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Manhattan Federal Judge Dismisses \$186 Billion 'Cash Sweep' Class Action Against Brokerages

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Here at the Litigation Daily, fat brokerage accounts are about as commonplace as July snowstorms. So forgive us our initial ignorance about the "cash sweep" programs offered by brokers, which were the subject of a class action that Manhattan federal district court judge Richard Sullivan dismissed Monday. But after reading Judge Sullivan's opinion, we feel like we could teach a course in cash sweeps.

The programs, Sullivan writes, were introduced back in the late 1970s. Instead of letting extra cash sit in customers' accounts, the brokerages would periodically place the money in money market accounts. The programs were modified in the 1990s to allow customers an opportunity to put their extra cash in bank accounts affiliated with the brokerages, instead of money market accounts.

The modification of the program was the focus of the complaint filed against Merrill Lynch, Morgan Stanley, Citigroup, Charles Schwab, and Wachovia. Customers alleged that the brokerages at first paid customers who put their cash in broker-affiliated bank accounts interest rates similar to those they were offered in money market accounts. But subsequently, plaintiffs alleged, the brokerages began to pay lower rates--and also sought to limit customer access to money market accounts. Among other things, the plaintiffs claimed that the brokerages' disclosures about their cash sweep programs were inaccurate and that the brokerages owed their customers a fiduciary duty to place their extra cash in the highest interest-bearing account. The amount that such practices affected? A whopping \$186 billion, according to the plaintiffs.

But Judge Sullivan rejected all of the plaintiffs' claims, citing Second Circuit precedent that establishes that "a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis." He also concluded that the plaintiffs had not shown that the brokerages' disclosures about their cash sweeps programs were materially inaccurate.

We called Samuel Sporn of Schoengold & Sporn, an attorney for the plaintiffs, said that he was studying the opinion and had not yet made any decision about whether to appeal.

Each brokerage had its own counsel, and yes, we are going to give them all a shout-out: Jay Kasner and Scott Musoff of Skadden, Arps, Slate, Meagher & Flom for Merrill Lynch; Allen Burton, Bradley Butwin, and Daniel Cantor of O'Melveny & Myers for Morgan Stanley; Alfred Pietrzak and Andrew Stern of Sidley Austin for Citigroup; Theo Robins and Kenneth Schacter of Bingham McCutchen for Charles Schwab; and Michael Conway, **Cameron Matheson**, and **James Murphy** of LeClairRyan for **Wachovia**.

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