



## INSURANCE CLASS ACTION DEFENSE UPDATE

### The Insurance Class Action Defense Practice of Sidley Austin LLP

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### RETAINED ASSET ACCOUNT CLASS ACTION MERITS VICTORY AFFIRMED BY SECOND CIRCUIT

The U.S. Court of Appeals for the Second Circuit has affirmed summary judgment in favor of an insurance company in a class action that challenged so-called retained asset accounts. *Rabin v. MONY Life Insurance Company*, No. 09-4907-cv (2nd Circuit July 21, 2010). The *MONY* case is the only summary judgment merits victory by an insurance company in the myriad of retained asset class actions filed against the insurance industry. It also is the first appellate court ruling confirming the bona fides of retained asset accounts. Sidley Austin LLP represented *MONY* in the lawsuit.

Retained access accounts are interest bearing accounts with check writing privileges that allow the policyholder or beneficiary to access all or part of the account balance by writing one or more checks. Payment of insurance proceeds by means of an interest bearing checking account are commonplace in the industry. A rash of class action lawsuits have been filed against life insurance companies challenging the use of such accounts, in lieu of lump sum checks, for delivery of death benefits or return of cash accumulation. Certain property and casualty policies also employ the use of retained asset accounts for the delivery of policy proceeds.

One other appellate court has addressed retained asset accounts. The First Circuit found that, in the ERISA context, the use of a retained asset account did not satisfy the requirement for payment of a lump sum and transfer of funds to the beneficiary. *Mogel v. UNUM Life Ins. Co.*, 547 F.3d 23 (1st Cir. 2008).

In the *MONY* putative class action, Plaintiff alleged that he should have received payment of his cash surrender value by means of a lump sum check rather than in the form of an interest bearing checking account. Plaintiff alleged breach of contract, breach of fiduciary duty, common law fraud, deceptive practices prohibited by statute, and unjust enrichment.

*MONY* sought summary judgment on the basis that it had not breached any promise or duty to Plaintiff because the access account checkbook gave Plaintiff the ability to draw his entire balance by writing a single check with the same minimal effort as endorsing and depositing a lump sum check. *MONY* also argued that Plaintiff incurred no damage as a result of anything said or done by *MONY* because Plaintiff could have transferred his funds to another investment option at any time.

In granting summary judgment, the district court ruled that MONY had not breached its contract because the policy language did not require use of a lump sum check, and because the account checkbook gave plaintiff the ability to draw his entire balance by writing a single check with the same minimal effort as endorsing and depositing a check. The district court also rejected plaintiff's claim that the account failed to pay a "competitive" interest rate. To the contrary, the court also found that MONY's explanatory materials clearly stated that interest paid on the account would "equal or exceed the national average for bank money market accounts, as measured by the Bank Rate Monitor National Index," and that this standard had been met.

The Second Circuit issued a complete affirmance on July 21, 2010. In affirming the trial court's ruling, the Second Circuit held that "MONY's use of interest-bearing checking accounts permitted [plaintiff] to liquidate his proceeds at any time by writing himself a check for the full account balance, this disbursement method was not sufficiently different from payment by check to permit a jury to find a material breach." Opinion at 4. The appellate court further found that there could be no deception of any kind because MONY advised the plaintiff of his right to liquidate his account by writing a check for the entire balance and also disclosed the specific rate at which the account would accrue interest. Finally, in a footnote, the Second Circuit distinguished the First Circuit's *UNUM* opinion as sounding in ERISA and involving different contractual language than used by MONY in its insurance contract.

On a going-forward basis, the *MONY* appellate court summary judgment affirmance provides useful support for defending asset retention class actions asserted against the insurance industry. It also provides a framework for potential best practices with respect to retained asset accounts.