Published on *The National Law Review* https://natlawreview.com

Hurricane Matthew Flood Claims May Not Be Entirely Preempted by Federal Law

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In the wake of Hurricane Matthew and its associated flooding (particularly in North Carolina and South Carolina), a recent case of first impression in the Sixth Circuit may be cited by both damaged businesses and insurers and insurance brokers in the Carolinas. *Harris v. Nationwide Mutual Fire Insurance Company*, __ F.3d __, 2016 WL 4174381 (6th Cir. Aug. 8, 2016).

Writing for a unanimous panel, Judge Ralph B. Guy, Jr. held that the National Flood Insurance Act (established in the wake of flooding in Florida and Louisiana after Hurricane Betsy in 1965) did not preempt claims based on state law for negligence in the procurement of an insurance policy for a home situated in a flood-prone area. Although this case was decided on principles of federal abstention, it has major ramifications for those practicing insurance law. While it is not binding on any courts in the area affected by Hurricane Matthew, policyholder counsel will likely cite to it as persuasive authority in support of negligence claims against insurance brokers and other professionals involved in the purchase of homes or insurance.

The case arose when a married couple suffered a flood loss during a 2010 flood of the Cumberland River. They brought a claim against their mortgage bank (Regions), a flood-zone certifier, their insurance company (Nationwide) and their insurance broker (David Vandenbergh). On appeal, the issue was whether the homeowers' state law claims for negligence during the procurement of their Standard Flood Insurance Policy were preempted by Congress when it passed the National Flood Insurance Act (NFIA) The panel unanimouslyheld that while the NFIA preempted coverage claims against the insurer, it did not preempt negligence claims regarding procurement of the policy. The case was remanded to the district court for further proceedings and, presumably, for trial.

The Court explained that:

> "The NFIA indisputably preempts state-law causes of action based on "the handling and disposition of SFIP claims." *Gibson [v. American Bankers Ins. Co.]*, 289 F.3d at 949. . . . . The Fifth Circuit has 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 [insurers'] acts or omissions regarding issuance of the policy because those claims are procurement-based, not claims-handling-based." *Spong v. Fid. Nat'l Prop. and Cas. Ins. Co.*, 787 F.3d 296, 306 (5th Cir. 2015). In determining whether a plaintiff's cause of

> action arises from claim handling or policy procurement, the Fifth Circuit looks to whether the plaintiff was “already covered” by a SFIP, or instead was a “potential future policyholder.” *Id*. We agree with the Fifth Circuit's approach and hold that the NFIA does not preempt policy-procurement claims such as plaintiffs'.”

In adopting the same distinction as the Fifth Circuit, the Court noted that:

> “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. . . . . 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.”

Addressing questions of federal abstention:

> “[G]eneral 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 269Id. at 269 (*quoting Green v. Fund Asset Mgmt., L.P., 245 F.3d 214, 222 (3d Cir. 2001*)).”

As Hurricane Matthew's floodwaters recede from the Carolinas, *Harris* and *Spong* are likely to be cited as the parties duel over whether claims for negligent procurement in the purchase of insurance can proceed to trial.

National Law Review, Volume VI, Number 292