

PARTIES

1. The Third Party Defendant, Cross-Plaintiff, and Counter-Plaintiff is Blair, individually, and as Class Representative of the Proposed Class.
2. The other parties to these proceedings are:
 - (i) JPMorgan Chase Bank, National Association, Successor Trustee ("JPMorgan") of the First City Bancorporation Employee Retirement Trust ("1976 Trust"), which is a Defendant in these proceedings;
 - (ii) FCLT Loans Asset Corporation ("FCLT"), which is a Defendant in these proceedings;
 - (iii) First City Financial Corporation ("FCFC"), which is a Defendant in these proceedings.
3. Blair and all Defendants have previously entered their appearances in these proceedings. Service is not necessary on any of the current parties.

JURISDICTION & VENUE

4. This Court has jurisdiction of the matters raised in these proceedings because the amount in controversy is within the jurisdictional limits of this Court. Harris County has been established as the proper venue for this action.

ANSWER

5. Under Rule 92 of the Texas Rules of Civil Procedure, Blair generally denies the allegations in JPMorgan's Original Answer, Cross-Petition and Third Party Petition for Declaratory Judgment. Blair submits that there are additional parties who are not currently before the Court, but whose presence in these proceedings is necessary for a just adjudication of some or all of the matters raised in the Original Petition filed by Prudential Financial, Inc.

6. The presence of these additional parties—the members of the Proposed Class—is necessary for two reasons. First, this is an action for declaratory judgment. Accordingly, under

section 37.006 of the Texas Civil Practice & Remedies Code ("CPRC"), "all persons who have or claim any interest that would be affected by the declaration must be made parties." Blair, on behalf of the Proposed Class, claims ownership in the Demutualization Proceeds (defined below). As the ownership of the Demutualization Proceeds is the chief issue in these proceedings, the Proposed Class will be affected by the declaration in this case. Second, this is a proceeding possibly involving a trust within the purview of section 115.001(a) of the Texas Property Code. See TEX. PROP. CODE ANN. § 115.011(b). Blair is one of approximately 3,800 members of the Proposed Class currently receiving (or entitled to receive) benefits from Prudential Group Annuity Contracts ("GACs") GA-5523 and GA-5858 (which includes GA-5524) at the time of the filing of this action. Such members are former employees of First City Bancorporation of Texas, Inc. ("First City") or of its many affiliates or subsidiaries. JPMorgan contends that the GACs are assets of the 1976 Trust. Blair contends (below) that such trust is terminated. Nevertheless, for purposes of joinder, the members of the Proposed Class on whose act or obligation this action is predicated, who are designated by name in the documents related to the 1976 Trust, and who are entitled to receive payments under the GACs are necessary parties to this action.

7. This interpleader action was filed by Prudential Financial, Inc. ("Prudential") on January 19, 2005. Prudential has been dismissed from this case. Shortly thereafter, other parties removed this action to Federal Court. Thereafter, this case was remanded to this Court where it was originally filed. Subsequently, the Court granted Blair's application to designate Thompson & Knight LLP as interim class counsel. Blair has filed his Unopposed Motion for Class Certification and Appointment of Class Counsel pursuant to Rule 42 of the Texas Rules of Civil Procedure.

GENERAL FACTUAL BACKGROUND

8. On January 1, 1983, First City adopted the restated First City Bancorporation Employee Retirement Plan ("1983 Plan") for the benefit of certain First City employees and their beneficiaries. Funds contributed to the 1983 Plan were administered by First City National Bank of Houston ("Bank") as trustee under the 1976 Trust, as adopted effective January 1, 1976.

9. In 1986, First City calculated that the 1983 Plan was over-funded in the approximate amount of \$40 million. In early 1987, the 1983 Plan was amended so as to: (i) enable First City to capture any trust funds remaining upon termination of the 1983 Plan resulting from a variation between actual requirements and actuarially expected requirements; and (ii) terminate the 1983 Plan and the 1976 Trust.

10. To effectively terminate the 1983 Plan and 1976 Trust, assets of the 1983 Plan and 1976 Trust were used to purchase the GACs from Prudential to fund benefit liabilities with respect to the participants and beneficiaries of the 1983 Plan, which includes the Proposed Class. Bank, in its capacity as trustee of the 1976 Trust, was the named "Contract-Holder" of the GACs. After the GACs were purchased, the remaining 1983 Plan assets in the 1976 Trust, which totaled approximately \$40 million, were distributed to First City; and, under the terms of the last amendment to the 1983 Plan and 1976 Trust, executed April 15, 1987, the 1976 Trust terminated upon the liquidation of same.

11. In 1992, First City was the subject of an involuntary bankruptcy. FCLT and FCFC are the post-bankruptcy successor entities to First City as set forth in First City's confirmed plan of reorganization ("First City Reorganization Plan")¹. First City's Bankruptcy

¹ "Joint Plan of Reorganization by First City Bancorporation of Texas, Inc., Official Committee of Equity Security Holders, and J-Hawk Corporation, with the Participation of Cargill Financial Services Corporation, under Chapter 11 of the United States Bankruptcy Code." The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, entered an Order confirming such plan on May 31, 1995.

Schedules and Statement of Financial Affairs declares, under penalty of perjury, that First City's interests in annuities, insurance policies, "IRA, ERISA, Keogh, or other pension or profit sharing plans" as "NONE." In early 1993, Texas Commerce Bank ("TCB") acquired the assets of the corporate trust department and trust business of Bank. TCB, through a series of mergers, name changes, and similar corporate transactions, became JPMorgan. Blair, however, contends that the 1976 Trust terminated when the 1976 Trust was liquidated and that JPMorgan, as "Contract Holder", holds title to the GACs as a mere nominee (or place holder) for the participants and beneficiaries of the 1983 Plan, which includes the Proposed Class.

12. On December 15, 2000, Prudential adopted a plan of reorganization of its business from a mutual insurance company to a stock insurance company in a process referred to as "demutualization." As part of the demutualization, reorganized Prudential issued common stock in Prudential or an affiliate to its policy and contract holders in consideration of, and in exchange for, their mutual ownership interests.² Approximately 321,211 shares of Prudential common stock are attributable to the GACs (which, together with accrued dividends, are referred to herein as the "Demutualization Proceeds").

13. After calculating the shares of common stock attributable to the GACs, Prudential notified FCLT of the existence of such stock and that Bank is listed as the "Contract Holder". FCLT responded by letter dated October 29, 2001, wherein Robert W. Brown, as President of FCLT, wrote, in pertinent part:

Let it be known, however, that FCLT Loans L.P. did not receive First City assets or obligations which ceased to exist prior to the closure of the First City banks in October, 1992, and in order to avoid any complications or unnecessary expense which could result from your assignment of stock to First City National Bank of Houston, later known as First City, Texas - Houston, N.A., this letter and the accompanying documents are hereby

² See N.J. STAT. ANN. § 17:17C-3 (requiring mutual insurance companies to compensate policyholders for their extinguished membership interests in the mutual insurance company).

presented to provide proof to Prudential that no such policy-holder exists and that the First City Bancorporation Employee Retirement Plan and that Trust governing such Plan have been terminated.

Upon completing your review, we would appreciate your informing us of your disposition of this matter. We assume you will either cancel the stock in question or place it in line for escheatment.

14. The stock and cash portion of the Demutualization Proceeds has been paid by Prudential to JPMorgan, pursuant to this Court's order of January 27, 2005. Under such order, JPMorgan is holding "the sales proceeds in 100% U.S. Treasury Securities Money market Fund pending further agreement, order of the Court or other resolution of all conflicting claims to the proceeds." The stock portion was liquidated on January 28, 2005, pursuant to the same order. The Demutualization Proceeds are now worth an estimated \$18 million.

15. The justiciable controversy in this action concerns the ownership of the Demutualization Proceeds.

AFFIRMATIVE DEFENSES, CROSS CLAIMS, AND COUNTERCLAIMS FOR DECLARATORY JUDGMENT

16. Blair complains of FCLT and FCFC by way of this cross claim on the grounds set forth below. Blair denies that FCLT or FCFC is the owner of the Demutualization Proceeds. Blair complains of JPMorgan by way of this counterclaim on the grounds set forth below. Blair denies that JPMorgan is the owner of the Demutualization Proceeds.

17. Declaratory Judgment. Blair is entitled to a declaratory judgment, under CPRC section 37.004(a), that the Demutualization Proceeds belong directly to the members of the Proposed Class. Pleading in the alternative, if the Court finds that the 1976 Trust is not terminated, Blair is entitled to a declaratory judgment that the Demutualization Proceeds belong to JPMorgan as "Contract Holder" to hold such proceeds for distribution to the members of the Proposed Class.

18. Judicial Estoppel. Blair asserts the affirmative defense of judicial estoppel under applicable bankruptcy case law with respect to FCLT's, FCFC's, and JPMorgan's claims to the Demutualization Proceeds. FCLT and FCFC separately claim the Demutualization Proceeds based on their respective rights pursuant to the First City Reorganization Plan. But neither the First City Reorganization Plan nor the other applicable bankruptcy filings describe or list, as an asset of First City, contingent, reversionary, or otherwise, any rights to surplus trust funds from the terminated 1983 Plan and terminated 1976 Trust or any right in and to the GACs. In fact, First City's Bankruptcy Schedules and Statement of Financial Affairs declares, under penalty of perjury, that First City's interests in annuities, insurance policies, "IRA, ERISA, Keogh, or other pension or profit sharing plans" as "NONE." Likewise, JPMorgan's claim to the Demutualization Proceeds is based on TCB's acquisition of the Bank's trust department from First City's bankruptcy estate. Under established Fifth Circuit bankruptcy law regarding judicial estoppel, FCLT, FCFC, and JPMorgan, as successors-in-interest to First City, are prohibited from claiming an interest in the GACs and associated Demutualization Proceeds because: (1) FCLT, FCFC, and JPMorgan are taking a position clearly inconsistent with a position taken by First City; (2) the Bankruptcy Court accepted First City's previous position; and (3) the non-disclosure was not inadvertent.

19. Waiver. Pleading in the alternative if such be necessary, Blair asserts the affirmative defense of waiver with respect to FCLT's claim to the Demutualization Proceeds. Blair contends that even assuming FCLT's claim to the Demutualization Proceeds is valid, FCLT waived any right to the Demutualization Proceeds by intentionally relinquishing its right or intentionally engaging in conduct that is inconsistent with claiming its right to the Demutualization Proceeds by its rejection of same in 2001 (*see* ¶ 13 above).

20. JPMorgan Holds The GACs As Nominee For The Proposed Class. Pleading in the alternative if such be necessary, Blair asserts that the Proposed Class is entitled to a direct distribution of the Demutualization Proceeds because First City effectively intended to purchase an annuity contract for each participant in the 1983 Plan. If individual annuities had been purchased, there would be no question that the members of the Proposed Class would be entitled to their share of the Demutualization Proceeds. The result in this case should be no different. The GACs were purchased instead because of administrative efficiency. But First City's intent is nonetheless evident under Texas law³ based on the following:

- a. the terms of the 1983 Plan and 1976 Trust entitled First City to the surplus of any trust funds remaining after the satisfaction of all liabilities with respect to employees that exist because of "actuarial error";
- b. however, the reversion to First City at the time of termination was the only reversion allowed under the terms of the 1983 Plan⁴ and 1976 Trust⁵;
- c. the 1983 Plan was terminated effective May 31, 1987, and the 1976 Trust was terminated upon the reversion to First City and the purchase of the GACs, which liquidated the 1976 Trust⁶;

³ Section 9.1 of the 1976 Trust provides that such trust is to be construed and regulated by the "laws of the State of Texas." Section 18.06 of the 1983 Plan provides: "The situs of the Plan and the Trust hereby created is Texas. All provisions of the Plan shall be construed in accordance with the laws of Texas except to the extent pre-empted by federal law." Section 3.11 of GAC GA-5523 and section 1.13 of GAC GA-5858 show that Texas law governs the construction and interpretation of the GACs.

⁴ Article II of the 1983 Plan provides: "Except as provided in Section 16.02(c) and Article XIX, no part of the Trust Fund can ever revert to an Employing Company or be used for or diverted to purposes other than the exclusive benefit of the Members and their beneficiaries." Section 18.04 of the 1983 Plan provides:

Except as otherwise specifically herein provided, no part of the corpus or income of the Trust Fund shall be used for any purpose other than the exclusive purpose of providing benefits for the Members and their beneficiaries and defraying reasonable expenses of administering the Plan. Anything to the contrary herein notwithstanding, the Plan shall never be construed to vest any rights in an Employing Company other than those specifically given hereunder.

⁵ Section 2.4 of the 1976 Trust provides: "Neither during the existence nor upon the discontinuance of the Plan shall any part of the Trust Fund be used for or diverted to purposes other than for the exclusive benefit of the employees of the Company or their beneficiaries, except as provided in Section 7.2."

⁶ The last amendment to the 1983 Plan and 1976 Trust, executed May 15, 1987, provides that following IRS and PBGC approval of plan termination, "and distribution of Plan funds as herein provided, the Plan and Trust shall automatically terminate."

- d. upon the purchase of the GACs, all liabilities with respect to First City employees under the 1983 Plan were satisfied;
- e. First City captured a surplus of approximately \$40 million and filed its final Form 5500 with the Internal Revenue Service;
- f. 1976 Trust assets were used to purchase the GACs;
- g. under the First Amendment to the 1976 Trust, the GACs are not considered trust funds; and
- h. JPMorgan does not hold the GACs as trustee of the 1976 Trust but as a mere *nominee* for the benefit of the annuitants.

21. On these facts, First City (and its successors) received all the surplus that it was entitled to receive under the terminated 1983 Plan and terminated 1976 Trust. By First City's design, there are no more trust funds, and, therefore, there can be no further surplus subject to reversion. FCLT recognized this fact and was willing to allow the Demutualization Proceeds to be canceled or escheat to the state (*see* ¶ 13 above). After capturing the \$40 million surplus, instead of purchasing individual annuities for the plan participants and beneficiaries, First City purchased the GACs and named "First City National Bank of Houston as Trustee of the First City Bancorporation Employee Retirement Trust" as the "Contract Holder" for administrative convenience. Had First City purchased individual annuities, there would be no dispute that the Proposed Class is entitled to his or her share of the Demutualization Proceeds. The result in this case should be no different as First City clearly intended to forever sever itself from the 1983 Plan and 1976 Trust by purchasing the GACs.

22. The Demutualization Proceeds Did Not Result From Actuarial Error. Pleading in the alternative if such be necessary, Blair claims that the Proposed Class is entitled to a direct distribution of the Demutualization Proceeds, and that FCFC and FCLT are not so entitled because the Demutualization Proceeds do not qualify as "*surplus* [that] exists because of an

actuarial error" under a plain reading of Section 16.02 of the 1983 Plan and Section 7.2 of the 1976 Trust.

23. The 1976 Trust Terminated. Pleading in the alternative if such be necessary, Blair contends that JPMorgan, as trustee of the 1976 Trust, is not entitled to the Demutualization Proceeds because the 1976 Trust terminated when the 1976 Trust was completely liquidated under the last amendment to the 1983 Plan and 1976 Trust, executed May 15, 1987. JPMorgan merely holds title to the GACs as a nominee for the beneficial owners—the Proposed Class. JPMorgan asserts that the 1976 Trust exists under the terms of the 1976 Trust and Texas trust law. Therefore, Blair claims that if the Court finds that the 1976 Trust is not terminated, that the Demutualization Proceeds belong to JPMorgan as "Contract Holder" to hold such proceeds for distribution to the Proposed Class.

24. Failure Of Condition Precedent As To FCLT And FCFC. Pleading in the alternative, if such be necessary, neither FCLT nor FCFC are entitled to the Demutualization Proceeds for failure to prove two condition precedents to their respective claims.⁷ First, both FCLT and FCFC must prove, as a condition precedent to their respective claims, that Section 16.02(c) of the 1983 Plan, which forms the basis of their argument that the Demutualization Proceeds must revert to the proper successor-in-interest to First City, was legally effective upon termination of the 1983 Plan. ERISA provides that any provision or amendment increasing the amount that may be distributed to the employer shall *not* be treated as effective before the end of the fifth calendar year following the date of the adoption. Second, both FCLT and FCFC must prove, as a condition precedent to their respective claims, that the provisions in the 1983 Plan that they are relying on as the basis for their claim to the Demutualization Proceeds are also

⁷ Although Blair has asked for the documents relevant to these conditions precedent in his discovery requests to FCLT and FCFC, Blair has not been provided copies of such documents.

reflected in the Summary Plan Descriptions (and summaries of material modifications) distributed to the participants of the 1983 Plan.

25. Additional Theories. Pleading in the alternative if such be necessary, Blair asserts the applicable statute of limitations, laches, res judicata, estoppel, and quasi-estoppel.

26. Conditions Precedent. In accordance with Rule 54 of the Texas Rules of Civil Procedure, all conditions precedent have been performed or have occurred that entitle Blair to recover as alleged herein.

27. Attorney's Fees And Costs. In addition to any other grounds entitling Blair to reasonable and necessary attorney's fees, costs and expenses, Blair is entitled to reasonable and necessary attorney's fees, costs and expenses under CPRC section 37.009.

28. Jury Demand. Blair requests a jury trial in this case, and tenders the required jury trial fee with the filing of this pleading.

WHEREFORE, PREMISES CONSIDERED, Blair, individually, and as Class Representative respectfully requests:

1. A declaratory judgment that the Demutualization Proceeds belong directly to the Plan Participants;
2. All reasonable and necessary attorney's fees, costs and expenses as allowed by law; and
3. such other and further relief to which it may show itself to be justly entitled.

DATED: September 2 2005.

Respectfully submitted,

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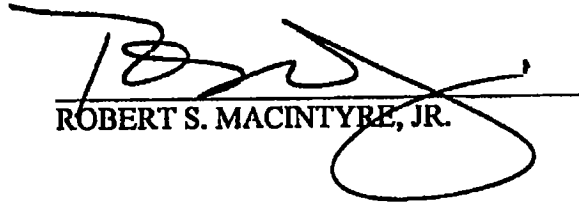
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been transmitted to all counsel of record by fax and/or first class mail on this 2 day of September, 2005.


ROBERT S. MACINTYRE, JR.