

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXX

Docket No. BD-03-19

Creditor Claim
XXXX Credit Union

**Decision and Order on Appeal
Decision**

This matter comes before the National Credit Union Administration Board (Board) under 12 C.F.R. Part 746, Subpart B, as an administrative appeal by XXXX (Petitioner) of the determination by the liquidating agent to deny its creditor's claim for XXXX in damages for lost profits or opportunity against the XXXX Credit Union (XXXX) liquidation estate.

Background and Initial Determination

XXXX was a federally insured, state-chartered credit union located in XXXX. On February 10, 2017, XXXX was placed into conservatorship because it was critically undercapitalized. It later became insolvent¹ and, on August 31, 2018, the Board placed XXXX into involuntary liquidation² and appointed itself liquidating agent³ for the credit union.

In April 2017, while the credit union was under conservatorship, Petitioner was engaged under a Master Services Agreement (MSA) to perform underwriting services for XXXX. The contract was renewed in April 2018, and the MSA was amended to require a 15-day written notice to terminate the agreement.

After placing XXXX into liquidation, the NCUA's Asset Management and Assistance Center (AMAC), the liquidating agent for XXXX, sent a creditor notice to Petitioner on September 17,

¹ XXXX's insolvency was generally a result of the devaluation of the credit union's large portfolio of taxi medallion loans.

² After XXXX became insolvent, the NCUA consulted with the XXXX, XXXX's primary supervisory authority, on April 20, 2018. The XXXX declined the opportunity to take action to liquidate the credit union; thus, the NCUA Board placed XXXX into involuntary liquidation and appointed itself liquidating agent for XXXX, effective August 31, 2018.

³ The NCUA Board has delegated complete authority to act as liquidating agent to the President of AMAC under Delegation of Authority AMAC 2.

2018, and, by letter of December 17, 2018, AMAC notified Petitioner of the liquidating agent's decision to disaffirm and repudiate its contract.⁴

Petitioner is appealing an initial agency determination by AMAC to partially disallow its creditor's claim for XXXX in "lost earnings" due to AMAC's failure to provide 15-day notice of contract termination. AMAC made an initial determination, allowing Petitioner's claim for services rendered prior to liquidation but disallowing its claim for XXXX in damages for lost profits or opportunity. Petitioner subsequently requested reconsideration, and AMAC issued a determination again allowing Petitioner's claim for services performed pre-liquidation but disallowing its claim for lost profits or opportunity. Petitioner sought administrative review of that determination by the Board.

Discussion and Analysis.

The issue before the Board in this case is whether AMAC's disallowance of Petitioner's claim for XXXX in damages for lost profits or opportunity is supportable. As more fully discussed below, upon review by the Board, AMAC's determination to disallow Petitioner's creditor's claim was sound.

Petitioner argues on appeal that it did not receive timely notification of termination based on the terms of the MSA, resulting in XXXX in lost earnings. In support, Petitioner argues it had already dedicated personnel, allotted time, and arranged for staff to provide the contracted services. Petitioner contends that had it received a 15-day notification, as per the MSA, it could have reallocated staff to respond to other client's needs. Petitioner acknowledges that the statute does not allow for damages for lost profits or opportunity.

The Board finds AMAC's determination was correct on two fronts. First, the Federal Credit Union (FCU) Act vests the liquidating agent with authority, within a reasonable time following its appointment, to repudiate any contract it determines to be burdensome if, in the judgment of the liquidating agent, repudiation will promote the orderly administration of the credit union's affairs.⁵ Here, following the date of liquidation, XXXX had no further need or use for Petitioner's underwriting services. Repudiation is appropriate in such cases. In any event, Petitioner has not challenged the liquidating agent's decision to repudiate the MSA.

Courts have found that a repudiation under Section 207 of the FCU Act renders the provisions contained in the repudiated contract unenforceable.⁶ Thus, notwithstanding Petitioner's allegations of breach of contract, the liquidating agent had no contractual obligation to provide 15-day notification of contract termination per the terms of the MSA after its repudiation.

Second, with respect to damages for repudiation, under the FCU Act, the liquidating agent is not liable for damages for contract repudiation, except for certain actual direct compensatory

⁴ See 12 U.S.C. §1787(c).

⁵ *Id.*

⁶ See *National Credit Union Admin. Bd. v. Goldman, Sachs & Co.*, 775 F.3d 145 (2nd Cir. 2014) (finding that §1787(c)'s grant of authority to NCUA in its role as liquidating agent to repudiate contracts included the authority to repudiate an arbitration clause contained in the overall agreement.).

damages.⁷ The FCU Act limits the liability of the liquidating agent for other damages, specifically providing that “lost profits or opportunity” are excluded from recoverable damages.⁸ Specifically, Section 207 of the FCU Act provides as follows:

(3) Claims for damages for repudiation.— (A) In general.—Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or liquidating agent for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the conservator or liquidating agent; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) **No liability for other damages.**—For purposes of subparagraph (A), the term “actual direct compensatory damages” does not include—

(i) punitive or exemplary damages;

(ii) **damages for lost profits or opportunity;** or

(iii) damages for pain and suffering.⁹

Petitioner’s claim for XXXX, consists of XXXX in lost wages for 15 days of full time underwriting services and XXXX for four hours of clerical support. Petitioner has failed to offer any evidence that these services were performed prior to liquidation. Petitioner also makes no contention that its claim does not constitute damages for lost profits or opportunity. In fact, Petitioner’s assertion that it is owed this amount for “lost earnings” or “lost income” that it otherwise would have earned had it received notice in adequate time to reallocate staff resources, seems to directly support the conclusion that this amount falls squarely within the types of “damages for lost profits or opportunity” that are expressly prohibited by statute.

If Petitioner could establish that it had already fully performed under the MSA before AMAC’s repudiation determination, its argument would be more persuasive. The FCU Act provides that, notwithstanding the repudiation power available to the liquidating agent, compensation for contractual services already rendered are recoverable.¹⁰ In this case, however, by Petitioner’s own admission, its claim is for lost earnings it *could have* gained had it performed the contracted underwriting services, not for those which it had actually performed.

⁷ See 12 U.S.C. §1787(c)(3).

⁸ See 12 U.S.C. §1787(c)(3)(B).

⁹ 12 U.S.C. §1787(c) (emphasis added).

¹⁰ 12 U.S.C. §1787(c)(7).

The FCU Act does not further define “actual direct compensatory damages,” but courts have interpreted this statutory language, which is also contained in the Federal Deposit Insurance Act, in matters involving the Federal Deposit Insurance Corporation (FDIC) or the Resolution Trust Corporation while acting in a capacity similar to that of the liquidating agent. Courts have generally held that this limiting language is designed to “distinguish between those damages which can be thought to make one whole and those that are designed to go somewhat further and put a plaintiff securely in a financial position he or she would have occupied but for the breach.”¹¹ As a result, courts have allowed recovery of “actual direct compensatory damages,” which include out-of-pocket expenses paid by a plaintiff in specific reliance on a particular contract, as well any amounts due and owing for past performance. Yet courts have denied relief for what has traditionally been known as the “benefit of the bargain” or lost profits.¹²

In a past creditor’s claim appeal involving similar facts,¹³ the Board looked to *ALLTEL Info. Services, Inc. v. FDIC*, a 9th Circuit case in which the U.S. Court of Appeals considered a service provider’s claim against the FDIC after the FDIC’s repudiation of the service contract. The petitioner in that case alleged the right to contractual fees for services not yet rendered. The *ALLTEL* court rejected the plaintiff’s argument, noting it failed “to establish how its claim for payments for services not yet rendered at the time of repudiation (and never rendered) cannot be characterized as remote, speculative or indirect.”¹⁴ Noting that the relevant statute excluded recovery of lost profits, the court found no reason to conclude that Congress intended for that term to mean anything other than the plain meaning of the phrase.¹⁵ The court also rejected the plaintiff’s contention that Congress intended to preserve a plaintiff’s claim for “reasonable expectation” damages.¹⁶ Given that “lost profits” is the usual measure of compensatory damages in breach of contract cases, the court found that the specific exclusion of that term from the definition of “actual direct compensatory damages” strongly suggested “that the statute was specifically intended to preclude the ordinarily available damages.”¹⁷

The FCU Act and applicable case law preclude recovery of the damages for lost profits or opportunity sought by Petitioner for AMAC’s repudiation determination.

Conclusion.

The FCU Act explicitly states that where the liquidating agent for an insured credit union repudiates a contract to which such credit union is a party, the liquidating agent’s liability for any damages for the repudiation are limited to actual direct compensatory damages. The statute expressly excludes damages for lost profits or opportunity from that term. Petitioner’s claim for XXXX in “lost earnings” constitutes damages for lost profits or opportunity and is not a cognizable claim under a plain reading of the statute.

¹¹ *Office & Professional Employees Int’l Union, Local 2 v. FDIC*, 27 F.3d 598, 604 (D.C. Cir. 1994).

¹² *See Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 246 (D.C. Cir. 1995).

¹³ *See e.g.*, NCUA BDAP-07-12 (Sept. 20, 2012).

¹⁴ *ALLTEL Info. Services, Inc. v. FDIC*, 194 F.3d 1036, 1039-40 (9th Cir. 1999) (emphasis in original).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Order

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

The decision of the Liquidating Agent for XXXX Credit Union denying XXXX claim for damages for lost profits or opportunity is AFFIRMED and the appeal of XXXX is DENIED.

The Board's decision constitutes a final agency determination, which is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code. Such action must be filed within 60 days of the date of this final determination.

So **Ordered** this 18th day of July, 2019, by the National Credit Union Administration Board.

Gerard Poliquin
Secretary of the Board