

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

LISA KRAGNES, et. al.)	Law No. CE 49273
)	
Plaintiff,)	
)	
vs.)	
)	DEFENDANT'S SECOND OBJECTION
CITY OF DES MOINES, IOWA,)	TO PROPOSED NOTICE TO CLASS
)	MEMBERS
Defendant.)	

COMES NOW the Defendant, the City of Des Moines, and for its Second Objection to the Proposed Notice to Class Members, states as follows:

1. The proposed notice makes no allowance for the fact that many of the class members do not speak English. The notice must make provision for those people who speak a language other than English.
2. While the proposed notice does include plans for a website containing information regarding the lawsuit, that is simply not sufficient. The City believes a large number of class members will not have access to a computer or the internet, making the website useless as to them. Provisions should be made for a toll free number, to be staffed by competent personnel as approved by the Court, to be open during regular business hours to answer questions from the class for at least the entire opt-out period.
3. The proposed notice contains no mention of the attorney's fees to be requested if the Plaintiff is successful.
4. The proposed notice needs to contain a disclaimer saying that simply because the Court has approved the case as a class action does not mean the Court has made any determination as to the merits of the case.

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STOLTZE & UPDEGRAFF, P.C.

5. The notice does not contemplate the appointment of a class action administrator.
6. The notice does not indicate that it is a Court order.

Attached as "Exhibit A" is notice from Newberg on Class Actions which the City offers to the Court as a model upon which to craft the notice in this case.

This objection, and the City's first objection, will be supported by a brief to be delivered to the presiding judge and Plaintiff's attorneys according to the Rules of Civil Procedure.

WHEREFORE, the City prays the Court strike the Plaintiff's proposed notice, craft a different notice that will comport with constitutional due process and fully and fairly inform the class of the possible financial consequences of the suit, and for other relief as appropriate.



Mark Godwin AT 0002848
Deputy City Attorney
City Hall
400 Robert D. Ray Drive
Des Moines, IA 50309-1891
Telephone: 283-4110
Fax: (515) 237-1748
ATTORNEY FOR DEFENDANT
CITY OF DES MOINES

Original Filed.

Copies to:

Honorable Joel D. Novak
Judge, Fifth Judicial District

Mr. Brad Schroeder
Hartung & Schroeder LLP
Equitable Building, Suite 100
608 Locust Street
Des Moines, IA 50309
ATTORNEY FOR PLAINTIFF

Bruce H. Stoltze
Stoltze & Updegraff, P.C.
P.O. Box 93295
300 Walnut, Ste. 260
Des Moines, IA 50393
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was
mailed upon all parties to the above cause to each of the
addresses of record herein at their respective addresses

Filed on the pleadings on Aug. 8, 2008

- | | |
|---|--|
| <input checked="" type="checkbox"/> U.S. Mail | <input type="checkbox"/> FAX |
| <input type="checkbox"/> Hand Delivered | <input type="checkbox"/> Overnight Courier |
| <input type="checkbox"/> Federal Express | <input type="checkbox"/> Other: |

Signature Lisa M. Muckey

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JULIA LUCICH, et al.,

No. 01 Civ. 1747 (TPG)

Plaintiffs,

v.

NEW YORK LIFE INSURANCE
COMPANY,

Defendant.

A. PROPOSED NOTICE OF CLASS ACTION

[To be mailed by Counsel for Plaintiffs if the subclasses are certified pursuant to Fed. R. Civ. P. 23(b)(3) and accompanied by an Order directing the Defendant to provide Plaintiffs' Counsel with the names and last known addresses of Subclass members.]

This notice may affect your rights. Please read carefully.

Your rights may be affected by a lawsuit pending in this Court, Lucich, et al. v. New York Life Insurance Company, Civil Action No. 01 Civ. 1747 (TPG). Plaintiff Julia Lucich, along with an additional 20 current and former N6 agents of New York Life Insurance Company ("NYL"), charges that, since January 1, 1991, NYL has unlawfully failed to treat a retirement benefit called the "Non-Qualified Benefit" as a plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq. The Plaintiffs have asked this Court to rule that the Non-Qualified Benefit Plan is an ERISA Plan, and to order that, in the future, the Plan be administered according to the requirements of ERISA. The Plaintiffs have brought suit on behalf of themselves and a class of current and former N6 agents who completed at least 5 years of service with at least some of that service on or after January 1, 1991, except current N6 agents who have not yet completed 20 years of service with NYL ("the Class").

In addition, Plaintiffs claim that a Subclass of all former agents who signed an N6 contract with NYL (Forms N6-64 or QN6-82), and who performed for fewer than 20 years before their contract with NYL was terminated, whether voluntarily or not, are entitled to restitution of lost benefits equal to the amount of the Non-Qualified Benefit they would have received had the Non-Qualified Benefit Plan been treated as an ERISA plan, including ERISA's accrual and vesting requirements. ERISA §§ 203, 204, 29 U.S.C. §§ 1053, 1054. This Subclass is known as the "Under 20 Subclass."

Also as a result of the alleged violation of ERISA, Plaintiffs claim that a Subclass of all former agents who signed an N6 contract with NYL (Forms N6-64 or QN6-82), and who performed for 20 years or more before their contract with NYL was terminated, whether voluntarily or not, are entitled to restitution of lost benefits equal to the amount of the Non-Qualified Benefit that NYL forfeited, in violation of ERISA's non-forfeiture provision. ERISA § 203, 29 U.S.C. § 1053. This Subclass is known as the "Over 20 Subclass." These forfeitures occurred due to imposition of debits to the ledgers of the former agents who are members of the Over 20 Subclass for various reasons, including but not limited to the imposition of FICA tax, commission reversals, and any other charges to these ledgers.

NYL denies these claims and charges. It contends that it properly administered the Non-Qualified Benefit

through the NYLIC Excess Benefit Plan, which, NYL claims, is exempt from ERISA because it expressly excludes participation by persons who are "common law employees." NYL contends that, due to this exclusion, the NYLIC Excess Benefit Plan is not subject to ERISA which, according to NYL, only protects Plans in which common law employees participate. In addition, NYL contends that it provided its N6 agents with sufficient information more than six years before this suit was filed and, thus, this suit is barred by the applicable statutes of limitations. Although, for purposes of this litigation, the Plaintiffs are not disputing NYL's contention that its Established Agents are "independent contractors" rather than "common law employees," the Plaintiffs dispute the remainder of NYL's contentions.

The Court has not ruled on the merits of the Plaintiffs' charges or on the denials and other defenses made by NYL. However, some matters have arisen during the pretrial phase of the case that affect the members of the Under 20 Subclass and the Over 20 Subclass. The purpose of this notice is to advise you, who have been identified as possibly a member of one of these Subclasses, of these events and their potential effect on your rights.

Class-Action Ruling

The Court has conditionally ruled that this lawsuit may be maintained as a claim for declaratory and prospective injunctive relief on behalf of the Class, and as a claim for monetary relief on behalf of the Under 20 Subclass and the Over 20 Subclass.

This ruling by the Court of a class action does not mean that any monetary relief will be obtained for the Subclass members because these are contested issues that have not been decided. Rather, the ruling means that the final outcome of this lawsuit, whether favorable to the Plaintiffs or the Defendant, will apply in like manner to every member of the and the Subclasses who do not timely elect to be excluded from the Subclasses (see below).

The Class is limited to those persons who contracted with NYL under an N6 contract (Forms N6-64 and QN6-82) and who completed at least 5 years of service with at least some of that service on or after January 1, 1991, except current N6 agents who have not yet completed 20 years of service with NYL. Current N6 agents who have completed 20 years of service with NYL are included in the Class for purposes of seeking injunctive relief to protect their rights to Non-Qualified Benefits they will receive at the time their contract with NYL is terminated. The Under 20 Subclass is limited to those Class members who did not complete at least twenty years of service before their contract was terminated. The Over 20 Subclass is limited to those Class members who completed at least 20 years of service for NYL before their contract was terminated. If you do not fall into one of these categories because you did not sign an N6 contract, or for any other reason, you are not a member of the Class or either Subclass on whose behalf this suit will be maintained and any claims you desire to make against NYL must be presented independently by you.

Election by Class Members

If you fit the above description of a Subclass member, you have a choice whether or not to remain a member of the Subclass. Either choice will have its consequences, which you should understand before making your decision. You may not exclude yourself from membership in the Class.

1.

If you want to be excluded from a Subclass, you must complete the enclosed form ("Exclusion Request") and return it to: Class Counsel, NYLIC Agents' Class Action Litigation, P.O. Box _____ [address], by mail postmarked no later than _____ [date]. By making this election to be excluded,

CLASSACT APP II-B
9 Newberg on Class Actions Appendix II-B (4th ed.)

- (a) you will not share in any recovery that might be paid to Subclass members as a result of trial or settlement of this lawsuit;
- (b) you will not be bound by any decision in this lawsuit favorable to the defendants; and
- (c) you may present any claims you have against NYL by filing your own lawsuit, or you may seek to intervene in this lawsuit.

2. If you want to remain a member of the Subclass, you should NOT file the "Exclusion Request" and are not required to do anything at this time. By remaining a Subclass member, any claims against NYL for monetary relief arising from NYL's conduct as alleged by the Plaintiffs will be determined in this case and cannot be presented in any other lawsuit.

Rights and Obligations of Class Members

If you remain a member of a Subclass:

1. Plaintiffs and their attorneys will act as your representative and counsel for the presentation of the charges against NYL. Plaintiffs' attorneys are the following:

Jennifer C. Jaff (JJ 4970)
Killian, Donohue & Jaff, LLC
363 Main Street
Hartford, CT 06106
(860) 560-1977

Julian Birnbaum (JB 6721)
James Wasserman (JW 3717)
Vladeck, Waldman, Elias &
Engelhard, PC
1501 Broadway, Suite 800
New York, NY 10036
(212) 403-7300

Michael D. Lieder (ML 7353)
Mark Amadeo (MA 1840)
Sprenger & Lang, PLLC
1614 20th Street, N.W.
Washington, DC 20009
(202) 265-8010
Teresa K. Patton (TP 0466)
Sprenger & Lang, PLLC
325 Ridgewood Avenue
Minneapolis, MN 55403
(612) 871-8910

If you desire, you may also appear by your own attorney. You may also seek to intervene individually and may advise the Court if at any time you consider that you are not being fairly and adequately represented by Plaintiffs and their attorneys.

2. Your participation in any recovery, which may be obtained from NYL through trial or settlement, will depend on the results of this lawsuit. If no recovery is obtained for the class, you will be bound by that result

also.

3.

You may be required as a condition of participation in any recovery through settlement or trial to present evidence respecting your membership in the Subclass, and the monetary relief to which you are entitled. You should, therefore, preserve documents reflecting the existence and duration of your N6 contract with NYL and your retirement benefits.

4.

You will be entitled to notice of any ruling reducing the size of the Subclass in which you are a member and also to notice of, and an opportunity to be heard respecting, any proposed settlement or dismissal of the class claims. For this reason, as well as to participate in any recovery, you are requested to notify "Class Counsel" of any corrections or changes in your name or address.

Further Proceedings

As noted, the essential allegations of the charges against NYL are denied by NYL. Because of the substantial discovery and other pretrial proceedings that remain to be done, trial is not likely to occur in the foreseeable future. You may communicate with Class Counsel if you have evidence you believe would be helpful to establishment of the claims of the Class and/or Subclass, and you may be asked by the parties to provide information relevant to the case.

Additional Information

Any questions you have concerning the matters contained in this notice, and any corrections or changes of name or address, should not be directed to the Court, but should be directed in writing to:

Class Counsel

NYLIC Agents' Class Action Litigation

P.O. Box _____ [address]

If you decide to remain a member of the Subclass and wish to communicate with Class Counsel as your attorney in this litigation, you may do so by writing or calling either of the following:

Mark A. Amadeo, Esq.

Sprenger & Lang, PLLC

1614 20th Street, NW

Washington, DC 20009

(202) 265-8010

mamadeo@sprengerlang.com

Jennifer C. Jaff

Killian, Donohue & Jaff, LLC

363 Main Street

Hartford, CT 06106

(860) 560-1977

jennifer@kdjlaw.com

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the office of the clerk, U.S. District Court for the Southern District of New York, Daniel Patrick Moynihan U.S. Courthouse, 500 Pearl Street, New York, NY 10007. Many of the pleadings also are available at a website

created by Class Counsel, <http://www.nylicagents.com>. The Court does not endorse any of the information contained on the website.

Reminder as to Time Limit

If you wish to be excluded from the Class and/or Subclass on whose behalf this action is being maintained, return the completed "Exclusion Request" to Class Counsel by mail postmarked on or before _____ [date].

Dated: _____

Clerk of Court
United States District Court
For the Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

Enclosure: Exclusion Request

EXCLUSION REQUEST

Read the enclosed legal notice carefully before filling out this form.

The undersigned has read the notice of class action, dated _____, and does NOT wish to remain a member of the Plaintiff Subclass certified in the case of Lucich, et al. v. New York Life Insurance Company, Civil Action No. 01 Civ. 1747 (TPG), in the United States District Court for the Southern District of New York.

Date: _____

Signature: _____

Typed or Printed name: _____

If you want to exclude yourself from the Subclass, you must complete and return this form by mailing before _____ [date] to:

Class Counsel

NYLIC Agents' Class Action Litigation

P.O. Box _____ [address]

A separate request for exclusion should be completed and timely mailed for each person or entity electing to be excluded from the Class and/or Subclass.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**