IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL CREDIT UNION ADMINISTRATION BOARD,

Plaintiff,

v.

ICONS, INC.,

Defendant.

OPINION AND ORDER

10-cv-779-slc

In December 2010, pursuant to the provisions of the Federal Credit Union Act, 12 U.S.C. § 1787 *et. seq*., plaintiff National Credit Union Administration Board ("the Board") removed this case from the Circuit Court for Rock County, Wisconsin, after the Board was appointed as liquidating agent for First American Credit Union, the former plaintiff in the state court action. Now before the court is the Board's motion to dismiss defendant Icons, Inc.'s counterclaim on the ground that defendant failed to exhaust its administrative remedies under the Federal Credit Union Act. Aa discussed below, I agree that administrative exhaustion was required notwithstanding the Board's prior notice of the claim, and that such exhaustion is a prerequisite to federal jurisdiction. Therefore, I am granting the Board's motion and dismissing the counterclaim.

In ruling on a motion under Rule 12(b)(1), I must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff, or in this case, the counterclaimant, Icons, Inc.. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993). From the pleadings and the documents submitted by the parties in connection with the motion to dismiss, I find the following facts for the purpose of deciding this motion:

FACTS

This case arises out of an action filed originally by First American Credit Union on June 16, 2009 in the Circuit Court for Rock County. First American sued defendant Icons, Inc., for

repayment of money First American had paid to Icons for certain information technology services that Icons allegedly never performed. Icons denied First American's allegations and filed a counterclaim alleging that it had properly performed the services required under the contract and that First American still owed Icons $18,900 for those services.

The case was scheduled for a jury trial on August 30, 2010. Meanwhile, the parties exchanged discovery and engaged in settlement negotiations. However, on or about August 30, 2010, First American was put into involuntary liquidation by the Wisconsin Department of Financial Institutions. As part of the liquidation process, the National Credit Union Administration ("NCUA") Board was appointed as liquidating agent pursuant to the Federal Credit Union Act, 12 U.S.C. § 1787(a)(1)(A).[1] Once appointed as liquidating agent, the NCUA Board assumed all the rights and responsibilities that First American Credit Union had to the lawsuit. 12 U.S.C. § 1787(b)(2)(A).

The NCUA Board removed the case to federal court on December 10, 2010.[2] Counsel of record for the NCUA Board is the same lawyer who had been representing First American in its

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[1] The National Credit Union Administration is the agency charged with administering the Federal Credit Union Act. *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 483 (1998).

[2] Section 1789(a) provides in relevant part:"In carrying out the purposes of this subchapter, the Board may- . . .

> (2) sue and be sued, complain and defend, in a court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Board shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy. The Board may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending...."

state court lawsuit suit against Icons. That same date, the Board filed a motion for a 90-day stay, as authorized by 12 U.S.C. § 1787(b)(12), which the court granted.

Pursuant to 12 U.S.C. § 1787(b)(3)(C), on January 7, 2011, the NCUA Board sent a letter to defendant Icons informing it that "[c]reditor claims against the credit union must be filed with the [NCUA Board] **no later than April 17, 2011**." The letter further advised that "[a]ny creditor claims filed after that date will be untimely and the claimant will be deemed to have waived all rights with respect to the claim."

Icons filed a claim with the NCUA Board on April 29, 2011, twelve days after the deadline. The NCUA Board denied the claim on the ground that it was untimely.

OPINION

I. The Federal Credit Union Act

The Federal Credit Union Act was enacted in 1934 to protect the interests of creditors of defunct federal credit unions. In 1989, in the wake of the savings and loan crisis, Congress supplemented the Act when it enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). *See* Pub. L. No. 101-73 § 1217, 103 Stat. 183. As amended by FIRREA, the Act sets out a comprehensive administrative scheme under which the NCUA Board is authorized to administer all claims against a liquidated credit union. 12 U.S.C. § 1787(b). This scheme mirrors that established under FIRREA for administering claims against failed banks and savings and loan institutions. *See* 12 U.S.C. § 1821(d); *Lafayette Federal Credit Union v. National Credit Union Admin.*, 960 F. Supp. 999, 1003 (E.D. Va. 1997) (noting that although different sections of FIRREA applied to banks and savings and loans versus credit unions, claims process under both statutes were "directly analogous").

Under the FCUA, judicial review of creditor claims is limited. Specifically, 12 U.S.C. § 1787(b)(13)(D), which has been described as a "distinct jurisdiction-stripping provision," *Bank of America Nat. Ass'n v. Colonial Bank*, 605 F.3d 1239, 1245 (11th Cir. 2010), reads as follows:

> (D) Limitation on judicial review
>
> Except as otherwise provided in this subsection, no court shall have jurisdiction over-
>
> > (I) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent, including assets which the Board may acquire from itself as such liquidating agent; or
> >
> > (ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

When the Board is appointed as liquidating agent of a failed credit union, the Board promptly must publish a notice to the institution's creditors to present their claims and proof by a specified date, which may not be less than 90 days after publication. 12 U.S.C. § 1787(b)(3)(B)(I). The Board must republish this notice twice; the first republication must occur approximately one month after the initial notice, and the second must occur approximately two months after the initial notice. 12 U.S.C. § 1787(b)(3)(B)(ii). In addition, the Board must mail a similar notice to any creditor shown on the institution's books. 12 U.S.C. § 1787(b)(3)(C). In this case, Icons does not challenge the adequacy of the notice provided by the Board.

If a claimant fails to present a claim to the Board within the time specified in the notice to creditors, the Act states that, with one exception, the claim "shall be disallowed and such disallowance shall be final." 12 U.S.C. § 1787(b)(5)(C). The exception applies to a claimant who does not receive notice of the appointment of the Board in time to file a timely claim but who files a claim in time to permit payment. 12 U.S.C. § 1787(b)(5)(C)(ii).

By contrast, if a timely claim, together with proof, is submitted, the Board must determine within 180 days whether to allow or disallow the claim and must notify the claimant. 12 U.S.C. § 1787(b)(5)(A)(I). If a claim is disallowed or if the Board fails to make a determination within the 180 day period, within 60 days the claimant either may request administrative review of the Board's determination or may "file suit on such claim (or continue an action commenced before the appointment of the liquidating agent)." 12 U.S.C. § 1787(b)(6)(A). 12 U.S.C. § 1787(b)(6)(B) provides that if a claimant fails to "file suit on such claim (or continue an action commenced before the appointment of the liquidating agent)," within the 60-day period, "the claim shall be deemed to be disallowed . . . as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim."

Although there are few cases interpreting these provisions, the Court of Appeals for the Seventh Circuit and other courts have interpreted their analogous FIRREA counterparts to mean that a party must use and exhaust the administrative claims process before a federal court may hear the claim. *Maher v. F.D.I.C.*, 441 F.3d 522, 525 (7th Cir. 2006) ("Federal courts lack jurisdiction to address claims that fail to comply with FIRREA's administrative claims process."); *Brady Development Co., Inc. v. Resolution Trust Corp.*, 14 F.3d 998, 1006 (4th Cir. 1994) ("Creditors must avail themselves of the statute in order to receive its benefits."); *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 192-93 (7th Cir. 1993) (court lacked jurisdiction over claim filed by creditor where creditor failed to file suit until more than 60 days after end of 180-day determination period); *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148, 1152 (1st Cir. 1992) (where claimant has been properly notified of appointment of federal insurer as receiver and has nonetheless failed to initiate administrative claim within filing period, claimant necessarily forfeits any right to pursue claim against failed institution's assets in any court); *Resolution Trust Corp. v.*

Mustang Partners, 946 F.2d 103, 106 (10th Cir. 1991); *Lafayette Federal Credit Union*, 960 F. Supp. at 1003-1004.

II. Icons' Failure to Timely File its Claim with the Board Deprives this Court of Jurisdiction

Icons does not dispute that it was notified by the Board of the period for filing an administrative claim, nor does it dispute that it failed to file such a claim within the notice period. Instead, it argues that it had already effectively "filed" its notice of claim when it filed its counterclaim against First American Credit Union back in July 2009, and that the Board had notice of this when it stepped into the credit union's shoes upon liquidation. Stated differently, Icons takes the position that the Act's administrative scheme does not apply to suits pending at the time the credit union is placed in receivership.[3]

Most appellate and district courts to have considered this question have rejected Icons' position, with good reason. *See Intercontinental Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1283 (9th Cir. 1994); *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993); *Marquis,* 965 F.2d at 1151; *Resolution Trust Corp. v. Mustang Partners*, 946 F.2d 103, 106 (10th Cir. 1991); *Holmes v. F.D.I.C.*, 2011 WL 1750227, *5 (E.D. Wis. 2011); *IndyMac Bank, F.S.B. v. MacPherson*, 672 F. Supp. 2d 313, 319 (E.D.N.Y. 2009); *George Kellett & Sons v. Stuart Homes*, 1992 WL 125439, *2 (E.D. La. 1992); *United Bank of Waco, N.A. v. First Republic Bank Waco, N.A.*, 758 F. Supp. 1166, 1168 (W.D. Tex. 1991). As these courts have noted in the analogous FIRREA

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[3] In the alternative, Icons argues that its counterclaim should not be dismissed for lack of jurisdiction because the Board admitted in its notice of removal that this court has jurisdiction over the case, and Icons relied on that representation in failing to submit a timely claim to the Board. This argument is meritless. It is beyond dispute that neither the actions of the parties nor the principles of estoppel can confer subject matter jurisdiction on a court where Congress has not done so. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir. 1986).

context, § 1821(d)(6)(B)(ii), which provides for the final disallowance of cases if claimants fail to "continue an action commenced before the appointment of the receiver" within 60 days after the end of the Board's period of review, expressly contemplates that the Act's scheme applies to pending cases.[4] That this is what Congress intended is confirmed by the House Report regarding FIRREA's administrative scheme:

> Any suit (or motion to renew a suit filed prior to appointment of the receiver) must be brought by the claimant within 60 days after the denial of the claim. Resort to either the District Courts or administrative process is available only after the claimant has first presented its claim to the FDIC.

H.R. Rep. No. 101–54(I), at 418 (1989). Further, as Judge Stadtmueller recently noted in the *Holmes* case, 2010 WL 1750227, *6, the Act's general limitation on jurisdiction supports this reading, "as it divests federal courts of jurisdiction (subject to exception) over *any* claim or action, not just those initiated after [the Board's] appointment as [liquidating agent]." (emphasis in original).

Icons does not attempt to distinguish these cases or point to any statutory text to support its position that pending cases are excused from the Act's administrative scheme. It cites only a single unreported case, *Shaw v. Barreca*, 1993 WL 600604, *1 (E.D. La. 1993), in which the court found that it retained jurisdiction over a claim filed against a credit union prior to the appointment of a liquidating agent even though the claimant had not filed a redundant administrative claim with the receiver.

Shaw is not persuasive for two reasons: first, in concluding that exhaustion was not required in pending cases, the court relied heavily on language in *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 585 (1989), in which the Court noted that in pending cases,

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[4] As noted previously, § 1821(d)(6)(B)(ii) is directly analogous to § 1787(b)(6)(B)(ii).

the receiver would receive notice of claims when it stepped into the shoes of the failed financial institution and took control of its assets. *Coit,* however, was decided before Congress enacted FIRREA, which was designed to address certain procedural and constitutional concerns raised by the Court in *Coit*, including the lack of time limitations on the receiver's consideration whether to pay or disallow administrative claims. *Coit*, 489 U.S. at 586. Because *Coit* did not review the FIRREA provisions, the *Shaw* court erred in relying on that case. Second, *Shaw*'s ruling on the exhaustion question arguably is dicta, insofar as the court ruled in the alternative that even if the Board's interpretation of the Act's administrative scheme was proper, there was no evidence that the Board had mailed the plaintiff a notice of the claims bar date as required by 12 U.S.C. § 1787(b)(3)(C). For these reasons, I decline to follow *Shaw*.

In the end, although Icons' "actual notice" argument has practical appeal, Icons has failed to identify a proper statutory or decisional hook on which to hang it. Further, even the redundancy argument may be overstated: as one court has observed, "[t]he [Board] presumably has actual notice of many, if not most, of the claims that are filed pursuant to FIRREA by virtue of possessing the failed institution's books and records," yet these claimants must file claims with the Board as a pre-requisite to federal subject matter jurisdiction. *MacPherson*, 672 F. Supp. 2d at 319. As the Court of Appeals for the Seventh Circuit and others have noted, in enacting FIRREA, Congress plainly intended to place jurisdictional limits on the power of federal courts to review matters involving failed financial institutions by ensuring that claims first go through the administrative process. To preserve its claim, Icons was required to play by the new rules, set out in detail by the Act, and file its notice of claim upon the Board within the administrative notice period. Its failure to do so means that this court lacks jurisdiction over Icons's counterclaim.

ORDER

IT IS ORDERED that the motion of plaintiff National Credit Union Administration Board to dismiss defendant Icons, Inc.'s counterclaim for lack of jurisdiction is GRANTED.

Entered this 7th day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge