

# THE DAILY RECORD

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## Advocate's VIEW

### Flood insurance basics

With rising water levels in Lake Ontario damaging homes and businesses locally, and the active hurricane season of 2017 impacting properties across the country, many people and business are asking about flood insurance.

#### Who offers flood insurance?

Generally, flood insurance is offered through the National Flood Insurance Program (NFIP), a private/public partnership authorized by the National Flood Insurance Act of 1968. Under this program, private insurers offer standard flood insurance policies (SFIPs) as agents of the United States; the federal government acts as the guarantor and reinsurer, with SFIP claims ultimately being paid by the U.S. Treasury. Supplemental flood policies are also offered by private insurers.

#### Who is eligible?

Any renter or homeowner (residential policy) or business owner (commercial policy) may purchase flood insurance if your property is located in a NFIP-participating community. (Most municipalities in Monroe County, including the City of Rochester, participate in NFIP. See a list of participating municipalities in New York State at <https://www.fema.gov/cis/NY.html>.) The Federal Emergency Management Agency (FEMA) determines which covered properties are considered to be at "high risk" for flooding. Owners of mortgaged properties determined to be "high risk" are required to purchase SFIP policies. Other property owners and renters are also permitted to purchase SFIP poli-



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cies (and preferred risk policies offering lower cost policies may be available in low to moderate flood risk areas).

#### What are the limits?

The highest policy limits available under a NFIP are: for residential property, \$250,000.00 for the building (structural elements) plus \$100,000.00 for contents (belongings), and for commercial property, \$500,000.00 for the building plus \$500,000.00 for contents. For higher limits, you may purchase a supplemental private policy in addition to the NFIP.

Note that SFIPs generally do not cover replacement of basement improvements (i.e., finished basements) such as carpeting, finished walls, paint, flooring materials, furniture or personal belongings kept in the basement.

#### What is covered?

The SFIP is codified at 44 CFR, Part 61, Appendix A(1), *et seq.* In basic terms, it covers "direct physical loss by or from flood" to the insured property. To constitute a "flood" under the SFIP, the policy requires: (1) a fairly large, temporary water condition, covering either two or more acres, or covering your property and at least one other property; and (2) the water condition must come from: "overflow of inland or tidal

waters" or "unusual and rapid accumulation of runoff of surface waters" or "mudflow."

#### What are "surface waters"?

A water condition that meets the size requirement (two acres or at least two properties including your own), and that is caused by "surface waters," is covered under the SFIP. The term "surface waters" is not defined in the SFIP, and has been subject to substantial litigation.

In one such action, *Flamingo South Beach I Condo. Ass'n v. Selective Insurance Co.*, 492 Fed. Appx. 16 (11th Cir. 2012), I represented Selective Insurance Co., a private insurer acting as an agent of the United States. The plaintiff, the owner of a 562-unit condominium in Miami Beach, claimed that during a severe rainstorm, water ran from an exterior, elevated deck into the lobby area, causing extensive damage to the lobby. I successfully argued that the term "surface water" requires water to fall on land and diffuse over the ground, and the Eleventh Circuit Court of Appeals agreed that rain water entering the building from an elevated deck is not "surface water" and thus not covered under the SFIP.

While flood policies cover "surface water" claims, conversely, average homeowner's policies exclude damage caused by "surface water," defined as water flowing over the ground and entering the home. See e.g. *Kannatt v. Valley Forge Ins. Co.*, 228 A.D.2d 564 (2d Dept 1996) (holding "surface water

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flowing down the incline of the backyard into the basement through the bottom of the basement door” is excluded under homeowner’s policy).

### **Action plan**

Usually, after you pay your first flood insurance premium, there is a 30-day waiting period until the policy goes into effect. For those without flood coverage, federal disaster assistance loans

may be available, but only if the community is declared a federal disaster area, and the loan repayment is generally more costly than insurance. If you are uninsured and receive federal disaster assistance after a flood, you may also be required to purchase flood insurance to remain eligible for future disaster relief. The best practice is to assess your flood coverage needs early and determine the best available rates before an incident occurs.

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