

All Redactions made pursuant to exemption (b)(6) of the FOIA – personal privacy.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXXXXXXXXXX

Docket BD 08-09

Creditor Claim
New London Security Federal Credit Union

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to Section 709.8 of the NCUA Regulations (12 C.F.R. 709.8), as an appeal of the determination by the Liquidating Agent of New London Security Federal Credit Union denying XXXXXXXXXXXX claim for a lump sum payment in the amount of \$265,306.64 and the failure to provide a timetable for any future payments.

Background

NCUA chartered New London Security Federal Credit Union (the FCU or New London) in 1936 as a faith-based credit union to serve the Jewish community in the New London/Groton area of Connecticut. The FCU was placed into involuntary liquidation on July 28, 2008 due to the alleged embezzlement of FCU funds by its investment broker. The Board appointed itself as liquidating agent and named staff from the Asset Management and Assistance Center (AMAC) as agent for the liquidating agent.¹

XXXXXXXXXXXXXXXXXXXXXXXXXXXX of New London, entered into a deferred compensation agreement (“the Agreement”) with the FCU on January 29, 1997. New London contributed a lump sum of \$55,000 to the trust. The Agreement set up a trust to collect funds for future payment to XXXXXXXXXXXX. It also named trustees who would be responsible for, among other things, investing the funds of the trust and paying the benefits to XXXXXXXXXXXX after her retirement under the terms of the Agreement. XXXXXXXXXXXX states that she retired from New London in XXXXXXXXXXXX at the age of XX. She then began receiving monthly payments of \$XXXXXXXX pursuant to the Agreement. The monthly amount was calculated pursuant to the Agreement as 80% of her monthly pay, less her social security benefits. The last payment

¹ All references to AMAC throughout this Decision refer to it in its capacity as agent for the liquidating agent.

Xxxxxxxxxxx received pursuant to the Agreement was in July 2008, prior to New London's liquidation.

On September 12, 2008, AMAC sent Xxxxxxxxxxx a creditor letter and copy of the Agreement, informing her that she was an unsecured creditor of the now liquidated FCU under the terms of the Agreement and her claim (if any) would be reviewed and handled together with claims from the general unsecured creditors of the FCU.

On November 5, 2008, Xxxxxxxxxxx filed a formal claim for \$265,306.64, for the present value of the monthly payments due her for the rest of her life expectancy, claiming the amount was determined based on her current benefit and a remaining life expectancy of xx years using the Social Security actuarial life table and a 1% discount rate.

On April 20, 2009, AMAC informed Xxxxxxxxxxx of the following determination on her claim: AMAC allowed her monthly payment through her lifetime under the Agreement, to the extent funds become available for general creditors; and AMAC disallowed Xxxxxxxxxxx' claim for a one-time lump-sum payment of \$265,306.64. AMAC further informed Xxxxxxxxxxx that it could not provide any timetable to Xxxxxxxxxxx of future payouts or distributions.

Appeal and Analysis

On June 19, 2009, the NCUA Board received xxxxxxxxxxxx appeal, submitted on her behalf by her attorney, which requested that the Board approve the requested lump sum payout of \$265,306.64, and that it provide a timetable of future payouts or distributions. The appeal letter was very short; it did not contain any arguments in support of xxxxxxxxxxxx request, nor did it contain certain administrative information required by NCUA's regulations. 12 C.F.R. §709.8.

A. Terms of the Agreement.

Our analysis of this claim begins with the key terms of the Agreement.

The preamble to the Agreement states generally that the FCU and the employee (Xxxxxxxxxxx) desire to establish a contract for the payment of deferred compensation to the employee. The preamble goes on to state that:

The parties desire further to provide for the transfer of certain of the Credit Union's assets to the Trustee, subject to the claims of the Credit Union's creditors in the event of the Credit Union's insolvency . . . to secure payment to the Employee insofar as practical under the circumstances . . .

Section 1 of the Agreement states that:

In consideration of the past and continuing performance of services by the Employee on the Credit Union's behalf, until the termination of her employment with the Credit Union, the Credit Union shall pay to the employee upon her retirement at the attained age of 65 years, or later retirement date, until her death, the fixed monthly sum necessary to provide her with a monthly income, that when added to her initial monthly income benefit entitlement under United States Social Security laws and rules of administration, will equal eighty percent (80%) her final compensation as defined herein. Final compensation shall mean the employee's gross compensation (without benefits) payable during the final month of her employment, but not less than the average monthly compensation during the highest two years of her last five years of employment with the Credit Union.

Section 2 of the Agreement states that:

*In order to give to the Employee assurance that the Credit Union's obligation hereunder will be fulfilled, the Credit Union shall transfer to the Trustee, contemporaneously with the execution hereof, the sum of \$55,000 for the purpose of creating a fund which will, at the anticipated date of payment, be sufficient for the payment of the full amount due hereunder **The Employee shall have no preferred claim on, or any beneficial interest in, the assets of the Trust. Any rights created under the Trust shall be mere unsecured contractual rights of the Employee against the Credit Union. Any assets held by the Trust shall be subject to the claims of the Credit Union's general creditors under federal and state law in the event of insolvency, as defined in Paragraph 7 hereof.***

(emphasis added). Section 7 of the Agreement further states, in relevant part:

*Effect of Credit Union's Insolvency. If the Credit Union becomes insolvent, within the meaning of this Agreement, . . . the Trustee shall deliver all assets held hereunder as directed by a court of competent jurisdiction, or a receiver duly appointed by a court of competent jurisdiction, **for the benefit of the general creditors (including the Employee)** to the Credit Union. The Credit Union shall be deemed insolvent for this purpose if any of the following shall occur: (c) The Credit Union shall have become unable to pay its debts as they come due in the ordinary courts of business.*

(emphasis added).

Although the Agreement included a separately-funded trust, XXXXXXXXXXXX, the beneficiary of the Agreement, was not legally vested in the assets of the trust. Instead, the Agreement provides that the trust funds are at risk in the event of the Credit Union's insolvency. Specifically, in the event of the insolvency, the preamble and Section 2 provide that the funds are subject to the claims of the creditors of the liquidation estate. Further, by the terms of Section 7, XXXXXXXXXXXX herself becomes only a general creditor of the estate to the extent of any claims she has to benefits under the Agreement.

This form of deferred compensation agreement is commonly known as a "Rabbi Trust" which is specifically drafted to ensure that the benefits are subject to the claims of creditors of the institution if it becomes insolvent and so those benefits do not vest. The reason parties enter into Rabbi Trusts organized this way is to inject sufficient uncertainty in the possibility of payment to the beneficiary that the I.R.S. will not treat the benefits under the trust as recognized, and thus taxable, at the time the trust is first funded. A properly structured Rabbi Trust ensures that the beneficiary only has to recognize income at the time each payment under the Trust is actually received by the beneficiary. In other words, the beneficiary of a Rabbi Trust obtains a tax benefit in exchange for the risk that the institution might become insolvent before the promised benefits are all paid out. Unfortunately for XXXXXXXXXXXX, this insolvency risk actually materialized in the case of New London.

AMAC correctly determined that the Agreement trust assets belonged to the liquidation estate for use in satisfying the claims of New London's creditors. 12 C.F.R. §709.4. AMAC also correctly determined that XXXXXXXXXXXX herself, to the extent she had a claim under the Agreement, was merely a general creditor of the liquidation estate. AMAC correctly allowed that the estate could pay XXXXXXXXXXXX her monthly payments as they became due -- but only to the extent there were funds available in the estate for general creditors.

While XXXXXXXXXXXX asks for a lump sum payment of the present value of her expected monthly payments, there is nothing in the Agreement that entitles her to such a lump sum payment. She is entitled only to receive monthly payments, and, again, because of the nature of a Rabbi Trust, only to the extent that there are funds available pro rata for the general creditors of the liquidation estate.

There appears to have been a massive fraud at New London. As a result, there are almost no assets available to pay any claims and, presently, none available for general creditors. Accordingly, the Board can provide XXXXXXXXXXXX neither a monthly payment nor a timetable as to actual future distributions.

Order

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

The decision of the National Credit Union Administration's Asset Management and Assistance Center (AMAC) denying XXXXXXXXXXXX' claim in the amount of \$265,306.64, and its denial to provide a timetable on future payout is affirmed and XXXXXXXXXXXX' appeal is denied.

The Board's decision constitutes a final agency determination. Pursuant to 12 CFR 709.8(c)(1)(iv)(B), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the FCU's principal place of business was located. Such action must be filed within 60 days of the date of this final determination.

So **ORDERED** this 19th day of November, 2009 by the National Credit Union Administration Board.

Mary Rupp
Secretary, NCUA Board