UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10566
Summary Calendar

SYLVIA M. ALONZO,

Plaintiff-Appellant,

versus

FIRST CITY, TEXAS,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver for first City Texas-Dallas,

Intervening Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-2504-D)

(November 23, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Sylvia M. Alonzo appeals the district court's dismissal of her claims against the Federal Deposit Insurance Corporation ("FDIC")[1]

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The FDIC is the receiver for First City, Texas, pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.) ("FIRREA").

for lack of subject matter jurisdiction. We reverse.

I

Prior to its failure, First City sued Alonzo to recover the deficiency on a defaulted car loan. Alonzo counterclaimed on various state-law grounds. Shortly after trial had commenced, the Texas State Banking Commissioner declared First City insolvent and appointed the FDIC as receiver. Approximately six months later, the county court entered a take nothing judgment against both parties. Alonzo appealed to the state court of appeals.

While the appeal was pending, the FDIC moved to substitute itself for First City. Instead of filing its own brief in the state appeals court, however, the FDIC removed the action to the District Court for the Northern District of Texas.[2] Alonzo moved to remand,[3] and the FDIC moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)[4], asserting that Alonzo had failed to file an administrative claim before the date barring such claims. The district court denied the motion to remand and granted the dismissal.

Alonzo appeals, arguing alternatively that: 1) because the state-court action preceded the FDIC's appointment as receiver, the district court continues to have jurisdiction under FIRREA; or 2)

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[2] 12 U.S.C. § 1819(b)(2)(B) (Supp. V 1993) provides that the FDIC "may remove any action, suit, or proceeding from a State court to the appropriate United States district court."

[3] Alonzo actually filed an Objection and Response to the removal, and the court treated this as a motion for remand.

[4] Rule 12(b)(1) provides that a party may move to dismiss for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1).

the FDIC failed to give Alonzo proper notice of the claims process, thereby exempting her from the claims bar.

II

A

Alonzo contends that the district court erred in dismissing her claim for lack of subject matter jurisdiction. We review Rule 12(b)(1) dismissals *de novo*. *Whatley v. RTC*, 32 F.3d 905, 907 (5th Cir. 1994); *Carney v. RTC*, 19 F.3d 950, 954 (5th Cir. 1994).

FIRREA provides for the disposition of claims against the receiver of a failed institution. 12 U.S.C. § 1821 (Supp. V 1993). FIRREA's scheme includes a comprehensive process through which the receiver can review and handle claims administratively. *Id.* Once this administrative process commences, it becomes exclusive, and claimants must comply with its requirements. *See id.* § 1821(d)(13)(D) (preventing court jurisdiction over claims subject to the administrative process). Claimants must present their claims to the receiver and exhaust their administrative remedies before resorting to the courts. *Id.* The receiver also has duties under the administrative process, namely to publish notices of the receivership and the claims bar date and to provide individual notice to known claimants. *Id.* § 1821(d)(3)(B).

When claims against the institution arise after the institution fails and a receiver has been appointed, the administrative process is always exclusive. *See Meliezer v. RTC*, 952 F.2d 879, 882 (5th Cir. 1992) ("FIRREA contains no provision granting federal jurisdiction to claims filed after a receiver is

appointed but before administrative exhaustion."). When the claim arises before the institution's failure and the appointment of a receiver, however, FIRREA requires the receiver to initiate explicitly the administrative process if that is the course the receiver prefers. In the recent case of *Whatley v. RTC*,[5] this Court explained the proper mechanism by which the receiver initiates the administrative process for prereceivership claims. In *Whatley*, plaintiffs had initiated a state-court action prior to the financial institution's failure and the appointment of the RTC as receiver. RTC did not notify the plaintiffs of the bar date for their claims, waited until after the bar date had passed, and then moved to dismiss their claims. The district court granted the dismissal. 32 F.3d at 907.

We reversed, stating: "Because subject matter jurisdiction is tested at the filing of the complaint, district courts presiding over actions properly filed prior to the appointment of a receiver continue to be vested with jurisdiction." *Id.* Further, we held that whether the claims would be disposed of administratively or through the pending state action depended on whether the RTC had exercised its option to stay the state-court proceedings and proceed administratively. *Id.* at 908 ("[Prereceivership] claims, based on valid federal jurisdiction when filed, may be affected only through the stay provision detailed in paragraph

[5] 32 F.3d 905 (5th Cir. 1994).

(12)(A)(ii).").[6] We further held that the district court continues to have jurisdiction regardless of whether a stay was requested.[7]

> Rather, if the receiver requests a stay, the court will defer action temporarily. If the receiver does not request a stay, the judicial action will routinely proceed. . . . Congress has given the receiver the option to either request a stay, and proceed administratively . . . , *or* forego the privilege of requesting a stay and thus proceed judicially.

Id. Because the RTC had not requested a stay, we deemed the RTC to have decided to proceed judicially in the state-court action. *Id.* at 910.

Alonzo argues that, because the FDIC did not opt to stay the state-court appeal, *Whatley* requires that the FDIC must proceed judicially and cannot bar her claim. We agree. The FDIC did not request a stay within the statutory period.[8] Accordingly, we deem the FDIC to have chosen the judicial route.[9]

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[6] Section 1821(d)(12)(A)(ii) provides that the receiver "may request a stay . . . in any judicial action or proceeding to which such institution is or becomes a party."

[7] 32 F.3d at 908 ("Neither a request for a stay nor the failure to request a stay deprives the district court of jurisdiction."); *see also Carney*, 19 F.3d at 955 ("FIRREA creates a `scheme under which courts will retain jurisdiction over pending lawsuits))suspending, rather than dismissing, the suits))subject to a stay of proceedings as may be appropriate to permit exhaustion of the administrative review process as it pertains to the underlying claims.'" (quoting *Marquis v. FDIC*, 965 F.2d 1148, 1154 (1st Cir. 1992)).

[8] *See Whatley*, 32 F.3d at 908 ("Should the receiver choose to proceed administratively, it must request the stay within 90 days of its appointment; thereafter no stay may be sought and the judicial action is to proceed."). The FDIC was appointed as receiver for First City on October 30, 1992, and should have requested a stay of the state-court proceedings by January 28, 1993. Instead, the state trial continued, and judgment was entered on February 19, 1993.

[9] Requiring the FDIC to choose its path is consistent with our requirement that claimants make the same choice. *See Carney*, 19 F.3d at 955 ("[O]ur conclusion that the district court had subject matter jurisdiction over

B

The FDIC contends that, because it provided notice of the administrative process to Alonzo,[10] the administrative process is exclusive and *Whatley* does not apply.[11] *If* the FDIC had requested a stay of the judicial proceedings, proper notice might have been dispositive. *See Greater Slidell Auto Auction, Inc. v. American Bank & Trust Co.*, 32 F.3d 939 (5th Cir. 1994) (requiring validity or existence of notice to creditor when receiver has requested a stay). Notice, however, does not become an issue until and unless the FDIC properly chooses to pursue the administrative process by seeking a stay. Contrary to the FDIC's proposed construction, *Whatley* applies to *any* prereceivership claim, not merely those in which notification was lacking.[12] The FDIC's exercise of the claims-notification procedures, even if sufficient, does not excuse its failure to avail itself of the proper procedures for initiating

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[the plaintiffs'] claims for monetary damages does not necessarily mean that [plaintiffs] can assert their administrative and judicial remedies concurrently.").

[10] Alonzo argues that the FDIC's attempts to give her notice were deficient under 12 U.S.C. § 1821(d)(3)(B), and that this deficiency exempts her from the bar date. *Id.* § 1821(d)(5)(C)(ii). Because the FDIC failed to opt for the administrative process by requesting a stay, we do not address the sufficiency of the FDIC's notice to Alonzo.

[11] The FDIC cites to several cases from other circuits supporting its position that prereceivership claims should be treated identically to postreceivership claims. This Court, however, has expressly disagreed with those circuits. *See Whatley*, 32 F.3d at 910 n.29 ("[W]e recognize that other circuits are not in accord [with our holding].").

[12] "We therefore hold that with regard to actions filed before the receivership, the receiver may opt either for the judicial route, by allowing the action to continue, or it may choose the administrative process, by moving for a stay within 90 days of its appointment." 32 F.3d at 910; *see also id.* (Duhe, J., concurring) (explaining that failure of notice was an alternate ground for reversal).

the administrative process.[13]

III

For the forgoing reasons, we REVERSE and REMAND to the district court for further proceedings consistent with this opinion.[14]

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[13] In this case, the FDIC not only failed to seek a stay, it did not even move to substitute itself for First City until *after* the bar date for the claims process had passed. The bar date for filing administrative claims was February 1, 1993. The FDIC did not move for substitution until August 23, 1993, six months after the trial court had rendered judgment. Consequently, Alonzo reasonably believed that her state-court appeal was properly continuing, and the FDIC's delay in substitution smacks of the sort of "sandbagging" *Whatley* intended to correct. *See Whatley*, 32 F.3d at 908 ("There is an added odious dimension when the receiver, with full knowledge of the pending lawsuit, foregoes a request for a stay and waits until the time for the administrative claims process has expired to appear in court requesting dismissal because of the plaintiff's supposed failure to exhaust administrative remedies."); *id.* at 909 ("[T]he purposes of FIRREA and basic notions of fair play militate against the procedure followed by the receiver))awaiting expiration of the time allowed for initiating claims and then moving to dismiss the pending judicial actions.").

[14] Although this case is at the appellate stage, removal and federal disposition of the case remain proper. *See In re Meyerland Co.*, 960 F.2d 512, 516, 520 (5th Cir. 1992) (holding that FIRREA authorizes removal of a state appellate case, and instructing the district court to "take the state court judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review").