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Jill M. Bisco

University of Akron, jbisco@uakron.edu

Chad G. Marzen

Florida State University, cmarzen@fsu.edu

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BANKING WITHOUT GUARANTEES? PUBLIC POLICY CONSIDERATIONS CONCERNING INSURANCE COMPANY RETAINED ASSET ACCOUNTS

Jill M. Bisco¹ & Chad G. Marzen²

I. INTRODUCTION

During a child's early years, many lessons are learned about the way the world operates. There are many lessons about language—schoolchildren learn how to write cursive, to write paragraphs, and also how to spell. There are lessons about the various continents and countries around the world, the various cultures, and the various careers one can pursue after entering into adulthood. Amidst these lessons, many will receive a piggy bank for the first time to learn the value of saving money.³ Over time, the value of the money in a piggy bank sometimes yields a surprise.⁴ Around a person's teenage years, he or she often opens up a checking account for the first time.⁵ As part of having a checking account, one has to learn not only how to use but also how to balance a checkbook.⁶

Surprisingly, checkbooks are not only issued by Federal Deposit Insurance Corporation (FDIC) insured banks, but also issued by life insurance companies through an account known as a “retained asset

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1. Assistant Professor of Finance, University of Akron, College of Business Administration. The author can be reached at jbisco@uakron.edu.
 2. Assistant Professor of Legal Studies, Florida State University, College of Business—Department of Risk Management/Insurance, Real Estate and Legal Studies. The author can be reached at cmarzen@fsu.edu.
 3. See Mandi Woodruff, *Revealed: The True Origins of the Piggy Bank*, BUS. INSIDER (June 6, 2012, 8:48 PM), <http://www.businessinsider.com/revealed-the-true-origin-of-the-piggy-bank-2012-6>.
 4. See Ashley Stewart, *Couple Makes Deposit on Future with 21-Year-Old Piggy Bank*, OWATONNA PEOPLE'S PRESS (June 8, 2015), http://www.southernminn.com/owatonna_peoples_press/article_e74aee4-afa3-5ffc-912c-9a8693be8a90.html (discussing a Minnesota couple who were surprised to discover they had saved over two thousand dollars in a piggy bank).
 5. See Kelley Holland, *Money Advice Your Kids Will Actually Use*, CNBC (Jan. 22, 2015, 1:43 PM), <http://www.cnbc.com/id/102342785>.
 6. See Mark Huffman, *More Tools for Teaching Kids About Managing Money*, CONSUMER AFF. (Aug. 26, 2014), <http://www.consumeraffairs.com/news/more-tools-for-teaching-kids-about-managing-money-082614.html>.

account” (RAA).⁷ With a retained asset account, a beneficiary under a life insurance contract does not receive a draft for the policy proceeds, but instead receives a checkbook or draft book to draw the policy proceeds from a retained asset account.⁸ While in the retained asset account, the money in the account typically earns a small percentage of interest,⁹ but the insurance company holding the account also earns interest through a spread.¹⁰

While retained asset accounts have been in existence in the life insurance industry since 1984,¹¹ in recent years, the operation of these accounts has received increased attention.¹² While flexibility in the timing of how a beneficiary can utilize the policy proceeds is cited as a benefit of the accounts,¹³ the accounts do not come without risk. For instance, retained asset accounts do not receive the same FDIC protection (up to \$250,000) as a bank account would receive.¹⁴ If an insurer becomes insolvent, it is possible that a beneficiary may not receive the full policy proceeds.¹⁵ In addition, a Bloomberg article in 2010 reported a case in which a beneficiary’s signature was allegedly forged on checks associated with a retained asset account,

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7. Advocate Law Grp., *Retained Asset Accounts*, RETAINED ASSET ACCOUNTS (2010) [hereinafter Advocate Law Group I], <http://www.retainedassetaccounts.com>.
 8. *Id.*
 9. David Evans, *Fallen Soldiers’ Families Denied Cash Payout as Insurers Profit*, BLOOMBERG (July 28, 2010, 10:00 AM), <http://www.bloomberg.com/news/articles/2010-07-28/fallen-soldiers-families-denied-cash-payout-as-life-insurers-boost-profit>.
 10. Advocate Law Group I, *supra* note 7 (“Although life insurance companies appreciate the benefits of the accounts for beneficiaries, and some see Retained Asset Accounts as a way to maintain a relationship with a new generation, most insurance companies began paying death claims through Retained Asset Accounts to earn ‘spread’—a profit between the ‘short term rate’ that is paid by banks and money market funds and the typically higher interest rates life insurers earn from their long term bond and mortgage investments. Depending on prevailing interest rates, ‘spread’ will typically range from 1% to 3% of the money on deposit in the Retained Asset Accounts. Even after the insurance company pays all the expenses of providing beneficiaries with the Retained Asset Accounts, the net result can be a decent extra profit.”).
 11. *Id.*
 12. *Id.*
 13. *See id.*
 14. *See* Evans, *supra* note 9.
 15. *See generally* Jill M. Bisco & Kathleen McCullough, *Retained Asset Accounts and the Risk Reward Trade-Off* 13 (Jan. 21, 2014) (unpublished manuscript) (on file with author Jill M. Bisco) [hereinafter Bisco & McCullough I] (explaining that most states only protect insurers through a guaranty fund for up to \$300,000 in death benefits).

and the bank contended it had no legal obligation to reimburse the beneficiary because the beneficiary was a non-customer.¹⁶

These risks have received more than mere media attention. In a number of states, insurance regulators have called for increased regulation of the accounts,¹⁷ and several states have enacted statutes that require certain disclosures be made to beneficiaries concerning the accounts.¹⁸ In addition, a number of lawsuits have been filed concerning the utilization of retained asset accounts and whether its usage contravenes state and/or federal law, particularly ERISA's fiduciary duties.¹⁹

At least two other commentators have generally discussed issues concerning retained asset accounts.²⁰ This Article contributes to the insurance law literature in that it provides a comprehensive overview examining all fifty states' regulation of retained asset accounts, discusses reported cases to date involving the utilization of retained asset accounts, and proposes several recommendations to further protect consumers and increase transparency with retained asset accounts.

Part II of this Article provides a general background of how life insurance operates and discusses an overview of retained asset accounts. Part III provides an overview of the regulation of retained asset accounts at the state level, including regulation through statutory provisions and state Departments of Insurance. Part IV discusses reported cases where policyholders have sued insurers concerning the operation of retained asset accounts. Throughout the

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16. See David Glovin, *Forged MetLife 'Checks' Show Retained-Asset Risks*, BLOOMBERG (Aug. 24, 2010, 11:54 AM), <http://www.bloomberg.com/news/articles/2010-08-24/forged-metlife-check-lawsuit-costs-show-risks-of-retained-asset-account>.
 17. See David Glovin, *MetLife Probed by Regulators as Asset Accounts Called Deceptive*, BLOOMBERG (Sept. 28, 2010, 12:01 AM), <http://www.bloomberg.com/news/articles/2010-09-28/metlife-a-focus-of-regulator-probes-as-judge-calls-asset-account-deceptive>.
 18. See *infra* Appendix – Table 5.
 19. See Jacklyn Wille, *High Court Declines to Review Challenge to Insurer's Use of Retained Asset Accounts*, BLOOMBERG BNA (May 20, 2014), <http://www.bna.com/high-court-declines-n17179890611/>.
 20. See Michael A. Barrese, Note, *Not in the Fine Print: Recommended Changes to Life Insurance Policy Disclosures Regarding Retained Asset Accounts*, 18 CONN. INS. L.J. 533, 535–37, 542, 548 (2012); Maria O'Brien Hylton, *Disclosure to the Rescue: A Conceptual Framework for Retained Asset Accounts*, 80 TENN. L. REV. 69, 74–76, 83–84 (2012).

past decade, most cases have ended up unsuccessfully challenging insurer utilization of retained asset accounts.²¹

Given that a majority of the reported cases to date have unsuccessfully challenged insurer utilization of retained asset accounts, Part V encourages states to adopt several reforms in their statutes that can make the utilization of retained asset accounts more consumer-friendly. These reforms include:

- (1) *Default Versus Non-Default*: Make it a requirement that a retained asset account only be utilized if a beneficiary affirmatively elects to utilize the option;
- (2) *“Clear and Conspicuous” Disclosures*: Similar to the requirements of the Truth-in-Lending Act, require “clear and conspicuous” disclosure by an insurer to a beneficiary that a retained asset account does not receive FDIC protection and that an insurance guaranty association may only provide limited recovery of policy proceeds if an insurer becomes insolvent. In addition, these reforms should require each insurer to disclose their A.M. Best Insurer Credit Rating in a “clear and conspicuous” manner. Finally, there are a number of other disclosures which some states have implemented which can be adopted by jurisdictions.

In conclusion, we contend that these reforms not only provide consumers with greater protections concerning the often-misunderstood world of retained asset accounts, but they also help restore retained asset accounts to one of their original intentions “to preserve beneficiaries’ choices until the beneficiary felt he or she was in a position to make a longer-term financial decision on how to handle or invest the money.”²²

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21. See generally Byrne J. Decker, *Retained Asset Account Class Actions—Challenges to the Checkbook*, in LIFE, HEALTH, DISABILITY AND ERISA: DEFENSE PRACTICE SEMINAR COURSE MATERIALS 257 (2013) (discussing the development of retained asset accounts case law).
 22. Advocate Law Grp., *Benefits of Retained Asset Accounts*, RETAINED ASSET ACCOUNTS (2010) [hereinafter Advocate Law Group II], <http://www.retainedassetaccounts.com/benefits-of-retained-asset-accounts.htm>.

II. BACKGROUND OF LIFE INSURANCE AND RETAINED ASSET ACCOUNTS

A. *Background of Life Insurance*

The development of life insurance began in the early nineteenth century during a movement to rationalize the management of death.²³ Life insurance can be defined as a contract where, for a specified compensation (the premium), one party (the insurance company or “insurer”) agrees to pay a specified amount (often the face amount of the policy) to a designated person(s) (the beneficiary(ies)) upon the death of another (the insured).²⁴ In other words, life insurance is intended to compensate specified individuals for the premature death of another. Since its early beginning, life insurance in the United States has grown to an impressive industry with 850 life insurance companies,²⁵ nearly \$19.7 trillion in in-force life insurance,²⁶ and direct premium receipts exceeding \$143 billion in 2013.²⁷

Upon the death of the insured, most life insurance policies allow the beneficiary to select from a number of settlement options for the death benefit of the policy.²⁸ Although these settlement options may vary among insurers, the most prevalent options available include: (1) lump sum (cash); (2) interest option; (3) fixed-period option; (4) fixed-amount option; and (5) life income options.²⁹ When the beneficiary selects the lump sum option, the proceeds of the life

23. See Viviana A. Zelizer, *Human Values and the Market: The Case of Life Insurance and Death in 19th-Century America*, 84 AM. J. SOC. 591, 593 (1978).

24. See SOLOMON S. HUEBNER, *LIFE INSURANCE: A TEXTBOOK* 3 (1921) (“From the standpoint of the individual, however, life insurance may be defined as consisting of a contract, whereby for a stipulated compensation, called the premium, one party (the insurer) agrees to pay the other (the insured), or his beneficiary, a fixed sum upon the happening of death or some other specified event.”).

25. See AM. COUNCIL ON LIFE INSURERS, *LIFE INSURERS FACT BOOK 2014*, at 1–2 (2014), <https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/FB14All%20ChaptersFinal.pdf>. The 850 life insurers are made up of 648 stock insurers, 113 mutual insurers, 82 fraternal organizations, and 7 others. *Id.* at 2 tbl.1.1.

26. *Id.* at 63. The in-force value is the sum of the death proceeds on active policies. In-force life insurance includes \$11.37 trillion of individual life insurance, \$8.21 trillion of credit life insurance, and \$.08 trillion of group life insurance. *Id.* at 66 tbl.7.1.

27. *Id.* at 92 tbl.10.6.

28. See Michael L. Walden, *The Whole Life Insurance Policy as an Options Package: An Empirical Investigation*, 52 J. RISK & INS. 44, 48 (1985).

29. See GEORGE E. REJDA & MICHAEL MCNAMARA, *PRINCIPLES OF RISK MANAGEMENT AND INSURANCE* 242–43 (12th ed. 2014).

insurance policy are fully paid in one payment.³⁰ When the interest option is selected, the insurance company retains the proceeds of the life insurance policy and pays out the interest to the beneficiary at specified intervals (i.e., monthly, quarterly, semi-annually, or annually).³¹ When the beneficiary selects the fixed-period option, the insurance company pays out the proceeds and any accrued interest over a specified length of time (e.g., quarterly over the next ten years).³² With this option, the timeframe is known but the amount of each payment will depend on the interest applied to the account, which may vary over time.³³ With the fixed amount option, the insurance company will pay out the amount specified by the beneficiary until all proceeds and the accrued interest are depleted.³⁴ In this case, the length of time necessary to pay out the proceeds is unknown and will depend on the amount of interest, which will vary.³⁵ The amount of each payment, however, is known because it is selected by the beneficiary.³⁶ Finally, there are several income options which provide a guaranteed payment for the life of the beneficiary. These options may provide additional guarantees (i.e., a specified number of payments will be made regardless of the length of the life of the beneficiary).³⁷ Once a life-income option is selected, a new contract is issued and the beneficiary and insurance company are bound to the contract—essentially removing the beneficiary's right to select any other option in the future.³⁸ Even with all of the options already available, a new settlement option was created—the retained asset account.

B. *Background of Retained Asset Accounts*

In 1984, Metropolitan Life introduced the retained asset account, an entirely new settlement option for life insurance proceeds.³⁹ Insurers began to offer these accounts in response to the perceived demand for a settlement option that would earn beneficiaries interest on the account and at the same time would allow for deferral of

30. *Id.* at 242.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 243.

38. *Id.* at 244.

39. Joseph E. Lauria, *Many Default to the Retained Asset Account*, 101 NAT'L UNDERWRITER 22 (Sept. 22, 1997); Bisco & McCullough I, *supra* note 15, at 10.

significant financial decisions at a difficult time (i.e., the loss of a loved one).⁴⁰ With a retained asset account, an insurer keeps the life insurance policy proceeds in its general account while paying interest to the beneficiaries on the proceeds while retained.⁴¹ The beneficiaries are issued a “checkbook” in which they can write a draft against either part or all of the account at any time.⁴² Significantly, as noted earlier, retained asset accounts are not FDIC insured.⁴³

Not all life insurers offer retained asset accounts. From 2010 to 2014, approximately 21% of insurers offered retained asset accounts.⁴⁴ Two scholars have investigated the types of insurers that offer retained asset accounts.⁴⁵ They found that more financially stable insurers (as measured by the A.M. Best Credit Rating, the standard deviation of return on assets, and the premium to surplus ratio) are more likely to offer retained asset accounts.⁴⁶ They also found that insurers who write larger average face value policies are more likely to offer retained asset accounts.⁴⁷ In addition, larger insurers (as measured by the log of assets) and insurers that are a member of an insurer group are more likely to offer retained asset accounts.⁴⁸ By the end of 2014, there were just over 880,000 retained asset accounts open with a total value of assets around \$31 billion.⁴⁹ The average amount held in an individual retained asset account in 2014 was \$34,870.⁵⁰

40. See Gerry H. Goldsholle & Kimberly C. Price, *Creating a Successful Retained Assets Program*, 96 BEST’S REV. 61, 61 (1996); Bisco & McCullough I, *supra* note 15, at 10.

41. See PricewaterhouseCoopers LLP, *NAIC Meeting Notes 4* (Nov. 1, 2010), <http://www.pwc.com/us/en/insurance/assets/fallnaic2010.pdf>; Bisco & McCullough I, *supra* note 15, at 11.

42. See *Guaranty Association Coverage of Retained Asset Accounts for Life Insurance Death Benefit Proceeds*, NAT’L ORG. LIFE & HEALTH INS. GUARANTY ASS’NS (2011), <http://www.nolhga.com/resource/file/GA%20Coverage%20of%20Retained%20Asset%20Accounts.pdf>; Bisco & McCullough I, *supra* note 15, at 11.

43. See Evans, *supra* note 9.

44. See *infra* Appendix – Table 1 (indicating the number of insurers that offered retained asset accounts each year under review); see also Bisco & McCullough I, *supra* note 15, at 47.

45. See generally Bisco & McCullough I, *supra* note 15 (identifying those insurers that offer retained asset accounts and characterizing them based on measures of financial stability and size).

46. *Id.* at 7.

47. *Id.* at 26.

48. *Id.* at 7.

49. See *infra* Appendix – Table 1.

50. See *infra* Appendix – Table 1.

In some states, retained asset accounts are required to be an optional settlement option and must be affirmatively selected by the beneficiary, but in others, it is the default option.⁵¹ Interest rates paid on retained asset accounts also vary widely, from a low .01% to a high 6%.⁵² Due to a spread between the earnings made by insurers on the invested retained assets and the interest rate paid to the beneficiary, life insurers in the United States are earning an estimated \$100 million in annual earnings from retained asset accounts.⁵³

While retained asset accounts are not FDIC insured, to a certain extent they are covered through the limits of state guaranty associations.⁵⁴ However, the limit of protection through guaranty associations is only \$300,000 total in death benefits per insured in most states.⁵⁵ With this limitation, it is possible for a beneficiary to lose a significant number of funds in the retained asset account in the event of an insurer insolvency. And this potential risk is not hypothetical—historically, insolvencies have posed a risk to retained asset accounts, such as the Thunor Trust Insolvencies during the late 1990s.⁵⁶ To address this significant risk, we contend, following the lead of other scholars, that disclosures should exist so that the beneficiary or owner is not confused or deceived about how such accounts work.⁵⁷

III. CURRENT STATE REGULATION OF RETAINED ASSET ACCOUNTS

Today, the insurance industry is regulated on a state level. The McCarron-Ferguson Act of 1945 states, “[T]he continued regulation

51. See Bisco & McCullough I, *supra* note 15, at 12; *infra* Appendix – Table 2.

52. See *infra* Appendix – Table 3.

53. Bisco & McCullough I, *supra* note 15, at 13; see Goldsholle & Price, *supra* note 40, at 61.

54. Bisco & McCullough I, *supra* note 15, at 13; see Evans, *supra* note 9. See PricewaterhouseCoopers LLP, *supra* note 41 (stating that companies do not always indicate whether the funds maintained in the retained asset account are FDIC insured).

55. See Elijah Brewer III et al., *The Role of Monitoring in Reducing the Moral Hazard Problem Associated with Government Guarantees: Evidence from the Life Insurance Industry*, 64 J. RISK & INS. 301, 305 (1997); Bisco & McCullough I, *supra* note 15, at 14; *infra* Appendix – Table 4.

56. Bisco & McCullough I, *supra* note 15, at 13–14; E-Mail from Sean McKenna, Dir. of Comm’ns, Nat’l Org. of Life and Health Ins. Guaranty Ass’ns, to author, Jill M. Bisco (Oct. 3, 2013, 1:28 PM) (on file with author Jill M. Bisco).

57. See Barrese, *supra* note 20, at 534–35; Hylton, *supra* note 20, at 71. See generally *infra* Part V (recommending specific types of disclosures).

and taxation by the several States of the business of insurance is in the public interest.”⁵⁸ With each state regulating the insurance industry within its borders, the laws, regulations, and bulletins pertaining to retained asset accounts vary by state.

Prior to the recent controversies regarding the use of retained asset accounts, only a handful of states had addressed the use of retained asset accounts either through statutes, bulletins, or orders from the Department of Insurance. For instance, the Arkansas Insurance Department issued Bulletin 26-91 on October 31, 1991⁵⁹ (amended by Bulletin 26A-91),⁶⁰ which became effective on January 1, 1992. In combination, these bulletins stated that the utilization of retained asset accounts as a settlement option and its use by any insurer will be evaluated on a case-by-case basis.⁶¹ They also stated that the eight percent interest required on life proceeds will not necessarily apply to the funds held in retained asset accounts unless the account is unfair or deceptive and there has been a violation of the Arkansas Code.⁶²

On December 22, 1994, the Nevada Division of Insurance issued Bulletin 94-005 to address the use of retained asset accounts.⁶³ This bulletin indicated that an insurer must provide to the beneficiary: (1) a written document detailing all of the settlement options available;

58. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (current version at 15 U.S.C. § 1011 (2012)).

59. ARK. INS. DEP’T LEGAL DIV., BULL. NO. 26-91, “NEGATIVE OPTION” CLAIM PAYMENT PROCEDURES AND “BENEFICIARY ACCESS” CHECKBOOK ACCOUNTS (1991) [hereinafter Arkansas Bulletin 26-91].

60. ARK. INS. DEP’T LEGAL DIV., BULL. NO. 26A-91, “NEGATIVE OPTION” CLAIM PAYMENT PROCEDURES AND “BENEFICIARY ACCESS” CHECKBOOK ACCOUNTS (1991) [hereinafter Arkansas Bulletin 26A-91].

61. See Arkansas Bulletin 26-91, *supra* note 59; Arkansas Bulletin 26A-91, *supra* note 60.

62. Arkansas Bulletin 26A-91, *supra* note 60; see ARK. CODE ANN. § 23-81-118(b)(1) (2014). The statute states the following:

When proceeds of any individual policy of life insurance, delivered or issued for delivery in this state, or refunds of premiums on any individual policy of life insurance delivered or issued for delivery in this state after July 20, 1979, are not paid within a reasonable period of time after proof of the death of the insured has been furnished to the insurer, the insurer shall pay interest upon the proceeds or refunds of premiums at the rate of eight percent (8%) per year.

Id.

63. NEV. DIV. OF INS., BULL. NO. 94-005, RETAINED ASSET ACCOUNTS (1994), <http://docs.nv.gov/doi/documents/bulletins/94-005.pdf>.

(2) a supplemental contract which discloses the beneficiary's rights and the insurer's obligations; and (3) a disclosure that provides specific details regarding the use of retained asset accounts (i.e., one check can be written for the full amount on deposit; fees charged, if any; minimum interest rate applicable; and that the retained asset account is not insured by the FDIC).⁶⁴

On December 8, 1995, the Kansas Insurance Department issued Bulletin 1995-22 to address the use of retained asset accounts.⁶⁵ This bulletin stated that retained asset accounts can be used under certain situations.⁶⁶ First, the retained asset account must be an option that is stated in the contract or added by endorsement to the policy after it is issued.⁶⁷ Second, the retained asset account must be selected by the beneficiary as a choice among the options available.⁶⁸ Third, if the insurer utilizes retained asset accounts, it must issue a disclosure with specified information such as how the "checkbook" works, whether fees are charged, and the frequency of statements.⁶⁹

North Carolina's regulations, effective since 1996, state that insurers cannot offer retained asset accounts unless they comply with certain requirements.⁷⁰ First, the insurer must list the retained asset account as a settlement option within the terms of the claim form, along with any other options available.⁷¹ Second, the insured must actively select the retained asset account (it cannot be the default settlement option).⁷² Third, the insurer must disclose the rights of the beneficiary and the obligations of the insurer as they pertain to the retained asset account.⁷³

Following the media attention surrounding retained asset accounts in 2010, many states began evaluating the use of retained asset accounts. At least twenty states issued some form of a bulletin, law, or regulation. Table 5 shows the level of current legislation regarding the use of the retained asset account in each state.⁷⁴ It is important to note that there are many states that have chosen not to address the issue of the retained asset account at all (e.g., Alaska,

64. *Id.*

65. KAN. INS. DEP'T, BULL. NO. 1995-22, RETAINED ASSET ACCOUNTS (1995).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* 11 N.C. ADMIN. CODE 12.1602 (2015).

71. 11 N.C. ADMIN. CODE 12.1602(1) (2015).

72. *See* 11 N.C. ADMIN. CODE 12.1602(2) (2015).

73. 11 N.C. ADMIN. CODE 12.1602(3) (2015).

74. *See infra* Appendix – Table 5.

Indiana, and Missouri).⁷⁵ Other states, such as California, enacted strict legislation which directly impacted the use of retained asset accounts. Specifically, California's law, which became effective on January 1, 2012, prohibits an insurer from making the retained asset the default settlement option unless the insured does not specifically elect another option from the list of options available.⁷⁶

Virginia also has implemented legislation regarding retained asset accounts. The law, effective in 2011, provides that the beneficiary must be made aware of all settlement options at the time of the claim.⁷⁷ The insurer also must provide a supplemental contract which details the beneficiary's rights and the insurer's obligations.⁷⁸ Finally, the insurer must provide a disclosure which includes specific information regarding the retained asset account.⁷⁹

Not all proposed legislation pertaining to retained asset accounts became law. In Texas, during the 82nd regular legislative session in 2011, a bill was introduced in the Texas House.⁸⁰ This legislation, if it had passed, would have required insurers to obtain written authorization from the beneficiary to issue a retained asset account,

75. See *infra* Appendix – Table 5.

76. See CAL. INS. CODE § 10170(f) (West 2013). The statute states the following:

Notwithstanding subdivision (e), all life insurance benefits shall be paid in the form of a lump-sum payment to the beneficiary or by another settlement option that is clearly described in the claim form. If the beneficiary is provided settlement options in addition to a lump-sum payment or a settlement option selected by the policyholder, the beneficiary shall have the option to choose how benefits are to be paid to the beneficiary. If the beneficiary does not choose one of the available settlement options, a retained-asset account may be the default option only if the claim form provides a prominent disclosure that, in the absence of a choice by the beneficiary, payment of policy benefits shall be made through establishment of a retained-asset account on the beneficiary's behalf. This disclosure shall be provided in the portion of the claim form where the beneficiary is offered the ability to select his or her choice of payment method and shall be in easy-to-understand language and in bold and at least 12-point font type. In all such cases, whether by beneficiary choice or default, the insurer shall provide to the beneficiary the disclosure provided for in Section 10509.937.

Id.

77. VA. CODE ANN. § 38.2-3117.2 (2014).

78. *Id.* § 38.2-3117.3.

79. See *id.* § 38.2-3117.4.

80. See H.B. 2152, 82nd Leg., Reg. Sess. (Tex. 2011).

indicating that it could not be used as the default settlement option.⁸¹ In addition to a required disclosure, the legislation also would have required that the funds held in an retained asset account be disbursed if the account had been inactive for thirty days.⁸² The bill, however, was left pending in committee on March 29, 2011, and therefore never was signed into law.⁸³

In addition, Wisconsin issued a proposed rule that would have required life insurers who utilize retained asset accounts to provide a clear disclosure of the rights and obligations of both the beneficiary and the insurer with respect to death benefits and retained asset accounts.⁸⁴ The disclosure would include all settlement options available, services provided, and costs associated with the retained asset account, including any tax implications.⁸⁵ The proposed rule, however, was never implemented.⁸⁶

The level of action regarding retained asset accounts varies significantly across states. One item that is consistent across many states is the requirement that the insurers issue a disclosure providing specific information regarding the retained asset accounts.⁸⁷ This requirement may come from the action of the National Association of Insurance Commissioners (NAIC), which serves as the coordinator of state insurance regulators.⁸⁸ When attempting to implement changes to insurance regulation, the NAIC can only make recommendations to the states and it is up to each state to determine whether to follow such recommendations.⁸⁹ The NAIC seeks to make recommendations with a high possibility of implementation across all states in an attempt to bring uniformity among the states.⁹⁰ In August 2010, the NAIC issued a Consumer Alert regarding retained asset accounts, including a definition of a retained asset

81. *Id.* at 4–5.

82. *Id.*

83. *Id.*

84. See WIS. OFF. OF THE COMM’R OF INS., STATEMENT OF SCOPE OF A PROPOSED RULE: REGARDING SECTION INS. 2.08, WIS. ADMIN. CODE, RELATING TO RETAINED ASSET ACCOUNTS FOR LIFE INSURANCE DEATH BENEFIT PROCEEDS (2010).

85. *Id.*

86. *Id.*

87. See generally *infra* Appendix – Table 5.

88. See *About NAIC*, NAT’L ASS’N INS. COMMISSIONERS, http://www.naic.org/index_about.htm (last visited Nov. 7, 2016).

89. *Id.*

90. *Id.*

account and a list of “Key Questions to Ask and Issues to Understand.”⁹¹

On December 16, 2010, the NAIC adopted the Retained Asset Accounts Sample Bulletin.⁹² Each state has the right to accept or reject the bulletin at its own discretion.⁹³ If the bulletin is adopted in a state, it would provide disclosure standards regarding the payment of life insurance benefits through a retained asset account.⁹⁴ The disclosure is intended to educate the owner on the specifics of a retained asset account, including: (1) proceeds are placed in a checkbook; (2) a single check can be written for all funds; (3) other available settlement options and whether these options are available until all funds are disbursed; (4) a statement of whether the account is a draft or check account; (5) a detail of account services provided; (6) a description of any fees; (7) frequency of statements; (8) the minimum interest rate to be credited and how the actual interest rate will be determined; (9) interest earned on the account may be taxable; (10) funds are not guaranteed by the FDIC but are covered by the State Guaranty Association (and how to learn about limitations of the fund); and (11) an explanation of the insurer’s policy regarding inactive retained asset accounts.⁹⁵

IV. LEGAL ISSUES: REPORTED CASES INVOLVING RETAINED ASSET ACCOUNTS

As public attention to the use of retained asset accounts has increased, legal scrutiny of their use has increased as well. A number of lawsuits have been filed which allege that insurer usage of retained asset accounts constitutes a breach of contract and breach of fiduciary duty. In addition, these lawsuits also allege that insurer retention of the interest rate spread (which occurs when the funds of a beneficiary are placed in a retained asset account as opposed to payment by a single lump sum draft) constitutes a breach of fiduciary duty. Most of the lawsuits arise in the context of group life insurance plans, which are governed by the Employee Retirement

91. See *Retained Asset Accounts and Life Insurance: What Consumers Need to Know About Life Insurance Benefit Payment Options*, NAT’L ASS’N INS. COMMISSIONERS (Aug. 2010), http://www.naic.org/documents/consumer_alert_raa.htm.

92. See Michael J. Rothman, *Retained Asset Accounts*, 21 FED’N REG. COUNS. J. 19, 22 (2010).

93. See *id.* at 23.

94. See *Retained Asset Accounts Sample Bulletin*, NAT’L ASS’N INS. COMMISSIONERS (Dec. 16, 2010), http://www.naic.org/documents/legal_bulletin_raa.pdf.

95. *Id.*

Income Security Act of 1974 (“ERISA”).⁹⁶ Despite a split in authority, the majority of courts have found that insurer utilization of retained asset accounts does not constitute a breach of contract with life insurance beneficiaries, nor do the operation of the accounts violate ERISA or common law fiduciary duties.

A. *Judicial Scrutiny of Retained Asset Accounts: The Mogel and Lucey Cases*

The first major reported federal case involving utilization of retained asset accounts in the context of a group life insurance plan resulted in the United States Court of Appeals for the First Circuit concluding that the usage of retained asset accounts were subject to ERISA.⁹⁷ In *Mogel v. UNUM Life Insurance Co. of America*, the United States Court of Appeals for the First Circuit also concluded that a class of life insurance beneficiaries stated a viable claim for breach of fiduciary duties under ERISA and overturned a lower court dismissal of the class action.⁹⁸

A number of the cases challenging retained asset accounts involve claims that insurer usage of retained asset accounts is in contravention of ERISA obligations. In general, ERISA imposes fiduciary duties upon employee benefits plan administrators who exercise discretionary control and/or authority concerning the management, disposition and administration of plan assets.⁹⁹ Two ERISA fiduciary duties in particular may apply to retained asset accounts. The first provision, places a requirement that an ERISA

96. See Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-On-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1484 (2011) (“Congress passed the Employee Retirement Income Security Act (ERISA) in 1974 to protect employees who participate in employee benefit plans by establishing nationally uniform standards for such plans.”).

97. *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 24 (1st Cir. 2008).

98. *Id.* at 27.

99. 29 U.S.C. § 1002(21)(A) (2012). The statute outlines the following duties:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id.

fiduciary must conduct duties “solely in the interest of the participants and beneficiaries” with respect to the benefits plan (“exclusive purpose requirement”).¹⁰⁰ The second duty requires an ERISA fiduciary to refrain from dealing with plan assets in one’s “own interest” and generally in self-interested transactions (“prohibition against self-dealing”).¹⁰¹

The First Circuit addressed both of the foregoing ERISA fiduciary duties in the *Mogel* case.¹⁰² In *Mogel*, the group life insurance policies at issue stated that, “[A]ll benefits payable . . . will be paid as soon as the Insurance Company receives proof of claim acceptable to it,” and “[u]nless otherwise elected, payment for loss of life will be made in one lump sum.”¹⁰³ The plaintiffs alleged that the insurer violated both the ERISA fiduciary duties outlined by 29 U.S.C. § 1104(a)(1) as well as 29 U.S.C. § 1106(b)(1) in its usage of a “Security Account” as a retained asset account.¹⁰⁴

The insurer in *Mogel* contended that it discharged its fiduciary duties when it established the retained asset accounts for the beneficiaries and mailed the checkbooks to them.¹⁰⁵ However, the *Mogel* court found that the utilization of a retained asset account did not constitute a “lump sum payment” under the policies at issue.¹⁰⁶ More significantly, the *Mogel* court found the insurer’s duties were

100. 29 U.S.C. § 1104(a)(1) (2012).

101. 29 U.S.C. § 1106(b) (2012). The statute states the following:

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not –

- (1) deal with the assets of the plan in his own interest or for his own account,
- (2) in his individual or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
- (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Id.

102. *See Mogel*, 547 F.3d at 25.

103. *Id.* (second alteration in original).

104. *Id.*; 29 U.S.C. § 1104(a)(1) (2012); 29 U.S.C. § 1106(b) (2012).

105. *Mogel*, 547 F.3d at 26.

106. *Id.* (“[The insurer’s] theory that its mailing of the checkbooks to the beneficiaries and their acceptance formed a unilateral contract is unpersuasive, for until the beneficiaries received the lump sum payments to which they were entitled, [the insurer] remained obligated to carry out its fiduciary duty under the plan.”).

subject to ERISA's fiduciary obligations, and thus the plaintiffs stated a viable cause of action under a breach of ERISA's fiduciary duties.¹⁰⁷

The *Mogel* decision was groundbreaking in that it opened the door for ERISA challenges to the utilization of retained asset accounts. Class actions in a number of other cases followed. In the *Lucey* case, beneficiaries of group life insurance policies issued under the Servicemembers Group Life Insurance Act (SGLIA)¹⁰⁸ filed a lawsuit alleging violations of the Act, as well as other violations concerning an insurer's usage of a retained asset account for policy settlement.¹⁰⁹ Under the SGLIA, a member can elect settlement either through a lump sum payment or thirty-six equal monthly installments.¹¹⁰ Just as the plaintiffs in *Mogel*, the plaintiffs in *Lucey* contended that the delivery of a checkbook for an "Alliance Account" (the type of retained asset account at issue) did not constitute "lump sum" delivery of the policy proceeds.¹¹¹ The insurer filed a motion to dismiss the plaintiffs' complaint.¹¹²

In denying the insurer's motion to dismiss, the *Lucey* court found that a payment by checkbook is not the same as a lump sum

107. *Id.* at 27 (citing 29 U.S.C. § 1002(21)(A) (1982)).

108. *See Lucey v. Prudential Ins. Co. of Am.*, 783 F. Supp. 2d 207, 209–10 (D. Mass. 2011). The Court discussed the Servicemembers Group Life Insurance Act as follows:

Pursuant to 38 U.S.C. § 1970, the Servicemembers Group Life Insurance Act (the "SGLIA"), active servicemembers, veterans, and Reservists are eligible for life insurance through two federally subsidized life insurance programs—Servicemembers Group Life Insurance ("SGLI") and Veterans Group Life Insurance ("VGLI"). The statute provides that group contracts will automatically insure servicemembers and their dependents, subject to their right to decline coverage, at a maximum coverage amount that is currently \$400,000.

Id.

109. *Id.* at 209.

110. 38 U.S.C. § 1970(d) (2012). The statute provides the following:

The member may elect settlement of insurance under this subchapter either in a lump sum or in thirty-six equal monthly installments. If no such election is made by the member the beneficiary or beneficiaries may elect settlement either in a lump sum or in thirty-six equal monthly installments. If the member has elected settlement in a lump sum, the beneficiary or beneficiaries may elect settlement in thirty-six equal installments.

Id.

111. *Lucey*, 783 F. Supp. 2d at 211–12 (citing *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 26–27 (1st Cir. 2008)).

112. *Id.* at 211.

payment.¹¹³ However, the court specifically noted that its findings concerning the “lump sum” payment issue related only to the motion to dismiss directly before the Court rather than consisting of any finding as to liability for breach of contract.¹¹⁴ Despite the critique of retained asset accounts in *Mogel* and *Lucey*, other courts that have handled class actions in recent years generally have adopted a rule concerning retained asset accounts: insurer utilization of retained asset accounts are not violative of ERISA’s fiduciary duties and do not give rise to liability for state law claims of breach of contract, breach of fiduciary duty, fraud, or unfair and deceptive acts and practices.

B. *The Development of the Majority Rule Concerning Retained Asset Accounts: The Faber, Edmonson, and Merrimon Cases and ERISA Issues*

In contrast to *Mogel* and *Lucey*, other courts have held that the usage of retained asset accounts do not violate fiduciary duties in the ERISA context. In *Faber v. Metropolitan Life Insurance Co.*, the United States Court of Appeals for the Second Circuit examined the question of whether an insurer usage of a retained asset account through an employee welfare benefit plan violated the “exclusive purpose” and “prohibition against self-dealing” requirements of ERISA.¹¹⁵ Interestingly, the *Faber* court invited the United States Department of Labor to submit its views on ERISA fiduciary duties.¹¹⁶ The Department of Labor concluded that the categorization of ERISA plan assets are based upon “ordinary notions of property rights,” and whether retained assets in retained asset accounts are “plan assets” subject to ERISA turns on whether the benefit plan has an ownership interest in them.¹¹⁷

The *Faber* court deferred to the Department of Labor’s view and concluded that assets in a retained asset accounts are not “plan interests” since the benefits plans do not have an ownership interest in the funds.¹¹⁸ Instead, the *Faber* court characterized the retained asset insurer-beneficiary relationship as one similar to a debtor-creditor.¹¹⁹ Thus, the court held that neither the “exclusive purpose”

113. *Id.* at 212.

114. *Id.*

115. *See Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 101 (2d Cir. 2011).

116. *Id.* at 102.

117. *Id.* at 105–06.

118. *Id.*

119. *Id.* at 106.

nor the “prohibition against self-dealing” requirements of ERISA applied.¹²⁰

In 2013, approximately two years after *Faber*, the United States Court of Appeals for the Third Circuit examined the utilization of retained asset accounts through a group life insurance plan in *Edmonson v. Lincoln National Life Insurance Co.*¹²¹ The plaintiff in *Edmonson* was a beneficiary entitled to \$10,000 in life insurance benefits through a group life insurance policy through her husband’s employer.¹²² The policy did not state that the beneficiary was to be paid the benefits through a retained asset account.¹²³ Three months after the establishment of the retained asset account, the plaintiff withdrew the full amount in the account.¹²⁴ Alleging that the insurer made a greater profit through investing the retained assets than the interest paid to her, the plaintiff argued the insurer violated both the “exclusive purpose” as well as the “prohibition against self-dealing” provisions of ERISA.¹²⁵

The *Edmonson* court noted that there were no provisions in the group life insurance policy which specifically outlined the establishment of retained asset accounts nor the method in which beneficiaries would be paid, unlike *Mogel* and *Faber*.¹²⁶ As specified in 29 U.S.C. § 1002(21)(A), an insurer is an ERISA fiduciary when it exercises any discretionary authority over plan administration or management.¹²⁷ The *Edmonson* court held that since the insurer held the discretion and choice of paying the plaintiff with either a retained asset account or some other type of distribution, it exercised actions of “plan administration or management” as well as control over plan assets which would make it subject to ERISA’s fiduciary duties.¹²⁸

As to the plaintiff’s claims that the insurer violated ERISA’s “exclusive purpose” requirement, the *Edmonson* court noted that the purpose of establishing the retained asset account was to pay the

120. *Id.* at 107.

121. *Edmonson v. Lincoln Nat’l Life Ins. Co.*, 725 F.3d 406, 411–12 (3d Cir. 2013).

122. *Id.* at 411.

123. *Id.*

124. *Id.* at 412.

125. *Id.*

126. *Compare id.* at 420, with *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 107 (2d Cir. 2011) (concluding that the use of a retained asset account did not violate ERISA when the insurance policy provided for it), and *Mogel v. UNUM Life Ins. Co.*, 547 F.3d 23, 26–27 (1st Cir. 2008) (concluding that the use of a retained asset account did violate ERISA when the insurance policy required a lump sum payment).

127. *Edmonson*, 725 F.3d at 421–22; see 29 U.S.C. § 1002(21)(A) (2012).

128. *Edmonson*, 725 F.3d at 422–23.

plaintiff benefits.¹²⁹ The plaintiff also contended that the payment by retained asset account created a potential for the insurer to profit; despite these assertions, the court noted that the “increased potential for profit” was insufficient to constitute a breach of ERISA’s fiduciary duties.¹³⁰ In addition, the court remarked that the payment via the retained asset account did not directly cause an injury to the plaintiff, and that the account “neither guaranteed or [sic] commanded that [the insurer] take the later act of investing the assets for its own profit.”¹³¹

As for the “prohibition against self-dealing” requirement of ERISA, the plaintiff also argued the insurer violated fiduciary duties when it invested the retained assets.¹³² The insurer contended, following the reasoning of *Faber*, that its relationship with the beneficiary was more of a creditor-debtor relationship or that of a customer and its bank.¹³³ The *Edmonson* court concluded that the insurer discharged its fiduciary responsibilities once it established the retained asset account, and thus did not violate any fiduciary duties when it invested the assets.¹³⁴

More recently, in July 2014, the United States Court of Appeals for the First Circuit in *Merrimon v. Unum Life Insurance Co. of America* examined whether insurer use of a retained asset account violated the “prohibition against self-dealing” and “exclusive purpose” fiduciary requirements of ERISA.¹³⁵ Examining whether the use of a retained asset account violates the “prohibition against self-dealing” provision of ERISA, the *Merrimon* court held that it was the beneficiaries, not the insurers who retained funds in general accounts, and who acquired ownership interests over the funds.¹³⁶ Thus, the court reasoned that unless the contract documents of an insurer provide evidence that a beneficiary’s assets are plan assets, then they are not plan assets subject to ERISA duties.¹³⁷

129. *Id.* at 423.

130. *Id.*

131. *Id.* at 424.

132. *Id.*

133. *Id.* at 425 (“[The insurer] analogizes its relationship with [the beneficiary] at that time to that of a customer and a bank, as the bank will invest a customer’s deposited assets for its own profit, and pay interest to the customer in an amount less than the profit it earns.”).

134. *Id.* at 426.

135. *See Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 50 (1st Cir. 2014).

136. *Id.* at 56.

137. *Id.*

The *Merrimon* court also examined the “exclusive purpose” requirement of ERISA.¹³⁸ The plaintiffs contended that when the insurer set the interest rate credited to retained asset accounts, it acted as a fiduciary under ERISA, and it did not set the rate exclusively for the benefit of the beneficiaries.¹³⁹ The court held, following *Faber* and *Edmonson*, that once the insurer created an interest-bearing retained asset account for the beneficiaries, it discharged its obligations as an ERISA fiduciary.¹⁴⁰ In addition, as to the setting of interest rates by the insurer, the court concluded that the setting of interest rates is related to management of the retained asset accounts and not the management of the benefits plans.¹⁴¹ Thus, the issue regarding the setting of interest rates was not governed by ERISA, but rather by state law.¹⁴²

Reading *Faber*, *Edmonson*, and *Merrimon* together, a majority rule has emerged that insurer utilization use of retained asset accounts does not violate the ERISA “exclusive purpose” requirement, nor does it violate the “prohibition against self-dealing” requirement. While the majority of appellate decisions have rejected challenges to retained asset accounts on the basis of claims under federal law and ERISA, challenges have also emerged to retained asset accounts through claims based upon state law.

C. State Law Issues

1. Breach of Contract

One of the common types of claims brought against the use of retained asset accounts are ones based upon breach of contract. In

138. *Id.* at 58 (citing 29 U.S.C. § 1104(a)(1) (2012)).

139. *Id.*

140. *Id.* at 59 (“In this instance, each of the plans provides that the insurer will, upon proof of claim, pay the death benefit owed by ‘mak[ing] available to the beneficiary a retained asset account.’ Each plan describes an RAA as ‘an interest bearing account established through an intermediary bank.’ The insurer followed this protocol precisely: it made available to each plaintiff an interest-bearing RAA established through an intermediary bank, which was credited with the full amount of the death benefit owed. No more was exigible to carry out the terms of the plans. Once the insurer fulfilled these requirements, its duties as an ERISA fiduciary ceased.”) (alteration in original) (emphasis omitted) (footnote omitted).

141. *Id.* at 60.

142. *Id.* (“When the insurer redeems a death benefit that is due a beneficiary by establishing an RAA, no other or further ERISA-related fiduciary duties attach. Thus, the insurer’s setting of an interest rate for the RAAs does not implicate ERISA; rather, its setting of the interest rate must be viewed as part of the management of the RAAs, governed by state law.”).

Rabin v. MONY Life Insurance Co., the plaintiff alleged that the insurer breached the terms of life insurance policies by utilizing a retained asset account instead of paying proceeds by a check, and also alleged a failure to award a competitive rate of interest to the retained asset account.¹⁴³

Regarding the plaintiff's first argument, the contracts themselves authorized the insurer to utilize settlement options other than a single lump sum payment.¹⁴⁴ In addition, the *Rabin* court noted that the plaintiff retained the ability to liquidate the retained asset account at any time, which was not materially different from disbursement by check.¹⁴⁵

The *Rabin* court also rejected the plaintiff's second argument.¹⁴⁶ The plaintiff alleged that he was only paid 0.75% interest on the retained asset account rather than the 8.3% interest the insurer paid to non-policyholder creditors.¹⁴⁷ In analyzing this claim, the *Rabin* court noted that the plaintiff was advised of the rate in which the retained asset account accrued interest, and he had the ability to withdraw the funds to any other investment at any time.¹⁴⁸

Breach of contract allegations concerning the utilization of a retained asset account also appeared in *Phillips v. Prudential Insurance Co. of America*.¹⁴⁹ In *Phillips*, the beneficiary of a life insurance policy was the class representative in a class action suit challenging retained asset accounts under Illinois state law.¹⁵⁰ The plaintiff contended that the insurer breached the contractual terms of the life insurance policy at issue by utilizing a retained asset account as the default method of settling her life insurance claim.¹⁵¹ The insured never elected a payment method of settlement before he died, and the beneficiary left a claim form blank which would have provided the beneficiary the option of settlement other than a retained asset account.¹⁵² Despite the fact that the claim form did not explicitly mention a lump sum option for the beneficiary, the policy itself included that option and did make reference to selection of

143. See *Rabin v. MONY Life Ins. Co.*, 387 F. App'x 36, 38–39 (2d Cir. 2010).

144. *Id.* at 39.

145. *Id.*

146. *Id.* at 40.

147. *Id.* at 39.

148. *Id.* at 39–40.

149. See *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1019–20 (7th Cir. 2013).

150. *Id.* at 1019.

151. *Id.* at 1020.

152. *Id.* at 1021.

“another payment option allowed in the policy.”¹⁵³ Under these facts, the United States Court of Appeals for the Seventh Circuit upheld the district court’s dismissal of plaintiff’s breach of contract claim.¹⁵⁴

2. Breach of Fiduciary Duty

Another challenge to retained asset accounts is that the usage of the accounts violates general fiduciary duties. There is academic discussion as to whether or not an insurer’s duty to its insureds should be characterized as fiduciary in nature,¹⁵⁵ particularly given that some courts have utilized the terms “fiduciary” in describing relationships between an insurer and an insured.¹⁵⁶ In *Rabin*, the plaintiff also proffered a breach of fiduciary duty claim.¹⁵⁷ The *Rabin* court noted that under New York law, insurers typically do not owe policyholders a fiduciary duty under the common law unless the situation is one in which the insurer is defending its insured on a liability claim.¹⁵⁸ The court also remarked that the plaintiff produced no evidence that the insurer exercised any investment decision-making on the plaintiff’s behalf, and thus the beneficiary’s relationship to the insurer was not fiduciary in nature.¹⁵⁹

153. *Id.* at 1022.

154. *Id.* at 1023–25.

155. See Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 385–87 (1998) (recognizing a number of courts characterize the insurer-insured relationship as a fiduciary one); William T. Barker, Paul E.B. Glad & Steven M. Levy, *Is an Insurer a Fiduciary to Its Insureds?*, 25 TORT & INS. L.J. 1, 1 (1989) (contending that an insurer typically is not a fiduciary to its insureds); Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 KY. L.J. 1, 5–6 (1999) (arguing an insurer is generally not a fiduciary to its insureds).

156. See, e.g., *Pareti v. Sentry Indem. Co.*, 536 So. 2d 417, 423 (La. 1988) (“Instead, the protection afforded to insureds against this contingency is that in every case, the insurance company is held to a high fiduciary duty to discharge its policy obligations to its insured in good faith—including the duty to defend the insured against covered claims and to consider the interests of the insured in every settlement.”); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wash. App. 487, 492 (1999) (“A fiduciary or quasi-fiduciary relationship exists between an insurer and its insured. An insurer has an enhanced fiduciary obligation that rises to a level higher than that of mere honesty and lawfulness of purpose. It requires an insurer to deal fairly with an insured, giving equal consideration in all matters to the insured’s interests as well as its own.”).

157. *Rabin v. MONY Life Ins. Co.*, 387 F. App’x 36, 42 (2d Cir. 2010).

158. *Id.*

159. *Id.*

Interestingly, the *Rabin* court also analyzed a New York law that imposes a fiduciary duty upon insurance agents and brokers for funds collected from insureds.¹⁶⁰ The law states:

Every insurance agent, title insurance agent, and insurance broker acting as such in this state shall be responsible in a fiduciary capacity for all funds received or collected as insurance agent or insurance broker, and shall not, without the express consent of his, her or its principal, mingle any such funds with his, her or its own funds held by him, her or it in any other capacity.¹⁶¹

The court noted that while the statute applies to insurance agents and brokers, nothing in the statute or any other authority extends the fiduciary duty concerning funds to insurers.¹⁶²

The United States Court of Appeals for the Seventh Circuit in *Phillips* also examined a claim based upon an alleged breach of fiduciary duty.¹⁶³ In *Phillips*, the plaintiff contended that when the insurer became the investment manager for the retained asset account, a fiduciary relationship was created.¹⁶⁴ The *Phillips* court rejected this argument, noting that the insurer did not invest any life insurance proceeds for the beneficiary's benefit, and thus, no fiduciary relationship existed.¹⁶⁵

3. Unfair and Deceptive Acts and Practices

Retained asset accounts are also potentially subject to claims for deceptive acts or practices. In *Rabin*, the United States Court of Appeals for the Second Circuit addressed claims that the insurer allegedly committed deceptive acts or practices surrounding the utilization of retained asset accounts.¹⁶⁶ Under New York law, “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in the state are unlawful.¹⁶⁷ The plaintiff alleged that a number of representations were deceptive, including the insurer's representation that policy

160. *Id.* at 43.

161. N.Y. INS. LAW § 2120 (McKinney 2015).

162. *Rabin*, 387 F. App'x at 43.

163. *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1024 (7th Cir. 2013).

164. *Id.*

165. *Id.*

166. *Rabin*, 387 F. App'x at 41–42.

167. *See* N.Y. GEN. BUS. LAW § 349 (McKinney 2012).

proceeds were to “be placed in an interest bearing checking account,” which led to the belief that, instead of the insurer retaining the funds in their own general account, the funds would be deposited in a separate account.¹⁶⁸ Analyzing the deceptive acts or practices claim, the *Rabin* court emphasized that the insurer provided a confirmation certificate and brochure that the plaintiff could withdraw the funds from the retained asset account at any time.¹⁶⁹ In addition, the court also noted that the plaintiff cited no authority that required the insurer to physically segregate beneficiary funds.¹⁷⁰ Thus, the court affirmed the district court’s granting of summary judgment dismissing the deceptive acts or practices claim.¹⁷¹

V. RECOMMENDATIONS AND PROPOSALS FOR STATE STATUTES

As court decisions involving retained asset accounts indicate, challenges to these accounts currently face an uphill climb (no matter if the challenges are based on federal claims of breach of ERISA fiduciary duties or state law claims). With courts deferring the larger policy issues concerning retained asset accounts to the states, it is up to state-level policymakers to enact reforms to make the utilization of retained asset accounts more consumer-friendly. The reforms can begin with the issue of whether a retained asset account can be utilized as a default method of life insurance policy settlement.

A. *Default Versus Non-Default*

Many beneficiaries may be surprised to learn that a retained asset account is utilized for life insurance policy settlement. For example, in *Phillips*, the insurer utilized a retained asset account as a default method of paying a life insurance claim.¹⁷² Many insurers use the retained asset account as a default method of settlement rather than a simple lump sum payment, creating a situation where the beneficiary has to electively *choose not* to utilize a retained asset account rather than to *positively request* a retained asset account. Today, thirty-seven out of fifty states allow an insurer to use a retained asset account as a default method of settlement.¹⁷³ The first reform state-level policymakers should implement is to provide the default for

168. *Rabin*, 387 F. App’x at 41.

169. *Id.*

170. *Id.*

171. *Id.* at 42.

172. *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1021 (7th Cir. 2013).

173. *See infra* Appendix – Table 2.

settlement to be a lump sum payment. Such a reform is not only insured/beneficiary/consumer-friendly, but also would likely eliminate most litigation concerning insurer utilization of retained asset accounts.

B. “*Clear and Conspicuous*” Disclosures

At least two other commentators laud the concept of improving disclosures concerning retained asset accounts to beneficiaries.¹⁷⁴ Michael Barrese and Maria O’Brien Hylton have focused on the issue of representations made to beneficiaries by insurers relating to the nature of the accounts being allegedly deceptive.¹⁷⁵ One critique is the representation that insurers describe retained asset accounts as “money market” accounts, which creates the impression that the accounts have the same protections afforded to money market accounts.¹⁷⁶ Hylton argues that disclosure be provided in three other areas: (1) retained asset accounts are not individual accounts; (2) the assets in the retained asset accounts are not FDIC insured; and (3) that the insurer makes a profit on the retained assets.¹⁷⁷

The proposals for disclosure suggested by Barrese and Hylton are all positive and necessary steps. Incorporating these suggestions and analyzing state regulations currently in effect, we propose that states implement “clear and conspicuous” disclosures in the following areas. One model for financial disclosure is found in the requirements of the Truth in Lending Act.¹⁷⁸ This Act requires certain credit transactions to include disclosures that are “clearly and conspicuously” presented by the creditor to the borrower.¹⁷⁹ We recommend states to make “clear and conspicuous” disclosures in the following areas:

1. A Beneficiary’s Right to Seek Outside Professional Counsel

Only eight states currently have statutes or regulations which encourage beneficiaries to obtain outside professional advice regarding the tax and investment considerations of utilizing a

174. Hylton, *supra* note 20, at 70–71; Barrese, *supra* note 20, at 534–35.

175. Hylton, *supra* note 20, at 93; Barrese, *supra* note 20, at 550.

176. Barrese, *supra* note 20, at 550.

177. *See* Hylton, *supra* note 20, at 92–93.

178. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (current version at 12 C.F.R. § 226.5 (2011)).

179. 12 C.F.R. § 226.5(a)(1)(i) (2011).

retained asset account.¹⁸⁰ One of these states is Kentucky, which requires a disclosure of “[t]he recommendation to consult a tax, investment, or other financial advisor regarding tax liability and investment options.”¹⁸¹

2. A Beneficiary’s Right to Be Clearly Informed That the Retained Asset Account May Not Be FDIC Insured

This is one of Hylton’s main concerns,¹⁸² and a common concern that has arisen regarding retained asset accounts. Currently, sixteen states require insurers to disclose that a retained asset account is not insured by the FDIC.¹⁸³ For example, California states that, “Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by State Guaranty Associations, and that the State Guaranty Association coverage limits vary by state.”¹⁸⁴

3. A Beneficiary’s Right to Be Informed of Information Concerning State Guaranty Fund Limits

In addition to many states requiring disclosure that retained asset accounts are not FDIC insured, some states require a notice to the beneficiary that more information on state guaranty funds can be found through the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA).¹⁸⁵ Currently, ten states mandate this disclosure.¹⁸⁶ For example, the Illinois Department of Insurance states, “The insurer must advise the beneficiary to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.”¹⁸⁷

4. A Beneficiary’s Right to Be Informed That an Insurer May Earn Income on the Retained Assets in Excess of the Interest Paid to the Beneficiary on the Account

The spread that the insurer earns on the retained assets is also one of the concerns highlighted by Hylton.¹⁸⁸ Despite the concerns

180. See *infra* Appendix – Table 2.

181. KY. REV. STAT. ANN. § 304.12-035(3)(b)(1) (West 2012).

182. See Hylton, *supra* note 20, at 92–93.

183. See *infra* Appendix – Table 5.

184. CAL. INS. CODE § 10509.937(j) (West 2013).

185. See *infra* Appendix – Table 5.

186. See *infra* Appendix – Table 5.

187. ILL. DEP’T OF INS., CO. BULL. 2011-03(J), USE OF RETAINED ASSET ACCOUNTS (2011).

188. See Hylton, *supra* note 20, at 92–93.

relating to insurer profit on the retained assets, only five states (Kentucky, Louisiana, Maryland, New York, and Rhode Island) require disclosure of this aspect to the beneficiary.¹⁸⁹ For example, Louisiana's Department of Insurance regulations require the following disclosure: "The income that may be derived by the insurer or a related party, in addition to any fees charged on the retained asset account, from the total gains received on the investment of the balance of funds in the retained asset account."¹⁹⁰

5. A Beneficiary's Right to Be Informed of How Interest Rates on the Retained Asset Account Are Determined and How They May Change

Twenty-one states currently mandate insurers to disclose the determination of interest rates on the retained asset account and how those rates may change. For instance, Maryland requires disclosure of "the method used to determine interest rates applied to the retained asset account, when and how interest rates may change, and any dividends and other gains that may be paid or distributed to the account holder."¹⁹¹

6. A Beneficiary's Right to Be Informed as to the Insurer Policies in the Event an Account Becomes Inactive

A potential risk incurred with the utilization of retained asset accounts is that an account could become inactive and therefore subject to a state's unclaimed property laws. State unclaimed property laws permit the state to be the custodian of unclaimed property until the owner claims it.¹⁹² As of the date of publication, approximately twelve states require disclosure regarding what happens to a retained asset account in the event it becomes

189. See *infra* Appendix – Table 5.

190. LA. DEP'T OF INS., BULL. NO. 2012-01(12), RETAINED ASSET ACCOUNTS (2012).

191. MD. CODE ANN., INS. § 16-117(d)(1)(ii)(1) (LexisNexis 2011).

192. See Ethan D. Miller & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?*, 70 U. PITT. L. REV. 511, 516–17 (2009) ("The principal objective of state unclaimed property laws is to assist owners in reclaiming their missing property. The state thus acts as an intermediary between the holder, which is in possession of the unclaimed property, and the owner. After the holder reports and remits the property to the state, the state is obligated to attempt to contact the owner and return the property to him. If the state is unsuccessful in finding the owner, the state must hold the property on the owner's behalf until the owner comes to collect it. Accordingly, state unclaimed property laws are primarily designed as procedural mechanisms that facilitate the return of unclaimed property to its owner.").

inactive.¹⁹³ For example, California requires disclosure with regard to the following: “A description of the insurer’s policy regarding retained asset accounts that become inactive, including the policy with respect to inactive accounts that are at risk of escheating to the state pursuant to the California Unclaimed Property Law”¹⁹⁴

7. A Beneficiary’s Right to Be Informed that Payment of the Total Proceeds Occurs with Delivery of a “Checkbook Kit” or “Draft Book Kit”

Approximately twenty-one states require the disclosure that payment of the total proceeds with a retained asset account is accomplished with the insurer’s delivery of a “checkbook kit” or “draftbook kit.” For instance, North Carolina’s regulation mandates disclosure “[t]hat payment of the total proceeds is accomplished by delivery of a ‘checkbook kit’ or ‘draft kit’ to the beneficiary.”¹⁹⁵

8. A Beneficiary’s Right to Be Informed That Access to the Entire Proceeds in the Account Can Be Obtained Through a Single Check, Draft, or Other Instrument

Twenty-two states currently require the disclosure that a beneficiary can access the entire proceeds of a retained asset account through a single check, draft, or other instrument.¹⁹⁶ One such state is Rhode Island, which requires that, “The entire proceeds are available to the account holder by the use of one such check, draft, or other instrument.”¹⁹⁷

9. A Beneficiary’s Right to Be Informed as to Whether the Retained Asset Account Is a Checking Account or Draft Account

Eighteen states require that an insurer inform a beneficiary as to whether a retained asset account is a checking account or a draft account.¹⁹⁸ For example, Virginia requires the inclusion of “[a] statement identifying the account as either a checking account or a draft account and an explanation of how the account works.”¹⁹⁹

193. See *infra* Appendix – Table 5.

194. CAL. INS. CODE § 10509.937(I) (West 2013).

195. See 11 N.C. ADMIN. CODE § 12.1603(5) (2015).

196. See *infra* Appendix – Table 5.

197. 27 R.I. GEN. LAWS § 27-4.9-5(b)(10) (Supp. 2015).

198. See *infra* Appendix – Table 5.

199. See VA. CODE ANN. § 38.2-3117.4(4) (2014).

10. A Beneficiary's Right to Be Informed as to the Preservation of Settlement Options in the Event the Balance Drops Below the Minimum Requirements of an Insurer or if the Entire Balance Is Withdrawn

Currently, sixteen states require disclosure concerning preservation of settlement options.²⁰⁰ For instance, California's statute mandates disclosure as to "[w]hether the available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum balance requirements."²⁰¹

11. A Beneficiary's Right to Notice That Interest Earned on the Retained Asset Account May Be Taxable

Twenty-one states currently require a notice that interest earned on a retained asset account may be taxable.²⁰² A typical regulation is exemplified by Colorado, which requires "[n]otice that the interest earned on the account may be taxable."²⁰³

12. A Beneficiary's Right to Disclosure of Any Applicable Fees on the Retained Asset Account

Twenty-two states mandate disclosure of any applicable fees on a retained asset account.²⁰⁴ For example, Iowa requires "[a] description of fees charged, if applicable."²⁰⁵

13. A Beneficiary's Right to Notification of Account Statement Frequency

Twenty-one states currently require this disclosure.²⁰⁶ One such state that requires disclosure regarding the frequency of account statements is Nebraska, which mandates disclosure of "[t]he frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity."²⁰⁷

200. See *infra* Appendix – Table 5.

201. CAL. INS. CODE § 10509.937(c) (West 2013).

202. See *infra* Appendix – Table 5.

203. See COLO. DEP'T OF REG. AGENCIES, DIV. OF INS., BULL. NO. B-4.12(III)(C)(9), RETAINED ASSETS ACCOUNTS: SETTLEMENT OF LIFE INSURANCE PROCEEDS (2011).

204. See *infra* Appendix – Table 5.

205. See IOWA INS. DIV., BULL. NO. 11-01, USE OF RETAINED ASSET ACCOUNTS (2011).

206. See *infra* Appendix – Table 5.

207. See NEB. DEP'T OF INS., BULL. NO. CB-125, USE OF RETAINED ASSET ACCOUNTS (2011).

14. A Beneficiary's Right to Notice of A.M. Best Insurer Rating of Insurer Which Utilizes Retained Asset Account

Currently, no states require disclosure of an insurer's A.M. Best Rating with the disclosures relating to retained asset accounts.²⁰⁸ As discussed above, insolvency may be a risk of an insurer in certain situations. Kansas requires a disclosure to a beneficiary "that a lengthy delay is possible before a beneficiary can get the proceeds if insolvency occurs."²⁰⁹ A.M. Best is the most reputable rating of insurer strength.²¹⁰ Disclosing the A.M. Best Rating of an insurer to a beneficiary of a retained asset account should be required.

VI. CONCLUSION

As the case law concerning retained asset accounts illustrates, the majority of courts thus far have upheld the utilization of retained asset accounts and generally conclude that their usage does not violate fiduciary duties. While future decisions of the courts may provide greater clarification concerning fiduciary duties, state legislatures are now in a position to enact meaningful legislation to help beneficiaries fully understand the occasionally complicated implications of retained asset accounts. A number of states have already enacted such legislation. It is now up to the states to take a close look at their insurance laws and do what is best for consumers.

208. See *infra* Appendix – Table 5.

209. See KAN. INS. DEP'T, BULL. NO. 1995-22(6), RETAINED ASSET ACCOUNTS (1995).

210. See Douglas R. Richmond, *Reinsurance Intermediaries: Law and Litigation*, 29 U. HAW. L. REV. 59, 88 (2006) ("A.M. Best is the most notable rating organization. A.M. Best rates insurance companies' financial strength as A++ and A+ (Superior), A and A- (Excellent), B++ and B+ (Very Good), B and B- (Fair), C++ and C+ (Marginal), C and C- (Weak), D (Poor), E (Under Regulatory Supervision) and F (In Liquidation).") (footnote omitted).

APPENDIX

Table 1: Summary of Retained Asset Accounts (as of Year-End)²¹¹

	2010	2011	2012	2013	2014
No. Insurers	800	789	738	746	730
No. Insurers w/ RAAs	161	167	162	162	159
Percentage w/ RAAs	20.13%	21.17%	21.95%	21.72%	21.78%
Total Open Accounts	1,084,386	1,045,749	1,004,838	957,073	883,273
Total Value in Accounts	32,153,286,598	32,014,755,674	31,729,846,956	31,984,925,763	30,799,430,427
Average \$ per Account	29,651.15	30,614.19	31,577.08	33,419.53	34,869.66

Table 2: States Permitting the Retained Asset Account to Be the Default Settlement Option²¹²

State	2010	2011	2012	2013	2014
Alaska	Yes	No	No	No	No
Alabama	Yes	Yes	Yes	Yes	Yes
Arkansas	No	No	No	No	No
Arizona	Yes	Yes	Yes	Yes	Yes
California	Yes	Yes	No	No	No
Colorado	Yes	Yes	Yes	Yes	Yes
Connecticut	No	No	No	No	No
District of Columbia	Yes	Yes	Yes	Yes	Yes
Delaware	Yes	Yes	Yes	Yes	Yes
Florida	Yes	Yes	Yes	Yes	Yes
Georgia	Yes	Yes	Yes	Yes	Yes
Hawaii	Yes	Yes	Yes	Yes	Yes
Iowa	Yes	Yes	Yes	Yes	Yes
Idaho	Yes	Yes	Yes	Yes	Yes
Illinois	Yes	Yes	Yes	Yes	Yes
Indiana	Yes	Yes	Yes	Yes	Yes

211. This table originally appears in Jill M. Bisco & Kathleen McCullough, *Retained Asset Accounts and Creditor Reactions to an A.M. Best Change 25* (2015) [hereinafter Bisco & McCullough II] (unpublished manuscript) (on file with author Jill M. Bisco).

212. This table originally appears in Bisco & McCullough II, *supra* note 211, at 30–31.

Kansas	No	No	No	No	No
Kentucky	Yes	Yes	Yes	Yes	Yes
Louisiana	No	No	No	No	No
Massachusetts	Yes	Yes	Yes	Yes	Yes
Maryland ¹	No	No	No	No	No
Maine	Yes	Yes	Yes	Yes	Yes
Michigan	Yes	Yes	Yes	Yes	Yes
Minnesota	No	No	No	No	No
Missouri	Yes	Yes	Yes	Yes	Yes
Mississippi	Yes	Yes	Yes	Yes	Yes
Montana	Yes	Yes	Yes	Yes	Yes
North Carolina	No	No	No	No	Yes
North Dakota	Yes	Yes	Yes	Yes	Yes
Nebraska	Yes	Yes	Yes	Yes	Yes
New Hampshire	Yes	Yes	Yes	Yes	Yes
New Jersey	Yes	Yes	Yes	Yes	Yes
New Mexico	Yes	No	No	No	No
Nevada	Yes	Yes	Yes	Yes	Yes
New York	Yes	Yes	No	No	No
Ohio	Yes	Yes	Yes	Yes	Yes
Oklahoma	Yes	Yes	Yes	Yes	Yes
Oregon	Yes	Yes	Yes	Yes	No
Pennsylvania	Yes	Yes	Yes	Yes	Yes
Rhode Island	Yes	Yes	Yes	Yes	Yes
South Carolina	No	No	No	No	No
South Dakota	Yes	Yes	Yes	Yes	Yes
Tennessee	No	No	No	No	No
Texas	Yes	Yes	Yes	Yes	Yes
Utah	Yes	Yes	Yes	Yes	Yes
Virginia	Yes	Yes	Yes	Yes	Yes
Vermont	Yes	Yes	Yes	Yes	Yes
Washington	Yes	Yes	Yes	Yes	Yes
Wisconsin	Yes	Yes	Yes	Yes	Yes
West Virginia	Yes	Yes	Yes	Yes	Yes
Wyoming	Yes	Yes	Yes	Yes	Yes

¹ Maryland stopped permitting the retained asset account from being the default settlement option.

on July 1, 2010.

Each state's Department of Insurance was contacted directly to determine whether the retained asset account was permitted to be the default settlement option for each year under review. In order for a state to be marked "Yes" they must have permitted the use of retained asset accounts as the default settlement option for life insurance for the entire year.

Table 3: Interest Rate Credited to Retained Asset Accounts²¹³

Average Interest Rates	2010	2011	2012	2013	2014
No. of Observations	152	160	154	147	137
High Interest	4.00%	4.00%	4.00%	4.00%	6.00%
Low Interest	0.07%	0.06%	0.05%	0.05%	0.01%
Standard Deviation	1.05	0.99	1.01	1.03	1.03
Average Interest	1.53%	1.39%	1.31%	1.26%	1.22%

Table 4: Life Insurance Guaranty Fund Programs²¹⁴

State ¹	Effective Date	Maximum Coverage - Per Insured Life
Alabama	1/1/1983	\$300,000
Alaska	5/16/1990	\$300,000
Arizona	8/27/1977	\$300,000
Arkansas	3/9/1989	\$300,000
California	1/1/1991	\$300,000 ²
Colorado	6/1/1991	\$300,000 ³
Connecticut	10/1/1972	\$500,000
Delaware	4/23/1982	\$300,000
District of Columbia	7/22/1992	\$300,000
Florida	10/1/1979	\$300,000
Georgia	7/1/1981	\$300,000
Hawaii	7/1/1988	\$300,000
Idaho	6/1/1977	\$300,000
Illinois	1/1/1986	\$300,000
Indiana	7/1/1978	\$300,000
Iowa	7/1/1987	\$300,000
Kansas	7/1/1982	\$300,000

213. This table originally appears in Bisco & McCullough I, *supra* note 15, at 55.

214. This table originally appears in Bisco & McCullough I, *supra* note 15, at 59–60.

Kentucky	6/17/1978	\$300,000
Louisiana	9/30/1991	\$300,000
Maine	7/25/1984	\$300,000
Maryland	7/1/1971	\$300,000
Massachusetts	4/3/1986	\$300,000
Michigan	5/1/1982	\$300,000
Minnesota	5/27/1977	\$500,000
Mississippi	4/9/1985	\$300,000
Missouri	8/13/1988	\$300,000
Montana	7/1/1974	\$300,000
Nebraska	8/24/1975	\$300,000
Nevada	7/1/1973	\$300,000
New Hampshire	6/25/1979	\$300,000
New Jersey	1/1/1991	\$500,000
New Mexico	4/9/1975	\$300,000
New York	8/2/1985	\$500,000
North Carolina	4/13/1974	\$300,000
North Dakota	7/1/1983	\$300,000
Ohio	9/14/1988	\$300,000
Oklahoma	9/1/1981	\$300,000
Oregon	9/13/1975	\$300,000
Pennsylvania	1/25/1979	\$300,000
Rhode Island	6/20/1985	\$300,000
South Carolina	7/14/1972	\$300,000
South Dakota	7/1/1989	\$300,000
Tennessee	7/1/1989	\$300,000
Texas	9/27/1973	\$300,000
Utah	7/1/1986	\$500,000
Vermont	4/2/1972	\$300,000
Virginia	7/1/1976	\$300,000
West Virginia	6/21/1977	\$300,000
Wisconsin	8/22/1969	\$300,000
Wyoming	7/1/1990	\$300,000

¹ Life guaranty funds are established on a state by state basis. Each state runs its own program with the exception of Connecticut, District of Columbia, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, and Virginia. These states formed Guaranty Fund Management Services, a voluntary, non-profit, unincorporated association which manages the funds and handles claim supervisory services for its member states. See GUARANTY FUND MGMT. SERVS., <http://www.gfms.org> (last visited Nov. 7, 2016).

² California: Coverage is limited to 80% of face value of the policy to a maximum of \$300,000 per insured.

³ Colorado: Prior to August 2011, the maximum was \$100,000 per insured.

Source: The effective date of the state guaranty funds was obtained from Brewer III et al., *supra* note 55, at 308–09. The maximum state limit for death benefit coverage under the guaranty fund was obtained from each individual state fund website by the author. See *Policyholder Information*, NAT'L ORG. LIFE & HEALTH INS. GUARANTY ASS'NS, <http://www.nolhga.com/policyholderinfo/main.cfm> (last visited Nov. 7, 2016).

Table 5: Retained Asset Account Regulation, Bulletins, and Rules

State	Statute or Regulation	Details of Statute or Regulation
Alabama	N/A	No statutes or regulations.
Alaska	ALASKA STAT. § 21.96.030 (2014).	“Unless another form of payment is agreed to by the policyholder or beneficiary, an insurance company doing business in this state may not pay a judgment or settlement of a claim in this state for a loss incurred in this state with an instrument other than a negotiable bank check payable on demand and bearing even date with the date of writing or by electronic funds transfer.”
Arizona	N/A	No statutes or regulations.
Arkansas	ARK. INS. DEP'T LEGAL DIV., BULL. 26-91, NEGATIVE OPTION CLAIM PAYMENT PROCEDURES AND “BENEFICIARY ACCESS” CHECKBOOK ACCOUNTS (1991); ARK. INS. DEP'T LEGAL DIV., BULL. 26A-91, NEGATIVE OPTION CLAIM PAYMENT PROCEDURES AND “BENEFICIARY ACCESS” CHECKBOOK ACCOUNTS (1991).	<p><i>Bulletin 26-91</i> noted that the Insurance Department does not have an objection to retained asset accounts so long as:</p> <ul style="list-style-type: none"> i. The beneficiary plays a “meaningful role” in the choice of such option, and, ii. The beneficiary is guaranteed to receive interest at no less than eight percent (8%) per annum” <p><i>Bulletin 26-91</i> also stated that, “The beneficiary will be presumed to have exercised a meaningful role in the election of his or her settlement option by having checked the option desired from a list of the options available prior to signing the proof of loss.”</p> <p><i>Bulletin 26A-91</i> relaxed the requirements of <i>Bulletin 26-91</i>, noting that 8% interest is not required unless the account is “unfair” or “deceptive” and there has been a violation of Arkansas law which requires that claims payments be “paid” or “settled” within 30 days.</p> <p><i>Bulletin 26A-91</i> permits the negative option selection of retained asset accounts and the “fairness” of a retained asset account is judged upon the following factors:</p> <ul style="list-style-type: none"> i. Whether the insurer makes it clear in the proof of loss form presented to the death claimant that he (or she) may “override” the automatic checkbook method of settlement and that he or she may do so on the proof of loss form itself; ii. Whether the insurer poses institutionalized

		<p>impediments to the conversion of an initially-selected Automatic Benefits Checkbook or Beneficiary Access account to any other sort of settlement option which the insurer may make available; and</p> <p>iii. Whether the interest earnings made available to the beneficiary are competitive with or comparable to what he (or she) might earn in a demand access passbook savings account in the State of the beneficiary's resident."</p>
California	<p>CAL. INS. CODE § 10170(f) (West 2013); CAL. INS. CODE § 10509.937 (West 2013).</p>	<p>Cal. Ins. Code § 10170(f) allows the utilization of retained asset accounts. The statute states:</p> <p>"All life insurance benefits shall be paid in the form of a lump-sum payment to the beneficiary or by another settlement option that is clearly described in the claim form. If the beneficiary is provided settlement options in addition to a lump-sum payment or a settlement option selected by the policyholder, the beneficiary shall have the option to choose how benefits are to be paid to the beneficiary. If the beneficiary does not choose one of the available settlement options, a retained-asset account may be the default option only if the claim form provides a prominent disclosure that, in the absence of a choice by the beneficiary, payment of policy benefits shall be made through establishment of a retained-asset account on the beneficiary's behalf. This disclosure shall be provided in the portion of the claim form where the beneficiary is offered the ability to select his or her choice of payment method and shall be in easy-to-understand language and in bold and at least 12-point font type. In all such cases, whether by beneficiary choice or default, the insurer shall provide to the beneficiary the disclosure provided for in Section 10509.937."</p> <p>Cal. Ins. Code § 10509.937 requires insurers to make the following written disclosures:</p> <p>"(a) Payment of the full benefit is accomplished by delivery of the draft book or checkbook.</p> <p>(b) One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time.</p> <p>(c) Whether the available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum balance requirements.</p> <p>(d) A statement identifying the account as either a checking or draft account and an explanation of how the account works, including, but not limited to, any minimum check or draft amount requirements.</p> <p>(e) Information about the account services provided and contact information where the beneficiary may request and obtain more details about those services.</p> <p>(f) A description of any fees charged, if applicable.</p> <p>(g) The frequency of statements showing the current account balance, the interest credited, drafts or checks written, and any other account activity. The insurer shall send the beneficiary at least one statement per quarter, and a statement for any month in which there has been account activity other than just the crediting of interest.</p> <p>(h) The guaranteed minimum interest rate to be credited to the account, how the actual interest rate will be determined, and the actual interest rate that would be</p>

		<p>credited to a newly opened account as of the date the disclosure is issued. The actual interest rate may be disclosed by the insurer with the disclosures provided with the claim documents sent to the beneficiary, through a toll-free telephone number established by the insurer, or through the insurer’s Web site.</p> <p>(i) That the interest earned on the account may be taxable.</p> <p>(j) Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by the State Guaranty Associations, and that the State Guaranty Association coverage limits vary by state.</p> <p>(k) A statement that advises the beneficiary to contact the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) to learn more about the coverage limitations applicable to his or her account, and that provides the beneficiary with the current Internet Web site address and telephone number for NOLHGA.</p> <p>(l) A description of the insurer’s policy regarding retained asset accounts that become inactive, including the policy with respect to inactive accounts that are at risk of escheating to the state pursuant to the California Unclaimed Property Law (Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure).”</p>
<p>Colorado</p>	<p>COLO., DEP’T OF REGULATORY AGENCIES, DIV. OF INS., BULL. NO. B-4.12, RETAINED ASSET ACCOUNTS: SETTLEMENT OF LIFE INSURANCE PROCEEDS (2011).</p>	<p><i>Bulletin No. B-4.12</i> states that, “The insurer shall provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy and how to obtain specific details relevant to the options.”</p> <p>If a retained asset account it utilized, a number of written disclosures must be provided by the insurer to the beneficiary. These disclosures are as follows:</p> <ol style="list-style-type: none"> “1. Payment of the full benefit amount is accomplished by delivery of the “draft book” or “check book.” 2. One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time. 3. Whether other available settlement options are preserved until the entire balance is withdrawn or until the balance drops below the insurer’s minimum balance requirements. 4. A statement identifying the account as either a checking or draft account and an explanation of how the account works. 5. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services. 6. A description of the fees charged, if applicable. 7. The frequency of statements showing the current account balance, the interest credited, drafts or checks written, and any other account activity. 8. The minimum interest rate to be credited to the account and how the actual interest rate will be determined. 9. Notice that the interest earned on the account may be taxable. 10. Notice that retained asset account funds held by insurance companies are not guaranteed by the Federal

		<p>Deposit Insurance Corporation (FDIC) but are guaranteed by the State Guaranty Associations. The beneficiary should be advised to contact the National Organization of Life and Health Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.</p> <p>11. A description of the insurer's policy regarding retained asset accounts that may become inactive."</p>
Connecticut	N/A	No statutes or regulations.
Delaware	<p>DEL. DEP'T OF INS., DOMESTIC/FOREIGN INSURERS BULL. NO. 39, RETAINED ASSET ACCOUNTS (2010).</p>	<p><i>Bulletin No. 39</i> states that, "If the insurer offers the beneficiary settlement options other than immediate cash payment of the full benefit amount, the insurer should provide the beneficiary with a supplemental contract that clearly discloses the rights and obligations of both the beneficiary and the insurer with respect to the benefit."</p> <p>The written disclosures in the supplemental contract must include the following:</p> <p>"B. Disclosure:</p> <p>(1) The "Checkbook." Literature describing the settlement options should clearly disclose that payment of the total proceeds is accomplished by delivery of a "checkbook," if that is the case. It should be disclosed to the beneficiary that one check can be written to access the entire proceeds, and that the other options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum payment requirements.</p> <p>(2) The Account. The insurer should disclose whether the account is a checking or draft account and explain the account's features. The disclosure document should include information about what banking services are provided to the account holder and by whom. It should be clearly stated which services are provided at no charge, and which services involve a fee. The nature and frequency of statements should be disclosed. The disclosure document should also provide a phone number and address where the beneficiary can obtain additional information and answers to questions.</p> <p>(3) Tax Implications. The disclosure information should indicate that there may be tax on the interest earned on the account, and the beneficiary should consult his or her tax advisor.</p> <p>(4) Other Options. Literature describing the settlement options should clearly disclose what other options are available under the policy. Where appropriate, the interest rate being paid under those options should also be disclosed.</p> <p>C. Interest:</p> <p>The insurer should disclose the interest rate being paid under the retained asset account. The disclosure should include a description of how the interest rate is determined and how it is credited to the account."</p>
Florida	<p>FLA. STAT. ANN. § 627.473 (West 2016).</p>	<p>Florida allows the utilization of retained asset accounts through the following statute:</p> <p>"Any life insurer shall have the power to hold under agreement the proceeds of any policy issued by it, upon such terms and restrictions as to revocation by the policyholder and control by the beneficiaries and with such exemptions from the claims of creditors of beneficiaries other than the policyholder as set forth in</p>

		the policy or as agreed to in writing by the insurer and the policyholder. Upon maturity of a policy, in the event the policyholder has made no such agreement, the insurer shall have the power to hold the proceeds of the policy under an agreement with the beneficiaries. The insurer shall not be required to segregate the funds so held but may hold them as part of its general assets.”
Georgia	N/A	No statutes or regulations.
Hawaii	HAW. REV. STAT. ANN. § 431:10D-112 (LexisNexis 2014).	Hawaii allows the utilization of retained asset accounts through the following statute: “Any life insurer shall have the power to hold under agreement the proceeds of any policy issued by it, upon such terms and restrictions as to revocation by the policyholder and control by beneficiaries, and with such exemptions from the claims of creditors of beneficiaries other than the policyholder as set forth in the policy or as agreed to in writing by the insurer and the policyholder. Upon maturity of a policy in the event the policyholder has made no such agreement, the insurer shall have the power to hold the proceeds of the policy under an agreement with the beneficiaries. The insurer shall not be required to segregate funds so held but may hold them as part of its general assets.”
Idaho	N/A	No statutes or regulations.
Illinois	ILL. DEP’T OF INS., BULL. 2011-03, USE OF RETAINED ASSET ACCOUNTS (2011).	Illinois requires the following with regards to retained asset accounts to avoid 10% interest accrual: “Section 1. Explanation of Settlement Options. The insurer shall provide to the beneficiary, at the time a claim is made, written information describing 10% interest accrual and the settlement options available under the policy and how to obtain specific details relevant to the options. Section 2. Supplemental Contract. If the insurer settles benefits through a retained asset account, the insurer shall provide the beneficiary with a supplemental contract that clearly discloses the rights of the beneficiary and obligations of the insurer under the supplemental contract. Section 3. Disclosures for Retained Asset Accounts to Beneficiaries. The insurer shall provide the following written disclosures to the beneficiary before the account is selected, if optional, or established, if not: A. Payment of the full benefit amount is accomplished by delivery of the ‘draft book’ /‘check book.’ B. One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time. C. Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum balance requirements. D. A statement identifying the account as either a checking or draft account and an explanation of how the account works. E. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services. F. A description of fees charged, if applicable.

		<p>G. The frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity.</p> <p>H. The minimum interest rate to be credited to the account and how the actual interest rate will be determined.</p> <p>I. The interest earned on the account may be taxable.</p> <p>J. Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by State Guaranty Associations. The insurer must advise the beneficiary to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.</p> <p>K. A description of the insurer's policy regarding retained asset accounts that may become inactive."</p>
Indiana	N/A	No statutes or regulations.
Iowa	IOWA INS. DIV., BULL. 11-01, USE OF RETAINED ASSET ACCOUNTS (2011).	<p>Iowa requires the following with retained asset accounts:</p> <p>"1. Explanation of Settlement Options. The insurer shall provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy and how to obtain specific details relevant to the options.</p> <p>2. Supplemental Contract. If the insurer settles benefits through a retained asset account, the insurer shall provide the beneficiary with a supplemental contract that clearly discloses the rights of the beneficiary and obligations of the insurer under the supplemental contract."</p> <p>The written disclosures must include the following:</p> <p>"A. Payment of the full benefit amount is accomplished by delivery of the 'draft book'/'check book.'</p> <p>B. One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time.</p> <p>C. Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum balance requirements.</p> <p>D. A statement identifying the account as either a checking or draft account and an explanation of how the account works.</p> <p>E. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services.</p> <p>F. A description of fees charged, if applicable.</p> <p>G. The frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity.</p> <p>H. The minimum interest rate to be credited to the account and how the actual interest rate will be determined.</p> <p>I. The interest earned on the account may be taxable.</p> <p>J. Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by the State Guaranty Associations. The beneficiary should be advised to contact the National Organization of Life and</p>

		<p>Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.</p> <p>K. A description of the insurer’s policy regarding retained asset accounts that may become inactive.”</p>
Kansas	<p>KAN. INS. DEP’T, BULL. 1995-22, RETAINED ASSET ACCOUNTS (1995).</p>	<p>In Kansas, retained asset accounts are only allowed in the following situations:</p> <ol style="list-style-type: none"> “1. It is a settlement option in the policy as issued; 2. It is a settlement option that is added as a rider or endorsement after the policy is issued; or 3. It is offered as a settlement option that the insured or beneficiary can choose dependent upon the mutual consent of the insured (or beneficiary) and the insurer.” <p>The following must also be disclosed to the insured or beneficiary:</p> <ol style="list-style-type: none"> “1. If a checkbook is used, a written explanation that the total proceeds will be paid in the form of a checkbook, and the beneficiary can, at anytime, cash one check for the balance of the entire proceeds. 2. A written explanation that explains the account is a checking or draft account and how those accounts work. This explanation must show what banking services are provided to the account holder as part of these accounts and by whom. It should also state which of those services are free and which cost money, the nature and frequency of bank statements, and a phone number and address where the beneficiary can get more information about the accounts. 3. A written explanation that there may be taxes on the earned interest on the account and that the beneficiary should consult his or her tax adviser. 4. A written explanation itemizing the other settlement options available under the policy. 5. A written explanation of the interest rate paid in the retained asset account and an explanation of how the interest is determined and how it is credited to the account. 6. A written explanation of what the limit of protection is for the retained asset account under the Kansas Life and Health Insurance Guaranty Association Act. It should also disclose that a lengthy delay is possible before a beneficiary can get the proceeds if insolvency occurs.”
Kentucky	<p>KY. REV. STAT. ANN. § 304.12-035 (West 2012).</p>	<p>The Beneficiaries’ Bill of Rights requires that, “A beneficiary shall be informed, prior to the distribution of any life insurance proceeds, of his or her right to receive a lump-sum payment of life insurance proceeds in the form of a bank check or other form of immediate full payment of benefits.”</p> <p>The law also requires that all life insurance proceeds payment options available to the beneficiary shall be disclosed.</p> <p>In addition, the law requires the following specific disclosures:</p> <ol style="list-style-type: none"> “1. The recommendation to consult a tax, investment, or other financial advisor regarding tax liability and

		<p>investment options;</p> <ol style="list-style-type: none"> 2. The initial interest rate, the circumstances and time frames under which interest rates may change, and any dividends and other gains that may be paid or distributed to the account holder; 3. The custodian of the funds or assets of the account; 4. The coverage guaranteed by the Federal Deposit Insurance Corporation (FDIC), if any, and the amount of coverage; 5. The limitations, if any, on the number or amount of withdrawals or transfers of funds from the account, including any minimum or maximum withdrawal amounts for payment of life insurance proceeds; 6. The delays, if any, that the account holder may encounter in completing authorized transactions and the anticipated duration of such delays; 7. The services provided for a fee, including a list of the fees and the method of their calculation; 8. The nature and frequency of statements of account; 9. The payment of some or all of the life insurance proceeds may be by the delivery of checks, drafts, or other instruments to access the available funds; 10. The entire life insurance proceeds are available to the account holder by the use of one (1) check, draft, or other instrument; 11. The insurer or a related party may derive income, in addition to any fees charged on the account, from the total gains received on the investment of the balance of funds in the account; 12. The telephone number, address, and other contact information, including a Web site address, to obtain additional information regarding the account; and 13. The following statement, 'FOR FURTHER INFORMATION, PLEASE CONTACT YOUR STATE DEPARTMENT OF INSURANCE.'
<p>Louisiana</p>	<p>LA. DEP'T OF INS., BULL. NO. 2012-01, RETAINED ASSET ACCOUNTS (2012).</p>	<p>Louisiana law requires that the beneficiary of a life insurance policy be allowed to have the opportunity to select a lump sum payment for life insurance policy settlement.</p> <p>If a retained asset account is utilized, then the following disclosures must be provided to beneficiaries:</p> <ol style="list-style-type: none"> “1. The recommendation to consult a tax, investment, or other financial advisor regarding tax liability and investment options; 2. The payment of some or all of the proceeds of the death benefit may be made by the delivery of checks, drafts, or other instruments to access the death benefit funds; 3. The entire proceeds are available to the account holder by the use of one such check, draft, or other instrument; 4. The initial rate of interest and the method of calculation of any interest, dividends, or other gains that the life insurer may pay or distribute to the account holder; 5. The name and contact information for use in accessing the death benefit funds deposited in the retained asset account; 6. The financial protections, guarantees, or insurance coverage covering the retained asset account; 7. The banking or other financial services offered to the

		<p>account holder;</p> <p>8. The limitations on the number and amount of withdrawals of death benefit funds from the retained asset account, including any minimum or maximum payment amount;</p> <p>9. The delays, if any, that the account holder may encounter in completing authorized transactions and the anticipated duration of such delays;</p> <p>10. The services provided for a fee and a list of the fees or the method of their calculation;</p> <p>11. The nature and frequency of statements of the retained asset account;</p> <p>12. The income that may be derived by the insurer or a related party, in addition to any fees charged on the retained asset account, from the total gains received on the investment of the balance of funds in the retained asset account;</p> <p>13. The telephone number, address and other contact information within the life insurer whereby the account holder may obtain additional information regarding the retained asset account;</p> <p>14. The telephone number, address and other contact information for the Louisiana Department of Insurance;</p> <p>15. The life insurer’s policy regarding inactivity in the retained asset account and the effect of state unclaimed property laws.”</p>
<p>Maine</p>	<p>ME. BUREAU OF INS., BULL. 376, RETAINED ASSET ACCOUNTS (2011).</p>	<p>Maine’s regulations include the following:</p> <p>“1. Explanation of Settlement Options. The insurer shall provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy and how to obtain specific details relevant to the options.</p> <p>2. Supplemental Contract. If the insurer settles benefits through a retained asset account, the insurer shall provide the beneficiary with a supplemental contract that clearly discloses the rights of the beneficiary and obligations of the insurer under the supplemental contract.”</p> <p>The following disclosures are also required to be provided to the beneficiaries:</p> <p>“A. Payment of the full benefit amount is accomplished by delivery of the ‘draft book’/‘check book.’</p> <p>B. One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time.</p> <p>C. Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum balance requirements.</p> <p>D. A statement identifying the account as either a checking or draft account and an explanation of how the account works.</p> <p>E. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services.</p> <p>F. A description of fees charged, if applicable.</p> <p>G. The frequency of statements showing the current account balance, the interest credited, drafts/checks</p>

		<p>written and any other account activity.</p> <p>H. The minimum interest rate to be credited to the account and how the actual interest rate will be determined.</p> <p>I. The interest earned on the account may be taxable.</p> <p>J. Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by the State Guaranty Associations. The beneficiary should be advised to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.</p> <p>K. A description of the insurer's policy regarding retained asset accounts that may become inactive."</p>
Maryland	<p>MD. CODE ANN., INS. § 16- 117(d)(1)(i)- (ii) (LexisNexis 2011).</p>	<p>Under Maryland law, an insurer may offer a retained asset account as a life insurance policy settlement option but at least one other settlement option must be offered and all settlement options available must be disclosed to the beneficiary in writing.</p> <p>The following disclosures must be provided in writing:</p> <p>"(i) A recommendation to consult a tax advisor, an investment advisor, or any other financial advisor regarding tax liability and investment options;</p> <p>(ii) An explanation of the features of the Retained asset account, including:</p> <ol style="list-style-type: none"> 1. The method used to determine interest rates applied to the retained asset account when and how interest rates may change, and any dividends and other gains that may be paid or distributed to the account holder; 2. The custodian of the funds or assets of the retained asset account; 3. Whether the funds in the retained asset account are guaranteed by the Federal Deposit Insurance Corporation (FDIC) and the amount of the coverage, if any; 4. The limitations, if any, on the numbers and accounts of withdrawals of funds from the retained asset account or investment, including any minimum or maximum withdrawal amounts; 5. The services provided for a fee, including a list of the fees or the method of their calculation; 6. The nature and frequency of statements of account; 7. A statement that the obligation of the insurer to pay the total policy or contract proceeds is satisfied by depositing the total proceeds in the retained asset account; 8. A statement that the entire proceeds are available to the account holder by the use of one check, draft, or other instrument; 9. A statement that the insurer or a related party may derive income, in addition to any fees charged on the retained asset account, from the total gains received on the investment of the balance of funds in the retained asset account; and 10. The telephone number, address, and other contact information, including Web site address, for obtaining additional information regarding the retained asset account; and <p>(i) The statement "For further information, please</p>

		contact your state insurance department.””
Massachusetts	N/A	No statutes or regulations.
Michigan	N/A	No statutes or regulations.
Minnesota	N/A	No statutes or regulations.
Mississippi	N/A	No statutes or regulations.
Missouri	N/A	No statutes or regulations.
Montana	OFFICE OF THE MONT. STATE AUDITOR, COMM’R OF SEC. & INS., ADVISORY MEMORANDUM ON RETAINED ASSET ACCOUNTS, (2010).	<p>The Advisory Memorandum requires the utilization of a supplemental contract in Montana – the memorandum states that, “If the insurer offers the beneficiary settlement options other than immediate cash payment of the full benefit amount, the insurer should provide the beneficiary with a supplemental contract that clearly discloses the rights and obligations of both the beneficiary and the insurer with respect to the benefit.”</p> <p>The following disclosures must be provided:</p> <p>“(1) The ‘Checkbook.’ Literature describing the settlement options should clearly disclose that payment of the total proceeds is accomplished by delivery of a ‘checkbook,’ if that is the case. It should be disclosed to the beneficiary that one check can be written to access the entire proceeds, and that the other options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum payment requirements.</p> <p>(2) The Account. The insurer should disclose whether the account is a checking or draft account and explain the account’s features. The disclosure document should include information about what banking services are provided to the account holder and by whom. It should be clearly stated which services are provided at no charge, and which services involve a fee. The nature and frequency of statements should be disclosed. The disclosure document should also provide a phone number and address where the beneficiary can obtain additional information and answers to questions.</p> <p>(3) Tax Implications. The disclosure information should indicate that there may be tax on the interest earned on the account, and the beneficiary should consult his or her tax advisor.</p> <p>(4) Other Options. Literature describing the settlement options should clearly disclose what other options are available under the policy. Where appropriate, the interest rate being paid under those options should also be disclosed.”</p> <p>The Advisory Memorandum also states that “The insurer should disclose the interest rate being paid under the retained asset account. The disclosure should include a description of how the interest rate is determined and how it is credited to the account.”</p>
Nebraska	NEB. DEP’T OF INS., BULL. NO. CB-125, USE OF RETAINED ASSET ACCOUNTS (2011).	<p><i>Bulletin No. CB-125</i> requires that, “The insurer shall provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy or how to obtain specific details relevant to the options.”</p> <p>Nebraska also requires insurers who utilize retained asset accounts to provide a beneficiary with a supplemental contract that “clearly discloses the rights of the beneficiary and obligations of the insurer under the</p>

		<p>supplemental contract.”</p> <p>In addition, the Bulletin mandates that the following disclosures be provided to the beneficiary:</p> <ul style="list-style-type: none"> •“Payment of the full benefit amount is accomplished by delivery of the ‘draft book’/’check book.’ •One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time. •Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum balance requirements. •A statement identifying the account as either a checking or draft account and an explanation of how the account works. •Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services. •A description of fees charged, if applicable. •The frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity. •The minimum interest rate to be credited to the account and how the actual interest rate will be determined. •The interest earned on the account may be taxable. •Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC). •A description of the insurer’s policy regarding retained asset accounts that may become inactive.”
<p>Nevada</p>	<p>NEV. DIV. OF INS., BULL. NO. 94-005, RETAINED ASSET ACCOUNTS (1994).</p>	<p>Nevada provides that:</p> <p>“1. The insurer must offer the beneficiary full cash payment or settlement options in accordance with the terms of the life insurance contract.”</p> <p>2. If the insurer offers the beneficiary settlement options in addition to immediate cash payment of the full benefit amount, the insurer must provide the beneficiary with a supplemental contract that clearly discloses the rights and obligations of both the beneficiary and the insurer for the benefit.”</p> <p>3.</p> <p style="padding-left: 2em;">a. Literature describing the settlement options must clearly disclose that if the beneficiary chooses settlement options other than immediate cash payment of the full benefit amount then payment of the total proceeds is accomplished by delivery of a ‘checkbook’ if that is the case. It must be disclosed to the beneficiary that one check can be written to access the entire proceeds, and that the other options are preserved until the entire balance is withdrawn or drops below the insurer’s minimum payment requirements.</p> <p style="padding-left: 2em;">b. The insurer must disclose whether the account is a checking or draft account and explain the account’s features. The disclosure document must include</p>

		<p>information about what banking services are provided to the account holder and by whom. It must be clearly stated which services are provided at no charge, and which services involve a fee. The nature and frequency of statements must be disclosed. The disclosure document must also provide a phone number and address where the beneficiary can obtain additional information and answers to questions.</p> <p>c. The disclosure information must indicate that there may be tax on the interest earned on the account, and the beneficiary should consult their tax advisor.</p> <p>d. Literature describing the settlement options must clearly disclose what other options are available under the policy. Where appropriate, the interest rate being paid under those options must also be disclosed.</p> <p>4. The insurer must disclose the interest rate being paid under the retained asset account. The disclosure must include a description of how the interest rate is determined and how it is credited to the account.</p> <p>5. The funds necessary to cover liabilities under these accounts must be reported on the annual statement”</p>
<p>New Hampshire</p>	<p>N.H. INS. DEP’T, INS. BULL. NO. 10-046-AB, USE OF RETAINED ASSETS (2010).</p>	<p><i>Bulletin No. 10-046-AB</i> requires that, “The insurer shall provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy and how to obtain specific details relevant to the options.”</p> <p>The Bulletin also requires insurers who utilize retained asset accounts to provide a beneficiary with a supplemental contract that “clearly discloses the rights of the beneficiary and obligations of the insurer under the supplemental contract.”</p> <p>In addition, the Bulletin mandates that the following disclosures be provided to the beneficiary:</p> <p>“A. Payment of the full benefit amount is accomplished by delivery of the ‘draft book’/check book.”</p> <p>B. One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time.</p> <p>C. Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum balance requirements.</p> <p>D. A statement identifying the account as either a checking or draft account and an explanation of how the account works.</p> <p>E. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services.</p> <p>F. A description of fees charged, if applicable.</p> <p>G. The frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity.</p> <p>H. The minimum interest rate to be credited to</p>

		<p>the account and how the actual interest rate will be determined.</p> <p>I. The interest earned on the account may be taxable.</p> <p>J. Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by the State Guaranty Associations. The beneficiary should be advised to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.</p> <p>K. A description of the insurer's policy regarding retained asset accounts that may become inactive."</p>
New Jersey	N.J. DEP'T OF BANKING & INS., ORD. NO. A11-101, IN THE MATTER OF RETAINED ASSET ACCOUNTS AND OTHER SETTLEMENT OPTIONS USED BY LIFE INSURERS (2011).	<p>New Jersey requires insurers to provide the following disclosures to beneficiaries:</p> <p>"i. A statement that payment of the full benefit amount is accomplished by delivery of the draft book/checkbook or similar instrument;</p> <p>ii. A statement that one draft or check may be written to access the entire amount, including interest, of the RAA at any time;</p> <p>iii. Notice whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum balance requirement;</p> <p>iv. A statement identifying the account as either a checking or draft account and an explanation of how the account works;</p> <p>v. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services;</p> <p>vi. A description of fees charged, if applicable;</p> <p>vii. Information about the frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity, and the method of delivery of such statements (i.e., via postal mail, email, etc.);</p> <p>viii. How the interest rate to be credited to the account will be determined;</p> <p>ix. A statement that the interest earned on the account may be taxable;</p> <p>x. A statement that RAA funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation ("FDIC"), but are guaranteed by the State Guaranty Associations. The beneficiary should be advised to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about coverage or limitations to his or her account.</p> <p>xi. A description of the insurer's policy regarding RAAs that may become inactive.</p>
New Mexico	N/A	No statutes or regulations.
New York	N.Y. DEP'T OF FIN. SERV., INS. CIRCULAR LETTER NO. 4, RETAINED ASSET ACCOUNTS (2012).	New York regulations require that, "Any form by which a settlement option is elected should clearly and conspicuously state that payment of the full life insurance proceeds in a single check is available. If no election is made, the insurer should send to the beneficiary a single check for the full life insurance proceeds. In no event should the insurer establish an RAA unless there has been

		<p>an affirmative election authorizing the insurer to do so.”</p> <p>The following disclosures must be provided by an insurer to a beneficiary if the beneficiary affirmatively elects to utilize a retained asset account:</p> <ul style="list-style-type: none"> •“In addition to an option to establish an RAA, a list of other available options from which the beneficiary may choose. Unless the policy provides for payment of the life insurance proceeds only in installments, one option should be for payment by a single check for the full proceeds. The option to receive the full life insurance proceeds as a single check should be offered as prominently as all other listed available options. •Notice that the settlement of the beneficiary’s claim made under the life insurance policy or certificate will be made through the delivery of a draft or check kit to the beneficiary where the RAA option is elected. •An accurate description of the nature of the RAA, including: that the beneficiary’s funds are held by the insurer (or affiliated entity, where applicable) and not in a bank or other institution; and whether or not the insurer is earning or has the potential to earn income on the beneficiary’s funds held in the RAA. •The name and address of the bank or other institution where the insurer will establish the account, and whether the account is a draft or checking account. •Notification that one draft or check (whichever is applicable) can be written at any time to access the full life insurance proceeds or remaining balance in the account. •Notification of whether or not RAA funds are insured by the Federal Deposit Insurance Corporation (FDIC) and, if so, the extent of such insurance. •Services provided by the bank or other institution to an RAA holder and the fees associated with such services, including any costs or fees associated with the RAA. •The nature and frequency of statements that will be sent to an RAA holder. •Notification of an RAA holder’s right to designate a beneficiary for the RAA. •Any restrictions on the usage of RAA drafts or checks (whichever is applicable), including minimum benefit payment restrictions, the number of withdrawals permitted within any time period and any applicable minimum withdrawal amounts. •An approximation of any time delays that an RAA holder should expect to encounter in completing any authorized transaction under an RAA and the anticipated length of such delay. •The minimum interest rate that may be paid on RAA funds, and a description of how the interest rate is determined and credit to the account. •A disclosure indicating that choosing an RAA may have tax implications and that the beneficiary should
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		<p>consult a tax advisor.</p> <ul style="list-style-type: none"> •Any reservation of rights that the insurer may claim to freeze RAA funds or take RAA funds back to set off an alleged claim against the account holder. •A telephone number and address where the beneficiary may obtain additional information and answers to any questions, including the current interest rate.
North Carolina	11 N.C. ADMIN. CODE 12.1602–12.1603 (2015).	<p>North Carolina regulations require that a retained asset account cannot be utilized unless the insurer complies with the following:</p> <p>“(1) The retained asset account shall be specifically identified as a settlement option within the terms of the claim form in conjunction with any other mode of settlement.</p> <p>(2) The policy owner shall be provided the contractual right of selection from all available optional modes of settlement before death or death of the insured if the insured is not the policy owner.</p> <p>(3) The insurer shall provide the beneficiary with information that clearly discloses the rights and obligations of both the beneficiary and the insurer with respect to the mode of settlement.”</p> <p>The following disclosures must be provided by the insurer to the beneficiary in writing:</p> <p>“(1) Any other settlement options available under the policy.</p> <p>(2) Any interest being paid under other options.</p> <p>(3) Whether the retained asset account is the equivalent of a checking or draft account.</p> <p>(4) An explanation of the account’s features, including:</p> <ul style="list-style-type: none"> (a)What banking services are provided to the account holder. (b)Which services are provided at no charge and which services involve a fee and the amount of the fee. (c)The nature and frequency of account statements. (d)A telephone number and address where the beneficiary can obtain additional information regarding the account. (e)Any minimum or maximum benefit payment requirements under the account. (f)The number of withdrawals permitted within any time period. <p>(5) That payment of the total proceeds is accomplished by delivery of a “checkbook kit” or “draft kit” to the beneficiary.</p> <p>(6) That one check or draft can be written to access the entire proceeds and that other settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum payment requirements.</p> <p>(7) Any time delays the beneficiary should expect to encounter in completing any authorized transaction under a retained asset account and the anticipated amount of such time delay.</p> <p>(8) That interest earned on the account may be taxable and the beneficiary should consult a tax advisor.</p>

		(9) The methodology used to determine the interest rate being paid under the retained asset account.”
North Dakota	N.D. DEP'T OF INS., BULL. 2000-3, INTEREST- BEARING/RETAINED ASSET ACCOUNTS AS A DEATH BENEFIT SETTLEMENT OPTION (2000).	<p>North Dakota requires insurers to provide beneficiaries the following disclosures:</p> <p>“a. The Checkbook. If a checkbook option is offered, literature must clearly disclose that payment of the total proceeds is accomplished by depositing the proceeds into an account and delivery of a checkbook. It must be disclosed to the beneficiary that one check can be written to access the entire proceeds, and that any other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum payment requirements.</p> <p>b. The Account. The insurer must disclose whether the account is a checking or draft account and explain the account’s features. The disclosure must include information about the banking services that are provided and by whom. It should clearly identify which services are provided at no charge and which services involve a fee. The nature and frequency of the mailing of statements should be disclosed. The disclosure document must also provide a telephone number and address where the beneficiary can obtain additional information.</p> <p>c. Tax Implications. The disclosure information must indicate that there may be tax on the interest earned on the account, and the beneficiary should consult his or her tax advisor.</p> <p>d. Other Options. All other available settlement options must be clearly described. Where appropriate, the interest rate being paid must also be disclosed.</p> <p>e. Default. If an insured does not choose one of the available settlement options or if the claimant does not offer payment options, the retained asset account may be the default only if the retained asset account default information is conspicuously disclosed by bolded enlarged type on the claim form.”</p> <p>North Dakota regulations also state the following:</p> <p>“Interest. The insurer must disclose the interest rate being paid under the retained asset account. The disclosure must include a description of how the interest rate is determined and how it is credited to the account.”</p> <p>Finally, North Dakota regulates also state:</p> <p>“Lump Sum Option. If the claimant or beneficiary statement form offers a lump sum payment and the company utilizes retained asset accounts, the form must allow the claimant to choose whether to receive payment directly by check or indirectly by depositing the proceeds into a retained asset account.”</p>
Ohio	OHIO DEP'T OF INS., BULL. 2011-01, RETAINED ASSET ACCOUNTS (2011).	<p>Ohio regulations state the following:</p> <p>“Section 1. Explanation of Settlement Options. The insurer should provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy and how to obtain specific details relevant to the options.</p>

		<p>Section 2. Supplemental Contract. If the insurer settles benefits through a retained asset account, the insurer should provide the beneficiary with a supplemental contract that clearly discloses the rights of the beneficiary and obligations of the insurer under the supplemental contract.”</p> <p>The regulations also require the following written disclosures to be provided to the beneficiary:</p> <p>“A. Payment of the full benefit amount is accomplished by delivery of the “draft book”/”check book”.</p> <p>B. One draft or check may be written to access the entire amount, including interest, of the retained asset account at any time.</p> <p>C. Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer’s minimum balance requirements.</p> <p>D. A statement identifying the account as either a checking or draft account and an explanation of how the account works.</p> <p>E. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services.</p> <p>F. A description of fees charged, if applicable.</p> <p>G. The frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity.</p> <p>H. The minimum interest rate to be credited to the account and how the actual interest rate will be determined.</p> <p>I. The interest earned on the account may be taxable.</p> <p>J. Retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation (FDIC), but are guaranteed by the State Guaranty Associations. The beneficiary should be advised to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.</p> <p>K. A description of the insurer’s policy regarding retained asset accounts that may become inactive.”</p>
Oklahoma	N/A	No statutes or regulations.
Oregon	N/A	No statutes or regulations.
Pennsylvania	N/A	No statutes or regulations.
Rhode Island	R.I. GEN. LAWS §§ 27-4.9-1–27.4.9-7 (Supp. 2015).	<p>The Rhode Island Beneficiaries’ Bill of Rights statute requires that an insurer inform a beneficiary of the right to receive a lump-sum payment of life insurance proceeds and requires disclosure of the option of utilization of a retained asset account to a beneficiary prior to using a retained asset account for life insurance policy settlement.</p> <p>The statute requires the following disclosures be provided by the insurer:</p> <p>“(1) The recommendation to consult a tax, investment, or other financial advisor regarding tax liability and investment options;</p>

		<p>(2) The initial interest rate, when and how interest rates may change, and any dividends and other gains that may be paid or distributed to the account holder;</p> <p>(3) The custodian of the funds or assets of the account;</p> <p>(4) The coverage guaranteed by the Federal Deposit Insurance Corporation (FDIC), if any, and the amount of such coverage;</p> <p>(5) The limitations, if any, on the numbers and amounts of withdrawals of funds from the account, including any minimum or maximum benefit payment amounts;</p> <p>(6) The delays, if any, that the account holder may encounter in completing authorized transactions and the anticipated duration of such delays;</p> <p>(7) The services provided for a fee, including a list of the fees or the method of their calculation;</p> <p>(8) The nature and frequency of statements of account;</p> <p>(9) The payment of some or all of the proceeds of the death benefit may be by the delivery of checks, drafts, or other instruments to access the available funds;</p> <p>(10) The entire proceeds are available to the account holder by the use of one such check, draft, or other instrument;</p> <p>(11) The insurer or a related party may derive income, in addition to any fees charged on the account, from the total gains received on the investment of the balance of funds in the account;</p> <p>(12) The telephone number, address, and other contact information, including website address, to obtain additional information regarding the account; and</p> <p>(13) The following statement: "For further information, please contact the department of business regulation."</p>
South Carolina	N/A	No statutes or regulations.
South Dakota	N/A	No statutes or regulations.
Tennessee	N/A	No statutes or regulations.
Texas	N/A	No statutes or regulations.
Utah	N/A	No statutes or regulations.
Vermont	N/A	No statutes or regulations.
Virginia	VA. CODE ANN. §§ 38.2-3117.1-38.2-3117.4 (2014).	<p>The Virginia statute states that, "The insurer shall provide the beneficiary, at the time a claim is made, written information describing the settlement options available under the policy and how to obtain specific details relevant to the options."</p> <p>The statute also notes that, "If the insurer settles benefits through a retained asset account, the insurer shall provide the beneficiary with a supplemental contract that clearly discloses the rights of the beneficiary and the obligations of the insurer under the supplemental contract."</p> <p>The following disclosures are required to be provided by the insurer:</p> <p>"1. Payment of the full benefit amount is accomplished by delivery of the draft book or check book;</p> <p>2. One draft or check may be written to access</p>

		<p>the entire amount, including interest, of the retained asset account at any time;</p> <p>3. Whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum balance requirements;</p> <p>4. A statement identifying the account as either a checking account or a draft account and an explanation of how the account works;</p> <p>5. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services;</p> <p>6. A description of fees charged, if applicable;</p> <p>7. The frequency of statements showing the current account balance, the interest credited, drafts or checks written, and any other account activity;</p> <p>8. The minimum interest rate to be credited to the account and how the actual interest rate will be determined;</p> <p>9. The interest earned on the account may be taxable;</p> <p>10. Retained asset account funds held by insurance companies are not insured by the Federal Deposit Insurance Corporation but are guaranteed by the state guaranty association. The beneficiary should be advised to contact the National Organization of Life and Health Insurance Guaranty Associations via the association's website to learn more about the coverage limitations to the account under a state guaranty association; and</p> <p>1.A description of the insurer's policy regarding retained asset accounts that become inactive."</p>
Washington	N/A	No statutes or regulations.
West Virginia	W.V. OFF. OF THE INS. COMM'R., INFORMATIONAL LETTER NO. 178A, USE OF RETAINED ASSET ACCOUNTS (2011).	<p>West Virginia regulations state that, "At the time a claim is made, an insurer must provide a beneficiary of a life insurance policy written information describing the settlement options available under the policy and how to obtain additional information. If the insurer provides benefits through a retained asset account, it must present the beneficiary with a supplemental contract that clearly discloses the rights of the beneficiary and obligations of the insurer under the supplemental contract."</p> <p>The following disclosures must be provided to the beneficiary by the insurer:</p> <p>"a. A statement that payment of the full benefit amount is accomplished by delivery of the "draft book" or "check book" to the beneficiary;</p> <p>b. A statement that one draft or check may be written to access the entire amount, including interest, of the retained asset account at any time;</p> <p>c. A description of whether other available settlement options are preserved until the entire balance is withdrawn or the balance drops below the insurer's minimum balance requirements;</p> <p>d. A statement identifying the account as either a checking or draft account and an explanation of how the account works;</p> <p>e. Information about the account services provided and contact information where the beneficiary may request and obtain more details about such services;</p>

		<p>f. A description of fees charged, if applicable;</p> <p>g. Information regarding the frequency of statements showing the current account balance, the interest credited, drafts/checks written and any other account activity;</p> <p>h. Information about the minimum interest rate to be credited to the account and how the actual interest rate will be determined;</p> <p>i. A statement that interest earned on the account may be taxable.</p> <p>j. A statement that retained asset account funds held by insurance companies are not guaranteed by the Federal Deposit Insurance Corporation, but are guaranteed, subject to certain limitations, by the respective state guaranty association. (The beneficiary should also be advised to contact the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) to learn more about the coverage limitations to his or her account.); and</p> <p>k. A description of the insurer's policy regarding retained asset accounts that may become inactive."</p>
Wisconsin	N/A	No statutes or regulations.
Wyoming	N/A	No statutes or regulations.

