

Tort - Mutual S & L Insiders Got Premium In Merger - Former Members Allege Sold Below Market Value — Claim Right To Director Payments — Class Action — Rehearing By Agency - \$3.5 Million Mediated Settlement

by admin

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Brief Statement of Claim: The plaintiffs, individually and as class representatives, filed a lawsuit to set aside the October 1993 conversion/merger of First Savings Bank of Forest City, a state savings bank, into Centura Bank.

The plaintiffs also asked to recover the money and stock given by Centura to the individual directors and officers of First Savings. They contended these insiders were unjustly enriched in consideration of their breach of fiduciary duties to the members of First Savings.

The class action was joined with an administrative appeal seeking a review of the Savings Institutions Division's approval of the transaction, and asking for an evidentiary hearing.

The plaintiffs contended that the directors and officers of First Savings engaged in a four-year scheme to: first, convert First Federal Savings and Loan, a federally chartered savings and loan, to First Savings Bank of Forest City, a state savings bank, in order to avoid federal control; and second, to merge First Savings into Centura, with substantial payments going to the directors and officers.

To further this scheme, the plaintiffs alleged that Centura conspired with the directors and officers by paying them in excess of 50 percent of the benefits from the conversion/merger transaction, or approximately \$5 million.

Principal Injuries (in order of severity): The plaintiffs complained that the savings and loan was sold for \$8.7 million, which was \$10 million less than the fair market value of the institution. They also complained that the majority of the consideration was paid to the directors and officers in an amount exceeding \$5 million. The plaintiffs alleged that Centura had conspired with the directors and officers to buy the bank for less than they should in exchange for these windfalls.

Special Damages: n/a

Tried or settled: The case was settled after the parties engaged in mediation proceedings with former Justice James Exum leading the negotiations over a two-day period. At the end of the second day, the parties were guided to a final settlement which resulted in an agreement resolving the administrative proceeding and the civil action.

County where tried or settled: Wake

Case Name and number: *Byers et al, on behalf of themselves and all others similarly situated v. Carpenter et al* (Wake County File No. 94 CvS 04489 (civil action); 94 NCB 103 (business court))

Date Concluded: Distribution formula tentatively approved by Business Court Judge Ben F. Tennille on Nov. 21, 1997; after a period of comment by the class, the distribution will be approved on Jan. 30, 1998.

Name of Judge: Ben F. Tennille

Amount: Under the settlement, Centura will pay \$3.5 million to the former members of First Savings. Also the directors and officers will surrender some of their future benefits. The money paid by Centura will be divided among the members based on the formula which was tentatively approved by Judge Tennille.

Insurance Carrier: None

Expert Witnesses and areas of expertise: For plaintiffs: Dr. Finley Lee, fiduciary duties, appraisal; Ms. Diane Lahti, appraisal and damages accounting; for defendants: Mr. James Causey, merger/conversions, appraisal; Mr. V. Gerard Comizio, federal administrative procedures

Attorneys for plaintiffs: Robert B. Glenn Jr., Stewart W. Fisher, Michael D. Calhoun, William S. Mills and Wilbur P. Gulley

Other Useful Info: This was one of many similar conversion/mergers in the state during 1993-94, according to the plaintiffs' counsel. Several mid-tier commercial banks went on a buying spree using a similar procedural model.

Using substantial inducements to the insiders, the banks were able to acquire these institutions for much less than their fair market value. As a result, millions of dollars were taken from the small savings and loans in rural communities and absorbed by the mid-tier banks, according to the plaintiffs.

At the time the buying spree began, it was the rule throughout the nation that members of mutual savings and loans had no ownership interest in the net worth of the institution. This holding paved the way for the actions by commercial banks.

Therefore, when this action was filed, the defendants contended that the plaintiff class had no interest in the benefits flowing to the directors, and therefore did not have standing to oppose the transaction.

However, the plaintiffs claimed that North Carolina specifically prohibits fiduciaries from enriching themselves, even if the beneficiaries have no claim to the money taken. The plaintiffs relied heavily on *Booher v. Frue*, 86 N.C. App. 390, 358 S.E.2d 127 (1987), *aff'd per curiam*, 321 N.C. 590, 364 S.E.2d 141 (1988).

The plaintiffs contended that the directors and officers, by gaining big payments to recommend the transaction to the members, were violating their duties and being unjustly enriched. That approach differentiated this case from the approach taken in many other unsuccessful challenges to conversion/mergers.

The defendants also relied on the fact that the transaction had been approved by the five federal and state agencies who oversaw the transaction. The members also argued that the members had received a proxy statement that disclosed the transaction to the members.

Because of these issues, the case was designated a complex case and transferred to Business Court.

The following is a brief chronology of the major events in the case:

- On Sept. 16, 1993, the eligible voting members of First Savings Bank of Forest City, SSB ("First Savings") voted to approve a proposed conversion/merger, by which First Savings was converted from a state-chartered mutual savings bank to a state-chartered stock-owned savings bank, and simultaneously merged into Centura.
- On Oct. 14, 1993, the Administrator of the North Carolina Savings Institution Division approved the entire transaction.
- On Nov. 19, 1993, the plaintiffs filed a petition for a contested case hearing with the SID seeking a reversal of the administrator's decision. That was denied on April 13, 1994.
- On May 13, 1994, the plaintiffs filed a joint petition for judicial review of the final decision by the SID and a civil action in Wake County.
- On March 2, 1995, the claims against the SID were severed from the claims against the other defendants. On Oct. 31, 1995, Judge Knox Jenkins remanded the judicial review proceeding to the SID to conduct a hearing on the petition for a contested case hearing.
- On or about March 4, 1996, the civil action was certified as a class action by Judge David LaBarre.

- On or about March 31, 1996, the civil action was designated a complex business case by Judge James Farmer pursuant to Rule 2.1 of the general rules of practice and assigned to Judge Ben F. Tennille, Special Superior Court Judge for Complex Business Cases.
- On Oct. 10, 1996, the defendants moved for summary judgment. The motion and the plaintiffs' response were extensively briefed. Although the motion was argued in January 1997, there had been no ruling when the parties entered into negotiations in October 1997.
- Only August 11-13, 1997, the SID Administrator conducted a three-day hearing on the matters set forth in the petition for a contested case hearing. An order was pending when the parties entered into negotiations.
- On Oct. 11, 1997, after two days of negotiations, the case settled.

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