Loan and Banking Disputes Subject to FDIC Review Under FIRREA

FIRREA — Financial Institutions Reform, Recovery, and Enforcement Act

FIRREA, as codified in Title 12, United States Code, section 1821, sets out a mandatory administrative process for claims against failed lending entities and the entity that purchases a failed lending institution's assets from the Federal Deposit Insurance Corporation ("FDIC") to allow the FDIC to quickly resolve many of the claims against failed financial institutions without unduly burdening the courts. *See* 12 U.S.C. §§ 1821(d)(3)-(13); *see also Stamm v. Paul,* 121 F.3d 635, 639 (11th Cir. 1997); *Lazarre v. JPMorgan Chase Bank, N.A.*, 780 F.Supp. 2d 1320, 1325 (11th Cir. 2011) (citing *Am. First Fed., Inc. v. Lake Forest Park, Inc.,* 198 F.3d 1259, 1263 n.3 (11th Cir.1999)).

FIRREA's effect on subject matter jurisdiction

Under FIRREA, no court has jurisdiction over these claims until the claimant exhausts this administrative process—section 1821 requires that claims against these entities first be submitted to the FDIC for administrative review and adjudication prior to judicial review in a court. *See Stamm,* 121 F.3d at 639 ("In enacting FIRREA, Congress anticipated that, as a receiver for failed lending entities, the [FDIC] would face numerous claims. . . . Accordingly, it sought to reduce the volume of formal litigation . . . by providing for administrative review of such claims by the [FDIC] before judicial proceedings could commence."). Specifically, 12 U.S.C. § 1821(d)(13)(D) provides:

> Limitation on judicial review.
>
> [N]o court shall have jurisdiction over . . . (ii) ***any claim*** relating to any act or omission of such [failed lending] institution or the [FDIC] as receiver.
> 12 U.S.C. § 1821(d)(13)(D) (emphasis added).

Thus, the statute strips all courts of jurisdiction over claims made outside the administrative procedures of section 1821, and only after exhaustion of the administrative review procedures set forth in section 1821(d) may a party seek adjudication of a claim in court. *See*§§ 1821(d)(3)-(13)(D); *see also Lazarre*, 780 F.Supp. 2d at1325 ("Courts have construed section 1821(d)(13)(D) as an administrative exhaustion requirement."); *Stamm,* 121 F.3d at 639 (referring to section 1821(d)(13)(D) as a "statutory exhaustion requirement"); *Gomez v. BankUnited*, 2011 WL 114066, slip op. at *2 (S.D. Fla. Jan. 13, 2011) (holding dismissal proper for failure to exhaust administrative remedies).

FIRREA and successor entities

Notably, a plaintiff cannot escape the administrative review protections afforded by section 1821(d) by simply alleging that her claims are solely predicated upon wrongful conduct by the entity that purchases the failed lending institution's assets. *Lazarre*, 780 F.Supp. 2d at 1326. In *Lazarre*, a consumer brought an action against Chase as acquirer of WaMu's assets, to recover for violations of the Fair Credit Reporting Act ("FCRA"), alleging that an identity thief had improperly opened a WaMu account in his name. *Id.* at 1322. Chase had reported the fraudulent activity to a consumer reporting agency, and as a result, Wachovia Bank closed the consumer's Wachovia account in 2009. *Id.* The consumer initially contacted Chase in 2009, ***after Chase assumed the account from WaMu***, to dispute the content of Chase's report and the manner that Chase handled the report. *Id.* Due to Chase's continued confirmation of the report, another of the consumer's bank accounts, this one at Regions Bank, was closed in June 2010. *Id.* at 1323. The consumer filed his suit against Chase in September 2010, alleging that Chase had violated the FCRA by its mishandling of the fraud claim and report between 2009 and 2010—***events that all occurred after Chase assumed the account from WaMu***. *Id*. Chase moved to dismiss the plaintiff's claims for lack of subject matter jurisdiction on the grounds that the consumer had failed to exhaust the FIRREA administrative procedures before filing his court action. *Id*. at 1325. The consumer argued that because his claims arose from Chase's failures, not from any conduct by WaMu, the FIRREA procedure did not apply. *Id.* at 1326. However, the Southern District disagreed, stating that the consumer could not escape the fact that Chase's alleged failures related to an initial act of WaMu—WaMu's opening of the account . *Id*. Citing the plain language of section 1821(d), barring judicial review of "*any claim*

relating to *any act* of a failed lending institution," ***the Southern District held that the consumer's claims were subject to the administrative exhaustions requirement because his claims against Chase related to an act of WaMu***. *Id.* at 1326–27.

The *Lazarre* court went on to discuss that both the FDIC and the Resolution Trust Corporation ("RTC"), in their capacities as receivers for failed lending institutions, have broadly construed the plain language of section 1821(d) to effectuate the Congressional intent that "[they] and not the courts serve as the first line of review under FIRREA." *Lazarre*, 780 F.Supp. 2d at 1325 (citing *Stamm,* 121 F.3d at 641 (noting that the RTC's approach subjects an expanded range of claims to FIRREA's administrative exhaustion requirement) and *Gomez,* 2011 WL 114066, at *4 (explaining that the FDIC has interpreted section 1821(d) to allow administrative review of claims that arise after the claim-filing period)).

The Eleventh Circuit has also afforded the full extent of FIRREA's protections to successor lending institutions, and also found these broad and inclusive constructions of section 1821(d) to be reasonable interpretations of an otherwise ambiguous statute, and thus worthy of deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984). *Id.* at 1327 and n.14; *see also Stamm,* 121 F.3d at 641 ("[W]e cannot say that [the RTC's broad interpretation of section 1821(d)(5)(C)(ii)] [fails to] represent a permissible reading of an ambiguous provision . . . under the deferential standard required by [*Chevron*] . . . .") (internal quotation marks omitted); *Gomez,* 2011 WL 114066, at *4 ("[T]he Eleventh Circuit has accepted the [FDIC's] [broad] interpretation of [section 1821(d)(5)(C)] to allow administrative review of those claims that do not come into existence until after the [claims] bar date.").

Legal support outside of Florida

Other courts around the country agree that claims related to acts of a failed lending institution cannot be addressed by the trial court where the claimant fails to exhaust administrative remedies under FIRREA, and claimants cannot avoid the FIRREA exhaustion requirement by subsequently raising claims against the assuming bank; the legal support for this position on a national level is overwhelming: *McCarthy v. F.D.I.C.*, 348 F. 3d 1075, 1079–81 (9th Cir. 2003) (holding court lacked jurisdiction under FIRREA bar, even where

claims stemmed from conduct after FDIC appointment as receiver); *In re Shirk*, 437 B.R. 592, 603–04 (Bankr. S.D. Ohio 2010) (holding negligence, misrepresentation, and TILA claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquire loan from FDIC, were subject to jurisdictional bar of FIRREA and could not be pursued absent exhaustion of administrative remedies); *Aber-Shukofsky v. JPMorgan Chase & Co.*, 755 F. Supp. 2d 441, (E.D.N.Y. 2010) (holding FIRREA applied to bar claims asserted against defendants as failed institution's successors in interest); *Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40, 50 (D. Conn. 2010) (holding FIRREA administrative claims process and exhaustion requirement deprived court of subject matter jurisdiction over mortgagor's claims against mortgagee's successor, Chase); *Muhammed v. F.D.I.C.*, 751 F. Supp. 2d 114, 121–22 (D.D.C. 2010) (holding court lacked jurisdiction because the FDIC is authorized to decide claims under FIRREA process and FDIC regulations); *Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 3168390 at *4–8 (N.D. Cal. Aug. 10, 2010) (holding court lacked subject matter jurisdiction related to any act of WaMu where plaintiff failed to exhaust FIRREA procedure); *Village of Oakwood v. State Bank and Trust Co.*, 519 F. Supp. 2d 730, 737–38 (N.D. Ohio 2007) (holding depositors' claims could not be allowed due to failure to exhaust administrative remedies under FIRREA).

Conclusion

Thus, where a borrower's claim relates to any initial acts of a failed lending institution, that borrower's claim is subject exhaust the FIRREA procedure, as required by Florida and federal law. Should a borrower bring that claim in court without first exhausting FDIC review, that court should dismiss for lack of subject matter jurisdiction.