ACLI
Financial Security...for Life.

LIFE INSURANCE, UNCLAIMED PROPERTY and the DEATH MASTER FILE

Toward a Uniform National Framework

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Introduction

Life insurance companies pay billions of dollars annually in claims on life insurance policies. In 2011, life insurers paid out over $62 billion in claims. Of course, when policy benefits go unclaimed, life insurers report the proceeds to the various states according to unclaimed life insurance laws. Historically, state unclaimed property laws and the models on which they are based have recognized that life insurance is not unclaimed until its maturity date, i.e., the date at which the face amount of a life insurance policy becomes payable by either death or other contract provisions. State unclaimed property laws have recognized alternatively that, in the absence of a claim, benefits may become dormant when the insured reaches his or her limiting age. In all circumstances, state unclaimed property laws were interpreted to work coherently and deferentially to policy requirements, based on state insurance laws regarding operation of a life insurance contract.

Over the past several years, state unclaimed property administrators began to assert that life insurance proceeds become due and payable immediately upon the death of the insured and have aggressively demanded significantly accelerated reporting of life insurance benefits to the states. Authorizing contingent fee auditors to examine life insurance companies, the unclaimed property administrators demand that insurers release all of their life insurance and annuity records to them so that the records could be matched to the Social Security Administration's ("SSA") Death Master File (the "Death Master File").

Many insurers questioned the administrators' legal theories of recovery and their proposed examination practices, based on the current unclaimed property laws and insurance codes which have been in place for decades. The insurers questioned the administrators' theories and examination practices concerning when a life insurance policy becomes payable and/or dormant under state unclaimed property laws, the imposition of a purported requirement that insurers use the Death Master File, and the insurer's purported responsibilities respective to a Death Master File match under the terms of a life insurance policy. As the examinations proceeded, insurance regulators also raised concerns about insurer use of the Death Master File, along with where and how life insurers needed to increase their use of the Death Master File, despite insurance code terms to the contrary.

Over the past two years, several court decisions have rejected these assertions by administrators and regulators, finding that, in the absence of legislation to the contrary, insurers are not required to mine external databases in connection with the payment or escheatment of life insurance benefits. Specifically acknowledging that these arguments are contrary to long established insurance code requirements, these courts have reinforced the need for consistency in unclaimed property laws and the need for clarity in the insurance codes.

These issues have become some of the most contentious in the history of life insurance regulation in the United States. Additionally, state legislatures have begun to enact laws specifically requiring insurers to conduct periodic Death Master File searches of their

records, conduct outreach to beneficiaries and to report unclaimed benefits to the states after such search efforts are completed. However, regulators and administrators continue to question life insurers' historic Death Master File use.

This paper provides a historical context to this recent debate, as well as clarification as to existing unclaimed property law related to life insurance and its interface with well-established insurance code provisions governing life insurance policies. The historical background makes clear that unclaimed property laws in the life insurance context have always respected and incorporated insurance law concepts regarding when policy proceeds become the property of
a beneficiary.

This paper makes clear that neither unclaimed property laws nor insurance codes have ever contained any requirement that insurers search for potentially deceased policyholders or otherwise accelerate the contractual claims process or the statutory escheatment schedule in the absence of a claim. This paper also provides recommendations for addressing future Death Master File use in a fair manner through the insurance code amendments, and the impact of such use and regulation on unclaimed property reporting responsibilities for life insurance companies.

ACLI Recommendations at a Glance

- Continue to recognize the vital and historic role of the life insurance claims process.
- The Death Master File should not be required to be used as conclusive proof of death under a life insurance policy.
- Assure that Death Master File search logic is efficient and effective.
- Death Master File use for fraud prevention should not be compared to Death Master File use for assisting beneficiaries.
- Utilize the NCOIL Model Unclaimed Life Insurance Benefits Act as the basis for developing a national framework for identifying Death Master File use standards.
- Consider the ACLI proposed enhancements to the NCOIL Model Act.
- Provide guidance to life insurance companies on lost policy search programs.
- Legislators and regulators should work to improve the integrity of examination processes.
- See Section 5 of this paper for the details about the recommendations.

1. History of Unclaimed Property Law in the United States

Government collection of unclaimed property began in medieval England. Under the doctrine of *bona vacantia,* unclaimed property was required to be passed to the Crown because the benefit to society was considered to be more important than the benefit to the finder or holder of the property.[1] *Bona vacantia* evolved under English common law and carried over to the United States common law. The principles of escheat and *bona vacantia* developed differently in the United States than in England. In 1905, the United States Supreme Court recognized a variation on the *bona vacantia* doctrine by ruling in the case of *Cunnius v. Reading School District*[2] that a state had the right to control the disposition of unclaimed personal property, including intangible property such as stock, bonds and promissory notes. After *Cunnius,* many states began to enact unclaimed property or escheat legislation that addressed the reporting to the state of unclaimed intangible property owned by a person whose whereabouts were unknown.

a. Early Development in the United States—Avoiding Multiple State Claims to Property

In the early 1900s, courts grappled with the issue of whether the state was denying the true owner's due process rights by taking the property after it had been dormant between 12 and 24 years. Courts also addressed the issue of which state had primary authority to collect the property.[3] In these cases, the holder of the property was faced with multiple states claiming a right to the property. Holders challenged the ultimate authority of the states to claim the property on the grounds that the state unclaimed property laws deprived property owners of due process and violated the Contract Clause of the United States Constitution. On multiple occasions, the United States Supreme Court upheld state unclaimed property laws, supporting their procedural due process structures.[4] However, the Court struggled with defining which state had the best claim to the property. Originally, the test for a state's claim of sovereignty was premised on that state's contacts with the obligation.[5] The contacts test ultimately proved unworkable following the practical result of a few Supreme Court cases, especially when life insurance was at issue. Bank account contents and life insurance proceeds would be a key factor in this early litigation. The development of model state unclaimed property laws, and amendments thereto, have tracked these cases.

In one of these early cases, *Anderson Nat'l Bank v. Luckett,* the United States Supreme Court found that a national bank was subject to state escheat laws in the state where bank deposits were incurred or performed, subjecting the abandoned deposits to the state's dominion.[6] "The state statute itself is notice to all depositors of banks within the state, of the conditions on which the balances of inactive accounts will be deemed presumptively abandoned, and their surrender to the state compelled."[7] Thus the abandoned "funds held by a debtor" are what "become subject to escheat."[8]

In 1948, the Supreme Court in *Connecticut Mutual Life Insurance Co. v. Moore,*[9] held that the State of New York could take possession of unclaimed funds due on life insurance policies issued to persons in New York whether the issuing life insurance company was domiciled in New York.[10] The *Moore* case involved a New York unclaimed property statute that deemed life insurance proceeds unclaimed if, in pertinent part, the policy proceeds (i) were "due to beneficiaries under policies" and remained "unclaimed" by the person "entitled thereto" for seven years, or (ii) remained unclaimed after

the insured reached, or would have reached if living, the limiting age on the policy's mortality table.[11] Multiple insurance companies that were licensed in New York, but domiciled elsewhere, challenged the statute's application, based on their lack of presence in the state, as well as under the Contracts Clause of the United States Constitution. The companies argued that the New York statute interfered with the terms of their life insurance policies, which required that due proof of death be submitted before the company's obligation to pay was established.

The *Moore* Court upheld the New York unclaimed property law, concluding that the State of New York had sufficient jurisdiction over the insurance companies and their policies issued to New Yorkers even though the companies were not domiciled in New York. While the Court also held that it was not unconstitutional for the statute to allow the state to collect unclaimed property without submitting due proof of death, the Court acknowledged that the state stands in the shoes of the beneficiary and that its rights to unclaimed property are derivative of a beneficiary's rights to that property once the insured reaches limiting age and no claim is made on the policy.[12] The *Moore* court made no reference to the states having any right to accelerate funds due under the life insurance policy based on the insured's date of death, or requiring the insurers to report funds at any time prior to the insured reaching limiting age, and to date, no court has interpreted *Moore* in this manner. Nothing in the *Moore* decision suggests that an insurance company is obligated to search out any potentially deceased beneficiaries, nor would such a search have been possible in 1948 when the case was decided. Instead, the *Moore* Court presumed that the unclaimed property dormancy period was triggered by a claimant's submission to the insurer of notification of a claim or, in the absence of such a claim, when the insured reached his or her limiting age.[13]

After the *Luckett and Moore* decisions were released, an effort was undertaken through the National Conference of Commissioners on Uniform State Laws (now the "Uniform Law Commission") to bring more uniformity to state unclaimed property laws. These efforts were demanded to protect holders from multiple claims on the same property from various states, and also to bring some uniformity to compliance requirements for companies operating in multiple states.[14] In 1954, the Commission released its first Uniform Unclaimed Property Act (the "Uniform Act," referred to hereafter based on the particular version by year of model adoption).

b. Life Insurance, Limiting Age and the 1954 Uniform Act

The 1954 Uniform Act defined when life insurance proceeds became "[u]nclaimed funds" as "all moneys held and owing by any life insurance corporation" for more than seven years "after the moneys became due and payable." A "life insurance policy not matured by actual proof of death of the insured" is presumed to be matured if the policy remains in force "when the insured attained the *limiting age* under the mortality table on which the reserve is based."[15] The 1954 Uniform Act included terms that were markedly similar to the New York Unclaimed Property Statute that was at issue in *Moore*.[16] The New York statute in that case provided that the dormancy period began to run after the funds became "due and payable." It also required reporting of the funds be made after the limiting age was reached if the policy had not matured by the company's receipt of actual due proof of death.

Clearly, the Uniform Law Commission considered a policy to be "due and payable" when delivery of actual proof of death was made to the insurance company. This is the only inference that can be made with this statutory language, as the Uniform Law Commission provided in the very next sentence that if the

"life insurance policy was *not matured by actual proof of death"* then maturity was "presumed when the insured attained the *limiting age* under the mortality table on which the reserve is based." Experts in statutory construction, along with courts, instruct that a statutory subsection may not be considered in a vacuum but must be considered in reference to the statute as a whole, or *in pari materia,* so that the subject matter is harmonized.[17] Comments by the Uniform Law Commission almost 30 years later also support this conclusion.[18] At that time, the Uniform Law Commission stated that "the 1987 Uniform Act provides that proceeds of a life insurance policy are presumed abandoned if the insurer is aware that the insured has died even if actual proof of death has not been furnished to the insurer. Under the 1966 Act, [same terms as 1954 Uniform Act] these proceeds would not have been reportable until the 103rd anniversary of the decedent's birth." In other words, if the life insurer does not receive due proof of death, then dormancy is triggered after the insured reaches the limiting age.

Prior to adoption of the 1954 Uniform Act, states had begun using *limiting age* as the default dormancy trigger for life insurance, presumably because it was the universally accepted actuarial assumption by insurance regulators and life insurance companies that the insured was deceased. Limiting age, otherwise known as the "omega age," is a common mathematical concept utilized by actuaries in preparing mortality tables for all life insurance products as the age beyond which no one is assumed to live.[19] The limiting age, or omega age, is a key element in determining the duration of investments and reserves for each given policy.[20] In 1941, state insurance commissioners, through the National Association of Insurance Commissioners ("NAIC") worked with the American Academy of Actuaries to develop the Commissioners Standard Ordinary ("CSO") Mortality Table. It was then updated in 1958, and updated again in 1980, 2001 and 2017.[21] Until 2001, the limiting age on the CSO Mortality Tables was age 100. In the 2001 CSO, the maximum age was raised to 121, in light of increasing human lifespan observed by regulators and actuaries.[22] This age of 121 was also used in the 2017 CSO.

Since its adoption in 1941, the CSO Mortality Tables have included a defined limiting age or omega age as an assumption of when the insured will be deceased.[23] Therefore, in 1954, as the Uniform Law Commission evaluated laws such as the New York Unclaimed Property Statute at issue in *Moore,* the Uniform Law Commission relied upon the limiting age as the logical dormancy trigger to utilize for life insurance in the absence of a claim. The 1954 Uniform Act's reference to limiting age as the dormancy trigger alternative to delivery of due proof of the insured's death provided all states with a uniform method of defining when an insured could be presumed deceased and the life insurance contract be presumed unclaimed without prematurely paying the contract proceeds to a state. As described below, limiting age has remained the standard dormancy trigger in all subsequent versions of the Uniform Act, including today's version.

C. Development of Unclaimed Property Law in the United States After 1954

After adoption of the 1954 version of the Uniform Act, states continued to dispute where property should be reported. In 1965, the United States Supreme Court delivered its pivotal decision regarding unclaimed intangible property in the case of *Texas v. New Jersey.*[24] The Court adopted a simple two-part test, known as the Primary Rule and the Secondary Rule, to determine the priority of state claims to uncased checks and to resolve the multiple state claims on them. The Court instructed that, under the Primary Rule, unclaimed intangible property first escheats to the state of the true owner's last-known address, if such address is known.

If the holder has no record of the true owner's address or if the state of the true owner's last known address does not provide unclaimed property reporting, then, under the Secondary Rule, the property escheats to the state of the holder's incorporation.[25] The United States Supreme Court has upheld the ruling in *Texas v. New Jersey* in two subsequent decisions: *Pennsylvania v. New York*[26] and *Delaware v. New York*.[27] In the past 40 years, revisions of the Uniform Act have been made in conjunction with these United States Supreme Court rulings in a continuing effort to clarify jurisdiction and priority of rights to unclaimed property among the states.[28] Despite these numerous revisions, after each review by the Uniform Law Commission, life insurance reporting has been treated consistently since 1954, with minimal amendments.

d. Uniform Act After 1954—Amendments in 1966, 1981 and 1995

Today, 44 states have enacted at least one version of the Uniform Act. There are still a handful of states, including Delaware, Kentucky, Massachusetts, New York, Ohio, and Texas, that have not adopted any form of these Uniform Acts.[29] However, many similarities remain in all of the laws, whether or not the state has adopted the Uniform Act, especially with regard to the reporting requirements for life insurance.

After the *Texas v. New Jersey* decision, a second version of the Uniform Act was released in 1966 in order to codify the jurisdictional rules adopted by the United States Supreme Court in that case. The 1966 Uniform Act included various amendments to assist holders with avoiding the problems of multiple liabilities and the "race of diligence" made possible by the decisions in *Moore* and other cases.[30] Despite many other contentious issues, the 1966 Uniform Act maintained the same definition of "unclaimed funds" and dormancy period for life insurance.[31] According to the Commission's Official Comments for the 1966 Uniform Act, clarification of the state jurisdictional test for unclaimed funds held by insurance companies was not needed because it was impractical for insurers, based on the standard methods that were used by life insurers to pay claims under their policies.[32]

After 1966, the Uniform Act was amended again in 1981. The 1981 Uniform Act was updated primarily to reflect comments made by the United States Supreme Court in *Pennsylvania v. New York*[33] and recognized that the Secondary Rule (if the owner's address is unknown then property is reported to the state of incorporation) would provide holders with consistency in their reporting efforts.[34] The 1981 Uniform Act also reflected a tendency among state legislatures to reduce dormancy periods, typically from seven to five years.[35]

The 1981 Uniform Act maintained the primary definition of unclaimed life insurance, still including "limiting age" as the primary dormancy trigger in the absence of a claim but adding "knowledge of death" as an additional dormancy trigger. The 1981 Uniform Act provided that "[f]unds held or owing under any life or endowment insurance policy or annuity contract" are "matured and the proceeds payable" on the occurrence of (1) maturation by "*actual proof of death* …according to the records of the company;" (2) "when the company *knows* that the insured … has died," or (3) when "the insured has attained, or would have attained if he were living, the *limiting age* under the mortality table on which the reserve is based."

As noted above, this revision was the first time the Uniform Law Commission discussed its understanding of limiting age. The Commission also acknowledged that an insurance company may receive information on an insured's death through an incomplete claims process or otherwise, and commented that such knowledge would become a dormancy trigger.[36]

In 1993, the United States Supreme Court made its last pronouncement on unclaimed property in its *Delaware v. New York*[37] decision, again upholding the jurisdictional rules it established in *Texas v. New Jersey.* Thereafter, in 1995, a fourth version of the Uniform Act was adopted by the Commission. The 1995 Uniform Act attempted to state presumptions of dormancy more succinctly but again did not alter reporting responsibilities greatly for life insurers.[38] The 1995 Uniform Act maintained, as in all prior Uniform Acts, that life insurance benefits qualify as unclaimed property after the relevant dormancy period has run. However, it removed "knowledge of death" as a dormancy trigger. It also shortened the duration of the dormancy period from five to three years.[39] The Commission's comment in the 1995 Uniform Act regarding the definition of unclaimed property, including life insurance, indicates that all modernizing changes since 1981 were made for administrative simplicity, not to indicate any difference with how unclaimed property obligations would be calculated.[40]

Recently, at least one state unclaimed property administrator has concurred with this historic analysis. On April 21, 2014, the Wisconsin Department of Revenue (Wisconsin DOR") issued Fact Sheet 6100, "Unclaimed Property – Life Insurers and DMF Searches" ("Fact Sheet").[41] Interpreting Section 177.07 of Wisconsin Unclaimed Property Code, based on the 1981 version of the Uniform Act (the "Wisconsin Code"), the Wisconsin DOR indicated that the Wisconsin Code only recognizes a life insurance policy or annuity contract to be mature based on the insurer's records, and does not require the company to conduct an independent Death Master File search order to identify a life insurance policy or annuity contract that has not matured through actual proof of death. The Fact Sheet clarifies that if an insurer uses the Death Master File and learns of an insured's death, the date of the match is considered to be the applicable dormancy trigger. The Fact Sheet also provides that, in the absence of a Death Master File match, if the insurer does not have independent information on the insured's death, then the applicable dormancy trigger for such policy, if it remains unclaimed, would be the insured's limiting age.[42]

Thus, since 1954, the Uniform Act has treated life insurance in a similar manner, continuing to use the limiting age, or omega age, as the default age when unclaimed life insurance is required to be reported to the state, while also assuring that both the owner's rights are protected and life insurance companies are not subject to multiple claims from states for a single policy. As a result, many life insurance companies maintain unclaimed property reporting and compliance structures that have followed reporting rules that have remained unchanged by state legislatures for decades. At no time has the insured's date of death been used or even considered as an alternative dormancy trigger. Likewise, no insurance code provision has required life insurers to affirmatively seek to determine whether or not their insureds were deceased for unclaimed property due diligence or reporting purposes. Therefore, concerns raised in the past several years by life insurers when contingent fee auditors alleged alternative interpretations of state unclaimed property laws were well founded. Also, demands by unclaimed property administrators that life insurance companies report unclaimed life insurance based on the insured's date of death, rather than limiting age, are merely efforts to accelerate the reporting of unclaimed life insurance outside the bounds of existing law in any state.

e. Unclaimed Property Reporting and Reliance on Existing Books and Records

Unclaimed property auditors also wrongfully assert that life insurance companies have been uncooperative in recent unclaimed property examinations because the insurers have balked at providing all of the company's customer records so they can be matched against the Death Master File. Insurers' assertions were based on solid and long established precedent that states may only require that property holders base their unclaimed property reporting on the holder's existing books and records.

As noted above, the United States Supreme Court has established choice of law rules to limit efforts by a state to force a holder of unclaimed property to generate new information in order to establish reporting liability to that particular state. The underlying premise of the Court's decisions in *Texas v. New Jersey, Pennsylvania v. New York,* and *Delaware v. New York,* was that simple and consistent rules must be applied to all unclaimed property reporting.[43] In two of these decisions, the Court ruled, in part, that a holder's "books and records" may never be defined to include any external sources of information in order to resolve an unclaimed property reporting dispute or creation of records not maintained in the ordinary course of business or as required by law.[44]

In *Pennsylvania,* the United States Supreme Court was asked to settle a dispute between New York and Pennsylvania regarding unclaimed money orders. Pennsylvania asserted that unclaimed money orders issued in Pennsylvania should be paid to Pennsylvania, even if Western Union did not have the sender's records. The lack of a last known address would arise when Western Union accepted cash for a money order and did not record the sender's address.[45] Pennsylvania proposed that the sender's address be presumed as Pennsylvania and reported to the State of Pennsylvania, due to Western Union's inadequate records. The Court rejected Pennsylvania's claim and determined that only the holder's existing records could be used in making the choice of law determination. The Court stated that:

> … to vary the application of the *Texas* Rule[s] according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided –that is to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts. [46]

In *Delaware v. New York,* over $360,000,000 in unclaimed dividends held by financial intermediaries such as stock brokers were at issue.[47] The intermediaries held the securities upon which the dividends were paid in a "nominee name" or a "street name," and recorded transfers of the underlying securities, along with all other transactions related to such securities, in book entry form, rather than through physical transfers. Periodically, the intermediaries were unable to distribute small portions of the dividends to the true beneficial owners. Most intermediaries were incorporated in Delaware, but had their principal places of business in New York. Delaware brought suit, seeking recovery of the monies reported to New York based on the Secondary Rule (if the owner's address is unknown, the unclaimed property is reported to the state of the holder's incorporation). New York argued that it should retain the unclaimed dividends because a significant number of holders were likely to be New York residents.

New York proposed to use statistical sampling of broker transactions to establish the residency of the true owners of the funds, in order to avoid the time and expense it would take to reconstruct the transaction records.[48] The Court rejected New York's proposal to use statistical sampling data [beyond the records of the holder] to prove the last known addresses of debtors because "in *Pennsylvania v. New York,* we expressly refused 'to vary the application of

the [primary] rule according to the adequacy of the debtor's records.' And we decline to do so here." The Court commented that New York and other States could have anticipated and prevented some of the difficulties stemming from incomplete debtor records, for nothing in our decisions "prohibits the States from requiring [debtors] to keep adequate address records."[49]

All versions of the Model Act also support this analysis. The 1954 Model Act provides that "Section 3, dealing with unclaimed funds held by insurance companies, establishes as the jurisdictional test for the purposes of the section the fact that "the last known address, *according to the records of the corporation,* of the person entitled to the funds is within the state… accordingly, jurisdiction is conferred upon the state of the *last recorded address* of the person entitled."[50] In the 1981 and 1996 Model Act, the Commission commented that

> "[t]he right of a State to claim abandoned property depends on the information in the holder's records concerning the apparent owner's identification. It is of no consequence that without notice to the holder, the owner may have transferred the property to another person. In *Nellius v. Tampax, Inc., 394 A.2d 233 (Del. Ch. Ct. 1978),* the court held that the address of the apparent, not the actual, owner controlled. The holder is not required to ascertain the name of the current owner or resolve a dispute between the owner of record and a successor contesting ownership."[51]

Therefore, claims by state unclaimed property regulators that life insurance companies are being uncooperative when failing to deliver all customer records for a matching exercise with the Death Master File has not historically been supported by well-established precedent from the United States Supreme Court or by any state unclaimed property law. In fact, such demands run counter to all established law affecting the unclaimed property reporting responsibilities of life insurance companies.

Recently, an important ruling on these issues was made in *Thrivent Financial for Lutherans v. Chiang, et. al.* (Case No. CGC13535156, Aug. 28, 2014). California Controller Chiang was demanding that the insurance company produce all its books and records to enable the regulator to search them against the Death Master File for unclaimed property. The Superior Court of California, County of San Francisco, denied the Controller's Motion for a Preliminary Injunction, stating that the Controller had not sufficiently established a likelihood of success on the merits or that the people of California would suffer irreparable harm if the preliminary injunction was not issued. The insurance company's defense at oral argument was based on strategies that differed from the other insurers taking a stand against the Controller. Thrivent raised arguments related to the constitutionality of the Controller's demands for information and privacy concerns, and those concerns resonated with the Court.

At the outset of the oral argument hearing, the Controller's counsel argued that Thrivent was totally uncooperative and refused to provide a single response to the Controller's demand for information. The Court fired back, "… and I don't blame them. I wouldn't either. The Controller's demands are the equivalent to 'we are the government and we can get everything we want, whenever we want, and however we want.' There are constitutional limitations on a subpoena and there have to be limits on what can be demanded here…like where the insurer has death certificates or where the insured is an age where he is presumed dead." The Controller's counsel made several arguments, including several assertions and comments that could not be supported by the record (which the Court recognized). The judge was very well prepared and had read all submissions carefully. Ultimately, the court ruled in the insurance company's favor and issued the order on September 2, 2014.

2. The Social Security Administration's Death Master File

The SSA Death Master File has become a focal point of the regulatory debate in recent years as to whether an insurance company must periodically review its records to identify unclaimed life insurance and annuities prior to the date when the insured reaches his or her limiting age. The following section provides background on the Death Master File, its origins, composition and historic uses along with recent amendments to federal law that impact the ability of businesses to access it.

The Death Master File was created by SSA to assure that SSA was not making Social Security benefit payments to deceased persons.[52] Congress provided SSA with authority to create the Death Master File and authorized it to compensate states that provide SSA with Death Master File information.[53] As a result, all 50 states, New York City, the District of Columbia and Puerto Rico submit death information to SSA for the Death Master File.[54] The Death Master File contains first and last name, date of birth and Social Security Number of individuals in the United States who are voluntarily reported to SSA as being deceased by family members, representatives, funeral homes or state health officials. Until 1988, the Death Master File contained information regarding the state of the deceased person's address, but this information was removed after November 2011.

SSA makes the Death Master File available to agencies of the federal government, as well as to the public, in a variety of forms. The Death Master File is available to a number of other government agencies that must use the Death Master File before making any payments to individuals, pursuant to the requirements of the Improper Payments Elimination and Recovery Improvement Act of 2012.[55] In 1980, SSA began to make the Death Master File available publicly, by subscription, through the United States Department of Commerce's National Technical Information Service ("NTIS").[56] Subscriptions are available on an annual basis, with weekly, monthly and quarterly updates through NTIS. Effective March 26, 2014, new Death Master File restrictions adopted as part of the Bipartisan Budget Act of 2013 ("Section 203") went into effect so the Death Master File remains public but is now subject to significant new limitations, as discussed further below.

a. Death Master File Size and Accuracy

The Death Master File is a sizable file, containing over 86 million records, but has increasing issues with its accuracy, based on limited data controls, periodic human error and recent limitations placed on its source documents.[57] On November 1, 2011, NTIS issued a public notice that SSA had removed over 4.2 million records from the Death Master File because the records were deemed to be "protected state records" under Section 205(r) of the Social Security Act.[58] NTIS also reported that this records removal policy would annually eliminate an estimated 1 million future death records from the Death Master File, which experts estimate will impact an estimated 40 percent of deaths that might otherwise have been reported in the Death Master File.[59] Additionally, SSA's removal of "protected state records" from the Death Master File has decreased the accuracy of Death Master File searches from almost 100 percent prior to the SSA removal of "protected state records" to 34 percent accuracy after the removal.[60]

The Death Master File has accuracy issues due to SSA's limited internal controls over the data that is reported by the states and other voluntary sources, such as funeral homes or family of Social Security recipients. In a recent report, the General Accounting Office ("GAO") commented

that the "SSA does not independently verify all reports before including them in its death records" and therefore "risks having erroneous death information in the Death Master File, such as including living individuals in the file or not including deceased individuals."[61] As a result, the GAO found that from May 2007 to April 2010, over 36,000 individuals were incorrectly reported as "deceased" on the Death Master File due to reporting or data entry errors. The GAO also found that SSA did not verify death records if an individual was not a Social Security recipient.[62] In 2009, SSA's Inspector General made similar findings regarding SSA's data entry accuracy.[63]

The Death Master File is utilized by scientists and others in many industries to conduct mortality studies. Over the past decade, academic researchers utilizing the Death Master File have cautioned that, while the Death Master File includes useful information, it has many limitations. Among recent observations of researchers are the following:

- The Death Master File is more accurate for individuals over 65, but less accurate for younger individuals (0-24).[64]
- The Death Master File is more likely to be accurate for men (95%) than women (93.3%).[65]
- The Death Master File is less likely to be accurate for foreign born males (83.3%) and females (77.8%).[66]
- African Americans have odds as high as 68% of being excluded from the Death Master File.

Thus, historic limitations combined with more recent deletions of material from the Death Master File make it much less accurate than it was as recently as a couple years ago.

b. Uses of the Death Master File by Financial Service Industry

For many years, the financial service industry, including banks, insurance companies and pension funds, have utilized the Death Master File in a targeted manner similar to the SSA – to prevent fraud and attempt to avoid paying pension and other financial product proceeds to deceased recipients. With many product structures, financial service providers; including life insurance companies, must assure that, upon the death of the account owner or insured, the payment is appropriately transferred to the designated beneficiary in order to avoid fraud, as well as adverse tax or legal consequences for beneficiaries.[67] Insurance regulators have historically encouraged life insurance companies to validate that a customer's Social Security Number remains active, via checking the Death Master File, in order to prevent fraud. Life insurance companies will validate a customer's Social Security Number when considering a policy or annuity contract application in order to prevent identity theft and indemnity fraud. In each instance, the company will check specific portions of the mammoth 86 million record file, often through third party vendors, to identify particular records that may require additional verification.

The financial service industry, including life insurance companies, also uses the Death Master File in order to comply with specific laws and regulations. Legal requirements such as complying with the USA PATRIOT Act, Customer Identification Program and Bank Secrecy Act to prevent money laundering and terrorist activities are a few reasons why various searches at various frequencies are conducted on the Death Master File. Again, these uses are targeted to verification of specific records. Life insurance companies also use the Death Master File to: (i) comply with the various state laws that require use of the DMF or comparable data base; (ii) comply with the terms of settlement agreements under which certain companies

have agreed to use the DMF; and (iii) perform mortality, biometric and other studies and research vitally important to the underwriting and administration of policies. This research is often conducted using aggregate and de-identified data. Conversely, no governmental or private entity, including state unclaimed property administrators, use the Death Master File to initiate claims payments and continue to require death claims to be filed with them by beneficiaries. Further, given the issues of the Death Master File's accuracy and size, control of the file could not be attributed to a life insurance company.[68]

c. NTIS Certification for Access to the Death Master File

Starting in 2014, public availability of the Death Master File was altered dramatically by the enactment of Section 203. Under Section 203, Death Master File information that is three or more years old, known as "Open Access DMF Information" is not limited as to its public availability.[69] However, Death Master File information containing data on individuals who have died within the past three years, known as "Limited Access DMF Information," is only available to businesses that are certified by NTIS as meeting certain stringent data use and security requirements.[70] NTIS issued interim final rules (the "Interim Rules") to implement Section 203.[71] Under Section 203 and the Interim Rules, immediate access to Limited Access DMF Information is limited to private entities that (1) will utilize the data for either legitimate fraud prevention interest or for a "legitimate business purpose pursuant to a law, regulation, governmental rule or fiduciary duty," and (2) maintain internal security standards that are similar to those outlined in 6103(p)(4) of the Internal Revenue Code.[72] Section 203 contains no exceptions for state or local governments.

NTIS requires all Limited Access Death Master File subscribers or licensees to certify their ability to comply with Section 203 and the Rules directly to NTIS. If anyone obtains Limited Access Death Master File data from a third party licensee or any other source, the recipient must provide the licensee with assurances that the recipient is in compliance with Section 203 and the Rules. NTIS is authorized to audit compliance of any certified entity without prior notice, and can assess the users acting in violation of Section 203 with fines of up to $250,000 ($1,000 per violation).[73]

3. Life Insurance, the Requirement for Due Proof of Death and Death Master File Matches

a. Due Proof of Death

Unclaimed property administrators have asserted that since a life insurance policy obligation becomes payable on the date of death, a Death Master File match to the insured can serve as a "proof of loss" to trigger the insurer's requirement to make payment under a policy immediately.[74] Based on this argument, the administrators also claim that they no longer need to await the beneficiary to make a claim, nor wait until the insured reaches his or her limiting age.[75] Such assertions have been at the root of the many multi-state unclaimed property examinations of life insurance companies initiated in the past four years. This theory of recovery is significantly flawed and raises numerous concerns. A recent ruling in *Thrivent Financial for Lutherans v. State of Florida, Department of Financial Services* rejected such assertions as made by the Florida Department of Financial Services.[76]

In the *Thrivent* case, the District Court of Appeals for the First District held that the Department of Financial Services' interpretation of Florida's Unclaimed Property statute that date of death is the Florida dormancy trigger was clearly erroneous under a plain language reading of the statute. The court affirmed that life insurance proceeds become "due and payable" as unclaimed property only (1) at the time the insurer receives proof of death and surrenders the policy, (2) when the insurer knows that the insured has died or (3) when the insured attained, or would have attained, the limiting age. The court further rejected the Department of Financial Services' argument that proceeds become "due and payable" at the time of the insured's death as it would render the alternative to receipt of a claim portion of the statute meaningless. The court went on to note the Department of Financial Service's argument was contrary to the Florida Insurance Code, citing the well-known statutory construction principle that "[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another."[77] The court also found that an insurer does not have an affirmative duty to search death records to identify deceased insureds, stating "this Court may not rewrite statutes contrary to their plain language."[78]

As discussed above, this theory of recovery is contrary to law that has been established for decades. Also, unclaimed property administrators must effectively re-write the state insurance code product standards, along with all life insurance contracts, in order to support this theory, in contravention of established principles of statutory construction. Nonetheless, the administrators' efforts to effect examinations that include these assertions continue unabated, despite increasing insurer litigation and court opinions to the contrary.

Since the early 1900s, most insurance codes have mandated that life insurance policies are required to include terms specifying that a proof of claim in the form of "due proof of death" of the insured is required to be filed with the company in order to trigger the insurer's obligation to adjust and pay the claim.[79] Many standards specify that "settlement shall be made upon receipt of due proof of death and, at the insurer's option, surrender of the policy and/or proof of the interest of the claimant."[80] Some statutes specify the maximum amount of time within which the insurer must pay the claim after it receives due proof of death.[81] Other states also allow for the insurance policy terms to require surrender of the policy before the claim can be paid.[82]

The product standards established by the Interstate Insurance Product Regulation Commission ("IIPRC"), a multi-state governmental entity effective in 44 states which establishes and maintains life insurance product standards that are effective by operation of law in all of its member states,[83] are indicative of the product standards that are generally applicable in most states. Each IIPRC product standard requires a life insurance policy to specify if due proof of death is required to trigger a claim payment.[84] The IIPRC life insurance product standards also specify that "due proof of death" is defined to mean a "certified death certificate or other lawful evidence providing equivalent information."[85] The IIPRC's life insurance product standards apply in states representing over 70 percent of the premium volume for the United States, thus making the standards controlling for most of today's individual life insurance products. These standards, enacted within the past decade, follow a century-old practice of insurance regulators requiring a beneficiary to submit due proof of death to the insurance company before the insurer's obligation to pay on the policy is triggered.

Courts have also recognized a life insurer's ability to require due proof of death as a proof of loss, along with proof of the claimant's interest, before a claim can be settled. Courts have observed that these requirements are in

place to assure that the insurer can adequately reserve for the claim, and also so the insurer can protect against fraudulent claims.[86] In the unclaimed property context, courts have also recently recognized that due proof of death must be presented before an insurer is required to pay a claim, or to create unclaimed property reporting liability prior to limiting age. Generally, every judicial review of every aspect of controversy between insurance companies and unclaimed property authorities has upheld the insurance company's interpretation of the law. A brief, national overview of the unclaimed property litigation is appended. See Appendix 1, Unclaimed Property Litigation Overview. The one exception is a decision by the West Virginia supreme court in 2015

In *Perdue v. Nationwide Life Ins. Co., et.al.,*[87] the Treasurer for the State of West Virginia brought suit against over 60 life insurance companies, claiming that the companies had a duty to utilize the Death Master File to identify deceased insureds, then report any unclaimed life insurance proceeds calculating dormancy under the policy based on the insured's date of death. The trial court rejected the State's contentions. The trial court held that, under established principles of statutory construction, statutes addressing the same subject (here, the West Virginia insurance code and the West Virginia unclaimed property code) must be interpreted together in a manner that harmonizes them.[88] Specifically, the trial court rejected the state's argument that insurers have an affirmative duty to check the Death Master File for deceased policyholders. Looking at the two relevant insurance code provisions, the court concluded that only two events trigger the creation of unclaimed property in the life insurance context: proof of death or reaching the policy's limiting age. Because policy payouts are not required until one of those two events occur and there's no provision requiring the insurance companies to check the Death Master File, the court held that no such affirmative duty exists.[89]

However, in June, 2015, the West Virginia supreme court reversed the trial court's decision. The supreme court wrote that the lower court had erred by construing the unclaimed property act "*in pari materia* with the inapposite provisions of the Insurance Code directed solely at the contractual relationship between insurer and insured, and not purporting" to govern unclaimed property administration. The supreme court also rejected the state's assertion that there is an affirmative duty to check the Death Master File. The court concluded that the state's unclaimed property act simply "requires insurers generally, as holders of property presumed abandoned, to account for and turn over that property" to the state. Each insurer may determine whether its policyholders are alive or dead in the manner it finds the "most economical and reliable," and "an insurer may well choose to review the Death Master File. as the best or most efficient way to perform its duties under the Act." If the insurer fails to properly turn over unclaimed property to the state, it is subject to the applicable penalties. The court then remanded the case to the trial court with instructions that after the insurer has had the opportunity to answer the state's complaint, the treasurer may audit its books to determine whether it has complied with the unclaimed property act. If so, no problem will be found. If not, the circuit court should proceed with a determination of whether the noncompliance was willful as opposed to an inadvertent misstep made without negligence, and assess the appropriate penalties.

The West Virginia Supreme Court decision is dissonant with other judicial decisions. For example, in *Feingold v. John Hancock Life Ins. Co.*[90], a federal court dismissed claims by a plaintiff/beneficiary that the life insurance company which issued a policy to his mother was required to periodically check the Death Master File to determine if its insureds were deceased. The court held that, under Massachusetts and Illinois law,[91] an insurer's

practice of requiring the life insurance policy beneficiary to submit proof of death and a claim before the insurer's duty to make payment under the policy comported with both Massachusetts and Illinois insurance law. "Both the insurance policy and state law allowed [the insurer] to hold the policy proceeds until [the beneficiary] provided proof of death."[92] The United States Court of Appeals for the First Circuit upheld the district court's decision that an insurer is legally entitled to require a claim and proof-of-death before the insurer affirms or denies coverage.[93]

Again, in *Total Asset Recovery Services, LLC v. Metlife, Inc., et al.* (ruling regarding Prudential Financial, Inc.), a Leon County, Florida court ruled that, under Florida's Unclaimed Property Code (based on the 1981 version of the Uniform Act), a life insurer was required to remit unclaimed life insurance proceeds when the insurer either (1) had actual knowledge that the insured had died more than five years after the insurer received such knowledge, or (2) the insured had reached, or if living would have reached his or her limiting age, the policy remained in force and the insurer had not received any contact from the insured in the two years prior.[94] The court also ruled that "Florida has not adopted a law requiring [the insurer] to consult the Death Master File." Nor has Florida adopted "a law imposing an obligation on [the insurer] to engage in elaborate data mining of external databases . . . in connection with payment or escheatment of life insurance benefits."[95] As a result, the court upheld the historic interpretation of the 1981 version of the Uniform Act that, in the absence of maturity/claim, life insurance only becomes "due and payable" as unclaimed property when either the insurer has knowledge of the insured's death or the insured, if living, would reach his or her limiting age.

Thus, the unclaimed property administrators' argument that a life insurance company is required to make payment on a policy as of the insured's date of death is not credible, and is contrary to long established insurance code requirements, and contracts developed in accordance with such laws. A life insurer's duty to pay a claim is triggered after receipt of a claim and due proof of death. The administrators' arguments attempt to circumvent the insurance code requirements and short change the beneficiary's rights to make a claim in an attempt to have the life insurance proceeds reported to the states on an accelerated basis.

b. NCOIL Unclaimed Life Insurance Benefits Act

Over the past four years, state legislators have worked to reconcile the administrators' increasing expectations associated with life insurer use of the Death Master File with the long established proof of claim requirements in state insurance codes and in most life insurance policies. In 2011, the National Conference of Insurance Legislators ("NCOIL") adopted the Unclaimed Life Insurance Benefits Act (the "NCOIL Model Act") in an effort to achieve this reconciliation on a national and uniform basis. The NCOIL Model Act is derived from an original multi-state settlement agreement that was entered into by regulators with a major life insurer. Since 2012, 19 states have adopted the NCOIL Model Act, or a variation of it. These states include Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Maryland, Mississippi, Montana, New Mexico, Nevada, New York, North Carolina, North Dakota, Rhode Island, Tennessee, Utah and Vermont, with their effective dates starting in 2013 and continuing into 2016.[96]

The NCOIL Model Act recognizes the long established proof of claim process, specifically providing that, within 90 days of making the Death Master File match, the insurer must:

> "provide the appropriate claims forms or instructions to the beneficiary or

beneficiaries to make a claim including the need to provide an official death certificate, if applicable under the policy or contract."[97]

The NCOIL Model Act requires life insurance companies to match periodically the Death Master File against their life insurance customer records. The NCOIL Model Act also requires insurers to conduct outreach to insureds or their beneficiaries in the event of a match in order to assist beneficiaries with making a claim. Further, the Model narrowly distinguishes between product lines for which Death Master File searches are appropriate and those for which such searches are unnecessary, inefficient or nonsensical.[98]

The NCOIL Model Act, as enacted by the various states, is the only law of its kind that specifically requires life insurance companies to match the Death Master File against certain customer records and conduct outreach to their customers before a claim is made on a policy. The NCOIL Model Act makes no attempt to alter the long-established life insurance product standards regarding the claims process and the triggering of an insurer's obligation to pay under the policy. Rather, it effectively recognizes of the importance of the claims review process, including a requirement that a valid proof of death be provided by the beneficiary, per the policy terms. The NCOIL Model Act also provides a "knowledge-based" dormancy trigger for the insurer to use to plan for its unclaimed property reporting obligations by requiring insurers to report unclaimed life insurance benefits after the Death Master File match and outreach are completed. As a whole, the NCOIL Model Act provides life insurers with operational uniformity and consistency among the states, which allows insurers to more efficiently perform Death Master File searches, identify matches and act affirmatively to located beneficiaries and assist them with the claims process. The NCOIL Model Act requires life insurers to periodically search the Death Master File against all active life insurance and annuity files to determine whether insureds are deceased and, in the event of a Death Master File match, to locate beneficiaries. Some states have enacted the NCOIL Model Act in a format that only applies to newly issued policies and contracts, or prospectively, in order to avoid concerns that the statute is a retroactive legislative requirement and also to limit burdens on small companies.[99]

But even modern state enactments of laws based upon the NCOIL Model Act face rigorous testing by insurance companies defending traditional legal principles. On August 15, 2014, for example, the Kentucky Court of Appeals issued an opinion *United Insurance v. Commonwealth of Kentucky, et al.,* reversing a Circuit Court declaratory judgment in favor of the Commonwealth of Kentucky and the Kentucky Department of Insurance (United Ins. Co. of America; The Reliable Life Ins. Co. and Reserve Nat'l. Ins. Co. v. Commonwealth of Kentucky, Dept. of Ins. and Sharon P. Clark, in her official capacity as commissioner of the Kentucky Dept. of Ins., Case No. 2013-CA-000612-MR, Aug. 15, 2014). The Court's analysis of Kentucky unclaimed property law lends additional support to the long-standing history of requiring proof of death before insurers commence claims and to trigger the dormancy period for unclaimed life insurance benefits.

The insurers on appeal in United Insurance challenged the retroactive application of the modern state Unclaimed Life Insurance Benefits Act, KRS 304.15-420 (the "Act"), to policies which were issued prior to January 1, 2013 (the "Effective Date"). The appellant insurers argued that the Act was not expressly intended to be retroactive, and that retroactive application of the Act's requirements would modify unconstitutionally their rights and obligations under existing contracts. The Kentucky Court of Appeals did not base its decision on any constitutional grounds because non-constitutional grounds could be relied upon. The Court found that the Act does not provide

for retroactive application on its face, nor that retroactivity was the intended result. The Court further concluded that the Act's requirement to escheat any unclaimed life insurance benefits or retained asset account within three years of a Death Master File match constituted a substantive change to the existing insurer's obligation to pay death benefits only upon receipt of notice and due proof death. The Court emphasized the importance of protecting the existing life insurance contract. The Act's new requirements affecting the contractual relationship between insurer and insured was found to be a substantive, not remedial, alteration and thus only applicable to insurance policies which were in force at the time of or after the Act's Effective Date. Thus, the Court reversed the Circuit Court's decision. This reversal strongly supports the need for uniform application of unclaimed property laws on a prospective basis.

4. Life Insurance Companies and Death Master File Use

Some regulators have asserted that, where life insurance companies use the Death Master File for fraud prevention purposes, such as against matured annuities whose owners are receiving periodic payments, they also have an implied legal obligation to search the Death Master File against all of the company's other files, to assure "symmetrical use" of the Death Master File. There is no dispute that such a requirement now exists in the states that have adopted the NCOIL Model Act, but existing laws in states that have not adopted the NCOIL Model Act do not give rise to such an obligation. Regulators in some of these states have asserted that life insurers that only check files regarding the annuity owner who is the subject of a Death Master File match, but not for other customers, are using the Death Master File "asymmetrically" and are thereby violating existing law. These assertions misinterpret both existing law and insurance contract terms.

In accordance with the state insurance laws noted above,[100] life insurance policies nationwide have, for decades, included contractual provisions establishing that the claimant must furnish due proof of death to the life insurer as a condition precedent to the insurer's investigation and payment of the claim. Thus, as a matter of contract, the life insurer "has no duty to make an independent investigation to determine if the beneficiary is entitled to make a claim" before due proof of death is received.[101]

Several recent court decisions have recognized that this contractual language grants the life insurer a contractual right to require receipt of due proof of death as a condition precedent to the claim process. For example, in 2012, in *Andrews v. Nationwide,* the Court of Appeals of Ohio upheld the ruling of two lower courts that there is no contractual duty for a life insurance company to periodically review the Death Master File to determine if an insured is deceased.[102] The *Andrews* court upheld the lower court's finding that the life insurance contracts at issue "create a clear and unambiguous condition precedent, in accordance with Ohio law, that requires, among other things, that appellants provide [the insurer] with proof of death for their life insurance claims to be honored. It is clear from the contracts, as well as from the case law, that the standard language used places the burden on the claimant or the beneficiary to produce the proof of death. Thus, "obligating [an insurer] to solicit or gather information pertaining to an insured's death" is not only contrary to existing state insurance law, but is also "contrary to the terms contained in the insurance policy."[103] The court refused to import additional unspoken duties and obligations onto the insurance company that conflicted with the parties' contracted terms

in the absence of legislative or administrative regulatory action.[104]

Similarly, in *Feingold v. John Hancock Life Ins.,* the district court specifically held that under the Massachusetts and Illinois Insurance Codes unfair claims practice requirements "an insurance company may only be held liable for committing an unfair practice if it fails to affirm or deny coverage 'after proof of loss statements have been completed.'"[105]

Thus, both *Andrews* and *Feingold* flatly rejected the allegation that insurers have a contractual duty to search the Death Master File as a means of identifying deceased insureds. As the court in *Feingold* explained, "established principles of insurance law" give insurers the contractual right to "require a beneficiary to furnish 'due proof of loss'...before paying policy proceeds."[106] Thus, an insurer's "practice of holding policy proceeds until receiving proof of the insured's death" comports with both state law and the terms of the insurance policy.[107] Consequently, there are no historical requirements for "symmetrical" use of the Death Master File, especially on a file for file basis.

Andrews and *Feingold* refute the contention that there were historical requirements for "symmetrical" use of the Death Master File, especially on a file for file basis. They also refute the argument that existing laws in states that have not adopted the NCOIL Model Act require insurers to perform Death Master File searches or locate beneficiaries before proof of death is received from a claimant. Further, claims regarding cooperation in unclaimed property examinations appear to have been developed to support assertions that life insurers should have been producing records that were well outside the scope of a state unclaimed property administrator to obtain. Likewise, claims regarding so-called "asymmetric use" were also constructed to provide the appearance of a legal violation, where none existed. If unclaimed property administrators were not authorized to review all life insurance company records and match them against the Death Master File in order to identify when insureds were deceased, and nothing in the state insurance codes defines limitations on "asymmetric use," then the issues currently being debated at least call for states to adopt clear and uniform standards to define their expectations regarding life insurance company use of the Death Master File. Recommendations for such standards are discussed below.

5. Discussion and Recommendations

Based on the observations and analysis above, the following recommendations are provided to state legislators, insurance regulators and state unclaimed property administrators regarding their review of the appropriateness and role that the Death Master File can play in the life insurance policy administration and claims process, and how this role can impact existing requirements of state insurance codes.

a. Continue to Recognize the Vital and Historic Role of the Life Insurance Claims Process

Life insurance companies have been subject to unclaimed property laws that, for at least the past 70 years, have remained relatively unchanged except for periodic reductions of the dormancy periods set forth in such laws. These unclaimed property laws have recognized that a fundamental tenet of state insurance law and practice is to require life insurance policies to require delivery of due proof of death to the insurance company before its obligation to make payment under the policy arises. The fundamental tenets of life insurance support a claims process that allows the insurer to obtain due proof of death in order to initiate the claims

process. These fundamental tenets should continue to be supported in any proposed amendments to state insurance codes or unclaimed property laws.

b. The Death Master File Should Not Be Required to be used as Conclusive Proof of Death Under a Life Insurance Policy.

In light of the various and substantial restrictions on access to the Death Master File, along with the continuing accuracy issues with the Death Master File caused by limitations on state-based content and from human error, the Death Master File cannot be used as conclusive "due proof of death" under a life insurance policy. The NCOIL Model Act supports this tenet. Whether through adoption of the NCOIL Model Act or otherwise, insurance regulators must be aware of the effort by state unclaimed property administrators and their contingent fee auditors to alter the fundamental terms of a life insurance policy through attempting to re-interpret their laws and assert that the date of an insured's death triggers dormancy.

c. Assure that Death Master File Search Logic is Efficient and Effective

The NCOIL Model requires Death Master File searches to be conducted semi-annually, with at least one search conducted using only the update to the Death Master File. The Death Master File search process itself is simple, but many insurers must sift through numerous false positive results on a manual basis to determine whether or not an insured may have been identified. This process is labor intensive and costly, and with more complex logic, insurers generally do not find significant returns on their searches but experience a significant number of false positive matches. As insurers have increasingly utilized the Death Master File to identify potentially deceased insureds, their technology experts have refined Death Master File search processes to be more efficient. These efficiencies are recognized in the NCOIL Model Act, and should be considered as insurance regulators and legislators consider the required frequency and complexity that should be applied to insurers periodic searches of the Death Master File.

d. Death Master File Use for Fraud Prevention Should Not Be Compared to Death Master File Use for Assisting Beneficiaries

The Death Master File has historically been used to detect fraud by many public and private payers. Additionally, as insurers increase their use of the Death Master File, they will significantly reduce the number of unclaimed life insurance policies that may remain outstanding to deceased customers. These efficiencies should not be confused to limit when insurers conduct Death Master File searches to detect fraud and misuse of products that are being paid out to customers and beneficiaries. Efforts to labeling fraud prevention searches as "asymmetric", in the absence of mirror-image searches throughout the company only serve to create a chilling effect on fraud prevention for insurers, also making them the only financial service payer under such regulatory scrutiny. This reverse logic helped to further contingent fee examinations, but is detrimental for fraud detection efforts.

e. Utilize the NCOIL Model Act as the Basis for Developing a National Framework for Identifying Death Master File Use Standards

The NCOIL Model Act provides standards for insurers to use to identify deceased insureds, then conduct systematic outreach to beneficiaries and report unclaimed proceeds to state unclaimed property administrators on an accelerated basis. Through adoption of the NCOIL Model Act states can assure that their insurance codes remain the primary governance tool for the operation of life insurance policies,

while also recognizing that technology can assist both consumers and states through accelerating the definition of when a life insurance policy becomes unclaimed, moving this date from limiting age to the date of a Death Master File match and verification.[108]

f. Consider the ACLI Proposed Enhancements to NCOIL Model Act

NCOIL has formed a Task Force to explore how the NCOIL Model Act could be enhanced to benefit from insurer experience since the NCOIL Model Act was first adopted almost three years ago. The American Council of Life Insurers ("ACLI") has recommended a number of enhancements to the NCOIL Model Act to expand its scope and address operational issues. Many states enacting the NCOIL Model Act have embraced these enhancements and NCOIL is also considering them as part of its Task Force efforts. These suggested enhancements are described below.

i. Clarify and Expand Certain Definitions (Section 3). The current version of the NCOIL Model Act contains terms that should be clarified to improve uniformity and also assure that the search requirements are efficient and effective. The definitions that the ACLI has recommended for clarification and expansion are:

A. Definitions associated with policies, contracts and retained asset accounts subject to the Death Master File search requirements should be clarified so that the searches are limited to those policies, contracts and accounts issued "in this state" or to "residents of this state", as applicable, to avoid extraterritorial application and to make the multi-state Death Master File search process more efficient.

B. Although the current NCOIL Model includes annuities in the definition of "contracts", the Model does not specifically apply the Death Master File search requirement to annuities. ACLI has recommended adding a definition of annuity, which would address concerns raised by regulators regarding insurers use of the Death Master File to terminate annuity payments but not check for life insurance benefits.

C. The definition of "policy" should be amended to exempt a policy issued to a group master policyholder for which the insurer does not provide "record keeping services," as further defined. An insurer should be required to conduct Death Master File searches only when it maintains specified information about each individual insured under the group policy, i.e., serves as a "record keeper."

D. Defining "knowledge of death" would be a critical revision to the current NCOIL Model in order to link the insurance codes and unclaimed property codes through a common definition and understanding of "knowledge of death" for purposes of paying insurance benefits and escheating unclaimed property to the state. Accordingly, including a definition of "knowledge of death" in the NCOIL Model – i.e., receipt of a death certificate or a validated DMF match – is an important linchpin to harmonizing the insurance and unclaimed property codes while not inadvertently redefining well established product requirements in state insurance codes and the IIPRC standards.

ii. Refine the Death Master File Search Requirement (Section 4). Based on a better understanding of how the Death Master File is populated and updated, along with experience on using it regularly, insurers should be required to perform a reconciliation of its in-force policies and contracts with the full Death Master File only once, and use the Death Master File updates for future comparisons. Additionally, insurers should not be required to perform

Death Master File searches on policies and contracts for which the insurer is receiving active premium payments from outside the policy or contract value. Section 4 should be revised accordingly.

iii. Authorize the commissioner to limit or phase-in compliance with the law; delay the effective date (Sections 4, 5). The resources necessary to comply with the new law are significant, especially for insurers that never used the Death Master File. The commissioner should be given the discretion to limit or phase-in compliance with the law, on a company-specific basis, if the circumstances are warranted and upon a demonstration of hardship. Additionally, the NCOIL Model Act does not require a specific effective date, though in a drafting note, the NCOIL Model Act suggests states consider a one-year delayed effective date given the insurer resource implications of the new law. ACLI has recommended that Section 5 specifically include at least a one-year delayed effective date to allow insurers the time needed to revise their policy administration systems to come into compliance.

iv. Unfair Trade Practices (Section 5). As the drafting note indicates, most states have adopted some version of the NAIC Unfair Trade Practices Model Act, which includes a provision (Section 3) making it an "unfair trade practice for any insurer to commit any practice if … [I] t has been committed with such frequency to indicate a general business practice to engage in that type of conduct." Since the provisions of the NCOIL Model Act are intended to be incorporated into the insurance code as unfair trade practices, the language of Section 5 should be amended to specifically include the "general business practice" language. Additionally, it should be clarified that nothing in the Act is intended to create or imply a private cause of action.

v. Unclaimed Property Reporting (Section 5). Any cross-references to unclaimed property reporting in Section 5 should be cross referenced with the state's unclaimed property code in order to assure consistency in reporting requirements. Life insurers submit unclaimed property reports to the states based on scheduled reporting dates, with sometimes months of statutorily required efforts to contact the intended recipient of the funds prior to their reporting. These reporting dates are utilized to calculate values, along with penalties and other required payments. The NCOIL Model should assure that any reporting mandates consider these unclaimed property reporting dates and requirements.

g. Provide Guidance to Life Insurance Companies on Lost Policy Search Programs

A number of states have implemented lost life insurance policy systems. Their systems provide a targeted and helpful tool for consumers. However, their lack of uniformity is problematic. These systems differ significantly in terms of the products to be searched, the data available regarding the potential policyholder, the format and transmission of information, the frequency and volume of information transmitted to life insurers, fraud protections built into the programs and the reporting required of the life insurers by the state. The administrative inefficiencies of these inconsistent approaches, coupled with the fact that consumers are likely to live in multiple states throughout their lifetimes, call for a common platform for such programs. Guidance from the NAIC on the key elements of lost policy search programs would promote uniform state approaches that will benefit insurers and consumers.

h. Legislators and Regulators Should Work to Improve the Integrity of Examination Processes

For the insurance industry, the past four years have highlighted the need for all regulatory examinations to be conducted on a fee for service basis, regardless of whether they

are joint examinations or conducted by one executive branch officer. Insurance company market conduct examinations have historically been conducted on a fee for service basis, with significant oversight of examiners through insurance department staff efforts. However, unclaimed property examinations have historically been conducted on a contingent fee basis, with little state oversight of examiners.[109] The recent "re-interpretations" of state unclaimed property laws, as described above, have been driven in large part by these examiners who were seeking to identify a "new" source of funds for their client-states and also share in the success of their examination efforts. These funds are being demanded merely by accelerating reporting that is due in the future, i.e., the difference between the insured's date of death and the date when the insured reaches limiting age.

For heavily regulated industries such as insurance companies, compliance with the requests of state regulators is of importance because their state licensure often depends upon it. Therefore, insurers must rely upon their regulators to conduct a fair examination with findings based in current law, rather than influenced by the outcome of the examination. We encourage state legislators and state unclaimed property administrators to review and adopt the recommendations of the U.S. Chamber Center for Legal Reform, and for state insurance regulators to assure that their examiners conduct themselves in a manner that is consistent with their enabling statutes and examination guidelines, regardless of the executive branch official with whom they may be collaborating.

Conclusion

Life insurance companies pay billions annually in claims on life insurance policies. Of course, when policies go unclaimed, life insurers report the proceeds to the various states pursuant to state laws addressing unclaimed life insurance, which have been guided by state insurance codes for decades. State unclaimed property laws, generally based on one of four versions of the Uniform Act, have all treated life insurance similarly for decades, recognizing that life insurance is not unclaimed until maturity or, in the absence of a claim, when the insured reaches his or her limiting age.

Recent assertions by state unclaimed property administrators that the insured's date of death is a dormancy trigger for reporting life insurance as unclaimed run counter to well-established unclaimed property law. Likewise, demands by such administrators and insurance regulators that life insurance companies' conduct regular Death Master File searches of their policy records in order to accelerate their unclaimed property reporting, in the absence of any prior-stated statutory standards, also run counter to existing law. Several court decisions released over the past two years have rejected these unsupported assertions by administrators and regulators, finding that, in the absence of legislation to the contrary, insurers are not required to mine external databases in connection with the payment or escheatment of life insurance benefits. Specifically acknowledging that these arguments are contrary to long established insurance code requirements, these courts have reinforced the need for consistency in unclaimed property laws and the need for clarity in the insurance codes.

The life insurance industry is generally not opposed to reasonable and periodic use of the Death Master File. Some types of products are not appropriate for searches, or some companies may need to be exempted or may only be able to conduct limited searches, due to operational or resource issues, and debate remains regarding whether or not searches should be prospective. Enactment of consistent laws, such as the NCOIL Model, which provide directives for insurer conduct of reasonable and regular Death Master File searches and outreach to beneficiaries, will complement existing unclaimed property law and insurance code provisions, while assuring uniformity and certainty for life insurance companies while also further assisting beneficiaries with obtaining their benefits. Development of uniform lost policy programs, such as those in Missouri, Ohio and Louisiana, will also assist consumers with identifying lost life insurance policies. Regulators are encouraged to support enactment of legislative standards, as described herein, and to offer lost policy programs for their consumers in order to bring future clarity to the issues surrounding Death Master File use by life insurers.

Endnotes

1 T. Conrad Bower, *Note: Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework,* 74 Ohio St. L.J. 515 (2013).

2 198 U.S. 458 (1905).

3 Sean M. Diamond, *Comment: Unwrapping Escheat: Unclaimed Property Laws and Gift Cards,* 60 Emory L.J. 971, 990 (2011).

4 William S. King, *Note: A Bridge Too Far: Due Process Considerations in State Unclaimed Property Law Enforcement,* 45 Suffolk U. L. Rev. 1249, 1253 (2012).

5 60 Emory L.J. 971, 990.

6 *Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 241 (U.S. 1944).

7 *Anderson* at 241.

8 *Anderson* at 241.

9 333 U.S. 541 (1947).

10 *Id.* at 550.

11 *Id.* at 543.

12 *Id.* at 542-43.

13 The New York Court of Appeals decision, as affirmed by the Supreme Court, held that the New York statute required insurers to surrender moneys to the state "only after maturity of the policy obligations," 297 N.Y. at 10, which is accomplished only by submission of a claim. *See* N.Y. Comp. Codes R. & Regs., tit. 11, § 216.4(a). In addition, both the Supreme Court and the Court of Appeals decisions discuss the statute as impacting unpaid claims. *See* 333 U.S. at 547 (statute gives the state custody of "abandoned claims"); 297 N.Y. at 10 (noting that the statute may revive "outlawed claims" that had been deemed barred by the statute of limitations).

14 The 1954 Uniform Act attempted to "protect a holder of intangible property from the dangers of multiple escheat." 74 Ohio St. L.J. 515, 524.

15 Uniform Unclaimed Property Act (1966) (emphasis added).

16 *Compare* Uniform Unclaimed Property Act (1954) *with* 333 U.S. 541 at 543-45.

17 *See* Sutherland Statutory Construction, Part V Subpart A §46.5. In ascertaining the intention of the legislature, all parts of a statute are to be read together to find the intention as to any one part and all parts are to be reconciled and harmonized, if possible." *Sewell v. Norris,* 811 a.2d 349 (2002); *see also Sherman v. City of Tempe,* 45 P.3d 336 (A2, 2002); *see also* Sutherland Statutory Const., Part V, Subpart A § 45:5 (in search for legislative intent, courts look to the objective to be attained, the nature of the subject matter, and the contextual settings. The statute is construed as a whole with reference to the system of which it is a part.). *See also* Balentines Law Dictionary (2010)("in pari materia" means "Statutes which relate to the same thing or to the same subject or object are in pari materia, although they were enacted at different times and it is a fundamental rule of statutory construction that such statutes should be construed together for the purpose of learning and giving effect to the legislative intention.").

18 *See* discussion under Section 1 (d).

10 Bowers, *Actuarial Mathematics,* 63 (Society of Actuaries 1997); Kirk, Actuarial Mathematics II, Fundamentals of Actuarial Mathematics, §2.4 ("Life tables have a maximum age called the 'Omega Age'. The probability of death at this age is 1. Thus, nobody can life beyond age Ω." (http://twentythirdfloor.co.za/blog_files/wp-content/uploads/2007/10/amii-course-notes-full-20071008.pdf). See also Bowers, *Actuarial Mathematics* at 51-52/ "[a] life table is an indispensable component of many models in actuarial science… some scholars fix the date [of the publication of the first life table] as the beginning of actuarial science [in] 1693.")

20 The American Academy of Actuaries' Life Practice Council Tax Work Group Statement to the Internal Revenue Service dated Oct. 9, 2009 at 3; The Alpha and Omega of Risk; The Significance of Mortality at 5 (see most insurance products are priced on the assumption that the limiting or omega age occurs on the insured's birth date). (http://cup.columbia.edu/media/7146/powers-acts-of-god-and-man.pdf)

21 Edwin Hustead, The History of Actuarial Mortality Tables in the United States, Journal of Ins. Medicine, vol. 20, no. 4 (1988) at 14.

22 2001 CSO Mortality Table.

23 The American Academy of Actuaries' Life Practice Council Tax Work Group Statement to the Internal Revenue Service dated Oct. 9. 2009 at 3-4. Discussions regarding principles based reserving would, for the first time, remove the standard average age from actuarial assumptions.

24 379 U.S. 674, 85 S. Ct. 626 (1965). The states of Texas, Pennsylvania and New Jersey were vying to collect $26,461.65 in un-cashed checks due to approximately 1,730 small creditors being held by the Sun Oil Company because the creditors could not be located. The three states all claimed an interest in the checks: Texas claimed the property because the Sun Oil Company

accounting operations were located in Texas; New Jersey claimed the property because the Sun Oil Company was incorporated in New Jersey; and Pennsylvania claimed the property because the Sun Oil Company's chief executive office was located in Pennsylvania.

25 *Id.* at 680-683, 85 S. Ct. at 630-631.

26 407 U.S. 206 (1972).

27 507 U.S. 490, 509 (1993).

28 *See* 45 Suffolk U. L. Rev. 1249, 1256.

29 Tracey L. Reid, Unclaimed Property: A Reporting Process and Audit Survival Guide 13 (2008).

30 *See Standard Oil Co. v. New Jersey,* 341 U.S. 428 (1951).

31 Uniform Unclaimed Property Act (1966).

32 In general, insurance companies qualify and are authorized to write insurance in many or most of the states of the Union. Therefore, jurisdiction over such companies as holders of unclaimed property is normally wide-spread throughout the country, thus permitting and suggesting differentiation from ordinary business or industrial corporations and also from banking organizations. Indeed, reliance upon the state of incorporation or principal place of business of the insurance company to take custody of unclaimed property would be most undesirable, both for the reason that it would concentrate the administrative burdens in the few states that incorporate most of the insurance companies, and also because such reliance would result in the same few states obtaining the use of the bulk of the unclaimed funds regardless of the state of address of the persons entitled thereto. The alternative used in section 3 is preferable, and accordingly, jurisdiction is conferred upon the state of the last recorded address of the person entitled [to the funds]. Comment, 1A-UA Unclaimed Property Law § UA.03 (1966).

33 407 US 206(1972).

34 Commissioner's Prefatory Comment, 1A-UA Unclaimed Property Law § UA.02 (1981).

35 1A-UA Unclaimed Property Law § UA.02 (1981).

36 The 1981 Uniform Act provides that proceeds of a life insurance policy are presumed abandoned if the insurer is aware that the insured has died even though actual proof of death has not been furnished to the insurer. Under the 1966 Act these proceeds generally would not have been reportable until the 103rd anniversary of the decedent's birth. The 1981 Uniform Act also provides that the policy proceeds are payable if the limiting age under the mortality table on which the reserve is based is reached and there has been no activity with respect to the policy for 2 years. This is a restatement of a similar provision in subsection (b) of Section 3 of the 1966 Act; however, the abandonment period has been reduced from 7 to 2 years. Commissioner's Prefatory Comment, 1A-UA Unclaimed Property Law § UA.02 (1981). *See* Andrea G. Podolsky, *Insurer's Duty to Disclose the Existence of a Policy,* 76 Colum.L.Rev. 825 (Jun. 1976).

37 507 US 490 (1993).

38 1A-UA Unclaimed Property Law § UA.02 (1981) (Section 2, "Presumption of Abandonment" continues the general proposition that all intangible property is within the coverage of this Act. It provides in a single section for all the various periods of abandonment that were separately stated in several sections of the 1981 Act. With limited exceptions this reorganization does not alter the bases for presuming abandonment of the property from that established in the 1981 Act, but merely restates those standards in a unified section, more easily applied, with less repetition".)

39 1A-UA Unclaimed Property Law § UA.01.

40 *See supra* n. 39.

41 Wisconsin Department of Revenue, http://www.revenue.wi.gov/ (last accessed May 7, 2014).

42 Wisconsin Department of Revenue, Fact Sheet 6100- *Unclaimed Property- Life Insurers and DMF Searches,* http://www.revenue.wi.gov/taxpro/fact/6100ucp_life_dmf.pdf (Last accessed May 7, 2014).

43 *See supra* ns. 25, 27 and 28

44 *Pennsylvania,* 407 U.S. at 214-215; *Delaware,* 507 U.S. at 509.

45 *Pennsylvania,* 407 U.S. at 214.

46 *Pennsylvania,* 407 U.S. at 215 (quoting *Texas v. New Jersey*) (emphasis added).

47 *Delaware,* 507 U.S. at 509.

48 *Id.*

49 *Id.*

50 Unif. Unclaimed Property Act (1954) § 1, Comment; Unif. Unclaimed Property Act (1981) § 1, Comment.

51 Unif. Unclaimed Property Act (1995) § 1, Comment.

52 GAO report at 3.

53 42 USC §405(r).

54 *Id.*

55 Pub. L. No. 112-248 §5 (2013).

56 NTIS, (http://www.ntis.gov) (accessed May 7, 2014).

57 GAO report at 18. *The Social Security Administration's (SSA) procedures for handling and verifying death reports may allow for erroneous death information in the Death Master File (DMF) because SSA does not verify certain death reports or record others. SSA officials said, in keeping with its mission, the agency is primarily focused on ensuring that it does not make benefit payments to deceased Social Security program beneficiaries. As a result, it only verifies death reports received for individuals who are current program beneficiaries, and even then, only for those reports received from sources it considers to be less accurate. For example, SSA officials consider death reports from [the 35] states that have pre verified decedents' name and SSN to be highly accurate, so SSA does not verify that the subjects of these reports are actually deceased. ... SSA verifies no death reports for individuals who are not beneficiaries, regardless of source. Because there are a number of death reports that SSA does not verify, the agency risks including incorrect death information in the DMF, such as including living individuals in the file or not including deceased individuals. Specifically, for death reports that are not verified, SSA would not know with certainty if the individuals are correctly reported as dead. SSA also does not record some deaths because incorrect or incomplete information included in death reports generally prevents SSA from matching decedents to SSA records. For example, if SSA is unable to match a death report to data in its records such as name and Social Security Number (SSN), it generally does not follow up to correct the non-match and does not record the death*

58 NTIS, Important Notice: Change in Public Death Master File Records (http://www.ntis.gov/pdf/import-change-dmf.pdf) (accessed May 7, 2014).

59 *Id.; See also* C. Maynard, Changes In the Completeness of the Social Security Death Master File: A Case Study, The Internet Journal of Epidemiology 2013, vol. 11, no. 2, at 3.

60 C. Maynard, Changes In the Completeness of the Social Security Death Master File: A Case Study, The Internet Journal of Epidemiology 2013, vol. 11, no. 2, at 3.

61 GAO Report at 10. The GAO reported that t SSA verified death records for Social Security recipients on a limited basis, but usually only if the information is received manually or from a source such as a funeral home or financial institution, both of which the SSA considers as unreliable sources.

62 *Id.*

63 SSA Inspector General "Quick Evaluation: Sources of Erroneous Death Entries Into the Death Master File", report no. A-06-09-=29095 (Feb. 4, 2009).

64 Hill & Rosenwaite, "The Social Security Administration's Death Master File: The Completeness of Death Reporting at Older Ages," Social Security Bulletin, v. 64, No. 1 (2001/2002), 45, 47.

65 Schisterman & Whitcomb, "Use of Social Security Administration's Death Master File of Ascertainment of Mortality Status," Population Health Metrics (Mar. 5, 2004) 1, 3.

66 *Id.*

67 *See* IRC §725 (annuity assignee provided with five years to make distribution election to limit taxation on assigned benefits).

68 SSA Inspector General "Quick Evaluation: Sources of Erroneous Death Entries Into the Death Master File," report no. A-06-09-=29095 (Feb. 4, 2009).

69 15 CFR §1110.100(b) (last checked May 7, 2014).

70 15 CFR §1110.100(a).

71 15 CFR §1110.

72 15 CFR §1110.102. The requirements in IRC §6103(p)(4) apply to vendors which work for the IRS and handle individual tax return information. These security requirements include specific requirements for storage, security, access restriction, user training, audits and disposal of secure data. See IRS Publication 1075 "Tax Information Security Guidelines for Federal, State and Local Tax Agencies: Safeguards for Protecting Federal Tax Returns and Return Information" (Jan. 2014).

73 *Id.*

74 State of Florida, Dept. of Financial Services, Declaratory Statement, *In Re* Petition for Declaratory Statement by Thrivent for Lutherans, Case No. 137963 (10/4/13)

75 *See* National Association of Unclaimed Property Administrators Memorandum to Drafting Committee to Revise the Uniform Unclaimed Property Act, Uniform Law Commission dated May 9, 2014.

76 District Court of Appeal, First District, State of Florida Opinion, *Thrivent Financial for Lutherans v. State of Florida, Department of Financial Services,* Case No. 1D13-5299 (Aug. 5, 2014).

77 *See supra* n. 77 (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 455 (Fla. 1992)).

78 *See supra* n. 77.

79 2-10 *Appleman on Insurance* § 10.03[2]. Iowa was the first state to adopt laws requiring life insurance policy review in 1904, with Tennessee following suit in 1907, Nebraska and New Hampshire in 1913 and Vermont in 1919.

80 Ala. Code § 27-15-13; Alaska Stat. § 21.45.130; Ariz. Rev. Stat. § 20-1215; Ark. Code §23-81-113; 18 Del. C. § 2914; D.C. Code § 31-4703; Fla. Stat. § 627.461; O.C.G.A. § 33-25-3; Idaho Code § 41-1913; §215 ILCS 5/224; K.S.A. §40-420; KRS § 304.12-235; La. R.S. § 22:1811; 24-A M.R.S. § 2513; Md. Ins. Code Ann. § 16-211; MCL § 500.4030; Minn. Stat. § 61A.03; Mont. Code Ann. §33-20-114; Nev. Rev. Stat. Ann. § 688A.140; N.J. Stat. § 17B:25-11; N.M. Stat. Ann. § 59A-20-14; N.C. Gen. Stat. § 58-3-40; N.D. Cent. Code § 26.1-33-05; Ohio Rev. Code § 3915.05; CRIR §02-030-013; S.C. Code Ann. § 38-63-220; S.D. Codified Laws § 58-12-1; Tenn. Code Ann. § 56-7-2307; 8 V.S.A. § 3731; ARCW § 48.23.130; Wis. Stat. § 628.46; Wyo. Stat. § 26-16-112.

81 Ala. Code § 27-15-13; Alaska Stat. § 21.45.130; Ariz. Rev. Stat. § 20-1215; Ark. Code §23-81-113; O.C.G.A. § 33-25-3; §215 ILCS 5/224; La. R.S. § 22:1811; MCL § 500.4030; N.J. Stat. § 17B:25-11; N.M. Stat. Ann. § 59A-20-14; N.D. Cent. Code § 26.1-33-05; Ohio Rev. Code § 3915.05; Tenn. Code Ann. § 56-7-2307; Wis. Stat. § 628.46.

82 Ala. Code § 27-15-13; Alaska Stat. § 21.45.130; Ariz. Rev. Stat. § 20-1215; Ark. Code §23-81-113; O.C.G.A. § 33-25-3; Idaho Code § 41-1913; 24-A M.R.S. § 2513; Md. Ins. Code Ann. § 16-211; Mont. Code Ann. §33-20-114; N.J. Stat. § 17B:25-11; N.M. Stat. Ann. § 59A-20-14; 8 V.S.A. § 3731; Wyo. Stat. § 26-16-112.

83 See "About the IIPRC", at http://www.insurancecompact.org/about.htm. The member states include Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

84 Each standard provides a standard to the effect that "[t]he policy may require that due proof of the death of the insured [or first to die] will consist of a certified copy of the death certificate of the insured, or other lawful evidence providing equivalent information, and proof of the claimant's interest in the proceeds." Individual Whole Life Insurance Policy Standards, IIPRC-L7 –I, §2(F)(4); Individual Single Premium Whole Life Insurance Policy Standards, IIPRC-L-07-I-1 §2(F)(4); Individual Term Life Ins. Policy Standards, IIPRC-L-04-I §3 (G) (4); Individual Joint Last to Die Survivorship Whole Life Ins. Policy Standards, IIPRC-L-07-I-2 §3 (F) (4); Individual Single Premium Joint Last to Die Survivorship Whole Life Ins. Policy Standards IIPRC-L-07-I-3§3 (F) (4); Individual Current Assumption Whole Life Ins. Policy Standards and Conforming Amendments to Individual Adjustable Life Standards IIPRC-L-07-I-5 §3 (G) (4); Individual Endowment Ins. Policy Standards IIPRC-L-02-I, §3 (F)(4); Individual Single Premium Endowment Ins. Policy Standards IIPRC-L-02-I-1 §3 (F) (4); Individual Joint Last to Die Survivorship Endowment Ins. Policy Standards IIPRC-L-02-I-2 §3 (F) (5); Individual Single Premium Joint Last to Die Survivorship Endowment Ins. Policy Standards IIPRC-L-02-I-3 §3 (F) (4); Individual Non-Variable Adjustable Life Ins. Product Line Individual Flexible Premium Adjustable Life Insurance Policy Standards IIPRC-L-09-I §1 (G) (4); Individual Joint Last to Die Survivorship Flexible Premium Adjustable Life Ins. Policy Standards IIPRC-L-09-I-2 §3 (F) (4); Individual Modified Single Premium Adjustable Life Ins. Policy Standards IIPRC-L-09-I-1 §3 (G) (4); Individual Variable Adjustable Life Insurance Product Line Individual Modified Single Premium Variable Life Ins. Policy Standards IIPRC-L-06-I-1 §3 (G) (4); Individual Modified Single Premium Joint First to Die Variable Life Ins. Policy Standards IIPRC-L-06-I-3 §3 (G) (4); Individual Flexible Premium Variable Adjustable Life Ins. Policy Standards IIPRC-L-06-I §3 (G) (4); Individual Joint Last to Die Survivorship Flexible Premium Variable Adjustable Life Ins. Policy Standards IIPRC-L-06-I-2 §3 (G) (4).

85 *Id.*

86 "The purpose of [notice of claim and proof of claim] requirements is to put the insurer on notice that a claim is being or may be made and to enable the insurer to make a prompt and proper investigation so that it can appraise its position and the extent of its exposure, and so that it can protect itself from fraud." *Haskins v. Occidental Life Ins. Co. of Cal.,* 349 F. Supp. 1192; 1972 U.S. Dist. LEXIS 11280 (E.D. Ark, W.D. 1972)(citing *National Casualty Co. v. Johnson,* 226 Ark. 737, 293 S.W. 2d 703 (1956); *see Dortch v. New York Life Ins. Co.,* 268 F.2d 149; 1959 U.S. App. LEXIS 3625 (8th Cir. 1959) (requirement to give "due proof" is "to give the insurer sufficient information to enable it to frame an intelligent estimate of its rights and liabilities" (citing 170 A.L.R. 1262, 1265 (1947)); see 8-86 Appleman on Insurance § 86.01[1][a].

87 *Perdue v. Nationwide Life Ins. Co., et.al.,* Civ. No. 12-c-287 (W.V. Cir. Ct. Dec. 27, 2013).

88 The *Perdue* court observed that "[t]he West Virginia Supreme Court of Appeals has consistently held that 'statutes which relate to the same subject matter should be read together and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Sly. Pt. 3, *University Commons Riverside Home Owner's Ass'n Inc. v. University Commons Morgantown, LLC,* 230 W.Va. 589, 741 S.E.2d 613 (2013) (citing Syl. Pt. 3 *Smith v. State Workmen's Compensation Comm'r,* 159 W.Va. 108, 219 S.E.2d 361 (1975)). Therefore, the UPA and the Insurance Code should be read in conjunction with one another to the extent that they are consistent and capable of being applied in a uniform manner in order to ascertain true legislative intent." *Id.* at 7.

89 *Id.* at 8.

90 No. 13-10185, 2013 U.S. Dist. LEXIS 117070 (D. Mass. Aug. 20, 2013); affirmed No. 13-2151, 2014 U.S. App. LEXIS 9714 (1st Cir., May 27, 2014).

91 The court noted that there was an issue as to which state's law applied, but ruled on both given that both insurance code provisions were almost identical. *Id.* at 5.

92 *Id.*

93 No. 13-2151, 2014 U.S. App. LEXIS 9714 (1st Cir., May 27, 2014); (The Court of Appeals also rejected Feingold's new argument raised by his attorneys at oral argument of a violation of the Illinois' Unclaimed Property Statute because Feingold failed to allege that Hancock had knowledge of his mother's death as required prior to reporting under Illinois law.

94 *Total Asset Recovery Services, LLC v. Metlife, Inc., et al. (ruling regarding Prudential Financial, Inc.),* No. 2010-CA-3719, at *4 (Fla. 2d Cir. Ct. 2013), appeal docketed, No. 1DCA-4420 (Fla. 1st DCA 2013), ¶3.

95 *Id.*

96 *See* ALA. CODE § 27-15-52 (2015), ARK. CODE ANN. § 23-81-901 (2015), GA. CODE ANN. § 33-25-14 (2015), IDAHO CODE ANN. § 41-3001 (2015) (effective July 1, 2016), IND. CODE ANN. § 27-2-23 (2015), IOWA CODE ANN. § 507B.4C (2015), KY. REV. STAT. ANN. § 304.15-420 (2015), MD. CODE ANN., INS. § 16-118 (2015), MISS. CODE ANN. § 83-7-301 (2015), MONT. CODE ANN. § 33-20-1604 (2014), NEV. REV. STAT. §§ 688D.090 (2015), N.M. STAT. § 59A-16-7.1 (2015), N.Y. INS. LAW § 3240 (2015), N.C. GEN. STAT. § 58-58-360 (2015), N.D. CENT. CODE §§ 26.1-55-01 to -05 (2015), R.I. GEN. LAWS § 27-80-1 (2015) (effective Jan. 1, 2016), TENN. CODE ANN. § 56-7-3401 (2015), UTAH CODE ANN. § 31A-22-1901 (2015), VT. STAT. ANN. tit. 27, § 1244a (2015).

97 NCOIL Model Unclaimed Life Insurance Benefits Act, Section 4(A)(1)(b)(ii).

98 Exempted forms of life insurance include (1) Group life plans where the insurer does not maintain key benefit information on the insured such as (a) Social Security number or name and date of birth, (b) beneficiary designation information, (c) coverage eligibility, (d) benefit amount, and (e) premium payment status, (2) coverage governed by ERISA, (3) credit or mortgage life, and (4) policies sold to fund preneed funeral contracts or arrangements.

99 The United States Supreme Court has explained that "[r]etroactive legislation presents problems of unfairness" because "it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein,* 503 U.S. 181, 191 (1992). Accordingly, U.S. Supreme Court declines to apply a new law retroactively if it "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *INS v. St. Cyr,* 533 U.S. 289, 321 (2001). The Contract Clause of the United States Constitution provides, in part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. The Court has explained that a retroactive law violates the Contract Clause if it (1) substantially impairs the terms of an existing contract, and (2) such impairment is not an appropriately tailored means of remedying an "emergency need," or a "broad and general social or economic problem." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 242 (1978). Retroactive application of the NCOIL Model Act may also conflict with multiple state constitutional rules prohibiting retroactive legislation. At least 43 states impose constitutional restrictions against retroactive laws that are equal to or greater than the federal Contract Clause standard. Ala. Const. §§ 22, 95; Alaska Const. art. I, § 15; Ariz. Const. art. II, § 25; Ark. Const. art. II, § 17; Cal. Const. art. I, § 9; Colo. Const. art. II, § 11 & art. XV, § 12; Fla. Const. art. I, § 10; Ga. Const. art I, § 1; Idaho Const. art I, § 16; Ill. Const. art. I, § 16; Ind. Const. art. I, § 24; Iowa Const. art. I, § 21; Ky. Const. § 19; La. Const. art. I, § 23; Mass. Const. pt. 1, art X; Md. Const. art. III, § 40; Md. Dec. of Rights arts. 19 & 24; Me. Const. art. I, § 11; Mich. Const. art. I, § 10; Minn. Const. art. I, § 11; Miss. Const. art. III, § 16; Mo. Const. art. I, §13; Mont. Const. art. II, § 31; Neb. Const. art. I, § 16; Nev. Const. art. I, § 15; N.H. Const. art.

23; N.J. Const. art. IV, § VII, ¶ 3; N.M. Const. art. II, § 19; N.C. Const. art. I, § 16; N.D. Const. art. I, § 18; Ohio Const. art. II, § 28; Okla. Const. art. I, § 15; Or. Const. art. I, § 21; Pa. Const. art. I, § 17; R.I. Const. art. I, § 12; S.C. Const. art. I, § 4; S.D. Const. art. VI, § 12; Tenn. Const. art. I, § 20; Tex. Const. art. I, § 16; Utah Const. art. I, § 18; Wash. Const. art. I, § 23; W. Va. Const. art. III, § 4; Wis. Const. art. 1, § 12; Wyo. Const. art. I, § 35. However, at least one court has reviewed arguments against the NCOIL Model Act and found that its application to all active business of an insurer in such state was a valid exercise of state authority. In *United Life Ins. Co. of Am. v. Kentucky,* No. 12-CI-1441 (Ky. Cir. Ct. Apr. 1, 2013), a Kentucky trial court held that retroactive enforcement of Kentucky's version of the NCOIL Model does not violate the Contract Clauses of the United States or Kentucky Constitutions, U.S. Const., art. I, § 10, Ky. Const. § 19, or Kentucky's statutory presumption against retroactive legislation, K.R.S. § 446.080(3). The ruling has been appealed, and the Court of Appeals has issued an order staying retroactive enforcement of the Act pending resolution of the appeal. *See United Ins. Co. of Am. v. Kentucky,* No. 2013-CA-000612, at 3-4 (Ky. App. Jul. 16, 2013). The Kentucky trial court's ruling was based on its conclusion that Kentucky's version of the NCOIL Model is "remedial" legislation—*i.e.,* legislation that does not alter substantive rights.

100 *See supra* n. 82.

101 13 L. Russ & T. Segalla, Couch on Insurance §§ 186:4, 189:78 (3d ed. 2011).

102 *Andrews v. Nationwide Mut. Ins. Co.* 2012 Ohio App. LEXIS 4318 at *19. The *Andrews* case was a proposed class action, brought by a policy owner/insured who claimed that she was of an age where, based on the mortality table applicable to her policy, she was more likely to be dead than alive. The policy owner claimed that the policy terms created a duty of good faith for the insurance company to search the Death Master File in order to protect her beneficiaries. *Id. at 25-29.*

103 *Id.*

104 *Id.*

105 No. 13-10185, 2013 U.S. Dist. LEXIS 117070 (D. Mass. Aug. 20, 2013), affirmed No. 13-2151, 2014 U.S. App. LEXIS 9714 (1st Cir., May 27, 2014).

106 *Id.* at *6-*7.

107 *Id.*

108 The ACLI is neutral as to whether the NCOIL Model Act is applied prospectively or not.

109 O'Connor, "Unclaimed Property: Best Practices for State Administrators and the Use of Private Audit Firms" (US Chamber Institute for Legal Reform 2014).

Appendix 1

Unclaimed Property Litigation Overview

2015

- *Kemper v. Illinois State Treasurer:* In November, 2015, Kemper companies brought action for a declaratory judgment against the Illinois Treasurer and its auditor, challenging the constitutionality and statutory basis of the Treasurer's unclaimed property audits. The suit alleges that the Treasurer and its auditor have imposed a new requirement that insurers must pay policy proceeds to beneficiaries or to the state based on whether a policy holder's name appears on the DMF, as opposed to whether proceeds are due under contractual policy language. Life insurers typically pay death benefits only after they receive a claim and proof of death from the beneficiary or insured's estate.[i]
- *Thrivent Financial v California Controller:* In October, 2015, Thrivent commenced action in California Superior Court seeking declaratory and injunctive relief against the California State Controller. The Complaint alleges that the Controller has established an underground regulation related to unclaimed life insurance proceeds which is inconsistent with statute. As a result, the actions of the Controller create ambiguity in the law which places Thrivent in the precarious position of either altering its processes in a way that is not consistent with the language of the statute or choosing to comply with the language of the statute in contravention of the underground regulation to its potential detriment.[ii]
- *Taylor v Yee Petition U.S. Supreme Court:* In August, 2015, aggrieved citizens whose retirement assets were forfeited to California state authorities without due process filed a petition for certiorari to the U.S. Supreme Court. Esteemed Harvard law professor Laurence Tribe is counsel of record for the petitioners. The ACLI recently approved a public policy position that an appeals process should provide for an independent and fair review of state unclaimed property administrator determinations including the propriety of an audit in progress.[iii]
- *State of West Virginia ex rel. Perdue v. Nationwide et al:* The West Virginia State Treasurer filed lawsuits against 63 life insurers alleging that their asymmetric use of the Death Master File (DMF) for annuities contracts but not for life insurance policies was improper and resulted in a failure to deliver unclaimed life insurance funds to the state. The Circuit Court of Putnam County dismissed the 63 complaints, finding that insurers' obligations under the West Virginia Uniform Unclaimed Property Act (the Act) did not arise until someone having a contractually-derived interest makes a formal claim in accordance with the policy terms (noting further that such terms are reviewed and approved by the state insurance regulator). In June 2015, the Supreme Court of Appeals reversed, finding the Circuit Court's reference to the Insurance Code "unnecessary and improper," holding that the "obligation to pay" is triggered by the death of the insured rather than the filing of a claim. The Court acknowledged that the Act does not imposed any duty on insurers to located deceased policyholders, but distinguished that an absence of the language (found in other versions of the UUPA, besides the 1995 version enacted in West Virginia) saying the Act "require[s] that proceeds be established 'due and payable' exclusively by resort to the insurer's records" created such an obligation. The Supreme Court determined that no specific statutory duty exists requiring insurers to search the DMF but that the dormancy period is triggered by the insured's death regardless of whether

due proof has been submitted to the insurer. Instead, the unclaimed property law simply required insurance companies to account for and escheat abandoned insurance policy proceeds to the state. Importantly, this is the only case which held the insurance laws to be irrelevant to interpretation of unclaimed property laws.[iv]

- *Finley v. Transamerica:* In June, 2015, the United States District Court for the Northern District of California granted Transamerica's Motion to Dismiss. In this case, a pro se plaintiff accused Transamerica of failing to pay the life insurance policy benefits owed upon his father's death (thereby breaching the terms of the policy and the implied covenant of good faith and fair dealing). Plaintiff did not notify Transamerica when the father died and eventually Transamerica escheated the policy proceeds to the State Controller. Plaintiff claims that Transamerica should have searched the DMF and proactively started the claims process upon his father's death. The court concluded that filing a claim is a condition precedent to the payment of policy proceeds; and finding that Transamerica was obligated to "solicit or gather information on his father's death would be contrary to the terms of the policy [requiring that a claim be filed]." In dismissing the case, the Court cited other recent cases that have concluded there is no affirmative DMF search requirement. These cases include California Controller vs American National Insurance Company and Thrivent v. California State Controller.[v]
- *Plains All American Pipeline v. Delaware:* In June, 2015, a limited partnership sued Delaware officials alleging that their unclaimed property audit infringes on the company's constitutional rights, deprives it of substantive and procedural due process, and is an unconstitutional taking of private property for public use without just compensation. Many of the allegations resonate with the experience of life insurance companies being compelled to use the DMF in the absence of statutory guidance and also ignoring the clear terms of the insurance contract regarding when funds become due and payable.[vi]
- *Hall v Minnesota:* In April, 2015 a citizen filed a class action alleging that the Minnesota Department of Commerce designed a system to collect unclaimed property and money that benefits government coffers but leaves rightful property owners in the dark. The suit argues that the state made great efforts to collect $654 million in unclaimed property but makes little effort to notify property owners who can claim what belongs to them. Instead, the unclaimed money goes into the state's general fund, meaning the "state has profited enormously." The class action asks the court to determine whether the state's seizure of unclaimed property without notifying owners constitutes a taking in violation of the Fifth Amendment, which requires "just compensation" if private property is taken for public use. It also asks for a ruling on whether the state's use of a website where people can search for their names is adequate notification.[vii]
- *California Controller vs American National Insurance Company:* In March, 2015, the California Court of Appeals reversed the trial court's order granting a preliminary injunction to the Controller (forcing the production of all requested policy data to the Controller and UPCJ, the auditor). Note that the Court of Appeals did not go so far as to decide that the auditor is not actually entitled to all of the requested policy data (for auditing/DMF search purposes). Rather, the Court determined that the issue should not be decided by means of preliminary injunction – rather, it should be determined by a trial on the merits.[viii]

2014

- *Thrivent v. California State Controller:* In September, 2014, the California Superior Court issued an order denying the Controller's motion for preliminary injunction to compel Thrivent to produce vast amounts of policy data pursuant to an unclaimed property audit. The court held there must be limitations on information requested by the government. The audit of Thrivent's books and records for unclaimed life insurance benefits is delayed until the adjudication of its Constitutional arguments against the Controller's audit tactics.[ix]
- *Thrivent Dec Action (on the interpretation of FL unclaimed property laws):* In August, 2014, a Florida appellate court issued an opinion that reversed the Florida Department of Financial Services' prior declaratory statement, regarding the interpretation of its unclaimed property laws. The Court determined that the Department's interpretation ignores the plain language of the statute, nothing in the statute supports the view that funds become "due and payable" the moment an insured dies (i.e., date of death as the dormancy trigger), and there is no statutory duty on an insurer to search the DMF to determine whether an insured has died.[x]
- *United Insurance Company of America (Kemper) v. Commonwealth of Kentucky (Kemper Lawsuit on the constitutionality of the retrospective application of the NCOIL model):* In August, 2014, the Kentucky Court of Appeals reversed a lower court decision and concluded that the Kentucky law requiring DMF searchs (based on the NCOIL Model "Unclaimed Life Insurance Benefits Act") imposes substantive obligations on insurer contracts, and therefore, cannot be applied to policies that were inforce as of the Act's effective date but only prospectively to policies issued after the effective date of the law.[xi]

2013

- *Total Asset Recovery Services LLC v.MetLife:* In August, 2013, a Florida Court of Appeals in a case specifically involving escheat of unclaimed life insurance proceeds held that Florida has not adopted a law requiring insurance companies to consult the DMF. As a result, the court upheld the historic interpretation of the 1981 version of the Uniform Act that, in the absence of maturity/ claim, life insurance only becomes "due and payable" as unclaimed property when either the insurer has knowledge of the insured's death or the insured, if living, would reach his or her limiting age.[xii]
- *Feingold v. John Hancock Life Insurance Co.:* In August, 2013, a federal district court dismissed a class action against the insurance company, holding that life insurers have no duty to search the DMF and that "under established principles of insurance law" an insurance company practice of requiring due proof of death before it considered policy proceeds to be "due and payable" complied with both Massachusetts and Illinois law. 94 The United States Court of Appeals for the First Circuit upheld the district court's decision that an insurer is legally entitled to require a claim and proof-of-death before the insurer affirms or denies coverage.[xiii]
- *Andrews v. Nationwide:* In October, 2012, the Ohio Court of Appeals upheld the ruling of two lower courts that there is no contractual duty for a life insurance company to periodically review the Death Master File to determine if an insured is deceased.[xiv]

Appendix 1, Endnotes

i Complaint for Declaratory and Injunctive Relief, Kemper v. Illinois State Treasurer (filed November 2015)

ii Complaint for Declaratory and Injunctive Relief, Thrivent Fin. For Lutherans v. Yee, No. CGC-15-548384 (Cal. Super Ct. S.F filed October 9, 2015).

iii Petition for Writ of Certiorari, Taylor v. Yee, (No. 15-169) (9th Cir. October 8, 2015).

iv Perdue v. Nationwide Life Ins. Co., et.al., Civ. No. 12-c-287 (W.V. Cir. Ct. Dec. 27, 2013), rev'd and remanded, State ex rel. Perdue v. Nationwide Life Ins. Co. 236 W.Va. 1 (June 16, 2015).

v Finley v. Transam. Life Ins. Co., No. 15—CV—00678—WHO, 2015 WL 3919598 (N.D. Cal. June 25, 2015), first amended complaint dismissed without leave to amend, No. 15—CV—00678-WHO, 2015 WL 6871944 (N.D. Cal. Nov. 9, 2015).

vi Complaint for Declaratory and Injunctive Relief, Plains All Am. Pipeline, L.P. v. Cook, No. 1:15-CV-00468-RGA (Del. Dist. Ct. filed June 5, 2015).

vii Class Action Complaint, Hall v. Minnesota, No. 62-CV-15-2112 (Minn. 2nd Dist. Ct. filed April 8, 2015).

viii Yee v. Am. Nat'l Ins. Co., 235 Cal.App. 4th 453 (2015).

ix Thrivent Fin. for Lutherans v. Chiang, No. CGC-13-535156, (Cal. Super Ct. S.F. Sept. 2, 2014).

x Thrivent Fin.for Lutherans v. Department of Financial Services, 145 So.3d 178 (Fla.Dist. Ct.App.2014).

xi United Ins. Co. of Am. v. Commw., Dep't of Ins., No. 2013–CA–000612–MR, 2014 WL 3973160 (Ky.Ct.App. Aug. 15, 2014).

xii Total Asset Recovery Services, LLC v. Metlife, Inc., No. 2010–CA–3719, 2013 WL 4586450 (Fla.Cir.Ct. Aug. 20, 2013) appeal docketed, No. 1DCA-4420 (Fla. 1st DCA 2013).

xiii Feingold v. John Hancock Life Ins. Co., No. 13—10185, 2013 WL 4495126 (D. Mass. Aug. 19, 2013), aff'd, No. 13—2151, 2014 U.S. App. WL 2186595 (1st Cir., May 27, 2014).

xiv Andrews v. Nationwide Mut. Ins. Co., No. 97891, 2012 WL 5289946 (Ohio Ct. App. Oct. 25, 2012), review denied 135 Ohio St.3d 1415, 986 N.E.2d 31 (Ohio 2013).

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