

Offsetting pillar 3a assets against a bankruptcy loss certificate claim

Topic: **Pension products** Case number: **2020/20**

Upon reaching retirement age, the client, who lives abroad, requested that the bank's pension foundation pay out his Pillar 3a assets in the form of a pension. The bank informed him that a withdrawal was only possible in the form of a lump sum. The payment of Pillar 3a assets in the form of an annuity was not provided for. He then requested the transfer of the credit balance to his account at a bank in his place of residence. Upon this, the bank informed him that it was offsetting this credit balance against a loss certificate claim which it still had from the bankruptcy of the client's company, a sole proprietorship. The client did not agree with this procedure, whereupon the bank offered to pay out half of the credit balance in exchange for the surrender of the loss certificate. He then submitted the case to the Ombudsman. The Ombudsman was unable to reach a better solution for the client in the Ombudsman proceedings. The client finally accepted the settlement. The Ombudsman expressed serious concerns to the bank about its actions.

In his submission to the Ombudsman, the client explained that he had gone bankrupt with his sole proprietor business when he was already over 50 years old. The bank was issued a certificate of loss for its unsecured claim in the bankruptcy for approximately CHF 43'000. The client then found employment, but was dismissed at the age of 59. Due to the forced early retirement, he was in modest financial circumstances and emigrated to an Asian country to keep his living costs as low as possible. According to his statements, he was in urgent need of his Pillar 3a assets.

In view of his 65th birthday, he requested payment of his Pillar 3a assets in the amount of approximately CHF 26'000, which he held with the bank's pension foundation on the basis of a pension agreement. The bank, which was responsible for the management of the pension foundation, informed him that the desired payment in the form of a pension was not possible. He could ask for the credit to be paid into an account at the bank or transferred to an account in his home country, whereupon the client requested the latter by e-mail. The bank then declared the offset against a loss certificate claim, which it had acquired in its capacity as the former lender of the client's sole proprietorship. When the client protested against this, the bank finally offered to pay out half of the Pillar 3a assets in exchange for the surrender of the loss certificate and the waiver of further claims arising from it.

The Ombudsman pointed out to the bank that, in his view, offsetting was not possible because the claims were not mutual. The bank's claim from a previous client relationship could not be offset against the client's claim from the pension relationship with the bank's pension foundation. The bank insisted on the settlement solution offered to the Ombudsman. It argued that a request for payment from the pension foundation had to be made in writing and that no such request had been made at the time, as the client had only requested payment by e-mail. If the client rejected the settlement solution, it could arrange as seizure of the client's assets after having received his formally valid request for payment and enforce its claim in the official procedure provided for this purpose.

After receiving the bank's statement, the Ombudsman discussed the settlement proposal with the

client. He was still of the opinion that the bank's intended set-off was legally not correct, but had to explain to the client that it would probably be possible for the bank to obtain a seizure order for the credit balance. The client would then have the option of asserting the plea of lack of new assets in the course of the further proceedings, the so-called arrest sequestration. The claim from a bankruptcy loss certificate can only be successfully enforced if the debtor has acquired new assets after the bankruptcy. In view of the modest financial circumstances he claimed, such a plea would probably have been successful if he could adequately substantiate it. A credit balance of less than CHF 30'000 is generally not considered as new assets under the relevant provisions of the Debt Enforcement and Bankruptcy Act.

In view of the costs and risks associated with such proceedings, the client decided to accept the bank's settlement. The Ombudsman later discovered that the bank had not transferred the full amount provided for in the settlement to the client, but had deducted from it the withholding tax incurred on the entire Pillar 3a assets. After a very clear intervention with the bank, it finally transferred the deducted amount to the client so that he could dispose of the entire settlement amount.

After closure of the case, the Ombudsman felt compelled to write to the bank expressing serious concerns about its handling of the matter. First and foremost, these concerns related to the bank's handling of conflicts of interest. The bank only had knowledge of the client's pension assets because it was the managing director of the pension foundation. In this capacity, it must protect the interests of the pension fund clients and could not simply put its own interests ahead of them. If it had had to enforce its loss certificate through the ordinary legal channels, it would have been confronted with the defense of the client's lack of new assets. The only way it could avoid dealing with this was by ultimately taking advantage of a distressed situation on the part of the client, who was unable to bear the financial risks that would have been associated with conducting such proceedings. Finally, the requirement for the client's payout request to be in writing, as asserted by the bank, was not foreseen in the pension agreement, i.e. as the managing director of the pension foundation, it would have had to comply with the client's payout request, which it had received by e-mail.