

## Homeowner Loses Suit Over Faulty Flood Zone Certificate

By [Ertel Berry](#)

A Durham homeowner cannot sue a company that incorrectly certified her property as outside of a flood zone, a federal judge has ruled in a case of first impression.

"Given the amount of flood-related litigation this state has seen over the last 10 years, mainly arising out of numerous hurricanes, this is a significant decision for the flood insurance industry, and certainly for folks like my client who provide flood zone certifications to federally-regulated lenders," said the defendant's lawyer, Judson Welborn of Raleigh.

The plaintiff in *Ford v. First American Flood Data Services, Inc.* (North Carolina Lawyers Weekly No. 06-03- 1162, 21 pages) claimed she never would have bought the property if she had known it was in a flood hazard area.

Once the truth came out — after two faulty certifications by the defendant, one before closing and the other during a refinance — the plaintiff was required to pay expensive flood insurance premiums for the life of her mortgage loan with USAA.

She filed suit in the U.S. Middle District against First American Flood Data Services, which provided the flood zone certification to USAA.

Citing state law, the plaintiff claimed First American was negligent. She also claimed she was a third-party beneficiary of the contract between USAA and First American.

In an Oct. 11 decision, the suit was dismissed under Rule 12(b)(6) by U.S. Middle District Judge William L. Osteen.

The Fourth Circuit barred similar claims under federal law in a 2004 decision but no North Carolina state court had addressed whether state law allowed suits against flood zone determination companies, according to Judge Osteen.

"There has been a lot of litigation, especially in Eastern North Carolina, primarily arising out of Hurricane Floyd," said Welborn. "But most of that dealt with the failure of an insurance agency or agent to provide appropriate coverage, as opposed to the situation here, where a flood certification company makes an erroneous determination that allegedly gives rise to a claim by a mortgage borrower against the company."

Judge Osteen said the North Carolina Supreme Court, if faced with the faulty certification issue, would follow the "overwhelming majority" of state and federal courts that have ruled on the matter.

Under those precedents, the plaintiff in *Ford* had no right to bring a private action against a flood zone determination company under either North Carolina common law or the federal Flood Disaster Protection Act of 1973, said Judge Osteen.

The federal act says that, before making or amending a loan secured by improved real property, the lender must determine whether the property is located in a special flood hazard area. The lender may allow a third party, like First American, to make the determination "so long as the third party guarantees an accurate result."

Said Judge Osteen: "After having considered the indicators of Congress's intent, including plain language, legislative history, and statutory structure and purpose, it appears that Congress did not intend to allow a private right of action, whether a state or federal claim, for a violation of the flood zone determination and notification provisions of the act."

The plaintiff argued that her claims were not based on the federal act but on common law negligence and contract principles.

Judge Osteen disagreed.

"Any duty First American owed to plaintiff, either from the contract between First American and USAA or from an ordinary negligence standard, would have arisen from the act," he said. "For this reason, plaintiff's claims are based directly on alleged violations of the act."

The plaintiff was unable "to cite a single case in which either a federal or state court has allowed a state law cause of action based on a violation of the act," according to Judge Osteen.

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