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Court Rules FDIC May Not Refuse to Consider Change in Bank Control Act Notice Based on Incomplete Information

Statutory Deadline for Decision Begins to Run When a Notice with Basic Information Is Submitted

SUMMARY

On March 7, 2022, in the aptly named case of *Hurry* v. *FDIC*,[1] Judge Randolph D. Moss of the U.S. District Court for the District of Columbia held that the FDIC improperly avoided its statutory deadline to rule on an application (technically, a "notice") to acquire an insured depository institution by refusing to consider the application on the ground it contained insufficient information. The FDIC maintained that this failure to provide sufficient information constituted "abandonment" of the application and, as a result, the Change in Bank Control Act's ("CIBCA") statutory deadlines for the FDIC to rule on the application never began to run. The Court, however, rejected the FDIC's argument, holding the statutory deadline is triggered by any notice that provides the basic information about the potential acquirer of the bank and the target bank. The Court held that the FDIC improperly rendered the statutory deadline for acting on a proposed acquisition a dead letter and denied the applicant the right to judicial review. The decision could represent an important precedent regarding the statutory period for regulatory review of applications to acquire banks under the CIBCA, and, although the statutory and regulatory schemes are different, potentially under the Bank Holding Company Act and Bank Merger Act.

BACKGROUND

A. STATUTORY AND REGULATORY BACKGROUND

The CIBCA provides that a person may not "acquire control of any insured depository institution" unless "the appropriate Federal banking agency has been given sixty days' prior written notice of [the] proposed

acquisition and within that time period the agency has not issued a notice disapproving the proposed acquisition."[2] That 60-day period may be extended up to 180 days by the banking agency under certain circumstances.[3]

The CIBCA provides that an agency may "disapprove any proposed action" for a variety of reasons, including if "any acquiring person neglects, fails, or refuses to furnish the appropriate Federal banking agency all the information required by the ... agency."[4] If the agency does disapprove the proposed acquisition, "the acquiring party may request an agency hearing on the proposed transaction," at the conclusion of which "the Federal banking agency shall by order approve or disapprove the proposed acquisition."[5] If after the hearing the proposed acquisition is again disapproved, the party seeking to acquire the bank may then seek review in "the circuit in which the home office of the bank to be acquired is located" or in the D.C. Circuit.[6]

B. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Justine Hurry first met with officials from the FDIC on October 10, 2017 to discuss the necessary steps for her proposed acquisition of the Bank of Orrick.[7] Subsequent to this informal meeting, Hurry submitted a written notice to the FDIC under the CIBCA.[8] Approximately two months later, the FDIC returned the notice, finding that it was incomplete due to missing information, including the proof of available funds to purchase control in the bank and the failure to include ownership interests for certain companies of which Hurry was the "Manager" and certain irrevocable trusts in which Hurry had a beneficiary interest.[9] Two weeks later, Hurry submitted an updated notice, which provided additional information regarding the request for proof of funds and clarified Hurry's business affiliations.[10] The FDIC once again returned the notice as incomplete, and cited its authority to disapprove a notice if the would-be acquirer fails to provide the FDIC with all the information it requires.[11]

Hurry's attorney conferred with the FDIC and discussed the documentation and information needed.[12] Hurry then submitted a third version of the notice, which included additional information, but which still did not satisfy the FDIC.[13] The FDIC, finding that it did not have sufficient information to substantiate Hurry's proof of funds or to understand Hurry's business affiliations, cautioned that it would be forced to conclude that Hurry did not wish to provide the requested information.[14] Hurry submitted additional records, but "disputed the materiality of the FDIC's request" and asserted that it was unrelated to her plans to acquire the bank and the FDIC lacks the power to require her to provide the documentation the agency was demanding.[15] Although the FDIC acknowledged that Hurry had "made some progress," it was "not enough."[16] Recognizing that Hurry and the FDIC were at an impasse, Hurry's lawyer requested that the FDIC make a final decision on the notice based on the information that had been provided.[17] In response, the FDIC did not reach a decision, but sent Hurry's lawyer a letter explaining that, because Hurry had failed to provide the requested information, the FDIC closed her file as "abandoned."[18] Hurry then filed her lawsuit.[19]

THE COURT'S HOLDING AND ANALYSIS

In Count I of Hurry's complaint, she asserted a claim under Section 706(1) of the Administrative Procedure Act ("APA") for agency action withheld or unreasonably delayed, arguing that the FDIC was obligated to render a decision on the potential acquisition.[20] The Court found that this framing of the issue was incorrect, because, under the CIBCA, the agency is not required to act on a written notice.[21] Rather, the statute allows the agency to disapprove of a proposed transaction, but, if the agency takes no action, the transaction may proceed.[22] Here, had the FDIC acted and disapproved the proposed acquisition, Hurry would have had the right to an administrative hearing and then judicial review.[23] Lastly, the Court found that the FDIC did in fact act by returning Hurry's notice and closing her case.[24] Accordingly, the Court granted summary judgment for the FDIC as to Count I.[25]

In Count II, Hurry alleged that the FDIC acted arbitrarily, capriciously, and contrary to law, in violation of Section 706(2) of the APA, when it closed her file.[26] Here, the Court upheld Hurry's position and concluded that that the FDIC erred in not accepting Hurry's notice.[27] The Court first clarified that this case does not call into question the FDIC's authority to return a notice missing certain pieces of information or documentation.[28] Rather, the Court framed the question as "whether the FDIC acted in contravention of the CIBCA when it returned Hurry's [notice and subsequently] declined Hurry's request for a decision on the merits of her notice and, instead, closed her file as abandoned," and analyzed it under the *Chevron* framework for deference to agency action.[29]

Beginning with the statutory text, the Court found that both Hurry and the FDIC agreed that the CIBCA, on its face, provides that the agency has 60 to 180 days, depending on extensions, to give notice disapproving the proposed acquisition, and, if the agency does not disapprove, the potential transaction may proceed.[30] The FDIC contended that the 60- to 180-day clock does not begin until the agency had received a notice and that here Hurry's notice was insufficient under the CIBCA because it did not provide the necessary information.[31]

The Court found, however, that the statutory scheme set up by Congress gave the agency a prescribed time to act on the notice.[32] This statutory deadline would be rendered meaningless under the FDIC's interpretation of the statute because "an agency could make request after request for additional information, prolonging the review period for many months, if not years."[33] In short, the 60- to 180-day deadline imposed by Congress "would be a dead letter—or near to it."[34]

The Court also found that at least three sections of the CIBCA demonstrated that Congress did not intend for the "substantial completeness" analysis to be a threshold requirement for commencing the review.[35] For example, in a neighboring section of the statute, Congress authorized the agency to "extend" the disapproval period if a party submitted an incomplete notice; this provision is incompatible with the FDIC's reading of the statute, under which the clock would not even start for an incomplete notice.[36] The Court

also found that another provision of the statute, providing that an agency shall conduct an investigation of completeness upon receiving notice, could not be squared with the FDIC's position that an incomplete notice is no notice at all.[37] Rather, "the submission of the notice triggers the completeness inquiry."[38] Lastly, the Court found that Congress considered a scenario in which the applicant did not provide the agency with the information it deemed necessary, and provided that the appropriate action in that circumstance was for the agency to disapprove the proposed acquisition, which would give the acquirer a right to an agency hearing, and, if disapproved at the hearing, to seek review in the appropriate court of appeals.[39] Additionally, the Court found that the FDIC's reading of the statute is inconsistent with its own regulations.[40] Specifically, the term "notice" in the FDIC's regulations is defined as "a submission notifying the FDIC that a depository institution intends to engage in or has commenced certain corporate activities or transactions."[41] In informing the FDIC that Hurry intended to acquire 63% of the outstanding stock of the Bank of Orrick, her notice plainly satisfied this definition.[42]

In sum, the Court held that the FDIC's letter returning Hurry's notice as incomplete was inconsistent with the text and purpose of the CIBCA.[43] The Court found that agencies are only permitted to either (1) extend the period for disapproval or (2) disapprove the proposed transaction when a would-be acquirer refuses to provide information that agency deems necessary.[44] "The FDIC's reading of the statute, in contrast, would permit federal banking agencies to delay the process indefinitely while it seeks additional information, and it would prevent acquiring persons from exercising their right to a hearing and appeal where the acquiring person and the banking agency disagree about the relevance of 'additional ... information' sought by the agency, 12 U.S.C. § 1817(j)(6)(H)."[45] Accordingly, the Court held that the FDIC's reading of the CIBCA failed at both *Chevron* step one and *Chevron* step two.[46]

As a remedy, the Court ordered the FDIC to consider Hurry's application to acquire the bank based on the application she had submitted.[47] In doing so, the Court held that the need for a banking agency to review a bank application outweighed Hurry's argument that, because the FDIC should have accepted her application in 2017, the deadline for the FDIC to reject her application had long since passed and so her application should be deemed automatically approved.[48]

IMPLICATIONS OF THE CASE

There has recently been controversy about the period of time taken by the federal banking agencies to rule on acquisition applications. In addition, there have been calls for regulatory adoption of a moratorium on bank acquisition applications above a certain asset size.

This case could become an important precedent in clarifying when the statutory period for regulatory review of applications for acquisitions of insured depository institutions begins to run and, as a result, when the statutory period of regulatory action concludes.[49] Specifically, although the various statutory and regulatory schemes are different, the decision expresses an overall skepticism of the ability of bank regulatory

agencies to delay the progress of a bank acquisition by repeatedly requesting additional information and documentation.

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ENDNOTES

1 *Hurry* v. *Fed. Dep. Insur. Corp., et al.*, No. CV 18-2435 (RDM), 2022 WL 670857 (D.D.C. Mar. 7, 2022).

2 12 U.S.C. § 1817(j)(1).

3 *Id*.

4 *Id*. § 1817(j)(7)(E).

5 *Id*. § 1817(j)(4).

6 *Id*. § 1817(j)(5).

7 *Hurry*, 2022 WL 670857, at *4.

8 *Id*.

9 *Id*. at *5.

10 *Id*.

11 *Id*. at *6.

12 *Id*.

13 *Id*. *6–7.

14 *Id*. at *7.

15 *Id*. at *8.

16 *Id*.

17 *Id*.

18 *Id*. at *9.

19 *Id*.

20 *Id*. at *10.

21 *Id*. at *11.

22 *Id*.

23 *Id*.

24 *Id*.

25 *Id*.

26 *Id*. at *10.

27 *Id*. at *18.

28 *Id*. at *12.

29 *Id*. at *13.

30 *Id*.

31 *Id*.

32 *Id*. at *16.

33 *Id*.

ENDNOTES (CONTINUED)

34 *Id*.

35 *Id*.

36 *Id*.

37 *Id*.

38 *Id*.

39 *Id*. ("There is no indication that Congress intended, as the FDIC suggests, to provide the appropriate banking agency with discretion to decide which of two tracks to take: to fail to accept a notice on the ground that it is incomplete, which would permit district court review under the APA, or to accept the notice and then disapprove the acquisition on the ground that the notice is incomplete, which would permit the acquiring party to seek a hearing and direct appellate court review.")

40 *Id*. at 17.

41 12 C.F.R. § 303.2(w).

42 *Hurry*, 2022 WL 670857, at *17.

43 *Id*.

44 *Id*.

45 *Id*.

46 *Id*.

47 *Id*. at *19.

48 *Id*.

49 *See* 12 U.S.C. § 1842(b); 12 U.S.C. § 4807.

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