



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
Baltimore Division

CATHERINE HOWELL, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Civil Action No. 1:04-CV-01494-BEL
	)	
v.	)	
	)	
STATE FARM INSURANCE COMPANIES,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

---

**PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS  
TO DISMISS CLAIMS, CLASS ALLEGATIONS AND REQUESTS FOR RELIEF**

November 12, 2004

Andrew N. Friedman (D. Md. Bar No. 014421)  
Victoria S. Nugent (D. Md. Bar No. 015039)  
Cohen, Milstein, Hausfeld & Toll, PLLC  
1100 New York Avenue, NW  
Washington, D.C. 20005  
Telephone: 202-408-4600  
Fax: 202-408-4699

Counsel for Plaintiffs

Defendants nevertheless, ask this Court to follow the *dissenting* judge in *Battle v. Seibels Bruce Insurance Company*, and hold that federal common law claims are not permitted under the SFIP.

Defendants' reliance on the *Battle* dissent is perplexing: the dissent is not only squarely at odds with the plain language of the NFIA and the SFIP, but also is unadorned by any citation to relevant authority.

The dissent's full treatment of SFIP claims grounded in federal common law states:

In my opinion, there is no cause of action arising under federal common law for either [breach of the covenant of good faith and fair dealing or conversion]. Among other reasons, acknowledging their existence under federal common law is very nearly in the teeth of *Erie Railroad v. Thompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). 'There is no federal general common law.' 304 U.S. at 78. Second, an equally strong reason is that I would not leave open on remand any option for the district court to find that such causes of action exist in this case under federal common law, thus inviting an arguable opportunity for a plaintiff to recover from the treasury of the United States on those causes of action, a result never intended under the National Flood Insurance Program. On remand, I would require the district court to dismiss those claims as not stating a federal question cause of action.

*Battle*, 288 F.3d at 610. Thus, Defendants urge this Court to reject the majority view in *Battle*, the express language of the NFIA implementing regulations and the SFIP, the federal common law developed in the Court of Claims and the Court of Appeals for the Federal Circuit governing contract disputes, and dismiss Plaintiffs' claims based on an unsubstantiated opinion expressed by one judge in the *Battle* dissent.

Defendants attempt to avoid liability for federal common law claims by arguing that all common law claims are preempted by the express language of the SFIP and related regulations. State Farm 12(b)(6) Mem. at 29-31. This simply is not so. The NFIA regulations and the SFIP explicitly establish that federal law – "the flood insurance regulations issued by FEMA, the National Flood Insurance Act

of 1968, as amended (42 U.S.C. 4001, *et seq.*), and Federal common law” – exclusively governs all claims arising from the SFIP. 42 C.F.R. § 61 App. A(1) (SFIP governing law provision). Under this scheme, numerous courts have held – and Plaintiffs do not dispute – that claims premised upon state statutes or state common law are preempted under the Supremacy Clause of the federal Constitution. *See, e.g., Gibson v. American Bankers*, 289 F.3d 943 (6th Cir. 2002). However, Defendants cannot bootstrap a conclusion that federal common claims are likewise preempted on the holdings of these preemption opinions. The doctrine of federal preemption arises from the Supremacy Clause of the federal constitution, U.S. Const. art. VI, cl. 2., and provides that state law in conflict with federal law is without effect. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks, citation omitted).<sup>10</sup> Where, as here, state law is not invoked, the doctrine of preemption is neither relevant nor necessary.

Defendants’ overreaching on this point is apparent from the specific cases that they rely upon – *Neill v. State Farm Fire and Cas. Co.*, 159 F. Supp. 2d 770 (E.D. Pa. 2000), and *Scherz v. South Carolina Ins. Co.*, 112 F. Supp. 2d 1000 (C.D. Cal. 2000) – both of which clearly conclude that state law claims are preempted, without making any broader statements about federal common law claims. *Neill*, 159 F. Supp. 2d at 778 (concluding that state law claims arising under Pennsylvania consumer protection and “bad faith” statutes gave rise to conflicts with federal law and were thus preempted);

---

<sup>10</sup> The preemption doctrine, moreover, is intended to facilitate uniformity in a regulatory scheme. Under the SFIP, the governing law provision ensures that Defendants are not exposed to the conflicting laws of states; rather, they may only be found liable under federal law. *See* Final Rule, 65 Fed. Reg. 60767 (explaining that governing law provision added to SFIP to address “need for uniformity in the interpretation of and standards applicable to the policies and their administration”).