

Legal Issues Facing the Flood Industry

NFDA Annual Conference – April 8, 2014

The information shared in this presentation does not constitute and may not be relied upon as legal advice. For questions regarding your specific circumstances, please consult an attorney.

Panelists

- Tom List, NFDA General Counsel, Moye White
- Larry Chattoo, Asst. General Counsel, Bank of America
- Lauren McKenna, Attorney, Fox Rothschild LLP
- Scott Giberson, Compliance, CoreLogic/NFDA

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Agenda

Part 1

- Flood Industry Case Law Update
- Legislative Process & NFIP Reforms
- A New Environment for Industry

Lauren McKenna

Larry Chattoo

Scott Giberson

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Flood Industry Case Law Update



National Flood Determination Association
2014 Annual Meeting
Case Law Synopsis

Updated for 2014 by:
Lauren P. McKenna of Fox Rothschild LLP



Fox Rothschild LLP
ATTORNEYS AT LAW

- Case law synopsis updated as of April 2014
- You will receive an electronic copy of this synopsis in your email inbox soon
- *Special thanks to Lauren McKenna and Fox Rothschild for this update*

Flood Industry Case Law Update

Case Name: Benbenek v. Fidelity National Property & Casualty

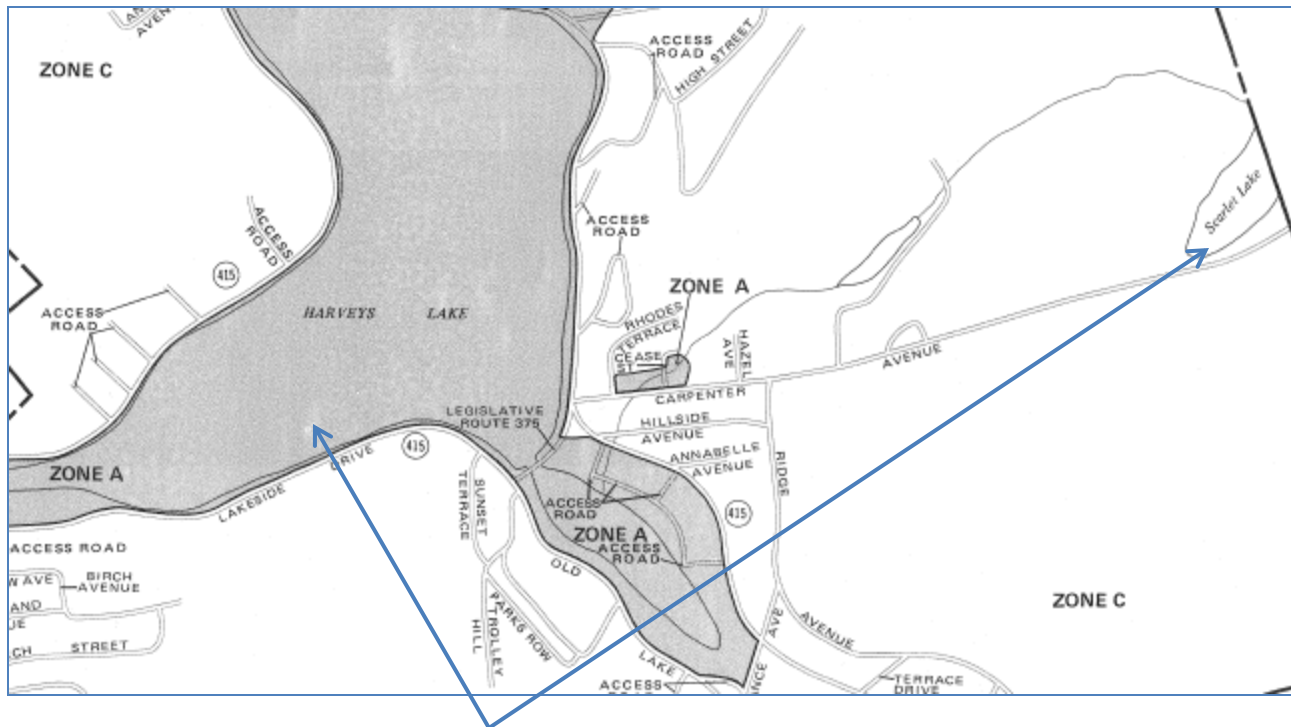
Date of Decision: September 24, 2013

Jurisdiction: U.S. District Court for Southern District of Indiana

Citation: 2013 WL 5366395

Plaintiff Michael Benbenek (the “Plaintiff”) financed a mortgage with GMAC in 2003 and GMAC required flood insurance because home was in SFHA. Plaintiff’s insurance agent obtained a quote for a Preferred Risk Policy through Defendant’s rating software based on agent’s designation of home as not being in SFHA. Defendant obtained a flood zone determination from Geotrac which also stated that building was not in SFHA. Preferred Risk Policy was issued. Later PRP was rescinded due to prior loss history and premium was raised. House flooded, Defendant paid claim and raised premium again. In 2010 a flood determination was completed for Defendant by Lereta which stated building was in SFHA. After a subsequent flood, the claim was denied due to policy exclusions related to basements. Plaintiff filed suit against Defendant alleging fraudulent misrepresentation, negligence, and breach of contract for the increased premiums, denial of coverage on finished basement and the alleged erroneous Geotrac flood determination. Court dismissed Fidelity finding Plaintiff understood premium increase possibility, that Fidelity could not alter flood policy, and that flood determination discrepancy did not constitute negligence or fraud.

Interesting legal and technical question



- Two lakes in same community, one shaded and other is not shaded

- What do you do if the flood determination is ordered on this house built over open water?



- Is open water considered SFHA?
- Why are certain water bodies shaded and others are not?
- If built after 1982, building is not eligible for NFIP flood insurance; what is lender's obligation?
- What will WYO carrier rely upon to determine eligibility?

How a Bill Becomes a Law (and how BW 12 became the law)

A New Environment for the Industry

2013-2014 headlines

- FTC sues senders of spam text messages for violations of FTC act
- Google agrees to pay \$7 million in fines after alleged violations of consumer protection laws 'street view' collected private citizen data; turns to Supreme Court in proposed class action
- Time Warner hit with robocall class action
- CFPB fines payday lender over robo-signing; payday lender agrees to refund \$14 million to consumers
- Banks to pay millions in lawsuits over force-placed insurance

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Implications for Service Providers of Regulated Lenders

CFPB Bulletin 2012-03 says that a service provider that is unfamiliar with consumer financial protection laws or that does not make efforts to implement those requirements carefully and effectively, or that has weak internal controls can harm consumers and create potential liabilities for the service provider and the institution.

CFPB Service Provider guidance

http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf

- Ted Dreyer, Wolters Kluwer Financial Services.
“Consumer Financial Protection Bureau”, NFDA
Conference 2013

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Implications for Service Providers of Regulated Lenders

Other Federal Financial Regulatory Agencies have issued regulatory guidance regarding a lender's use of third party service providers.

Examples--

Federal Reserve System (SR 13-19 / CA 13-21)

<http://www.federalreserve.gov/bankinfo/reg/srletters/sr1319.htm>

Office of Comptroller of the Currency (2013-29)

<http://occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html>

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What has changed?

- Increase in risk assessments
- Increase in compliance questionnaires
- Increase in site visits
- Increase in requests for documentation of—
 - Internal Controls
 - Procedures
 - Training
 - Compliance
 - Consumer complaint handling

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And what are the potential costs of not being prepared?

- Reputational risk to company and to client-company
- Consumer complaints against company and client-company
- Negative publicity on industry
- Potential exposure to litigation under consumer protection laws

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Litigation under Consumer Protection Laws

- Both federal and state consumer protection laws exist
- May recognize private rights of action
- May permit punitive damages and may treble damages
- Often allow for attorneys' fees to be rewarded

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Reducing the Likelihood of Litigation

- Ensure purpose of services is clear in contracts and documentation
- Ensure staff is properly trained for positions and training is recorded
- Ensure procedures are documented and followed
- Follow changes in relevant laws and regulations and potential impact on consumers (e.g. BW 12 and Homeowners Affordability Act)
- Ensure staff potentially communicating with consumers are appropriately trained
- Understand UDAAP and how to avoid it

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