

CAUSE NO. 2005-04492

TR#35

P.8

TJNOX

PRUDENTIAL FINANCIAL, INC.

Plaintiff

VS.

JPMORGAN CHASE BANK,  
NATIONAL ASSOCIATION, FIRST  
CITY FINANCIAL CORPORATION,  
FIRST-CITY NATIONAL BANK OF  
HOUSTON AS TRUSTEE OF THE  
FIRST CITY BANCORPORATION  
EMPLOYEE RETIREMENT TRUST,  
AND FCLT LOANS ASSET  
CORPORATION

Defendants

VS.

TIMOTHY J. BLAIR

Third Party Defendant  
and Counter-Plaintiff

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

By \_\_\_\_\_  
Harris County, Texas  
Deputy

OCT 24 2005

CHARLES BACARISSE  
District Clerk

152ND JUDICIAL DISTRICT

**ORDER PURSUANT TO TEX. R. CIV. P. 42(c) GRANTING TIMOTHY J. BLAIR'S  
MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**

CAME ON for consideration Timothy J. Blair's ("Blair") Motion For Class Certification And Appointment Of Class Counsel ("Motion"), and after considering the pleadings, affidavits, evidence, and arguments of counsel, the Court is of the opinion that this case should be certified as a class action; it is therefore,

1. ORDERED that the Motion is GRANTED. All capitalized terms not otherwise defined herein are defined in the Motion. The parties have agreed to the form of this Order with the understanding that any findings herein are related solely to class certification issues, and that this Order is inadmissible as evidence in the trial on the merits. The parties also agree, and the

RECORDER'S MEMORANDUM  
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at the time of imaging

EXHIBIT  
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Court hereby **ORDERS** that the theories, claims, and defenses of Blair, FCLT, FCFC, and JPMorgan set forth below are subject to change without the necessity of amending this Order. It is further,

2. **ORDERED** that the requirements of numerosity, commonality, typicality, and adequate representation have been met; in accordance with the requirements of Rule 42(a). It is further,

3. **ORDERED** that the class is properly defined as follows:

All persons having any beneficial interest as of December 15, 2000 (the official date that Prudential adopted its plan to demutualize) under Group Annuity Contracts GA-5523 and GA-5858 (which includes GA-5524) purchased from The Prudential Insurance Company of America. In the event of the death of any such person after December 15, 2000, the class shall include such person's estate. In the event of the divorce of any such person after December 15, 2000, and the divorce decree or settlement of property rights incident to the divorce assigned any portion such person's interest in said group annuity contracts to any other person pursuant to a Qualified Domestic Relations Order as defined in Section 414(p) of the Internal Revenue Code and in accordance with the other terms and conditions of said group annuity contracts, then the class shall include such other person (or such other person's estate in the event of his or her death since such date).

It is further,

4. **ORDERED** that the Class is hereby **CERTIFIED** under Rule 42(b)(1)(A). It is further,

5. **ORDERED** that the Class issues, claims and defenses are as follows:

a. *Overall issues.* Whether the Class is entitled to a declaratory judgment, under section 37.004(a) of the Texas Civil Practice & Remedies Code, that the Demutualization Proceeds belong directly to the Plan Participants. In the alternative, if the Court finds that the 1976 Trust is not terminated, the issue becomes whether the Class is entitled to a declaratory

judgment that the Demutualization Proceeds belong to JPMorgan as "Contract Holder" to hold such proceeds for distribution to the Class.

b. Theories. First. Blair asserts the affirmative defense of judicial estoppel under applicable bankruptcy case law with respect to FCLT's and FCFC's claims to the Demutualization Proceeds. Blair contends that FCLT and FCFC are estopped from claiming an interest in the Demutualization Proceeds because First City stated in its bankruptcy schedules that it had no interests in insurance policies or contracts, annuities, IRA, ERISA, Keogh, or other pension or profit sharing plans. This affirmative defenses will require an examination of applicable federal bankruptcy case law and the filings in First City's bankruptcy.

c. Second. Blair asserts the affirmative defense of waiver with respect to FCLT's claim to the Demutualization Proceeds. This affirmative defense will require an examination of whether FCLT intentionally relinquished its rights or intentionally engaged in conduct inconsistent with claiming its rights to the Demutualization Proceeds by its rejection of same in 2001

d. Third. Blair claims "the 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 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." This claim will require an examination of Texas law regarding contract interpretation and construction juxtaposed against the terms of the 1983 Plan, 1976 Trust, GACs, other writings, and relevant testimony.

e. Fourth, FCLT and FCFC, as successors to First City, claim the Demutualization Proceeds on the basis that section 7.2 of the 1976 Trust provides: "If, upon termination of the Trust, after satisfaction of all liabilities with respect to employees of the Company and their beneficiaries, a surplus exists because of an actuarial error, such surplus shall be distributed to the Company upon the written direction of the Committee." Section 16.02(c) of the 1983 Plan contains an analogous provision. Blair claims that the Class is entitled to a direct distribution of the Demutualization Proceeds, and that FCFC and FCLT are not so entitled, because under ERISA and applicable federal tax law, the Demutualization Proceeds do not qualify as "surplus [that] exists because of an actuarial error". This claim will likely require an examination of federal ERISA and tax laws to determine the meaning of "surplus" and "actuarial error" under the 1983 Plan and 1976 Trust.

f. Fifth, Blair contends that JPMorgan is not entitled to the Demutualization Proceeds because the 1976 Trust terminated when the 1976 Trust was completely liquidated. JPMorgan merely holds title to the GACs as a nominee for the Class. JPMorgan asserts that the 1976 Trust is not terminated. If the Court finds that the 1976 Trust is not terminated then the Demutualization Proceeds belong to JPMorgan as "Contract Holder" to hold such proceeds for the benefit of the Class. This claim will require an examination of Texas trust law and the terms of the 1976 Trust to determine whether such trust is terminated.

g. Distribution of Demutualization Proceeds. In the event that FCLT, FCFC, or JPMorgan prevails, the Court will order the Demutualization Proceeds to be paid to the prevailing party. In the event Blair succeeds, Blair plans to file an application or motion with the Court to approve the manner of distribution of the Demutualization Proceeds to individual class members. Individual class members will be paid distributions of the Demutualization

Procedures allocated on a proportionate basis based on each member's respective "interest" in the GACs as of December 15, 2000. Each member's interest in the GACs as of December 15, 2000, is presently ascertainable from objective criteria and from actuarial calculations of the present value of each member's interest in the GACs as of December 15, 2000. Blair plans to hire an actuary or other appropriate expert to assist him in ascertaining such interests should he prevail. It is further,

6. ORDERED that the class representative is Timothy J. Blair, 1001 Fannin, Suite 700 Houston, Texas 77002. Further, the Court

7. FINDS that Thompson & Knight LLP is adequate pursuant to Rule 42(g)(1)(B) and (C) and is best able to represent the interests of the Class and hereby APPOINTS Thompson & Knight LLP, attorney-in-charge: Robert S. MacIntyre Jr., 333 Clay Street, Suite 3300, Houston, Texas 77002, as class counsel ("Class Counsel"). Pursuant to Rule 42(g)(1)(C), in evaluating Class Counsel, the Court considered the following:

a. the work Class Counsel has done in identifying or investigating potential claims in the action, such as:

- (1) extensive legal research in ERISA, tax, bankruptcy, and state law;
- (2) multiple conferences regarding the issues in this action;
- (3) prepare, conduct, respond to, and review of discovery, including the review of documents produced by FCLT and JPMorgan;
- (4) prepare and file all of the pleadings on behalf of Mr. Blair in this

Court and the United States District Court, including: Timothy J. Blair, Class Representative, Appearance and Answer; Response of Timothy J. Blair to Motion to Discharge Prudential Financial, Inc.; Timothy J. Blair's First Amended Original Answer, Counter-Petition and

Application for Designation of Interim Class Counsel; Motion to Expedite Hearing on Application for Designation of Interim Class Counsel; Timothy J. Blair's Motion for Remand and for Abstention; Timothy J. Blair's Second Amended Original Answer, Counter-Petition and Application for Designation as Interim Class Counsel; and Motion for Class Certification.

- b. Class Counsel's experience in handling class actions, bankruptcy litigation, ERISA matters, and other complex litigation;
- c. Class Counsel's knowledge of the applicable law; and
- d. the resources Class Counsel will commit to representing the class.

It is further,

8. ORDERED that Class Counsel may be awarded attorney's fees and nontaxable costs in accordance with Rule 42(h) and (i).

SIGNED this \_\_\_\_\_ day of OCT 21 2005, 2005.

  
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JUDGE PRESIDING

APPROVED AS TO FORM AND  
SUBSTANCE AND ENTRY REQUESTED:

**THOMPSON & KNIGHT LLP**

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