

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

IN THE MATTER OF)
JOHN R. GIVENS)
FORMER PRESIDENT AND DIRECTOR)
U.S. NATIONAL BANK OF CLAYTON)
ST. LOUIS, MISSOURI)

AA-MW-91-136

DECISION OF THE COMPTROLLER OF THE CURRENCY

I. Summary

The Comptroller of the Currency ("Comptroller") dismisses the civil money penalty ("CMP") action against the Respondent, John R. Givens ("Givens" or "Respondent"), former President and Director, U.S. National Bank of Clayton, St. Louis, Missouri (the "Bank"), as a result of his death.

The request of Respondent's widow for oral argument is denied.

II. Issue

Whether the CMP action against the Respondent survives his death.

III. Procedural Background

On August 27, 1991, a Notice of Assessment of a Civil Money Penalty ("Notice") was issued by the Office of the Comptroller of the Currency ("OCC") against the Respondent. The Notice alleged that the Respondent committed the following violations of law:

- o three violations of 12 U.S.C. § 371c, arising from three loans made to companies controlled by the chairman of the board of directors of the Bank;
- o one violation of 12 U.S.C. § 375b, arising from the renewal of one of the loans that constituted an alleged violation of 12 U.S.C. § 371c;
- o one violation of 12 U.S.C. § 161, arising from an understated Allowance for Loan and Lease Losses on the Bank's March 31, 1990 Report of Condition and Income; and
- o one violation of 12 U.S.C. § 72, arising from the failure of two directors to own sufficient Bank stock to meet the legal requirements.

Notice at 2-5.

Prior to the hearing, summary judgment was granted to the Respondent on the alleged violation of 12 U.S.C. § 72 only. A hearing was held on the other alleged violations in St. Louis, Missouri from June 15, 1992, until June 19, 1992. The OCC was represented by counsel from its Enforcement and Compliance Division and its Midwestern District office (collectively, "E&C"). The Respondent was represented by counsel.

On October 6, 1992, the Administrative Law Judge, Hon. Arthur L. Shipe ("ALJ"), vacated the summary judgment on the alleged violation of 12 U.S.C. § 72. A hearing was held on this issue alone in St. Louis, Missouri on November 13, 1992. The final pleading prior to the ALJ's Recommended Decision, the Reply Brief on the alleged 12 U.S.C. § 72 violation, was submitted by each party on January 8, 1993. On January 9, 1993, Respondent died suddenly in an automobile accident.

IV. The Recommended Decision and Exceptions

On February 8, 1993, the ALJ filed his Recommended Decision. The ALJ found that the action abated as a result of the Respondent's death. Therefore, he recommended a final order abating any penalty and dismissing the action.

On March 3, 1993, Respondent's widow, in her capacity as the personal representative of Respondent's estate, filed Exceptions to the Recommended Decision. In the Exceptions, Respondent's widow argued that criminal actions abate upon the death of the defendant, but civil actions (such as those for a civil money penalty) do not. Respondent's Exceptions at 2-8. A decision is necessary because the estate succeeds to any potential claim for attorney fees under the Equal Access to Justice Act ("EAJA"). Id. at 7. Respondent's widow and child have a right to a final decision, which they believe will clear the name of the

Respondent. Id. at 8.

In separate pleadings, Respondent's widow also filed a Request for Oral Argument and a Motion for Substitution of herself as the respondent in this case.

On March 10, 1993, E&C filed Exceptions to the Recommended Decision. E&C argued that the Bank had agreed to indemnify the Respondent for expenses, including but not limited to attorney fees, incurred in defending any action brought by the OCC. E&C's Exceptions at 2. OCC regulation prohibits indemnification of fees incurred in an action where a final order is issued assessing a civil money penalty. Id. at 2 fn. 2, citing 12 C.F.R. § 7.5217(a). Because Respondent engaged in the violations of law alleged in the Notice, the Bank may be unjustly required to pay Respondent's costs if no final order is issued. Id. at 3.

E&C filed no response to the Request for Oral Argument and the Motion for Substitution.

V. Motions Submitted with Respondent's Exceptions

The Exceptions filed by Respondent's widow were accompanied by a Request for Oral Argument and a Motion for Substitution, which will be considered before a discussion of the issue of abatement.

A. Motion for Substitution

Because the Comptroller dismisses this action as a result of Respondent's death, the Motion for Substitution is denied.

However, in the interests of fundamental fairness, the Exceptions and Request for Oral Argument submitted by Respondent's widow will be considered as if they had been submitted by the Respondent.

B. Request for Oral Argument

The Request for Oral Argument is also denied.¹ Respondent's widow cites two grounds for the necessity for oral argument. First, there is no legal precedent directly on point to determine the sole legal issue in this case, the issue of abatement. Request for Oral Argument at 1. Second, the unusual fact situation and unique procedural history raise questions that can be most appropriately dealt with at oral argument. Id.

The Comptroller finds neither of these arguments persuasive. Because the Comptroller in his discretion dismisses this action, it is unnecessary to determine whether the action abates as a matter of law.

¹The Comptroller's Rules of Practice and Procedure provide that "[a] denial of a request for oral argument may be set forth in the Comptroller's final decision." 12 C.F.R. § 19.40(b).

The facts and procedural history of this matter are clear from the record. As discussed below, the death of a respondent in an OCC enforcement action is extremely rare but not unprecedented. For these reasons, the Request for Oral Argument is denied.

VI. Comptroller's Authority to Assess Civil Money Penalties

This CMP action was brought under 12 U.S.C. §§ 93(b), 504(a), and 1818(i). Notice at 1. These statutes authorize the Comptroller to assess a CMP against, among other persons, any officer or director of a national bank for, among other acts, any violation of law or regulation. 12 U.S.C. §§ 93(b)(1), 504(a), 1818(i)(2)(A). In his Notice of Request for Hearing ("Answer"), Respondent admitted that, at all relevant times, he was president and a director of the Bank. Answer at 1; see also Notice at 2.

VII. Discussion

A. Reasons for Dismissal

Although the ALJ and the parties have discussed whether this proceeding should abate as a matter of law, the Comptroller finds it unnecessary to discuss the abatement issue. Rather, the Comptroller has decided to dismiss this action as an exercise of his discretion.

The Comptroller believes that a final decision on the merits of this action would serve little purpose in enforcement of the banking laws. Because Respondent is deceased, any CMP that might be assessed would have no deterrent effect against him. Any general deterrent effect of a CMP would not outweigh the burden of analyzing the hearing record, making a final decision on the merits, and collecting the CMP.²

In her Exceptions, Respondent's widow expresses her desire to clear her husband's name. Respondent's Exceptions at 7. Because this action is dismissed ab initio, there is no cloud over Respondent's name, and this concern need not be addressed.

B. Attorney's Fees

In their Exceptions, both parties raised the issue of payment of attorney's fees. The Respondent's widow argued that abatement would compromise a potential claim for attorney's fees under EAJA. Respondent's Exceptions at 7. E&C argued that abatement could unfairly require the Bank to pay Respondent's attorney's

²This decision is consistent with the decision made by the Comptroller in a similar situation. In In the Matter of the First National Bank of Mt. Auburn, Mt. Auburn, Illinois, one of the respondents died shortly after the Comptroller imposed a final order against him. AA-EC-82-42, Order to Set Aside Comptroller's Order with Respect to Albert P. Mulberry (June 29, 1984). Counsel for the deceased respondent filed a motion to dismiss the proceeding against him. Without any discussion of the legal issues, the cease and desist order was set aside as to the deceased director.

fees. E&C's Exceptions at 2-3, citing 12 C.F.R. § 7.5217(a).

The Comptroller finds that this issue is not sufficiently significant to require a final decision on the merits. Even so, Respondent's widow is free to file an EAJA claim.³ Likewise, if the Bank believes that it is unfairly required to pay attorney's fees, it may commence an action against Respondent's estate.⁴ In any event, the tail of allocation of attorney's fees should not wag the dog of a merits decision that is no longer required.

C. The Merits

Because the Comptroller dismisses the CMP action against the Respondent, it is unnecessary to make a final decision on the merits. Nothing in this Decision is intended as a decision or other commentary on the merits of this action.

³She may not recover, however, unless the tribunal both determines that she is a prevailing party, and does not find "that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

⁴Payment by a bank of attorney fees that are clearly excessive or disproportionate may be an unsafe and unsound practice, but that issue is irrelevant to this decision.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

The Comptroller makes the following findings of fact:

1. At all times relevant to this action, Respondent was the President and a Director of the Bank.
2. On August 27, 1991, a Notice was issued against Respondent, alleging the following violations of law: three violations of 12 U.S.C. § 371c, one violation of 12 U.S.C. § 375b, one violation of 12 U.S.C. § 161, and one violation of 12 U.S.C. § 72.
3. On June 15, 1992, through 19, 1992, inclusive, and on November 13, 1992, hearings were held on the violations alleged in the Notice in St. Louis, Missouri.
4. On January 9, 1993, Respondent died in an automobile accident.

B. Conclusions of Law

The Comptroller makes the following conclusion of law:

1. The purposes of the CMP statutes, and justice generally,

would be most effectively served by dismissing the civil money penalty action against the Respondent due to the Respondent's death.

IX. CONCLUSION

After a careful review of the relevant portions of the record, the Recommended Decision of the ALJ, and the applicable law, the Comptroller in his discretion believes that the civil money penalty action against the Respondent should be dismissed. Accordingly, the Comptroller issues the attached final Order dismissing the proceedings against the Respondent.

6/9/93
Date

Eugene A. Ludwig
Comptroller of the Currency

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ORDER

On August 27, 1991, the Midwestern District of the Office of the Comptroller of the Currency issued a Notice of Assessment of a Civil Money Penalty pursuant to 12 U.S.C. §§ 93(b), 504, and 1818(i)(2) against the Respondent John R. Givens, former President and Director of the U.S. National Bank of Clayton, St. Louis, Missouri, for violations of 12 U.S.C. §§ 371c, 375b, 161, and 72. An administrative hearing was held on June 15 through 19, 1992, and November 13, 1992, before the Honorable Arthur L. Shipe, Administrative Law Judge, in St. Louis, Missouri.

The Comptroller has determined, in his discretion, that this action should be dismissed. Accordingly, it is ORDERED that the proceeding be, and is hereby, dismissed.

So ORDERED, this 9th day of June, 1993.

Eugene A. Ludwig
Comptroller of the Currency