

March 11, 2010

## MEMORANDUM TO CLIENTS

### **RE: Court Grants Preliminary Approval of Hartford Fee Lawsuit Settlement**

On March 3, 2010, the district court granted preliminary approval of the proposed settlement in *Phones Plus, Inc. v. Hartford Life Insurance Co.* (D.Conn., No. 3:06-cv-1835 (AVC)). In contrast to the fee lawsuits that the Schlichter law firm filed on behalf of plan participants against plan sponsor fiduciaries, the *Phones Plus* lawsuit is brought by a plan sponsor fiduciary against a plan service provider, Hartford Life Insurance Company ("Hartford").

As discussed below, if final approval of the settlement is granted in June, Hartford will pay approximately \$14 million and will make several changes to its basic plan documents, group annuity contracts and funding agreements. Hartford also will provide to its current and future plan customers additional disclosures regarding revenue sharing.

### **Background**

Phones Plus initially filed the lawsuit against Hartford in November 2006. In the lawsuit, Phones Plus maintained that Hartford qualifies as a fiduciary under ERISA, and that Hartford breached its fiduciary duties and committed prohibited transactions by receiving and retaining revenue sharing payments from the investment options on the platform that Hartford made available to its retirement plan customers. Phones Plus alleged that Hartford did not include an investment option on the platform unless Hartford would receive revenue sharing in connection with that investment.

### **The Proposed Settlement**

The proposed settlement calls for the creation of two settlement classes:

- (1) a "Monetary Relief Class" consisting of current and former trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provided services from November 14, 2003 through the date that the court granted preliminary approval of the settlement, and
- (2) a "Structural Changes Class" consisting of trustees, sponsors, fiduciaries, and administrators of ERISA-covered 401(a) or 401(k) plans for which Hartford provides services on or after the date the court granted preliminary approval of the settlement.

Under the settlement, Hartford will pay \$13,775,000. From this amount, plaintiff's attorneys intend to seek an award of fees and costs of \$6,862,500. The remaining balance will be distributed to the members of the Monetary Relief Class based on the plan's average asset level since November 14, 2003 (for those plans that did not use Hartford during the entire period, the average asset level will be proportionally reduced).

With respect to the Structural Changes Class, Hartford agreed to make several changes to its plan-related documents. Specifically, Hartford:

- will remove from prototype plan documents a provision indicating that the prototype plan sponsor may limit the types of property in which plan assets can be invested. Hartford further agreed to not enforce this provision as to its existing plan customers;
- with regard to its group annuity contracts and group funding agreements,
  - will seek insurance department approval of revisions to the documents to further explain that Hartford will not delete or substitute an investment option that had been selected by the customer and offered to the plan participants unless the investment option is not available because of either (a) a change in law; or (b) a change or event initiated by the fund company (for example, due to a fund closure or merger). Hartford further agreed to not enforce this provision as to existing plan customers.
  - absent client consent, will not enforce a provision in a Separate Account Rider addressing Hartford's ability to invest plan assets in short term money market instruments, cash, or cash equivalents;
  - will include in its account opening documents a disclosure that dividends and capital gain distributions payable on the shares of an investment fund are paid in the form of additional shares (if available), together with a customer instruction that dividends and capital gain distributions should be received in the form of additional shares;
- will provide an additional disclosure to customers that all mutual fund investment options on its platform make revenue sharing payments to Hartford;
- will make available to its customers a list of investment options offered for the plan product and the associated revenue sharing rates paid by the fund companies;
- will make available to customers information regarding (i) the revenue sharing rates for investment options offered by plan clients to its participants; (ii) the published expense ratios for investment options offered by plan clients to its participants; (iii) the estimated amount of the revenue sharing received by Hartford in relation to the plan's investments (based on an estimated account balance in each investment option); (iv) how such estimates were calculated; (v) what types of payments fall within the definition of revenue sharing; and (vi) the separate account fee (in percentage and dollar terms), the annual maintenance fee (in dollar terms) and per participant fees (in dollars per participant terms).

Hartford agreed that these changes would remain in effect for a minimum of five years.

### **Next Steps in the Litigation**

The court has scheduled a June 15, 2010 hearing to decide whether to grant final approval of the settlement. In connection with seeking final approval, Phones Plus will provide to the court a report issued by an independent fiduciary evaluating the reasonableness of the settlement. Plan trustees, sponsors, fiduciaries, and administrators who are members of the two settlement classes have until May 25, 2010 to file with the court any objections they may have with respect to the terms of the settlement.

In order to obtain a settlement payment, the class members in the Monetary Relief Class are required to submit a form that provides instructions as to the manner in which the settlement funds are to be paid. The instruction forms are due in early July.

Members of the Monetary Relief Class alternatively have the right to "opt out" of (*i.e.* exclude themselves from) the settlement. Those who elect to opt out would not receive payment under the settlement but would have the right to subsequently maintain a separate lawsuit against Hartford. Under the terms of the settlement, trustees, sponsors, fiduciaries, and administrators cannot opt out of the Structural Changes Class.

### **Observations**

The *Phones Plus, Inc.* case is the first of the fee lawsuits against plan service providers to result in a class settlement and, therefore, it stands in contrast to the settlement that John Hancock entered into last year with the individual plaintiff in its fee lawsuit. However, the settlement amount represents a small fraction of the losses that Phones Plus and its expert witnesses claimed that Hartford's plan customers incurred in connection with the revenue sharing arrangements. As noted above, the settlement payments ultimately to be distributed to the plan customers will be net of the fees paid to plaintiff's counsel.

Notwithstanding the settlement of the *Phones Plus* matter on a class basis, whether the fee cases against service providers can be maintained as class actions still remains a matter of substantial dispute. In 2008, the district court in the Principal fee lawsuit denied the plaintiff's motion for class certification. Last fall, the district court in the Nationwide fee lawsuit granted class certification. Nationwide has asked the Second Circuit Court of Appeals to review the class certification ruling. The Second Circuit is expected to decide shortly whether to grant interlocutory review.

In considering the document changes and fee disclosures agreed to in the settlement, it is important to keep in mind that DOL is scheduled to issue its 408(b)(2) and participant fee disclosure regulations in the coming months. Those regulations will have a far greater impact on industry practices.

\* \* \*

Groom Law Group is representing defendants in several of the other fee cases that have been filed and we continue to track developments in this area. If you would like further information or have question regarding the fee cases, please contact:

Mike Prame	(202) 861-6633	<a href="mailto:mjp@groom.com">mjp@groom.com</a>
Tom Gigot	(202) 861-6624	<a href="mailto:tsg@groom.com">tsg@groom.com</a>
Lars Golumbic	(202) 861-6615	<a href="mailto:lcg@groom.com">lcg@groom.com</a>
Jason Lee	(202) 861-6649	<a href="mailto:jhl@groom.com">jhl@groom.com</a>
Alex Ryan	(202) 861-6639	<a href="mailto:apr@groom.com">apr@groom.com</a>