commercial lines losses and claims.

- All insurers licensed to do business in New York. (This excludes excess and surplus lines insurers.)

NOTICE REQUIREMENTS

- After the effective date of February 25, 2013, an insurer must send written notice informing an insured of its right to mediation in the following circumstances:
 - When an insurer denies a qualifying claim, in whole or in part;
 - Within ten (10) business days after the insurer receives notification that an insured disputes a settlement offer, as long as the difference between the positions is greater than \$1,000; or
 - Within two (2) business days of when an insurer has not offered to settle an insured's claim within forty-five days after the insurer's receipt of a properly executed proof of loss and all requested supporting documentation.
- In the following additional circumstances, on or before March 11, 2013, an insurer must send the insured written notice of its right to mediate:
 - Where the insurer denied the claim, in whole or in part, before February 25, 2013 (the effective date of the Amendment); or
 - Where the insurer made a settlement offer that was disputed by the insured before February 25, 2013; or
 - Where, before February 25, 2013, more than forty-five (45) days have elapsed after the insurer received a properly executed proof of loss "and all items, statements and forms that the insurer had requested from the claimant;" AND
 - Where the claim "remains unresolved." (The Mediation Amendment does not define the term "unresolved" in this context.)
- In all other situations, including situations in which the insured was paid for the entirety of the claim, with no part of the claim being denied, and in which the insured did not dispute the settlement offer, a mediation notice is not required.
- Content of the Notice: In all situations where a mediation notice is required to be sent, the notice "shall inform that claimant of the claimant's right to request mediation and shall provide instructions on how the claimant may request mediation." These instructions must include the name, address, and phone and fax number of the organization designated to mediate the claim, as well as the insurer's address and phone number. (To date, the Department of Financial Services has not released a list of approved mediators.)
- Upon receipt of a request to mediate from an insured, an insurer must forward that request to the mediation organization within three (3) business days.

CONDUCT OF THE MEDIATION

- All mediations are non-binding, and all statements made during a mediation are confidential.
- A mediation may address any disputed issue involved in a claim to which the Amendment applies.
- Mediations shall be conducted in accordance with procedures established by the mediation organization to be designated and approved by the Superintendent of Financial Services.
- A mediation may be conducted by face-to-face meetings, video conferences, or telephone conferences, "as determined by the designated organization in consultation with the parties."
- Insurer's Representative: The representative participating on behalf of the insurer must:

- Be knowledgeable about the claim;
- Have authority to make binding claims decisions;
- Have authority to issue payment on behalf of the insurer; and
- Bring a copy of the policy and the entire claim file to the mediation.
- The Mediation Amendment requires an insurer to participate in the mediation in good faith. The good faith requirement mandates, at a minimum, that:
 - The insurer not "disrupt the process, become unduly argumentative or adversarial or otherwise inhibit the negotiations;" and
 - If the insurer does not alter its original decision on the claim, it must provide "a reasonable explanation for its action."
- An insurer is obligated to pay the designated organization the entire fee for the mediation within five (5) days after receiving a bill for the mediation.

PARTICIPATION IN MEDIATION DOES NOT IMPAIR THE INSURED'S OTHER RIGHTS

- An insured's participation in mediation does not affect its right to (a) have all or part of its loss appraised in accordance with the policy or (b) litigate any dispute with an insurer.

EXCEPTIONS: WHEN MEDIATION IS NOT REQUIRED

- An insurer is not required to participate in a mediation concerning:
 - A property valuation dispute that has already been referred to appraisal (unless the insurer and insured agree otherwise);
 - Any claim that is the subject of a pending civil lawsuit (unless the insurer and insured agree otherwise);
 - Any claim "that the insurer has reason to believe is a fraudulent transaction or for which the insurer has knowledge that a fraudulent insurance transaction has taken place;" or
 - Any type of dispute that the designation mediation organization has excepted from its mediation process in accordance with its procedures approved by the Superintendent of Financial Services.

If we can be of any assistance to you, please do not hesitate to contact us.

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