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FEMA IHP Assistance: Appealing Adverse Decisions & Avoiding FEMA Overpayments

An Introduction for Legal Aid and Pro Bono Attorneys

By Southeast Louisiana Legal Services
www.slls.org

Purpose and Source

This resource is a general outline only, intended as an introductory resource for legal services and pro bono lawyers unfamiliar with FEMA's **Individuals and Households Program (IHP)** assistance for disaster survivors.

Prepared for 2012 LSBA disaster training by Rowena T. Jones, Managing Attorney, Employment & Benefits Unit, Southeast Louisiana Legal Services, www.slls.org, based on the experiences of SLLS attorneys since Katrina. In navigating FEMA claims issues, we were grateful recipients of assistance from other legal aid programs that had gone through previous disasters. Keep sharing your disaster-related experience and insight through the National Disaster Legal Aid website, at www.disasterlegalaid.org.

Trigger for FEMA IHP Assistance

- Presidential declaration of “major disaster”
- Federal assistance supplements resources of state and local governments and voluntary relief organizations

Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. §5121 *et seq.*
http://www.fema.gov/pdf/about/stafford_act.pdf
(with related authorities)

Federal Assistance to Individuals & Households

42 U.S.C. § 5174 (Sec. 408, Stafford Act)

44 C.F.R. Part 206.110 *et seq*.

Eligibility Factors §206.113 (not for everyone, not for every loss)
FEMA cash aid restricted to U.S. citizens, LPRs, and "qualified aliens."
See www.nilc.org for useful fact sheets.

www.fema.gov (agency website - keep up-to-date with news releases related to specific disasters)

Individuals & Households Program (IHP)

- Housing assistance.
- Other needs assistance (ONA).
- Maximum assistance amount per disaster = $25,000 adjusted annually to reflect Consumer Price Index changes. 42 U.S.C. §5174(h), 44 C.F.R. §206.110(b).
- Unpaid FEMA debts should not interfere with assistance receipt on new disaster applications.
- FEMA disaster assistance is not intended to duplicate assistance from other sources. 42 U.S.C. §5155; 44 C.F.R. §206.110(h).

Housing Assistance under the IHP

- Direct or financial assistance offered when:
- **Primary** residence is
- Destroyed, inaccessible, or uninhabitable.

Applicants may be ineligible for other reasons (e.g., insurance), and housing assistance is not intended for those with adequate rent-free alternative housing available, those who evacuated solely as a precaution and are able to return, and will not be eligible for housing assistance. 44 C.F.R. §206.113(b).

42 U.S.C. §5174(b)-(d), 44 C.F.R. §206.117 ("Housing Assistance")

Possible Types of Housing Assistance

Housing Assistance may include:

- Rental Assistance for up to 18 months
- Temporary shelter in hotels, mobile homes (trailers), boats, or housing on a military base
- Money to repair damaged homes/hazard mitigation
- Money to replace destroyed housing

All members of pre-disaster household are expected to **share** temporary units or rentals, unless "the size or nature of the household requires that we provide assistance for more than one residence." 44 C.F.R. §206.117(b)(i)(A), (ii)(B).

Other Needs Assistance (ONA)

FEMA may cover "other **disaster-related** necessary expenses or serious needs," which may include:

- Medical and dental costs.
- Replacement or repair of necessary medical items.
- Funeral and burial costs.
- Clothing, furnishings, appliances, tools for jobs, education-required items such as computer, uniforms and books.
- Cleaning and sanitization of eligible property items.
- Vehicles damaged by the disaster or public transportation needs.
- Moving and storage costs needed to avoid additional damage or during repairs.

42 U.S.C. §5174(e), 44 C.F.R. §206.119 ("Financial Assistance To Address Other Needs"); §206.120 (states may administer ONA but must comply with federal rules).

IHP Assistance & SBA Loans

- Completed SBA loan application needed for ONA, but not housing assistance. 44 C.F.R. §206.119(a).
- Summary denials (e.g., very low income/resources) may be done by FEMA and SBA.
- SBA disaster loan decisions can be appealed. 13 C.F.R. §123.13 (six months to request reconsideration; appeal within 30 days after reconsideration denial).
- Agency website www.sba.gov (Disaster Loan section)

Applying/Registering for FEMA Benefits

- Online: www.disasterassistance.gov (to register and monitor app.)
- Phone: (800) 621-FEMA (3362)
- Smart Phone: m.fema.gov
- Registration period 60 days after disaster declaration, but extendable, and late registration period of 60 additional days if "suitable documentation" for the delay. 44 C.F.R. §206.112.

"Split Household" Issue

- FEMA assistance is meant for **one household per damaged address.**
- "Household" is those who lived together in the pre-disaster residence at the time of the disaster, as well as those who were not present at the time but who are expected to return during the assistance period. 44 C.F.R. §206.111.
- **Multiple claims** by various household members likely to lead to FEMA recoupment of overpaid benefits and/or possible referral for fraud prosecution. Advise clients appropriately to their circumstances.

Insurance Issues

- FEMA assistance is not intended to duplicate insurance-covered losses. See 44 C.F.R. §206.113(a) (under "Eligibility Factors")
- Applicants may not read the FEMA notices thoroughly, may not understand them, or may forget the prohibition against duplication of resources. 44 C.F.R. §206.110(h).
- Advise clients with insurance coverage of their obligations and potential adverse consequences for ignoring them.

Lack of Contact with FEMA

- Advise applicants to notify FEMA promptly by phone or by DRC visit when address or phone number changes.

- FEMA can consider applications withdrawn if unable to contact.

- When you see a client for the first time, good idea to call FEMA together to ensure FEMA has current contact information, and to get FEMA claim status. Call (800) 621-3362; TTY (800) 462-7585.

FEMA Inspection

- FEMA tries to inspect the damaged property ASAP after registration.
- Applicant should try to be present.
- Can ask for repeat inspection if needed.
- When on the ground inspections are problematic, FEMA can determine extent of damage in other ways.

FEMA decision

Arrives by mail; applicants can:

- Appeal if disagree. 44 C.F.R. §206.115.
  - time limit to appeal on FEMA notice (60 days)
  - Include supporting documentation with appeal
- Amend application if circumstances change.

If your client doesn't already have a copy of their FEMA file, and you intend to help them with an appeal, write FEMA and ask for the complete file. You'll need a signed release that meets FEMA's requirements.

Assistance Approved

- Advise recipients to use FEMA (and any SBA) assistance only for the approved purposes & to document its use.
  - REMEMBER that recoup is possible even in error.
  - Keep receipts and bills.
- FEMA benefits are tax free and exempt from garnishment; they are not countable as resources or income by other federal needs-based assistance programs (e.g., TANF, SNAP (food stamps), Medicaid, SSI). 44 C.F.R. §206.110(f),(g).

Appealing FEMA IHP Decisions

Legal Basis of Right to Appeal

- 42 U.S.C. §5189a (Sec. 423 of the Stafford Act)
- 44 C.F.R. §206.115 (Appeals)

Can Appeal Any Eligibility-Related Decision

- Eligibility for assistance, including recoupment;
- Amount or type of assistance;
- Cancellation of an application;
- Rejection of a late application;
- Denial of continued assistance under 206.114
- FEMA's intent to collect rent on housing provided by FEMA;
- Termination of direct housing assistance;
- Denial of request to purchase FEMA-provided housing unit;
- Sales price of such housing unit;
- "Any other eligibility-related decision."

44 C.F.R. §206.115 (a)

Appeal Is On Paper Only

- Hearsay & other deficient evidence unchallenged.
- FEMA decision maker invisible.
- Inability to challenge ex parte contacts by FEMA.
- Inability to present live testimony.
- Inability to cross-examine adverse witnesses.

Appeal Requirements

- In writing - 44 C.F.R. §206.115(b);
- Explain reason(s) for the appeal - 44 C.F.R. §206.115(b);
- Must be signed by the applicant or authorized representative (who must also include a form meeting FEMA requirements, signed by applicant) - 44 C.F.R. §206.115(b);
- Postmark or fax within 60 days of FEMA's decision mailing date - 44 C.F.R. §206.115(a). FEMA mailing address & fax number is on the decision. Currently:

  FEMA - Appeals Officer, National Processing Service Center, P.O. Box 10055, Hyattsville, MD 20782-7055; or FAX to1-800-827-8112.

Recommended Inclusions

- Any due process or other legal objections.
- **All relevant** evidence you want considered with the appeal, in best form available (e.g., affidavits, declarations or other statements, receipts, any type of documentation). Competent evidence best.
- Don't assume appeal adjudicators will review FEMA file; include copy of full file or selected portions if sufficient; if you seek judicial review have in your appeal everything you want a court to see.
- Any need for accommodation, or argument of illegal discrimination, should be thoroughly documented.
- Include FEMA registration number on every page submitted.

Multiple Household Claims Issues

- IHP aid is meant for **one household per damaged address.** "Household" means those who lived together pre-disaster, or who were absent but expected to return during the period of assistance. 44 C.F.R. §206.111
- Family members or others may file multiple applications on the same damaged address. Advise clients of potential for recoupment or fraud referral, and options to avoid adverse consequences.
- FEMA often pays out duplications even knowing the facts, then later attempts to recoup improper payments.
- FEMA may also deny an applicant separate assistance due to another award determination on the same disaster and damaged address.

Appeals on Multiple Household Claims Issues

- Applicant with a head of household claim (e.g., homeowner or the one who signed a lease), can argue primacy of right.
- FEMA may allege duplication, but definition not strictly applicable to multiple household claims. If maximum household amount not reached, and/or "duplication" used appropriately, point out.
- Applicant may be split from household through no fault of her own, and/or recipients did not share FEMA assistance with her, and/or disability or other reason for separate housing assistance could justify duplication.
- Applicant may be victim of identity theft, and have proof (e.g., police or fraud report).
- FEMA may be wrong on facts.

Duplication with Insurance

Insured applicants are eligible for FEMA aid if:

- The insurance claim is denied;
- Insurance proceeds are significantly delayed through no fault of their own and they agree to repay FEMA;
- Insurance proceeds (and help from other sources, if available) are less than FEMA's maximum aid amount and proceeds are "insufficient to cover necessary expenses or serious needs;"
- Housing is not available in the private market.

44 C.F.R. §206.113(a)

Appeals on Insurance Duplication

- Insurance award may have gone to someone other than applicant, and not used appropriately.
- FEMA may be wrong on facts; applicant may have been underinsured, or denied insurance award on property FEMA covered.
- Document your appeal thoroughly.

Flood Bar Issue

- Flood zone recipients of FEMA aid are required to purchase and maintain flood insurance “for at least the assistance amount” on the flood-damaged property. 44 C.F.R. §206.110(k)(3).

- **Homeowners** must maintain flood insurance for as long as the address exists, and the flood insurance requirement “is reassigned to any subsequent owner.” 44 C.F.R. §206.110(k)(3)(1)(A).

- **Renters** must keep flood insurance “on the contents” for as long as they reside at the flood-damaged unit. 44 C.F.R. §206.110(k)(3)(1)(B).

- Those who do not comply are not eligible for future FEMA assistance on the same flood-damaged property. §206.110(k)(3); §206.113(b)(8).

Appeals on Flood Bar Issue

- FEMA may not have the facts right.
- FEMA should prove the prior assistance amount and that the recipient was informed of the future obligation.
- If a prior owner was the recipient, argue that FEMA should prove that your client received notice. But if you can prove the opposite, document this in your appeal.
- FEMA may have sent notice of the obligation to a wrong address.
- Document thoroughly.

Denials for Lack of Contact

- FEMA may deny applications if unable to contact, but contacts may not have been properly recorded, or addresses updated.

- FEMA usually will re-open when applicant calls, or comes into a DRC, and updates contact information.

- Appeal if necessary.

"Insufficient Damage" Issues

- Specifics may be gleaned from FEMA call or review of FEMA file.
- FEMA inspection may have been deficient; can ask for another.
- Damaged property may have been prematurely removed or repaired; poorer households may have more difficulty convincing FEMA of disaster-causation.
- Severity and/or disaster-causation can be documented with photos, statements or affidavits, news accounts, etc.
- Applicants may need education about limited nature of FEMA's assistance, especially as relates to home repair. 44 C.F.R. §206.117.
- Lack of published standards a problem; litigation pending on this issue.

Judicial Review

- Available under the federal Administrative Procedure Act for six years after the first FEMA appeal decision on the issue.
- Courts are very limited in what issues can be reviewed.
- 42 U.S.C. §5148; 5 U.S.C. §701(a)(2).

Civil Rights Violations

- FEMA can't discriminate on the basis of race, color, religion, nationality, sex, disability, age, or economic status (www.fema.gov/civil-rights-program).
- To try informal resolution call FEMA Equal Rights Office (202) 646-3535 or 1-(800) 621-3362.
- File formal written complaint within 180 days of the discrimination.

Avoiding FEMA Recoupment Of Overpaid Assistance

Best Strategy to Avoid FEMA Recoupment

is for applicants to:

- Only accept assistance for which they are clearly eligible.
- Use assistance appropriately.

But in every disaster, mistakes are made on both sides, and many FEMA assistance recipients will receive a notice of debt sometime in the future.

ALERT: Some prior FEMA debts may need quick action

The FEMA Disaster Assistance Recoupment Fairness Act ("DARFA") (12/11), gave time-limited authority for complete waiver (no tax consequence) of debts resulting from disasters between 8/28/05 and 12/31/10. FEMA's DARFA authority will expire when the next budget is passed. DARFA eligibility requires:

- Gross income (of current household) less than $90,000.
- No fraud, false claim, fault or misrepresentation, and overpayment was the result of FEMA error.
- Collection would be against equity and good conscience.

See www.fema.gov/debtwaiver

Check for unpaid FEMA debts

- Unpaid debts from a prior disaster should not be offset from new disaster assistance, but old debts should be addressed (even if DARFA waiver unavailable, regular debt resolution options may remain for your client).

- Prior FEMA recipients may have moved and not have received an overpayment collection notice.

- Current FEMA applicants can call the FEMA Recoupment Helpline 1-800-816-1122 to see if any old debt is in collection. If you are with a client, do this together.

- If so, you can advise them about their options and they can seek appropriate collection relief, if any.

FEMA Collections Reboot

- Prior Collections Process Suspended September 5, 2008 (Fed.Reg. Vol. 73, No. 173, pp. 51831-51832). FEMA sent debtors letters about this and some mistakenly thought the debt was permanently cancelled.

- New FEMA Recoupment Process - Effective March 15, 2011 (Fed.Reg. Vol. 76, No. 50, pp. 14039-14040). Some ignored the new debt notices that FEMA sent out after regulations were promulgated, believing they were sent in error.

FEMA's Authority To Recover Overpaid Assistance.

44 C.F.R. §206.116 Recovery of Funds

(a) The applicant must agree to repay to FEMA (when funds are provided by FEMA) and/or the State (when funds are provided by the State) from insurance proceeds or recoveries from any other source an amount equivalent to the value of the assistance provided. In no event must the amount repaid to FEMA and/or the State exceed the amount that the applicant recovers from insurance or any other sources.

(b) An applicant must return funds to FEMA and/or the State (when funds are provided by the State) when FEMA and/or the State determines that the assistance was provided erroneously, that the applicant spent the funds inappropriately, or that the applicant obtained the assistance through fraudulent means.

Collection Regulations

- 6 CFR Part 11 (Dept. of Homeland Security)
- 31 CFR Parts 900-904 (Dept. of Treasury)
- 44 CFR Part 206 (Federal Disaster Assistance)

What FEMA May Recoup

- Expedited Assistance
- Personal Property Assistance
- Transitional Housing Assistance
- Rental Assistance
- Transportation Assistance
- Any other kind of assistance

Why FEMA May Recoup

- Duplication of benefits within the single household
- Duplication of benefits with insurance
- Damaged dwelling not primary residence
- Failure to maintain flood insurance
- Overpayment of assistance (e.g. Personal Property)
- Other reasons

Collection Process Step 1

Notice of Debt (Written demand for payment)
6 C.F.R. §11.3; 33 C.F.R. §901.2

Client's Options at this point:

- Pay in full
- Ask for repayment plan
- Ask for compromise of debt
- Appeal
- Ignore it (not the best idea)

Deadlines From Notice of Debt

- 30 days: **pay in full** or FEMA starts to charge interest
- 60 days: deadline to **appeal**
- 90 days: deadline to **set up repayment plan** to avoid financial penalties (6% per year)
- 120 days: FEMA turns case over to Treasury Department for collection

Get More Information ASAP

- FEMA debt notices are vague and unspecific.
- Client may not remember much, or may misremember, and rarely will have all prior claim documentation.
- FEMA financial forms, and maybe an appeal, will require client to review her records and make statements under oath.
- You may need client's last tax return, and if you may need proof of client's attestations about income, assets, and expenses.
- Call Recoupment Helpline @ 1-800-816-1122 or TTY @ 1-800-462-7585, 9 a.m. – 8 p.m. Monday – Friday. FEMA will send financial forms to client.
- Request full FEMA file if client doesn't have it.

Full Repayment

- Pay by check, money order, or credit card.
- 30 days from Notice of Debt to exercise this option if want to avoid adding more to amount owed.
- Stops interest from running.
- If win appeal, FEMA pays money back (contact U.S. Senator or Representative for help in event of unreasonable delay).

Repayment Plans

- Repayment plan or any other type of compromise will require completion of FEMA financial forms (Household expense listing, FEMA financial statement).
- Payment on installments should not exceed three years.
- Standards for repayment plans set out in 31 C.F.R. §901.8 (see also 6 C.F.R. §11.9)

Compromise

FEMA should compromise (lump sum, not installments) if you show:

- Inability to pay or that it can't collect full amount "within a reasonable time" OR
- Cost of collection "does not justify" enforcement, OR
- there is "significant doubt" of agency ability to prove its case in court.

33 C.F.R. §902.2, 6 C.F.R. §11.11

Factors Relevant to Ability to Pay

- Age and health
- Present and potential income
- Inheritance prospects
- Possibility of concealed or transferred assets
- Availability of assets through enforcement

Document thoroughly any favorable factors.

You can try to negotiate anything, including total amount to be repaid and how (lump sum and/or periodic payments); rate and amount of interest; assessment of penalties and costs; repayment time frame; etc.

31 C.F.R. §902.2

Suspension Allowable:

- Debtor has requested waiver or review of debt,
- Debtor can't be located, or
- Improvement in financial condition expected,

IF the statute of limitations hasn't run, or the debtor agrees to pay interest and her ability to pay will be enhanced by suspension.

33 C.F.R. §903.2; 6 C.F.R. §11.12

Termination Allowable:

- Debt can't be collected or debtor can't be located;
- Collection costs will exceed the amount recoverable;
- Debt can't be substantiated, is legally without merit, is discharged in bankruptcy, or enforcement is barred by statute of limitations.

Termination only ceases active collection; debt may be revived and pursued later if possible.

31 C.F.R. § 903.3, 6 C.F.R. §11.12

Other Points To Remember:

- Resolution may not come before the 60 day debt notice appeal deadline, so client should exercise other options in meantime.
- Actual “discharge” or compromise of the debt may result in issuance of an IRS Form 1099. Defenses to tax liability may exist.
- If win an appeal, FEMA will return any money paid in meantime.

Appealing Debt Notices

- Appeal on paper only UNLESS you ask for Oral Hearing (explain in detail why it's needed) *AND* FEMA agrees it is necessary (unlikely to do so, but it can be by telephone or in-person). Oral Hearing arguably needed when credibility issues are involved, FEMA notice lacks sufficient details/provides no evidentiary basis for the debt.

- In appeal include all relevant evidence, in the most competent form possible. Remember, appeal arguments are not evidence; preserve due process and other legal issues; and mark each page with client's FEMA number.

- To maximize chances especially on judicial review, try to submit competent evidence.

- Reserve right to supplement appeal, and do so if get new evidence (e.g., get FEMA file after file appeal).

Debt Collection Appeal Issues

- FEMA may revisit issues decided in client's favor during initial application process, or raise entirely new issues.

- Most common issues addressed in beginning of this outline. Other issues that can arise at debt notice level can include: (1) mistaken valuation – Document FEMA's mistake, if any; (2) 'misused' money – Document appropriate use if possible; FEMA notices about how aid to be used may not have reached client.

- Argue other relevant factors such as need for disability accommodation, res judicata, equitable estoppel, hardship.

If FEMA Proceeds with Collection, Steps 2 and 3

- Step 2 is a Letter of Intent from the FEMA Finance Center letter = “last chance to pay or resolve debt” notice.

- Step 3 - Debt will be referred to U.S. Department of the Treasury, which will send a notice explaining its multiple means of collection including:
  A. Offset of other federal payments, such as Social Security benefits or IRS tax refunds.
  B. Referral to private collection agency.
  C. Administrative wage garnishment of federal employees.

Additional fees will be added to the debt once it is final.

Collection, cont'd

- Certain amounts are protected from recovery, including:
  - A. Debtor's first $750 a month in Social Security income is exempt.
  - B. Collection in general is limited to 15% of income.

  31 CFR §285.4(e)(1).

- In court actions, exemptions are available that would be available in bankruptcy. 28 U.S.C. §3014.