UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8216
Summary Calendar

CHARLES McCLURE and
VIRGINIA McCLURE,

Plaintiffs-Appellants,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of Security National Bank of
Midland,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(92-CV-142)

(January 4, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Charles and Virginia McClure appeal the dismissal of their petition to set aside a post-judgment order which reduced their damage award in a prior suit. Finding no error, we affirm.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

In 1986 a jury returned a $750,000 verdict in favor of the McClures and against Security National Bank of Midland for violation of the antitying provisions of the Bank Holding Company Act, 12 U.S.C. §§ 1971-1978. The district court trebled the damage award under 12 U.S.C. § 1975 and entered judgment in the amount of $2,250,000. The bank appealed. Subsequently the bank was declared insolvent and the Federal Deposit Insurance Corporation was appointed receiver. The FDIC filed a post-judgment motion seeking relief from the statutory trebling provision. The McClures opposed the motion on procedural grounds. The district court granted the motion, finding that treble damages were in the nature of a penalty and therefore beyond Congress's waiver of sovereign immunity and, further, that imposition of treble damages against the FDIC would not serve its intended regulatory purpose. The judgment reducing the damage award to $750,000 was entered on April 1, 1988.

The McClures did not appeal. Instead, on October 9, 1992, four and one-half years later, they filed the instant action seeking to set aside the April 1, 1988 decree. On motion of the FDIC the district court dismissed the case under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The McClures timely appealed.

Analysis

This appeal implicates rarely invoked portions of Rule 60(b) of the Federal Rules of Civil Procedure, which provide in pertinent

part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
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> . . .
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> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
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> (4) the judgment is void;
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> . . . .
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court.

The McClures contend that: (1) the judgment was procured by fraud upon the court, and (2) was void.

The McClures claim that the FDIC engaged in fraud when its lawyers represented to the district court that treble damages under 12 U.S.C. § 1975 were punitive. Fraud complaints under Rule 60(b)(3) are subject to a one-year prescriptive period. The McClures, therefore, may urge only an independent action, a mechanism for relief available "only under unusual and exceptional circumstances."[1] As we have reminded, "[i]t is not the function of an independent action to relitigate issues finally determined in another action between the same parties" or to raise issues that

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[1] **Carter v. Dolce**, 741 F.2d 758, 759 (5th Cir. 1984), quoting 11 Wright & Miller, Federal Practice & Procedure, § 2868 at 239 (1973 and 1993 Supp.).

could have been litigated before.[2]

The McClures offer no reason their allegation of fraud could not have been raised in conjunction with the FDIC's motion to reduce the trebled damage award. To the contrary, it cannot be gainsaid that such a response would have been relevant and could have been raised. The McClures' claim rests on the premise that it was conclusively established that section 1975 treble damages were not punitive at the time that the FDIC argued otherwise. If such were the case, that argument was available to the McClures at that time. We do not now decide whether treble damages under section 1975 are available against the FDIC. We merely note that there is substantial authority for the FDIC's position.[3] The McClures' strongest support comes from **Molzof v. United States**,[4] a decision rendered in 1992, several years after the allegedly fraudulent conduct occurred. Failure to anticipate subsequent jurisprudence does not constitute fraud upon the court.[5]

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[2]**Id.**

[3]See, e.g., **American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.**, 456 U.S. 556 (1982) (antitrust treble damages were designed in part to punish and in part to deter); **Hometowne Builders, Inc. v. Atlantic National Bank**, 477 F.Supp. 717 (E.D.Va. 1979) (a separate award of punitive damages is not available for bank tying violations because there is a punitive element inherent in the trebling of actual damages).

[4]_____ U.S. _____, 112 S.Ct. 711 (1992).

[5]See **Wilson v. Johns-Manville Sales Corp.**, 873 F.2d 869, 872 (5th Cir.) (fraud upon the court reaches only that type of fraud that defiles the court itself or is "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication") (internal quotation and citation omitted), cert. denied, 493 U.S. 977 (1989); cf. **Hazel-Atlas Glass Co. v.**

The McClures also contend that the amendment of the judgment was void because the district court improperly set aside the jury verdict in violation of the seventh amendment. That is not what occurred; the jury verdict remained intact. The court's determination concerning the treble damage provision of section 1975 was a decision of law, a matter reserved to the court. Correct or not, that decision did not disturb the jury's verdict. Nor was the judgment void, as the McClures maintain, for failure to comply with what they characterize as a mandatory statute. This contention merely recasts the McClures' argument that the district court erred in interpreting the statute. A judgment is not void merely because it is erroneous. Rule 60(b)(4) is reserved for judgments entered in the absence of jurisdiction or due process.[6] The McClures' complaint alleges neither.

Finally, the McClures charge that the FDIC breached its fiduciary duties by seeking relief from treble damages. This contention could have been raised previously, is barred by *res judicata*, and will not be addressed.

The judgment of the district court is AFFIRMED.

Hartford-Empire Co., 322 U.S. 238 (1944) (attorney who wrote a spurious article supporting his client's position and submitted it to the court as the work of a disinterested expert committed a fraud upon the court), overruled on other grounds, **Standard Oil Co. of California v. United States**, 429 U.S. 17 (1976).

[6]**United States v. 119.67 Acres of Land, Etc.**, 663 F.2d 1328 (5th Cir. 1981).