

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANTHONY AND DONNA DUDICK, h/w	:	
Plaintiffs,	:	
	:	No. 06-CV-01768-CG
v.	:	
	:	
NATIONWIDE MUTUAL FIRE	:	
INSURANCE COMPANY, et al.,	:	
Defendants.	:	

**MEMORANDUM**

**GREEN, S.J.**

**March 27 , 2007**

Presently pending are Defendants’ Nationwide Mutual Fire Insurance Company (“Nationwide”), the DiRuggeris Agency, and Joseph Lelli’s Motions to Dismiss Plaintiffs; State Law Based Claims, and Plaintiffs’ Answer in Opposition thereto. For the reasons set forth below, Defendants’ Motion to Dismiss will be granted.

**I. FACTUAL BACKGROUND**

Plaintiffs allege the following: Plaintiffs, Anthony and Donna Dudick, own real property located at 1630 River Road in Upper Black Eddy, Pennsylvania (“the Property”). Defendants Joseph Lelli and the DiRuggeris Agency, as agents for Nationwide, issued a flood insurance policy on the Property. Nationwide issued the policy in its capacity as a participant the National Flood Insurance Program.

Plaintiffs claim that in September 2004 they requested and received a quote for flood insurance coverage from Joseph Lelli, acting on behalf of the DiRuggeris Agency and Nationwide. Plaintiffs allege that the quote for the total annual premium was \$489.00 for \$250,000.00 and \$10,000.00 on the Property’s building and contents, respectively. Plaintiffs further allege that they submitted the amount quoted for the annual premium to

Lelli and the DiRuggeris Agency. The Complaint states that the Property was covered by a Nationwide flood insurance policy as of February 19, 2005.

Plaintiffs allege that on or about April 1, 2005, the Property was damaged by a flood. They further assert that they submitted a claim for the damage to Nationwide, but were advised by Nationwide that the Property was not covered by a Nationwide flood insurance policy. In the Report of Rule 26(F) meeting submitted by the parties, Plaintiffs stated that although they were initially advised that no flood insurance policy had been entered, “. . . eventually Nationwide agreed to issue a flood policy for a substantially additional premium with reduced coverage. Eventually the Dudicks received a \$50,000 policy limit with the reduced coverage provided by Nationwide.” Report of Rule 26(F) Mtg.

Nationwide agrees that a policy was issued to the Plaintiffs effective February 19, 2005 and also that a flood occurred on April 1, 2005 which caused damaged to the insured Property. Id. at 2. Nationwide further submits that “[w]hile there was some initial confusion as to the applicable limits of coverage under the Plaintiffs’ SFIP [standard flood insurance policy], shortly after Nationwide was notified of the loss it confirmed that Plaintiffs had available \$250,00.00 in total building coverage and \$10,000.00 in total contents coverage.” Id. Nationwide further claims that in May 2005 Plaintiffs submitted Proof of Loss to Nationwide in the amount of \$141,908.21. Id. at 3. In June 2005 Nationwide rejected Plaintiffs initial proof of loss due to lack of supporting documentation, however, Nationwide approved Plaintiffs’ request for an advance loss payment of \$5,000.00. Id. at 3, 4. Nationwide also submits that in August 2005 it approved a final proof of loss on Plaintiff’s behalf in the amount of \$56,301.80 (minus

over \$8,000 in depreciation and Plaintiffs' \$1,000.00 deductible). Id. at 3. Defendants Lelli and the DiRuggeris Agency deny any wrongdoing in connection with the issuance of the policy. Id. at 5, 6.

Plaintiffs' Complaint sets forth four counts against Defendants. Count I is a claim for breach of the flood insurance contract. Plaintiffs claim that Defendants' refusal to indemnify Plaintiffs' loss constitutes a breach of the insurance contract. Count II is a claim for violation of Pennsylvania's Bad Faith Act, 42 Pa.C.S.A. §8371. Plaintiffs claim Defendants engaged in bad faith conduct when adjusting the amount of loss suffered by Plaintiffs in their flood insurance claim. In this count Plaintiffs further claim: Defendants misrepresented pertinent facts about the policy provisions and placed unduly restrictive interpretations on the policy; unreasonably valued their loss and unfairly negotiated the amount of the loss; and, Defendants unreasonably withheld policy benefits. Count III is a claim for negligence and misrepresentation. In this Count Plaintiffs assert that their damages are resultant of all of the Defendants' carelessness and negligence in: representing the existence of flood coverage; failing to properly underwrite and investigate Plaintiffs' premises prior to their loss; and making false and fraudulent misrepresentations regarding the premium due and the amount and existence of flood insurance coverage. Lastly, Count IV is a claim for misrepresentation pursuant to the Unfair Trade Practices Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-2. Plaintiffs claim that Defendants misrepresented the flood insurance policy by creating misunderstanding and confusion as to the existence of coverage, the premium to be charged for the coverage, and the necessary steps to be performed in order to obtain the

coverage. Plaintiffs seek actual damages, counsel fees and costs, treble and punitive damages in this claim.

## **II. MOTION TO DISMISS**

Each Defendant moves to dismiss Plaintiffs' state-law based claims in Count II (bad faith pursuant to 42 Pa. C.S.A. §8371), Count III (negligence and misrepresentation) and Count IV (misrepresentation pursuant to UTPCPL). Defendants do not seek to dismiss Count I. Defendants base their Motions to Dismiss on their arguments that Plaintiffs' claims arise from, and are inseparable from, the insurance policy and are therefore barred and preempted by federal law.

In their Answer to Defendant Nationwide's motion, Plaintiffs acknowledge that Count II against Defendant Nationwide is preempted. Thus, they abandon Count II as against Defendant Nationwide. Accordingly, Defendant Nationwide's motion to dismiss Count II will be granted. Plaintiffs do not abandon Count II with respect to Defendants Joseph Lelli and the DiRuggeris Agency. Plaintiff oppose all Defendants' motions to dismiss with respect to Counts III and IV.

## **III. DISCUSSION:**

Defendants moves to dismiss all Plaintiffs' state law claims pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c). A court may dismiss a complaint for failure to state a cause of action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Swierkiewicz v. Sorema N.A., 122 S.Ct 992, 998 (2002). The court "must take all the well pleaded allegations as true and construe the complaint in the light most favorable to the plaintiff." Colburn v. Upper Darby Twp., 838 F.2d 663, 665-66 (3d Cir. 1988). Claims should be dismissed under

Fed. R. Civ. P. 12(b)(6) only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.” Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12© is governed by the same standard of review as a Rule 12(b)(6) motion to dismiss for failure to state a claim. Neill v. State Farm Fire and Cas. Co., 159 F.Supp.2d 770, 771-772 (E.D.Pa. 2000).

The flood insurance policy Nationwide issued is a Standard Flood Insurance Policy (“SFIP”) issued pursuant to the National Flood Insurance Program (“NFIP”), 42 U.S.C. §4002 et seq. The NFIP is administered by the Federal Emergency Management Agency (“FEMA”), and flood insurance claims are ultimately paid by the United States Treasury. Van Holt. v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 165 (3d Cir. 1998). Nationwide is a participant in FEMA’s Write-Your-Own (“WYO”) program, under which a private insurance carrier is authorized to issue a standard flood insurance policy under the National Flood Insurance Program. Nationwide acts as fiscal agent of the United States in the National Flood Insurance Program.

As the Court of Appeals for the Third Circuit determined in C.E.R. 1988 v. AETNA Cas. And Sur. Co, 289, F.3d 263 (3d Cir. 2004), although Plaintiffs’ claims may appear to sound in tort, they are intimately related to - and inextricably intertwined with - the disallowance of their claim for damages. See, Id. at 268. State law claims which involve disputes regarding the adjustment and handling of claims are preempted by the National Flood Insurance Act (“NFIA”) Id. at 272. In fact, all WYO policies are now amended to read:

[A]ll disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, in the

National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4001, et seq.) and Federal common law.  
44 C.F.R. pt. 61, app. A91), art. IX.

Plaintiffs attempt to present their state law claims as claims based on fraud and misrepresentation in policy procurement which, they argue, are not preempted by the NFIA. Plaintiffs have cited case law in support of their argument that state law claims based upon fraud and misrepresentation in policy procurement are not preempted by the NFIA. However, Plaintiffs have not presented any authority which is binding on this court to support their position. Moreover, the cases upon which Plaintiffs rely all held that the respective plaintiffs' state law claims for misrepresentation and fraud were preempted by the NFIA. (See, Neill v. State Farm Fire and Casualty Company, 159 F.Supp.2d 770 (E.D. PA. 2000); Deverant v. Selective Insurance Company, Inc. 2004 WL 1171333 (E.D. Pa.,2004); C.E.R. 1988, Inc. v. The Aetna Casualty and Surety Company, 386 F.3d 263 (3d Cir. 2004)). Furthermore, where state law claims have not been pre-empted, courts have distinguished claims arising from allegations of fraud and misrepresentation in policy procurement from those relating to claims adjustment. (See, Messa v. Omaha Property & Cas. Ins. Co., 122 F.Supp.2d 513 (D.N.J.2000) where that court held that “. . .Plaintiffs' claims herein differ from those cases in which. . . the allegations of fraud where WYO insurers [or their agents]. . . engage in fraudulent behavior designed to procure customers to get flood insurance through them-instead of through other insurers or not at all.”)

Although Plaintiffs argue that their claims for fraud and misrepresentation derive from Defendants' conduct in policy procurement, construing the allegations contained in the Complaint liberally and in a light most favorable to Plaintiffs, this court must

nevertheless conclude that Plaintiffs state law claims are preempted by the NFIA. Despite Plaintiffs' assertions to the contrary, the crux of their claims in Counts II-IV are inextricably combined with the claims handling process. Plaintiffs essentially seek to hold Defendants liable for their losses based upon the adjustment of their claim. As Plaintiffs admit, at least with respect to Defendant Nationwide, Count II is clearly a claim regarding the adjustment of the benefits awarded under the policy. There is no other way to construe this Count regarding Plaintiffs' claims against the remaining Defendants. Plaintiffs simply seek an adjustment of the amount awarded on their claim for loss. The court specifically notes that in Count III of the Complaint, Plaintiffs claim that their damages result from failure to properly underwrite and investigate the premises and failure to provide insurance services in a manner consistent with the standard for insurance agents. Moreover, Plaintiffs seek, inter alia, punitive damages for this claim - the type of damages the C.E.R. court sought to preclude with respect to claims relating to the NFIA. CER at 272. Similarly in Count IV, Plaintiffs claim Defendants made misrepresentations regarding, inter alia, the existence of coverage which resulted in misunderstandings and confusion regarding their policy. Plaintiffs also seek treble damages and punitive damages in this count.

The court has carefully examined Plaintiffs' Complaint, the allegations contained therein, and the parties' briefs in support of their respective positions. Plaintiffs' Complaint does not allege that the policy limits contained in the flood insurance policy under which they seek benefits are for amounts less than the amount of benefits sought in connection with their losses due to the flood. Furthermore, Plaintiffs do not claim that their policy limits are insufficient to satisfy the maximum loss they claimed for damages.

Thus, while Defendants appear to accept potential liability for up to \$250,000.00 in covered losses under Plaintiffs flood insurance policy, See Rept. Rule 26(F) Mtg., the court does not need to rely upon Defendants' statements contained therein to establish that Plaintiffs' claims derive from, and are within the limits of, their flood insurance policy issued by Nationwide. The court concludes that Plaintiffs claims are for benefits sought under or in connection with the flood insurance policy, and also that Plaintiffs' asserted claims for damages are for amounts within the policy limits. Therefore, all of Plaintiffs' claims contained in Counts II-IV are little more than an attempt to recover - under tort theories - their asserted benefits due under the policy.

This court concludes that examination and interpretation of the Policy are required to determine the merits of all of Plaintiffs' claims against the Defendants. Interpretation of the Policy is a matter clearly intended to be preempted by the NFIA. See, C.E.R., 386 F.3d at 270, 272. Furthermore, Plaintiffs seek punitive damages, attorneys fees, treble damages and the like. Claims for this type of relief result in the type of financial burdens which draw on federal funds and contravene the National Flood Insurance Programs's purpose of reducing fiscal pressure on federal flood relief efforts. Id. at 270. Accordingly, this court concludes that Plaintiff's claims II through IV are preempted by the NFIA and will be dismissed.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANTHONY AND DONNA DUDICK, h/w	:	
Plaintiffs,	:	
	:	No.: 2:06-CV-01768-CG
v.	:	
	:	
NATIONWIDE MUTUAL FIRE	:	
INSURANCE COMPANY, et al.	:	
Defendants.	:	

**ORDER**

Presently pending is Defendant Nationwide Mutual Fire Insurance Company's and Defendants' Joseph Lelli and the DiRuggeris Agency's Motions to Dismiss Plaintiffs' State Law Based Claims, and Plaintiff's Answer in Opposition thereto. **AND NOW**, this 27<sup>th</sup> day of March 2007, **IT IS HEREBY ORDERED** that Defendants' Motions to Dismiss Plaintiffs' state law based claims, are **GRANTED**, and that all state-law based claim against Defendants are dismissed, including but not limited to Plaintiffs' state law claims of fraud, bad faith, violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, negligence, and all claims for punitive damages.

BY THE COURT:

/s/ Clifford Scott Green

CLIFFORD SCOTT GREEN