APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20228

ALI EKHLASSI,
Plaintiff-Appellant,

v.

NATIONAL LLOYDS INSURANCE COMPANY,
Defendant-Appellee.

Filed: June 4, 2019

Appeal from the United States District Court
for the Southern District of Texas

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

OPINION

RHESA HAWKINS BARKSDALE, Circuit Judge:

Ali Ekhlassi challenges the summary judgment awarded National Lloyds Insurance Company pursuant to the National Flood Insurance Act (the Act), 42 U.S.C. §§ 4001 et seq. Primarily, at issue are: whether 42 U.S.C. § 4072 (providing for "original exclusive jurisdiction" in

district court and one-year limitations period) is applicable to actions against Write-Your-Own (WYO) carriers ("private insurers [which] issue flood insurance policies [underwritten by the Government] in their own names" as part of the National Flood Insurance Program (created by the Act), *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir. 2009)); and, if § 4072 is applicable, whether its one-year limitations period bars relief. AFFIRMED.

I.

This action concerns the Act's government program, 42 U.S.C. §§ 4071–72, which allows private insurance companies (as WYO carriers) to issue and administer flood-insurance policies underwritten by the Government. *See Campo*, 562 F.3d at 754. The required language of the policy issued by WYO carriers is provided in the Code of Federal Regulations in 44 C.F.R. pt. 61, App. A(1). *See Campo*, 562 F.3d at 754 n.11. Lloyds participated in the program as a WYO carrier.

The above-referenced Standard Flood Insurance Policy, provided in the Code of Federal Regulations and utilized by WYO carriers participating in the National Flood Insurance Program, states the "Requirements in Case of Loss". 44 C.F.R. Pt. 61, App. A(1), Art. VII (J). Among those requirements, the policyholder "must . . . send [the insurer] a proof of loss, which is [the insured's] statement of the amount [the insured is] claiming under the policy [and is] signed and sworn to by [the insured]". *Id.*

Ekhlassi insured his house in Houston, Texas, with a National Flood Insurance Program policy from Lloyds and a homeowner's policy from Auto Club Indemnity Company (ACIC). ACIC is not a party on appeal. An extensive rain-storm that caused flooding damaged

Ekhlassi's home on 25 May 2015, and he reported the loss to Lloyds the next day.

On 28 May 2015, the Federal Emergency Management Agency (FEMA) issued a notice with a waiver for National Flood Insurance Program policyholders, extending the time within which to file a proof of loss by 180 days for "all claims for the flood damage related to the Texas and Oklahoma flooding" that began on 16 May 2015 and included Ekhlassi's house. As stated in the notice, policyholders had "a total of 240 days after the date of loss" to file the proof of loss. The notice stated it did "not . . . waive any other provisions of the [Standard Flood Insurance Policy]".

One such non-waived provision in the policy is the one-year statute of limitations. 44 C.F.R. Pt. 61, App. A(1), Art. VII (R). That provision states: "If you do sue, you *must* start the suit within one year after the date of the written denial of all or part of the claim, and you *must* file the suit in the United States District Court of the district in which the covered property was located at the time of loss." *Id.* (emphasis added).

Ekhlassi had an adjuster inspect his house. After doing so, the adjuster obtained estimates from contractors for the cost of repair, which exceeded $ 200,000. Lloyds also inspected the house, and concluded flooding from the 25 May storm did not cause much of the claimed damage.

As a result, Lloyds' subsequent 6 October 2015 letter to Ekhlassi stated it had reviewed his adjuster's report and would process a claim for $ 3,768.25 upon receipt of a "signed, dated and sworn to proof of loss". The letter also stated it was "denying payment for any building and contents items not subject to direct physical loss by or from

flood" and "denying payment for all non-covered items located below the lowest elevated floor of [Ekhlassi's house], pursuant to the Standard Flood Insurance Policy".

More to the point, the 6 October letter warned Ekhlassi about the above-quoted, one-year limitations period. As noted, this period is provided in the Act, 42 U.S.C. § 4072; its regulations, 44 C.F.R. § 62.22(a); and the Standard Flood Insurance Policy, *id.* Pt. 61, App. A(1), Art. VII (R). Notably, "strict compliance with the provisions of federal flood insurance policies is required because payments are drawn from the federal treasury". *Shuford v. Fidelity Nat'l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1343 (11th Cir. 2007) (citation omitted).

Ekhlassi submitted a proof of loss in late December 2015 for $ 274,940.05. In response, Lloyds' 11 January 2016 letter to Ekhlassi acknowledged receipt of the proof of loss, and rejected all but $ 3,768.25 (the amount offered by the 6 October letter). The 11 January letter also instructed Ekhlassi to "refer to the denial letter dated October 6, 2015[,] for what Federal law allows under the Standard Flood Insurance Policy and for reasons of denial for damages that have been claimed".

In mid-January, Ekhlassi signed, *inter alia*, a different proof of loss for $ 3,768.25, but he disagreed with the amount and stated his intent not to "conclude this claim in any manner whatsoever".

One year from the 11 January 2016 denial, Ekhlassi filed this action in Texas state court on 11 January 2017. He claimed, *inter alia*, breach of contract against Lloyds. This action was removed to federal court on 24 April 2017.

ACIC, the issuer of the homeowner's policy, filed a summary-judgment motion, which was granted in November 2017. (As noted, ACIC is not a party on appeal.)

Lloyds also filed a summary-judgment motion, which was granted in January 2018. *Ekhlassi v. Nat'l Lloyds Ins. Co.*, 295 F. Supp. 3d 750 (S.D. Tex. 2018). The court ruled Ekhlassi's action was time-barred, based on its concluding the 6 October, not the 11 January, letter triggered the one-year limitations period. *Id.* at 755.

In early February 2018, pursuant to Federal Rule of Civil Procedure 59(e), Ekhlassi moved to reconsider the summary judgment awarded Lloyds. The March 2018 order denying the motion reiterated the court's prior holding: the 6 October letter served as the denial triggering the limitations period.

II.

As governed by the Act, this action concerns a WYO carrier. Our court has previously, and comprehensively, explained how the WYO program operates:

> By enacting the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 et seq., Congress established the [National Flood Insurance Program] to make flood insurance available on reasonable terms and to reduce fiscal pressure on federal flood relief efforts. FEMA administers the [p]rogram. Within [that] [p]rogram, the WYO program allows private insurers to issue flood insurance policies in their own names. Under this framework, the federal government underwrites the policies and private WYO carriers perform significant administrative functions including "arrang[ing] for the adjustment,

> settlement, payment and defense of all claims arising from the policies." WYO carriers must issue policies containing the exact terms and conditions of the [Standard Flood Insurance Policy] set forth in FEMA regulations. Additionally, FEMA regulations govern the methods by which WYO carriers adjust and pay claims. Although WYO carriers play a large role, the government ultimately pays a WYO carrier's claims. When claimants sue their WYO carriers for payment of a claim, carriers bear the defense costs, which are considered "part of the . . . claim expense allowance"; FEMA reimburses these costs. Yet, if "litigation is grounded in actions by the [WYO] Company that are significantly outside the scope of this Arrangement, and/or involves issues of agent negligence," then such costs will not be reimbursable to the WYO carrier.

Campo, 562 F.3d at 754 (footnotes omitted).

WYO carriers are fiscal, not general, agents of the United States. *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 165 (3d Cir. 1998). As such, they administer the National Flood Insurance Program by "strictly enforc[ing] the provisions set out by FEMA and" can not "vary the terms of [the Standard Flood Insurance Policy]" without "express written consent" from the Government. *See C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 267 (3d Cir. 2004). At least historically, if not today as well, WYO carriers write far more policies than does FEMA. *See id.* Pursuant to federal regulation, WYO carriers are "sued in place of the FEMA [Administrator]" in actions involving WYO policies. *See id.* at 267 n.4.

The summary judgment awarded Lloyds is reviewed *de novo*. *E.g.*, *Borden v. Allstate Ins. Co.*, 589 F.3d 168,

170 (5th Cir. 2009). "Summary judgment is appropriate when the record demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* at 170–71 (internal quotation marks and citation omitted); *see also* Fed. R. Civ. P. 56(a).

In his original opening brief on appeal, Ekhlassi challenged: the district court's using Lloyds' first claim-denial letter (6 October 2015) to trigger the limitations period; and, its denying his Rule 59(e) motion. But, pending oral argument, we, *sua sponte*, ordered supplemental briefing by the parties regarding "the effect of the federal court's original exclusive jurisdiction on whether the action is barred by the limitations period".

Accordingly, primarily at issue are: whether 42 U.S.C. § 4072 applies to a WYO action like the one at hand; and, if it does, whether the statute's requirement of "original exclusive jurisdiction" in federal court causes this action to be time-barred because it was not filed in, or removed to, federal court within one-year of the claim's denial, regardless of which of the two letters (6 October 2015 or 11 January 2016) was the operative denial. For the reasons stated below, we hold: 42 U.S.C. § 4072 applies to actions against WYO carriers; and, because Ekhlassi's action did not arrive in federal court within one-year of his claim's denial, it is time-barred. (This holding pretermits our addressing whether the first or second letter served as the operative denial triggering the limitations period.)

A.

First addressed is whether, as urged by Ekhlassi, 28 U.S.C. § 1331 precludes the application of 42 U.S.C. §

4072 in actions involving a WYO carrier; and, if not precluded, whether § 4072 applies.

1.

In his supplemental brief, Ekhlassi contends 28 U.S.C. § 1331 applies to this action to the exclusion of 42 U.S.C. § 4072. Needless to say, § 1331 is the grant of federal-question jurisdiction to district courts. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). And, our court has previously held "an action for breach of a[ ] [Standard Flood Insurance Policy], a policy issued pursuant to the [National Flood Insurance Program], satisfies § 1331 by raising a substantial question of federal law". *Borden*, 589 F.3d at 172 (citations omitted).

But, of course, the application of federal-question jurisdiction pursuant to § 1331 does not preclude application of the very federal statute giving rise to the federal interest at stake. In other words, merely because § 1331's jurisdictional grant applies does not mean § 4072's statute of limitations does not.

2.

Having determined § 1331 does not preclude application of § 4072, next considered is whether § 4072 applies to actions involving WYO carriers. Ekhlassi contends § 4072 applies only to the FEMA Administrator, not WYO carriers. That section provides:

> In the event the program is carried out as provided in section 4071 of this title, the Administrator shall be authorized to adjust and make payment of any claims for proved and approved losses covered by

> flood insurance, and upon the disallowance by the Administrator of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, *the claimant, within one year* after the date of mailing of notice of disallowance or partial disallowance by the Administrator, may institute an action against the Administrator on such claim in the *United States district court for the district in which the insured property* or the major part thereof *shall have been situated*, and *original exclusive jurisdiction is hereby conferred upon such court* to hear and determine such action without regard to the amount in controversy.

42 U.S.C. § 4072 (emphases added); *see also* 44 C.F.R. § 62.22(a).

Without their providing underlying analysis, at least two prior decisions by our court applied § 4072 to actions against WYO carriers. *Ferraro v. Liberty Mut. Fire Ins. Co.*, 796 F.3d 529, 531 (5th Cir. 2015) ("The district court had jurisdiction pursuant to 42 U.S.C. § 4072, which provides exclusive federal jurisdiction over litigation arising out of the [National Flood Insurance Program]."); *Constr. Funding, L.L.C. v. Fidelity Nat. Indem. Ins. Co.*, 636 F. App'x 207, 209 (5th Cir. 2016) ("The district court had jurisdiction over this dispute under 42 U.S.C. § 4072, which grants federal courts exclusive jurisdiction over disputes between claimants and insurers in the [National Flood Insurance Program]."); *see also Cohen v. Allstate Ins. Co.*, ___ F.3d ___, 2019 WL 2151314 (5th Cir. 2019) (applying statute of limitations provided in § 4072 to action involving WYO carrier).

Our court is not alone in applying § 4072 to WYO actions. The sixth circuit reached a similar conclusion in

Gibson v. Am. Bankers Ins. Co., 289 F.3d 943, 947 (6th Cir. 2002) ("[Section] 4072 provides exclusive subject matter jurisdiction over suits against a WYO insurance company arising out of a disputed flood insurance claim". (citations omitted)); *id.* ("[T]his language mandates that federal district courts have exclusive jurisdiction over suits under [the National Flood Insurance Act]". (citation omitted)). The third circuit reached the same conclusion in *Van Holt*, 163 F.3d at 167 (holding § 4072 and § 1331 applied). The second circuit did as well in *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006) ("holding . . . § 4072 gives rise to jurisdiction over claims against WYO companies", but not reaching the application of § 1331).

Again, Ekhlassi, in his supplemental brief, contends § 4072 applies only to FEMA's Administrator. Along that line, the seventh circuit declined to apply § 4072 to a WYO action. *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 680 (7th Cir. 2001) ("Because we see no good reason to disregard not only the identity of the litigants but also the fact that § 4072 is limited to suits against the [Administrator], we decline to adopt *Van Holt*'s reasoning."). Rather, *Downey* applied jurisdiction under § 1331. *Id.* at 681–82. In doing so, *Downey* relied on § 4072's not mentioning a WYO carrier. *See id.* at 679.

As quoted above, § 4072 only describes an action against "the Administrator", which the statute later defines as "the [FEMA] Administrator". 42 U.S.C. §§ 4072, 4121(a)(6) (defining "Administrator"); *see also Palmieri*, 445 F.3d at 186; *Van Holt*, 163 F.3d at 166. But, § 4072's context is significant. *Palmieri*, 445 F.3d at 186; *Van Holt*, 163 F.3d at 166. "It is a 'fundamental canon of statutory construction that the words of a statute must be

read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Accordingly, we "must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme'". *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

That framework counsels in favor of applying § 4072 to WYO actions. In doing so, the third circuit's analysis in *Van Holt* is instructive:

> For several reasons, a suit against a WYO company is the functional equivalent of a suit against FEMA. First, a WYO company is a fiscal agent of the United States. 42 U.S.C. § 4071(a)(1). Second, FEMA regulations require a WYO company to defend claims but assure that FEMA will reimburse the WYO company for defense costs. 44 C.F.R. § 62.23(i)(6). Third, an insured's flood insurance claims are ultimately paid by FEMA. After a WYO company depletes its net premium income, FEMA reimburses the company for the company's claims payments. 44 C.F.R. Pt. 62, App. A, Art. IV(A). When a WYO company's proceeds from insurance premiums exceeds its current expenditures, it must pay the excess proceeds to the [Flood Insurance Administration]. 44 C.F.R. Pt. 62, App. A., Art. VII(B). Although a WYO company collects premiums and disburses claims, only FEMA bears the risk under the flood insurance program. Thus, a lawsuit against a WYO company is, in reality, a suit against FEMA. *Cf. Gowland* [*v. Aetna*, 143 F.3d 951, 954–55 (5th Cir. 1998)], (refusing to estop WYO

> company due to relationship between company and FEMA).

Van Holt, 163 F.3d at 166–67; *see also Campo*, 562 F.3d at 754 (as quoted *supra*, describing how the WYO system in the National Flood Insurance Program operates). Similarly, as stated in *Palmieri*, 445 F.3d at 186, in a WYO action, the "suit is 'against' the [Administrator] in the colloquial sense, because it will draw down the federal financial resources he manages". Accordingly, "a broader reading of the statute is appropriate as to suits against WYO companies". *Id.*

Also instructive is 42 U.S.C. § 4053. *See Spence v. Omaha Indem. Ins.*, 996 F.2d 793, 795 n.12 (5th Cir. 1993) (stating "[§ 4053] indicates congressional intent to place a one year limitations period on actions under flood policies issued by private [National Flood Insurance Program] participants"). "When Congress created the [National Flood Insurance Program,] it gave the program's administrator two ways to execute the program and discretion to choose between them." *Downey*, 266 F.3d at 678. The first way is through the industry program, pursuant to 42 U.S.C. §§ 4051–56, which "allows a pool of private insurers to underwrite flood insurance with financial backing from the government". *Downey*, 266 F.3d at 678 (citation omitted). The alternative is the government program, pursuant to 42 U.S.C. §§ 4071–72, which "allows the government to run the [National Flood Insurance Program] itself—offering federally underwritten policies—with the potential for administrative assistance from private insurers". *Downey*, 266 F.3d at 678 (citation omitted). But, the industry program ended in the 1970s, leaving only the government program. *Id.*

Nevertheless, § 4053 can inform our interpretation of § 4072. *Palmieri* explains:

> The general design of the [National Flood Insurance] Act also evidences an intent to ensure that claims involving the programs it creates are heard in the federal courts. Section 4053, which applied to the now-defunct Industry Program, vested exclusive jurisdiction in the federal courts over any action brought by an insured against a pool of private insurers. *See* 42 U.S.C. § 4053. Section 4072 similarly provides for exclusive jurisdiction in the federal courts over any action brought by an insured "against the [Administrator]." *Id.* § 4072. The statutory framework thus indicates not only that private insurers are to act as fiscal agents of the government in administering the federal program, but also that all claims for benefits under a[ ] [National Flood Insurance Act] policy, whether issued as part of the Industry Program or the Government Program and whether sought from a private insurer or the government, are to be litigated exclusively in federal court.

Palmieri, 445 F.3d at 186.

Finally, we note Ekhlassi's inconsistent positions regarding § 4072. His supplemental brief urges our holding § 4072 inapplicable to WYO carriers. But, despite his newfound efforts to distance his action from the restrictions of § 4072, he cited § 4072 numerous times in his original and reply briefs.

Even if prior decisions by our court had not applied § 4072 to actions against WYO carriers, we would be persuaded by the well-reasoned opinions from the second,

third, and sixth circuits: in short, § 4072 applies to WYO carriers.

B.

Having determined the applicability of § 4072, we turn to whether we can affirm the district court on this alternative basis; and, if we can, whether § 4072's application renders Ekhlassi's action time-barred. We answer both questions in the affirmative.

1.

Ekhlassi asserts Lloyds waived the statute-of-limitations defense premised on this action's not being filed in federal court. But, even if Lloyds did not raise this precise contention, we can still consider it.

In our court, "a well-settled discretionary exception to the waiver rule exists where a disputed issue concerns 'a pure question of law'". *New Orleans Depot Servs. Inc. v. Director, Office of Worker's Comp. Programs*, 718 F.3d 384, 388 (5th Cir. 2013) (en banc) (citations omitted); *Atl. Mut. Ins. Co. v. Truck Ins. Exch.*, 797 F.2d 1288, 1293 (5th Cir. 1986) ("An issue raised for the first time on appeal generally is not considered unless it involves a purely legal question or failure to consider it would result in a miscarriage of justice." (citations omitted)).

The issue at hand is a question of law; there are no disputed facts needing resolution. Moreover, this is an appeal from a summary judgment—a legal determination. Further, we ordered supplemental briefing on this issue and addressed it during oral argument. *See New Orleans Depot Servs. Inc.*, 718 F.3d at 388 (invoking the exception to the waiver rule because, *inter alia*, "every party was

provided an adequate opportunity to brief and argue the issue before the . . . court").

2.

Ekhlassi's claim is time-barred. Lloyds' first letter was sent on 6 October 2015; its second, on 11 January 2016. Ekhlassi filed this action in state court on 11 January 2017, exactly one year from the second letter.

But, 42 U.S.C. § 4072 confers "original exclusive jurisdiction" on "the United States district court for the district in which the insured property . . . shall have been situated". This action was not removed to district court until 24 April 2017, well over one year from either letter, and, therefore, too late under the statute.

That Ekhlassi may have filed this action within one year of an operative denial-letter does not save it, because he filed in state court, when 42 U.S.C. § 4072 required the action to have been filed in federal court within a year. In other words, Ekhlassi did not timely file in the correct court. (As noted, because of the above basis on which we hold Ekhlassi's claim time-barred, we need not reach which of the two letters triggered the limitations period.)

III.

For the foregoing reasons, the judgment is AFFIRMED.

HAYNES, Circuit Judge, concurring:

Because we are bound by precedent to apply § 4072 to a WYO carrier, I concur in the judgment of the court in this case. I write separately because, unlike the majority opinion, I conclude that our precedent wrongly construes § 4072 in a counter-textual fashion.

We should instead begin and end with the plain text of the statute, which refers only to suits against the FEMA Administrator. *See* 42 U.S.C. § 4072. As quoted in the majority opinion, the statute clearly states, in relevant part, "the claimant . . . may institute an action against the *Administrator* on such claim."[1] *Id.* (emphasis added). In turn, the term "Administrator" is defined as the "Administrator of the Federal Emergency Management Agency," while "Write Your Own" describes "the cooperative undertaking between the insurance industry and the Federal Insurance Administration which allows participating property and casualty insurance companies to write and service standard flood insurance policies." *Id.* § 4004 (a) (3), (5).

The text is unambiguous; it simply does not mention WYO carriers. If Congress had intended § 4072 to apply to WYO carriers it could have added that to the provision. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that the legislature says in a statute what it means and means in a statute what it says there.'") (brackets omitted) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

The Second Circuit, although agreeing that "§ 4072 does not expressly indicate that anyone other than the [Administrator] may be sued," nevertheless concluded that the provision was ambiguous because the word

[1] I note that the one-year statute of limitations would be applicable here regardless of whether "Administrator" under § 4072 encompasses the WYO carrier because Paragraph VII.R. of the applicable insurance policy issued to Ekhlassi states that "you must start the suit within one year after the date of the written denial of all or part of the claim."

"against" "could mean either 'having as defendant' or 'opposed to'." *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 186 (2d Cir. 2006). This seems to be searching for an ambiguity where one does not exist; taken at its ordinary meaning, the phrase "the claimant . . . may institute an action against the Administrator," seems clearly to contemplate an insured suing the FEMA Administrator.

But even assuming there is some ambiguity in the provision, I agree with the Seventh Circuit that although WYO carriers stand in the shoes of the Administrator in many respects, that does not compel the conclusion that § 4072 applies to WYO carriers. *See Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 680 (7th Cir. 2001). The Seventh Circuit disagreed with the Third Circuit's conclusion that § 4072 applies to WYO carriers because under FEMA regulations, WYO carriers are (1) fiscal agents of the United States, (2) reimbursed by FEMA for defense costs, and (3) required to pay excess proceeds to the Federal Insurance Association, and FEMA ultimately pays the insurance claims. *Id.* at 679–80; *see Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 166 (3d Cir. 1998). The Seventh Circuit concluded that FEMA's financial obligations meant there was a federal interest, and thus federal jurisdiction under 28 U.S.C. § 1331, but the federal interest did not mean that a lawsuit against a WYO carrier was in fact a lawsuit against FEMA. *Downey*, 266 F.3d at 680–82. This reasoning makes the most sense in light of the text of the provision itself. As the Seventh Circuit pointed out, courts do not "typically look to see who will be *affected* by a decision" for "jurisdictional purposes." *Id.* at 680.

Further, although WYO carriers are "placeholder[s]" for FEMA in many respects, *id.*, they are independent in other respects. As Ekhlassi points out in his supplemental briefing, FEMA regulations provide that WYO carriers (1) "arrange for the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance [they] issue[ ]," (2) use their "own customary standards, staff and independent contractor resources," and (3) "are solely responsible for their obligations to their insured . . . such that the Federal Government is not a proper party defendant in any lawsuit arising out of such policies." 44 C.F.R. § 62.23 (d), (e), (g).

Also, WYO carriers are fiscal agents, but not general agents, of the United States. *Id.* § 62.23 (g); *cf. Dwyer v. Fidelity Nat. Prop. & Cas. Ins. Co.*, 565 F.3d 284, 289 (5th Cir. 2009). It is one thing to have a cooperative relationship with a private insurance carrier, quite another to transform that carrier into a governmental entity. We should not assume Congress made that transformation *sub silentio*.

Thus, while I respect and agree that we are bound by precedent, I disagree that our precedent is correct. For that reason, I concur in the judgment but not in the reasoning beyond citing precedent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. H-17-1257

ALI EKHLASSI,
Plaintiff,

v.

NATIONAL LLOYDS INSURANCE CO. and
AUTO CLUB INDEMNITY CO.,
Defendants.

Filed: January 9, 2018

MEMORANDUM AND OPINION GRANTING NATIONAL LLOYDS' MOTION FOR SUMMARY JUDGMENT

Before LEE H. ROSENTHAL, Chief United States District Judge.

This case arises from a dispute over flood-insurance payments for damage from a Houston, Texas storm in May 2015. Ali Ekhlassi held two insurance policies: a Texas Homeowners Deluxe Policy issued by the Auto Club Indemnity Company; and a flood-insurance policy with National Lloyds Insurance Company, underwritten by the Federal Emergency Management Agency. (Docket Entry Nos. 16–2, 16–3). The court previously

granted Auto Club's motion for partial summary judgment. (Docket Entry No. 17). National Lloyds now moves for summary judgment on the basis that the statute of limitations bars Ekhlassi's claims.

Based on the motion, the record evidence, and the applicable law, National Lloyds' motion for summary judgment is granted and Ekhlassi's claims are dismissed, with prejudice. The reasons are stated below.

I. Background

The relevant facts are undisputed. Between May 23 to 25, 2015, a severe storm caused heavy flooding in Houston. Ekhlassi suffered significant damage to his home when five to six feet of floodwater filled his unfinished basement garage for two days. Ekhlassi alleges a loss amount of $274,940.05 for the flood damage. (Docket Entry No. 19 at 2). Ekhlassi had coverage under both the Homeowners policy from Auto Club and the flood policy from National Lloyds, before and during the storm. The National Lloyds policy was part of the National Flood Insurance Program administered by the Federal Emergency Management Agency.

In May 2015, just after the flood, Ekhlassi reported his losses to National Lloyds. A few days later, National Lloyds sent insurance adjuster Jim Nemechek to inspect Ekhlassi's property. Nemechek estimated losses totaling $3,768.15 for "flood loss clean-up and other covered damages," but found that all other damages were excluded under Ekhlassi's policy. (Docket Entry No. 18 at 3).

On October 6, 2015, National Lloyds sent Ekhlassi a letter stating that he had not yet submitted a proof of loss form for his claim and that it could not process his claim payment for $3,768.25 until it received his proof of loss.

(Docket Entry No. 18, Ex. C). The letter informed Ekhlassi that he had 240 days from the date of loss to provide the signed and sworn proof of loss and that National Lloyds was denying payment for "any building and contents items not subject to direct physical loss by or from flood" and "all non-covered items located below the lowest elevated floor of your post-FIRM elevated building." (*Id.*). On December 28, 2015, Ekhlassi provided the sworn proof of loss to National Lloyds, stating an amount of $276,190.05 less the deductible, for a total of $274,940.05. On January 11, 2016, National Lloyds sent Ekhlassi a second letter rejecting the proof of loss, confirming that it would pay only the previously determined amount of $3,768.25, and referring Ekhlassi to the October 6, 2015 denial letter for the reasons. (Docket Entry No. 18, Ex. E).

One year later, on January 11, 2017, Ekhlassi sued National Lloyds and Auto Club, alleging breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, and violations of the Deceptive Trade Practices Act. TEX. INS. CODE § 541.060, 542.055–60; TEX. BUS. COM. CODE § 17.46.

National Lloyds moved for summary judgment, (Docket Entry No. 18), and Ekhlassi responded, (Docket Entry No. 19). The summary judgment record evidence includes a copy of Ekhlassi's Standard Flood Insurance Policy, Number 1547431881, a copy of the loss report, the October 6, 2015 letter from National Lloyds to Ekhlassi, Ekhlassi's original petition, a copy of the January 11, 2016 letter from National Lloyds to Ekhlassi, an affidavit from National Lloyds' records custodian, and FEMA memorandum W-15022 granting a 180–day extension for policy

holders to submit proof of loss. This record is analyzed under the applicable legal standards.

II. The Legal Standards

A. Summary Judgment

"Summary judgment is required when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting FED. R. CIV. P. 56(a)). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* (quoting *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by showing an absence of evidence to support the nonmoving party's case. *Fret v. Melton Truck Lines, Inc.*, No. 17-50031, 2017 U.S. App. LEXIS 16912, at *5-6 (5th Cir. Sept. 1 2017) (quoting *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994)). While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Coastal Agric. Supply, Inc. v. JP Morgan Chase Bank, N.A.*, 759 F.3d

498, 505 (5th Cir. 2014) (citing *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)). A fact is material if "its resolution could affect the outcome of the actions." *Aly v. City of Lake Jackson*, 605 Fed. App'x 260, 262 (5th Cir. 2015) (citing *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 411 (5th Cir. 2007)). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *Pioneer Exploration, LLC v. Steadfast Ins. Co.*, 767 F.3d 503 (5th Cir. 2014).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Bailey v. E. Baton Rouge Parish Prison*, 663 Fed. App'x 328, 331 (5th Cir. 2016) (quoting *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010)). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Jurach v. Safety Vision, LLC*, 642 Fed. App'x 313, 317 (5th Cir. 2016) (quoting Boudreaux, 402 F.3d 536, 540 (5th Cir. 2005)). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Darden v. City of Fort Worth*, 866 F.3d 698, 702 (5th Cir. 2017).

B. The National Flood Insurance Program

The National Flood Insurance Program is a statutorily-created insurance program, administered by FEMA and the Federal Insurance Administration, and underwritten by the U.S. Treasury. The terms of the insurance

policy are established by FEMA. 44 C.F.R. §§ 61.4(b), 61.13(d). National Lloyds serves as a "Write Your Own" insurer, a private insurance company that issues the Standard Flood Insurance Policy "in the place and stead of the Federal Insurance Administrator." 44 C.F.R. § 61.13(f). National Lloyds acts as a fiscal agent of the United States and may not alter, vary, or waive any provision of the Standard Policy. 42 U.S.C. § 4071(a)(1); 44 C.F.R. §§ 61.4(b), 62.23(c).

Under the Standard Policy, a policyholder cannot file a lawsuit without first complying with all policy requirements. 44 C.F.R. § 61, app. (A)(1), art. VII(R). FEMA requires strict adherence to all conditions precedent, including submission of a sworn proof of loss. *Marseilles Homeowners Condo. Ass'n v. Fid. Nat'l Ins. Co.*, 542 F.3d 1053, 1057 (5th Cir. 2008); *see also* 44 C.F.R. § 61, app. A(2), art. VII(J)(4). A claimant may challenge a denial of coverage by filing suit within one year of receiving notice of that denial. 42 U.S.C. § 4072 ("[T]he claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Administrator, may institute an action against the Administrator on such claim"); *see also* 44 C.F.R. Pt. 61, App. A(1), Art. VII(R) ("You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.").

The issue here is limitations, which turns on when Ekhlassi received notice of the denial of his claim.

III. Analysis

If, as Ekhlassi claims, the January 11 letter was the notice of denial, then his suit is timely filed. If, as National Lloyds argues, the October 6 letter was the notice of denial, then the suit is untimely and barred by the statute of limitations.

The October 6 letter made clear that it was a denial of Ekhlassi's claim. The letter stated, in part:

> The Independent Adjuster's final report indicates there were no visible signs of covered flood damage to the subfloor and flooring of the first elevated floor. We are denying payment for any building and contents items not subject to direct physical loss by or from flood, pursuant to the Standard Flood Insurance Policy . . . .
>
> . . .
>
> In accordance with the Standard Flood Insurance Policy, we are denying payment for all non-covered items located below the lowest elevated floor of your post-FIRM elevated building . . . .

(Docket Entry No. 18, Ex. C). The letter also stated that "[i]f you do not agree with our decision to deny your claim, in whole or in part, Federal law allows you to appeal that decision within 60 days of the date of this denial letter." The October 6 letter instructed Ekhlassi that National Lloyds had determined that it would cover his losses in the amount of $3,768.25, but it could not process his payment unless and until he submitted his sworn proof of loss.

In contrast, the January 11 letter states that the amount of the claim was previously determined in the prior letter: "Please be advised the below referenced flood claim payment(s) were previously sent out under separate cover. . . ." The letter rejected Ekhlassi's attempt to increase his payment by submitting a proof of loss for the full amount, and confirmed that National Lloyds would only pay the previously determined amount. In fact, the January letter referenced the October letter directly, stating: "Please refer to the denial letter dated October 6, 2015 for what Federal law allows under the Standard Flood Insurance Policy and for the reasons of denial for damages that have been claimed." (Docket Entry No. 18, Ex. E). The letter makes clear that National Lloyds had already denied the claim in October.

This result is consistent with the case law. In *Cole v. N.H. Insurance*, No. 1:10CV183–SA–DAS, 2012 U.S. Dist. LEXIS 2513, at *31 (N.D. Miss. Jan. 9, 2012), the court addressed a letter identical to the one at issue here:

> Here, on May 14, 2009, Defendant sent Plaintiffs a written denial letter. Specifically, the letter stated, "*We are denying* all non-covered items located below the lowest elevated floor of your post-FIRM elevated building, pursuant to the Standard Flood Insurance Policy[.]" The letter further stated, "If you do not agree with your insurer's *decision to deny your claim or any part of your claim*, Federal law allows you to appeal that decision within 60 days of the date of this denial letter." Thus, May 14 is the date of mailing of the notice of "disallowance or partial disallowance" (or as stated in the SFIP notice that the claim has been "denied" in whole or

> part) for purposes of the running of the statute of limitations.

(emphasis in original). Similarly, in *Wing Building Holding Co., LLC v. Standard Fire Insurance, Co.*, No. 1:13–CV–1007, 2015 U.S. Dist. LEXIS 17761 (N.D.N.Y. Feb. 13, 2015), the court compared two letters sent by the insurance company to the plaintiff. The first letter stated:

> *While we cannot make formal determinations on your claim until we receive your Proof of Loss and a waiver from FEMA*, it is our understanding from the Independent Adjuster that you are looking for coverage on items that are not covered under the Standard Flood Insurance Policy such as mold, the elevator's related equipment, and foundation damage. *We would be required to deny* any damage from mold, moisture and/or mildew . . . . *We would be required to deny* damage to the elevator's related equipment . . . .
>
> Cleaning invoices from Insulate & Accessorize Company for $17,300 were submitted for consideration. Invoices 4701 and 4714 are not itemized; contain duplicate charges and non-covered items such as contents and manipulation. *We would be required to deny* coverage for contents manipulation . . . .

Id. at 3 (emphasis in original). By contrast, the second letter stated:

> *We are denying* payment for elevator and waste management invoices for contents located in the basement and all other non-covered items located in the basement . . . .

> *We are denying* payment for any pre-existing damages and damage from mold . . . .
>
> . . . we are hereby complying with the Standard Flood Insurance Policy's requirement regarding payment or rejection of the insured's Proof of Loss within 60 days of its being filed by the insured. We have received a signed proof of loss in the amount of $115,374.00. *We are accepting* $12,373.21 of the Proof of Loss *and are rejecting* $103,000.79 . . . .
>
> If you do not agree with our decision to deny your claim or any part of the claim, Federal law allows you to appeal the decision within 60 days of the date of *this denial letter*.

Id. at *4 (emphasis in original). The court explained that the difference in the two letters was "self-evident." *Id.* The first letter repeatedly used "conditional language" to signify "a possible or likely future determination"; the second letter "definitively states" the outcome of the claims and refers explicitly to the letter itself as a "denial letter." *Id.* The second letter was the denial of the insurance claim at issue and the point at which the statute of limitations began to run.

The same is true here. The October 6 letter makes clear that National Lloyds was denying the majority of Ekhlassi's claim at that time. The letter refers to itself as a denial letter. The statute of limitations began to run at that point. Because Ekhlassi waited more than one year to file suit, his claim is barred.

Ekhlassi cites two cases in support of his argument that the January 2016 letter gave him notice, not the earlier letter. Both cases are distinguishable. In *Qader v.*

FEMA, 543 F. Supp. 2d 558 (E.D. La. 2008), the court addressed the same issue, but noted that after Hurricane Katrina, FEMA substantially modified the National Flood Insurance Program to expedite claims, in part by partially waiving the proof of loss requirement. With this waiver, a policyholder who agreed with an adjuster's estimate could settle a that claim without any proof of loss. By contrast, the limited waiver in this case granted an extension of the time to file a proof of loss from 60 days to 240 days from the flood date. (Docket Entry No. 19–1 at 1). However, FEMA also made clear that "[b]y granting this limited waiver and extension of the time period to send a proof of loss, FEMA does not hereby waive any other provisions of the [Policy], and all other terms and conditions of the [Policy] remain in effect." (*Id.*). The one-year deadline to file suit remained. The second case, *Kroll v. Johnson*, No. 14–2496, 2014 U.S. Dist. LEXIS 128597 (D.N.J. Sept. 15, 2014), applied the reasoning from *Qadar* to an identical extension FEMA granted for Hurricane Sandy. Unlike those cases, Ekhlassi's proof of loss did not appeal FEMA's decision, but was a prerequisite to payment. In this case, FEMA denied Ekhlassi's claim in October 2015 and simply required submission of the sworn proof of loss before it could pay on the claim.

IV. Conclusion

For the reasons stated above, National Lloyds' motion for summary judgment, (Docket Entry No. 18), is granted. This case is dismissed, with prejudice.

SIGNED on January 9, 2018, at Houston, Texas.

s/ LEE H. ROSENTHAL
Lee H. Rosenthal
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. H-17-1257

ALI EKHLASSI,
Plaintiff,

v.

NATIONAL LLOYDS INSURANCE CO. and
AUTO CLUB INDEMNITY CO.,
Defendants.

Filed: March 14, 2018

ORDER DENYING THE PLAINTIFF'S MOTION FOR RECONSIDERATION

Before LEE H. ROSENTHAL, Chief United States District Judge.

The plaintiff, Ali Ekhlassi, moves this court to reconsider its January 8, 2018 ruling granting the defendant, National Lloyds, summary judgment and finding that the statute of limitations barred Ekhlassi's claim. The court declines to do so.

The Federal Rules of Civil Procedure do not specifically provide for motions for reconsideration. *See St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336,

339 (5th Cir. 1997) ("[T]he Federal Rules of Civil Procedure do not recognize a general motion for reconsideration."). A motion that asks the court to change an order or judgment is generally considered a motion to alter or amend under Rule 59(e). *T-M Vacuum Products, Inc. v. TAISC, Inc.*, 2008 U.S. Dist. LEXIS 54248, 2008 WL 2785636 at *2 (S.D. Tex. July 16, 2008). A Rule 59(e) motion "calls into question the correctness of a judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) (citing *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). A Rule 59(e) motion "'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). The court has "considerable discretion" in addressing a motion for reconsideration. *Templey*, 367 F.3d at 479. Changing an order or judgment under Rule 59(e) is an "extraordinary remedy" that courts should use sparingly. *Id.*; see also 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2810.1 at 124 (2d ed. 1995). The Rule 59(e) standard "favors denial of motions to alter or amend a judgment." *S. Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). A motion to reconsider may not be used to relitigate matters or to raise arguments or present evidence that could have been raised before the entry of the judgment or order. 11 WRIGHT & MILLER § 2810.1 at 127-28 (footnotes omitted).

The National Flood Insurance Policy statute and regulations make it clear that a plaintiff has one year from "the date of the written denial of all or part of the claim"

to file suit. 44 C.F.R. § 61, app.(A)(1), art. VII(R). The October 6, 2015 letter in this case was a written denial of part of Ekhlassi's claim. "We are denying payment for any building and contents items not subject to direct physical loss by or from flood, pursuant to the Standard Flood Insurance Policy. . . . In accordance with the Standard Flood Insurance Policy, we are denying payment for all non-covered items located below the lowest elevated floor of your post-FIRM elevated building. . . ." (Docket Entry No. 18, Ex. C). The letter also stated that "[i]f you do not agree with our decision to deny your claim, in whole or in part, Federal law allows you to appeal that decision within 60 days of the date of this denial letter." (*Id.*). This express written denial of part of Ekhlassi's claim began the limitations period. This conclusion is buttressed by the rule when, as here, the United States has waived immunity to suit, courts narrowly construe the waiver conditions. *See Migliaro v. Fid. Nat'l Indem. Ins. Co.*, 880 F.3d 660, 667 (3d Cir. 2018) ("For the same reasons we must narrowly construe the type of suit a policyholder may bring against a WYO carrier, we must also narrowly construe when a policyholder may bring suit.").

The motion for reconsideration, (Docket Entry No. 22), is denied.

SIGNED on March 14, 2018, at Houston, Texas.

s/ LEE H. ROSENTHAL
Lee H. Rosenthal
Chief United States District Judge

APPENDIX D

1. 42 U.S.C. 4053 provides:

Adjustment and payment of claims; judicial review; limitations; jurisdiction

The insurance companies and other insurers which form, associate, or otherwise join together in the pool under this part may adjust and pay all claims for proved and approved losses covered by flood insurance in accordance with the provisions of this chapter and, upon the disallowance by any such company or other insurer of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance of the claim, may institute an action on such claim against such company or other insurer in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

2. 42 U.S.C. 4071 provides:

Federal operation of program; determination by Administrator; fiscal agents; report to Congress

(a) If at any time, after consultation with representatives of the insurance industry, the Administrator determines that operation of the flood insurance program as provided under part A cannot be carried out, or that such

operation, in itself, would be assisted materially by the Federal Government's assumption, in whole or in part, of the operational responsibility for flood insurance under this chapter (on a temporary or other basis) he shall promptly undertake any necessary arrangements to carry out the program of flood insurance authorized under subchapter I through the facilities of the Federal Government, utilizing, for purposes of providing flood insurance coverage, either—

(1) insurance companies and other insurers, insurance agents and brokers, and insurance adjustment organizations, as fiscal agents of the United States,

(2) such other officers and employees of any executive agency (as defined in section 105 of Title 5) as the Administrator and the head of any such agency may from time to time, agree upon, on a reimbursement or other basis, or

(3) both the alternatives specified in paragraphs (1) and (2).

(b) Upon making the determination referred to in subsection (a), the Administrator shall make a report to the Congress and, at the same time, to the private insurance companies participating in the National Flood Insurance Program pursuant to section 4017 of this title. Such report shall—

(1) state the reason for such determinations,

(2) be supported by pertinent findings,

(3) indicate the extent to which it is anticipated that the insurance industry will be utilized in providing flood insurance coverage under the program, and

(4) contain such recommendations as the Administrator deems advisable.

The Administrator shall not implement the program of flood insurance authorized under subchapter I through the facilities of the Federal Government until 9 months after the date of submission of the report under this subsection unless it would be impossible to continue to effectively carry out the National Flood Insurance Program operations during this time.

3. 42 U.S.C. 4072 provides:

Adjustment and payment of claims; judicial review; limitations; jurisdiction

In the event the program is carried out as provided in section 4071 of this title, the Administrator shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance, and upon the disallowance by the Administrator of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Administrator, may institute an action against the Administrator on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

4. 42 U.S.C. 4081 provides in pertinent part:

Services by insurance industry

(a) Contracting for services and facilities

In administering the flood insurance program under this subchapter, the Administrator is authorized to enter into any contracts, agreements, or other appropriate arrangements which may, from time to time, be necessary for the purpose of utilizing, on such terms and conditions as may be agreed upon, the facilities and services of any insurance companies or other insurers, insurance agents and brokers, or insurance adjustment organizations; and such contracts, agreements, or arrangements may include provision for payment of applicable operating costs and allowances for such facilities and services as set forth in the schedules prescribed under section 4018 of this title.

* * * * *

(c) Hold harmless

The Administrator of the Federal Emergency Management Agency shall hold any agent or broker selling or undertaking to sell flood insurance under this chapter harmless from any judgment for damages against such agent or broker as a result of any court action by a policyholder or applicant arising out of an error or omission on the part of the Federal Emergency Management Agency, and shall provide any such agent or broker with indemnification, including court costs and reasonable attorney fees, arising out of and caused by an error or omission on the part of the Federal Emergency Management Agency and

its contractors. The Administrator of the Federal Emergency Management Agency may not hold harmless or indemnify an agent or broker for his or her error or omission.

* * * * *

5. 42 U.S.C. 4121 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(6) the term "Administrator" means the Administrator of the Federal Emergency Management Agency * * *.

* * * * *

6. 44 C.F.R. 62.22 provides:

Judicial review.

(a) Upon the disallowance by the Federal Insurance Administration, a participating Write-Your-Own Company, or the servicing agent of any claim on grounds other than failure to file a proof of loss, or upon the refusal of the claimant to accept the amount allowed upon any claim after appraisal pursuant to policy provisions, the claimant within one year after the date of mailing by the Federal Insurance Administration, the participating Write-Your-Own Company, or the servicing agent of the notice of dis-

allowance or partial disallowance of the claim may, pursuant to 42 U.S.C. 4072, institute an action on such claim against the insurer only in the U.S. District Court for the district in which the insured property or the major portion thereof shall have been situated, without regard to the amount in controversy.

(b) Service of process for all judicial proceedings where a claimant is suing the Administrator of FEMA pursuant to 42 U.S.C. 4071 shall be made upon the appropriate United States Attorney, the Attorney General of the United States, and the Federal Insurance Administrator of the Federal Emergency Management Agency.

7. 44 C.F.R. 62.23 provides in pertinent part:

WYO Companies authorized.

(a) Pursuant to section 1345 of the Act, the Federal Insurance Administrator may enter into arrangements with individual private sector property insurance companies or other insurers, such as public entity risk sharing organizations. Under these arrangements, such companies or other insurers may offer flood insurance coverage under the program to eligible applicants. Such WYO companies may offer flood coverage to policyholders insured by them under their own property business lines of insurance, pursuant to their customary business practices, including their usual arrangements with agents and producers. WYO companies may sell flood insurance coverage in any State in which the WYO company is authorized to engage in the business of property insurance. Other WYO insurers may offer flood insurance coverage to their

pool members insured by them under their own property business lines of coverage, pursuant to their customary business practices. These other WYO insurers may provide flood coverage in any State that has authorized the other insurer to provide property coverage to its members. Arrangements entered into by WYO companies or other insurers under this subpart must be in the form and substance of the standard arrangement, titled "Financial Assistance/Subsidy Arrangement." Each year, at least six months before the effective date of the "Financial Assistance/Subsidy Arrangement," FEMA must publish in the Federal Register and make available to the WYO companies the terms for subscription or re-subscription to the "Financial Assistance/Subsidy Arrangement."

(b) Any duly authorized insurer so engaged in the Program shall be a WYO Company. (The term "WYO Company" shall include the following kinds of insurers: Public entity risk-sharing organizations, an association of local governments, a State association of political subdivisions, a State-sponsored municipal league, and other intergovernmental risk-sharing pool for covering public entity structures.)

* * * * *

(d) A WYO Company issuing flood insurance coverage shall arrange for the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the Program, based upon the terms and conditions of the Standard Flood Insurance Policy.

(e) In carrying out its functions under this subpart, a WYO Company shall use its own customary standards, staff and independent contractor resources, as it would in the ordinary and necessary conduct of its own business affairs, subject to the Act and regulations prescribed by the Federal Insurance Administrator under the Act.

(f) To facilitate the marketing of flood insurance coverage under the Program to policyholders of WYO Companies, the Federal Insurance Administrator will enter into arrangements with such companies whereby the Federal Government will be a guarantor in which the primary relationship between the WYO Company and the Federal Government will be one of a fiduciary nature, i.e., to assure that any taxpayer funds are accounted for and appropriately expended. In furtherance of this end, the Federal Insurance Administrator has established "A Plan to Maintain Financial Control for Business Written Under the Write Your Own Program."

(g) A WYO Company shall act as a fiscal agent of the Federal Government, but not as its general agent. WYO Companies are solely responsible for their obligations to their insured under any flood insurance policies issued under agreements entered into with the Federal Insurance Administrator, such that the Federal Government is not a proper party defendant in any lawsuit arising out of such policies.

* * * * *

(i) To facilitate the adjustment of flood insurance claims by WYO Companies, the following procedures will be used by WYO Companies.

(1) WYO companies will adjust claims in accordance with general company standards, guided by NFIP Claims manuals. The Arrangement provides that claim adjustments shall be binding upon the FIA.

* * * * *

(6) Pursuant to the Arrangement, the responsibility for defending claims will be upon the Write Your Own Company and defense costs will be part of the unallocated or allocated claim expense allowance, depending on whether a staff counsel or an outside attorney handles the defense of the matter. Claims in litigation will be reported by WYO Companies to FIA upon joinder of issue and FIA may inquire and be advised of the disposition of such litigation.

* * * * *

(k) To facilitate the operation of the WYO Program and in order that a WYO Company can use its own customary standards, staff and independent contractor resources, as it would in the ordinary and necessary conduct of its own business affairs, subject to the Act, the Federal Insurance Administrator, for good cause shown, may grant exceptions to and waivers of the regulations contained in this title relative to the administration of the NFIP.

* * * * *