

UNCLAIMED LIFE INSURANCE PROCEEDS AND THE DUTY TO SEARCH: WHO IS THE TRUE BENEFICIARY?

Alyca Riley*

I. INTRODUCTION

Life insurance is like “hugging your kid but with money.”¹ Naming a child or other family member as the intended beneficiary of a life insurance policy is one of the primary ways Americans provide future support for loved ones. But what if instead of your children or family, the state where you lived became the beneficiary of the proceeds? Recently, as a result of unclaimed property audits, life insurance companies have been required to turn over unclaimed life insurance proceeds to state governments rather than the intended beneficiaries.² As a result, the state becomes the intermediate (and often ultimate) beneficiary of the life insurance proceeds, not the insured’s family.

Unclaimed property laws have existed in the United States for many years.³ But until recently, few people knew of their existence.⁴ In the last few years, “[t]hird-party audit firms have brought increased attention to state abandoned property laws by performing contingency fee audits.”⁵

*J.D. 2016, Baylor University School of Law. I would like to thank Professor Elizabeth Miller and Professor Bridget Fuselier for their guidance on this article. I would also like to thank my parents for their support and for listening to my numerous ideas for this article. Finally, I would like to thank the students of the *Baylor Law Review* for all the hard work they put into reviewing and publishing this article.

¹Television Commercial by State Farm Life Insurance Company, *Kids*, ISPOT.TV, <http://www.ispot.tv/ad/7frA/state-farm-life-insurance-kids> (last visited Oct. 16, 2016).

²See David A. Fruchtman, *Fundamentals of the Escheat of Abandoned Property*, N.Y.U. ST. AND LOC. TAX INST., at 1 n.1 (2006), <http://www.statetaxalert.us/articles/NYU02>.

³*Id.* at 1.

⁴*Id.*

⁵*Id.* at 5. In 2011, one such auditor represented approximately thirty-five states and the District of Columbia in contingency fee audits. Press Release, John Hancock Fin. Servs., *John Hancock Statement on Settlement With State of Florida Regarding Abandoned Property*, PR NEWSWIRE (May 18, 2011) (on file with PRNewswire), <http://www.prnewswire.com/news-releases/john-hancock-statement-on-settlement-with-state-of-florida-regarding-abandoned-property-122177529.html>.

These audit firms approach the state with a revenue-generating proposal.⁶ The auditors contract with the state on a contingent basis to locate unclaimed property in exchange for a finder's fee.⁷ Once the state receives the property, the audit firm is "paid a percentage of revenues the states would not otherwise reap."⁸ In fiscal year 2013, unclaimed property "represented the third-largest source of revenue [for the state of Delaware] . . . bringing \$566.5 million into state coffers."⁹

Recently, the life insurance industry has been a target of these unclaimed property audits.¹⁰ These audits give an advantage to the state by providing a setting outside of a courtroom "where life insurers do not have the benefit of a neutral arbiter deciding questions of fact and law."¹¹ When this issue has been brought before a court, states and insurance regulators have asked the courts to impose a duty on life insurance companies to regularly search death records and compare the findings to all in-force policies on record to identify potential unclaimed funds and accelerate escheatment to the state.¹² However, imposing an affirmative duty on insurance companies to search death records is in opposition to historical contract principles and a long precedent of judicial interpretation of insurance policies. Texas courts have not heard a case on this issue yet, but many other state courts have upheld judicial precedent that treats the insurance policy as a contract and enforces the contract based on the agreed-upon terms.¹³ While laws and regulations designed to ensure that an insurance company does not wrongfully retain payable funds are appropriate, arguably an insurance company is the party best suited to locate the intended beneficiary and should be allowed to develop and implement processes for doing so.

This note will provide a brief overview of unclaimed property and the laws that regulate claims to such property in Part II, focusing specifically on Texas's approach. Part III will explore the interaction between unclaimed

⁶ See Fruchtmann, *supra* note 2, at 5.

⁷ See Christopher J. Hopkins, *Unclaimed Property: Current Issues and Trends*, THE TAX ADVISER (Sept. 1, 2014), <http://www.thetaxadviser.com/issues/2014/sep/salt-sept2014.html>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Jason Gosselin et. al., *Life Insurers Start Fighting Back*, LAW360 (Oct. 1, 2013), <http://www.law360.com/articles/476918/life-insurers-start-fighting-back>.

¹¹ *Id.*

¹² See *infra* Part IV.B.1.

¹³ See *infra* Part IV.B.3.

property laws and the highly regulated insurance industry. In various subsections, Part III will explain when life insurance proceeds become subject to unclaimed property laws and will emphasize the judicial precedent that an insurance policy is a contract between the insured and the insurance company that should be enforced pursuant to the agreed-upon terms. Part IV will discuss current responses to the theory of a “duty to search,” explaining the positions of the supporting and opposing parties. Part V will conclude with a suggestion that balances each party’s competing interests, while still ensuring that the intended beneficiaries are the ultimate recipients of any money due under the contract.

II. THE BASICS OF UNCLAIMED PROPERTY

A. *What Is Unclaimed Property?*

Unclaimed property is “property held or [owed] in the ordinary course of business that the owner has not claimed for a certain period of time. . . .”¹⁴ Unclaimed property may take many forms, but most often it will be intangible property that remains unclaimed by the rightful owner beyond the statutorily defined abandonment period.¹⁵ Common types of unclaimed property include deposits, uncashed payroll and dividend checks, gift certificates, and life insurance proceeds.¹⁶ Once property becomes unclaimed (as defined by the laws of each state), the property is subject to escheatment to the state within a prescribed period of time.¹⁷ Escheatment is “the reversion of property . . . to the state in the [United States] when there are no legal heirs.”¹⁸

¹⁴Hopkins, *supra* note 7.

¹⁵Kelly Cruz-Brown, *Recent Developments in Unclaimed Property/Escheat Law*, CARLTON FIELDS, P.A. 255. 259 (April 2012), https://www.carltonfields.com/files/Publication/782a38dc-741d-4e75-b3f0-cea717290371/Presentation/PublicationAttachment/f1a90b44-13f2-4a73-8b47-732181d3e58a/14_Brown%5B1%5D.pdf (last visited Oct. 16, 2016).

¹⁶Fruchtman, *supra* note 2, at 2. *But see In re Nov. 8, 1996, Determination of State*, Dept. of Treasury, Unclaimed Prop. Office, 706 A.2d 1177, 1180 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 722 A.2d 536 (N.J. 1999) (noting that not all states treat gift certificates as unclaimed property subject to escheatment, particularly excluding gift certificates that are redeemable only for goods and services).

¹⁷Fruchtman, *supra* note 2, at 1.

¹⁸*Escheat*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1998).

Most state statutes require the immediate surrender of escheatable property.¹⁹ Holders who fail to escheat unclaimed property may face pecuniary consequences including fines, penalties, and interest for failing to comply with the law.²⁰ Some states may waive the fines and penalties if the holder can show it acted in good faith, but simply failed to turn over the escheatable property timely.²¹

B. When Does Property Become Unclaimed?

Every state has adopted laws that define and regulate unclaimed property.²² Some state laws follow the model act known as the Uniform Unclaimed Property Act (UUPA) while other states have created their own unclaimed property regime.²³ These laws define the specific types of property that are subject to the escheat rules in the state, set the abandonment period, and outline the procedures for how to remit the property to the state once it is abandoned.²⁴

¹⁹ See, e.g., CAL. CIV. PROC. CODE § 1532(a) (West Supp. 2016) (stating that a holder of property shall deliver the property to the state no later than seven months and fifteen days after the due date of its escheated property report); N.C. GEN. STAT. ANN. § 116B-61(a) (West 2015) (stating that a holder of property shall deliver the property to the state Treasurer upon filing its abandoned property report); TEX. PROP. CODE ANN. § 74.301(a) (West 2014) (stating that each holder of unclaimed property shall deliver it to the state by July 1 of the year following the year in which it was deemed to be unclaimed).

²⁰ See, e.g., CAL. CIV. PROC. § 1576(b) (stating that a penalty between \$5,000 and \$50,000 may be assessed against a holder of property who willfully refuses to pay or deliver escheated property to the state); N.C. GEN. STAT. § 116B-77(b) (stating that a penalty of up to \$1,000 per day, up to \$25,000 plus twenty-five percent of the value of any property not reported, may be assessed against a holder of property who willfully fails to report, pay or deliver property within the proper time period); TEX. PROP. CODE ANN. §§ 74.705(a), 74.706(a) (stating that Texas imposes a penalty equal to five percent of the value of unclaimed property to be escheated plus ten percent interest annually from the date the property should have been remitted).

²¹ See, e.g., N.C. GEN. STAT. § 116B-77(d) (stating that the Treasurer may waive the interest or penalties for good cause); TEX. PROP. CODE ANN. § 74.707(a) (stating that the penalty may be waived if the holder made a good faith effort to comply).

²² Fruchtman, *supra* note 2, at 1.

²³ *Id.* Some states may have adopted an older version of the UUPA rather than the most recent version. *Id.* The most recent version of the UUPA is the 1995 version. UNIF. LAW COMM'N, *Unclaimed Property Act Summary*, <http://www.uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act> (last visited Oct. 16, 2016). The 1995 Act is not materially different from the previous versions. See *id.*

²⁴ See UNIF. UNCLAIMED PROP. ACT §§ 1, 2, 4, 8 (UNIF. LAW COMM'N 1995).

Most states create a presumption of abandonment by statute.²⁵ Generally unclaimed property will be presumed abandoned if: (1) it is held or issued in the ordinary course of the holder's business, (2) there is a debt or obligation running from the holder to the owner of the property or creditor, and (3) the property remains unclaimed by the owner for more than the statutory abandonment period after it becomes payable by the holder to the owner.²⁶

C. Where Does Unclaimed Property Escheat?

Often, multiple states may have an interest in the unclaimed property. Historically, the state of the owner's last domicile had the right to the unclaimed property.²⁷ In the landmark case *Texas v. New Jersey*, the United States Supreme Court clearly defined the priority rules: the owner's state of domicile has priority over all other states in regulating and claiming the property upon abandonment.²⁸ Only if the owner's state of domicile cannot be ascertained will the holder's state of corporate domicile have any claim to the property.²⁹

The UUPA provisions follow the Supreme Court's holdings. States adopting the UUPA generally require by statute that, after the presumed abandonment period, the holder of the property conduct due diligence to locate the owner of the property by the owner's last known address.³⁰ If the owner cannot be located or the property cannot be returned to the owner, the property must be transferred to the state of the owner's last known domicile.³¹ The state then holds the property as a custodian for the owner

²⁵Fruchtman, *supra* note 2, at 1.

²⁶*Id.* at 1–2.

²⁷*See Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 551 (1948) (reasoning that an insured's domicile created sufficient contacts with the state to give the state the rightful authority over the property). Three years later, the United States Supreme Court affirmed this decision in *Standard Oil Co. v. New Jersey*, holding that the state of the holder, i.e., the corporate insurance company, will have a claim to the property only if the insured's state of domicile does not claim it. 341 U.S. 428, 441–42 (1951).

²⁸379 U.S. 674, 681–82 (1965).

²⁹*Id.* This was upheld by a later decision where the Supreme Court held that the priority rules could not be overridden by state legislatures. *Delaware v. New York*, 507 U.S. 490, 509–10 (1993).

³⁰Cruz-Brown, *supra* note 15, at 259.

³¹*See id.* at 259–60.

who may come forward to claim it at any time.³² If the owner never comes forward to claim the property, the state keeps the property as its own.³³

D. Unclaimed Property in Texas

In Texas, the legislature has not adopted the Uniform Unclaimed Property Act.³⁴ Instead, the legislature has created its own unclaimed property regime that any business domiciled in Texas must comply with.³⁵ In Texas, personal property will be presumed abandoned if:

[F]or longer than three years: (1) the existence and location of the owner of the property is unknown to the holder of the property; and (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.³⁶

The Texas legislature has defined presumptions for specific types of personal property such as unclaimed wages, stored value cards, utility deposits, traveler's checks, and money orders.³⁷

³² *Id.* at 260.

³³ *Id.*

³⁴ UNIF. LAW COMM'N, *Enactment Status Map*, <http://www.uniformlaws.org/Act.aspx?title=Unclaimed%20Property%20Act> (last visited Oct. 16, 2016) (showing that Texas has not adopted the Uniform Unclaimed Property Act).

³⁵ See TEX. PROP. CODE ANN. §§ 72.001–76.704 (West 2014 & Supp. 2016). Chapter 72 defines when property is considered abandoned. See generally *id.* §§ 72.001–72.103. Chapter 73 defines specific rules related to property held by financial institutions such as banks or credit unions. See generally *id.* §§ 73.001–73.102. Chapter 74 outlines the reporting, delivery, and claims process for escheating property to the state of Texas. See generally *id.* §§ 74.001–74.710. Chapter 75 addresses specific rules related to unclaimed mineral rights and proceeds. See generally *id.* §§ 75.001–75.102. Finally, Chapter 76 addresses special reporting, delivery, and claims procedures for school districts, municipalities or counties, certain junior colleges, or property less than \$100. See generally *id.* §§ 76.001–76.704.

³⁶ *Id.* § 72.101(a).

³⁷ See *id.* § 72.1015 (stating that unclaimed wages are presumed abandoned after a period of one year if certain requirements are met); *id.* § 72.1016 (stating that stored value cards are presumed abandoned on the card's expiration date, the third anniversary of the later of the date the card was issued or last used, or the first anniversary of the later of the date the card was issued or last used if the card represents wages to the owner); *id.* § 72.1017 (stating that utility deposits are presumed abandoned on the later of either the first anniversary of the date the refund of the deposit became payable, the first anniversary of the date the utility last received communication from the owner of the deposit, or the first anniversary of the date the refund check was issued if no

III. UNCLAIMED PROPERTY LAW AND THE INSURANCE INDUSTRY

A. *Additional Statutory Regulation*

Life insurance proceeds have become a more prevalent focus of unclaimed property law in recent years.³⁸ Because of the highly regulated nature of the insurance industry, unclaimed life insurance proceeds are subject to both general unclaimed property laws and state insurance laws.³⁹ For example, in Texas, Chapter 1109 of the Texas Insurance Code specifically subjects unclaimed insurance proceeds to the unclaimed property enforcement provisions of Chapter 74 of the Texas Property Code.⁴⁰ However, the Texas Insurance Code preempts the general unclaimed property statutes in determining when life insurance and annuity contract proceeds become unclaimed.⁴¹

Under the most recent version of the UUPA, unclaimed property in the form of life insurance proceeds is the “amount due and payable under the terms of an annuity or insurance policy. . . .”⁴² Unclaimed life insurance proceeds will not be presumed abandoned until they are unclaimed for a period of “three years after the obligation to pay arose or, in the case of a policy or annuity payable upon proof of death, three years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based. . . .”⁴³ In other words, the abandonment presumption is triggered only after the obligation becomes due and payable upon either (1) proof of death per the terms of the policy to prove the policy has matured or (2) the insured reaching the mortality age.⁴⁴

Under Texas’s unclaimed property laws, life insurance proceeds and proceeds from an annuity contract held and owed by an insurance company doing business in Texas will be subject to the unclaimed property rules only if two requirements are met.⁴⁵ First, the last known address of the

claim to the check or act of ownership has been asserted); *id.* § 72.102 (stating that traveler’s checks and money orders will not be presumed abandoned unless certain requirements are met).

³⁸ Cruz-Brown, *supra* note 15, at 259.

³⁹ *See id.* at 260.

⁴⁰ TEX. INS. CODE ANN. § 1109.002 (West 2009).

⁴¹ *Id.* § 1109.001(a), (c); TEX. PROP. CODE ANN. § 72.001(c).

⁴² UNIF. UNCLAIMED PROP. ACT § 1(13)(vi) (UNIF. LAW COMM’N 1995).

⁴³ *Id.* § 2(a)(8).

⁴⁴ *See id.*

⁴⁵ TEX. INS. CODE ANN. § 1109.001(a).

beneficiary per the insurance company's records must be located in Texas.⁴⁶ If the company does not know the identity or address of the beneficiary, the beneficiary's address will be presumed to be the same as the last known address of the insured or annuitant.⁴⁷ Second, the proceeds must have been "unclaimed and unpaid for at least three years after the date, according to the company's records, that the proceeds became due and payable under a life or endowment insurance policy or annuity contract that has matured or terminated."⁴⁸ Based on the statutory language, the proceeds becoming due and payable is a condition precedent to being presumed unclaimed or abandoned.

In Texas, life insurance proceeds generally become due and payable by proof of death under the terms of the contract.⁴⁹ The statute creates one exception for when a life insurance policy may become due and payable other than by proof of death: "only if the policy is in force at the time the insured attained the limiting age under the mortality table on which the reserve is based."⁵⁰ Under the statutory construction doctrine of *expressio unius est exclusio alterius*, when the legislature specifically provides for only one exception, this is clear evidence that the legislature considered exceptions and intended to only include the stated exception.⁵¹ Because the Texas legislature only provided one exception for when life insurance proceeds become due and payable other than by the contract terms, Texas courts should not imply other exceptions.

B. Insurance Policies as Contracts

Courts across the country have long recognized a life insurance policy as a contract between the holder (the insurance company) and the owner (generally the insured).⁵² The Ohio Court of Appeals stated that "[a]n insurance policy is a contract, and the relationship between the insurer and

⁴⁶ *Id.*

⁴⁷ *Id.* § 1109.001(b).

⁴⁸ *Id.* § 1109.001(a).

⁴⁹ *See id.* § 1109.001(c).

⁵⁰ *Id.*

⁵¹ *McCalla v. State Farm Mut. Auto. Ins. Co.*, 704 S.W.2d 518, 519 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd) ("When specific exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no other shall apply.").

⁵² *See* STEVEN PLITT, ET AL., *COUCH ON INSURANCE* § 1:10 (3d ed. 2009).

the insured is purely contractual in nature.”⁵³ As with any other contract, the provisions negotiated and agreed upon within the four corners of the contract will govern.⁵⁴ However, in order to protect the insureds (who have less bargaining power), if the terms of the contract are ambiguous or “are reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured.”⁵⁵ This prevents life insurance companies from taking advantage of individual purchasers of life insurance.⁵⁶

In the absence of an ambiguity, the contractual nature of an insurance policy will control the relationship between the insured and the insurer.⁵⁷ One California court of appeals described the effect of an insurance policy being treated as a contract between the holder and the insured:

[A]n insurance contract is a bona fide contract between the insurer and the insured. As such, an insured has certain obligations to perform pursuant to the contract before an insurer has a duty to pay benefits thereunder.

. . . .

Insurance contracts legitimately call for the filing of a claim, complete with proof of loss. It would seem reasonable that any responsibility to investigate on an insurer’s part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with [the] claims procedure was made, has been determined.⁵⁸

Most life insurance policies require proof of death of the insured before the proceeds become due and payable. For example, in the *Andrews* case,

⁵³ *Andrews v. Nationwide Mut. Ins. Co.*, No. 97891, 2012 WL 5289946, at *3 (Ohio Ct. App. Oct. 25, 2012); *see also* *Finley v. Transamerica Life Ins. Co.*, No. 15-cv-00678-WHO, 2015 WL 3919598, at *2 (N.D. Cal. June 25, 2015) (“An insurance policy is, fundamentally, a contract between the insurer and the insured; accordingly, a court must ‘look to the language of that contract to determine the obligations which the parties have assumed.’”) (quoting *Stein v. Int’l Ins. Co.*, 217 Cal. App. 3d 609, 613 (1990)).

⁵⁴ *See Andrews*, 2012 WL 5289946, at *3.

⁵⁵ *Id.* at *4.

⁵⁶ *See Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir. 1990).

⁵⁷ *Paulfrey v. Blue Chip Stamps*, 197 Cal. Rptr. 501, 507 (Ct. App. 1983).

⁵⁸ *Id.* at 507–08.

the policy language and relevant Ohio law expressly imposed the burden of providing proof of death to the insurer upon the beneficiary or claimant before a policy was payable.⁵⁹ The Nationwide policy “expressly provide[d] that Nationwide [was] required to pay death proceeds to the beneficiary of the policy on receiving ‘due’ or ‘satisfactory’ proof of the insured’s death.”⁶⁰ This language mirrored the statutory language and put the burden on the beneficiary to provide proof of death.⁶¹

Because of these contract terms, insurance companies generally do not have an affirmative duty to determine if a claim is due and payable.⁶² Instead, the burden is on the beneficiary or owner of the policy to make a claim.⁶³ This has historically been upheld by the courts and is common in industry practice.⁶⁴ Moreover, a court cannot enlarge the coverage or responsibilities of the insurer beyond what the contract requires.⁶⁵ In interpreting the terms of an insurance policy according to its plain meaning, the Ohio appellate court found that “[t]he terms ‘receipt’ and ‘receiving’ demonstrate[d] Nationwide’s passive role in establishing an insured party’s proof of death; they [did] not connote an obligation to procure such information.”⁶⁶ It would be impractical and time consuming to require an insurer to constantly research and investigate whether one of its insureds has died.

In addition, the statutory exception that a policy become due and payable upon the insured reaching the limiting age in the mortality table is a guaranteed date that a policy will become owed absent any proof of death under the contract.⁶⁷ At that point, the insurer must attempt to identify and

⁵⁹ *Andrews*, 2012 WL 5289946, at *4; *see also* *Am. Emp’rs Ins. Co. v. Metro Reg’l Transit Auth.*, 12 F.3d 591, 592–93 (6th Cir. 1993) (finding that notice of a claim in an insurance contract is an “essential condition of the contract” and “the notice provision of an insurance policy create[d] a condition precedent, non-compliance with which preclude[d] recovery by the insured”).

⁶⁰ *Andrews*, 2012 WL 5289946, at *1.

⁶¹ *See id.*; *cf.* OHIO REV. CODE ANN. § 3915.05(K) (LexisNexis 2010).

⁶² *E.g.*, *Andrews*, 2012 WL 5289946, at *6 (“Importantly, the contracts do not impose a duty on Nationwide to search the DMF to determine whether their insureds are deceased.”).

⁶³ *Id.* at *4.

⁶⁴ *Id.*

⁶⁵ *Id.* at *3 (“[C]ourts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties.”).

⁶⁶ *Id.* at *4 (referencing provisions such as “upon receiving proof” and “after we receive at our Home Office proof of death”).

⁶⁷ *See* TEX. INS. CODE ANN. § 1109.001(c) (West 2009).

locate the owner or beneficiary of the policy. If either cannot be located, after three years, the funds may become truly unclaimed and escheatable. This prevents an insurer from indefinitely retaining unclaimed funds.

C. *The Death Master File*

The Death Master File (DMF) is the United States Social Security Administration's (SSA) master list that contains records of reported deaths in the last seventy-five years.⁶⁸ According to the official website, the DMF contains over eighty-six million records of deaths based upon Social Security payment records.⁶⁹ The DMF is updated weekly and contains information on each reported deceased individual, including his or her social security number, name, date of birth, and date of death.⁷⁰

The DMF, however, is not the most reliable resource. The SSA clearly states on the DMF website: "SSA does not guarantee the veracity of the file. Thus, the absence of a particular person is not proof this person is alive."⁷¹ In addition, the accessibility of the database to the general public is shrinking. As of November 1, 2012, 4.2 million of the recorded deaths were to be made accessible only by federal agencies, and of the 2.8 million deaths reported annually, only 1 million would be available to the general public.⁷² Because of the limited and inaccurate information, strict, mandatory reliance on the DMF is likely to result in erroneous payments of life insurance proceeds to beneficiaries or no payment when one may be due if the insured is not listed on the DMF and whose death is not verified. While the DMF may be a useful supplemental tool, it is not a

⁶⁸ See *Social Security Administration (SSA) Limited Access Death Master File (DMF)*, SOCIAL SECURITY DEATH MASTER FILE, <https://www.ssdmf.com/Library/InfoManage/Guide.asp?FolderID=54&SessionID=%7B24E16AB9-68F9-410E-9103-C68E4B46A9EF%7D&SP=2> (last visited Oct. 16, 2016); Ed Leefeldt, 'Death Master' Limits Life Insurance Companies' Access to Death Records, INSURE.COM (Jan. 9, 2012), <http://www.insure.com/life-insurance/ssa-limits-death-records.html>.

⁶⁹ See SSA DMF, *supra* note 68.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Leefeldt, *supra* note 68. This is due to a prohibition on disclosing deaths it received knowledge of from "protected state records." See *id.* Most of the deaths that will be available to the general public will not be the most recent ones. *Id.* Today, the general public is allowed to "Search the Limited Access DMF," which even then requires a registration and user fee to gain access. *Search the Limited Access DMF*, SOCIAL SECURITY DEATH MASTER FILE, <https://www.ssdmf.com/Library/SSN/Search.asp?FolderID=49&SessionID=%7B331B4A15-9CC7-4318-9D38-C5CD740664C5%7D&RLMsg=&SP=2> (last visited Oct. 16, 2016).

comprehensive source that insurance companies should be required to use to locate and verify deceased insureds.⁷³ As one MetLife representative explained, MetLife uses the DMF as a “safety net” for smaller benefits, but other investigative procedures are required because “sometimes the information is incorrect.”⁷⁴

IV. RESPONSES TO IMPOSING A “DUTY TO SEARCH”

A. *Legislative Imposition of Duty to Search*

In response to these unclaimed property issues, some state legislatures have recently adopted laws to expressly impose a statutory duty on life insurance companies to periodically search certain death records.⁷⁵ The National Conference of Insurance Legislators (NCOIL) Model Act advocates for this approach.⁷⁶ The NCOIL Model Act expressly requires that insurance companies perform a quarterly search of the DMF, comparing all in-force policies in the company’s records to the DMF records.⁷⁷ The argument is that if an insured’s social security number is found in the DMF, the policy should be considered immediately due and payable even though no claim has been made on the policy.⁷⁸ This shifts the burden of identifying deceased insureds to the insurance company and away from the beneficiaries.⁷⁹ The Act also requires insurers to immediately “notify state treasury departments and escheat the [unclaimed] funds[] per

⁷³ See Leefeldt, *supra* note 68.

⁷⁴ *Id.*

⁷⁵ Mary Jo Hudson & Jill Murphey, *Life Insurance, Unclaimed Property and the Death Master File: Toward a United National Framework*, AM. COUNCIL OF LIFE INSURERS, at 3–4 (3d ed. Jan. 2016), <https://www.acli.com/Newsroom/Documents/memo%20ACLI%20white%20paper%20revised%20FINAL%20Jan16.pdf>.

⁷⁶ Press Release, Nat’l Conference of Ins. Legislators, NCOIL Model to Ensure Timely Payment of Death Benefits (Nov. 20, 2011) (on file with author), <http://ncoil.org/wp-content/uploads/2016/04/11302011UnclaimedBenefitPR.pdf>. The NCOIL is an organization based in Washington, D.C. that exists to “help legislators make informed decisions on insurance issues that affect their constituents and to declare opposition to federal encroachment of state authority to oversee the business of insurance.” *History & Purpose*, NAT’L CONFERENCE OF INS. LEGISLATORS, <http://ncoil.org/history-purpose/> (last updated 1996).

⁷⁷ Press Release, Nat’l Conference of Ins. Legislators, *supra* note 76.

⁷⁸ *See id.*

⁷⁹ *See id.*

unclaimed property laws” once they are identified, accelerating the payment of funds into state treasuries rather than into the beneficiaries’ hands.⁸⁰

Only a minority of states has adopted unclaimed property laws similar to the NCOIL Model Act that expressly require a search of the DMF.⁸¹ One of the first states to statutorily impose a duty to search death records was Kentucky with the adoption of its Unclaimed Life Insurance Benefits Act (ULIBA).⁸² Kentucky’s ULIBA mandates that “[a]n insurer shall perform a comparison of its insureds’ in-force life insurance policies, contracts, and retained asset accounts against a Death Master File, on at least a semiannual basis, to identify potential matches of its insureds.”⁸³ If there is a match, the insurer must “attempt to notify listed beneficiaries of a *potential* claim.”⁸⁴ The Kentucky court of appeals upheld the Act as a constitutional mandate to insurance companies.⁸⁵ In upholding the Act, the court stated that “the Act’s requirements are primarily regulatory and do not directly alter the operation of any conditions precedent for coverage under the insurance contracts. . . . [T]he Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured’s beneficiaries and estate to the insurer.”⁸⁶

Now, insurers in Kentucky have the duty and burden to investigate potential claims, but the “burden of providing such proof and making a claim remains with the potential beneficiary or the estate, and the Act does

⁸⁰ *See id.*

⁸¹ *See, e.g.,* ALA. CODE § 27-15-53(a) (LexisNexis 2014) (“An insurer shall perform a comparison of its insureds’ in-force life insurance policies, annuity contracts, and retained asset accounts against a death master file, to identify potential death master file matches of its insureds.”); MD. CODE ANN., INS. § 16-118(c) (LexisNexis 2014) (requiring a search of in-force life insurance policies against the DMF or similar database “at regular intervals, on at least a semiannual basis”); MONT. CODE ANN. § 33-20-1605(1) (West 2015) (requiring at least a semiannual search of in-force policies against the death master file or similar database); N.M. STAT. ANN. § 59A-16-7.1(B) (West 2015) (requiring a comparison of in-force policies to the death master file at least twice a year); N.D. CENT. CODE § 26.1-55-02(1) (2015) (requiring at least a semiannual search of in-force policies against the death master file); VT. STAT. ANN. tit. 27, § 1244a(b) (2015) (requiring at least a semiannual search of in-force policies against the death master file or similar database).

⁸² *See* KY. REV. STAT. ANN. § 304.15–420 (LexisNexis 2015).

⁸³ *Id.* §§ 304.15–420(3).

⁸⁴ *United Ins. Co. of Am. v. Kentucky*, No. 2013-CA-000612-MR, 2014 Ky. App. Unpub. LEXIS 1046, at *10 (Aug. 1, 2014).

⁸⁵ *See id.* at *11–12.

⁸⁶ *Id.* at *11.

not alter the insurer's contractual obligation to pay death benefits only upon receipt of proof of death.⁸⁷ Although the insurer has an additional burden to search for potential claims and inform the beneficiary that it believes there may be a potential claim, the proceeds shall not be paid until proof of death has been provided as required by the contract.⁸⁸

In New York, the legislature has not adopted new unclaimed property laws, but the Department of Financial Services has advised all life insurance companies that:

[A] cross-check of all life insurance policies, annuity contracts, and retained asset accounts on their administration data files . . . should be performed with the latest updated version of the U.S. Social Security Administration's Death Master File ("SSA Master File"), or another database or service that is at least as comprehensive as the SSA Master File, to identify any death benefit payments that may be due⁸⁹

Although not a legislative body, the Department of Financial Services does oversee the insurance industry in New York, and this guidance will have an impact on industry practices.⁹⁰

B. *Judicial Imposition of Duty to Search*

1. State Governments' Argument "For" Imposition of Duty to Search

Although both statutory and contractual language indicate the relevant period for determining abandonment begins on the date that the obligation to pay arose, state governments, supported by third-party audit firms, claim that the period on which to presume abandonment should instead begin upon the date of the insured's death, regardless of whether or not the insurer

⁸⁷ *Id.* at *10.

⁸⁸ *Id.*

⁸⁹ Press Release, N.Y. State Dep't of Fin. Servs., Guidance For Filing Responses To The Dep't's July 2011 Request For Special Reports Pursuant To Section 308 Of The N.Y. Ins. Law Relating To Investigating Claims And Locating Beneficiaries With Respect To Death Benefits Under Life Ins. Policies, Annuity Contracts And Retained Asset Accounts (Oct. 25, 2011) (on file with author), <http://www.dfs.ny.gov/insurance/life/filing-guidance-10252011.pdf>.

⁹⁰ See *Who We Supervise*, N.Y. ST. DEP'T OF FIN. SERVS., <http://www.dfs.ny.gov/about/whowesupervise.htm> (last visited Oct. 16, 2016).

is aware of the insured's death.⁹¹ State governments claim this approach is necessary because life insurance companies are intentionally withholding unclaimed property from the state.⁹²

In many cases, the states argue that, even absent additional legislative action to expressly impose a duty to search the DMF or a similar database, the existing laws and the nature of insurance contracts *impliedly* impose a duty on insurance companies to perform regular searches as part of the duty of good faith and fair dealing implied in every insurance contract.⁹³ But the courts have not looked favorably on this argument. In *Andrews*, the plaintiff argued that Nationwide breached the duty of good faith and fair dealing by “failing to make reasonable attempts to determine when the beneficiaries of a life insurance policy are entitled to death benefit proceeds.”⁹⁴ The court rejected this argument and held that Nationwide did not breach its duty of good faith and fair dealing “by failing to incorporate the DMF into its account servicing practices when it is not contractually or legally obligated to do so.”⁹⁵ Recently in 2015, one of the Ohio district courts also clearly rejected this claim in finding that the duty of good faith and fair dealing applied only to acting in good faith in performing under the contract terms, not outside the contract terms:

Under Ohio law, because a fiduciary relationship exists in the context of insurance contracts, the insurer has a duty to act in good faith in handling the claims of the insured. However, this implied duty does not supplant express contract terms. Rather, it requires good faith in performing those contract terms.⁹⁶

Arguably, in some cases, a beneficiary who did not know he or she was the beneficiary of an insurance policy and thus never made a claim with the insurance company may be more likely to discover that he or she is a

⁹¹ See U.S. CHAMBER INST. FOR LEGAL REFORM, *Unclaimed Property: Best Practices for State Administrators and the Use of Private Audit Firms*, at 3–4 (Apr. 2014), <http://www.instituteforlegalreform.com/uploads/sites/1/BestPractices.pdf>.

⁹² See Gosselin et. al., *supra* note 10.

⁹³ See, e.g., *Andrews v. Nationwide Mut. Ins. Co.*, No. 97891, 2012 WL 5289946, at *6 (Ohio Ct. App. Oct. 25, 2012).

⁹⁴ *Id.* at *1.

⁹⁵ *Id.* at *6.

⁹⁶ *Costigan v. John Hancock Ins.*, No. 5:14CV1002, 2015 WL 1400761, at *10 (N.D. Ohio Mar. 26, 2015) (citations omitted).

beneficiary and make a claim for the property through the state's general unclaimed property website.⁹⁷ However, the states still require the beneficiary to proactively make a claim for the proceeds; the states make little to no effort to locate or return funds to the beneficiaries.⁹⁸ Therefore, the acceleration of escheatment to the state could result in additional revenue for the states with the intended beneficiaries never receiving the benefit.

2. Insurance Industry's Argument "Against" Imposition of Duty to Search

In contrast, insurance companies argue against imposing an implied duty to search death records.⁹⁹ By contract, life insurance proceeds are not due and payable until the beneficiary comes forward with proof of death of the insured or meets other contractual obligations.¹⁰⁰ The states' argument ignores the duties stated and defined in the contract.¹⁰¹ Furthermore, state unclaimed property laws by their plain language apply only to obligations that are owed.¹⁰² The presence of express statutes being adopted in nineteen states imposing a statutory duty to search for potential payable policies is evidence that there is no implied duty to take any affirmative action to search for potentially deceased insureds absent additional legislation.¹⁰³

⁹⁷ See NAT'L ASS'N OF UNCLAIMED PROP. ADM'RS, *What is Unclaimed Property*, <https://www.unclaimed.org/what/> (last visited Oct. 16, 2016) ("2.5 million claims totaling \$2.25 billion returned to rightful owners in FY2011 as a result of state unclaimed property program efforts.").

⁹⁸ See, e.g., TEX. COMPTROLLER OF PUB. ACCOUNTS, *Texas Unclaimed Property Search*, <https://mycpa.cpa.state.tx.us/up/Search.jsp> (last visited Oct. 16, 2016). This website allows users to search by name for unclaimed property held by the state in Texas. See *id.* Other than providing the database, the only proactive effort the state claims to make is that it *may* send notices by mail to owners with complete last known addresses. See TEX. PROP. CODE ANN. § 74.203(a) (West 2014). However, this is likely the same action an insurer would have taken in an attempt to locate the owner or beneficiary before escheating the property to the state. Therefore, the state's efforts are unlikely to be effective in locating the owner.

⁹⁹ See *Andrews*, 2012 WL 5289946, at *1.

¹⁰⁰ See *supra* Part III.A.

¹⁰¹ See *supra* Part IV.B.1.

¹⁰² See, e.g., TEX. INS. CODE ANN. § 1109.001(a) (West 2009) (stating that the chapter applies if "the proceeds have been unclaimed and unpaid for at least three years after the date, according to the company's records, that the proceeds became *due and payable*") (emphasis added).

¹⁰³ See *supra* Part IV.A.; see also Hudson & Murphey, *supra* note 75, at 17.

Additionally, insurance companies are compelled to comply with all laws of the state in which they do business.¹⁰⁴ A company should be free to implement procedures to ensure it complies with the applicable laws. Insurance companies, like any other company, should be required to report, and be held liable for a failure to report, all due and payable claims that are unclaimed according to the statute. However, the law is clear that insurance proceeds cannot be unclaimed until owed.¹⁰⁵ Therefore, a court should not require an insurance company to step outside of its contract terms to create new due and payable claims.

3. The Judiciary Agrees with the Insurance Industry

Although Texas has not heard a case on the issue yet, there have been many key cases related to the issue of a duty to search in recent years.¹⁰⁶ While the courts are split on the issue, the majority of courts have not imposed a duty to search the DMF or other similar database without express statutory language mandating such action.¹⁰⁷

One of the first cases addressing the issue of unclaimed insurance proceeds is from California.¹⁰⁸ The court there explained that each party is required to uphold its duties under the contract terms in order to require performance from the other party.¹⁰⁹ To uphold its duty, the plaintiff was required by the policy terms “to furnish written notice of the claim to [the defendants] together with written proof covering the occurrence and extent of the loss . . . [U]nless and until [the plaintiff] satisfied both requirements, or substantially complied therewith, [the defendants] were under no obligation to investigate [the plaintiff’s] claim.”¹¹⁰ Not only was there no duty to pay until a claim was made, but there was no obligation to

¹⁰⁴ See NAT’L ASS’N OF INS. COMM’RS, *State Insurance Regulation*, http://www.naic.org/documents/consumer_state_reg_brief.pdf (last visited Oct. 16, 2016).

¹⁰⁵ See NAT’L ASS’N OF INS. COMM’RS, *Unclaimed Life Insurance Benefits*, http://www.naic.org/cipr_topics/topic_unclaimed_life_insurance_benefits.htm (last updated May 23, 2016).

¹⁰⁶ See *infra* Part IV.B.3.

¹⁰⁷ See *infra* Part IV.B.3.

¹⁰⁸ See generally *Paulfrey v. Blue Chip Stamps*, 197 Cal. Rptr. 501 (Ct. App. 1983).

¹⁰⁹ *Id.* at 507–08 (“In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer’s failure to investigate a nonclaim.”).

¹¹⁰ *Id.* at 508.

investigate the claim prior to a claim being made.¹¹¹ Imposing a duty to search death records such as the DMF would fall under the purview of the “investigation” of a claim.¹¹²

In another California case, the court found that “without actual presentation of a claim by the insured in compliance with [the claims procedure] contained in the policy, there is no duty imposed on the insurer to investigate the claim.”¹¹³ California continues to maintain this approach. In a 2015 case, the court said that “finding that Transamerica was obligated to ‘solicit or gather information’ of [the plaintiff’s] father’s death would thus be ‘contrary to the terms [of the] policy . . . and, hence, ‘independent of [any] contractual underpinnings.’”¹¹⁴

In Florida, per statute, life insurance proceeds are due and payable “at the time the insurer receives proof of death and surrender of the policy . . . [or] when the insurer knows that the insured has died, or when the insured attained or would have attained the limiting age.”¹¹⁵ In its initial petition to the Florida Department of Financial Services (Florida DFS), Thrivent Financial, the insurance company, filed for declaratory relief that the “due and payable” standard per the statute was only triggered after the beneficiary provided proof of death per the contract terms.¹¹⁶ Florida DFS disagreed and found that the claim became due and payable upon the death of the insured regardless of whether a claim was filed on the policy, triggering the start of the unclaimed property abandonment period upon the instant of death.¹¹⁷ In addition, Florida DFS ruled that the insurer was required to search the DMF as part of its “reasonable steps to pay . . . the beneficiary.”¹¹⁸ The district court of appeals overturned this ruling and found that “[n]othing in the plain language of [the statute] support[ed] DFS’ interpretation that funds become ‘due and payable’ at the moment the insured dies.”¹¹⁹ Instead, as stated in the plain language of the statute, life

¹¹¹ See *id.* at 507–08.

¹¹² See *id.* at 507.

¹¹³ *Cal. Shoppers, Inc. v. Royal Globe Ins. Co.*, 221 Cal. Rptr. 171, 202 (Ct. App. 1985) (citation omitted).

¹¹⁴ *Finley v. Transamerica Life Ins. Co.*, No. 15-cv-00678-WHO, 2015 WL 3919598, at *5 (N.D. Cal. June 25, 2015) (citation omitted).

¹¹⁵ *Thrivent Fin. for Lutherans v. Dep’t of Fin. Servs.*, 145 So. 3d 178, 182 (Fla. App. 2014).

¹¹⁶ *Id.* at 180.

¹¹⁷ See *id.* at 181.

¹¹⁸ *Id.* at 180–81.

¹¹⁹ *Id.* at 181.

insurance funds become “due and payable as established from the records of the insurance company” upon “receipt of due proof of death and surrender of the policy.”¹²⁰ Reading the statute in any other way would render meaningless the section of the statute that allows for a “deemed” due and payable policy when “not matured by actual proof of the death.”¹²¹ Furthermore, “nothing in the plain language of [the statute] imposes an affirmative duty on insurers to search these death records.”¹²²

In *Total Asset Recovery Services, LLC v. Metlife, Inc.*, the Florida courts again found that the insurance company had no obligation to search the DMF.¹²³ In interpreting and applying the law, the court granted a motion to dismiss partly because Florida has “not adopted a law requiring [the insurer] to consult the Death Master File . . . in connection with payment or escheatment of life insurance benefits.”¹²⁴ Nor has the state of 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.”¹²⁵

The Massachusetts District Court dismissed a case premised on the claim that a life insurance company should be required to search the DMF to find potentially unknown deceased insureds.¹²⁶ The court dismissed the case in part because the law was clearly settled that a beneficiary is required to make a claim on a policy before it is due and payable.¹²⁷ Proof of death was required under the law and was upheld by the court as an “established principle[] of insurance law.”¹²⁸

Likewise, in Ohio, the Ohio Court of Appeals found that Nationwide Mutual Insurance Company had no duty to search the DMF.¹²⁹ Basing its

¹²⁰ *Id.* (quoting FLA. STAT. ANN. §§ 717.107(1), 627.461 (West 2015)).

¹²¹ *Id.* (quoting FLA. STAT. § 717.107(3)).

¹²² *Id.* at 182.

¹²³ *See* No. 2010-CA-3719, 2013 WL 4586450, at *4 (Fla. Cir. Ct. Aug. 20, 2013).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Feingold v. John Hancock Life Ins. Co.*, No. 13-10185-JLT, 2013 WL 4495126, at *1 (D. Mass. Aug 19, 2013), *aff'd*, 753 F.3d 55 (1st Cir. 2014).

¹²⁷ *See id.* at *2.

¹²⁸ *Id.*

¹²⁹ *Andrews v. Nationwide Mut. Ins. Co.*, No. 97891, 2012 WL 5289946, at *5 (Ohio Ct. App. Oct. 25, 2012) (“In the absence of legislative or administrative regulatory action, we will not import additional unspoken duties and obligations onto Nationwide that will conflict with the parties’ contracted terms.”).

decision on the absence of legislative guidance and the contract terms of the policy, the court stated that “obligating [the insurer] to solicit or gather information pertaining to an insured’s death would be contrary to the terms contained in the insurance policy.”¹³⁰ The court was unwilling to impose any additional duties beyond what the parties contract for: “[w]hile we understand that the death of an insured party is an inevitable fact, we are not persuaded that such certainty places an additional duty on Nationwide beyond what is expressed in the life insurance contracts”¹³¹ As mentioned in Part B.1 above, the insurance company was also not liable for breach of the covenant of good faith and fair dealing.¹³² Because Nationwide had no duty to search the DMF pursuant to the contract, the court was “unable to conclude that Nationwide ha[d] breached its duty of good faith and fair dealing by failing to incorporate the DMF into its account servicing practices when it is not contractually or legally obligated to do so.”¹³³

Finally, in West Virginia, the courts took a more moderate approach. The West Virginia state treasurer brought sixty-three separate lawsuits against insurance companies alleging violations of the UUPA adopted in West Virginia.¹³⁴ The court rejected the claim that an insurer must search the DMF because the statute did not mandate it.¹³⁵ However, the court reinforced the insurance company’s duty by law to comply with the existing unclaimed property statutes enacted by West Virginia.¹³⁶ The court left the specific procedures on how to comply with the applicable laws up to the discretion of the insurance company:

[T]he West Virginia Uniform Unclaimed Property Act imposes no specific duty on insurers to search the Department of Commerce’s Death Master File or any comparable data source. Rather, the Act simply requires insurers generally, as holders of property presumed

¹³⁰ *Id.* at *4.

¹³¹ *Id.* at *5.

¹³² *Id.* at *6.

¹³³ *Id.* Other courts have rejected the idea that the duty of good faith and fair dealing imposes additional duties on an insurer. *See, e.g., Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (“California law is clear, that without a breach of the insurance contract, there can be no breach of the implied covenant of good faith and fair dealing.”).

¹³⁴ *State ex rel. Perdue v. Nationwide Life Ins. Co.*, 777 S.E.2d 11, 13–14 (W. Va. 2015).

¹³⁵ *Id.* at 19.

¹³⁶ *Id.*

abandoned, to account for and turn over that property to the Treasurer. . . . Each insurer is free to determine how it will investigate and discover whether its insureds are yet living.¹³⁷

Based on its own experience, a particular insurer may determine that “contacting its insureds directly or farming the task out to its agents may produce the desired results in the most economical and reliable fashion. On the other hand, an insurer may well choose to review the DMF as the best or most efficient way to perform its duties.”¹³⁸ The West Virginia court recognized that each insurer is capable of implementing its own procedures for keeping track of its insureds and should be allowed to do so.¹³⁹

C. Settlements

In response to potential or pending lawsuits, many of the largest insurance companies in the country have entered into settlement agreements to pay states a certain amount of money in unclaimed property and change their claim procedures.¹⁴⁰ As noted by John Hancock Financial Services, the terms of its agreement with thirty-five states goes “well beyond those required by law or regulation.”¹⁴¹ With the size of the insurance companies involved, full comprehensive audits of each policy in existence would have taken years and thousands, if not millions, of dollars to conduct. Therefore, many insurers have simply taken the settlement agreements offered by the states and auditors in order to continue business without interruption.¹⁴²

Beginning in 2008, the California State Controller has been one of the leaders in initiating audits of multiple insurance companies in search of unclaimed property.¹⁴³ Per the Controller’s website, the state has settled

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See* Gosselin, *supra* note 10; Arthur D. Postal, *11 More Calif. Insurers Settle Unclaimed Property*, LIFEHEALTHPRO (June 7, 2013), <http://www.lifehealthpro.com/2013/06/07/11-more-calif-insurers-settle-unclaimed-property>.

¹⁴¹ Press Release, John Hancock Fin. Servs., *supra* note 5. The terms of the agreement include a different timetable than prescribed by law within which the company must identify abandoned property, conduct due diligence to find the owner or beneficiary, and report and remit the unclaimed funds to the state. *Id.*

¹⁴² *See* Postal, *supra* note 140.

¹⁴³ Press Release, Cal. State Controller’s Office, *Controller Sues Thrivent Fin. for Impeding Investigation*

with over twenty insurance companies including AIG Insurance Company, Hartford, John Hancock, MetLife, Nationwide, New York Life, Prudential, and many more.¹⁴⁴ As a result of an impending audit of John Hancock Life Insurance Company, John Hancock agreed to pay the involved states \$13.3 million and “agreed to business reforms that will ensure they perform thorough searches to pay out life insurance, annuity, and retained asset account benefits”¹⁴⁵ One of the reformed business processes requires John Hancock to search its in-force policies against the DMF or similar database at least monthly.¹⁴⁶ If a beneficiary cannot be found, John Hancock must transfer the unclaimed proceeds to the state of California pursuant to California’s unclaimed property laws.¹⁴⁷

In 2012, MetLife entered into an agreement with twenty-seven different states.¹⁴⁸ The agreement required that MetLife perform monthly searches of the DMF or similar database to determine if any of its insureds, annuitants, or holders of retained asset accounts (RAA) have died.¹⁴⁹ Upon finding a deceased insured, annuitant, or RAA holder, MetLife will have a year to perform a thorough due diligence search for the rightful beneficiary through information retained by the company and online resources.¹⁵⁰ If after a year the beneficiary has not been located, the funds must be transferred to the

(Nov. 5, 2013) (on file with author), http://www.sco.ca.gov/PDF-Var/eo_pressrel_14255.pdf.

¹⁴⁴CAL. STATE CONTROLLER’S OFFICE, *Protecting Life Insurance Beneficiaries*, http://sco.ca.gov/protecting_life_insurance_beneficiaries.html (last visited Oct. 16, 2016). Other insurers who have settled include Allianz, Aviva, Forethought, Genworth, ING, Lincoln National, Midland National, Northwest Mutual, Pacific Life, Symetra, Sun Life, TIAA-CREF, Transamerica, and Western & Southern. *Id.* In addition, the Controller has sued ANICO, Kemper, and Thrivent Financial for Lutherans to gain access to the companies’ records to determine if the companies are complying with the unclaimed property rules. *Id.*

¹⁴⁵Press Release, Cal. Dept. of Ins., Settlement Reached in Death Master Investigation (Nov. 16, 2012) (on file with author), <http://www.insurance.ca.gov/0400-news/0100-press-releases/2012/release161-12.cfm>.

¹⁴⁶*Id.*

¹⁴⁷*See id.*

¹⁴⁸Press Release, Cal. Dept. of Ins., Ins. Comm’r Dave Jones Announces 27 States Join MetLife Settlement Agreement (May 15, 2012) (on file with author), <http://www.insurance.ca.gov/0400-news/0100-press-releases/2012/release057-12.cfm>.

¹⁴⁹*Id.*

¹⁵⁰*Id.*

state controller as unclaimed property.¹⁵¹ Prudential and Nationwide entered into similar agreements.¹⁵²

V. PROPOSED APPROACH TO BALANCE COMPETING INTERESTS

The underlying basis for the audits and the argument for imposing a duty to search death records is that life insurance proceeds in some cases are not being remitted to the beneficiary. In reality, this rarely happens. As one article noted, “[w]hile there are times when beneficiaries fail to submit death claims, those occasions are rare. In reality, the traditional claim process works almost all of the time.”¹⁵³ MetLife, one of the largest insurers, claims to pay out “99 percent of life insurance benefits in the normal course of a year.”¹⁵⁴ For the funds that do become unclaimed, acceleration of escheatment to the states will not fully remedy the problem. As discussed previously, the beneficiary must still realize that the state is holding unclaimed property for them and make a claim.¹⁵⁵

Using the rationale of the West Virginia court in *Perdue*, insurers should be required to track, report, and escheat all true unclaimed property that is due and payable under state law, but in states that have not imposed a statutory duty upon an insurer to search the DMF or other database, the insurer should not be required to search for potential claims that may have become payable had a claim been made.¹⁵⁶ As a compromise, the American Council of Life Insurers suggests that an insurer be required to search the DMF once to identify any outstanding unclaimed property that has accumulated unknown to the insurer, but not regularly on policies that are actively paid.¹⁵⁷ A one-time search to determine if any policies have unknowingly been retained is a reasonable request of an insurer. But

¹⁵¹ *Id.*

¹⁵² Press Release, Cal. Dept. of Ins., *supra* note 148.

¹⁵³ Gosselin et. al., *supra* note 10.

¹⁵⁴ Leefeldt, *supra* note 68.

¹⁵⁵ See Cruz-Brown, *supra* note 15, at 260.

¹⁵⁶ See 777 S.E.2d 11, 19 (W. Va. 2015).

¹⁵⁷ Hudson & Murphey, *supra* note 75, at 22–23 (“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.”).

imposing mandatory annual, semi-annual or monthly searches is an impractical burden to impose on insurers. Practically, if an insurer were required to periodically search death records, its cost of doing business would increase and would inevitably be passed on to the insureds through higher premiums. Therefore, the insureds will ultimately bear the burden of these additional duties and requirements.

Unclaimed property laws were intended to ensure the rightful beneficiaries received the unclaimed property.¹⁵⁸ But in some states, unclaimed property funds are being used to support the operations of the state government and unrelated projects.¹⁵⁹ For example, in Oklahoma, in early 2014, the Senate passed a bill that would allow state officials to “take the money from the state’s Unclaimed Property Fund to help complete the sprawling American Indian Cultural Center and Museum”¹⁶⁰ A senator opposed to the bill aptly noted that bills such as this allow state governments to “take money that does not belong to [them]”¹⁶¹ Similarly, in some states, the unclaimed property divisions are required to fund their offices with collected unclaimed property instead of through general appropriations.¹⁶²

A successful insurance company will have processes in place to find beneficiaries. For example, Western & Southern Mutual Holding Company argued that it had adequate procedures for searching for deceased insureds and locating and notifying beneficiaries.¹⁶³ A representative of the company testified:

Western & Southern has a variety of ways to learn whether an insured is deceased. When Western & Southern learns that an insured may be deceased—dividend checks go uncashed, mail is returned, or notification from a family member or friend—Western & Southern then “do[es] whatever is possible to find the person that is the

¹⁵⁸ See UNIF. LAW COMM’N, *supra* note 23.

¹⁵⁹ As one author notes, practically, the acceleration of insurance proceeds through an escheatment process is “an indefinite, interest-free loan to the state.” U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 91, at 2.

¹⁶⁰ *OK Senate approves \$40M for OKC Indian museum*, CHEROKEE PHOENIX, Mar. 27, 2014, <http://www.cherokeephoenix.org/Article/Index/8090>.

¹⁶¹ *Id.*

¹⁶² U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* at note 91, at 2.

¹⁶³ See *Stevenson v. W. & S. Mut. Holding Co.*, No. 1:11-CV-01354, 2012 WL 1035726, at *3 (N.D. Ohio Mar. 27, 2012).

beneficiary.” Although Western & Southern does not . . . have a policy of checking the Death Master File, it does use third-party sources to find confirm insureds’ deaths, including LexisNexis, TransUnion, the Social Security Administration’s website, and even public obituaries. Using an “escheat checklist,” Western & Southern “goes through various exhaustive measures to try to find [the rightful beneficiary].”¹⁶⁴

If the claim is deemed due and payable under state law and has remained unclaimed, or the insurance company cannot locate the intended beneficiary after reasonable due diligence, for the statutory period from the date the obligation to pay arose, only then should the “state assume[] custody of the proceeds for the benefit of each person entitled to receive the proceeds and for the safekeeping of the proceeds”¹⁶⁵

Finally, contingent-fee audit contracts should have “no place in a fair, balanced, and effective unclaimed property statutory framework.”¹⁶⁶ Contingent fees “encourage auditors to be overly aggressive, to interpret State laws to their own advantage, to ‘cherry pick’ audit targets, and to ignore holder errors that would result in lower assessments.”¹⁶⁷ As a result of locating unclaimed property, the auditors are paid an agreed-upon percentage of the collection, often paid directly from the collected unclaimed property funds.¹⁶⁸ This payment could “reduce funds that would otherwise be available for return to the rightful owners of the property”¹⁶⁹

¹⁶⁴ *Id.* (internal citations omitted). The court did not rule on the merits of this case because the plaintiff could not prove standing under constitutional standards. *Id.* at *4; *see also Range v. Cincinnati Life Ins. Co.*, No. 1:11-CV-1367, 2012 WL 1035728, at *1–2, 4 (N.D. Ohio Mar. 27, 2012) (dismissing Range’s case due to a lack of standing when Cincinnati Life presented “evidence that it takes regular steps to determine the life-status of its policyholders” by sending annual policy statements to insureds and investigating using multiple processes to locate the intended beneficiary although it does not “annually check the DMF for each of its policyholders.”). The facts of *Range* closely paralleled those in the *Stevenson* case, and it was decided by the same court on the same day. *Range*, 2012 WL 1035728, at *1.

¹⁶⁵ TEX. INS. CODE ANN. § 1109.055(a)(1) (West 2009).

¹⁶⁶ Douglas L. Lindholm & Ferdinand S. Hogroian, *The Best and Worst of State Unclaimed Property Laws*, COUNCIL ON STATE TAXATION, at 4 (Oct. 2013), <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=85349>.

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*; *see also Hopkins*, *supra* note 7.

¹⁶⁹ Lindholm & Hogroian, *supra* note 166, at 4.

The insurance company is in the best position to return any unclaimed funds to the rightful owner. Insurance companies maintain records of each policy issued, the insured, the named beneficiaries, and the amount due under a claim.¹⁷⁰ Furthermore, insurance companies are likely to have better records of social security numbers and last known addresses than the state because insurance companies are required to gather such information annually for tax information reporting purposes.¹⁷¹ Because of this, the insurance company has a better chance of reuniting property with its rightful owner than the state does in these circumstances.

VI. CONCLUSION

The best protection will always be the beneficiary's knowledge of a policy.¹⁷² No process is perfect, and there will inevitably be instances where policies become unclaimed and an insurance company fails to identify and escheat every dollar owed to the state. However, if there is to be a change, it should be implemented by the state legislature, not the judiciary, as a change in fundamental state policy in determining the nature and responsibilities of a policy as a contract in the life insurance industry.¹⁷³

Texas courts have not been faced with the challenge of interpreting the Texas Unclaimed Property Law under these new allegations. But the Texas unclaimed property laws as they relate to insurance proceeds contain similar language as the states where the courts have found no implied duty to search for potentially due and payable policies such as Florida and Ohio.¹⁷⁴

¹⁷⁰TEX. INS. CODE ANN. § 1109.053(a).

¹⁷¹See Leefeldt, *supra* note 68.

¹⁷²*Id.* (“Let your beneficiaries know that you have a life insurance policy Tell them where the policy can be located. And notify your life insurance company when you move.”).

¹⁷³Gosselin et. al., *supra* note 10.

¹⁷⁴Compare TEX. INS. CODE ANN. § 1109.001(a)(2), (c) (unclaimed life insurance proceeds are those that “became due and payable under a life or endowment insurance policy or annuity contract that has matured or terminated”), with FLA. STAT. ANN. § 717.107(1), (3)(b) (West 2015) (unclaimed life insurance proceeds are those that are “held or owing under any life or endowment insurance policy or annuity contract which has matured or terminated” or are deemed matured if the “insured has attained, or would have attained if he or she were living, the limiting age under the mortality table on which the reserve is based.”) and OHIO REV. CODE ANN. § 169.02(C) (LexisNexis 2014) (unclaimed life insurance proceeds are those that are unclaimed “after becoming payable as established from the records of such holder under any life or endowment insurance policy or annuity contract that has matured or terminated . . . [or] deemed matured and the proceeds payable if such policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based.”).

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Thus, when faced with the issue, an insurance company in Texas should challenge any imposition of a duty to search by the state and ask the courts to uphold the plain language of the statute requiring life insurance proceeds to become due and payable as defined by statute and the contract terms before the proceeds can be considered unclaimed for escheatment purposes. This will provide the best chance of reuniting the beneficiary with the money he or she is entitled to.