IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-1023

RONNA M. LAWLER,

Plaintiff Below, Petitioner,

vs.

NAVY FEDERAL CREDIT UNION, et al.,

Defendants Below, Respondents.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Regulations, & Rules

INTRODUCTION

Petitioner, an unsophisticated, first-time homebuyer relied on Navy Federal's flood zone determination and guidance in the process leading up to purchasing her home. Petitioner relied on Navy Federal's declaration of "GOOD NEWS Not in a flood zone" – unaware that Navy Federal had prior knowledge of the property's flood designation through its own correspondence, servicing, and insurance policy requirements for the prior owner of the property, and its own ownership of the property following a foreclosure sale. APP009, APP013. Navy Federal's actions caused significant injury to the Petitioner which it now seeks to avoid culpability through an inapplicable liability shield.

The plain language of 42 U.S.C. § 4104b(d) and (e) do not support the Circuit Court's application of a "liability shield" to Navy Federal. The liability shield language is not applicable to a lender who "makes" a loan as opposed to one who "increases, extends, renews, or purchases" a loan. Petitioner's preemption argument is not irrelevant because the "liability shield" under federal law can only bar Petitioner's common law claims through the doctrine of preemption.

This Court should reject Navy Federal's request that it rule on Petitioner's claims on independent grounds which were not substantively ruled on by the Circuit Court. Deciding non-jurisdictional fact-dependent questions for the first time on appeal is not appropriate. Moreover, as Navy Federal did not cross-assign as error the Circuit Court's decision not to rule on Navy Federal's other grounds for dismissal in accordance with Appellate Rule 10(f), these issues are not properly before this Court. It would be particularly inappropriate to consider these grounds for the first time on appeal, when, as here, Navy Federal's motion to dismiss relied on facts and documents from outside of the record without the Petitioner having the benefit of discovery.

ARGUMENT

I. Sections 4104b(d) and (e) Do Not Shield Navy Federal From Liability Under State Law

The Circuit Court incorrectly interpreted and applied 42 U.S.C. § 4104b(d)(e) when it dismissed Petitioner's claims against Navy Federal.

Navy Federal seeks to have this Court arbitrarily "read into [a statute] that which it does not say." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 491, 647 S.E.2d 920, 926 (2007). Instead, this Court is "obliged not to add to statutes something the Legislature purposely omitted." *Id.* Navy Federal's argument that the word "making" should be read into 42 U.S.C. § 4104b(e) because it is grouped together with "increasing," "extending" and "renewing" a loan in an entirely separate section, 42 U.S.C. § 4012a(b)(1)(A) [R. Br. at 19-21], is in direct contradiction with the "familiar statutory interpretation maxim *expression unius est exclusion alterius*, or the express mention of one thing implies the exclusion of another." *Id.* at 220 W.Va. at 490, 647 S.E.2d at 926. Rather, this Court should find that the omission of "making" from § 4104b(e) was intentional, as Congress clearly included the term in § 4104b(d) and § 4012a(b)(1)(A).

The Fifth Circuit has recognized the distinction:

> [t]here is no liability for a lender who relies on a previous flood-zone determination at the time of "increasing, extending, renewing, or purchasing a loan ...." *Id.* § 4104b(e). It is unclear how that particular immunity applies to the making of the initial loan. *Cf. Id.* § 4104b(d) (a lender who "*makes*, increases, extends, or renews" a relevant loan may rely on a third party to determine flood-zone status).

Paul v. Landsafe Food Determination, 550 F.3d 511, 513 (2008) (emphasis original) (finding that "erroneous flood-zone determination was the kind of professional opinion, developed in the course of a party's business and supplied for the guidance of others in a transaction, on which justifiable and detrimental reliance by a reasonably foreseeable person might be shown to have occurred").

Unlike *Paul*, the cases relied on by Navy Federal are unpersuasive because they do not directly address the statutory construction question as to the use of the word "makes" in § 4104b(d) and its omission from § 4104b(e).[1]

Contrary to Navy Federal's assertion, it makes perfect sense why the liability shield in § 4104b(e) would not extend to a lender who "makes" a loan as opposed to one who "increas[ed] extend[ed[, renew[ed] or purchas[ed] a loan." In the case of a lender who "makes" a loan, either the lender or its designated third party is making the initial flood determination on the property being purchased by the purchaser. The initial lender has the ability to perform the determination itself or it may vet, choose, review and oversee a third-party vendor that performs the determination. However, in the case of a lender who increased, extended, renewed, or purchased a loan" an initial flood determination has already been made regarding whether the property is in a flood zone for the original purchaser, thus, it makes sense that a lender can rely on the initial determination for a limited period of seven years. Section 4104b(e) further references reliance "on a ***previous*** determination" which indicates that the determination was done in the past as opposed to being done at the origin of the loan.

The Act clearly sets forth the requirements of a federal agency lender in making mortgage loans. 42 U.S.C.S. § 4012a(b)(2) requires that a "federal agency lender may not make, increase, extend, or renew any loan secured by improved real estate ... to be located in an area that has been identified ... as an area having special flood hazards...." In fact, the lender may only "provide for

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[1] *See Clark v. Amsouth Morg. Co.*, 474 F.Supp.2d 1249 (M.D. Ala. 2007); *Duhon v. Trustmark Bank*, 2007 U.S. Dist. LEXIS 18078, 2007 WL 627889 at *13 (S.D. Miss. 2007) (Court remanded case to state court after concluding that under unsettled Mississippi law, the complaint stated a claim of negligence per se against the non-diverse defendant Trustmark (lender)); *Ford v. First Am. Flood Data Servs.*, 2006 U.S. Dist. LEXIS 74350, 2006 WL 2921432 (M.D. N.C. 2006); *Cruey v. First Am. Flood Data Servs.*, 174 F.Supp. 2d 525 (E.D. Ky. 2001); and *Klecan v. Countrywide Home Loans, Inc*, 951 N.E.2d 1212, 1215 (Ill. App. 2011).

the acquisition or determination of such information to be made by a person other than such lender ... only to the extent such person guarantees the accuracy of the information." § 4104b(d). It would make no sense for the lender to be able to shield itself from liability for non-compliance with the act merely because it outsourced the determination to a third-party. The lender chooses the third-party to make the determination on their behalf. The Act would be rendered toothless if the lender is able to absolve itself of all liability in complying with its requirements by merely choosing to employ the services of a third-party.

Moreover, the initial lender is protected by the guarantee it negotiates and obtains from the third-party professional. However, the homeowner or borrower remains exposed as he or she is not a party to the guarantee. Therefore, it makes perfect sense that the homeowner would have a right of action against the lender, which in turn has a guarantee and contractual right of action against the professional flood certification provider. Likewise, it makes perfect sense that the homeowner would not have a right to sue a subsequent purchaser of the loan for a "*previous*" inaccurate determination, which purchaser did not have the opportunity to vet, choose, review and oversee the third-party vendor or to negotiate the terms of a contractual guarantee for the "*previous*" determination.[2]

The Act does not provide a liability shield to Navy Federal. The Circuit Court erred in dismissing the Petitioner's claim based on the incorrect interpretation and application of the liability shield to Navy Federal.

Furthermore, Navy Federal goes too far when it suggests that no court has approved of a common law claim against a lender. Indeed, at least one court here in West Virginia has done just

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[2] 42 U.S.C.S. § 4104b(e) on its face applies only to "previous" determinations opposed to present determinations used for making a loan. Furthermore, federal law does not require specific terms of the third-party guarantee required by § 4104b(d) and leaves it to the individual lenders to negotiate reasonable terms of the guarantee for their own protection. See, H.R. Conf. Rep. 103-652, § 528.

that. *See Salyers v. Jeanie's Real Estate LLC, et al.*, Cir. Ct. Clay County Civ. Action No. 17-C-40 (Cir. Ct. Clay Cnty, WV November 29, 2018) (unpublished e-filed decision) at pages 5-8 ("The *Burnett* Court found that the NFIA does not create a federal cause of action, but it also does not preclude state causes of action ... The Court finds that the Plaintiffs' common law actions against Clay County Bank and CBCInnovis may proceed."). Two federal courts of appeals have also indicated state law claims related to flood hazard determinations may proceed against lenders. In *Harris v. Nationwide Mut. Fire Ins. Co.*, 832 F.3d 593, 597 (6th Cir. 2016), plaintiff, like the plaintiff in *Salyers*, sued both their lender and the flood zone certifier. The court held:

> Damages stemming from policy-procurement claims, unlike those arising from policy-coverage claims, are not "flood policy claim payments." 44 C.F.R. § 62 App. A, Art. I. That being so, the Federal Treasury bears no responsibility for damages awarded in policy-procurement actions. See 42 U.S.C. § 4017(d)(1) (authorizing Treasury fund payments for "cost incurred in the adjustment and payment of any claims for losses" (emphasis added)). Policy-procurement damages, therefore, pose no danger to the federal interests prompting preemption in the claims-handling context, i.e., "reduc[ing] fiscal pressure on federal flood relief efforts." *C.E.R. 1988, Inc.*, 386 F.3d at 270. Moreover, general conflict-preemption principles do not compel barring state-law policy procurement claims. It is possible to comply with both state tort laws and FEMA regulations, and state laws regarding misrepresentation and breach of fiduciary duty in the policy-procurement process do not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the NFIA. *Id.* at 269 (quoting *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 222 (3d Cir. 2001)).

In *Hofbauer v. Nw. Nat'l Bank*, 700 F.2d 1197, 1201 (8th Cir. 1983), the Court of Appeals held that: (1) provisions of the Act allegedly violated by lender who did not require that plaintiffs purchase flood insurance as condition of mortgage loan and did not inform plaintiffs that their property was located in special flood hazard area did not create implied private cause of action for damages under federal law, but (2) there was possibility that such provisions allegedly violated created standard of conduct which, if broken, would give rise to action for common-law negligence. *See also, Hofstetter v. Chase Home Finance, LLC*, 2010 WL

3259773 (N.D. Cal. 2010) (the court held that the mortgagor's statutory state law claims stemming from the lender's allegedly wrongful purchase of flood insurance for the mortgagor were not preempted by the Act).

II. Petitioner's Preemption Argument is Not Irrelevant

Navy Federal claims that Petitioner's argument on preemption is a "legal strawman" as the Circuit Court did not apply the constitutional doctrine of preemption and none of the cases replied on by Petitioner address preemption. (R. Br. at 21). As set forth in the original brief, Petitioner's argument is that the Circuit Court's broad interpretation and application of 42 U.S.C. § 4104b(d) and (e) results in the NFIA's ***implied*** preemption of the Plaintiff's common law and statutory claims. P. Br. at 7. Petitioner's claims arise out of West Virginia statutory and common law – not the NFIA. "This Court has therefore interpreted the preemption doctrine to mean that "[t]he Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law." *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 68, 680 S.E.2d 77, 83 (2009) (citations omitted). In sum, the only way the "liability shield" in the NFIA can bar Plaintiffs' claims is if the NFIA preempts Plaintiff's West Virginia common law and statutory claims.

The "ultimate touchstone" in any preemption analysis is the purpose of Congress in enacting the federal law in question. *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 1192, 173 L.Ed.2d 51 (2009). And courts begin their analysis with the "assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Id.* Absent such a "clear and manifest" intention of Congress to preempt state law, courts should decline to find that a federal law preempts a given state law.

The cases relied on by Petitioner support her argument that the Act does not preempt or preclude her state law claims against Navy Federal. *See Hofbauer v. Nw. Nat'l Bank*, 700 F.2d 1197, 1201 (8th Cir. 1983) (the Act "does not itself create a federal cause of action, but we do not think it prohibits a state court from finding negligence when there has been a violation of the statute."); *Spong v. Fid. Nat'l Prop. and Cas. Ins. Co.*, 787 F.3d 296, 306 (5th Cir. 2015) (the Act does not preempt state-law claims "to the extent that they implicate [defendants'] acts or omissions regarding issuance of the policy because those claims are procurement-based, not claims-handling-based."); *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754, 757 (5th Cir. 2009) ("federal law does not preempt state-law procurement-based claims"; "permitting prosecution of procurement-related state-law tort suits does not impede the full purposes and objectives of Congress."); *Harris v. Nationwide Mut. Fire Ins. Co.*, 832 F.3d 593, 597 (6th Cir. 2016) (the Act does not preempt policy-procurement claims); and *Williams v. Standard Fire Ins. Co., et al.*, 892 F.Supp.2d 615, 620-622 (M.D. Pa. 2012) (found the "Act does not deal with or provide a remedy for torts or wrongdoing during the procurement of flood insurance" and nothing in the Act allows for making misrepresentations or acting negligently and the "state law tort claims do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress … to reduce losses caused by flood damage and spread the risk of flood losses.").

Allowing the Petitioner's state law tort claims in the instant case, would promote the government objective of reducing losses caused by flood damage. First, had Navy Federal acted appropriately, the Petitioner would not have purchased the property and would not have suffered a loss. Second, even if she had gone through with the purchase (which she would not have), the proper upfront disclosure of the property being in a flood zone would have resulted in the purchase

of flood insurance through the Act and potentially a private flood insurance policy with the option for replacement costs coverage.

Clearly, the Act contemplates and values the borrower being able to make an informed decision, since a potential purchaser is entitled to a written "warning" from his or her lender, which warning must be provided "in advance of the signing of the purchase agreement, lease, or other documents involved in the transaction." *See*, 42 U.S.C. § 4104a. Therefore, enforcing parallel or similar state laws in no way interferes with or frustrates the intent of Congress. *See, Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30,35-36, 681 S.E.2d 465, 477-78 (2009) ("In fact, we recognize that Plaintiffs' [state law] claims tends to further the Congressional objective of requiring lenders to notify purchasers if properties they are proposing to buy lie in designated flood plain areas by providing lenders with an additional incentive to do so. Since Congress has not provided a federal remedy for conduct by private lenders that would constitute a violation of 42 U.S.C. §4104(a) ... a decision that state law claims such as those asserted by Plaintiffs in this case are preempted would effectively immunize private lenders from any injury sustained by a purchaser no matter how egregious the lender's conduct may have been. We do not believe that Congress intended such a result. As a result, we hold that Plaintiffs' right to assert otherwise proper state law causes of action are not pre-empted by 42 U.S.C. §4001, et seq.").

Petitioner's preemption argument is not irrelevant. The circuit court's improper application of the "liability shield" to a lender "making" an initial loan preempts Petitioner's state law claims. While the cases cited by Petitioner may not specifically address the "liability shield" argument they illustrate that other courts have declined to find even a direct preemption of state law claims much less an implied preemption.

III. This Court Should Not Affirm Dismissal of Petitioner's Claims on Independent Grounds Which Were Not Substantively Ruled on by the Circuit Court

The Respondents are wrong in their claim that this Court could and should affirm the Motion to Dismiss on any of the other grounds Navy Federal advanced in the circuit court. As noted in Petitioner's brief, the Circuit Court declined to substantively address Navy Federal's other claims, deeming them moot following its determination that the NFIA barred Petitioner's claims. (APP724); *see* P. Br. at 1, n.1 (citing APP431-449 which consisted of Petitioner's substantive responses to Navy Federal's motion to dismiss on other grounds).

This Court has a long-established history of declining to decide "nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." *State ex rel. Ten South Mgmt. Co. LLC v. Wilson*, 231 W.Va. 372, 745 S.E.2d 263, n. 4 (W.Va. 2013) (citing syl. pt. 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971); syl pt. 1, *Shackleford v. Catlett*, 161 W.Va. 568, 244 S.E.2d 327 (1978); syl. pt. 3, *Voelker v. Frederick Business Properties Co.*, 195 W.Va. 246, 465 S.E.2d 246 (1995)). As the *Mowery* Court noted:

> [u]pon an appeal to this Court from a judgment of a circuit court entered in a civil action, if it appears that certain questions were properly presented for decision but not considered or decided by the trial court, this Court may reverse the judgment of the trial court and remand the case to that court for decision of the questions thus properly presented for decision but not decided.

Id. at syl. pt. 2. The reason behind this hesitation is due to the "need to have the issue refined, developed, and adjudicated by the trial court so that we may have the benefit of its wisdom." *Whitlow v. Bd. of Educ. Of Kanawha Cty.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993).

This case exemplifies why this long-accepted principle of appellate review exists. The Circuit Court specifically declined to address certain arguments made by Navy Federal on the basis that it had determined the Plaintiffs' claims against Navy Federal were barred by federal statute. Thus, the only ruling and finding by the Circuit Court to be appealed was the finding that the

claims were barred by federal statute. It is nonsensical for Navy Federal to assert that the Petitioner was required to appeal a lower court's determination that it would **not** specifically address certain arguments raised by the opposing party.

Navy Federal should have filed a cross-assignment of error pursuant to Appellate Rule of Procedure 10(f) if it desired to have this Court address and decide issues not ruled on by the Circuit Court. *See Fairmont Tool v. Opyoke*, 2022 W.Va. LEXIS 455 at n.17 (W.Va. 2022) (finding respondent failed to assert a cross-assignment of error on issue); (*Yost v. Fuscaldo*, 185 W.Va. 493, 408 S.E.2d 72, n.1 (W.Va. 1991) (declining to address argument raised by appellee after finding that he did not appeal decision, thus his argument was not properly before the Court); *Brooks v. City of Huntington*, 234 W.Va. 607, 768 S.E.2d 97, n. 7 (W.Va. 2014) (finding that an issue was not properly before the Court when respondent did not cross-assign a finding as error).

Respondent's reliance on *Birchfield v. Zen's Dev., LLC*, 245 W.Va. 82, 857 S.E.2d 422 (W.Va. 2021) is misplaced. [R. Br. at 24]. *Birchfield* involved the failure of a Petitioner to include as an assignment of error a substantive ruling actually made by the lower court which granted summary judgment finding that the negligence claim was barred by the statute of limitations. 245 W.Va. at 93-84, 857 S.E.2d at 433-34. In this case, there was no substantive ruling by the Circuit Court for Petitioner to appeal.

Respondent claims that this Court can affirm a motion to dismiss "on any of the other grounds Navy Federal advanced in the Circuit Court." [R. Br. at 24] (citing *Greaser v. Hinkle*, 245 W.Va. 122, 128, 857 S.E.2d 614 (2021). *Greaser* is not applicable to this case. In *Greaser*, this Court recognized that it has the authority to "affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record regardless of the ground, reason or theory assigned by the lower court as the basis of its judgment." *Id.* at 620. (citation

omitted). The *Greaser* Court proceeded to affirm the lower court's substantive ruling on summary judgment concluding "the undisputed facts of this case support the circuit court's order granting partial summary judgment." *Id.* In this case, there are no substantive rulings for this Court to affirm.

Finally, appellate resolution of these issues now would be unfair. Navy Federal is asking this Court to not only address an issue that the lower court did not substantively rule on but also to consider facts and documents outside of the pleadings when no discovery has been undertaken.[3]

CONCLUSION

For all the foregoing reasons, and those set forth in the Petitioner's brief, this Court must find that the National Flood Insurance Program, including 42 U.S.C. § 4104b(e), does not shield Navy Federal from liability under state law and must remand the case for determination on the merits.

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[3] *See* APP040-043, 047-049, 052-79, 087, 090, 122-43, 102-105, 158-84, 481, 206-09, 215, 218, 780.

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, I served the foregoing **Petitioner's Reply Brief** via USPS first-class mail and email.

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