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Disclosure to the Rescue: A Conceptual Framework for Retained Asset Accounts

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I. Introduction

Retained Asset Accounts (RAAs) are a relatively recent innovation of the life insurance industry.

Beginning in about 1984 insurers began offering beneficiaries, upon claim approval, a draft book

with what look like checks. Beneficiaries, expecting a check from the insurer and not a package

of blank checks, might review the statement that accompanies the “check book” and learn that

the total amount due under the policy has been set aside in a RAA. The RAA will typically offer

a market rate of interest and may be called any one of several optimistic sounding names: an

Alliance Account,¹ a SecureLine², or a Total Control Account.³ Often the disclosure informs the

beneficiary that a check may be written for any amount from \$250.00 up to the full balance.

To be clear, the beneficiary is essentially given a choice to spend at least \$250.00 or to write a

check for the full amount of the policy proceeds. A choice to write a check for anything less than

¹ Name used by Prudential Financial Inc. for its general corporate account where beneficiaries' funds reside until drawn. *Death Benefit Accounts Seem to Slight Survivors*, N.Y. TIMES, July 29, 2010, (at B6 if exact copy) <http://www.nytimes.com/2010/07/29/business/29insure.html>.

² Name used by Lincoln National Life Insurance Co. for an account established by the insurer with a third-party where beneficiaries' funds will be deposited at the time and in the amount requested by the beneficiary. *Life Insurance Beneficiary's Claim for Additional Interest May Proceed; Edmondson v. Lincoln Nat'l Life Ins. Co., No. 10-4919 (E.D. Pa. Apr. 1, 2011)*, INSURANCE LAW AND LITIGATION WEEK, Apr. 25, 2011 at 26.

³ Name used by MetLife for an account managed by the insurer where beneficiaries' funds reside until drawn. David Glovin, *Forged MetLife 'Checks' Show Retained-Asset Account Risks*, BLOOMBERG (Aug. 24, 2010, 11:54 AM), <http://www.bloomberg.com/news/2010-08-24/forged-metlife-check-lawsuit-costs-show-risks-of-retained-asset-account.html>

the full policy amount results in a balance in the retained asset account. If the beneficiary writes a check for the full amount to herself, she could then deposit that money into a traditional bank account.

RAAs have been the subject of considerable recent controversy. Insurers argue that the RAA provides a valuable service to beneficiaries at what is often a difficult time in their lives; instead of deciding what to do with a large check a beneficiary is free to leave their policy proceeds in the RAA until they are emotionally stable and ready to spend. But, in exchange for this service the beneficiary takes a risk that the insurer may become insolvent. Numerous commentators have pointed out that not only do beneficiaries lack an individual account, they are also exposed to serious risk of loss in the case of insurer insolvency which can be easily avoided by depositing the proceeds in a traditional FDIC-insured bank account.

This paper reviews the recent litigation surrounding these largely unregulated accounts and evaluates industry claims that RAAs provide a valuable service for beneficiaries. It argues that the law should demand high quality disclosure from insurers who offer the RAA option. In Part II I describe RAAs and evaluate the industry claim that they are often a good choice for beneficiaries. In particular, I consider the quality of disclosure to beneficiaries and the degree to which unused RAA funds are protected in the event of a default or insolvency. Part III reviews

the implication for RAAs of ERISA fiduciary standards. Although authority is split, life insurance offered through an ERISA plan appears to provide beneficiaries with a higher degree of protection via ERISA's fiduciary duties than are available to beneficiaries of non-ERISA plans. In Part IV I propose uniform, high quality disclosure to beneficiaries. I conclude that serious concerns about the absence of FDIC insurance suggest that, at a minimum, insurers need to provide clear and complete disclosure in order to avoid confusing and deceiving life insurance beneficiaries.

II. How Do Retained Asset Accounts Work and Why Are They Controversial?

Insurers created the RAA device as a mechanism to increase profits.⁴ RAA funds are typically invested in general fund investments⁵ which often enjoy a rate of return of about 5%. The

⁴ Gerry H. Goldsholle, inventor of RAA's in 1984 while at MetLife, has acknowledged that he created these financial vehicles so, "[t]he company would win because we would make a nice spread on the money." David Evans, *Duping the Families of Fallen Soldiers*, BLOOMBERG (July 28, 2010, 5:44 PM), <http://www.bloomberg.com/news/print/2010-07-28/duping-the-families-of-fallen-soldiers.html> .

⁵ Recent survey of predominantly insurance company CFO's provides some insight into both the investment approaches these companies have taken with the funds in their general accounts. Respondents showed that among the investment vehicles of choice, "taxable fixed-income investments ranked first at 60% with the full sample and at 77% among life (re)insurers. Tax-exempt municipals (11%) were followed by cash and high-yield fixed income. Common stock was pegged at 8%, with the balance spread among real estate, hedge funds and other classes." Moreover, despite the expected lean towards fixed-income investments nearly half of respondents indicated that they would pursue more aggressive investment strategies in the near future. Tower Watson, *Insights: Insurer Investment Practices*, July 2011 http://www.towerswatson.com/assets/pdf/5008/Towers_Watson-Insurer-Inv-Prac.pdf ; See also AMERICAN COUNCIL OF LIFE INSURERS, 2011 LIFE INSURERS FACT BOOK 11-12 (2011)(divergent

insurer profits from the spread between the return on its own investment and the interest paid to the beneficiary—typically 0.8 to 1.5%.⁶ Some RAAs pay a fixed rate of interest while others use a variable rate. The key feature that drives profitability, however, is the spread between the investment return rate and the rate paid to the beneficiary. It is important to note that often the rate the beneficiary receives is *higher* than the prevailing bank savings rate or money market rate. Because many beneficiaries do not withdraw all of their funds promptly, insurers are currently estimated to be holding at least \$28 billion in RAA dollars which would otherwise have been paid out upon claim verification.⁷

As one might expect, the level of profits associated with RAAs are in dispute. However, best estimates put the profits at 0.3% to 1.8% of earnings at the largest insurers.⁸ Thus, while generating positive cash flow, RAAs cannot be described as a significant source of profit for the insurance industry. Numerous insurers have pointed out that few beneficiaries would be able to

investment strategies between life insurance general account and separate accounts is manifest across the industry with nearly 72% of general account funds invested in bonds versus an 80% investment in stocks for separate accounts)

⁶ Leslie Scism, *Insurers Safe If Accounts End*, WALL ST. J., Aug. 20, 2010,

<http://online.wsj.com/article/SB10001424052748703791804575439833429948208.html>

⁷ Bloomberg News, *Death Benefit Accounts Seem to Slight Survivors*, N.Y. TIMES, July 29, 2010,

<http://www.nytimes.com/2010/07/29/business/29insure.html>

⁸ Leslie Scism, *supra* note 6

match the returns on investment generated by their professional investment managers.⁹ This is why, they argue, the RAAs represent a genuine service to beneficiaries: a grieving survivor can leave her policy proceeds to be invested by a professional for as long as she wishes and at no cost. And, when she is ready to spend, all she has to do is write a check. The interest bearing account, the argument goes, increases the odds that unsophisticated and distraught survivors will avoid greedy and grasping relatives and others eager to take advantage.

Following their introduction in 1984¹⁰ RAAs quickly gained popularity. The recent critical attention can be traced to an influential article in Bloomberg News which focused on the case of

⁹ Leslie Scism & Erik Holm, *Are Life Insurers Playing Fair?* WALL ST. J., (August, 14, 2010), <http://online.wsj.com/article/SB10001424052748703723504575425662798020930.html> (“Short-term interest rates are now close to zero, so many money-market funds are paying less than insurers are.”); Hugh Son, *Prudential Says Retained Accounts Helpful To Beneficiaries, Have Insurance*, BLOOMBERG, (Aug. 12, 2010) <http://www.bloomberg.com/news/2010-08-12/prudential-calls-retained-accounts-helpful-to-beneficiaries-fully-insured.html> (“Prudential Financial Inc., the second-largest U.S. life insurer, said the ‘vast majority’ of survivors getting so-called retained-asset accounts benefit from the service.”) ; Bloomberg News, *supra* note 7 (“For some families, the account is the difference between earning interest on a large amount of money and letting it sit idle.”)

¹⁰ It appears Metlife pioneered the product in 1984. David Evans, *supra* note 4, and Prudential Financial started using retained-asset accounts for beneficiaries represented by the Department of Veterans Affairs in 1999. BLOOMBERG NEWS, *V.A. Agreed to Withholding of Benefits. Documents Say*, N.Y. TIMES, Sep. 29, 2010. Notably, Massachusetts Mutual Life Insurance Co., Aflac and Hartford Financial Services Group still automatically send beneficiaries a bank check for the full policy amount. Alexis Leondis, *MassMutual Skips Retained Accounts, Cuts Beneficiaries a Check*, WASH. POST, Aug. 8, 2010, at G04, available at 2010 WLNR 26711473.

the survivors of a soldier killed in the conflict in Afghanistan.¹¹ In that case, Ms. Lohman, mother of the deceased, received a large envelope from Prudential Financial Inc., the carrier chosen by the Department of Veterans Affairs, which contained what appeared to be a checkbook and a letter regarding her son's \$400,000 policy. The letter explained that the policy amount due would be placed in "a convenient interest-bearing account" until she decided when and how much to withdraw. A fine print disclaimer on the letter revealed that the account holding the funds was not guaranteed by the FDIC; Ms. Lohman said she did not notice it. Six months passed before she attempted to access any of the funds in the account via the 'checkbook' provided by Prudential. When using a 'check' to make two purchases -- for a bed and a camera -- each time the salesperson rejected it. Despite appearing to be checks tied to a bank account (the bank name of JPMorgan Chase appeared on them not Prudential's), these were in fact drafts which meant that funds were only available for access through JPMorgan Chase *after* Prudential sent the amount requested.¹² Prudential responded to inquiries about Ms. Lohman's case and RAA's in general by New Jersey insurance regulators. A letter, received by New Jersey's Commissioner of banking and insurance, revealed that from October of 2008 through

¹¹ Tony Capaccio & David Evans, *Duping the Families of Fallen Soldiers*, BLOOMBERG MARKETS MAGAZINE, (June 29, 2010), <http://www.bloomberg.com/news/2010-07-28/soldier-death-payout-practices-of-insurers-to-be-probed-by-veterans-agency.html>

¹² *Death Benefit Accounts Seem to Slight Survivors*, *supra* note 1

April 2010 25 other drafts had cleared Ms. Lohman's RAA account with most of the benefits withdrawn by the end of that time period. However, Ms. Lohman was quick to note those cleared drafts were not always processed "in a timely fashion" and more slowly than what would be expected for checks written on a bank account.¹³

The Bloomberg piece generated enormous media interest¹⁴ which prompted investigations and promises of legislative action from a variety of sources. The Attorney General of New York,¹⁵ the National Association of Insurance Commissioners (NAIC)¹⁶ and the FDIC¹⁷ each expressed

¹³ Leslie Scism & Erik Holm, *State Blesses Payouts By Pru*, WALL ST. J., Aug. 11, 2010, at C1, available at PROQUEST 741331111

¹⁴ See e.g. Leslie Scism & Erik Holm, *Are Life Insurers Playing Fair*, WALL ST. J., (August, 14, 2010), <http://online.wsj.com/article/SB10001424052748703723504575425662798020930.html> ("The checkbook approach has been around since the 80s. But a July Bloomberg Markets magazine article put a human face on the subject"); Eleanore Szymanski, *Insurance companies benefit greatly from Retained Asset Accounts*, TIMES, Feb. 13, 2011, at D04 available at 2011 WLNR 2860989; David Evans, *U.S. Pays as Prudential Invests Troop Death Benefits*, WASH. POST, Oct. 3, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/02/AR2010100200530.html>; Dan Frosch, *Families of Dead Soldiers Sue Insurer Over Its Handling of Survivors' Benefits*, N.Y. Times, Aug. 29, 2010, at A11, available at <http://www.nytimes.com/2010/08/30/us/30prudential.html>

¹⁵ Press Release, New York State Office of the Attorney General, Attorney General Cuomo Launches Investigation Of Life Insurance Industry For Defrauding Military Families And Others Of Millions In Cash Payouts (July 29th, 2010) (on file with author), available at <http://www.ag.ny.gov/press-release/attorney-general-cuomo-launches-investigation-life-insurance-industry-defrauding>

¹⁶ Consumer Alert, National Association of Insurance Commissioners, Retained Asset Accounts and Life Insurance: What Consumers Need to Know About Life Insurance Benefit Payment Options (Aug. 2010) (on file with author), available at http://www.naic.org/documents/consumer_alert_raa.htm; Press Release, National Association of Insurance Commissioners, NAIC President Jane L. Cline Releases Statement Regarding Retained Asset Accounts (July 29, 2010) (on file with author) http://www.naic.org/Releases/2010_docs/raa_statement.htm

concern about the unregulated nature of these large bank-like “accounts”. Plaintiff’s lawyers quickly joined the fray and filed class actions against major insurers holding RAA dollars.¹⁸

Quickly, a few key issues crystallized. First and perhaps most important, was an insurer bound by ERISA fiduciary standards¹⁹ at the time the RAA was created or were all duties discharged

¹⁷ Letter from Sheila C. Blair, Chairman, FDIC, to Therese M. Vaughan, Ph. D, CEO, NAIC (Aug. 5, 2010) (on file with author)

¹⁸ See e.g. David Glovin, *MetLife Must Defend Lawsuit Over Retained Asset Checkbook*, BLOOMBERG, (Dec. 20, 2011), <http://www.bloomberg.com/news/2011-12-20/metlife-must-defend-lawsuit-over-checks-forged-from-retained-asset-account.html> (“MetLife wouldn’t make payments to Herrera, the beneficiary of Diaz’s policy, after the daughter allegedly forged Herrera’s name to \$302,820 in checks, according to the complaint.”); *Suit: Prudential Made \$500M Off Vets’ Death-Benefit Money*, BLOOMBERG, (Aug. 31, 2010), <http://www.investmentnews.com/article/20100831/FREE/100839981> (“The suit claims Prudential fails to pay beneficiaries in a lump sum as required by U.S. law and the language of the policies, instead encouraging them to leave the money in accounts with the company, which pays them a small amount of interest.”)

¹⁹ ERISA section 3(21)A provides that, except in the case of an investment company described in section 3(21)B, a person is a plan fiduciary “to the extent” he (i) exercises discretionary authority or control over plan management or any authority or control over management or disposition of plan assets, (ii) renders investment advice regarding plan assets for a fee or other compensation or has authority or responsibility to do so, or (iii) has any discretionary authority or responsibility in plan administration. 29 U.S.C. §1002(21)(A)(B) (2011). Section 404(a)(1) of ERISA imposes a basic duty on plan fiduciaries to act “solely in the interest” of plan participants and beneficiaries otherwise known as the exclusive benefit rule. Subsection (A) of this section adds the requirement that the fiduciary act for the “exclusive purpose” of providing plan benefits and defraying reasonable expenses of plan administration. 29 U.S.C. §1104(a)(1)(A) (2011). Section 404(a)(1)(B) requires a plan fiduciary to act with the “care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of alike character and with like aims.” 29 U.S.C. §1104(a)(1)(B) (2011). Section 404(a)(1)(C) requires a fiduciary to “diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.” 29 U.S.C. §1104(a)(1)(C) (2011). Section 404(a)(1)(D) requires a fiduciary to act “in accordance with the documents and instruments governing the plan insofar as such documents and

when policy assets were deposited in to the RAA? This would become a crucial question as ERISA fiduciary liability is often expansive—if an insurer’s fiduciary duties continue after the formation of the RAA, liability may attach.²⁰ Second, was the nature and quality of disclosure that beneficiaries received adequate? (Were beneficiaries improperly led to believe that their RAA dollars were insured against institutional failure?) In the event of insolvency²¹would a

instruments are consistent with the provisions of this title or Title IV.” 29 U.S.C. §1104(a)(1)(D) (2011). Section 404(c) protects the fiduciary from liability when a loss or breach occurs as a result of a participant’s exercise of control over the assets in the account. 29 U.S.C. §1104(c) (2011). Section 406(b)(1) prohibits a fiduciary from dealing with plan assets in his own interest or for his own account, otherwise known as the prohibition against self-dealing. 29 U.S.C. §1106(b)(1) (2011).

²⁰ The liability for a fiduciary in breach can be substantial. ERISA §409(a) imposes liability on the fiduciary in breach to: (1) make restitution of plan losses caused by the breach, (2) disgorge profits obtained as a result of the breach, and (3) be subject to other equitable relief deemed appropriate by the court to address harm caused by the breach. 29 U.S.C. §1109(a) (2011). There are two distinct causes of action available in the event that a breach of fiduciary duty occurs. 29 U.S.C. §1132(a)(2)(3) (2011). The first, under Section 502(a)(2), is available to the Secretary of Labor, a plan participant, beneficiary, or fiduciary in order to obtain relief for the benefit *plan* only as opposed to individual plan participants. See Massachusetts Mut. Life Ins. CO. v. Rusell, 473 U.S. 134 (1985)(finding that suit under §502(a)(2) may only be brought on behalf of the benefit plan as a whole). Section 502(a)(3), alternatively, permits a participant, beneficiary or fiduciary to enjoin any act or practice which violates either Title I of ERISA or the language of the insurance contract, or to obtain equitable relief for such a violation; this equitable relief has been held to permit individual relief. See Vanty Corp. v. Howe, 516 U.S. 489 (1996)(finding individualized equitable relief under §502(a)(3) proper, “for injuries caused by violations that section 502 does not elsewhere adequately remedy.”). Moreover, litigation initiated by the Secretary of Labor can trigger civil penalties against the fiduciary in breach in addition to the liability created by the breach. 29 U.S.C. §1132(i)(l) (2011). Those under §502(i) apply to prohibited transactions and the penalty can range from as low as 5 percent to 100 percent of the amount involved in the transaction. 29 U.S.C. §1132(i) (2011). Section 502(1) imposes a 20 percent penalty on amounts recovered for a benefit plan by judgment or settlement. 29 U.S.C. §1132(l)(1) (2011).

²¹State insurance commissioners, “can order conservation, rehabilitation or liquidation on numerous statutory grounds ranging from financial insolvency to unsuitable management and operations.” Kris

beneficiary's funds be subject to the general claims of creditors or would they be protected by state guaranty funds?²² Did the insurer's communications create a reasonable impression in

DeFrain, *U.S. Insurance Financial Regulatory Oversight and the Role of Capital Requirements*, Center for Insurance Policy and Research Newsletter (National Association of Insurance Commissioners) Jan. 2012, available at http://www.naic.org/cipr_newsletter_archive/vol2_oversight.htm. Bankruptcy is governed by Federal regulations whereas insolvency is managed under diverse state receivership laws. See e.g., C.A. Ins. CODE D. 1, Pt. 2, Ch. 1, Art. 14 (West 2012); N.Y. Ins. LAW § 7419 (Mckinney 2005); T.X. INS. CODE ANN. T. 4, Subt. C, Ch. 443 (West 2009). Bankruptcy is a process by which the court administers the estate of the debtor to allow, disallow, organize and prioritize claims amongst creditors with claims to the debtor's estate. 9 Am. Jur. 2d Bankruptcy § 6 (2012). The two primary aims of these bankruptcy proceedings are to (1) convert the debtor's estate into funds to distribute to its creditors and (2) the debtor relief to the extent possible from overwhelming indebtedness. 9 Am. Jur. 2d Bankruptcy § 5 (2012). Insolvency is similar but distinct from bankruptcy in that the standard is whether the insurer is in a hazardous financial condition usually found when its assets are exceeded by claims or other liabilities or if the insurer is unable to pay its obligations when due. 1 Couch on Ins. § 5:6 (2011). Secured creditors, those who have a lien on property, are better situated compared to unsecured creditors who lack any interest in specific property of the debtor. Whether via insolvency dissolution or bankruptcy, the benefit of the lien to secured creditors is that the court will generally honor the lien resulting in proportionally larger repayment of the debt owed than would otherwise occur. The unsecured creditor, however, simply has an interest in some amount owed and therefore must compete with other unsecured creditors for a portion of the liquidated assets which can result in a repayment that is proportionally small relative to the obligation owed.

²² State guarantee funds operate in a similar fashion to more the more commonly known FDIC guarantee but the consuming public knows little of their existence or operation. While FDIC provides a \$250,000 guarantee per account, state guaranty funds designate a single umbrella guarantee for all policies held by an insurer that is typically set at \$300,000. States also have placed guaranty limits on particular types of insurance of which the life insurance guaranty often equals the total aggregate guaranty. Those entitled to a death benefit as an RAA and entitled to the benefits of other policies held by a now insolvent insurer will have to leave otherwise due benefits on the table. *What Happens When Your Insurance Company Becomes Insolvent*, INSURE.COM, (Oct. 2, 2009)

<http://www.insure.com/articles/generalinsurance/bankrupt-company.html>. Even if the funds owed to the beneficiary are well within the amount of the state guaranty immediate access to those accounts held by the insurer may be delayed by administrative rules or worse frozen by court order. David Glovin, *Forged MetLife 'Checks' Show Retained-Asset Account Risks*, BLOOMBERG (Aug. 24, 2010)

the beneficiary that her money would be retained in a bank-like account?) Third and finally, in the non-ERISA context, is there a fiduciary relationship between an insured and the insurer which is breached by the normal operation of an RAA?

Although recent and still developing, there is now enough case law to allow for a preliminary answer to each of these questions and to help guide insurers that wish to continue to offer RAAs. As one would expect, the ERISA/non-ERISA dividing line is significant, with ERISA fiduciary standards offering more robust protection to beneficiaries than non-ERISA state contract law. Additionally, it is clear that the *quality* of disclosures made to beneficiaries is critical. As with so many other areas of insurance law²³the clarity of information provided and

<http://www.bloomberg.com/news/2010-08-24/forged-metlife-check-lawsuit-costs-show-risks-of-retained-asset-account.html> -Explain these funds and how they work.-

²³ See e.g. Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352, 357 (Iowa 1995)(finding that the insurer did nothing that would have lead plaintiff to think coverage would have been extended where the policy contained an exclusion for “intoxication” and the deceased had consumed alcohol for ten hours prior to death by carbon monoxide asphyxiation); Gordinier v. Aetna Cas. & Sur. Co., 154 Ariz. 266, 272-73 742 P.2d 277, 283-84 (1987)(stating that unambiguous boilerplate terms will not be enforced in circumstances where the terms, “cannot be understood by the reasonably intelligent consumer,” where “full and adequate notice of the term,” is lacking and the provision is, “unusual or unexpected, or . . .emasculates apparent coverage,” where actions by the insurer, “create an objective impression of coverage in the mind of the reasonable insured,” or where “the insurer has induced a particular insured [to] reasonably. . . believe that he has coverage. . . [when] coverage is expressly . . . denied by the policy.”)

the reasonable expectations²⁴ of the intended beneficiary of the policy dominate when considering the reasonableness of an RAA.

III. ERISA Fiduciary Obligations and the Problem of Disclosure

A. ERISA Life Insurance Plans

²⁴ The doctrine of reasonable expectations draws inspiration from the doctrine of contracts of adhesion in that it exists to counter-balance the disproportionate expertise and comprehension of policy terms enjoyed by the insurance company relative to the insured. Application of reasonable expectations of the insured results in the court considering, “what a hypothetical reasonable insured would glean from the wording of the particular policy and the kind of insurance at issue...” in order to evaluate whether the insured’s interpretation of the policy would stand against the insurer’s interpretation. 16 RICHARD A LORD, WILLISTON ON CONTRACTS § 49:20 (4th ed.). Courts have diverged on whether or not an ambiguity of the policy language is a prerequisite to applying the doctrine of reasonable expectations. Some conclude “even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured.” Gibson v. Callaghan, 158 N.J. 662, 671, 730 A.2d 1278, 1283 (1999) (quoting Werner Indus., Inc. v. First State Ins. Co., 112 N.J. 30, 35-36, 548 A.2d 188 (1988)). See also Atwater Creamery Co. v. Western Nat. Mut. Ins. Co., 366 N.W.2d 271, 52 A.L.R.4th 1217 (Minn. 1985)(finding that although definition of terms in the burglary clause had unambiguous meanings, consideration of the reasonable expectations of the insured was in keeping with the intent of the clause as a whole). Others find that in absence of ambiguity will present no obstacle if, “it is proved that the parties’ prior dealings led the insured to form a reasonable belief.” Allen v. Sentry Ins., 137 N.H. 579, 581, 630 A.2d 780, 781 (1993) (quoting V & V Corp. v. American Policyholders’ Ins. Co., 127 N.H. 372, 380, 500 A.2d 695, 700 (1985)). Yet some have held a more rigid line “that the doctrine of reasonable expectations is applicable. . . only if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print purports to take away what is written in large print.” Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 928 (Del. 1982). See also Boggs v. Camden-Clark Memorial Hosp. Corp., 225 W. Va. 300, 693 S.E.2d 53 (2010)(noting that doctrine of reasonable expectations is reserved for when the policy language is ambiguous); Colony Ins. Co. v. Dover Indoor Climbing Gym, 158 N.H. 628, 974 A.2d 399 (2009)(noting that absent ambiguity the court should not consider the parties’ reasonable expectations).

1. The exclusive benefit rule

The First and Second Circuits which are the only federal appellate courts to have ruled on RAAs thus far have split on the question of the scope of ERISA fiduciary duty and the formation of an RAA. In Faber v. Metropolitan Life,²⁵ and in Mogel v. Unum Life,²⁶ the courts were presented with similar facts but came to very different conclusions about the reach of ERISA's fiduciary provisions. In Mogel the plaintiffs were a class of beneficiaries of UNUM's RAA's who alleged "breaches of fiduciary duties under... ERISA."²⁷ Plaintiffs submitted valid death benefit claims to UNUM. UNUM then mailed each plaintiff both a letter and a checkbook. The letter told the recipients: (1) that the death benefits were now in a 'UNUM Security Account,' (2) that these accounts would garner interest at a variable rate, and (3) that the checks in the checkbook could be used to draw on the account amounts of at least \$250 and up to the balance of the account. UNUM's initial defense was quickly dismissed by the court when it observed, "that delivery of the checkbook did not constitute a 'lump sum payment' called for by the policies."²⁸ The key issue then became whether UNUM continued to act as an ERISA fiduciary even after the RAAs were established. Relying on language in the policy which noted that "all benefits payable...will

²⁵ 648 F. 3d 98 (2nd Cir. 2011).

²⁶ 547 F. 3d 23 (1st Cir., 2008).

²⁷ *Id.* at 24.

²⁸ *Id.* at 26

be paid as soon as the Insurance Company receives proof of claim acceptance to it' and 'unless otherwise elected, payment for loss of life will be made in one lump sum,'"²⁹ the Mogel court reasoned, that "until the beneficiaries received the lump sum payment to which they were entitled, UNUM remained obligated to carry out its fiduciary duty under the plan."³⁰ Since Mogel, several decisions of the Massachusetts District Court have followed and reiterated this rationale.³¹

Mogel has proven influential well beyond the First Circuit and in non-ERISA cases. For example, in Keife v. Metropolitan Life Ins. Co.,³² the Nevada District Court found that "under

²⁹ Id. At 25.

³⁰ Id. At 26.

³¹ See, e.g., Vander Luitgaren v. Sun Life Ins. Co. of Canada, No. 1:09-cv-11410, 2010 WL 4722269, *1 (D.Mass. Nov. 18, 2010) (noting "that until a lump sum check is cashed by the beneficiary, the money due to the beneficiary is an asset of the plan." The court refused to adopt an "all's well that ends well approach [that] ignores the purpose of ERISA's imposition of fiduciary duties." In Otte ex. Rel. Estate of Reynolds v. Life Ins. Co. of North America, 275 F.R.D. 50, 55 (D. Mass., 2011) the court noted that it was "persuaded by the First Circuit's reasoning in Mogel that the checkbook at issue was 'no more than an IOU which did not transfer the funds to which the beneficiaries were entitled out of the plan assets; hence [the defendant insurer] remained a fiduciary with respect to those funds.'" See also, Lucey v. Prudential Ins. Co. of America, 783 F. Supp. 2d 207 (D. Mass., 2011) which considered two federally subsidized life insurance programs covering veterans and service members. The policy language here provided that "the member may elect settlement of insurance under this subchapter either in a lump sum or in thirty six equal monthly installments." Most beneficiaries opted for the lump sum and the court, relying explicitly on Mogel noted that "[t]he difference between delivery of a check and a checkbook ... is the difference between [the insurance company] retaining or [the insurance company] divesting possession of plaintiffs' funds."

³² 797 F. Supp. 2d 1072 (D. Nev., 2011).

the plain language of Section 5 [of the policy], MetLife was obligated to pay Keife the death benefits (1) immediately, and (2) in one sum, after receiving a completed claims form.³³ The defendant-Insurer asserted that the RAA in question was the equivalent of a complete lump sum payment. The court rejected this argument, noting that “MetLife did not make an immediate payment of the benefits because MetLife maintained possession and control of the funds while they were in the [RAA].”³⁴ .

Perhaps the most helpful discussion of ERISA duties in the context of RAAs is found in Edmonson v. Lincoln Nat. Life Ins. Co.,³⁵ where the Pennsylvania District Court offered a

³³ At 1077.

³⁴ The Keife court was emphatic: “The court has reviewed the documents and pleadings on file in this matter and finds that Keife has sufficiently alleged that MetLife breached its obligations to pay the death benefits immediately, and in one sum. Although MetLife argues that it paid Keife’s death benefits immediately upon receipt of his completed claims form by crediting the full amount of the benefits to a TCA and sending him a checkbook to draw upon the TCA, the court finds that MetLife did not make an immediate payment of the benefits because MetLife maintained possession and control of the funds while they were in the TCA. Until Keife draws on the account, the funds represented by the checkbook are not in Keife’s possession. Rather, they are maintained in MetLife’s general operating account and MetLife has the use of those funds for its own benefit. Therefore, the court finds that crediting a TCA does not constitute immediate payment of the death benefits and, as such, Keife has sufficiently alleged that MetLife breached the FEGLI Policy.” at 1077.

³⁵ 777 F. Supp. 2d 869 (E.D. Pa., 2011).

detailed rationale for the Mogel assertion that ERISA, in particular the Supreme Court's Harris Trust³⁶ decision, requires broad construction of the term "fiduciary". As the Edmonson points out, there are two possible bases in ERISA for a claim of ongoing fiduciary duty after the establishment of an RAA: first, 29 U.S.C. section 1104 (a)³⁷ which requires a fiduciary to act

³⁶ Harris Trust involved the trustee of a retirement plan bringing suit against John Hancock Mutual Life Insurance Co. alleging, amongst other claims, violations of ERISA in the management of the group annuity funds. The court held that this financial vehicle did not fall under ERISA's guaranteed benefit exclusion because funds in excess of those necessary to fulfill guaranteed benefits were still subject to discretionary management of the insurer, and therefore the insurer had fiduciary obligations in the management of those excess funds. Justice Ginsberg's majority opinion emphasized that "[t]o help fulfill ERISA's broadly protective purposes, (footnote omitted) Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive." 510 U.S. 86 at 96. The consequence of such a broad approach to finding fiduciary duties apply is a proportional narrowing of the guaranteed benefit policy exception. *Id.* This interpretation embraces the functional approach embodied in the language of the statute itself, which defines a fiduciary as any person who "exercises *any authority or control* respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A) (2011)(emphasis added).

³⁷ See *e.g.*, Liss v. Smith, S.D.N.Y.1998, 991 F.Supp. 278, 308 (holding that ERISA plan trustees have a fiduciary duty to act to ensure that a plan receives all funds to which it is entitled for use on behalf of beneficiaries and participants where plaintiff's alleged that defendant trustees and their legal counsel waived interest on delinquent contributions to the health and pension funds); Martin v. National Bank of Alaska, 828 F.Supp. 1427, 1436 (D. Alaska 1992)(holding that the exclusive benefit rule of ERISA was violated, "[w]hen NBA [using plan assets to make mortgage loans to mortgagors who used mortgage loan proceeds to retire construction loans made by bank]. . . NBA was acting in its own interest, assuring itself that the construction loan would be virtually without risk."); Williams v. Williamson-Dickie Mfg. Co., 778 F.Supp. 1197, 1198 (S.D.Ala.1991) (holding that ERISA fiduciaries should exercise discretion to serve interests of *all* plan participants and that an employer would be liable for breach of that duty where they knowingly and deliberately withheld information about modification of the plan's vesting requirements from employees); Foltz v. U.S. News & World Report, Inc., 865 F.2d 364, 373, 275 U.S.App.D.C. 145, 155 (C.A.D.C.1989) *cert. denied* 109 S.Ct. 3162, 490 U.S. 1108, 104 L.Ed.2d 1024(holding that the exclusive benefit rule creates no exclusive duty of maximizing benefits where plaintiff's stock in employer was valued using the minority as opposed to majority valuation prior to sale of employer).

solely in the interest of plan participants and beneficiaries for the purpose of providing benefits (this is known as the exclusive benefit rule); and, second, 29 U.S.C. section 1106(b)(1)³⁸ which prohibits fiduciaries from self-dealing.

The exclusive benefit rule creates a fundamental duty in an ERISA fiduciary to act “for the exclusive purpose of providing benefits to participants and their beneficiaries.”³⁹ This provision

³⁸ See e.g., Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) *cert. denied* 117 S.Ct. 1838, 520 U.S. 1237, 137 L.Ed.2d 1042, *on remand* 1998 WL 526500 (held that ERISA fiduciary violated prohibition on self-dealing when the fiduciary failed to meet its, “burden of proving that he fulfilled his duty of care and loyalty and that the ESOP received adequate consideration,” where the valuation provided by third-party was not questioned and where a casual review would have revealed it was careless in its assessment); Acosta v. Pacific Enterprises, 950 F.2d 611, 620-21 (9th Cir. 1991), amended on rehearing (held that plan fiduciaries use of shareholdings list in connection with election of board of directors to allegedly solicit votes was not a valid self-dealing claim because it failed to, “demonstrate that [defendant] actually used its power to deal with the *assets* of the plan for its own benefit.”)(emphasis added); Lowen v. Tower Asset Management, Inc., 653 F.Supp. 1542, 1554 (S.D.N.Y.1987), *aff’d*, 829 F.2d 1209 (2d Cir. 1987)(held that investment manager, investment banking corporation, and registered broker dealer along with officers and shareholders violated the prohibition on self-dealing in “readily apparent,” fashion where they caused pension plan assets to be invested in companies in which officers and directors had equity interest and investment manager agreed to provide consulting services to corporation at the same time it had agreed to invest the plan assets in that same corporation); Alves v. Harvard Pilgrim Health Care Inc., 204 F.Supp.2d 198, 216 (D.Mass.,2002)(holding that ERISA health plan sponsors did not engage in self-dealing where beneficiaries’ copayments exceeded sponsor’s actual costs for same prescription drugs through use of discounting arrangements and where no evidence was produced that sponsor’s sought to gain, “even indirectly,” from the copayment provision); LaScala v. Scruferi, 96 F.Supp.2d 233, 237 (W.D.N.Y.,2000) (holding that ERISA plan manager who allegedly gave himself pay raise without authorization by plan trustees was not exempted from claims of self-dealing under sections 408(b)(2) and 408(c)(2) as, “there would be no triable issue of fact regarding the reasonableness of [the pay raise if proved that plan manager] violated the prohibitions against self-dealing).

³⁹ 29 U.S.C. § 1104 (a)(i) (2011)

embodies both a fundamental principle of what it means to operate in a fiduciary capacity⁴⁰ as well as the purpose of the ERISA statute as a whole to ensure that the benefits promised to employees are safeguarded from employer malfeasance.

The prohibition against self-dealing is a particular type of prohibited transaction that was designed to protect the plan assets from being abused by the fiduciary to its own benefit at the expenses of the beneficiaries.⁴¹ This provision accounts for what is one of several prohibited transactions that are crucial to defining the obligations, negative as well as affirmative, of an ERISA fiduciary.⁴²

In each of these cases, the courts had to address the defendant-insurer claim that the guaranteed benefit exemption precluded a finding of ongoing fiduciary status. ERISA goes to great lengths to carve out exceptions to “plan assets” that warrant fiduciary obligations.⁴³ The

⁴⁰ “To establish a claim for breach of fiduciary duty . . . concerning coverage under any employee benefit plan, a plaintiff must show that the defendant was acting in a fiduciary capacity when it made the challenged representations.” *Stark v. Mars, Inc.*, 790 F.Supp.2d 666 (2011).

⁴¹ 29 U.S.C. § 1106 (b)(i) (2011)

⁴² *See e.g.* 29 U.S.C. § 1106 (a) (2011) (prohibiting fiduciary to engage in a transaction with a party they “knew or should have known” was a party in interest).

⁴³ Section 401(b)(2) provides that when, “a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.” 29 U.S.C. § 1101(b)(2) (2011). This guaranteed benefit policy is further clarified as, “an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.” 29 U.S.C § 1101(b)(2)(B) (2011).

court in Trs. of Laborers' Local No. 72 Pension Fund v. Nationwide Life Ins. Co.,⁴⁴

acknowledged that the exception exists to limit the scope of fiduciary obligation for insurers when operating general corporate accounts which are used to fund not only benefits to policy holders but to meet the insurer's operating expenses.⁴⁵ When grappling with a circuit split⁴⁶ over the reach of this exception, the court in Harris Trust acknowledged that Congress did not intend to have *all* general account funds exempted from fiduciary liability⁴⁷ The Supreme Court adopted the Peoria Union⁴⁸ approach where, "division of the contract into its component parts and examination of risk allocation in each component," is the basis for determining when funds fall into or outside the exception.⁴⁹

This line of cases, which relies on Mogel and rests post-RAA fiduciary liability on the retention of funds by the insurer, is not without its critics. The Second Circuit carved out a different path in Faber which has become the basis for a distinct line of cases that reject the who-holds-the-money approach adopted in Mogel. The Faber court mainly relied squarely on an opinion of the Department of Labor which took the position that an RAA was an effective

⁴⁴ 783 F.Supp. 899 (D.N.J.1992)

⁴⁵ *Id.* at 904 n. 7

⁴⁶ Compare Mack Boring and Parts v. Meeker Sharkey Moffitt, Actuarial Consultants of New Jersey, 930 F.2d 267, 277 (3d Cir.1991)(holding that fiduciary duties did not apply to funds deposited in the general account for a policy with guaranteed benefits) *with* Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co., 698 F.2d 320, 327 (7th Cir.1983)(holding a phasic analysis of the insurance contract as necessary to observe when fiduciary duties applied)

⁴⁷ 510 U.S. at 100-01, n. 12

⁴⁸ 698 F.2d at 324-27

⁴⁹ *Id.* at 102.

distribution of assets that extinguished the defendant-insurer's fiduciary duties under ERISA.

The Second Circuit suggested the DOL's view was entitled to deference and distinguished between the policy at issue in Mogel which expressly called for a lump sum payment and the plan language in Faber which provided for an RAA. The Faber court noted that the creation of the RAA transformed the relationship between the insurance company and the beneficiary from one of fiduciary governed by ERISA to that of debtor and account holder. The Faber court focused on an important feature of RAAs: given that a beneficiary can take all of her benefits from the RAA at any time and ERISA "does no more than protect the benefits which are due to an employee under a plan"⁵⁰ what, exactly, is the duty breached by the creation of the RAA?

ERISA fiduciary duty case law is not unfamiliar with situations in which an arrangement which provides a benefit to the plan is challenged as a violation of the exclusive benefit rule.

Lockheed Co. v. Spink⁵¹ and Hughes Aircraft Co. v. Jacobson⁵² concerned whether amendments made by employers to benefit plans amounted to conduct on the part of the employer that amounted to an exercise of fiduciary duty that would have violated the exclusive benefit rule. In both Jacobson and Spink the Court went to great lengths to point out that the

⁵⁰ Faber at 107.

⁵¹ 517 U.S. 882 (1996)

⁵² 525 U.S. 432 (1999)

alleged benefits retained by the employers⁵³ did *not* arise out of any commercial transactions with plan assets or employee benefits.⁵⁴ This meant that fiduciary obligations, including the exclusive benefit rule, were not triggered.⁵⁵ Applying this reasoning to the use of RAA's, the real issue is whether the plan derives an incidental benefit from the creation of the RAA or whether it has stepped over the line and engaged in a practice designed to extract a benefit at the expense of participants and beneficiaries.⁵⁶

2. Self-dealing

The ERISA prohibition against self-dealing forbids a fiduciary from using plan assets for their own benefit.⁵⁷ The clearest case for a violation is where there is both a net benefit to the fiduciary *and* a net loss to the plan. Patel Credit Union v. Sahni and Board of Trustees v. J.R.D.⁵⁸ provide (unfortunately common) examples of behavior the statute prohibits.

⁵³Hughes, 525 U.S. 432 (1999)(using surplus funds from employee contribution plan to fund non-contribution plan with lesser benefits); Spink, 517 U.S. 882 (1996)(waiver of employment related claims)

⁵⁴ See Hughes, 525 U.S. at 444; Spink, 517 U.S. at 891-893 (noting that the fiduciary duty is triggered in the management of the plan assets); See also Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995); Lynch v. J.P. Stevens & Co., Inc., 758 F.Supp. 976 (D.N.J., 1991)

⁵⁵ See *infra* note 93

⁵⁶ See *e.g.*, Wright v. Nimmons, 641 F.Supp. 1391, 1402-1404 (S.D.Tex. 1986) ("Defendant . . . blatantly disregarded his duty of loyalty by consistently treating the trust assets as if they were his own property" evidenced most clearly in his transfer of plan assets to finance corporate purchases.); Donovan v. Daugherty, 550 F.Supp. 390, 409-410 (S.D. Ala. 1982) (finding that breach of fiduciary duty occurred where defendant trustees credited themselves time worked and used plan funds to meet their monthly contributions in order to obtain access to plan benefits to the detriment of other plan participants)

⁵⁷ 29 U.S.C. § 1106 (b)(i) (2011)

⁵⁸ See *e.g.*, Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) (held that a fiduciary engaged in self-dealing, where he set his own compensation and collected the amount from plan assets); Pension Benefit Guar. Corp. v. Morin, No. Civ. 99-246-P-C, 2000 WL 760737 (D. Me. Apr. 24, 2000) (held trustee

In Sahni the manager of the company health plan engaged in what the court generously “described as sloppy,” accounting practices.⁵⁹ The account manager had sole control over both the account into which premiums were deposited and the one from which he would draft payments for claims. Ultimately the manager commingled the funds in both of those accounts and what he described as his administrative fee, into the claims account from which he would write payments to medical providers. Sahni continued to pay himself the administrative fee for an additional three months *after* his termination. He also received a commission for selecting the insurer of claims in excess of \$500 for the health benefits plan.⁶⁰ The court was unequivocal in concluding that these were, “per se breach[es] of fiduciary duty in violation of 29 U.S.C. § 1106(b),” given that the plan manager was acting in a fiduciary capacity .⁶¹

While Sahni involved a fiduciary engaged in self-dealing by acts of direct and indirect compensation, Board of Trustees⁶² illustrates how the use of plan assets to satisfy a fiduciary’s pre-existing financial obligations is also an act of self-dealing. Here the corporate officer tasked with managing plan assets subordinated the obligation to make contributions to the plan to the demands of creditors.⁶³ The court noted that a “fiduciary [who] uses plan assets to satisfy other business obligation . . . violates his duty.”⁶⁴ Read together with Sahni, these cases demonstrate that self-dealing is evident where there is measurable harm to the plan assets accompanies the identified benefit to the fiduciary. In the RAA life insurance context, the self-

committed two acts of self-dealing where he transferred \$141,760 of plan assets to himself and an additional \$1,200 to a corporation he controlled); Board of Trustees of the Airconditioning & Refrigeration Indus. Health & Welfare Fund. v. J.R.D. Mechanical Servs., Inc., 99 F. Supp. 2d 1115 (C.D. Cal. 1999) (held that fiduciary engaged in an act of self-dealing when it paid creditors instead of making required contribution to plan)

⁵⁹ Sahni, 262 F.3d at 901

⁶⁰ Id. at 902

⁶¹ Id. at 904

⁶² Board of Trustees of the Airconditioning & Refrigeration Indus. Health & Welfare Fund. 99 F. Supp. 2d at 1117

⁶³ Id. at 1118

⁶⁴ Id. at 1123 (quoting PMTA–ILA Containerization Fund v. Rose, No. 94–5635, 1995 WL 461269, *5 (E.D.Pa. Aug.2, 1995))

dealing claim is that the insurer – fiduciary retains assets that properly belong to the beneficiary in order to generate a profit for itself and at the expense of the participant- beneficiary.

B. Non-ERISA Plans

The non-ERISA landscape is friendliest to insurers when plan documents explicitly permit payment via a retained asset account. Insurers generally owe no fiduciary duty to insureds⁶⁵ which means that language in the insurance contract will be enforced absent some extraordinary circumstance which is inconsistent with the reasonable expectations⁶⁶ of the insured or evidence of behavior which violates public policy.⁶⁷ As the small handful of non-

⁶⁵ At common law there is no fiduciary duty owed to the insured under the assumption that the insurance company must remain able to act in its own interests and that the insurer's obligation to act in good faith provided sufficient protection. 2 Insurance Claims and Disputes 5th § 9:28 (2012). This approach is applied generally with some jurisdictions treating heightening the good faith obligation owed. *See e.g.*, Village Northridge Homeowners Ass'n v. State Farm Fire and Cas. Co. 50 Cal.4th 913, 929, 237 P.3d 598, 608, 114 Cal.Rptr.3d 280, 292 (Cal.,2010)(quoting *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966, 973, 135 Cal.Rptr.2d 718.(2003)) (“ [i]nsurer is not a fiduciary, and owes no obligation to consider the interests of its insured above its own’ ”); *Greenberg v. Life Ins. Co. of Virginia* 177 F.3d 507, 521 (C.A.6 (Ohio),1999)(insurer not a fiduciary); *Safeco Ins. Co. of America v. Butler* 118 Wash.2d 383, 390, 823 P.2d 499, 503 (Wash.,1992)(no fiduciary relationship); *and Tran v. Farmers Group, Inc.* 104 Cal.App.4th 1202, 1212, 128 Cal.Rptr.2d 728, 735 (Cal.App. 1 Dist.,2002) (“[A]n insurer's breach of its 'fiduciary-like duties' is adequately redressed by a claim for breach of the covenant of good faith and fair dealing implied in the insurance contract.”); *Powers v. United Services Auto. Ass'n* 115 Nev. 38, 42, 979 P.2d 1286, 1288 (Nev.,1999)(duty owed is fiduciary in nature); *Decker v. Browning-Ferris Industries of Colorado, Inc.* 931 P.2d 436, 443 (Colo.,1997)(duty to deal in good faith creates “quasi fiduciary” relationship).

⁶⁶ “[T]he rule of construction now known as the doctrine of reasonable expectations, whereby the court upholds the insured's expectations as to the scope of coverage, provided that the expectations are objectively reasonable.” 2 Couch on Ins. § 22:11 (2011). Absent an ambiguity in the policy many jurisdictions require evidence of extraordinary circumstances before applying the doctrine. *See e.g.* *West Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 705 (Minn.,2009) (quoting *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn.2006) (“In the absence of ambiguity in the policy language or an ‘extreme situation’ . . . the language of an insurance policy ‘must be given its plain and ordinary meaning,’ “). *See also*, *American Resources Ins. Co. v. H & H Stephens Const., Inc.*, 939 So.2d 868, 880 (Ala.,2006) (“[T]he doctrine of reasonable expectations is not so expansive that *any ambiguity* in a policy will automatically justify disregarding an unambiguous exclusion in the policy”)(emphasis added). Jurisdictions that adopt more expansive approaches were previously discussed. *See cases cited supra* notes 23-24.

⁶⁷ “[C]ourts are hesitant to invalidate an insurance contract or clause on the ground of public policy, and will not do so unless the public policy is clearly set forth in an express legislative enactment or a previously articulated judicial declaration, and the contract or clause at issue clearly runs afoul of the public policy.” 16 RICHARD A LORD, WILLISTON ON CONTRACTS § 49:12 (4th ed.). *Compare* U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co. 277 S.W.3d 381, 390 (Tenn.,2009) (“If the terms of an

ERISA cases makes clear, the RAA remains a legal vehicle for payment of life insurance proceeds.⁶⁸ The Massachusetts District Court had an opportunity to consider the effect of Mogel on non-ERISA plans in the Lucey⁶⁹ case. Recall that in Vander Luitgaren⁷⁰ and Otte⁷¹ (both cases involving ERISA plans) this Massachusetts court consciously extended the Mogel view that so long as the insurer holds onto plan assets the fiduciary duty continues. Even though the defendant-insurer argued in Vander Luitgaren that the plaintiff had “received everything to which he was entitled under the plan documents”, the court described this as an “all’s well that ends well approach [that] ignores the purpose of ERISA’s imposition of fiduciary duties.”⁷²

In contrast to Otte and Vander Luitgaren though, Lucey presented an opportunity to think about RAAs without the benefit of ERISA fiduciary obligations. Lucey concerned a class of beneficiaries of group life insurance policies issued under the Servicemembers Group Life Insurance Act.⁷³ Although the contracts for life insurance called for payment in a lump sum,

insurance policy do not comport with the statutory requirements, the statutory requirements supersede the conflicting policy provisions and become part of the insurance policy itself.”); *Griffin v. Old Republic Ins. Co.* 122 Nev. 479, 482, 133 P.3d 251, 253 (Nev.,2006)(“[W]e may void an unambiguous exclusion if it violates public policy”) *with Mendez v. Brites* 849 A.2d 329, 338 (R.I.,2004) (quoting *Amica Mutual Insurance Co. v. Streicker*, 583 A.2d 550, 554 (R.I.1990))(“We are bound, however, ‘to respect the express terms and conditions of an insurance contract that are not in violation of public policy.’ “); *Neff Towing Service, Inc. v. U.S. Fire Ins. Co.* 264 Neb. 846, 853, 652 N.W.2d 604, 609 - 610 (Neb.,2002) (“[A]n insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute”).

⁶⁸ Some states however, such as California, have placed restriction upon insurer’s ability to place benefits in RAAs by requiring a lump sum payment to be the default absent some express agreement in writing by the beneficiary to elect another method. West’s Ann.Cal.Ins.Code § 10170 (e).

⁶⁹ Lucey v. Prudential Ins. Co. of America, 783 F.Supp.2d 207, 211 (D.Mass. 2011)

⁷⁰ Vander Luitgaren v. Sun Life Ins. Co. of Canada, No. 1:09-cv-11410, 2010 WL 4722269, *1 (D.Mass. Nov. 18, 2010)

⁷¹ 275 F.R.D. at 55

⁷² Vander Luitgaren v. Sun Life Ins. Co. of Canada, No. 1:09-cv-11410, 2010 WL 4722269, *1 (D.Mass. Nov. 18, 2010)

⁷³ 38 U.S.C. § 1970 (2011). Of significance in Lucey was the portion that afforded the service member to, “elect settlement of insurance under this subchapter in either a lump sum or in thirty-six equal monthly installments,” and extended that same right in the absence of a decision by the service member to, “the beneficiary or beneficiaries.” 38 U.S.C. § 1970(d) (2011).

Prudential (the insurer) instead provided beneficiaries with a checkbook and access to the funds as part of a retained asset account. Plaintiffs alleged various state law claims including fraud, breach of contract, breach of the covenant of implied faith and fair dealing, and unjust enrichment. It appears that until 1999 the insurer in fact provided checks to beneficiaries who elected a lump sum option (the other choice was payment in 36 equal monthly installments which does not appear to have been a popular choice.) Beginning In 1999 beneficiaries who elected a lump sum received their payment via an “Alliance Account” which was described as interest bearing and “similar to a checking account.” The gist of plaintiffs’ complaint was that Prudential’s contracts with them and with the Veterans Administration (VA) required payment in a lump sum for those who made that election. The district court agreed, noting that Mogel “unambiguously held that ‘delivery of the checkbook did not constitute a “lump sum payment” called for by the policies.’”⁷⁴

Lucey remains the lone example of success by plaintiffs without resort ERISA fiduciary claims. In all other reported instances non-ERISA plaintiffs have failed in their attempts to argue breach of contract,⁷⁵ fraud,⁷⁶ and breach of fiduciary duty.⁷⁷ The absence of ERISA claims in Lucey though, did not preclude a short discussion of the fiduciary obligations an insurer owes to insureds—at least those who are beneficiaries by virtue of the SGLIA. In a short and astonishing paragraph Lucey opinion noted that:

Plaintiffs’ allegations regarding breach of fiduciary duty arise not out of Defendant’s role as holder of the life insurance policy, but instead out of Defendant’s role as holder of the insurance proceeds between the time of

⁷⁴ 783 F.Supp.2d at 212 (quoting Mogel v. UNUM Life Ins. Co. of Am., 547 F.3d 23, 26 (1st Cir.2008))

⁷⁵ See, e.g., Keife v. Metropolitan Life, 797 F. Supp. 2d 1072 (2011) and Garcia v. Prudential Life Insurance Co., No. 08–5756, 2009 WL 5206016 (D.N.J. Dec. 29, 2009)

⁷⁶ See, e.g., Rabin v. MONY Life Insurance Co., No. 09-4907-cv, 2010 WL 2838402 (2d Cir. July 21, 2010)

⁷⁷ See, e.g., Phillips v. Prudential Insurance Co. of America, No. 11–cv–0058–DRH , 2011 WL 5915148 (S. D. Ill. Nov. 28, 2011)(“It is well settled in Illinois that a fiduciary relationship does not exist between an insurer and insured.”)

death of the insured who elected a lump-sum payment and the time at which the beneficiary actually possessed the lump sum. *[The argument that b]ecause Defendant benefits from the use of the money during this time ...it has a fiduciary duty to Plaintiffs. Defendant argues, to the contrary, that any duties that it owes Plaintiffs cease once it makes the insurance proceeds available via the Alliance Account, because its sole duty under the contract is to pay the proceeds in a lump sum. This assertion, of course, rises and then falls on Defendant's underlying contention that the creation of the Alliance Account is the equivalent of the mailing of a check for the lump sum.*⁷⁸

This language in Lucey seems to suggest that an insurer may in fact owe a fiduciary duty to its insureds where, as here, it holds onto property belonging to them.

The typical non-ERISA plaintiff has not been able to replicate the outcome in Lucey. In Rabin the 2nd circuit affirmed the district court's ruling in favor of MONY Life Insurance Company ("MONY") on all five claims made by the plaintiff related to the use of a RAA, called a MONY Market Account by insurer, as the means paying benefits owed. Plaintiff claimed breach of contract when (1) MONY failed to pay proceeds by check and (2) for failing to award a competitive interest rate on the proceeds kept in the MONY Market Account. The claim that payment by check was required by the language of the policy rested on an interpretation of the words "pay" and "payment" that contemplated disbursement by check, but the court found that contention so tenuous that, "no rational fact finder could conclude that such an obligation pertains to the payment."⁷⁹ Moreover

⁷⁸ At 215. (italics added).

⁷⁹ Rabin, 2010 WL 2838402 at *1

the language of policy *explicitly* provided for payment by any means other than lump sum. On the second breach of contract claim the court stressed the provision of a brochure plaintiff received that indicated that the rate in the MONY Market Account would be tied to the national average of bank money market accounts as measured by Bank Rate Monitor Index. Without evidence that this index, “failed to represent a competitive rate of return,”⁸⁰ the claim failed as a matter of law.

The fraud claim related to the rate to be paid on the MONY Market Account also failed for an absence of any misrepresentations by MONY either collateral to the contract or to induce the plaintiff to enter into it. Plaintiff’s deceptive acts and practices claim was also defeated by the provision of the brochure as state law first requires that MONY’s acts to have been materially misleading in some way and the brochure made the interest rate accruing on the account clear. That the brochure indicated that an account would be opened in his name did not necessarily require that the funds underlying that account be segregated. To the extent that MONY represented that the benefits were payable through State Street Bank and Trust Company *might* lead a reasonable policyholder in the Plaintiff’s circumstances to conclude that the funds were deposited in an account in that bank , with FDIC insurance, there was no demonstration of any loss due to the funds lacking FDIC insurance. Under New York law an unjust enrichment claims are not available when there is a valid and enforceable insurance contract as there was here.⁸¹ Lastly, there was no breach of fiduciary duty as none exists at common law except when the insurer is defending claims against the insured and there being no evidence that MONY was exercising its investment discretion of the funds on the plaintiff’s behalf. The breadth of claims raised and rejected in Rabin paint a very dismal picture for the prospects of non-ERISA plaintiffs.

⁸⁰ *Id.* at *2

⁸¹ *Id.* at *4

Garcia demonstrates *further* difficulties outside the ERISA context for beneficiaries even where the option to elect a single sum was provided *and* elected at the creation of the policy. Here Prudential Life Insurance sent a claim form to the beneficiaries with six settlement options among which was an Alliance Account which was marked as the preferred method of payment by the insurer and heavily marketed to the beneficiary as the option to select. While the claim form also included text encouraging the reader to contact Prudential if none of the options listed were of interest, the form included language that set the Alliance Account as the default method of payment. Plaintiff left the fields where an alternative method of payment could be selected and signed the claim form. Again claims of breach of insurance contracts, breach of the policy contract, breach of fiduciary duty, and unjust enrichment claims were raised and dismissed.⁸² The breach of contract claim failed because the policy permitted the plaintiff to elect a receipt of benefits that was different from that chosen by the decedent and the insurer's compliance with that choice to modify the method of payment is the opposite of breach.⁸³ As to the breach of contract claim as to the terms of the Alliance Account itself the court, as in Rabin, noted that there is no duty to segregate account funds and that the Alliance Account was in fact an interest bearing account to which the beneficiary had access to at all times. The court found plaintiff's further claim that the Alliance Account was a "no-cost" account and therefore Prudential was obligated to divulge any profits from the spread between the interest rate paid to the beneficiary and that earned by investing the funds via the general account to be an unreasonable interpretation of the "no cost" term.⁸⁴ The court, also found that Prudential's promise to pay a "competitive" interest

⁸² Garcia, 2009 WL 5206016, at *2-3

⁸³ *Id.* at *8

⁸⁴ *Id.* at *9

rate could not be reasonably construed as a promise to award all investment proceeds obtained from investing funds in the Alliance Account.⁸⁵

Phillips was also a complaint raised against a Prudential Alliance Account and again the court found that the breach of contract and fiduciary duty claims should fail.⁸⁶ Unique to Phillips, was plaintiff's claim for a breach of an Illinois state statute. The statute in question was enacted to provide a remedy for beneficiaries who encounter difficulties when an insurer withholds benefits and the Phillips court found it to be inapplicable given that Plaintiff had complete access to the proceeds in the Alliance Account.⁸⁷ (*4-5)

The take home message from most non-ERISA cases is that the insurance policy language and the nature of the RAA accounts carefully skirt the bounds of both common law claims and statutory safeguards.

IV. High Quality Disclosure

A review of Faber, Mogel and the handful of cases that have followed suggests that a few general principles are emerging for both ERISA and non-ERISA plans. In the non-ERISA context it is clear that so long as plan documents contemplate creation of an RAA, an insurer is within its rights to create the RAA without any lingering concerns about fiduciary breach. Rabin, Garcia and Phillips⁸⁸ support this conclusion. Indeed the court noted in Phillips "a fiduciary relationship does not generally exist between and insurer and insured".⁸⁹

⁸⁵ *Id.* at *10

⁸⁶ Phillips, 2011 WL 5915148, at *2-3

⁸⁷ *Id.* at *4-5

⁸⁸ Rabin, 2010 WL 2838402 at *5; Garcia, 2009 WL 5206016, at *2-3; Phillips, 2011 WL 5915148, at *2-3; See also discussion supra Part III of non-ERISA plan RAA cases.

⁸⁹ See case cited supra note 59.

As one might expect, the fiduciary duty issue is significant where the insurance is provided via an ERISA plan. In that case, with the notable exception of Faber, an insurer faces potential liability for fiduciary breach whether the RAA is an explicit contractual option or not. Mogel and the cases that follow it suggest that even when a contract for life insurance provides for payment by RAA, fiduciary liability may attach because an insurer should not “conflate compliance with plan documents with compliance with the statutory requirements of ERISA.”⁹⁰

A substantial amount of all life insurance in the U.S. is provided via ERISA plans.⁹¹ Given the trajectory of Mogel and uncertainty over the viability of Faber beyond the Second Circuit, plan fiduciaries need to consider whether and how to limit liability if they utilize the profitable RAA vehicle for the distribution of benefits. The objections to the RAA in Mogel and Edmonson are striking in that they focus on the benefits of the RAA device to the plan sponsor at the expense of the beneficiary. The Mogel court rejected the reasoning of the insurer that the funds were the beneficiary’s as a charade for, “[u]ntil a beneficiary draws a check on the Security Account, the funds represented by that check are retained by UNUM and UNUM had the use of the funds for its own benefit.”⁹² The court in Edmonson without drawing conclusions acknowledged that,

[i]f the plaintiff alleges that as of the day she received the benefits to which she was entitled, those benefits were diminished by the fiduciary’s impropriety and not remedied at the time of disbursement, that is sufficient for statutory standing as a beneficiary. Here, Plaintiff alleges that the value of her benefits in the SecureLine Account was diminished because Defendant improperly retained the “spread,” or the difference between the interest that Defendant earned on the benefits and the interest that Plaintiff received.⁹³

⁹⁰ Edmonson v. Lincoln National Life Ins. Co., 777 F. Supp. 869, 888 (E.D.Pa., 2011).

⁹¹ Get numbers here—[employee benefits research institute \(EBRI\) may be helpful here.](#) ->problem

⁹² 547 F.3d at 26

⁹³ 777 F.Supp.2d at 883

Given that the plaintiffs in each of these cases could have written a check at any time for the full amount of the policy benefit, it does not seem unfair to ask how, exactly, were they harmed by the RAA? And, the answers—that the interest earned on the undistributed proceeds (Edmonson) rightly belongs to the beneficiary; the assets were at some risk when they remained with the insurer (various commentators)— are precisely the kinds of issues that full disclosure could properly address.

In the end, there are four serious critiques of RAAs. These are that beneficiary/consumers simply do not understand the following: 1. There really are no individual “accounts”; 2. The assets in the RAA are not insured by the FDIC⁹⁴ and are therefore much riskier than a regular bank account; 3. Only a portion of the interest earned on the RAA is shared with the beneficiary (which means the insurer is making a profit on the assets it retains); and 4. The disclosure provided to beneficiaries is often incomplete and/or deceptive. Each of these concerns must be addressed by ERISA fiduciaries, at least outside of the Second Circuit. And, although each is serious, disclosures written in clear and straight forward language both in the original plan documents and in the documents that accompany the creation of the RAA must address each of these objections.

A. There are no “individual accounts”

⁹⁴ The Federal Deposit Insurance Act established the Federal Deposit Insurance Corporation to insure deposits in all banks and savings associations eligible under the statute. 12 U.S.C. § 1811 (2011). The FDIC will guarantee up to \$250,000 per person per each type of account at *each* insured bank or savings association. This means that some types of accounts, e.g. joint accounts, can have up to \$500,000 in coverage at \$250,000 per owner. *Deposit Insurance FAQ*, FEDERAL DEPOSIT INSURANCE CORPORATION, https://www.fdic.gov/edie/fdic_info.html#01 (last visited July 31, 2012). Most important of all is that when there is, “liquidation of, or other closing or winding up of the affairs of, any insured depository institution, payment of the insured deposits in such institution shall be made by the Corporation as soon as possible.” 12 U.S.C. § 1821(f)(1)(A) (2011).

ERISA fiduciaries with any experience administering defined benefit plans⁹⁵ or other pooled arrangements will readily understand the importance of conveying this concept to plan participants and beneficiaries. And, there are plenty of good examples to employ. No informed participant in a health insurance plan or a defined benefit pension arrangement believes that “his” dollars are segregated in a separate account. (In contrast, participants in increasingly common defined contribution arrangements⁹⁶ *do* track their investments in personal accounts.) Meaningful disclosure requires that insureds and their beneficiaries understand that RAA funds are not separated in a special bank account. Beneficiaries who are uncomfortable with pooling their proceeds should have sufficient information to permit them to withdraw all funds.

B. No FDIC Insurance

A related problem that arises out of the use of “account” and the issuance of a book of checks, is the impression created in beneficiaries that their retained dollars are in a bank-like account with all of the attendant protections. As we have seen this is not so. Full and fair disclosure

⁹⁵ Defined-benefit plans, “consist of a general pool of assets rather than individual dedicated accounts,” to provide for a fixed benefit and notably, “no account is kept for an employee.” 60A AM. JUR. 2D *Pensions* § 15 (2012); *see also* 29 U.S.C.A. § 1002(35) (2011) (“The term ‘defined benefit plan’ means a pension plan other than an individual account plan.”). In this way the defined-benefit plan operates in an analogous fashion to the disbursement of life insurance benefits using RAAs. Defined-contribution plans, however, specify the level of employer contributions and place those contributions into *individual* employee accounts. 29 U.S.C.A. § 1002(34) (2011) (“The term “individual account plan” or “defined contribution plan” means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.”).

⁹⁶ E.g. 403(b) or 401(k)s. A 403(b) plan is “also known as a tax sheltered annuity (“TSA”) plan, is a retirement plan for certain employees of public schools, employees of certain tax exempt organizations, and certain ministers,” where pre-tax contributions are made, usually by the employer, out of the employee’s paycheck and into an account tied to the employee. INTERNAL REVENUE SERVICE, TAX-SHELTERED ANNUITY PLANS (403(B) PLANS) 2 (2011), *available at*, <http://www.irs.gov/pub/irs-pdf/p571.pdf>; *see also* 26 U.S.C. § 401(k)(2010). A 401(k) plan operates in the same fashion in that it, “allows employees to contribute a portion of their wages to individual accounts.” *401(k) Plans*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/retirement/article/0,,id=120298,00.html>, (last updated Mar. 7, 2012); *see also* 26 U.S.C. § 403(b) (2010).

here requires that beneficiaries be informed not only of the absence of FDIC insurance, but also of the risk that the insurer could become insolvent and the assets subject to the claims of general creditors.⁹⁷

How real this risk is has been the object of some debate.⁹⁸ The internet has made it possible for insureds to readily ascertain information about the financial health of their insurers⁹⁹; however, it is hard to imagine bereaved beneficiaries taking steps to gather this information at the time the RAA is formed and they receive their checkbook in the mail. And, fortunately they do not have

⁹⁷ When an insurer has become insolvent most statutory schemes create priorities for different claims against the insurer's assets. 1 Couch on Ins. § 6:8 (2011). Typically claims have the following priority: (1) administrative costs of liquidation; (2) wages by insurer's former employees; (3) taxes and debts due the government that are secured by liens *before* the delinquency proceeding; (4) policyholders, beneficiaries and insureds, third-party and guarantee association claims; (5) all other claims. *Id.* Each state places their own variations on these general rules. *See e.g.*, *General Reinsurance Corp. v. American Bankers Ins. Co. of Florida*, 996 A.2d 26, 34 (Pa.Cmwlth.,2009) ("When the final distribution of the estate assets is made, all policyholder claimants, including guaranty associations, will receive the same percentage reimbursement on their claims."); *State ex rel. Grimes v. Oklahoma Property and Cas. Ins. Guar. Ass'n*, 796 P.2d 352, 353 (Okla.App.,1990) ("Clearly, the Legislature intended policyholders, general creditors or not, to have priority over all other claims except administration expenses and certain employees."). Some states will also vary the priority of claims. *See e.g.*, CAL.INS.CODE § 1033 (West 2000); N.Y. INS. LAW § 7434 (McKinney 2005); TEX. INS. CODE ANN. § 443.301 (West 2011). Where the condition of the insurer was so poor, as was the case of Executive Life Insurance Corporation in 1991, policy holders were left with very little. Lisa Girion, 'Little People Floundering' From Executive Life Losses, LA TIMES, Apr. 28, 2002, at C1, available at, <http://articles.latimes.com/2002/apr/28/business/fi-execlife28> ("More than 10 years after the failure of California's Executive Life Insurance Co., many of its policyholders, some of them elderly and disabled, are struggling to get by on monthly annuity payments that are 30% to 50% less than what they had been promised")It took years for many of these policy holders to win civil damages to compensate for the shortfall. *Executive Life Policyholders to Finally Get Payments from Class Action Case*, INSURE.COM, <http://www.insure.com/articles/lawsuitlibrary/executive-life.html> (last updated Dec. 21, 2000); *see also* *Gersenson v. Pennsylvania Life and Health Ins. Guar. Ass'n*, 729 A.2d 1191, 1199 (Pa.Super.,1999).

⁹⁸ Compare David S. Hilzenrath, *Va. Insurer's Decline Came With Scant Warning Policyholders at Risk After Firm Seized*, WASH. POST, Mar. 4, 2009, at D01, available at, 2009 WLNR 27053409 ("the situation at Shenandoah illustrates what can happen to consumers as the global financial crisis eats away at the assets insurance companies hold to absorb losses and pay claims"); Diane Levick, *What To Do When Life Or Health Insurance Companies Falter: Cash Out? Stay In?*, HARTFORD COURANT, Apr. 11, 2009, available at 2009 WLNR 6815533 ("[guaranty] funds 'may create the illusion of safety where it does not exist.' ") with Steve Wartenberg, *Insurance Safety Net Backed By Companies*, Mar. 29, 2009, at 01D, available at, 2009 WLNR 5907748 (" [L]ife insurers in particular are feeling stress . . . [b]ut most are just fine' ").

⁹⁹ *See e.g.* A.M. BEST CO., <http://www.ambest.com/> (last visited July 31, 2012); MOODY'S, <http://www.moody.com/> (last visited July 31, 2012); STANDARD & POOR'S, <http://www.standardandpoors.com/home/en/us> (last visited July 31, 2012); WEISS RATINGS, <http://www.weissratings.com/products/life-and-annuity-insurers.aspx> (last visited July 31, 2012).

to. In much the way that securities dealers routinely disclose that proffered investments are not FDIC insured¹⁰⁰, RAA beneficiaries could and should receive the same information.

C. Interest income

Fiduciaries need, at a minimum, to disclose the rate of interest to be paid on the assets in the RAA, along with the market rate for comparable investments. Information provided in this context should be sufficient to allow a beneficiary to decide whether to leave the money in the RAA or to write a check for the full amount of the policy proceeds. The claim in Edmonson that the fiduciary violated the exclusive benefit rule is easiest to understand in this context. In a case where the insurance company invests the RAA dollars and splits the return with the beneficiary (which seems to be the most common current arrangement) there is clearly a benefit that accrues to the insurer when the dollars remain in the RAA. The question however, is not whether there is an incidental benefit, which ERSIA permits¹⁰¹ but whether the benefit is so substantial as to constitute a breach of fiduciary duty. Once again, the quality of the disclosure would seem to matter tremendously here. So long as a beneficiary understands that it is entitled only to a portion of the return on its assets should it elect to leave them with the insurer,

¹⁰⁰ All non-FDIC insured institutions must post, “clearly and conspicuously in all advertising. . . at each station or window where deposits are normally received, [at] its principal place of business and all its branches where it accepts deposits or opens accounts. . . and on its main Internet page, a notice that the institution is not federally insured.” 12 U.S.C. § 1831t(3)(b)(2)(A) (2011).

¹⁰¹ Spink, 517 U.S. 882 (1996) (held no breach of fiduciary duty under the exclusive benefit requirement where employer amended retirement plan to create an *option* for higher benefits in exchange for a waiver of legal claims arising out of the course of employment by the beneficiary). Justice Thomas’ majority opinion made clear that, “‘incidental’ . . . benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily.” *Id.* at 893-894.

it is hard to see how this could be viewed as anything other than an incidental benefit to the fiduciary given that the owner of the RAA can withdraw all dollars at any time.

D. Incomplete or Deceptive Disclosure

At least since the Supreme Court's decision in Varity v. Howe¹⁰² a hallmark of actionable fiduciary breach has been the conscious and deliberate dissemination of inaccurate information for the purpose of misleading participants and beneficiaries. "To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act 'solely in the interest of the participants and beneficiaries.'"¹⁰³ And, rightly so. Although each disclosure must be evaluated on its own merits, language that appears designed to encourage a beneficiary to make a decision that is, objectively, not in his best interests will always be suspect.¹⁰⁴ As the Third Circuit has noted, an ERISA fiduciary must do more than simply avoid outright dishonesty. In Bixler v. Central Pennsylvania Teamsters

¹⁰² 516 U.S. 489 (1996). Varity Corporation attempted to avoid fulfilling the medical and non-pension benefits of its subsidiary by executing a corporate bait and switch dubbed "Project Sunshine." *Id.* at 493. Varity created a new subsidiary into which they transferred all of its money-losing divisions in the hopes that the new developed entity would fail but in a contained fashion to protect the more profitable divisions from being on the hook for those debts. Varity then held a special meeting to entice the Massey-Ferguson employees to *voluntarily* switch employers, over to the newly created Massey Combines, and in so doing release Massey-Ferguson from its obligations. The crux of this meeting was an extensive presentation that, despite their knowledge that, "Massey Combines was insolvent from the day of its creation", Varity officials represented that employee benefits would not be jeopardized by the change in employment. *Id.* at 494.

¹⁰³ *Id.* at 506.

¹⁰⁴ Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988)(finding that the employer may have breached its fiduciary duty under ERISA by the misrepresentations). The Sixth Circuit, in Berlin, became the first circuit to find that material misrepresentations concerning the availability of enhanced benefits in the future could form the basis for fiduciary liability. *See also* Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997) ("[fiduciary] may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, regardless of whether or not it is seriously considering future plan changes"); Canale v. Yegen, 782 F. Supp. 963, 967-68 (D.N.J. 1992) (holding that a claim for failure to diversify ESOP assets is stated where fiduciaries allegedly were engaged in a fraudulent scheme to impair financial condition of ESOP sponsor).

Health & Welfare Fund¹⁰⁵, the plaintiff's husband was a member of the teamsters, whose medical, disability and life insurance plan ("The Fund") had lapsed prior to his death due to collective bargaining issues. The employer broke off negotiations to initiate a new benefits plan and the employees, including plaintiff's husband, called a strike. Both the natural lapse and the strike were disruptions in coverage under The Fund were "qualifying events" under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") amendments to ERISA¹⁰⁶ that would have allowed the decedent to have maintained the same coverage offered by The Fund or the new employer plan respectively. Plaintiff's husband died after the election period for The Fund's COBRA had lapsed and during the election period for the new employer plan although no payment for coverage was submitted.¹⁰⁷

Bixler's complaint alleged that in a series of conversations with personnel from The Fund and her husband's employer left her with the errant belief that coverage under either plan could not be continued. And while the court found that there was no breach as a result of the conversation with The Fund, there was sufficient concern that although the employer "responded with a specific and accurate answer[,] to Bixler's question there was enough evidence in the record to indicate that the employer knew enough about the Bixlers' circumstances that the employer's fiduciary obligation was to advise as to available benefits."¹⁰⁸ The third circuit based this conclusion on its recognition that the role of a fiduciary is not a passive one:

This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.

In addition, the duty recognizes the disparity of training and knowledge that

¹⁰⁵ 12 F.3d 1292 (3d Cir. 1993)

¹⁰⁶ 29 U.S.C. §§1161-1168 (2011)

¹⁰⁷ Bixler, 12 F.3d 1292, 1294-1295

¹⁰⁸ *Id.* at 1302

potentially exists between a lay beneficiary and a trained fiduciary. Thus, while the beneficiary may, at times, bear a burden of informing the fiduciary of her material circumstance, the fiduciary's obligations will not be excused merely because she failed to comprehend or ask about a technical aspect of the plan.¹⁰⁹

Information and advice that is proffered must *in fact* encourage an advantageous result for the beneficiary.

Some have suggested banning RAAs altogether on the ground that they never represent an attractive option for a beneficiary¹¹⁰ and can only be understood as a profit making opportunity for insurers who, with their superior knowledge and investment expertise, are simply taking advantage of unsophisticated insureds and their beneficiaries. Professor Stempel and others have argued that a beneficiary is better off taking a lump sum payment. Peter Kochenburger, executive director of the University of Connecticut School of Law's Insurance Law Center, wants beneficiaries to be more assertive and not, "simply accept[ing] the option the insurance company provides."¹¹¹

In evaluating this claim, it is important to remember that every RAA arrangement allows for the immediate withdrawal of all funds by simply writing one check for the full policy proceeds. No beneficiary is ever forced to leave assets in a risky, non-FDIC insured "account" that earns interest for the insurer exclusively. So, the question is not can a beneficiary avoid the RAA—they can. The question is, should the law prohibit an arrangement that at least some beneficiaries appear to want? There are myriad consumer arrangements that share the least

¹⁰⁹ *Id.* at 1300

¹¹⁰ Professor of Law Jeffrey Stempel, William S. Boyd School of Law at the University of Nevada has intimated as much by describing the industry practice as, " ' institutionalized bad faith . . . [designed] to defraud by inducing the policyholder's beneficiary to let the life insurance company retain assets they're not entitled to.' "David Evans, *supra* note 4.

¹¹¹ Eleanor Laise, *A Dubious Deal for a Death Benefit*, KIPLINGER'S RETIREMENT REPORT, May 2012, <http://www.kiplinger.com/features/archives/krr-a-dubious-deal-for-a-death-benefit.html>. Professor Stempel has taken his colleague's advice further by advocating, "the better thing is just to get control of the money as soon as you can." *Id.*

attractive features of the RAA—risk, and a sub optimal investment option. Credit cards¹¹², automobile loans¹¹³, payday loans¹¹⁴, and other consumer products¹¹⁵ directed at those with poor or non-existent credit come to mind. And, while it is easy to see the ways in which these products are less-than-ideal, some consumers continue to demand them. Substituting the judgment of regulators for beneficiaries and banning RAAs is an approach that would have the direct effect of reducing consumer choice. It is hard to see why RAAs represent a more serious threat to the consumer public than, say, payday loans.¹¹⁶ And , all of the objections to RAAs can

¹¹² The variable but inevitably high interest rates on unpaid principal create a financial trap for persons who find themselves unable to pay more than the minimum monthly payment. Missing just a few payments can damage an individual's credit score and undercut their ability to acquire housing, save for retirement, or get a job. <http://www.sopimc.com/the-dangers-of-credit-card-debt.php>

¹¹³ Small initial fees blind the debtor to the exorbitant rates of interest charged on the unpaid principal whether using an existing vehicle as collateral or seeking to purchase one with poor credit. See e.g., *Avoid the Dangers of Car Title Loans*, FINANCIALWEB.COM, <http://www.finweb.com/loans/avoid-the-dangers-of-car-title-loans.html>, (last visited Aug. 5, 2012); *Subprime Auto Loans: 3 Dangers*, FINANCIALWEB.COM, <http://www.finweb.com/loans/subprime-auto-loans-3-dangers.html>, (last visited Aug. 5, 2012).

¹¹⁴ Many persons are forced to rely on these short term high interest rate loans to meet basic expenses due to low income, creating a perpetuating debt cycle. Jennifer Waters, *Payday Loans Could Spur Costly Debt Cycle*, MARKETWATCH.COM, (July 30, 2012), http://articles.marketwatch.com/2012-07-30/finance/32924985_1_payday-loans-community-financial-services-association-advance-america.

¹¹⁵ Subprime mortgages, private student loans, tax refund anticipation loans, check-cashing stores, and pawnshop loans ran among some of the most predatory. *What is Predatory Lending?*, LSUAGCENTER.COM, http://www.lsuagcenter.com/en/family_home/home/design_construction/Getting+Started/Preparing+Financially/What+is+Predatory+Lending.htm, (last updated May 31, 2010, 7:48:05 AM) . Current United States Senate candidate and former Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau Elizabeth Warren, in advocating for the now functioning Consumer Financial Protection Bureau, aptly described these financial products as attempts by lenders, “bury risks and to move the true costs to the back end of the transaction with ballooning interest rates or payment obligations, unexpected fees, or hard-to-avoid penalties.” *Oversight of The Consumer Financial Protection Bureau Before the Subcomm. On Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 112th Cong. 52 (2011)(statement of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau), available at, <http://financialservices.house.gov/UploadedFiles/112-18.pdf>. Some have even advocated for the agency to investigate fees associated with pre-paid credit cards. Mary Beth Quirk, *Consumers Union Urges CFPB To Regulate Prepaid Credit Cards More Closely*, THECONSUMERIST.COM, (May 23, 2012, 11:00 AM), <http://consumerist.com/2012/05/consumers-union-urges-cfpb-to-regulate-prepaid-credit-cards-more-closely.html>.

¹¹⁶“Typical loans are for over \$300, due on the borrower's next payday, and cost \$15 to \$30 per \$100 loaned or 390 to 780 percent annual percentage rate.” Jean Ann Fox & Patrick Woodall, *Cashed Out: Consumers Pay Steep Premium to “Bank” at Check Cashing Outlets*, CONSUMER FEDERATION OF AMERICA, 2 (Nov. 2006), http://www.consumerfed.org/pdfs/CFA_2006_Check_Cashing_Study111506.pdf. These rates allow the industry to take, “\$3.1 billion in wealth from low-income, working poor who are literally trying to pay bills from paycheck to paycheck.” Tanya Somanader, *Report: How Payday Lenders Make*

be addressed by insisting on high quality disclosure from insurers. If, in spite of the newly disclosed disadvantages, consumers still wish to leave insurance proceeds with their insurer, surely they should be free to do so.

For the ERISA fiduciary, high quality disclosure would provide protection against a claim of fiduciary breach. In the non-ERISA state contract context, the disclosure would likewise insulate the insurer from state claims of fraud and misrepresentation. If, with ample disclosure it turns out that beneficiaries refuse to leave dollars in an RAA, then the disclosure (which respects the judgment and autonomy of the beneficiary) has done its job. On the other hand, if beneficiaries continue to vote with their money and leave it in RAAs, fully informed of the risks and drawbacks, the law should have nothing to say. Consumers make foolish decisions all the time—the purchase of lottery tickets¹¹⁷ is a persistent example of objectively irrational behavior.

V. Conclusion

RAAs are a life insurance innovation that is likely of small value to most beneficiaries. In many cases it will make the most financial sense for a beneficiary to write a check to herself for the entire policy proceeds and deposit those funds into an insured bank account. Some

Billions By Fleecing Americans In Poverty, THINKPROGRESS.ORG, (Jan 19, 2012, 5:30 PM), <http://thinkprogress.org/economy/2012/01/19/407365/report-how-payday-lenders-make-billions-by-fleecing-americans-in-poverty/?mobile=nc>.

¹¹⁷Because of the long odds of winning, the Mega Millions has 1 in 176 million odds, combined with other post winning costs such as taxes, sharing with others, and penalties associated with an upfront payout, “the value of a \$1 ticket is only 63.2cents (or a bit more or less depending on your state.” Brad Plumer, *Mega Millions frenzy: Can you ever beat the lottery's long odds?*, EZRA KLEIN'S WONKBLOG (Mar. 30, 2012, 10:03 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/mega-millions-frenzy-can-you-ever-beat-the-lotterys-long-odds/2012/03/30/gIQAbRmCIS_blog.html. Despite this fact, “[p]laying the lottery is practically a religion among poor people in the United States.” Palash R. Ghosh, *Mega Millions Lottery: A Curse And Plague On The Poor*, INTERNATIONAL BUSINESS TIMES (Mar. 29, 2012, 5:49 PM), <http://www.ibtimes.com/articles/321601/20120329/lottery-mega-millions-state-new-york-poverty.htm>. Various studies by consumer organizations have found that people making \$13,000 or less have spent anywhere from 5 to 9 percent of their wages on lotteries, “making this ‘harmless’ game a ‘deeply regressive tax.’” *Id.*

beneficiaries, however, may find the RAA device helpful. It is impossible to anticipate the myriad circumstances that beneficiaries may face at the time of an insured's death. So long as insurers provide full and clear disclosure (which ERISA fiduciary standards demand) consumers should remain free to choose a Retained Asset Account as one of several options.