UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7249

EASTWOOD CORPORATION,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Bell Savings Banc of Texas,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(CA3-88-2383-T)

(December 29, 1993)

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges and WERLEIN,* District Judge.**

GARWOOD, Circuit Judge:

The issues before us in this appeal arise in the context of summary judgment and concern, *inter alia*, the propriety of the district court's ruling on the value of certain collateral, an

* District judge of the Southern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

issue which we find was not raised by either party as a ground for summary judgment. Accordingly, we reverse the judgment on that issue and remand for further proceedings. We affirm in part and reverse in part on the remaining issues before us.

Facts and Proceedings Below

Plaintiff-appellant in this action is Eastwood Corporation (Eastwood), the successor in interest to the shareholders (Shareholders) of Anderson Systems International Holdings, Inc. (Holdings). Defendant-appellee is the Federal Deposit Insurance Corporation (FDIC), as receiver of Bell Savings Banc of Texas (Bell Savings).

This procedurally complex lawsuit began in 1988 when Eastwood sued the Federal Savings and Loan Insurance Corporation (FSLIC), which was then acting as receiver for Bell Savings. The FDIC was later substituted for the FSLIC following the passage of the Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. 101-73, 103 Stat. 183 (1989).

Eastwood's claims originate from the 1983 sale of all outstanding capital stock of Holdings to S & L Financial Corporation (Bell Sub), a wholly-owned subsidiary of Bell Savings.[1] As a result of the sale, Anderson Systems International, Inc. (ASI), a wholly-owned subsidiary of Holdings involved in the manufacture of precast concrete building modules, became a second tier wholly-owned subsidiary of Bell Sub.

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[1] S & L Financial Corporation later changed its name to Bell Banc Development, Inc. but remained a wholly-owned subsidiary of Bell Savings.

The Stock Purchase Agreement governing the sale provided that the Shareholders would receive (1) $1,500,000 in cash; (2) a promissory note for $1,500,000; and (3) additional payments contingent upon certain future profitability or operational achievements by ASI, including a $200,000 payment for each module casting mold completed by ASI. In addition, Bell Sub expressly and impliedly agreed that it would use its best efforts to operate and continue the business of Holdings so that the business would be profitable.

The parties executed Pledge and Security Agreements, pledging all capital stock of Holdings and ASI to secure Bell Sub's obligations to the Shareholders and granting the Shareholders a security interest in the intellectual property of Holdings and ASI. Bell Savings executed a Guaranty, guaranteeing the debts and obligations of Bell Sub, Holdings, and ASI under the Stock Purchase Agreement and the Promissory Note.

On August 2, 1985, the Federal Home Loan Bank Board (FHLBB) declared Bell Savings insolvent and appointed the FSLIC as receiver. On August 30, the Shareholders organized and formed Eastwood as successor in interest to the Shareholders' rights arising from the 1983 transactions.

At the time of the declaration of insolvency, Bell Sub's payments on the Promissory Note, with accrued interest, were current. The FSLIC funded one additional payment in October 1985, reducing the balance due under the Promissory Note to $900,000. No further payments were made. Additionally, Bell Sub owed Eastwood $600,000 for three molds which had been completed prior to Bell's insolvency. The FSLIC made no payments on this amount. The FSLIC assumed control over the affairs of ASI temporarily, but later caused the business to cease operations.

Eastwood notified the FSLIC of its claims for the balance due on the note and for the payments due for the completed molds, $1,500,000 in all. The FSLIC denied the claims as untimely, but the FHLBB remanded for reconsideration on the merits. On August 26, 1988, the FSLIC issued its decision, allowing Eastwood's claims for the full $1,500,000, but assigning them unsecured status.[2] The FSLIC disallowed Eastwood's claim for interest.

On September 23, 1988, while an appeal from the FSLIC's second ruling was pending before the FHLBB, Eastwood filed this action in the district court against the FSLIC, as receiver for Bell Savings, seeking judgment for Bell Savings' obligations as guarantor.[3] In addition to claims for the amounts due under the Promissory Note and the payments for the completed molds, Eastwood requested

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2 FSLIC classified Eastwood's claims as (f)(7) claims. According to the regulations governing the receivership, these claims were:

> "Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims of the fifth and sixth categories; any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default[.]"

3 Eastwood later amended its complaint to add claims against FSLIC in its corporate capacity and against the FHLBB, which had, since the commencement of the lawsuit, denied Eastwood's claims on appeal from the FSLIC decision.

monetary damages for the FSLIC's failure to continue the operation of ASI in order for ASI to generate profits and increase Eastwood's compensation under the "additional payments" provisions of the Stock Purchase Agreement.

The FDIC, stepping into the shoes of the FSLIC, answered and moved for dismissal for lack of subject matter jurisdiction and for failure to state a claim. In particular, the FDIC contended that Eastwood should have exhausted its administrative remedies prior to instituting the action and that the claims for monetary damages for failure to continue ASI's business sounded in tort and were barred by Eastwood's failure to comply with the Federal Tort Claims Act (FTCA). The district court denied the motion to dismiss, finding that the action was not premature, under the Supreme Court's ruling in *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 109 S.Ct. 1361 (1989), and ruling that Eastwood's claims for monetary damages were based on contract theories rather than tort.

Eastwood moved for partial summary judgment, renewing its demand for the amounts due under the Promissory Note and for the completed molds, and asserting that the FDIC should classify its claims as secured, pursuant to the Pledge and Security Agreements. Eastwood also claimed judgment for interest on its $1,500,000 claim and requested both a ruling that the FSLIC's classification scheme was unlawful and an interlocutory order prohibiting the FDIC from distributing any more funds to creditors of Bell Savings. Other than its claim for the $600,000, Eastwood did not move for summary judgment on its claims involving the additional payments arising from Bell Sub's operation (and cessation of operation) of ASI.

The FDIC filed a cross-motion for summary judgment on the issues of the authority of the FHLBB over the liquidation of Bell Savings and the authority of a federal receiver to determine the time and manner of distribution of receivership assets. The FDIC's motion also raised the issue of the duty, or lack thereof, of a receiver to invest assets of a receivership or continue operation of a business in receivership.

The district court granted each summary judgment motion in part and ordered that the case be dismissed with prejudice. On Eastwood's motion, the court found that the FDIC had abused its discretion in classifying the claim for the Promissory Note balance as unsecured and ordered the FDIC to return the collateral to Eastwood. It decided, however, that the value of the collateral securing the Promissory Note was *de minimis*, thus in essence relegating Eastwood to the ranks of the unsecured creditors on that claim. The court held that the FDIC had properly classified the mold payment claim as unsecured. Addressing the FDIC's motion, the court agreed that the FDIC and its predecessors had the necessary authority to promulgate regulations governing the receivership for Bell Savings. Finally, the district court concluded that Eastwood's claims against the FDIC based on the FSLIC's decision to terminate the operations of Holdings and ASI sounded in tort and dismissed the claims as within the discretionary function exception to the Federal Tort Claims Act.

Eastwood filed a motion for new trial or for amendment or modification of the judgment, which the district court denied. Eastwood now brings this appeal.

Discussion

In reviewing a summary judgment, we employ the same standard the district court should. "Our function in reviewing the district court's decision is thus two-fold. First, we must decide whether the district court `overlooked or impermissibly resolved any disputed material facts.' Our second job on appeal involves deciding whether the district court correctly applied the relevant law to the undisputed facts." *Equal Employment Opportunity Comm'n v. Boeing Services Int'l*, 968 F.2d 549, 553 (5th Cir. 1992) (internal citations omitted). It is primarily the former function which requires our attention in the present case.

I. Secured Status

A. Promissory Note

The district court held that Eastwood's claim for the principal balance due under the Promissory Note was secured by the pledge and security agreements. The court examined FHLBB Resolution 85-642, which sets forth the priority schedule for payment of claims of Bell Savings' creditors. Section (a) of the secured claims section of that regulation provides:

> "An allowed claim of a creditor secured by a lien on property of Bell or in which Bell has an interest is secured to the extent of the realizable value of the property securing such claim, and is unsecured to the extent that such realizable value is less than the amount of the allowed claim."

Section (c) of the same section provides:

> "A claim to security shall be recognized by the Receiver to the extent that . . . such creditor claim is secured by . . . assets or property of any kind of Bell or in which Bell has an interest."

The district court concluded that these provisions were sufficient to establish that FSLIC should have granted secured status to Eastwood's claim for the balance due under the note:

> "The court concludes that FSLIC abused its discretion in determining that no part of Eastwood's claim was entitled to secured status. It is undisputed that Bell Sub executed a valid security agreement which pledged the stock and intellectual property of Holdings as collateral, and that Bell Sub was the wholly owned subsidiary of Bell. Subsequent to Bell's insolvency and the termination of Bell Sub, FSLIC, and now FDIC, continued to maintain possession of the collateral which forms the basis of the security agreement between Eastwood and Bell Sub.
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> "The court concludes that, through its interest in its subsidiary, Bell had an interest in the collateral which formed the basis of the security agreement between Bell Sub and Eastwood."

We agree with the district court's conclusions and affirm its determination that Eastwood's claim for the balance due under the note is secured.

B. Completed Molds

We disagree, however, with the lower court's findings that Eastwood's claim for the $600,000 for the molds was unsecured. It was undisputed that ASI had produced three molds before Bell Savings was declared insolvent in August 1985. Because Eastwood had not made a demand for the $600,000, however, as required by the Guaranty, the district court concluded that the claim had not accrued or become unconditionally fixed prior to Bell Savings' insolvency and that the claim was properly classified as unsecured.

The Guaranty provided:

> "In the event of default by Debtor in payment or performance of all or part of the Guaranteed Obligations, when such Guaranteed Obligations become due, either by its terms or as the result of the exercise of any power to accelerate, Guarantor shall, *on demand* and without further notice of dishonor, pay the amount due thereon to the Shareholders." (Emphasis added.)

While Bell Savings may not have been required to make payments on the $600,000 until Eastwood demanded it, under the terms of the Stock Purchase Agreement the debt arose upon completion of the molds. The language of Section Three of the Stock Purchase Agreement, which describes the additional payments, does not condition the obligation to pay for the molds on any event other than their completion.[4] The FDIC does not dispute that the casting molds had been completed prior to Bell Savings' insolvency. Although Eastwood may not have made its demand on Bell Savings at that time, its claim for the molds had certainly accrued and become unconditionally fixed.

The district court's analysis of the Promissory Note claim applies equally to the claim for the payments for the completed molds, because the Pledge and Security Agreements executed by Bell Sub in favor of Eastwood's predecessors secured Bell Sub's obligations under both the Promissory Note and the Stock Purchase

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[4] Section Three provides in part:

> "In addition to the payments set forth in Sections 2(a) and (b) hereof, [Bell Sub, Holdings, and ASI] hereby agree jointly and severally to pay to the Paying Agent on behalf of the Shareholders, within forty-five (45) days of the end of each calendar quarter, an amount equal to the following amounts multiplied by the Percentage (as hereinafter defined), up to a total payment of $10,000,000:
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> * * * *
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> "(e) $200,000 for each Module Casting Mold owned by or on behalf of [Holdings or ASI] in lieu of a percentage of gross receipts attributable to the sale of Castings resulting from such ownership, payable with respect to that quarter in which the Module Casting Mold is completed . . . ."

Agreement.

The district court erred in holding that Eastwood's claim for the $600,000 for the completed molds was unsecured.

II. Value of the Collateral

Eastwood claims that the district court improperly found, as a matter of fact, that the value of its collateral is *de minimis*. The court stated in its summary judgment order, after determining that Eastwood's claim for the balance due under the Promissory Note was secured:

> "Eastwood's status as a secured creditor appears to be of dubious value, as section (a) of the classification schedule provides that an allowed claim is secured only to the extent of the realizable value of the property securing the claim. Operation of Holdings has been terminated, and the value of the stock and intellectual property of the business appears to be *de minimus* [sic]."

Although the district court correctly reclassified Eastwood's claim for the principal balance owing on the Promissory Note as secured and concluded that the collateral should be turned over to Eastwood, its determination that the value of that collateral was *de minimis* was improper. Neither Eastwood nor the FDIC made any factual or legal assertion concerning the value of the collateral in its motion for summary judgment or in its response to the opposing party's motion.

There was no need for Eastwood to raise the issue of the value of the collateral, as summary judgment could properly be entered on the issue of its secured status even if there remained a genuine issue of fact as to the amount of its claim. *See* FED. R. CIV. P. 56(c) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."). Further, there is no requirement that Eastwood support its own summary judgment motion with evidence negating a possible claim by the FDIC that the collateral was valueless. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986) ("we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim") (original emphasis). Finally, there was no need for Eastwood to submit evidence regarding the value of its collateral in response to the FDIC's motion for summary judgment because the FDIC did not put the value of the collateral at issue.[5]

Although a district court may grant summary judgment on a ground not raised in the summary judgment motion under certain circumstances, it may not do so without giving prior notice to the party against whom a judgment is entered. *Judwin Properties, Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 436-437 (5th Cir.

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[5] The FDIC claims that it raised the issue of the collateral's value by pointing out in its motion for summary judgment that "a liquidating receiver has no duty to invest assets of a receivership in a speculative non-profitable business for the benefit of one creditor over another" and "[t]he receiver for Bell Savings did not, in its discretion, choose to expend assets of the receivership to meet the speculative obligations of its subsidiary Bell Development." These statements were made in the context of the FDIC's own motion for summary judgment on Eastwood's claims for monetary damages for the failure to carry on the business of ASI and Holdings. As such, the statements were not sufficient to put Eastwood on notice that the value of the collateral was at issue on its secured status claim. The FDIC's references to the profitability of the business never addressed the issue of the effect of the value of the collateral on Eastwood's secured status, *i.e.*, that Eastwood, if a secured creditor, was secured only to the extent of the value of the collateral, according to the terms of the FHLBB resolutions governing the receivership of Bell Savings.

1992) (holding that a court could not grant summary judgment to the movant on a ground not raised in its motion without giving the non-movant ten days notice to allow it the opportunity to present its case on that ground). *See also Federal Deposit Ins. Corp. v. Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991) (declining to consider on appeal new grounds in defense of summary judgment where non-moving party was not on notice of the need to address those grounds and record was not adequately developed).

The district court may not resolve disputed issues of material fact on summary judgment.[6] *Jones v. Western Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982) ("The trial court has no duty to decide factual issues, only whether there is an issue of fact to be

[6] Eastwood claims there was an issue of material fact concerning the value of the collateral. It refers to the affidavit of J. Douglas Kilpatrick, III, president of Eastwood and former general manager of ASI, which Eastwood filed with its timely motion for new trial, after the district court granted summary judgment dismissing the case. The FDIC argues that, because the Kilpatrick affidavit was not filed until after the district court had granted summary judgment, Eastwood did not raise an issue of material fact concerning the issue of the collateral's value in its motion for summary judgment.

In the affidavit, Kilpatrick stated that he was approached in the spring of 1990 by an unidentified foreign company which was interested in purchasing the exclusive use of the ASI intellectual property and which issued a firm offer of $1.8 million as consideration for such a right. Kilpatrick asserted that as a result of this offer, he requested and was granted the right to inspect the intellectual property collateral, stored in one of the FDIC's secured warehouses in Dallas, Texas. According to the affidavit, only twenty percent of the collateral remained; a representative of the FDIC informed Kilpatrick that the missing items may have been in a building which had been bulldozed along with its contents. The FDIC did not confirm this statement.

Presumably, Eastwood did not submit this affidavit with its motion for summary judgment because it moved only for partial summary judgment and saw no need for this evidence at that stage. Eastwood presented the affidavit with its motion for new trial, after the *district court* had for the first time placed the value of the collateral at issue.

tried."). In ruling on the value of the collateral, the district court decided against Eastwood a material fact which was not expressly or impliedly raised by or included within either party's motion for summary judgment or reply thereto. This was improper.

The FDIC makes several arguments to excuse the district court's action. First, the FDIC asserts that the district court may properly grant summary judgment on an issue not raised by the prevailing party, citing as authority *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991). In that case, this Court affirmed the district court's *sua sponte* granting of summary judgment for the nonmoving party on an issue *raised by the moving party in its motion*. We do not face that situation here. Instead, the district court below granted summary judgment for the FDIC on an issue that *neither party* had asserted as grounds for judgment.

In addition, the FDIC claims that Eastwood waived its right to a determination of the value of the collateral because it did not exercise its rights under the Pledge and Security Agreements to foreclose and to take control of ASI Holdings and ASI after Bell Sub defaulted. While Eastwood's failure to foreclose may constitute a waiver of the right to nonjudicially foreclose, it does not create a waiver of the lien in the collateral.

Finally, as an alternate ground for affirmance, the FDIC claims that Eastwood's security interest, if any, ran only to property in which Bell Savings had a direct interest, not in property in which its interest was as a parent to its subsidiary, Bell Sub. The district court rejected this theory in its summary judgment order below, finding that Eastwood had lien on property "in which Bell has an interest," as required by the FHLBB resolution governing the receivership.[7] While we admit some appeal to the FDIC's argument, we conclude that under the circumstances here the passing of the property from the wholly-owned subsidiary to Bell Savings would not operate to nullify the security interest as to the transferred assets, particularly as Bell Savings was from the inception clearly burdened with knowledge of and affirmatively recognized the validity of Eastwood's interest in the collateral.

We reverse the district court's determination that Eastwood's collateral was of *de minimis* value and remand this action to allow the parties to present evidence regarding the value of the collateral.[8]

III. Tort/Contract Claims

Section Three of the Stock Purchase Agreement allowed additional payments to the shareholders up to $10 million, $600,000 of which had accrued for the completed molds. Eastwood claimed the remaining possible $9.4 million as losses caused by the decision of the FDIC's predecessors to terminate the operations of ASI and Holdings. The district court characterized this claim as sounding

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[7] Although the district court rejected this theory below, the FDIC may raise this issue on appeal as possible grounds for affirming the result reached by the district court. 9 J. MOORE, FEDERAL PRACTICE, § 204.11[3] ("However, even if an appellee does not file a cross-appeal or cross-petition, he may defend the judgment in his favor with any argument that is supported by the record, whether it was ignored by the court below or flatly rejected.").

[8] We do not determine whether summary judgment would be appropriate on a properly developed record. Clearly, however, Kilpatrick's affidavit (see note 6, *supra*) makes it evident that Eastwood's position is not frivolous.

in tort rather than in contract;[9] the court held that the claims fell within the discretionary function exception to the FTCA and dismissed them.

We are concerned here with the possibility that the district court did not have jurisdiction over Eastwood's claim for monetary damages because Eastwood failed to exhaust its administrative remedies.[10] Although in *Coit Independence Joint Venture*, 109 S.Ct. at 1361, the Supreme Court allowed a creditor of an institution in receivership to bring its state law claims against that institution in district court before exhausting its administrative remedies, Eastwood's claim for monetary damages presents a slightly different situation.

This is not a claim to collect on a pre-receivership debt owed by the institution in receivership. There, as allowed by *Coit*, the creditor could file its claim in district court, receive its judgment, and file that judgment with the FDIC as receiver for payment. Here, however, Eastwood has filed a claim for alleged wrongs done by the FDIC (or its predecessors) in its actions in managing the receivership of Bell Savings.

Eastwood's claim in its original complaint, asserted against the FSLIC in its role as receiver, sought damages based upon the FSLIC's ceasing to operate the business of ASI and Holdings and the

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[9] In this ruling, the district court reversed its earlier decision in which it denied the FDIC's motion to dismiss on these grounds.

[10] Counsel for Eastwood conceded at oral argument that it did not file a claim with FDIC or its predecessors for damages arising out of the decision to terminate the operations of ASI and Holdings.

resulting waste of the assets of those companies. In its amended complaints, Eastwood reasserted the claim, against the FDIC in its corporate *and* receivership capacities, both as a breach of the Guaranty contract and as a breach of fiduciary, statutory, and other duties allegedly owed to Eastwood to preserve the assets of ASI and Holdings. It is not clear, in the event Eastwood prevailed on this claim, whether the claim would be paid out of the assets, if any remain, of Bell Savings or whether it would be paid out of the assets of the FDIC.

We remand this issue to the district court to allow the parties to address this jurisdictional concern.[11]

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[11] Because we remand this issue to the district court to address the jurisdictional point, we do not reach the issue of whether Eastwood's claims sound in tort or contract. We note, however, that in either case, Eastwood's recovery is limited, if not barred entirely.

We agree with the district court that, if Eastwood's claims sound in tort, they are barred by the FTCA. *See United States v. Gaubert*, 111 S.Ct. 1267 (1991) (acts of FHLBB in advising and overseeing operation of a thrift institution fell within discretionary function exception to the FTCA).

If the claims are based on contract, any liability of the FDIC is limited by statute. 12 U.S.C. section 1821(e)(1) makes clear that the FDIC had no duty to continue the business of ASI and Holdings as provided for in the Stock Purchase Agreement. This section allows a receiver to disaffirm or repudiate any contract (1) to which the institution in receivership is a party; (2) if the receiver, in its discretion, determines the performance of the contract to be burdensome; and (3) if the disaffirmance or repudiation of the contract would promote the orderly administration of the institution's affairs. The FDIC may exercise its rights of repudiation as set forth in section 1821(e)(1) within a reasonable time following its appointment as receiver. 12 U.S.C. § 1821(e)(2). Any liability for the disaffirmance or repudiation of a contract is limited to actual direct compensatory damages, which do not include damages for lost profits or opportunity. 12 U.S.C. § 1821(e)(3). The fact that the FDIC (or its predecessors) operated ASI's business for a short period following the declaration of Bell Savings' insolvency does not preclude the FDIC from later repudiating the contract. 12 U.S.C. § 1821(e)(7)(C).

IV. Interest and Attorneys' Fees

Eastwood claims it is entitled to interest on its claims against the FDIC. The Promissory Note provided for interest at the rate of eleven percent until maturity and eighteen percent thereafter. Eastwood claimed prejudgment interest at the rate of 6% on the $600,000 claim.[12]

The district court assumed that interest would have been available under the Promissory Note had the collateral been of sufficient value for Eastwood to recover under the note.[13] Because we reverse the district court summary judgment that the collateral had only *de minimis* value, we cannot determine the availability of interest under the note. Should Eastwood recover on its Promissory Note claim upon remand, and should the value of the collateral exceed the principal so recovered, the district court must determine the amount of interest due, as calculated under the terms of the note.

On the issue of attorneys' fees, Eastwood is not entitled to

The FDIC had no duty to continue operation of ASI and Holdings. Although it may perform functions of the failed institution in the name of the institution, these functions are those which are consistent with the appointment as conservator or receiver. 12 U.S.C. § 1821(d)(2)(B)(iii). Its role with regard to this receivership is generally to liquidate the business of Bell Savings, not to indefinitely continue to run unrelated businesses owned by a subsidiary corporation.

[12] The district court held that Eastwood was not entitled to interest on its $600,000 claim, as interest was not provided for in the Guaranty or in the Stock Purchase Agreement.

[13] The court noted in its summary judgment order that, "had Eastwood established a specific value for its collateral, it would have been entitled to an award of interest commensurate with the value of the collateral."

such fees at this time. The terms of the Guaranty condition payment of attorneys' fees upon the collection of money from Bell Savings: "Notwithstanding any limit on the liability of Guarantor hereunder, *if any sum due the Shareholders by Guarantor is placed in the hands of an attorney for collection*, . . . then Guarantor promises to pay the Shareholders reasonable collection and attorneys' fees to the extent allowed by law." (Emphasis added.)

Eastwood also claimed attorneys' fees under the Texas Civil Practices & Remedies Code, section 38.001. The award of such fees under this section is discretionary. Eastwood argues that FSLIC's and FDIC's actions during the administrative stages of this action justify an award of attorneys' fees. The district court did not address these grounds for recovery of fees; it merely found that, given the disposition of the action, neither party was entitled to attorneys' fees.

While we agree that the district court did not abuse its discretion in not granting attorneys' fees based upon its determination of the case, we have altered that determination by this opinion. Should Eastwood collect money from Bell Savings upon remand, Eastwood would be entitled to attorneys' fees under the express terms of the Guaranty. In addition, the district court may, in its discretion, choose to reconsider the claim for attorneys' fees under the Texas Civil Practices & Remedies Code.

We vacate and remand the issues of interest and attorneys' fees for reconsideration, conditional upon resolution, in Eastwood's favor, of the remanded claim concerning the value of the collateral.

Conclusion

For the reasons stated above, the judgment of the district court is

AFFIRMED in part; REVERSED in part; and REMANDED.