

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1424

AZTEC GENERAL AGENCY,

Plaintiff-Appellee,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as Receiver of
Chireno State Bank and in its Corporate
Capacity as Receiver for Chireno State
Bank,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:91-CV-2361-P)

(February 7, 1994)

Before JOHNSON, GARWOOD, and JOLLY, Circuit Judges.

PER CURIAM:*

Defendant-appellant Federal Deposit Insurance Corporation ("FDIC") appeals the grant of summary judgment in favor of plaintiff-appellee Aztec General Agency ("Aztec") holding that a letter of credit backed by a contingent promissory note is an

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

"insured deposit" requiring payment by the FDIC. Because we find that the district court lacked subject matter jurisdiction to review a final determination by the FDIC concerning the payment of insured deposits under 12 U.S.C. § 1821(f)(4), we remand this case to the district court with instructions to dismiss.

I

On March 7, 1989, Chireno State Bank ("Chireno") issued a one-year renewable letter of credit at the request of J&D Construction Company ("J&D") for the benefit of Aztec in the amount of \$70,000. J&D paid an annual fee of \$700, which was one percent (1%) of the amount of the letter of credit, and delivered a contingent promissory note secured by certain pieces of equipment, which would be paid in the event Aztec drew upon the letter of credit.

On May 9, 1991, the State Banking Commissioner declared Chireno insolvent and appointed the Federal Deposit Insurance Corporation as receiver ("FDIC-Receiver"). As receiver, FDIC-Receiver was charged with winding up the affairs of Chireno, including selling the assets and paying creditors' claims. In its corporate capacity, FDIC-Corporate had the duty of paying all insured deposits of the failed bank within a reasonable time.¹

Pursuant to its statutory duties, FDIC-Receiver and FDIC-Corporate entered into a purchase and assumption transaction with

¹FDIC-Receiver and FDIC-Corporate are distinct legal entities. Texas American Bancshares, Inc. v. Clarke, 954 F.2d 329, 335 (5th Cir. 1992).

the First State Bank of Glade Water ("First State") for the purchase of certain assets of Chireno and payment of insured deposits. Because J&D's promissory note was not booked as an asset of Chireno, it was not transferred to First State. Likewise, J&D's letter of credit was not transferred to First State because it was a contingent liability of Chireno.

On May 10, FDIC-Receiver notified Aztec that Chireno had been declared insolvent, that FDIC-Receiver had been appointed receiver, and that Chireno's records reflected that Aztec might be the beneficiary of a standby letter of credit. FDIC-Receiver sent similar notices to J&D. On May 20, however, Aztec sent a written request to Chireno seeking payment of the letter of credit pursuant to its terms. That request was returned to Aztec by First State with instructions that Aztec contact FDIC-Receiver. On July 31, Aztec submitted a written request to FDIC-Receiver, but Aztec received no correspondence or other information from FDIC-Receiver concerning the payment of the letter of credit.

II

On September 27, Aztec filed suit against Chireno and FDIC-Corporate in Texas state court for wrongful dishonor of the letter of credit, alleging breach of contract, breach of duty to Aztec, deception, and fraud. On October 25, FDIC-Receiver moved to substitute itself in place of Chireno. One week later, the suit was removed to federal court.

On November 16, Aztec moved for summary judgment, which FDIC-Receiver and FDIC-Corporate opposed. On January 29, 1993, at the pretrial conference, the FDIC, both Corporate and Receiver, moved to dismiss the case for lack of subject matter jurisdiction. On March 12, however, the district court granted Aztec's motion for summary judgment, and denied all other motions without comment. The district court found that the letter of credit was a true, clean, provable letter of credit, and as such, the letter of credit was entitled to status as an "insured deposit." Because the letter of credit was deemed an "insured deposit," Aztec was entitled to recover \$70,000 from FDIC-Corporate. FDIC-Corporate now appeals.²

III

FDIC-Corporate argues that under 12 U.S.C. § 1821(f)(4) the district court lacked subject matter jurisdiction to hear disputes concerning FDIC-Corporate's final determination denying payment of an insured deposit. Whether the district court has subject matter jurisdiction is a question of law subject to de novo review. Ceres Gulf v. Cooper, 957 F.2d 1199, 1204 (5th Cir. 1992).

Federal statute govern the process by which the FDIC determines which claims are entitled to federal deposit insurance.

²Although Aztec sued both FDIC-Receiver and FDIC-Corporate, the district court entered its judgment against FDIC-Corporate only. Because the district court essentially found that FDIC-Receiver was not liable, and because Aztec has not filed a cross-appeal, any issues relevant to FDIC-Receiver's liability are not before us in this appeal.

See 12 U.S.C. § 1821(f) (1989).³ Under this statute, once a final determination has been made, any appeal must be filed in the appropriate federal court of appeals. Kershaw v. Resolution Trust

³(f) **Payment of insured deposits**

* * *

(3) **Resolution of disputes**

(A) **Resolutions in accordance to corporation regulations**

In the case of any disputed claim relating to any insured deposit or any determination of insurance coverage with respect to any deposit, the Corporation may resolve such disputed claim in accordance with regulations prescribed by the Corporation establishing procedures for resolving such claims.

(B) **Adjudication of claims**

If the Corporation has not prescribed regulations establishing procedures for resolving disputed claims, the Corporation may require the final determination of a court of competent jurisdiction before paying any such claim.

(4) **Review of corporation's determination**

Final determination made by the Corporation shall be reviewable in accordance with chapter 7 of Title 5 by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the principal place of business of the depository institution is located.

(5) **Statute of limitations**

Any request for review of a final determination by the Corporation shall be filed with the appropriate circuit court of appeals not later than 60 days after such determination is ordered.

12 U.S.C. § 1821(f) (1989).

Corp., 987 F.2d 1206, 1208 (5th Cir. 1993); Nimon v. Resolution Trust Corp., 975 F.2d 240, 243-44 (5th Cir. 1992). In Nimon, for example, the RTC denied Nimon federal deposit insurance coverage. Pursuant to the statute, Nimon appealed directly to the Fifth Circuit. The RTC challenged the Fifth Circuit's jurisdiction, arguing that the proper forum for review was the federal district court. The Fifth Circuit, however, held that § 1821(f)(4) clearly specified that the courts of appeal were the proper fora for such reviews. Id. at 243-44.

In this case, the district court lacked subject matter jurisdiction to hear Aztec's appeal of FDIC-Corporate's determination that the letter of credit was not an "insured deposit." As a preliminary matter, we note that Aztec acknowledges that FDIC-Corporate has not made a final determination in this case. In fact, although Aztec wrote a letter to FDIC-Receiver seeking payment of the letter of credit, Aztec never submitted a claim to FDIC-Corporate for payment of an insured deposit. Because Aztec never sought payment of an insured deposit from FDIC-Corporate, it is not surprising that FDIC-Corporate never made a final determination denying payment.⁴ Thus, without a final determination from FDIC-Corporate denying payment of the alleged

⁴According to the FDIC, Aztec first indicated that it was seeking payment from FDIC-Corporate of an insured deposit when it filed its petition in Texas state court, a claim Aztec does not dispute.

insured deposit, this case is not, in any event, ripe for judicial review. See e.g., State of Texas v. United States Dept. of Energy, 764 F.2d 278 (5th Cir. 1985)(without final agency action, the challenged decision is not ripe for judicial review).

Even if FDIC-Corporate had made a final determination, we nevertheless would be required to remand this case to the district court for dismissal. Under 12 U.S.C. § 1821(f)(4) and the cases construing this section, an appeal of the FDIC's final determination concerning payments of insured deposits can be made only to the appropriate appellate court. Kershaw v. Resolution Trust Corp., 987 F.2d 1206 (5th Cir. 1993); Nimon v. Resolution Trust Corp., 975 F.2d 240 (5th Cir. 1992).⁵ Therefore, the Fifth Circuit is the proper forum in which Aztec should have sought review of FDIC-Corporate's final determination. See e.g., Kershaw v. Resolution Trust Corp., 987 F.2d 1206 (5th Cir. 1993); Palermo

⁵Aztec raises several nonmeritorious arguments against applying § 1821(f)(4) in this case. First, Aztec attempts to distinguish Nimon and Kershaw from this case by stating that those cases concerned the "denial of coverage for excess funds in deposit accounts" whereas this case involves the classification of an account as an "insured deposit." While this may be true, § 1821(f) makes no such distinction and either issue would be subject to § 1821(f)(4). Aztec further contends that Congress did not intend to make appellate courts fact-finding fora. However, this argument was considered and rejected in Nimon v. Resolution Trust Corp., 975 F.2d at 244. Finally, Aztec contends that FDIC-Corporate voluntarily submitted to a district court determination of the issue under 12 U.S.C. § 1821(f)(3) when it removed the case to federal court. However, removing a suit instigated by Aztec to federal court is not the functional equivalent of voluntarily requesting judicial determination under § 1821(f)(3)(B). Nor did FDIC-Receiver otherwise invoke § 1821(f)(3)(B).

v. FDIC, 981 F.2d 843 (5th Cir. 1993). As such, the district court lacked subject matter jurisdiction.

IV

For the foregoing reasons, we remand this case to the district court with instructions to dismiss.

R E M A N D E D.