

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

Employees Credit Union

Docket BD-09-10

Insurance Claim

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to 12 CFR 745.202, as an administrative appeal of the determination by the Agent for the Liquidating Agent of St. Paul Croatian Federal Credit Union (FCU) denying Employees Credit Union's insurance claim.

Background

NCUA placed St. Paul Croatian FCU (FCU) into conservatorship on April 23, 2010, following the discovery of fraud, in the form of fictitious loans and other manipulation of the records, allegedly perpetrated by the FCU's CEO. On April 30th, one week later, the NCUA Board determined, given the scope of fraud, that conservatorship was not a viable option and placed the FCU into involuntary liquidation.

Claim

Employees Credit Union, a Texas FISCO (appellant), made a \$250,000 investment in a six-month share certificate offered by the FCU in December, 2009. Dividends earned on the account were posted at the end of each month and a check in the amount of the dividend was sent to the appellant on the next business day. In this way, the appellant was able to preserve a balance in the account equal to the insured limit for all but one day in each dividend period.

The FCU was placed into liquidation as of the close of business on April 30, 2010. Effective that date, the April dividend of \$287.67 had been posted to the account. Had the FCU not failed, its regular course of business with appellant indicates that it would have sent a check out the next business day representing this monthly dividend earned on the account. In this case, however, the liquidation intervened, and the check was not

sent. Instead, when NCUA' Asset Management and Assistance Center¹ conducted their assessment of the insured account balances, they determined that the dividend amount of \$287.67 was included in the account balance, putting the total account balance over the insured limit by that amount. AMAC paid Appellant \$250,000, leaving the \$287.67 as uninsured shares. Appellant has objected to that treatment and appeals AMAC's determination.

Argument

Appellant does not dispute that a strict imposition of the insured account limits would have the result of leaving the \$287.67 monthly dividend amount uninsured. Instead, Appellant contends that AMAC should have followed the FCU's previous business practice and should have first sent a check for the dividends to Appellant on the business day following the end of the month, then determined the insured account balance.

Appellant asserts that it had a contract with the FCU by which the FCU was committed to this practice. However, Appellant has not produced any document in which that contractual obligation is contained. Appellant has included a copy of the account receipt issued when the share certificate was first acquired, which indicates, under the heading of "Dividend Payment Options," that Appellant had elected to have dividends paid out to it by draft, as opposed to having dividends reinvested or transferred to another account. Appellant also relies on the fact that its course of dealing with the FCU was that dividends actually paid out to it monthly, and Appellant submitted a copy of its last regular account statement to document this practice.

Discussion

Whether or not the course of dealing between the FCU and Appellant concerning the transmittal of earned dividends created some form of obligation on the part of the FCU, the controlling factor in this case is that the FCU was placed into liquidation effective April 30th. Obligations of the institution to make payments arising after that date are effectively cut off by the intervening appointment of the liquidating agent, whose charge is to, according to NCUA's regulation addressing involuntary liquidation and creditor claims: "do all things desirable or expedient in its discretion to wind up the affairs of the credit union. . . ." 12 C.F.R. §709.4(c). Making a payment to one party, in cash, after the date of the liquidating agent's appointment would be inconsistent with that charge, and would create an unfair preference in favor of that party at the expense of other claimants holding equally legitimate claims of equal priority.

Furthermore, we note that, in accordance with the FCU Act, a party may not establish a claim against a closed credit union on the basis of an alleged agreement unless the agreement meets several specific criteria, all of which are designed to assure that the

¹ References to AMAC throughout this decision refer to AMAC staff acting in their capacity as agents for the liquidating agent.

agreement is legitimate and well documented. Specifically, the Act provides that an agreement may not form the basis of a claim unless the agreement:

- i. Is in writing;
- ii. Is executed by the credit union and the party asserting a claim thereunder;
- iii. Has been approved by the credit union's board of directors, as reflected in board meeting minutes; and
- iv. Has continuously since its execution been a record of the credit union.

12 U.S.C. §1787(b)(9)(A); *cf* 12 U.S.C. §1788(a)(3). Although the liquidating agent should be accorded some discretion in determining whether and to what degree each of these criteria must be present in a specific case to establish the existence or legitimacy of an agreement before it can form the basis of a claim, the language does support the proposition that the liquidating agent is entitled to evidence unequivocally establishing that an agreement exists. Appellant has not met that standard in this case. At best, Appellant has produced a receipt, issued by the FCU at the time of Appellant's investment, in which a notation is made indicating the option Appellant preferred for the receipt of dividends.

We consider the overriding issue in this case to be the share account relationship. Dividends earned and posted form the basis of this claim. Accordingly, any possible creditor status is surpassed by Appellant's posture as an account holder. The resolution of its claim should be governed by the rules governing share insurance. In terms of the appropriate insurance treatment of this issue, Subpart B of part 745 of NCUA regulations provides the following:

[f]or the purpose of determining insurance coverage, dividends earned in the ordinary course of business and posted to share accounts for any prior accounting or dividend period shall be deemed to be principal under this part.

12 C.F.R. §745.200(b). In this case, the dividend was posted to Appellant's account. In accordance with the rule, it became part of the principal balance in the account for purposes of determining insurance coverage. For single ownership accounts, the insured maximum is \$250,000. 12 C.F.R. §745.3.

Conclusion

As discussed above, we are not persuaded that Appellant has made out a compelling legal argument in support of its appeal of the insured amount as determined by AMAC. Even though dividends were typically paid out to Appellant on the next business day following the close of the applicable dividend period, the FCU's liquidation intervened. The course of dealing between the parties is not enough to establish the existence of a contract creating a binding obligation on the part of the liquidating agent. In accordance with our rules, the posted dividend becomes part of the share balance for purposes of calculating insurance coverage. Applying the rule for single ownership accounts, the amount representing posted dividends (\$287.67) is uninsured.

Order

For the reasons set forth above, it is ORDERED as follows:

The Board upholds the agent for the liquidating agent's decision and denies Employees Credit Union's appeal.

The Board's decision constitutes a final agency determination. Pursuant to 12 CFR 745.203(c), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States district court for the Federal judicial district where the credit union's principal place of business was located. Such action must be filed not later than 60 days after the date of this final determination.

So **ORDERED** this 21st day of October 2010 by the National Credit Union Administration Board.

Mary Rupp
Secretary of the Board