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Unclaimed Property ADVISORY ■

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There's No Escaping Death: West Virginia Supreme Court Holds That Death Triggers Dormancy Period

On June 16, 2015, in *State ex rel. Perdue v. Nationwide Life Insurance Company, et al.*,[1] the Supreme Court of Appeals of West Virginia held that under Section 36-8-2 of the West Virginia Uniform Unclaimed Property Act (the "Act"), the "obligation to pay" for a life insurance policy is triggered by the death of the insured rather than the filing of a claim. Accordingly, the court held that the dormancy period for a life insurance policy will be triggered by the death of the insured. The court also held that while the Act generally requires life insurance companies to account for and escheat property presumed abandoned—i.e., to ascertain their insureds' dates of death so as to calculate the date upon which unclaimed life insurance proceeds become presumed abandoned—it does not prescribe a particular method for determining when that duty arises, such as searching the Social Security Administration's Death Master File (DMF) or any comparable data source.

The Supreme Court of Appeals reversed the Circuit Court of Putnam County's 2013 dismissal of 63 of the complaints brought by the state against various life insurance companies. In its earlier holding, the circuit court had interpreted the Act to provide that the insurer's obligations under the Act do not arise until someone having a contractually derived interest makes a formal claim in accordance with the life insurance policy's terms—terms that are reviewed and approved by the state's insurance regulator.

At oral argument, the insurance companies argued that the West Virginia Insurance Code should be read in conjunction with the Act because it provides several provisions that are required in 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. The state argued that the circuit court erred in interpreting the Act in conjunction with the insurance code because the language of the Act is explicit in stating that the policy owner's failure to make demand for payment is not a bar to escheatment of the policy proceeds.[2]

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[1] No. 14-0100, at 12 (W. Va. June 16, 2015) ["*Nationwide*"].

[2] *See* Alston & Bird's prior coverage of the oral arguments, "Dead or Alive in West Virginia: Must Life Insurance Companies Search for Due Proof of Death"? http://www.alston.com/advisories/Dead-Alive-West-Virginia/.

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Death Is the Dormancy Trigger

Section 36-8-2 of the Act provides that amounts owed under a life insurance policy are presumed abandoned "three years after the obligation to pay arose." This language is adopted from the 1995 Uniform Unclaimed Property Act ("1995 Act") and departs from the language utilized in the previous 1981 Uniform Unclaimed Property Act ("1981 Act"). The 1981 Act provides that "[f]unds held or owing under any life or endowment insurance policy or annuity contract that has matured or terminated are presumed abandoned if unclaimed for more than 5 years after the funds became due and payable *as established from the records of the insurance company holding or owing the funds*" (emphasis added). A life insurance policy or annuity contract "not matured by actual proof of the death of the insured or annuitant according to the records of the company is matured and the proceeds due and payable if," among other things, "the company knows that the insured or annuitant has died."

In determining that the dormancy period for a life insurance policy is triggered by the death of the insured rather than the date a valid claim is filed by a beneficiary, the Supreme Court of Appeals relied on Section 36-8-2(e) of the Act and the U.S. Supreme Court's decision in *Connecticut Life Insurance Co. v. Moore*, 333 U.S. 541 (1948).

In what the West Virginia court called a "crucial component" of Section 36-8-2 of the Act, subsection (e) states that:

> Property is payable or distributable for purposes of this article *notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment*. (emphasis added)

The court explained that the language of subsection (e) "demonstrates the Legislature's intent to affirmatively separate the insurer's obligation to account for and pay those proceeds to the Treasurer from the filing of any claim for benefits required by the policy terms." Instead, the court found that the insurance companies' obligations to account for and escheat such proceeds are tied to the death of the insured, maturing three years thereafter.

The court interpreted subsection (e) as a codification of the U.S. Supreme Court's decision in *Moore*, in which the Court upheld a New York statute requiring insurers to report and escheat life insurance policy proceeds if no claim had been made within seven years following the death of the insured. Specifically, the West Virginia court relied heavily on the Supreme Court's observation that "the state, in taking custody of abandoned property, 'is acting as a conservator, not as a party to a contract.'"

The West Virginia court interpreted *Moore* to be consistent with the official commentary to the 1995 Act (on which the Act is based), which explains:

> Subsection (e) is intended to make clear that property is reportable notwithstanding that the owner, who has lost or otherwise forgotten his or her entitlement to property, fails to present to the holder evidence of ownership or to make a demand for payment. See *Connecticut Mutual Life Insurance Co. v. Moore*….

In so holding, the West Virginia court rejected the insurance companies' and the circuit court's interpretation of the Act that the "obligation to pay" the proceeds of a life insurance policy cannot arise until a beneficiary files a claim. The court determined that the circuit court's resort to the West Virginia Insurance Code was "unnecessary and improper," stating that courts may not regard separate and distinct statutes *in pari materia* unless the legislature's intent in the statute in question is ambiguous. Finding that the Act's relevant provisions are not ambiguous, the court overruled the interpretation of the circuit court.

No Affirmative Duty Under the Act to Search the DMF, But Failure to Do So May Result in Penalties and Interest

The Supreme Court of Appeals determined that the Act imposes no specific duty on insurers to search the DMF or comparable data source, despite the fact that the court found that the dormancy period was triggered by the insured's

death regardless of whether due proof has been submitted to the insurer. Instead, according to the court, the Act simply requires insurance companies generally to account for and escheat abandoned insurance policy proceeds to the state.

The court cited the Florida appellate court's holding in *Thrivent Financial for Lutherans v. State of Florida*[3] in support of its conclusion. In that case, the Florida court held that "nothing in the plain language of [the Florida unclaimed property act] imposes an affirmative duty on insurers to search these death records." Similarly, instead of requiring insurers to supplement records by consulting the DMF, the West Virginia court found that "[e]ach insurer is free to determine how it will investigate and discover whether its insureds are yet living." Interestingly, and in contrast to the West Virginia court, the Florida court rejected the state's assertion that the dormancy period for life insurance proceeds was triggered by the insured's death, holding instead that proceeds become due and payable under the Florida unclaimed property law "at the time the insurer receives proof of death and surrender of the policy." However, the West Virginia court tacitly acknowledged the difference in statutory language between the West Virginia Act and the Florida act (which is derived from the 1981 Act), noting that the Florida act "required that proceeds be established 'due and payable' exclusively by resort to the insurer's records." The West Virginia Act contains no such language (consistent with other 1995 Act states).

However, the court found that the "comprehensive remedial scheme" of the Act—including the potential for penalties and interest—would encourage life insurance companies to take proactive measures to determine if the insured is deceased and thus determine whether the proceeds are escheatable.

Observations and Practical Considerations

This decision is a great disappointment to holders that applauded the circuit court's dismissal of the state treasurer's claims on the grounds that the Act premises dormancy on the receipt of proof of death by the insurer from a beneficiary rather than on the date of the insured's death itself.

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."[4] Neither the Act 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. The trial court, in ruling that life insurance companies have no duty to search the DMF to determine whether any of its insureds may have died, and that the proceeds of a life insurance policy are "due and payable" under the Act only when the insurance company receives "due proof of death" of the insured or the insured reaches the limiting age under the mortality tables on which the policy is based, clearly applied the law as it was enacted and as it has always been applied, rather than attempting to "legislate by litigation" as the treasurer would like the courts to do.

On the other hand, the court's decision should be limited in persuasiveness to only those states that have adopted the 1995 Act language for unclaimed life insurance proceeds. States with 1981 Act language can be readily distinguished from this *Nationwide* holding, as the court itself acknowledges in reference to the Florida *Thrivent* decision. According to the West Virginia court's opinion, 15 states have adopted language similar to the 1995 Act.

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3 *Thrivent Financial for Lutherans v. State*, 145 So. 3d 178 (Fla. Dist. Ct. App. 2014).

4 W. Va. Code § 33-13-14.

The trial court also followed the clear weight of authority on these issues (in addition to the *Thrivent* decision, as cited by the West Virginia court):

- In 2012, the Ohio Court of Appeals affirmed dismissal of a class action complaint alleging that life insurers were obligated to search the DMF in *Andrews v. Nationwide Mutual Ins. Co*, No. 97891 (Ohio Ct. App. Oct. 25, 2012).
- In 2013, the District of Massachusetts similarly dismissed a purported class action against John Hancock, holding that life insurers had no duty to search the DMF and that under "established principles of insurance law" Hancock's practice of requiring due proof of death before it considered policy proceeds to be "due and payable" complied with both Massachusetts and Illinois law (*Richard Feingold v. John Hancock Life Insurance Co.*, Civ. No. 13-10185-JLT (D. Mass. Aug. 19, 2013).
- Also in 2013, Florida's Second Circuit Court of Appeal held in a case specifically involving escheatment of unclaimed life insurance proceeds that "Florida has not adopted a law requiring [the insurer] to consult [the DMF] … in connection with payment or escheatment of life insurance benefits." (*Total Asset Recovery Services, LLC v. Metlife, Inc., et., al.*, Case No. 2010-CA-3719 (Fla. 2d Cir. Ct. Aug. 20, 2013).

We also note that the West Virginia court's holding is contrary to the language of Section 36-8-2(a)(8) of the Act itself, by essentially reading out of the statute the provision that requires the dormancy period to be triggered based on the insured's limiting age. The limiting age provision, by its terms, applies either when the insured actually reached the limiting age or when the insured "would have attained" the limiting age, "if living." We interpret the latter to mean that the limiting age triggers the dormancy period if death is not known. As a result, it is unclear to us how this alternative dormancy trigger can be reconciled with a holding that the date of death always triggers the dormancy period. In our view, the statute clearly contemplates that the dormancy period would be triggered, in the event of a deceased owner, if either there is actual proof of death or the limiting age is reached.

Finally, the court also leaves unanswered the question of which methods life insurance companies may use to determine whether policy insureds are deceased, though it notes the broad execution by industry members of Verus audit resolution agreements that require DMF searches on a prospective basis, as well as the multistate passage of NCOIL legislation requiring DMF review. This may be the most efficient[5] way for life insurers to satisfy the West Virginia requirement, but not the only way. This also leaves the door open to how aggressive the treasurer will be in carrying out the "comprehensive remedial scheme" of the Act.

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[5] Critics of reliance upon the DMF database note its percentage of erroneous database hits, which pose a risk of erroneous/premature escheatment. Such escheatment runs the risk of a holder not being extended indemnification by the state unless reliance on the DMF is accorded statutory "per se" good faith status.

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