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.

BRIEF OF PETITIONER

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INTRODUCTION

Petitioner Ronna Marie Lawler f/k/a Ronna Marie Shupe, who was the Plaintiff below ("Plaintiff"), appeals the Circuit Court of Berkeley County's order entered November 11, 2019, granting Defendant Navy Federal Credit Union's ("Navy Federal") motion to dismiss, in a civil action asserting various claims against Navy Federal related to its role in the financing and purchase of residential property located in Berkeley County, West Virginia. Plaintiff's claims against Navy Federal included breach of contract, common law negligence, fraud in the inducement and execution of contract, fraudulent concealment, and violation of the West Virginia Consumer Credit and Protection Act.

The Circuit Court misapplied the National Flood Insurance Act of 1968 ("NFIA"), 42 U.S.C. § 4104b(e), in its finding that the NFIA shielded Navy Federal from liability from Plaintiff's claims. For the reasons more fully set forth below, the NFIA does not preempt the claims here as they arise out of the procurement of flood insurance. Every appellate court (and the weight of other courts) have rejected the preemption argument that served as the basis for the circuit court's dismissal of Plaintiff's claims.

Plaintiff requests that the Circuit Court's order granting Navy Federal's motion to dismiss, with prejudice, be reversed, and the case be remanded for determination on the merits.

ASSIGNMENTS OF ERROR

Plaintiff raises the following assignment of error for the Court's review on appeal:

- The Court erred in finding that 42 U.S.C. § 4104b(e) shields Navy Federal from liability under state law and granting Navy Federal's motion to dismiss. [1]

[1] Navy Federal also alleged that Plaintiffs' claims failed on independent grounds (APP431-449); however, the Circuit Court declined to address these claims deeming them moot following its determination that the NFIA barred Plaintiff's claims against Navy Federal.

STATEMENT OF THE CASE

Plaintiff, a first-time homeowner, secured financing through Navy Federal for the purchase of property ("the property") located in Berkeley County. APP011. Plaintiff, as a long-standing member of the credit union, maintained multiple accounts at Navy Federal, including checking and savings accounts as well as vehicle loans. *Id.* Plaintiff sought the assistance and advice from Navy Federal throughout the process of obtaining financing and purchasing the property. *Id.*

Plaintiff specifically inquired about the need for flood insurance and advised Navy Federal that she would not buy property in a flood zone. APP012-13. Navy Federal, through its agent Melissa Westerfield, advised the Plaintiff "Ronni GOOD NEWS Not in a flood zone." APP013. Plaintiff, an unsophisticated purchaser, relied upon Navy Federal's expertise and experience in assessing and determining whether the property was in a flood zone. APP019. Based on Navy Federal's representations, Plaintiff proceeded to complete the contract, mortgage loan with Navy Federal and closed on the property on August 19, 2016. APP013.

Plaintiff's Complaint alleges that Navy Federal inaccurately reported that the property was not in a flood zone despite being aware that it was in an AE zone (flood zone) from FEMA notifications, as well as its own correspondence, servicing, and insurance policy requirements for the prior owner of the property. APP007-9; APP020. Plaintiff's Complaint further alleges that "a search of its own records related to this property and its address would have revealed the AE flood zone designation." APP013. Plaintiff's Complaint further alleged that Navy Federal "knowingly made false statements and misrepresentations about the property in order to secure a mortgage note and deed of trust." APP025.

Subsequent to the purchase, the property has flooded on numerous occasions, with standing water over a foot and often higher in the basement. APP015. The flooding resulted in significant

property damage, personal injuries (including falling in the water-filled and dark basement following several outlets and circuits being tripped and respiratory issues from mold), and levels of mold spores and fungi that rendered her home unlivable and required the abandonment of all personal property. APP015-18. Plaintiff's claims on her home-owner's insurance policy and title insurance were denied due to the lack of flood insurance which she had not obtained based on Navy Federal's representations that the property was not in a flood zone. APP018-19.

The Plaintiff's Complaint asserted direct claims against Navy Federal which are outside the scope of the NFPA and based on state law. APP019-20 (violations of the West Virginia Consumer Credit and Protection Act); APP022 (breach of contract); APP023 (fraud in inducement to contract); APP024-26 (fraud in execution of contract); APP027 (common law negligence); APP028 (declaratory judgment). The Plaintiff should be permitted to engage in the discovery process to establish evidence to prove her claims against Navy Federal which includes evidence beyond reliance upon CoreLogic's flood certification.

PROCEDURAL HISTORY

On September 11, 2020, Plaintiff filed a civil action asserting claims against the Defendant, Navy Federal related to its role in the financing and purchase of residential property located in Berkely County, West Virginia. APP001-28. Plaintiff's claims against Navy Federal included violations of the West Virginia Consumer Credit and Protection Act, breach of contract, fraud in inducement to contract, fraud in execution of contract, common law negligence, and declaratory judgment.

On March 26, 2021, Navy Federal filed a motion to dismiss and memorandum of law in support alleging that the NFIA barred Plaintiff's claims against it. Navy Federal argued that 42 U.S.C. § 4104b(e) provides a liability shield for lenders who rely on flood zone determinations

from third parties. APP037-39; APP412-449. Navy Federal contended that under the statute it was entitled to rely on CoreLogic's determination as to whether the Plaintiff's property was located in a flood hazard zone and that the NFIA precluded Plaintiff from bringing any claims against it.

On May 3, 2021, Plaintiff responded to Navy Federal's motion to dismiss on the basis of West Virginia's liberal policy of pleading and favoring determination of actions on the merit and disfavoring motions to dismiss. APP483-91. Plaintiff reserved the right to supplement her response consistent with the stipulation for extension of time filed with the Court. APP490.

On May 21, 2021, Plaintiff filed an amended response to Navy Federal's motion to dismiss.[2] Plaintiff asserted that Navy Federal's reliance on 42 U.S.C. § 4104b(e) was misplaced and inaccurate as it only applied to a person "increasing, extending, renewing, or purchasing a loan secured by improved real estate" and not to a person "making" a loan, which is what Navy Federal did in regard to Plaintiff's property. APP493-512. Plaintiff additionally argued the Complaint alleged that Navy Federal knew of the flood designation issues and impairments of the involved property but failed to take the necessary steps to guarantee its accuracy. APP499. Plaintiff further claimed that not only did Navy Federal fail to take steps to guarantee accuracy, but it was negligent in ignoring information in its possession, custody, and control. Thus, 42 U.S.C. § 4104b(e) was inapplicable to the facts of the case and should not be applied. APP498-99.

On June 11, 2021, Navy Federal filed its reply in support of its motion to dismiss.[3] APP513-532. Defendant argued that the NFIA did not create any affirmative duty on behalf of Navy Federal to persons such as the Plaintiff. APP519-21. Navy Federal disagreed with Plaintiff's contention that as 42 U.S.C. § 4104b(d)-(e) were separate and distinct provisions, only subsection

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[2] Plaintiff's response brief also specifically responded to Navy Federal's claims which the Circuit Court deemed moot.

[3] Navy Federal's reply brief included replies to arguments the Circuit Court deemed moot.

(d) applied to Navy Federal. Navy Federal further contended that West Virginia uses the terms "make" and "extend" interchangeably when discussing loans. *Id.* Finally, Navy Federal asserted that CoreLogic made a guarantee regarding the accuracy of the flood determination which it relied upon, thus it was shielded from liability. *Id.*

On August 11, 2021, Plaintiff moved for leave to supplement/amend her response to Navy Federal's motion to dismiss to provide an affidavit from a home inspector to rebut an assertion in Navy Federal's brief relating to Plaintiff's alleged prior knowledge of flooding. APP0690-95.[4]

On November 11, 2019, the Circuit Court entered an Order granting Navy Federal's motion to dismiss, with prejudice, for failure to state a claim for which relief can be granted. APP719-24. The Circuit Court held that the NFIA "permits lenders, such as Navy Federal, to rely on information provided by a third-party as to whether a given property is within a special flood hazard area, provided the third-party guarantees the accuracy of that information." APP722. The Circuit Court further held the "Act also provides a liability shield from lawsuits brought by homeowners for lenders who rely on flood zone determinations provided by third-parties." APP722-23. Thus, the Circuit Court concluded Navy Federal was entitled to rely on CoreLogic's determination and was shielded from liability for Plaintiff's claims. APP723.[5] It is from this order that Plaintiff appeals.

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[4] Navy Federal responded on September 11, 2021 and Plaintiff filed a reply brief on September 13, 2021. APP0703-10 and APP711-15.

[5] The Circuit Court declined to rule on Plaintiff's Motion to Supplement/Amend her response regarding the home inspector's affidavit as it had determined that the motion should be denied on federal statutory grounds that did not require detailed factual determinations. APP721-22. It also declined to address the remaining claims by Navy Federal, deeming them moot.

SUMMARY OF ARGUMENT

The Circuit Court of Berkeley County misapplied the NFPA and erred in holding that 42 U.S.C. § 4104b(e) shields Navy Federal from liability under state law. Three federal circuits courts of appeal and a number of trial courts have rejected the argument that the NFPA preempts Plaintiff's state law claims. Moreover, such a holding is contrary to the plain text of the statute. Because the Circuit Court misapplied the law, Plaintiff requests that the Circuit Court's order be reversed, and the case be remanded.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary as the dispositive issues would be significantly aided by oral argument. Petitioner requests that the Court set this matter for Rule 20 argument because the issue of whether the NFPA preempts state law involves an issue of first impression. R.A.P. 20(a)(1).

ARGUMENT

I. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. Syl. Pt. 1, *Boone v. Activate Healthcare, LLC*, 245 W.Va. 476, 859 S.E.2d 419 (2021) (citations omitted). A trial court "in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at Syl. Pt. 2 (citations omitted). "Courts must construe the factual allegations in the light most favorable to the plaintiff." 245 W.Va. at 480, 859 S.E.2d at 423.

II. THE NATIONAL FLOOD INSURANCE PROGRAM DOES NOT SHIELD NAVY FEDERAL FROM LIABILITY UNDER STATE LAW.

1. The National Flood Insurance Act does not preempt Plaintiff's state common law and statutory claims.

The Circuit Court's broad interpretation and application of 42 U.S.C. § 4104b(d) and (e) results in the NFIA's implicit preemption of the Plaintiff's common law rights pertaining to breach of contract, fraud in inducement to contract, fraud in execution of contract, and negligence, as well as her rights under the West Virginia Consumer Credit and Protection Act. The NFIA does not preempt West Virginia common or statutory law.

Preemption of state law is disfavored. 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.

Congress created the National Flood Insurance Program ("NFIP") through its enactment of the National Flood Insurance Act of 1968. 42 U.S.C. § 4001, *et. seq* ("the Act"). The NFIP seeks to ease "an increasing burden on the Nation's resources" by providing "a reasonable method of sharing the risk of flood losses" and "making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection." The Flood Insurance Protection Act of 1973 supplemented the NFIP by mandating that lenders require flood insurance on loans secured by properties located within high-risk flood areas. *See*, 42 U.S. Code § 4002(b)(4). Thereafter, before making loans, federally regulated lenders were required to

determine if secured properties were located within a special flood hazard area as identified by FEMA. *See*, 42 U.S. Code § 4012a(b).

The National Flood Insurance Reform Act of 1994 further strengthened the NFIP with a number of reforms that included increasing the focus on lender compliance. After the effective date, lenders were required to ***warn*** a real estate purchaser in writing that the residence being purchased is in an "area having special flood hazards" as a "condition of making, increasing, extending, or renewing any loan secured by improved real estate." The "warning" must be provided a reasonable period "in advance of the signing of the purchase agreement, lease, or other documents involved in the transaction." 42 U.S.C. § 4104a. The amendments also standardized the flood hazard determination process and required the use of FEMA approved flood determination forms in order "to facilitate compliance with the flood insurance purchase requirements" of the Act. 42 U.S.C. § 4104b(b)(1).

> The lender must determine whether or not the structures on the security property are located in an SFHA by using the Standard Flood Hazard Determination form endorsed by FEMA as mandated by federal flood insurance purchase requirements.[6]

Lenders may undertake this task themselves, but it is more common to obtain the required flood determination form from a professional flood certification company that issues a guarantee of its work to the lender. *See*, 42 U.S.C. § 4104b(d). While the Act does not create a federal cause of action against lenders or flood certification companies, at the same time it does not preclude state causes of action for those aggrieved by their carelessness.

In furtherance of the Act, FEMA has promulgated a series of federal regulations which, along with the Act, make up the NFIP's legal framework. The Standard Flood Insurance Policy

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[6] Part B, Subpart 7, Chapter 3, Property and Flood Insurance at p 996 of the Fannie Mae Selling Guide, available at https://singlefamily.fanniemae.com/media/20116/display.

("SFIP"), which is provided for in 44 C.F.R. pt. 61, App. A (1), provides that, "This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended, and Federal common law." 44 C.F.R. pt. 61, App. A (1) art. IX (internal citations omitted). While this provision has been held to preempt state law based claims against insurance carriers, *Gallup v. Omaha Prop. & Cas. Ins. Co.*, 434 F.3d 341, 345 (5th Cir. 2005), by its plain language, the provision applies only to "disputes arising from the handling of any claim."

The clear weight of authority is against the Circuit Court's Order. As one commentator stated, the "general rule is that [the NFIA] preempts all state law causes of action that arise from the handling and disposition of SFIP claims against a private insurance company that has issued the SFIP. However, it is also widely held that state law claims brought under a SFIP that relate to the procurement of the policy are not preempted by federal law." 36 A.L.R. Fed. 3d Art. 6. Indeed, at least three federal circuit courts of appeal (and a number of trial courts) have rejected the assertion that claims against lenders and flood determination companies are preempted.

In *Hofbauer v. Nw. Nat'l Bank,* the Eighth Circuit rejected a finding of preemption holding that the NFIA does not prohibit a state court from finding negligence when there has been a violation of the statute. 700 F.2d 1197, 1021 (8th Cir. 1983). In *Hofbauer,* Plaintiff sued a lender for not advising that the property was in a special flood hazard area. *Id.* at 1199. The Eighth Circuit noted that "[e]ven though the Hofbauers cannot assert a private cause of action arising under federal law, the federal statutes may create a standard of conduct, which, if broken, would give rise to an action for common-law negligence. That is a question of Minnesota law best left to the courts of that State." *Id.* at 1201.

Similarly, in *Spong v. Fid. Nat'l Prop. And Cas. Ins. Co.*, the Fifth Circuit distinguished claims-handling causes of action from policy procurement causes of action, and held that the NFIA 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. 787 F.3d 296, 306 (5th Cir. 2015). *Spong* reaffirmed the seminal case of *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 757 (5th Cir. 2009) which held:

> [T]wo factors convincingly demonstrate that federal law does not preempt state-law procurement-based claims. First, Congress, via its delegation of regulatory power to FEMA, has expressly preempted state law only as to handling-related claims. And, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." We thus consider FEMA's "limited statement of preemption through the canon of statutory construction *inclusion unius est exclusion alterius*, indicating Congress's lack of interest in more broadly limiting state power." ...
>
> Second, unlike in handling-based cases, permitting prosecution of procurement-related state-law tort suits does not impede the full purposes and objectives of Congress. "Clearly, the principal purpose in enacting the Program was to reduce ... the massive burden on the federal fisc of the ever-increasing federal flood disaster assistance." Suits related to handling, or claims adjustment, generally seek monety that will ultimately be disbursed from federal funds thereby directly conflicting with Congress's objective to reduce pressure on the federal fisc. In contrast, FEMA does not reimburse carriers for procurement-related judgments.

Finally, the Sixth Circuit adopted the Fifth Circuit's approach in *Harris v. Nationwide Mut. Fire Ins. Co.*, 832 F.3d 593, 597 (6th Cir. 2016), and held that the NFIA does not preempt policy-procurement claims. In *Harris,* the plaintiffs purchased a home and financed it with defendant Regions Bank. CoreLogic provided Regions with an erroneous flood-zone determination. Although the home was in a Special Flood Hazard Area according to the Flood Insurance Rate Map, plaintiffs in connection with their purchase of the home were informed 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 district court held the claims were preempted under the Act. The Sixth Circuit reversed.

Like the Plaintiff in this case, the plaintiffs in *Harris* asserted only state-law claims arising from procurement of their SFIP – namely, that they would not have purchased their home absent defendants-appellees' representations that the property was not in a flood zone. *Id.* at 596. The court of appeals observed that the NFIA "aims to foster availability of affordable flood insurance." To this end, it founded that the Act "indisputably" preempts state-law causes of action based on "the handling and disposition of" flood insurance claims, which implicate the Federal Treasury. *Id.* at 596-97. The *Harris* Court, however, followed the Fifth Circuit and distinguished the plaintiffs' policy procurement state-law claims, i.e., claims relating to the acquisition of a flood insurance policy, from causes of action alleging wrongdoing in the claims process.

The *Harris* Court adopted the following test:

> In determining whether a plaintiff's cause of action arises from claim handling or policy procurement, the [court] looks to whether the plaintiff was "already covered" by a SFIP, or instead was a "potential future policyholder."

The Court held that the Act does not preempt policy procurement-related claims brought by plaintiffs against their lender:

> 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 41 U.S.C. § 4017(d)(1) (authorizing Treasury fund payments for "costs incurred in the adjustment and payment of any claims for losses" 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 misrepresentations 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. 1001)).

> Because plaintiffs were potential future policyholders at the time the alleged wrongs occurred, to the extent that their state-law claims arise solely from the policy-procurement process, the NFIA does not preempt them.

Id. at 597.

Harris provides this Court with a clear path to finding that 42 U.S.C. § 4104b does not shield Navy Federal from liability under state law. Courts in the Fourth Circuit have similarly recognized the distinction between causes of action for insurance claims handling, which are preempted, and claims involving policy procurement, which are not.[7] Courts from numerous other jurisdictions have rejected defenses based on express, field and/or conflict preemption under the Act.[8]

In another factually similar case, *Williams v. Standard Fire Ins. Co. et al.,* 892 F.Supp. 2d 615 (M.D. Pa. 2012), the plaintiff-homeowner sued the insurer and flood determination company, CoreLogic, based on an errant flood zone determination and resulting damages. For reasons largely

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[7] *See e.g. Reeder v. Nationwide Mut. Fire Ins. Co.,* 419 F.Supp.2d 750 (D. Md. 2006) (reviewing cases and concluding that procurement claims are not preempted). *See also, Municipal Ass'n of South Carolina v. Omaha Property and Cas. Ins. Co.*, 2007 WL 7945179 (D.S.C. 2007) (court concluded that "there was no evidence that Congress intended to supplant the application of state law or state involvement in the area of national flood insurance.").

[8] *See e.g., Maloney v. Indymac Morg. Services*, 2014 WL 6453777 (C.D. Cal. 2014) (Court found the bank's contention that the NFIA occupies the field of forced flood insurance placement was not supported. Furthermore, the court said, as one court in the circuit had recognized, agencies implementing the NFIA appear to agree that NFIA does not preempt all flood-insurance related claims under state law.); *M & K Restaurant LLC v. Farmers Ins. Co. Inc.*, 29 F.Supp.3d 1204 (E.D. Ark. 2014) (The court held that motel owners' extra-contractual and tort state law claims relating to the *procurement* of a Standard Flood Insurance Policy (SFIP), were not expressly preempted by the National Flood Insurance Act); *Hofstetter v. Chase Home Finance, LLC*, 2010 WL 3259773 (N.D. Cal. 2010) (the court held that the mortgagor/insured'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); *Maitland v. State Farm Fire and Cas. Ins. Co.*, 914 F.Supp.2d 794 (E.D. La. 2012) (holding federal preemption with regard to flood policies issued pursuant to the National Flood Insurance Program is limited to handling of flood insurance claims); *Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009) (claim for violation of the state Mortgage Lending Act in which borrowers alleged the lender knew, but did not disclose until after the closing, that the property being purchased was in a flood plain was not preempted).

already discussed, the court rejected all three forms of preemption – no express preemption because the Act contains no language that expressly preempts a homeowner's claim pertaining to an errant flood zone determination, no field preemption because the "Act does not deal with or provide a remedy for torts or wrongdoing during the procurement of flood insurance" and no conflict preemption because the court found "it is possible for a party to comply with both state and federal law" noting that nothing in the Act allows for making misrepresentations or acting negligently and that "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." *Id.* at 620-622.

Here, like in *Williams,* allowing the state law tort claims would promote the Act's objective of reducing losses caused by flood damage. Had Navy Federal acted appropriately, the Plaintiff would not have purchased the property and would not have suffered a loss. Moreover, even if she had gone through with the purchase, the proper upfront disclosure of the property being in a flood hazard area would have triggered a mandatory insurance requirement and protected her from subsequent flood damage.

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 that the residence being purchased is in an "area having special flood hazards" requiring flood insurance. *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, 681S.E.2d 465, 477 (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 the 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."). Plaintiff respectfully requests that this Court follow the well-reasoned holdings of the aforementioned authorities.

2. Preemption of Plaintiff's Claims Is Inconsistent With The Statutory Language of 42 U.S.C. § 4104b(e).

The Circuit Court misapplied 42 U.S.C. § 4104b(e) which by its plain language is not applicable to the facts of this case.

It is a long-standing maxim that "[s]tatutes in derogation of the common law are strictly construed." *Phillips,* 220 W.Va. at 491, 647 S.E.2d at 927. The primary rule of statutory construction is to "ascertain and give effect to the intention of the Legislature. *Phillips v. Larry's Drive-In Pharmacy, Inc.,* 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007). The United States Supreme Court has made clear that a court must "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). "Absent a clearly expressed legislative intention to the contrary that language must ordinarily be regarded as conclusive." *Id.*

It is not for a Court to arbitrarily "read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Phillips,* 220

W.Va. at 491, 647 S.E.2d at 927. This Court should follow the "familiar statutory interpretation maxim *expressio unius est exclusio alterius,* or the express mention of one thing implies the exclusion of another." *Id.*, at 220 W.Va. 490, 647 S.E.2d at 926.

42 U.S.C. § 4104b is the section of the Act pertaining to standard hazard determination forms. The purpose of this subsection titled "Standard hazard determination forms" is the development of "a standard form for determining, in the case of a loan secured by improved real estate ... whether the building ... is located in an area identified by the Administrator as an area having special flood hazards and in which flood insurance under this chapter is available." 42 U.S.C. § 4104b(a).

The specific language of 42 U.S.C. § 4104b(d) and (e) is as follows:

> **(d) Guarantees regarding information**
>
> In providing information regarding special flood hazards on the form developed under this section, any lender (or other person required to use the form) who **makes**, increases, extends, or renews a loan secured by improved real estate or a mobile home may provide for the acquisition or determination of such information to be made by a person other than such lender (or other person), only to the extent such person guarantees the accuracy of the information.
>
> **(e) Reliance on previous determination**
>
> Any person increasing, extending, renewing, or purchasing a loan secured by improved real estate or a mobile home may rely on a previous determination of whether the building or mobile home is located in an area having special flood hazards (and shall not be liable for any error in such previous determination), if the previous determination was made not more than 7 years before the date of the transaction and the basis for the previous determination has been set forth on a form under this section, unless –
>
> (1) map revisions or updates pursuant to section 4101(f) of this title after such previous determination have resulted in the building or mobile home being located in an area having special flood hazards; or
>
> (2) the person contacts the Administrator to determine when the most recent map revisions or updates affecting such property

> occurred and such revisions and updates have occurred after such previous determination.

(emphasis added).

In drafting subsection (d), Congress specifically delineates lenders who make, increase, extend or renew a loan secured by improved real estate and allows them to provide for the acquisition or determination of information from a third party to the extent the third party guarantees the accuracy. However, in drafting subsection (e), Congress does not include a person who "makes" a loan, rather, it limits subsection (e) to those "increasing, extending, renewing, or purchasing a loan" and allows those lenders to rely on a "previous determination" of whether the building was located in an area with a special flood hazard as long as the *previous* determination was made not more than 7 years prior to the date of the transaction. Congress's use of language and intent is clear. It makes perfect sense that a lender who is not making, *i.e.*, initiating a loan, but is "increasing, extending, renewing, or purchasing a loan" would have a window of time (seven years) to rely on a previous determination. However, it would not make sense and would, in fact, directly contradict Congress's intent to allow an initiator of a loan to escape liability for compliance merely by farming out such determination to a third-party. Instead, the Act requires the third-party service provider to guarantee the accuracy of its determination and, thereby, protects the federally regulated lender directly and any injured purchaser indirectly. Accordingly, *both* the "personal hardships and economic distress" of the purchaser and "burden on the Nation's resources" are avoided. *See*, 42 U.S. Code § 4001(a).

Furthermore, the Plaintiff's claims are not solely reliant on Navy Federal or CoreLogic's determination. Rather, as noted above, the Complaint alleges 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. In fact, Navy Federal actually

owned this property following a foreclosure sale and presumably purchased its own insurance during this time period. *See* APP009.

3. The Cases Relied On By The Circuit Court Are Not Persuasive.

In dismissing Plaintiff's case, the Circuit Court here relied on out-of-jurisdiction cases, some of which are unpublished, to support its finding that the Act provides a liability shield from lawsuits brought by homeowners for lenders who rely on flood zone determinations provided by third parties. Some of these cases do not even discuss the statutory language in 42 U.S.C. § 4104b(d-e) and none of them address the inclusion of the word "makes" in 42 U.S.C. § 4104b(d) and the exclusion of it from 42 U.S.C. § 4104b(e).[9]

Moreover, a number of the cases are contrary to the binding circuit precedent noted above. *Cruey v. First Am. Flood Data Servs., Inc.*, a 2001 opinion from the Eastern District of Kentucky has been effectively overruled by the Sixth Circuit's 2016 decision in *Harris, supra.* 174 F.Supp.2d 525 (E.D. Ky. 2001) (finding that 42 U.S.C. § 4104b(e) amounts to an "*express denial* of a cause of action by the borrower as against the lender, at least with respect to actions predicated on special

[9] *See, e.g. Clark v AmSouth Mortg Co Inc.,* 474 F.Supp.2d 1249 (M.D. Ala. 2007) (finding that 42 U.S.C. § 4104b(e) released lenders from liability for incorrectly force placing flood insurance on plaintiffs' property based on an error by the third-party contractor after a one paragraph analysis which conflates 42 U.S.C. § 4104b(d) and (e)); *Ford v. First Am. Flood Data Servs.*, 2006 U.S. Dist. LEXIS 74350 at *19 (M.D.N.C. Oct. 11, 2006 (summarily concluding that 42 U.S.C. § 4104b(e) expressly denies a cause of action by a borrower against a lender); *Lukosus v. First Tenn. Bank Nat'l Ass'n*, 2003 U.S. Dist. LEXIS 11941, at **2-6 (W.D. Va. July 9, 2003) (recognized that the statute "does not necessarily preclude a state cause of action based on a violation of the standard of conduct imposed by the federal law"; acknowledged that there was no Virginia authority directly on point but concluded that "the Virginia Supreme Court would follow the precedent from other jurisdictions and hold that no state cause of action can be based on a failure to provide the notice required by federal law" when those state courts rejected common law cause of actions "based in part on principles of federalism" and without conducting any analysis or discussion of 42 U.S.C. § 4104b(d) and (e)); and *Wells Fargo Bank, N.A. v. Fonder*, 868 N.W.2d 409, 414 (S.D. 2015) (in a case against a flood-determination company, simply states that "the NFIA does prohibit liability for lenders as against borrowers" citing 42 U.S.C. § 4104b(d-e) with no discussion).

flood hazard determinations made by third persons within the previous seven (7) years" even though it also noted that § 4104b "does not mention the borrower" (emphasis original) (internal quotations omitted). Similarly, the Fifth Circuit's 2015 decision in *Spong*, *supra*, amounts to an overruling of *Duhon v. Trustmark Bank*, 2007 U.S. Dist. LEXIS 18078, at *4-5 (S.D. Miss. Feb 25, 2007 (summarily stating that "[t]he 1994 amendments to the NFIA include a grant of immunity to Regulated Lenders that rely on third parties to make SFHA determinations" citing U.S.C. § 4104b(e) and *Cruey*, *supra*). The remaining cases are contrary to the weight of authority. Indeed, no appellate court has found preemption. This Court should not be the first.

CONCLUSION

For all the forgoing reasons, 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 remand the case for determination on the merits. Because the Plaintiff did not have a flood insurance policy at the time of the alleged misconduct and her claims are of the nature of procurement claims against a lender opposed to insurance claims handling against an insurer, federal preemption cannot apply.

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I served the foregoing **Petitioner's Brief** via USPS first-class mail and email, and **Appendix (Volumes 1 and 2)** via email only.

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