

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 4:18-cv-10077-KMM

RICARDO RODRIGUEZ,

Plaintiff,

v.

WRIGHT NATIONAL FLOOD INSURANCE CO.,

Defendant.

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**ORDER ON DEFENDANT'S MOTION TO DISMISS**

THIS CAUSE came before the Court upon Defendant Wright National Flood Insurance Company's ("Defendant") Motion to Dismiss ("Motion") (ECF No. 6) certain claims raised by Plaintiff Ricardo Rodriguez ("Plaintiff") in the Complaint.<sup>1</sup> Plaintiff failed to file a response and the time to do so has passed. The matter is ripe for review.

**I. BACKGROUND<sup>2</sup>**

Defendant is a Write-Your-Own ("WYO") insurance carrier participating in the United States Government's National Flood Insurance Program ("NFIP"). The NFIP makes Standard Flood Insurance Policies ("SFIPs") available to individuals who seek protection. 42 U.S.C. § 4001(c). The WYO program permits private insurance companies to issue SFIPs in their own

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<sup>1</sup> Plaintiff filed the Complaint (ECF No. 1-1) in state court and Defendant removed the action to federal court (ECF No. 1).

<sup>2</sup> The following background facts are taken from Plaintiff's Complaint (ECF No. 1-1), and accepted as true for purposes of ruling on this Motion. The Court also considers the "Flood Declarations Page" (ECF No. 8), attached as an exhibit to Defendant's Motion. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on 12(b)(6) motions, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice").

names. 44 C.F.R. § 62.23(F). “By statute, a WYO carrier acts as a ‘fiscal agent’ and ‘fiduciary’ of the United States.” *Smith-Pierre v. Fidelity Nat. Indem. Ins. Co.*, No. 11-60298-CIV, 2011 WL 3924178, at \*1 (S.D. Fla. Sep. 7, 2011) (citing 42 U.S.C. § 407(a)(1); 44 C.F.R. § 62.23(f)).

Defendant issued Plaintiff a contract of insurance, No. 09 1150148449 07 (“Policy”),<sup>3</sup> to cover Plaintiff’s property located at 19 Astor Terrace, Key West, Florida 33040 (“Property”). Compl. (ECF No. 1-1), ¶ 8. On September 10, 2017, during the coverage period of the Policy, hurricane winds and rain damaged Plaintiff’s Property. *Id.*, ¶ 11. Plaintiff made a timely claim for the damage to the Property. *Id.*, ¶ 12. Defendant tendered partial payment on Plaintiff’s claim. *Id.*, ¶ 13.

Plaintiff alleges that Defendant breached the Policy. *Id.*, ¶ 16. Plaintiff seeks entry of judgment against Wright for breach of contract, actual and compensatory damages, pre-judgment interest, and attorney’s fees and costs pursuant to section 627.428 of the Florida Statutes. *Id.*, ¶ 18. Defendant moves to dismiss Plaintiff’s claims for damages pursuant to Florida law, including actual and consequential damages, attorneys’ fees, costs, and interest, arguing that these state law claims are preempted and barred by federal law. Motion (ECF No. 6) at 1.

## II. STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556

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<sup>3</sup> The Flood Declarations Page (ECF No. 8) states that the Policy is a standard NFIP Policy, or SFIP, for the Property identified in the Complaint during the relevant time period. The Court notes that the Flood Declarations Page identifies the Policy number as 09 1150148449—which differs from the Policy number identified by Plaintiff in the Complaint. The Court relies upon the information contained in the Flood Declarations Page and attributes the inconsistency to scrivener’s error.

U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The purpose of this requirement is “to give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555. When considering a motion to dismiss, the court must accept all of the plaintiff’s allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must also contain enough facts to indicate the presence of the required elements. *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1302 (11th Cir. 2007). However, “[a] pleading that offers ‘a formulaic recitation of elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “[C]onclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal.” *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

### **III. DISCUSSION**

Defendant moves to dismiss Plaintiff’s claims for damages pursuant to Florida law—including actual and consequential damages, attorney’s fees, costs, and interest. Defendant argues that (1) federal law applies; (2) state law claims under the SFIP are preempted and barred by federal law; and (3) the claims for consequential damages and fees fail under the SFIP.

The Eleventh Circuit has explicitly stated that federal law applies in such cases. “[M]atters pertaining to the SFIP . . . must be heard in Federal court and are governed exclusively by Federal law.” *Shuford v. Fidelity Nat. Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1344 (11th Cir. 2007) (internal citation omitted).

The Eleventh Circuit has also made clear that state law claims pertaining to SFIPs are preempted. “A claim under state law is expressly preempted ‘when Congress has manifested its

intent to preempt state law explicitly in the language of the statute.” *Shuford*, 508 F.3d at 1344 (quoting *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004)). “The terms of the SFIP are set by federal regulations.” *De La Cruz v. Bankers Ins. Co.*, 237 F. Supp. 2d 1370, 1372 (11th Cir. 2002). And in *Shuford*, the Eleventh Circuit stated that “[t]he plain language of the [SFIP], which is embodied in a federal regulation, reflects a clear intent to preempt claims under state law[.]” *Shuford*, 508 F.3d at 1344. Thus, “[a] WYO company may write a policy in its name, but FEMA dictates the terms.” *Newton v. Capital Assur. Co., Inc.*, 245 F.3d 1306, 1312 (11th Cir. 2001). Accordingly, the state law claims are preempted by federal law.

Further, only certain types of loss under SFIPs are covered by federal law. The federal regulations provide that only direct physical loss by or from flood are covered. 44 C.F.R. pt. 61, App. A(1), Art. V(A). “[T]he type of loss insured under the SFIP does not include the kind of economic loss claimed by appellant under the rubric of ‘consequential damages.’” *Perdido Sun Condominium Ass’n, Inc. v. Nationwide Mut. Ins. Co.*, No. 3:06cv3118/MCR, 2007 WL 2565990, \*6 (N.D. Fla. Aug. 30, 2007) (quoting *Atlas Pallet, Inc. v. Gallagher*, 725 F.2d 131, 139 (1st Cir. 1984)). In addition to consequential damages, attorney’s fees and costs are similarly barred. *Chatman v. Wright Nat’l Flood Ins. Co.*, No. 3:1-cv-00125-HES-PDB, 2017 WL 3730558, at \*1 (M.D. Fla. June 21, 2017) (quoting 44 C.F.R. pt. 61, App. A(1), II(B)((12)) (“under federal law, Plaintiff is not entitled to recover attorney’s fees or other litigation related expenses, as the SFIP only extends to provide coverage for ‘loss or damage to insured property, directly caused by a flood’”). The law is also well established that a claim for prejudgment interest under the SFIP fails. *Newton v. Capital Assur. Co., Inc.*, 245 F.3d at 1312 (“prejudgment


interest awards against WYO companies are direct charges on the public treasury forbidden by the no-interest rule”).

Accordingly, Plaintiff’s state law claims are preempted by federal law and those claims must be dismissed as set forth above. *See 121 Duval Co., Inc. v. American Bankers Ins. Co. of Florida*, 13-10130-CIV-MARTINEZ-GOODMAN, 2014 WL 11514597, \* (S.D. Fla. June 20, 2014).

#### IV. CONCLUSION

Upon consideration of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, the Motion to Dismiss (ECF No. 6) Plaintiff’s state law claims is hereby GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of August, 2018.



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K. MICHAEL MOORE  
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record