



Flood Hazard Area” as designated by the Federal Emergency Management Agency (“FEMA”). She was also given a separate written notice by the lender notifying her that the property was not in such an area and that accordingly flood insurance was not required as a condition of the mortgage loan.

In 2001, the plaintiff sought refinancing of her mortgage with a different lender. At that time it was discovered that the prior information was incorrect and that in fact her residence was in a special flood hazard area and that in order to refinance she would be required to purchase flood insurance at a cost of \$631 per year. She alleged that had she known that her property was in a special flood hazard area she would not have purchased it and that the resale value of the property has been diminished because of its location in such an area. She sought recovery in damages against the defendants on the basis of negligence (Count I), constructive fraud (Count II), actual fraud (Count III), and breach of contract (Count IV).

The defendants filed a Demurrer and Plea in Bar of the Statute of Limitations in state court and then removed the action to this court based on diversity of citizenship and amount in controversy.<sup>2</sup> The court and the parties have treated the pleadings filed by the defendants in state court as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), which motion has been briefed and argued

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<sup>2</sup> See 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2002).

and is ripe for decision.

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, the plaintiff is not entitled to relief. The court may not dismiss a complaint unless the plaintiff can prove no set of facts that would entitle the plaintiff to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A federal court exercising diversity jurisdiction must apply the law of the state in which it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). In order to determine state law, a federal court must follow the decisions of the state’s highest court, or, where the law is unclear, predict how that court would rule. *See Wells v. Liddy*, 186 F.3d 505, 528 (4th Cir. 1999).

Federal banking regulations adopted pursuant to the National Flood Insurance Act (“NFIA”), 42 U.S.C.A. §§ 4001-4129 (West 1994 & Supp. 2002), require a regulated lender of a real estate mortgage loan to determine and notify the purchaser if the property is located in a special flood hazard area. *See, e.g.*, 12 C.F.R. § 339.9 (2003) (FDIC regulation). It is settled that no express or implied federal cause of

action is created by this requirement in favor of a purchaser who fails to receive proper notice. *See Arvai v. First Fed. Sav. & Loan Ass'n*, 698 F.2d 683, 684 (4th Cir. 1983). This does not necessarily preclude a state cause of action based on a violation of the standard of conduct imposed by the federal law. *See Hofbauer v. Northwestern Nat'l Bank of Rochester, Minn.*, 700 F.2d 1197, 1201 (8th Cir. 1983). Nevertheless, those state courts that have considered the issue have rejected any such common law cause of action, based in part on principles of federalism. *See Mid-Am. Nat'l Bank of Chicago v. First Sav. & Loan Ass'n of S. Holland*, 515 N.E.2d 176, 180 (Ill. App. Ct. 1987) (holding that violation of NFIA cannot be used to create a duty giving rise to common law misrepresentation action); *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d 284, 289 (N.D. 1982) (same as to common law negligence action); *Bigler v. Centerbank Mortgage Co.*, No. CV 93 0348772 S, 1994 WL 711168, at \*2 (Conn. Super. Ct. Dec. 12, 1994) (same as to negligence, misrepresentation and fraud actions).

While there is no Virginia authority directly on point, I find 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.<sup>3</sup> Since the only activity on the part of the defendants complained of by the plaintiff is that mandated by the federal law in question, I must grant the motion to dismiss.<sup>4</sup>

A separate judgment consistent with this opinion is being entered herewith.

DATED: July 9, 2003

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United States District Judge

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<sup>3</sup> While the plaintiff also asserts a breach of contract, counsel conceded at oral argument that there was no express contract claimed, but only one implied in fact by the fee charged and the notice given. Thus, there was no contract duty assumed by the defendants other than that imposed by federal law.

<sup>4</sup> In view of my decision, it is not necessary for me to consider the statute of limitations defense raised by the defendants.