Brief Bank

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF:	)	
	)	
Janet F. Acker,	)	OCC AA-EC-93-112
Change in Bank Control Applicant	)	
Interstate National Bank	)	
Dallas, Texas	)	
	)	

ORDER

On July 27, 1955, the Comptroller ordered the Enforcement and Compliance Division ("E&C) and Applicant Janet F. Acker to submit arguments on whether this proceeding is now moot in light of Applicant's sale of her contractual right to acquire a controlling interest in Interstate National Bank, Dallas, Texas ("Bank"), the subject of her notice under the Change in Bank Control Act, 12 U.S.C. § 1817(j). For the reasons below, the Comptroller finds that the matter is moot. Accordingly, the Comptroller vacates the OCC's disapproval of Applicant's notice of change in control and dismisses the proceeding.

In response to the Comptroller's Order, E&C argues that the proceeding is moot because Applicant on June 23, 1995, conveyed her right to acquire control of the Bank to another bank, and the two banks have since merged. According to E&C, Applicant suffers no lasting harm from the OCC's disapproval and Applicant "can not establish that she would be subject to the same problems in a future adjudication of a change in bank control application." At the same time, E&C does not object to vacating the disapproval.

Applicant argues that the proceeding is not moot. She notes that she paid a $ 15,000 fee "for the right to obtain a decision" concerning the purchase of the Bank's shares; that the ALJ concluded after a hearing that her notice of change in control should have been approved; and that her ability to obtain judicial review, should the Comptroller not rule in her favor, should be preserved. In Applicant's view, a final decision by the Comptroller on the merits is needed because her future applications would be prejudiced by the OCC's disapproval in this matter. Applicant also complains that she was forced to sell her interest because "the OCC . . . on May 26, 1995 granted another party the right to dissolve the charter of the Interstate National Bank and merge it into a much larger institution . . . ."

The Comptroller finds that this proceeding is moot and that the OCC's disapproval should be vacated and the proceeding dismissed. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969); Northwest Pipeline Corp. v. FERC, 863 F.2d 73, 76 (D.C. Cir. 1988). Here, Applicant does not deny that she has sold all rights to acquire a controlling interest in the Bank to Fidelity Bank, N.A., University Park, Texas, and that the two banks were subsequently merged.[1] The bank that Applicant sought to acquire no longer exists. Because she cannot acquire the Bank, her notice of change in control is no

[1] Applicant's right to acquire an interest in the Bank was conveyed in a document entitled Assignment Agreement and Release By and Between Janet F. Acker, and Fidelity Bank, National Association. The document was executed on June 23, 1995, by Janet F. Acker, Gary Acker and William C. Murphy in his capacity as President of Fidelity Bank, National Association. By letter dated July 18, 1995, OCC's Southwestern District Office certified the merger of the two banks with an effective date of July 13, 1995, and approved the use of the Bank's main office as a branch of the merged institution.

longer viable. Indeed, paragraph 6 of the Assignment Agreement and Release requires Applicant to withdraw her notice. Under these circumstances, the matter is moot and any decision by the Comptroller on the merits would be meaningless. See Brownlow v. Schwartz, 261 U.S. 216, 217 (1923) (petitioner's sale of interest in subject of dispute moots appeal). Accordingly, the Comptroller will not rule on whether the OCC erred in disapproving Applicant's notice or on the 11 other issues listed in her pleadings.

Applicant argues that the Comptroller should address the merits because Applicant "could find herself in a similar situation in the future, in the event she should seek to acquire stock in another national bank."[2] Applicant appears to be trying to fit within an exception to mootness known as the "capable of repetition, yet evading review" doctrine. However, in Weinstein v. Bradford, 423 U.S. 147 (1975), the Supreme Court explained that, in the absence of a class action, this exception is

> limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

423 U.S. at 149. Similarly, the Supreme Court has stated that

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[2] Applicant's Objection . . . and Applicant's Response to Office of the Comptroller of the Currency's Reply to Comptroller's Order of July 27, 1995 (hereafter, "Applicant's Objection") at 8.

> the capable-of-repetition doctrine applies only in exceptional circumstances, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.

City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983). See also Annotation, 44 L. Ed. 2d 745, 754-755.

Applicant has failed to make an adequate showing that she will file a notice of change in control in the future or, if she does, that the notice will be disapproved. Her assertions that she "might seek from the agency" another approval for a change in control "in the event she should seek to acquire stock in another national bank"[3] are too uncertain to meet the Supreme Court's standard.[4]

Beyond this, each notice of change in control is judged on the basis of the facts stated in the notice and the associated transaction. Even when the Applicant is the same, the circumstances may be different. In the pending case, the OCC's disapproval was based on Applicant's refusal to furnish requested tax and other financial information. In response to a future notice, Applicant may choose to furnish everything requested, as contemplated by the

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[3] Id. at 5, 8.

[4] Compare Roe v. Wade, 410 U.S. 113 (1973), in which the Supreme Court held that pregnancy provides a "classic justification for a conclusion of nonmootness" since it "comes more often than once to the same woman, and in the general population . . . it will always be with us." 410 U.S. at 125.

express language of the Change in Bank Control Act, 12 U.S.C. § 1817(j)(7)(E), and in that event the OCC will obviously not disapprove Applicant's notice for the reason cited in the disapproval here.

Applicant also asserts that she meets the first condition in Weinstein v. Bradford -- that the challenged action was too short in duration to be fully litigated to its cessation -- because her "contractual relationship with certain shareholders of Interstate National Bank did not endure long enough to survive the lengthy judicial process of obtaining a final decision from the Comptroller . . . ."[5] This, of course, was because Applicant elected to sell her contract to acquire the Bank. She did so voluntarily, without informing the Comptroller, who was then deliberating on the merits of this proceeding. When a party voluntarily changes the status quo so radically, the challenge to agency action becomes moot. Northwest Pipeline Corp. v. FERC, supra, 863 F.2d at 76-77 (D.C. Cir. 1988).

Applicant also complains that the OCC on May 26, 1995, issued an order dissolving the Bank's charter and merging it with another institution, leaving her "with no choice" but to sell her contract rights.[6] The Comptroller is aware of no such action by OCC on that date. Applicant has apparently been misled by a reference to May 26, 1995, in a pleading filed in a related court case, which pleading indicates that the Bank and Fidelity had hoped to consummate their merger on that date. It was not until after Applicant sold her contract

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[5] Applicant's Objection at 7.

[6] Applicant's Reply to Comptroller's Direction at 7. See also id. at 3.

rights on June 23, 1995, that the two banks consummated the merger, causing the OCC's Southwestern District office to issue a letter certifying that the merger was effective as of July 13, 1995.[7] In short, no action by the OCC forced Applicant to sell her contract rights, and therefore there were no exigent circumstances that could justify a finding of nonmootness.[8]

Although the controversy is now moot, the Comptroller is mindful of the need to give Applicant any relief that may be just and reasonably fashioned. In analogous cases, the courts have vacated the agency's challenged order. See Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 46-47 (D.C. Cir. 1992)(criticizing agency for not vacating challenged order in moot case). The Comptroller will take the same action here. Vacating the OCC's disapproval of Applicant's notice assures that the record is wiped clean. Thus, neither the disapproval nor the facts giving rise to it will be considered in any future filing by Applicant.

Now, therefore, it is ORDERED that this proceeding is dismissed and that the OCC's disapproval of Applicant's notice of change in control is vacated. It is also ORDERED

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[7] OCC's preliminary approval of the merger was given on March 29, 1994.

[8] Compare Church of Scientology v. U.S., 506 U.S. __ (1992)(compliance with a court order to produce tapes does not moot an appeal of that order); Barnes v. Bosley, 828 F.2d 1253, 1257 n. 4 (8th Cir. 1987)(payment of judgment of back pay award to stop accrual of interest does not render moot the issue of propriety of award); Ferrell v. Trailmobile, Inc., 223 F.2d 697, 698 (5th Cir. 1955)(payment of judgment to prevent foreclosure does not moot appeal from underlying judgment).

that the documents referred to in footnote 1 be made part of the record of this proceeding.

IT IS SO ORDERED this 18th day of October, 1995.

Eugene A. Ludwig
Comptroller of the Currency