Surplus Distribution Dispute Decision Alleviates Some Concerns

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Legal
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The decision of the Financial Services Tribunal (FST) in the Montreal Trust surplus distribution dispute has alleviated much, although not all, of the 'you can't get there from here' concern that had been raised by reason of the superintendent's initial position in that matter.

The company and the members' committee had negotiated a surplus split on the wind up of the plan. As is the practice, proceedings were commenced under the Class Proceedings Act, 1992 ((the CPA). It was certified and a court order approving the terms of the settlement and directing the payment of the surplus pursuant to the settlement was obtained. The order provided that the plan amendment giving effect to the settlement was valid and binding, subject to applicable regulatory filings.

Refused His Consent

When the application was then made to the Ontario Superintendent of Pensions, he refused his consent on the basis that:

- the historical analysis of the provisions of the plan compelled the conclusion that the plan did not provide for payment of surplus to the employer.
- the court order, being based on the agreed settlement, did not validly amend the pension trust. That trust could only be amended by the consent of 100 per cent of the beneficiaries.

The company and the members' committee argued that the court had equitable jurisdiction to amend the trust through approval of a settlement of a "real and serious dispute." The reference in the order providing that the plan amendment was valid "subject to applicable regulatory filings" was simply to ensure that the plan amendment that implemented the settlement was properly registered.

The Financial Services Tribunal concluded that the court did indeed have equitable jurisdiction to amend a trust where there was a real and serious dispute, as the parties maintained there was in this case (although the Superintendent did not agree). The court had done so by declaring the plan amendment to be valid and binding all relevant parties by issuing the order under the CPA. The uniqueness of that process lies in the fact that the CPA contemplates orders being made that bind all affected persons, except those who opt out.

Appropriate Jurisdiction

The FST also indicated that the reference to regulatory filings of the plan amendment simply meant that the amendment be filed in the appropriate jurisdiction. The other references to regulatory approval in the order went not to the issue of legal entitlement to surplus which had been settled by the court, but to any other legislative and administrative requirements for surplus distributions.

It is to be sincerely hoped that the superintendent will let the issue rest there and not raise the same issue on future surplus applications. After the pension bar has managed, at considerable expense to their clients, to find a way around the 1994 TecSyn decision through settlements sanctioned by court orders under class proceeding legislation, it was distressing to see the superintendent raising yet another road block to negotiated surplus sharing agreements, and disturbing that the superintendent would launch a collateral attack on a court order.

As to what the result would be if there were not a "real and serious dispute" as to the entitlement issue, we may never find out. Counsel for any employer applying for the superintendent's consent to surplus sharing will certainly ensure that filed materials include evidence of such a dispute and that court orders in surplus matters will be drafted with an eye to the language in the FST decision.

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