

State-law Based Claims Against Parties Other than the United States Seeking Damages Arising Out of the Procurement of Flood Insurance for Property Located in a Flood Zone under the National Flood Insu

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Question of First Impression in Sixth Circuit

Harris v. Nationwide Mutual Fire Insurance Company, __ F.3d __, 2016 WL 4174381 (6th Cir. Aug. 8, 2016) **Case at a Glance** Plaintiffs purchased a home located in a federal flood zone, but they did not purchase full coverage flood insurance allegedly based on two wrongful acts: (1) they were erroneously advised prior to purchasing the home that it was not in a zone that required the purchase of any flood insurance; and (2) when they were advised, after purchasing the home, that they needed flood insurance they were sold a type of policy that did not provide them full coverage. When a flood occurred and they were not fully compensated for their loss, they sued. The United States Court of Appeals for the Sixth Circuit, in a case of first impression in that circuit, held that damage claims against private parties under state law based on 448 © 2016 Thomson Reuters Vol. 38, No. 16, October 4, 2016 Insurance Litigation Reporter alleged wrongs in the procurement of the flood policy, which did not involve the handling and disposition of their later flood claim, were not preempted by the Federal Flood Insurance Act. **Summary of Decision** Homeowners filed suit over the purchase of their home and the application for flood insurance. They sued their mortgagee, flood-zone certifier, private flood insurer, and insurance broker, seeking damages when they suffered damages from a flood but the flood insurer did not fully cover their losses. Plaintiffs

purchased a home with financing by Regions Bank. The National Flood Insurance Act (“NFIA”) requires that mortgagors obtain flood insurance if their home is in a flood zone. Defendant CoreLogic provided Regions with flood-zone certification services. Although the home was in a Special Flood Hazard Area according to the Flood Insurance Rate Map of the National Flood Insurance Program, defendant CoreLogic erroneously informed plaintiffs in connection with their purchase of the home that they did not have to purchase flood insurance. Plaintiffs alleged that they would not have purchased the home absent the defendants’ negligence and breach of fiduciary duty in mistakenly determining their flood zone and flood insurance requirement. The Federal Emergency Management Agency (“FEMA”) subsequently issued a revised Flood Insurance Rate Map, and Regions advised plaintiffs at that time that they needed to purchase flood insurance. Due to the age of their home plaintiffs should have purchased a flood policy which, in order to provide full coverage, required an elevation certificate showing sufficient elevation above the base flood zone. Instead, they were sold a policy that did not require an elevation certificate for full coverage. When a flood occurred and they submitted a claim, they were asked to provide an elevation certificate, since the age of their home required an elevation certification for full coverage. Plaintiffs obtained an elevation certificate showing that their home’s lower level was below the base flood-zone elevation. Plaintiffs’ flood claim was adjusted and paid so as not to cover all building and personal property losses “below the lowest elevated floor.” Plaintiffs filed state and federal claims, seeking damages for claim underpayment, diminution in property value, and wrongful purchase of the home. The district court dismissed the claims against Regions, CoreLogic and another party, and plaintiffs appealed. On appeal plaintiffs pressed only their state-law claims based on their purchase of flood insurance. They did not press any claims concerning the claim payment process. The court of appeals found that the NFIA “indisputably” preempts state-law causes of action based on “the handling and disposition of” flood claims. It addressed, as an issue of first impression, whether the NFIA preempts what it termed policy procurement type state-law claims, i.e., claims relating to the acquisition of a flood insurance policy, which did not implicate any alleged wrongdoing in the claims process. Agreeing with a decision of the Fifth Circuit on that issue, the Sixth Circuit held that the NFIA does not preempt such policy procurement-related claims. The court noted that since such claims do not concern policy claims, and were asserted only against private parties, the Federal Treasury bears no responsibility or financial risk for such claims. The court stated that while the NFIA does not provide borrowers a private right of action against lenders and flood zone certifiers, it does not prohibit a finding of negligence or misrepresentation when there has been a violation of the statute, expressing no view on the potential merits of plaintiffs’ policy procurement-related claims.

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