

# PUBLICATION

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## Court Orders FEMA to Reinstate \$21.8 Million in Federal Disaster Assistance Funds

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On September 18, 2014, the United States District Court for the Southern District of Florida ordered the Federal Emergency Management Agency to reinstate \$21.8 million in federal disaster assistance funds that FEMA had provided years ago to the South Florida Water Management District. *South Florida Water Management District v. FEMA*, Case No. 13-80533-CIV (S.D.Fla. September 18, 2014). These funds were initially approved by FEMA in 2004-2006 to repair canals damaged by Hurricanes Charlie, Frances, Jeanne and Wilma, and were then deobligated in 2012 after FEMA determined it had misinterpreted its own policy when the funds were originally provided.

The District Court's decision in the *South Florida* case should be considered a major development for all state, local and tribal government entities, and private non-profit entities, who have received or may in the future receive disaster assistance from FEMA. For some years, FEMA has taken the position that, whenever FEMA decides it has erroneously obligated funds – no matter how long ago, and regardless of whether the recipient has already spent them in accordance with grant requirements – FEMA is required to recover the funds. Congress enacted Section 705(c) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, titled "Binding Nature of Grant Requirements," in 2000 to protect recipients of disaster assistance from these retroactive deobligations. Section 705(c) provides:

"A State or local government shall not be liable for reimbursement or any other penalty of any payment made under this Act if –

- the payment was made pursuant to an approved agreement specifying the costs;
- the costs were reasonable; and
- the purpose of the grant was accomplished."

In the *South Florida* case, there was no question that the funds had been formally approved and obligated by FEMA, that the costs had been specified (most of the grants had already been closed out years before the deobligation), that the costs were reasonable or that the purpose of the grant – the repair of the damaged canals – had been accomplished. FEMA nonetheless contended that Section 705(c) did not bar its retroactive deobligation because the section is only applicable to payments "made under the [Stafford] Act." FEMA then claimed that the \$21.8 million paid to the South Florida Water Management District (in 152 versions of 52 Project Worksheets approved over the course of four years) were not payments made under the Stafford Act because the approvals had violated FEMA "regulations and policies." FEMA also argued that Section 305 of the Stafford Act gave it unreviewable discretion over decisions to grant or withhold disaster assistance.

The Court found that FEMA's interpretation of Section 705(c) was simply wrong:

"The Court gives the plain meaning to the statute and finds that 'any payment made under this (Act)' means any payment made under the Stafford Act."

The Court further found that FEMA's interpretation of Section 705(c) would render it meaningless; under FEMA's interpretation, the section would only protect grant recipients from deobligation of funds when FEMA had no reason to deobligate funds. Finally, the Court reacted strongly to FEMA's suggestion that the 52 Project Worksheets had somehow been obligated by rogue field employees:

"FEMA has not convinced the Court that the employees involved in approving the funding for the District's projects were not authorized to bind the agency.... In light of the amount of money involved and the processes that FEMA, DEM, and the District followed, it is inconceivable that rogue low-level FEMA staff was able to obligate over \$23.5 million of FEMA funds without supervision, only to be reviewed by FEMA seven or so years later."

The Court concluded that, even if FEMA were correct that the funds should not have been obligated in the first place, "any error FEMA made in originally applying its regulations and policies is irreversible at this point" in light of Section 705(c). Finally, the Court also rejected FEMA's argument that its conduct was not subject to review per Section 305: "Because the Court finds that the Stafford Act prevents recovery of funds where [Section 705(c)] applies, FEMA has no discretion to recover funds."

The full significance of the Court's ruling is still unclear. First, FEMA has 60 days to appeal to the Eleventh Circuit Court of Appeals, although we believe the District Court's ruling is strong. And if FEMA does not appeal, will FEMA apply the ruling nationwide – or only in the Southern District of Florida? Second, how many second appeal decisions that affirmed the retroactive deobligation of funds can be reopened to apply the *South Florida* ruling?

The Court's interpretation of Section 705(c) should give state and local governments confidence that, if they accept and spend FEMA public assistance program funds, they can count on retaining those funds *as long as* they comply with the terms of the grant. This is particularly important given FEMA's strong desire to persuade applicants to agree to "fixed estimates" of disaster damage under the Sandy Recovery Improvements Act pilot projects. Even where the Department of Homeland Security's Office of Inspector General believes that the initial grant decisions by FEMA were flawed, FEMA may be able to rely on the South Florida decision to reject any recommendations to retroactively disallow funding if the project was approved, costs specified, costs were reasonable and the project completed.

Full disclosure: Ernest Abbott, of counsel to Baker Donelson, was retained by South Florida Water Management District to assist the District both in preparing administrative appeals, and in challenging FEMA's retroactive deobligation in District Court.

If you have questions about the specific items covered by this Alert please contact Ernest B. Abbott or Wendy Huff Ellard, or to discuss federal disaster assistance programs, please contact a member of our Disaster Recovery and Government Services Team.