

**JOE DOE, MARY DOE AND
OSCAR C. RUSSELL, JR.**

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NO. 2004-CA-1806

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**ABC CORPORATION, DEF
CORPORATION, XYZ
CORPORATION, AND
HIBERNIA CORPORATION**

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

CONSOLIDATED WITH:

CHARLES J. SHAW, JR.

NO. 2004-CA-1807

VERSUS

**HIBERNIA NATIONAL BANK
AND HIBERNIA
CORPORATION**

CONSOLIDATED WITH:

CONSOLIDATED WITH:

**JOHN DOE, MARY DOE AND
OSCAR C. RUSSELL, JR.**

NO. 2005-CA-0292

VERSUS

**ABC CORPORATION, DEF
CORPORATION, XYZ
CORPORATION,, AND
HIBERNIA CORPORATION**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 94-8087 C/W 96-11743, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge**

Judge Roland L. Belsome

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(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Michael E. Kirby, Judge Leon A. Cannizzaro, Jr., Judge Roland L. Belsome)

MURRAY, J., DISSENTING IN PART WITH REASONS

CANNIZZARO, J., CONCURS WITH REASONS

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REVERSED IN PART AND REMANDED; AFFIRMED IN PART

Plaintiffs/appellants, Oscar Russell and Charles Shaw, appeal the trial court's grant of Hibernia Bank and Hibernia Corporation's motion for summary judgment. The trial court granted defendants' motion and dismissed plaintiffs' suit on the grounds that plaintiffs' claims constituted an impermissible collateral attack on a federal agency's prior ruling, which lies outside the jurisdiction of that court.

FACTS

Oscar Russell and Charles Shaw are former executive officers of Hibernia National Bank ("the Bank"). Russell and Shaw signed employment agreements ("Employment Agreements") with the Bank and the Hibernia Corporation ("the Corporation"), a bank holding company. The Employment Agreements included generous severance packages, or "golden parachutes," that would be paid if the officers were dismissed without cause. The Employment Agreements are the subject of the current dispute.

Shaw joined the Bank in 1973 and was elected to the Bank Board in 1985. He became Bank President and was elected to the Corporate Board in

1988, and he received a generous employment agreement. The Executive Compensation Committee of the Board set the terms of the contract. His contract was for a three year term and provided that in the event of termination, actual or constructive, without cause, or due to change in control, he would be entitled to “a golden parachute,” i.e. the balance of the amount due for the remaining term of his contract.

Oscar Russell also received a similar contract. Russell was a vice-chairman of the Corporation and the Bank, and his job was to oversee the operational side of the Bank.

In 1991, the Office of the Comptroller of the Currency (“the OCC”), the regulatory body that oversees national banks, began investigating the Bank for what it perceived to be unsound banking practices. The OCC District Administrator, John Bodnar, began to review the validity of the Employment Agreements. On June 3, 1991, in a letter to the Bank’s executive officers, Bodnar declared that the Employment Agreements violated national banking laws and ordered the Bank to rescind the contracts. Specifically, Mr. Bodnar determined that the contracts violated 12 U.S.C. § 24, Fifth, which mandates that banks must be allowed to fire officers at their pleasure.

Bodnar declared the Employment Agreements invalid in a letter to the

Hibernia Bank Board of Directors dated June 3, 1991 (“the Bodnar Letter”). Bodnar determined that the Employment Agreements prohibited “the removal of the executive officers except for cause, thereby curtailing the statutory right of the Bank’s Board to hire and fire executive officers at will,” in violation of 12 U.S.C. § 24, Fifth. Bodnar also determined that the Employment Agreements violated many federal regulations. 12 C.F.R. § 7.5220 permits national banks to enter into employment contracts so long as they contain “reasonable terms and conditions.” The “golden parachute” provisions violated this regulation according to the Bodnar Letter because they were “not consistent with national banking laws, thus they are per se unreasonable.” The Employment Agreements were also found to violate federal regulations governing profit sharing plans, pension plans, stock options, and indemnification of officers for costs associated with regulatory investigations.

On June 13, 1991, the OCC sent a letter to Shaw informing him that his contract was invalid. These two letters are collectively known as the “Bodnar Letters.” Soon after the arrival of the Bodnar Letters, both Russell and Shaw signed Termination Agreements. On July 20, 1991, Shaw and Russell signed a letter (“the Termination Agreement”) indicating that they were voluntarily resigning on July 31, 1991, and that they were accepting

severance benefits limited to six-months salary and miscellaneous other benefits.

All parties disagree about the significance of the OCC directives contained in the Bodnar Letters. Shaw and Russell contend the directives in the Bodnar Letters were merely recommendations from the OCC that could have been appealed or disobeyed without consequence. Hibernia Bank and Hibernia Corporation contend that the directives were final agency action that can only be appealed in federal court, and that it had no choice but to obey the OCC's orders to rescind the contracts.

Shaw and Russell further contend that the OCC determinations were clearly incorrect, that they were the product of the Bank Board's surreptitious advocacy to have the contracts deemed unenforceable, and that the Board should have appealed the corresponding directives on their behalf. For these reasons, Shaw and Russell now claim that they signed the Termination Agreements out of mistake, since both parties believed the Employment Agreements were invalid when they actually were valid. Alternatively, they claim that they signed away their rights to substantial severance pay as the result of fraud and duress. Either way, they seek to rescind the Termination Agreements and to enforce the Employment Agreements.

PROCEDURAL HISTORY

In May of 1994, Russell filed suit against the Corporation, claiming improper rescission and breach of his employment agreement, and seeking liquidated damages. On July 22, 1996, Shaw filed a similar suit against the Corporation and the Bank. The suits were filed in the Civil District Court for the Parish of Orleans, and because the factual circumstances of both cases were nearly identical, the cases were consolidated for purposes of discovery. The cases were removed to federal court by the defendants on August 20, 1996, but remanded to state court on October 10, 1996. On May 11, 1999, Hibernia filed and was granted a motion for summary judgment on the grounds the Termination Agreement was valid and there were no genuine issues of material fact. This court reversed the trial court, holding that granting the motion for summary judgment was premature, and remanded the case for additional discovery.

On January 21, 2004, defendants filed another motion for summary judgment seeking a determination that Bodnar's Letters of June 3 and June 13, 1991 were "final agency action" and that Shaw and Russell's suits were an impermissible "collateral attack" on those rulings. Shaw opposed and filed his cross motion for summary judgment claiming that the Bodnar Letters were mere "moral suasion," not final agency action, and seeking a

determination of the legal effect of the Termination Agreement or its rescission under Louisiana state law. The court below granted the defendants' motion and denied plaintiffs' cross motion.

In the trial court's own words:

It is undisputed that the district administrator of the Office of the Comptroller of the Currency ordered that the contract be terminated and rescinded as unlawful...

Reviewing the Plaintiff's statement of contested facts in opposition to Defendant's motion for summary judgment shows that Plaintiff challenges the appropriateness of the OCC determination. A successful challenge of the OCC's ruling is necessary to render Plaintiff relief he seeks.

This Court agrees with Defendant that Plaintiff's claim constitutes an impermissible collateral attack on a prior order of a federal agency, which lies outside the jurisdiction of this Court.

Plaintiffs' appeal is now before us.

ASSIGNMENTS OF ERROR

The parties assert the following errors by the Court below: the district court erred in granting Summary Judgment on the holding that the Bodnar Letters were final agency OCC action and Shaw's suit an impermissible collateral attack on a prior Agency's ruling; further, the district court erred in denying Shaw's Cross Motion for Summary Judgment and in failing to hold that the Bodnar Letters were mere "moral suasion," not final agency action, and that Shaw's suit merely seeks to determine the legal effect of the

Termination Letter.

STANDARD OF REVIEW

Appellate courts review summary judgments *de novo*, using the same criteria that governs the trial court's consideration of whether summary judgment is appropriate. *Richard v. Hall*, 2003-1488, p. 4 (La. 4/23/04), 874 So.2d 131, 137. Summary judgment shall be rendered if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. La.Code Civ. Pro. art. 966(B).

A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966. If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. *Oakley v. Thebault*, 96-0937 (La.App. 4 Cir. 11/18/96), 684 So.2d 488, 490.

LAW AND ANALYSIS

Shaw claims that the collateral attack rule, which bars preemptive attempts to bypass the specific methods Congress has provided for reviewing agency action, is not implicated here, and does not preclude state law actions respecting contracts however much they may have been

influenced by the opinions of employees of federal agencies. Shaw also argues that the OCC only takes final agency action when it issues a notice of charges and fixes a date for formal hearing to determine whether a cease and desist order should issue, thus the Bodnar Letters were not final agency action.

Suits against third parties are impermissible collateral attacks where the heart of the suit necessitates an attack on agency decision. We believe this case is analogous to *Caribou Four Corners, Inc. v. American Oil Co.*, 628 F.Supp. 363, 371-72 (D. Utah 1985). The court in *Caribou* held that a suit by private oil refinery against other participants in Department of Energy's entitlements program was actually a premature challenge to agency action, despite being based upon various state common-law theories, and could not be maintained without exhaustion of administrative remedies. *Caribou*, 628 F.Supp. at 373. Here, if appellants were allowed to sue to enforce a contract deemed illegal by the Bank's supervising agency, it would allow them to challenge the OCC's determination without exhausting the appropriate federal remedies.

It is settled "that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had." *City of*

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). The United States Congress granted a limited waiver of sovereign immunity in the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, specifically allowing direct judicial review of federal agency actions. The APA vests exclusive subject matter jurisdiction over these matters to the federal courts.

Pursuant to the APA, any person “adversely affected or aggrieved” by “final action” of a federal agency may challenge that action in federal court in accordance with the procedures set forth in the act.

There is evidence that the Bodnar Letters may not have been final agency action. However, if they were not final agency action, there were review mechanisms available through the OCC itself. Thus, no matter how the Bodnar Letters are ultimately characterized (i.e., “final,” or “not final”), a state court does not have subject matter jurisdiction to review the appropriateness of the determination contained in those letters.

Russell and Shaw point out that many state courts since 1990 have agreed that the National Banking Act does not serve as a bar to the enforcement of severance provisions of employment agreements between banks and their executives. Courts in several states have upheld the validity of the severance pay provisions contained in employment agreements

between executive banking officers and their employers, and found them not to be in violation of the National Banking Act's mandate that banks be able to dismiss these officers at any time, with or without cause.

In *Citizens Nat'l Bank and Trust Co. v. Stockwell*, 675 So.2d 584, 586-87 (Fla.1996), the Supreme Court of Florida pointed out the unfairness of allowing a bank not to pay agreed-upon severance benefits. First, the Court distinguished between a suit for wrongful termination (which violates the National Banking Act) and a breach of contract claim to pay severance benefits (which is permitted). It then stated that a bank:

“cannot have the proverbial cake and eat it too. We do not read the National Bank Act to permit national banks to hold out lucrative contractual provisions in order to entice officers to work for them, and then hide behind a tenuous interpretation of the Act to get out of those provisions when they no longer need the officers.” *Stockwell* at 587.

The *Stockwell* court then held that the “golden parachute” provisions were enforceable. *Stockwell* at 586.

Here, the Bank was also free to enter into contracts for employment without agreeing to payment of severance benefits on termination. But, the Bank expressly agreed that if it chose to terminate its officers, it would pay them certain severance benefits. Hibernia Bank “voluntarily used the promise of those benefits as one bargaining tool to secure” the employment of Shaw and Russell during the years before they resigned or were fired.

Stockwell at 587. Because there was no limitation on the power of the Bank to remove its officers, the enforcement of the severance pay provisions is completely consistent with the National Bank Act.

Unfortunately for Appellants, this case is distinguishable from the cases listed above. Like the cases above, Russell and Shaw had employment agreements with the Bank and the Corporation, and these agreements contained “golden parachutes.” But in this case, the OCC investigated the Bank and explicitly held that the contracts violated provisions of the National Banking Act and federal banking regulations and ordered the Bank to immediately rescind the contracts, which it did.

Ultimately the appellants seek a declaration of the appropriateness of the Bodnar Letter’s determinations, and a federal court or the OCC must make this determination. For these reasons, we affirm the trial court’s grant of summary judgment to defendants/appellees on grounds that Plaintiff Shaw’s suit against the Bank was an impermissible collateral attack on a federal agency determination.

Russell and Shaw’s claims against the Corporation are different than Shaw’s claim against the Bank. In this case, the Bank (subject to regulation by the Office of the Comptroller and Currency under the National Banking Act) and the Corporation (subject to regulation by the Federal Reserve

System under the Bank Holding Company Act) entered into an employment agreement with two of the Bank's officers, Shaw and Russell. The OCC has no jurisdiction over the Corporation, and 12 U.S.C. § 24, Fifth, does not apply to bank holding companies. Therefore, although Shaw's claim against the Bank may not be brought in state court, Shaw and Russell's claims against the Corporation are valid state law contract claims.

A Michigan appellate court entertained a similar dispute in *Ambro v. American National Bank and Trust Co. of Michigan*, 394 N.W.2d 48 (Mich.App. 1986). There, a former senior vice-president of a national bank brought a wrongful discharge action against a national bank and a bank holding company. The court held that the National Bank Act precluded the senior vice-president from maintaining a wrongful discharge suit against the national bank. *Ambro* at 618. However, the *Ambro* court also held that the senior vice-president could maintain his suit against the bank holding company. *Ambro* at 619. The court reasoned that state law was not preempted with respect to employment practices of bank holding companies because,

“(t)he National Bank Act does not govern national holding companies. The National Bank Holding Company Act, 12 U.S.C. § 1841 et seq., does not contain a provision similar to § 24 of the National Bank Act. Thus, we do not believe state law is preempted with respect to employment practices of bank holding companies.” *Ambro* at 619.

We agree, and hold that Shaw and Russell's claims against the Corporation do not constitute collateral attacks on any federal agency ruling, and may stay in state court.

The trial court erred in holding that Appellants' claims against the Corporation constituted impermissible collateral attacks on the prior ruling of a federal agency. Appellants' claims against the Corporation, which is not governed by the OCC, do not constitute impermissible collateral attacks on the OCC's rulings. These claims are valid state law contract claims. However, Shaw's claim against the Bank is an impermissible collateral attack on the OCC's rulings. Therefore, the claims against the Corporation may stay in state court, and Shaw's claim against the Bank must be brought in a more appropriate venue.

CONCLUSION

For the reasons stated above, we reverse the trial court's rulings dismissing Appellants Shaw and Russell's claims against Hibernia Corporation and remand for further proceedings. We further affirm the trial court's ruling dismissing Appellant Shaw's suit against Hibernia Bank.

DECREE

REVERSED IN PART AND REMANDED; AFFIRMED IN PART