

# *Joseph Fantl v. Transamerica Life Canada*

## **Summary of Proposed Settlement**

This is a short summary<sup>1</sup> of the proposed settlement of the claim for alleged excess management fees charged by the defendant Transamerica Life Canada in the proposed class action, *Joseph Fantl v. Transamerica Life Canada*<sup>2</sup>.

The settlement is not final unless it is approved by the court as being fair, reasonable, and in the best interests of the class members. The motion in court (a public hearing) to consider these issues will take place before the Honourable Mr. Justice Perell on August 10 – 12, 2009 in Toronto.

### ***Introduction***

The policyholders included in the proposed settlement (the class members) are those who entered into insurance contracts with Transamerica, NN Life Insurance Company of Canada (“NN Life”) or its predecessors, which provided benefits based upon the value of one or more of the 28 segregated funds listed in Schedule “A” to this summary. The specific types of insurance contracts included in the settlement are also set out in Schedule A to this summary.

Without admitting liability, Transamerica has agreed to pay compensation to class members if they were charged management fees in excess of the amounts set out in either the insurance contracts or accompanying summary information folders.

### ***Settlement Terms - Compensation***

With the assistance and advice of legal counsel and financial advisors, the parties have negotiated and agreed upon a method for calculating the compensation owing to each class member. As summarized below, the calculation of compensation will be done on an individual basis.

As a result of the negotiations and compromises described below, the total value of the settlement, inclusive of interest, as estimated by Transamerica to date is approximately \$52 million<sup>3</sup>. In addition to that amount, Transamerica will pay class counsel’s fees (as described below) and the expenses associated with administering the settlement.

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<sup>1</sup> The summary was prepared jointly by the parties at the direction of the court. The actual terms of the settlement are set out in the agreement. If there is any discrepancy between the terms of this summary and the agreement, the terms of the agreement prevail.

<sup>2</sup> Court File No. 06-CV-306061-CP, in the Ontario Superior Court of Justice. The separate claim that a specific fund (namely, the Can-Am Fund) failed to replicate the S&P 500 Total Return Index is not part of the settlement and the action will continue after the settlement of the excess management fee claim.

<sup>3</sup> This is an estimate of the present value of the settlement, however, the actual amount will vary depending on changes in market conditions affecting fund returns, interest rates and the results of the settlement calculation which is intended to be prepared as of September 30, 2009 based on transactions up to and including that date.

Deloitte & Touche LLP will act as the monitor and administrator for purposes of verifying and monitoring the calculation and distribution of compensation.

**Compensation Formula** - The objective of the methodology for compensation is to put each policyholder in the position they would have been in if excess management fees had not been charged. The methodology and calculations are, however, subject to various assumptions (due in part to unavailable data and complexity of the insurance contracts) and compromises (some of which are discussed further below).

**Calculating Compensation** - The calculation of compensation will be done on an individual policy basis and will use the actual transactions that occurred in each policy and the historic returns of the segregated funds in which the policy was invested from time to time.

The calculation of compensation will also take into account other adjustments that may be necessary due to other contractual rights and/or payments already made under the contracts, including adjustments and prior payments of guarantees, cost of insurance (where applicable), and investment bonuses.

Where money has been withdrawn from an insurance contract, by partial or total surrender, interest on that money from the date of withdrawal will be added to the compensation payable to class members<sup>4</sup>.

### ***Distribution of Compensation***

Class Members will not need to register or fill out application forms or otherwise make individual claims in order to be eligible to receive compensation as part of this settlement.

**Existing Policyholders** – Where class members are existing policyholders (they have in force policies with Transamerica), compensation will be made by increasing the number of units in the funds and by increases in other accounts in universal life policies.

**Former Policyholders** – For terminated policies, the total compensation will be paid by cheque, net of withholding of tax where applicable. Due to administration costs, no compensation will be paid to individual class members in respect of any terminated policy where the compensation under the settlement would be less than \$50 for that policy. Such amounts under \$50 will remain in trust and will ultimately be given to the Heart and Stroke Foundation as described below.

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<sup>4</sup> Interest will be calculated and compounded semi-annually using the quarterly pre-judgment interest rates for causes of action arising after October 23, 1989 set under s. 127 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

### *Undistributed Funds & Charity*

Subject to compliance with unclaimed property legislation, any compensation which remains unclaimed 18 months after the approval of the settlement (including any compensation under \$50 for a terminated policy) will be given to the Heart and Stroke Foundation.

Before any property may be considered unclaimed, Transamerica shall have first made reasonable efforts to locate the eligible recipient. In the case of class members with terminated policies who are entitled to \$50 or more but less than \$500 in compensation, if official notices to them (including the notice of the fairness hearing to approve the proposed settlement) are returned, Transamerica will engage the services of the National Search Unit of the federal government in an effort to obtain current addresses for these class members. If the compensation owing to such class members is \$500 or more, Transamerica will engage a search firm to attempt to locate them.

### *Lapsed Policies*

The compensation payable in respect of non-registered accounts might, in some circumstances, have been available to pay any outstanding premiums on otherwise lapsed policies. The payment of such premiums may have prevented the lapsing of the policy and extended the period for which the policy remained active and in force. A letter will be sent to each class member where the policy lapsed providing particular information and notice of this possibility. As part of the settlement, if the policyholder died during the period for which the policy could otherwise have remained in force, Transamerica will apply the compensation owing towards past premiums and will honour a claim by policy beneficiaries for the applicable death benefit payable in accordance with the terms of the policy. Proper documentation and proof must also be submitted to Transamerica.

### *Legal Fees of Class Counsel*

Class members will not be required to pay class counsel's legal fees and disbursements. These will be paid directly by Transamerica to class counsel on behalf of the class members. The amount of those fees and disbursements will either be agreed upon by the parties and approved by the court, or otherwise set by the court, at a hearing immediately following the motion to approve the settlement.

### *Areas of Compromise*

Various concessions and compromises were made to settle the excess management fee claims. Examples follow:

- While Transamerica disputes that the summary information folder is part of the insurance contract, it has agreed to take it into account when determining the maximum allowable management fees or management expense ratios that could be charged for particular

contracts<sup>5</sup>. This position eliminated a potentially significant issue, namely, individual reliance.

- For purposes of determining whether Transamerica gave the required advance written notice of management fee increases otherwise permitted under certain contracts, Transamerica agreed not to rely on its notification to policyholders in March 2001 of an increase in management expense ratios as a result of regulatory changes.
- Transamerica claims that NN Life followed a practice of recovering a fixed percentage (0.5%) for operating expenses from each fund for the years prior to 2001, in lieu of charging the actual operating expenses incurred which were higher than 0.5% (except for the years 1999 and 2000, as described below)<sup>6</sup>. Transamerica claimed that this 0.5% charge should first be deducted from the overall fees charged to the funds before calculating whether any management fees were overcharged. The actual operating expenses for 1999 and 2000 were lower than this percentage (0.38% for 1999 and 0.45% for 2000). Transamerica agreed that the 0.38% and 0.45% will be used as the operating expenses for those years for the purposes of calculating compensation to class members.
- The plaintiff disputed whether Transamerica should be permitted to notionally deduct operating expenses prior to 2001. Further, the plaintiff disputed whether certain types of expenses being charged by Transamerica to the funds should have been absorbed as part of the management fees. These issues and others were addressed at a mediation before the Honourable Mr. Justice Campbell. At the conclusion of the mediation, the parties agreed that, for the years 1998, 1999 and 2000<sup>7</sup>, the percentage of operating expenses deducted prior to calculating whether any management fees were overcharged will be lowered to a level that otherwise increases overall compensation payable to the class by \$7.5 million (inclusive of interest) calculated as at June 19, 2009. The plaintiff, his legal counsel and his financial experts believe that \$7.5 million is a significant increase in the amount of compensation available to the class, and a reasonable compromise in the context of this overall settlement given the other claims and positions taken in the negotiation of this settlement.
- Starting in 2001, Transamerica capped the operating expenses that it recovered from the segregated funds at 0.15% (for variable investment options under universal life policies) and at 0.25% (for segregated fund investments under other policies). Transamerica claimed that it was, and still is, entitled to recover all expenses associated with the funds and policies for 2001 onwards, notwithstanding any prior rebates. As part of the settlement and as a compromise, Transamerica will be permitted to charge any actual expenses incurred by it up to a maximum of 0.5%, which it did not previously charge

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<sup>5</sup> The rules that will be applied in determining the maximum allowable management fees for each type of insurance contract for restitution purposes are summarized in Schedule B.

<sup>6</sup> Due to the passage of time and change of ownership of NN Life, there was a lack of historical accounting records for the years prior to 2000 that would have enabled the plaintiff, his legal counsel and financial experts to reach a definitive conclusion on this claim.

<sup>7</sup> The period starting January 1, 1998 is approximately the commencement date of any 6 year limitation period that may apply to the original statement of claim, which was issued on December 9, 2003.

because of its cap on recoverable expenses at 0.15% and 0.25%. The approximate total amount of that adjustment is estimated by Transamerica to be in the \$2.1 to \$2.5 million range. The plaintiff views this as a reasonable compromise given, among other things, the \$7.5 million increase in overall compensation described above and the estimated total value of the settlement as described above.

- The plaintiff and his counsel attempted to negotiate for higher interest rates, however, the statutory rates are not unreasonable, having regard to Canadian bond rates and t-bills for the relevant period, the use of semi-annual compounding and the fact that these statutory rates are legislated default rates in Ontario

## Schedule A

The 28 segregated funds included in the settlement are:

1. American Asset Allocation Fund
2. American Equity Index Fund
3. Asset Allocation Fund (also known as the Balanced Fund)
4. Bond Fund
5. Canadian 35 Index Fund
6. Canadian Communications Fund
7. Canadian Financial Services Fund
8. Canadian Growth Fund
9. Canadian Resources Fund
10. Canadian Small Cap Fund
11. Can-Am Fund
12. Can-Asian Fund
13. Can-Daq 100 Fund (also known as the Can-Daq Fund)
14. Can-Emerge Fund
15. Can-Euro Fund
16. Can-Global Bond Fund
17. Dividend Fund
18. Equity Fund
19. European Equity Index Fund
20. Information Technology Fund
21. International Bond Index Fund
22. International Brands Fund
23. Mid-Term Bond Fund (also known as the Bond Fund, but distinct from #4 above)
24. Global Market Neutral Fund (also known as the Elite Fund)
25. T-Bill Fund
26. Money Market Fund
27. 5 Year Pooled Fund
28. Global Fund

The insurance contracts included in the settlement are (a) the variable annuity contracts known as IMS I, IMS II, IMS III and NN RRIF, (b) the NN Asset Accumulation Plan, (c) the Money Market Fund, (d) the Equity Linked Annuity Policy and (e) the Challenger, Discovery 2000, Achiever, Achiever Plus, Endeavour and Omnilife universal life insurance contracts.

## **Schedule B**

The maximum allowable management fees for each type of insurance contract will be set having regard to both the insurance policy and the related summary information folder, and applying the following rules:

- (1) The lower of the maximum allowable Fees stated in the insurance policy or the summary information folder shall be used.
- (2) Where an insurance contract states a current management fee subject to change with notification, the current management fee shall be used until the November 14 , 2008 (the “Reset Date”), at which time the maximum allowable management fees became effective under such contracts.
- (3) Where an insurance contract indicates a stated “current” management fee subject to change without notification, the policyholders within that “band” shall receive the benefit of the “current” management fee for a 12 month period commencing in the month when the majority of such contracts were issued.
- (4) Where there is a range of fees listed in an insurance contract without a notice requirement for increase to the maximum, the top end of the range will be used.