



## Unclaimed Property ADVISORY ■

**APRIL 10, 2015**

### Dead or Alive in West Virginia: Must Life Insurance Companies Search for Due Proof of Death?

On April 8, 2015, the Supreme Court of Appeals of West Virginia heard oral arguments in *Perdue v. Nationwide Life Insurance Company, et al.*, the latest in a line of legal challenges initiated by life insurance companies and/or state unclaimed property administrators regarding the appropriate standards to be applied to the disposition of life insurance proceeds.<sup>1</sup> The West Virginia State Treasurer sued Nationwide Life Insurance Company and other life insurance companies in 2012, asserting that such companies' asymmetrical use of the Social Security Death Master File (DMF) resulted in violations of the state's unclaimed property law and breached their statutory duty of good faith. The Circuit Court of Putnam County granted Nationwide's motion to dismiss on December 30, 2013, and the state appealed. At issue on appeal is whether West Virginia's unclaimed property laws impose a statutory duty upon life insurance companies to periodically search the DMF to determine if any policyholder has died and to assess whether life insurance proceeds are due and payable.

The parties' oral arguments were concentrated on two main issues: (1) whether the state's insurance code should be read in conjunction with West Virginia unclaimed property laws for purposes of determining whether a claim must first be made in order for a life insurance policy to be subject to a presumption of abandonment, and (2) why life insurance companies reference the DMF for annuities but not insurance policies.

#### **Whether the West Virginia Unclaimed Property Act Should Be Read in Conjunction with the West Virginia Insurance Laws**

West Virginia's unclaimed property laws provide that life insurance proceeds are reportable "three years after the obligation to pay arose."<sup>2</sup> West Virginia's insurance laws expressly require life insurance contracts to contain a provision conditioning payment upon the insurer's "receipt of due proof of death."<sup>3</sup> Neither the unclaimed property laws nor the state insurance laws explicitly require life insurance companies to search or reference the DMF or other similar databases for purposes of determining whether a life insurance policy is due and payable or to determine if any policyholder has died.

<sup>1</sup> *Perdue v. Nationwide Life Insurance Company, et al.*, No. 14-0100 (W.Va.).

<sup>2</sup> W. Va. Code § 36-8-2(a)(8).

<sup>3</sup> W. Va. Code § 33-13-14.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

However, the treasurer disputes that the state insurance laws should be read in conjunction with the unclaimed property laws in this manner and argues that claimants are not required to provide proof of death to trigger the dormancy period for life insurance proceeds and that there is an implied requirement that life insurance companies consult the DMF for unclaimed property purposes. In making this argument, the treasurer relies on Section 36-8-2(e) of the unclaimed property laws, which states that “[p]roperty is payable or distributable for purposes of this article notwithstanding the owner’s failure to make demand or present an instrument or document required to obtain payment.”

More specifically, in its appeal brief, the state argued that the circuit court erred in subjecting the unclaimed property laws to the requirements of the insurance code and concluding that an “obligation to pay” life insurance proceeds does not arise, and hence the abandonment period for unpaid life insurance proceeds does not begin to run under the unclaimed property laws unless a claim has been made and notice of death has been received by the insurer. In addition, the state argued that the language of Section 36-8-2(e) of the unclaimed property laws is explicit and on point in stating that the claim requirements of West Virginia’s insurance laws are unnecessary for purposes of determining whether insurance proceeds are abandoned property.

In further support of its argument, the state cites the U.S. Supreme Court decision in *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948), in which the Court was asked to consider the validity of New York’s Abandoned Property Law as applied to life insurance policies. In *Moore*, the Court affirmed the constitutionality of the New York Abandoned Property Law, which based the reporting and delivery of life insurance proceeds on the death of the insured, regardless of whether the beneficiary had provided proof of death or made other claims for the life insurance proceeds. During oral arguments, West Virginia’s counsel stated that *Moore* was specifically cited by the National Conference of Commissioners on Uniform State Laws<sup>4</sup> (NCCUSL) in drafting the 1995 Uniform Unclaimed Property Act and accompanying commentary as an example of when Subsection 2(e) applies (i.e., all property included in the unclaimed property laws, including life insurance proceeds).<sup>5</sup> In particular, a comment to the 1995 Act states that “[Subsection 2(e)] is intended to make clear that property is reportable notwithstanding that the owner ... fails to present to the holder evidence of ownership or to make a demand for payment.” West Virginia’s Section 36-8-2(e) is modeled on Subsection 2(e) of the 1995 Act.

In contrast, the circuit court previously distinguished *Moore* on the basis that it interpreted a New York statute that did not impose any obligation to proactively investigate whether the insured had died. Further, the DMF did not exist in 1948, when the case was decided. Nationwide’s counsel reiterated the circuit court’s conclusion and argued that *Moore* is “completely distinguishable,” because it was interpreting the New York Abandoned Property Law, which is “dramatically different” from West Virginia’s unclaimed property laws.<sup>6</sup>

Nationwide’s counsel further argued that the state insurance code is necessary and relevant in determining an insurance company’s unclaimed property obligations because it provides several statutory provisions that must be incorporated into every insurance policy, including the provision that requires the receipt of proof of death in order to establish the insurance company’s obligation to pay out proceeds. Accordingly, read together with the definition

---

<sup>4</sup> This organization is now known as the Uniform Law Commission, and it is in the process of rewriting the 1995 Act.

<sup>5</sup> The state did not address the aspect of Section 2(a)(8) that provides that the limiting age under the mortality table on which the reserve is based is the dormancy trigger for policies payable upon proof of death.

<sup>6</sup> The West Virginia unclaimed property act is based upon the 1995 Act.

of “property” under the unclaimed property laws—“a fixed and certain interest in intangible personal property”—the unclaimed property laws adopt the proof of death requirement from the insurance code as being the relevant dormancy trigger. According to Nationwide’s counsel, there can be no fixed and certain interest in any life insurance policy until a claim is made and such claim is accompanied by proof of death of the insured.

### **Use of DMF by Insurance Companies for Purposes of Annuities and as Agreed To Under State Settlements**

During oral argument, the justices repeatedly asked why insurers reference the DMF for purposes of annuities but not for purposes of paying life insurance proceeds or reporting unclaimed property. For purposes of annuities, insurance companies check the DMF to ascertain whether an annuitant is deceased and therefore no longer entitled to payment under an annuity contract. In addition, the justices were interested in the fact that insurance companies have settled and entered administrative agreements with 32 states. Some or all of such agreements provide that the insurance companies will reference the DMF and that a DMF hit shall be presumed to be the trigger of the dormancy period.

State counsel alleged that insurers only refer to the DMF when it is to their benefit (i.e., in the context of annuities). Nationwide’s counsel clarified that this use of the DMF occurs because payouts for annuities are ongoing and there is a financial incentive for people to receive these payments even if the annuity owner dies; therefore, it is incumbent upon a life insurer to prevent fraudulent behavior on the part of recipients of annuity payments. Nationwide’s counsel also stated that the administrative settlements entered into by various life insurance companies with state unclaimed property agencies and insurance regulators do not create a statutory duty for insurance companies to reference the DMF or other external databases to confirm the status of life insurance policyholders under the unclaimed property laws. The agreement by the companies entering the settlements provides that they will do so on a prospective basis.

Nationwide’s counsel stated that this is a matter for the legislature to address rather than the courts, noting that 16 other states have enacted statutes requiring life insurance companies to search the DMF, although such statutes generally also require a second verification by the insurance company before payment is due. State counsel argued that the West Virginia legislature had already effectively dealt with this issue by requiring life insurance companies to act in good faith and to apply a “commercially reasonable” standard in determining whether a life insurance policyholder is dead or alive.

### **Alston & Bird Observations**

Based on the justices’ questions during the oral arguments, it is difficult to predict whether the court will uphold or overrule the circuit court’s decision. The court repeatedly pointed out that there was no specific requirement to search the DMF in the unclaimed property laws and that a conclusion in favor of the treasurer in this case may in fact represent “legislation by litigation.” However, at least two of the five justices seemed fairly hostile to the insurance companies’ position, and the court also seemed unclear on whether life insurance companies should be permitted to “stick their heads in the sand” and not take any action to determine whether a life insurance policy is due and payable based on the death of an insured and the subsequent absence of a claim to the proceeds.

The justices did not indicate when a decision will be made, and until then, a number of questions remain unanswered: (1) whether the court will be swayed by the analysis and holding in the Florida Court of Appeal’s decision in *Thrivent Financial for Lutherans v. State of Florida*<sup>7</sup> that the interpretation of Florida’s unclaimed property law to require insurers to search the DMF was clearly erroneous and (2) whether any ruling in favor of West Virginia will have a retroactive effect.

---

<sup>7</sup> *Thrivent Financial for Lutherans v. State of Florida*, No. 1D13-5299 (Fl. Dist. Ct. App. Aug. 5, 2014). Although this case was not brought up or discussed during the oral arguments, it was cited and discussed in Nationwide’s response brief and West Virginia’s reply brief.

If you would like to receive future *Unclaimed Property Advisories* electronically, please forward your contact information to [SALT.advisory@alston.com](mailto:SALT.advisory@alston.com). Be sure to put “**subscribe**” in the subject line.

Alston & Bird offers clients unparalleled experience dealing with issues involving state unclaimed property/escheat laws. Our five senior attorneys with unclaimed property expertise together have more than 85 years of experience advising major corporations on unclaimed property matters. We assist our clients in analyzing complex legal issues, obtaining legal opinions, conducting multistate/multi-entity internal compliance reviews, designing corporate compliance policies, advising clients on planning and related restructurings, negotiating voluntary disclosure agreements, defending single-state and multistate audits, litigating unclaimed property issues and influencing unclaimed property policy and administration.

Click [here](#) for Alston & Bird’s Tax Blog

Please direct any questions to the following members of Alston & Bird’s Unclaimed Property Group:

John L. Coalson, Jr.  
john.coalson@alston.com  
404.881.7482

Kendall L. Houghton  
kendall.houghton@alston.com  
202.239.3673

Ethan D. Millar  
ethan.millar@alston.com  
213.293.7258

Michael M. Giovannini  
michael.giovannini@alston.com  
704.444.1189

Matthew P. Hedstrom  
matt.hedstrom@alston.com  
212.210.9533

Maryann H. Luongo  
maryann.luongo@alston.com  
202.239.3675

Andrew W. Yates  
andy.yates@alston.com  
404.881.7677

Liz Cha  
liz.cha@alston.com  
202.239.3721

Samantha M. Bautista  
samantha.bautista@alston.com  
213.576.1052

# ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2015

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260  
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, Ca 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001  
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333