The Dodd-Frank Act: Act Changes Legal Landscape of Insurance

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have been filed challenging life insurers’ use of retained asset accounts to pay policy benefits. A retained asset account is an interest-bearing account to which policy benefits are credited. The beneficiary is sent a checkbook on which he or she can write checks up to the full amount of the insurance proceeds and interest credited.


In July, the U.S. Court of Appeals for the Second Circuit affirmed the U.S. District Court for the Southern District of New York’s grant of summary judgment in favor of the life insurer in *Rabin v. MONY Life Ins. Co.*, No. 09-4907, 2010 WL 2838402 (2d. Cir. July 21, 2010). In September, the U.S. District Court for the District of Nevada granted the life insurer’s motion for summary judgment in *Clark v. Metropolitan Life Insurance Co.*, No. 3:08-CV-00158-LRH-(VPC), 2010 WL 3636194 (D. Nev. Sept. 10, 2010). The case is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit. Also on appeal is the U.S. District Court for the Southern District of New York’s grant of the life insurer’s motion to dismiss in *Faber v. Metropolitan Life Insurance Co.*, 1:08-cv-10588-HB-RLE (S.D.N.Y Oct. 23, 2009), No. 09-4901 (2d Cir.). In December, the Second Circuit asked the Solicitor General and the Secretary of Labor to submit in Faber the Department of Labor’s view on whether MetLife complied with ERISA’s guaranteed benefit policy exemption and discharged its fiduciary obligations when it established a beneficiary’s retained asset account. Recently, the U.S. District Court for the District of Massachusetts denied the life insurer’s motion to dismiss in *Luitgaren v. Sun Life Assurance Company of Canada, et al.*, No. 1:09-cv-11410-NG (D. Mass. Nov. 18, 2010), finding that the plaintiff had stated a plausible claim for breach of a fiduciary duty under ERISA, 29 U.S.C. § 1132(a)(3). Additional putative class actions alleging ERISA and/or state law claims are expected to be filed.

The litigation challenging life insurers’ use of retained asset accounts has also prompted recent regulatory action. In November, the National Association of Insurance Commissioners (“NAIC”) submitted for comment a draft Retained Asset Accounts Bulletin, revising the NAIC’s 1995 Bulletin. The bulletin provides, in relevant part, that the insurer must: (1) at the time a claim is made, provide the beneficiary with written information explaining the retained asset account settlement option, including the applicable interest rates; and (2) thereafter, provide the beneficiary with a supplemental contract disclosing the rights and obligations of both the beneficiary and the insurer with respect to the retained asset account. At least two states (New York and Georgia) are investigating insurers’ retain asset account practices. Phillip E. Stano - Sutherland Asbill and Brennan, LLP, (202) 383-0261, phillip.stano@sutherland.com and Steuart H. Thomsen - Sutherland Asbill and Brennan, LLP, (202) 383-0166, steuart.thomsen@sutherland.com and Brendan Ballard - Sutherland Asbill and Brennan, LLP (202) 383-0820, brendan.ballard@sutherland.com

**THE DODD-FRANK ACT**

**Act Changes Legal Landscape of Insurance**

Title V of the Dodd-Frank Wall Street Reform and Consumer Protection Act, P. L. 111-203, created the Federal Insurance Office, the first federal agency with responsibility over the insurance industry in general. The Federal Insurance Office is under the auspices of the Department of Treasury. It is charged with responsibility for monitoring the insurance industry, and for gathering and distributing information concerning insurance with an eye toward facilitating equal and fair access to insurance. The Federal Insurance Office will also serve as a uniform, national voice for insurance in the international arena and will streamline regulation of reinsurance and surplus lines.

Section 531(b) of Dodd-Frank simplifies reinsur-
ance regulation by preempting the extra-territorial application of state laws to reinsurance. In other words, the laws of the state where the ceding insurer is domiciled will continue to apply, while all other states’ laws are preempted. Dodd-Frank specifically preempts state anti-arbitration provisions in regards to reinsurance disputes, except for those of the ceding insurer’s home state.

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The Harkin Amendment: Indexed Annuities And Other Products

The “Harkin Amendment,” a very small piece of the massive Dodd-Frank financial reform legislation enacted in July, was primarily intended to establish that equity indexed annuities are not securities under the Securities Act of 1933. It is generally viewed as having achieved that objective, although as discussed below the Harkin Amendment does present certain challenges in its practical application and there are some common misunderstandings regarding the Amendment that bear correcting. In addition, apart from equity indexed annuities (“EIAs”), it is important to appreciate that the Harkin Amendment is not limited to EIAs and that by its terms it could apply to a wide variety of annuity and life insurance products.

Congress enacted the Harkin Amendment with practically no legislative history for guidance in its interpretation - no hearings and no real committee reports. In fact, the Harkin Amendment was added to the Dodd-Frank Wall Street Reform and Consumer Protection Act in the House-Senate Conference, even though it was not included in either the House or Senate versions of that legislation. The Harkin Amendment became law as Section 989J of that Act, and we have little more than the language of Section 989J itself to guide in its application and interpretation.

Section 3(a)(8) of the Securities Act of 1933 (the “1933 Act”) provides simply and in broad terms that “any insurance or ... annuity contract” (issued by a regulated insurance company) is exempt from the provisions of that Act (except as otherwise specifically provided). Subsection (a) of Section 989J provides that the SEC “shall treat as exempt securities described under section 3(a)(8) of the Securities Act of 1933 ... any insurance or endowment policy or annuity contract or optional annuity contract” (collectively, any “insurance product”) that meets the following three requirements:

1. **Separate Account** — the value of the insurance product does not vary according to the performance of a separate account;

2. **Nonforfeiture** — the insurance product either-
   - (A) satisfies standard nonforfeiture laws or similar requirements at the time of issue; or
   - (B) in the absence of applicable standard nonforfeiture laws or requirements, satisfies the Model Standard Nonforfeiture Law for Life Insurance or the Model Standard Nonforfeiture Law for Individual Deferred Annuities, or any successor model law, as published by the National Association of Insurance Commissioners (“NAIC”); and

3. **Suitability** — the insurance product is issued either-
   - (A) on and after June 16, 2013 in a state, or issued by an insurance company that is domiciled in a state, that adopts rules that govern suitability requirements in the sale of an insurance product which substantially meet or exceed the minimum requirements established by the NAIC’s Suitability in Annuity Transactions Model Regulation (“SATMR”) or any successor thereto (within 5 years of the successor’s adoption by the NAIC); or
   - (B) by an insurance company that adopts and implements practices nationwide for the sale of any insurance product that meet or exceed the minimum requirements established by the SATMR (and any successor thereto) and is therefore subject to...