

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>GORDON VIOLA,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Civil No. 95-141-P-DMC</b>
	)	
<b>FLEET BANK OF MAINE et al.,</b>	)	
	)	
<i>Defendants</i>	)	

**ORDER ON MOTION TO DISMISS OR TO STAY FILED BY  
DEFENDANT FEDERAL DEPOSIT INSURANCE CORPORATION<sup>1</sup>**

Defendant Federal Deposit Insurance Corporation (“FDIC”) has moved to dismiss or in the alternative to stay the plaintiff’s claim against it (Docket No. 12), contending that the court is without subject matter jurisdiction in light of the plaintiff’s failure to exhaust administrative remedies as required by the relevant provision of the Financial Institutions Reform, Recovery and Enforcement Act (“FIRREA”), 12 U.S.C. § 1821(d)(13)(D). In addition, the court has entered an order (Docket No. 15) requiring the plaintiff to show cause why the claims asserted against FDIC should not be dismissed without prejudice pursuant to section 1821(d) pending his exhaustion of the FDIC’s administrative procedure for claims resolution. In response to this order (Docket No. 18), the plaintiff refers the court to his response to FDIC’s dismissal motion (Docket No. 16).

In his complaint alleging negligence and conversion, the plaintiff contends that Maine Savings Bank deprived him of certain funds he placed on deposit there, as the result of

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

embezzlement by a bank employee. Maine Savings Bank became insolvent in 1991 and FDIC was appointed its receiver. The plaintiff originally filed his complaint in state court and defendant Fleet Bank of Maine answered; thereafter, FDIC removed the action to this court and filed the pending motion to dismiss or to stay.

FDIC is entitled to dismissal of the action as requested in its motion. The jurisdictional provisions of FIRREA are plainly dispositive:

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 depository institution for which [FDIC] has been appointed receiver, including assets which [FDIC] may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or [FDIC] as receiver.

12 U.S.C. § 1821(d)(13)(D). The procedure for judicial review is set forth in 12 U.S.C. § 1821(d)(6)(A), authorizing the filing of a suit against FDIC only

[b]efore the end of the 60-day period beginning on the earlier of --

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which [FDIC] is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i)[.]

Paragraph (5)(A)(i), in turn, requires FDIC to notify a claimant within 180 days after receiving a claim whether the claim is allowed or disallowed. 18 U.S.C. § 1821(d)(5)(A)(i). Thus, the only way a person with a claim against FDIC as receiver for a failed financial institution can vindicate his claim before this court is to start by filing an administrative claim with FDIC itself.

Section 1821(d) also contains certain provisions requiring FDIC to provide notice to potential claimants against a closed depository institution for which FDIC becomes the receiver. These provisions require publication of a notice on three occasions as well as the mailing of individual notices to any creditor shown on the institution's books. 12 U.S.C. § 1821(d)(3)(B) and (C). Pursuant to these requirements, FDIC gave notice by publication in February, March and April of 1991. Affidavit of Myles Rice (Docket No. 13) at ¶ 4 and Exh. B thereto. FDIC concedes that it did not provide notice by mail to the plaintiff until June 6, 1995, after the pendency of this action. *Id.* at ¶ 6-7 and Exh. C thereto. The plaintiff filed a notice of claim with FDIC on June 19, 1995, *id.* at ¶ 9, and the 180-day administrative review period is now in progress.

The plaintiff contends that, given the timing and nature of FDIC's notice to him, to dismiss his action would be at the expense of his right to due process. Such a contention is premature because it assumes that FDIC will deny his administrative claim. *Simon v. F.D.I.C.*, 48 F.3d 53, 58 (1st Cir. 1995). Until FDIC has acted, the plaintiff has failed to exhaust his administrative remedies as required by FIRREA and this court is simply without the authority to entertain his claims against FDIC.<sup>2</sup> “The jurisdictional bar of section (d)(13)(D) reaches *all* claims seeking payment from the affected institution; *all* suits seeking satisfaction from those assets; and *all* actions for the determination of rights vis-a-v-s those assets.” *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1152 (1st Cir. 1992) (emphasis added).

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<sup>2</sup> The plaintiff also contends that the jurisdictional bar imposed by section 1821(d)(13)(D) is not applicable because the certificate of deposit that is the subject of this litigation was never an asset of Maine Savings Bank. This argument is devoid of merit. Even assuming that a certificate of deposit is not an “asset” of the bank issuing it, section 1821(d)(13)(D) requires exhaustion of administrative remedies in connection with “any claim or action for payment *from*” the assets of a failed bank for which FDIC is the receiver (emphasis added). The plaintiff cannot seriously contend that his claim does not seek payment from the assets of Maine Savings Bank.

Accordingly, the plaintiff's claims against defendant Federal Deposit Insurance Corporation are hereby **DISMISSED** without prejudice.<sup>3</sup>

*Dated this 8th day of August, 1995.*

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*David M. Cohen*  
*United States Magistrate Judge*

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<sup>3</sup> Also pending are motions by FDIC seeking enlargement of time to respond to certain discovery requests (Docket No. 17) and to respond to the plaintiff's written settlement demand (Docket No. 21). Obviously, these motions are now moot.