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JOHN D. PERDUE, etc.,
Petitioner-Plaintiff Below

v.

NATIONWIDE LIFE INSURANCE CO., *et al.,*
Respondents –Defendants Below

Appeal from a Final Order of Dismissal of the Circuit Court of Putnam County (No. 12-C-287)

***Amicus Curiae* Brief of Xerox State & Local Solutions, Inc., d/b/a/ Xerox Unclaimed Property Clearinghouse, in Support of Petitioner-Plaintiff, John D. Perdue, etc., and for reversal of the Circuit Court's Order of Dismissal**

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STATEMENT OF *AMICUS CURIAE*[1]

The unclaimed property laws throughout the United States expressly empower the State unclaimed property administrator to examine the records of any person to determine whether the person has complied with that law. Examination of records is important to the effective administration of the unclaimed property laws because it provides a means to overcome the problem of "lucrative silence." As the Uniform Law Commission had opined, holders of property presumed abandoned "can find doing nothing with its customers' property and communicating as little as possible with its customers to be 'lucrative silence.'" Unif. Law Comm'n, *Unclaimed Property Law Summary* (2014), a true copy of which is included in this brief's Appendix, at 1. The Uniform Law Commission has also pointed out that "many holders find the economic incentive for noncompliance so great that violations of the law are frequent and extensive" because the "holder who neglects to report or pay has the use of property which is extremely valuable to it." Unif. Unclaimed Property Act (1981), § 34 cmt., 8C U.L.A. 269 (2001).

Xerox State & Local Solutions, Inc., does business as the Xerox Unclaimed Property Clearinghouse ("UPCH"). Since 1984, UPCH and its predecessors have provided professional auditing services to State unclaimed property administrators, either individually or with groups of States. It is dedicated to helping States achieve their unclaimed property program objectives. It does so by using advanced technology and tested procedures in the examination, identification, collection, reporting, and delivery processes. For almost 30 years, UPCH has provided such examination services to the State of West Virginia. And it currently has similar contracts with 47

[1] No counsel for any party to this appeal authored this *amicus* brief, in whole or in part. No party to this appeal or their counsel made a monetary contribution specifically intended to fund the preparation or submission of this *amicus* brief. And no person, other than the *amicus curiae* itself, made a monetary contribution to the preparation and submission of this brief.

States, the District of Columbia, and the Commonwealth of Puerto Rico. Furthermore, UPCH has performed examinations of life insurers, implementing the instructions and protocols that the States have given. Those protocols include the use of technology to search and match an insurer's policyholder records with the record of deaths in the federal Death Master File derived from Social Security Administration information. UPCH has seen firsthand the content of insurer records; the potential of reliable, accurate database matching; the value that matching has in locating unpaid benefits for beneficiaries and other citizens; and the not-unusual, lengthy delay in reporting unclaimed benefits to the States as required by the unclaimed property laws.

Drawing on its extensive practical experience and expertise with unclaimed property law issues throughout the country, UPCH presents for consideration a discussion of the issues on appeal from the standpoint of an unclaimed property examiner applying State law over the past 30 years.

ARGUMENT

I. THE STATE TREASURER'S COMPLAINT DOES STATE A CLAIM FOR RELIEF THAT PRECLUDES A DISMISSAL

Because West Virginia's civil procedure rules favor the determination of actions on their merits, motions for dismissal for failure to state a claim are "viewed with disfavor and rarely granted," and the plaintiff's burden in resisting the motion is a relatively light one. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978). The motion should be denied if the complaint states a claim for relief under any theory. *Id.*, 161 W. Va. at 605, 245 S.E.2d at 159. And no particular importance attaches to the fact that the complaint proceeds upon a theory of recovery not recognized in West Virginia, if the plaintiff establishes a right to recover on the facts pleaded. *Tiller v. Baisden*, 128 W. Va. 126, 128-29, 35

S.E.2d 728, 729 (1945). A dismissal motion is not to be granted where any apparent deficiency can be cured by an amendment. *Copley v. Mingo County Bd. of Educ.*, 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). In making its *de novo* review of the Circuit Court's order dismissing a complaint, the Supreme Court is not bound by the Circuit Court's findings, although relevant. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 775-76, 461 S.E.2d 516, 521-22 (1995).

On 20 September 2012, the State Treasurer filed a Complaint against Nationwide Life Insurance Co. that is typical of the one filed against the other insurers before the Circuit Court. In the Complaint, one form of relief that the Treasurer specifically demanded was "to examine the records of the [insurer] to determine if [the insurer] has fully and truthfully complied with the West Virginia Unclaimed Property Act." ¶ 31. That prayer for relief is founded on the Treasurer's authority to "examine the records of any person to determine whether the person has complied with the [unclaimed property act]," and to do so even "if the person believes that it is not in possession of any property that must be reported." W.Va. Code § 36-8-20(b). Although reasonable cause to conduct an examination is not required, ¶¶ 21 through 27 of the Complaint present facts that establish the Treasurer's reasonable concerns about the veracity and inclusiveness of the insurer's reporting. Those concerns were substantiated by the background facts that arose from inquiries by other States into the practices of insurers; for example, in the Appendix to this brief (at 4), there is an article published in *The Wall Street Journal* on 12 August 2012 that reported on the questions raised about the actions of insurers that undermine the payment of death benefits to beneficiaries and the changes that insurers were making to rectify those actions. Because the experience of other States with other insurers establishes that insurers may be holding substantial amounts of unpaid policies that are unreported, the

Treasurer's Complaint properly seeks to conduct an examination to determine whether these insurers have indeed complied with West Virginia's law.

Supporting the propriety of the State Treasurer's Complaint is the instructive decision of the California Superior Court in *Chiang v. Am. Nat'l Ins. Co.*, No. 34-2013-00144517 (Cal. Super. Ct. Oct. 9, 2013), *appeal pending*, No. C075248 (Cal. Ct. App. (3rd Dist.) Nov. 18, 2013), a true copy of which is included in the Appendix to this brief (at 9). There the California State Controller commenced an action against an insurer for continuing to violate the State's Unclaimed Property Law and delaying an unclaimed property examination. Underlying the action was the insurer's resistance to use of the Death Master File to determine whether its insured had died and whether death benefits were paid to the beneficiary or to the State. The trial court explained how the actions of some insurers contravened the unclaimed property law:

> There is shown to be longstanding practices in the life insurance industry whereby companies have failed to take reasonable steps to determine whether the insured under their life insurance and annuity products are deceased. These practices in the life insurance industry have not just resulted in substantial delays in payments to beneficiaries of life insurance products; they have resulted as well in the failure of beneficiaries even to receive notice and payment of amounts to which they are entitled by reason of an insured's death. Hundreds of millions of dollars in life insurance proceeds go unclaimed each year. This is often because beneficiaries of these policies do not know the proceeds are due to them. ...
>
> Further, these practices in the life insurance industry have resulted in both substantial delays in the escheatment of amounts due from the insurance industry to the State of California, or the failure to escheat such amounts to the State at all pursuant to the [Unclaimed Property Law]. As just one example of how these practices could lead to a failure to escheat funds under the UPL, anti-forfeiture provisions of life insurance policies provide that the cash values built up in life insurance policies [the equity] automatically be used to pay premiums when due and unpaid. Where an insured is deceased and therefore fails to pay policy premiums when due, the cash value in the policy may be entirely depleted over time if the insurance company never takes appropriate actions to learn of the death of an insured. With the cash value entirely depleted, the policy lapses and the company may never report the cash values that were due and payable under the [Unclaimed Property Law].

Id., at 2; Appendix at 10. The trial court then identified how the State Controller's examination related to those practices of the life insurance industry:

> As a result of [the insurer's] delay, the Controller has been unable to fully determine whether, and/or when [the insurer] has learned of an insured's death yet has failed to use this information to pay amounts due to beneficiaries; whether [the insurer] has used the built-up cash value of insurance policies to continue to pay premiums to itself, even *after* having received notice of an insured's death; whether [the insurer] lacks adequate procedures to monitor when retained asset accounts have been dormant for years, preventing the company from taking appropriate steps to locate an account owner or escheat proceeds to the State if the owner cannot be located; whether [the insurer], in the past, selectively and self-servingly reviewed the Death Master File to cease annuity payments to an annuitant, but has not used the same readily available information to pay life insurance proceeds to beneficiaries or escheat funds to the State if the beneficiaries cannot be located; and whether [the insurer] has adequate policies and procedures in place for the identification of unclaimed death benefits that require escheatment.

Id., at 4; Appendix at 12. Concluding that California and its citizens "have suffered and continue to suffer significant damages by being deprived of the beneficial use of those unclaimed insurance proceeds," on 9 Ocobert 2013, the trial court entered a mandatory injunction compelling the insurer to produce the documents for the State's examination. *Id.*, Appendix at 15.

The rationale of the California trial court applies equally here. Just as the California State Controller had the statutory authority to conduct an unclaimed property law compliance examination and verify that the insurer had filed complete and accurate reports, so too the West Virginia State Treasurer has pled facts in his Complaint that sufficiently show the bases for his prayer for relief to conduct a similar examination.

II. UNDER STATE UNCLAIMED PROPERTY LAW, LIFE INSURANCE IS PAYABLE WHEN THE INSURED HAS DIED, NOT WHEN A CLAIM IS SUBMITTED TO AN INSURER UNDER THE STATE'S INSURANCE LAW

States have rejected the insurers' notion that their obligation to pay death benefits arises only when a claim is made as provided in a State's insurance law. Rather, the States understand that the obligation to pay arises when the insured's death occurs. Representative of the States' rationale is the Declaratory Statement —a formal administrative advisory legal opinion— of the Florida unclaimed property administrator in *In re Petition for Declaratory Statement of Thrivent Financial for Lutherans*, No. 137963-13-DS (Fla. Dept. of Fin. Servs. Oct. 4, 2013), *appeal pending sub nom. Thrivent Financial for Lutherans v. Fla. Dept. of Fin. Servs.*, No. 1D-13-5299 (Fla. Dist. Ct. App. (1st Dist.) Oct. 30, 2013), a true copy of which is included in the Appendix to this brief (at 18). Exactly as do the insurers here, Thrivent's position was based solely on the Florida insurance statute that every life insurance contract "shall provide that, when a policy becomes a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and surrender of the policy." Fla. Stat. § 627.461. Other than the inclusion of "surrender of the policy," that provision is the same as W.Va. Code §33-13-14. Thrivent too argued that because its insurance contracts had been approved by the Florida insurance regulator and contained the provision required by Fla. Stat. § 627.461, its contracts become "due and payable" under the unclaimed property law when it receives proof of death and a claim for benefits. *Declaratory Statement, supra*, at 1; Appendix at 18. Thrivent too contended that it was not obligated to do database matching to determine whether any Florida insureds had died, thereby triggering the dormancy period established by Florida's unclaimed property law for the reporting and remitting of unclaimed life insurance benefits. *Id.* at 1-2; Appendix at 18-19. The

Florida Department rejected all of Thrivent's contentions, finding that a life insurance policy becomes a claim upon the death of the insured, a claim that is due and payable for unclaimed property law purposes upon the death of the insured (*Id.* at 9; Appendix at 26):

> Section 627.461, Florida Statutes [—the insurance code], provides that a life insurance policy "becomes a claim by the death of the insured." "Claim" is not defined in the statute. Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. The most common dictionary definition of the noun "claim" is a demand for something as *due.* In other words, claim means the amount which a person may "demand" from the Fund. Similarly, here, a "claim" is the amount which a beneficiary can demand from the insurance company. The amount of the claim is "due" upon the death of the insured because section 627.461 provides that a policy "becomes a claim by the death of the insured." Just as a claim is "due," pursuant to subsection 627.461(2), Florida Statutes, upon the death of the insured, a life insurance claim is "due and payable," pursuant to subsection 717.107(1), Florida Statutes[—the unclaimed property law], upon the death of the insured.

Id. at 10 (citations and internal quotation marks omitted); Appendix at 27.

The foundation of Florida's conclusion is three fundamental principles of unclaimed property jurisprudence. First, the United States Supreme Court long ago established the principle that by force of unclaimed property legislation, "the state is acting as a conservator, not a party to [a] contract." *Connecticut Mut. Life Ins. Co.* v. *Moore,* 333 U .S. 541, 547 (1948). In the unclaimed property situation, the State's rights are "distinguishable and independent of the rights of the individuals" in the underlying transaction, and those rights "cannot be demolished or suppressed by acts" of those individuals. *State of New Jersey v. Standard Oil Co.*, 68 A.2d 499, 505, 503 (N.J. Super. Ct. Ch. Div. 1949), *judgment modified* and *aff'd*, 74 A.2d 565 (N.J. 1950), *aff'd*, 341 U.S. 428 (1951). Giving effect to the plain language of the unclaimed property law, the role of the underlying contract is to fix the "*amount* due and payable under the terms of an annuity or insurance policy." W.Va. Code § 36-8-1(13) (vi), emphasis added. It is the unclaimed property law alone that determines when the payment of that contracted amount is

payable for the purposes of that law, *i.e.*, three years after the obligation to pay arose. *Id.*, § 36-8-2(a) (8). That one looks to the unclaimed property law to determine when the property is payable effectuates the concept that, as stated by the New Jersey Supreme Court, unclaimed property law is a part of the general law of the State and is a "continuing constituent part" of any contract or agreement entered into by parties that are subject to the State's laws," such that any private agreement that "is clearly opposed to the spirit and essence of the public custodial escheat law and to the broad public policy represented thereby" cannot "survive." *State of New Jersey v. Jefferson Lake Sulphur Co.*, 178 A.2d 329, 335, 338-39 (N.J.), *cert. denied* and *appeal dismissed*, 370 U.S. 158 (1962).

Second, the United States Supreme Court's decision in *Moore* also established the principle that "[w]hen the state undertakes the protection of abandoned claims, it would be beyond reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties." *Moore, supra, id.* That principle is codified in W.Va. Code § 38-8-2(e). It provides that property is deemed payable notwithstanding the owner's failure to present any document required to obtain payment. The Uniform Law Commissioners' Comment to § 2 of the Uniform Unclaimed Property Act of 1995, which is replicated in the West Virginia provision, explains that that section "is intended to make clear that property is reportable notwithstanding that the owner, who has lost or otherwise forgotten his or entitlement to the property, fails to present to the holder evidence of ownership or to make a demand for payment." Unif. Unclaimed Prop. Act (1995), § 2 cmt., 8C U.L.A. 106 (2001). This provision undermines the argument that an insurer's obligation to pay can only arise when it receives the proof-of-death. By deeming property payable notwithstanding the owner's failure to present any required document, the unclaimed property law overrides the insurance contract's

proof requirement and gives rise to the insurer's obligation to pay upon the very occurrence of the insured's death. When the death occurs, the underlying insurance contract is pertinent only insofar as it establishes the "amount due and payable," as stated in the definition of "property." Otherwise, this provision would be useless if an insurance law or an insurance contract could impose a proof-of-death or claim submission as a precondition to an insurer's obligation to pay under the unclaimed property law. To do so would violate the rubric of statutory interpretation that "it is presumed that a legislature will not enact a useless statute." *State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.*, 147 W. Va. 645, 653, 129 S.E.2d 921, 926 (1963).

Third, a fundamental principle in applying unclaimed property laws to certain circumstances is that an unclaimed property law is remedial legislation designed to put an end to the unearned and fortuitous enrichment of the holders of abandoned property and to provide instead for the interests of the citizens and ensure that any such escheat would be for public benefit rather than for private gain. *Comptroller of the Treasury v. PHH Corp.*, 717 A.2d 950, 952 (Md. Ct. Spec. App. 1998); *Riggs Nat'l Bank of Washington, D.C. v. District of Columbia,* 581 A.2d 1229, 1233-34 (D.C. App. 1990). Because of its remedial objectives, unclaimed property laws are "given a liberal interpretation in favor of the state." *Clymer v. Summit Bancorp.*, 726 A.2d 983, 989 (N.J. Ch. Div. 1998), *rev'd on other grounds*, 758 A.2d 652 (N.J. App. Div. 2000), *rev'd*, 792 A.2d 396 (N.J. 2002). In accord with these principles, Florida's interpretation of its life insurance provision was made to effectuate its law's purpose of protecting the interests of missing owners of property:

> Having the dormancy period begin at the date of death protects the interests of missing beneficiaries. [The insurer] argues that under current law, insurers have no affirmative duty to determine whether insureds have died. "The traditional industry practice allows insurance companies to stick their heads in the sand and

> ignore publicly available data regarding the deaths of their insured, to the detriment of the beneficiaries (and the public)." [*United Ins. Co. v. Commonwealth,* No. 12-CI-1441 (Ky. Cir. Ct. (Franklin Cty.) April 1, 2013) at p. 7, *appeal pending*, No. 2013-CA-000612 (Ky. Ct. App. Apr. 3, 2013)]. Adopting [the insurer]'s interpretation ... would allow an insurer who learned of a death years after the fact to keep the funds for an additional five years. Let's assume an insured died 15 years ago and an insurer learns of the death today. Under [the insurer]'s interpretation of the statute, the insurer could keep the funds for an additional five years. The Department interprets section 717.107, Florida Statutes, with the purpose "of protecting the interest of missing owners of property." The Department's interpretation will allow claimants to learn of unclaimed insurance proceeds in a more timely manner by a search of the state's unclaimed property database. Florida claimants do not have access to [an insurer's] database and an unknown beneficiary cannot reasonably be expected to contact every insurance company doing business in Florida to determine whether he/she is a beneficiary. The Department's interpretation is consistent with the "manifest purpose" [of the unclaimed property law].

Declaratory Statement, supra, at 14; Appendix at 31 .

The statutory construction that the Florida administrator follows is in accord with that of other States. The California interpretation is set forth in its Holder Handbook:

> **Life Insurance Policy Proceeds**
> A holder must report all funds held and owing by a life insurance corporation under any life or endowment insurance policy or annuity contract that has matured or terminated when such funds have remained unclaimed for more than three consecutive years after becoming due and payable. A policy will be deemed matured upon proof of death that may be identified through a declaration of death, death certificate, comparison of the holder's records against the Social Security Death Master File or other equivalent resources available to the company. Interest, dividends, or other amounts earned must be reported and remitted along with the funds due on such policies.
> Law reference: Code Civ. Proc. section 1515, Escheat Period: 3 Years

State of California, *Unclaimed Property Holder Handbook,* <http://www.sco.ca.gov/upd_form_rptg.html>, at 12 (Sept. 2013). Additionally, as discussed by Skadden Arps in an article also in this brief's Appendix, the interpretations and application of unclaimed property laws in Florida and California mirror those of the other States. Skadden Arps, Slate, Meagher & Flom LLP, *Unclaimed Property Compliance and Its Impact on the Insurance Industry, July 23, 2012,* <

http://www.skadden.com /insights/unclaimed-property-compliance-and-its-impact-insurance-industry>, Appendix at 48.

The States have made the same interpretation and application regardless of whether they have enacted the life insurance abandonment provision of the Uniform Disposition of Unclaimed Property Act (1954/66), the Uniform Unclaimed Property Act (1981), the Uniform Unclaimed Property Act (1995), or *sui generis* legislation. That last uniform act was the one that West Virginia enacted (1997 W. Va. Laws c. 1). It does not constitute a departure from the concepts underlying the previous Uniform Acts. As the Uniform Law Commissioners explained, the 1995 Uniform Act "changes no fundamental principle of modern unclaimed property law." Unif. Law Comm'n, *supra*, at 3; Appendix at 3. It is improbable that the Uniform Law Commission or the West Virginia Legislature intended to make a significant change in the unclaimed property law as to unclaimed life insurance proceeds without some mention or explanation in the Comments to the unclaimed life insurance provision.

Hence, in the conduct of unclaimed property examinations, the States with which UPCH has worked are consistent in their interpretation that the abandonment period for life insurance contracts commences when the insured dies, regardless of any insurance contract provision requiring submission of a claim.

III. BECAUSE THE STATE TREASURER'S ACTION IS ONE IN EQUITY, CONCEPTS OF FAIRNESS AND EVEN-HANDED JUSTICE MAY INFORM A COURT'S DECISION ABOUT THE APPLICATION OF UNCLAIMED PROPERTY LAWS

An unclaimed property law enforcement action, such as the one that the State Treasurer has commenced, has been understood to be an action in equity for two reasons. First, the nature of the relationship between the State and the apparent owner is in the nature of a trust:

> Implicit in the terms and provisions of the Escheat Act is the persuasion of the Legislature that the retention of abandoned and unclaimed personal property for an ultimate and eventual disposition to the beneficial owner has constituted a relationship in the nature of a trust. Hence the investment of jurisdiction in equity.

State of New Jersey v. Standard Oil Co., *supra*, 68 A.2d at 503. And second, in an action to enforce the unclaimed property law, the State comes into court seeking an accounting for property that has escheated or become subject to the State's protective custody. *State of New Jersey v. Otis Elevator Co.*, 95 A.2d 715, 720 (N.J. 1953).

One of the principles of equity jurisprudence is "a court of equity ... often departs from dry legal rules in the interest of substantial, even-handed justice." *Williamson v. Jones*, 43 W. Va. 562, 590-91, 27 S.E. 411, 422 (1897). And another is that "a court of equity looks upon that as done which ought to be done." *Marshall v. Porter*, 83 W. Va. 246, 249, 98 S.E. 207, 209 (1919). Those principles support the propriety of the States' application of unclaimed property laws in deeming insurance benefits payable upon the death of the insured and using publicly-available databases to learn if insureds have died. As a New Jersey chancery judge concluded in a case involving unclaimed insurance payments, "[t]he public policy supporting escheat is vastly superior to any claim defendants have, as holder, to refuse to report and to refuse to deliver all provable unclaimed funds to the custody of the State Treasurer. Defendants' interests are at odds with the general welfare." *State of New Jersey v. Chubb Corp.*, 570 A. 2d. 1313, 1317 (N.J. Super. Ct. Ch. Div. 1989). Expressing thoughts typical of that of other State administrators, the Florida administrator found that "[i]n an age when an unprecedented volume of information is readily available in digital form, the Department sees no reason why an insurance company---or a fraternal benefit society that purveys insurance contracts to its members-should balk at making reference to a publicly accessible digital

database that would easily reveal whether any of its insureds had died." *Declaratory Statement, supra*, at 7; Appendix at 24. That balking is unfair when some insurers have used database matching when it was advantageous to them[2] and have accumulated vast sums awaiting claims that might never come. Attached in the Appendix is an article in *The Wall Street Journal* about the States' settlement with Prudential Financial Inc., its use of database matching since 1998, and its decision to reserve an additional $99 million for claims expected because of the enhanced efforts that it would now be making. Leslie Scism, *States Enter Pact with Prudential*, The Wall Street Journal, Jan. 14, 2012, <http://online.wsj.com/news/articles/SB10001424052970203721704577158920897327022>, Appendix at 50.

That equity will not permit a holder of unclaimed funds to use the law to the disadvantage of the parties entitled to those funds is demonstrated by the federal District Court's decisions in *Tennille v. The Western Union Co.* 751 F.Supp. 2d 1168 (D.Colo. 2010) and No. 09-cv-00938, 2013 WL 6920449 (D.Colo. Dec. 31, 2013). That class action challenged Western Union's practice of failing to notify customers when their attempted wire transfers fail or go unclaimed upon issuance, and holding those funds in interest-bearing accounts, sometimes for years, until individual state unclaimed property laws trigger a notification obligation. *Id.*, 751 F.Supp. 2d at 1169. Western Union asserted that it had "immunity" from suit, "premised on a theory that its practices are privileged under existing

[2] The concept of "asymmetrical use" of database matching means that in their business practices, some insurers conduct the matching in order to learn if an annuitant has died; annuities are frequently retirement income contracts. If a match is found, the insurer then discontinues any further payment to that annuitant, thereby avoiding any overpayment. This practice is asymmetrical because the insurer will not do any matching for any other insureds, ostensibly because doing so might generate claims for payment where none have yet been made. Not doing matching in other instances allows the insurer to continue to enjoy the use and benefit of the funds, perhaps for a long period or until the policy cash values are exhausted by premium loans that are taken after the insured's death. One aspect of an unclaimed property examination is to determine whether a certain insurer has made such an asymmetrical use of database matching.

state unclaimed property laws." *Id.*, 751 F.Supp. 2d at 1170. The District Court found that the customers had valid claims for unjust enrichment and conversion because Western Union's action violated notions of equity and justice:

> By holding customers' unclaimed deposits, sometimes for years, while those deposits accrued interest, and then failing to return that interest or an amount compensating Plaintiffs for the lost time-value of their deposits, Western Union exercised dominion over, and benefitted at Plaintiffs' expense by holding, moneys that belonged to Plaintiffs, not Western Union, which in equity and justice should be returned to them.

Id., 751 F.Supp. 2d at 1173. That litigation was eventually settled through mediation. *Id.*, 2013 WL 6920449 at *1. That settlement included an injunction requiring Western Union to give early notice of unclaimed deposits to its customers. That injunction was the most significant aspect of the settlement because it barred Western Union from "continuing a lucrative but anti-consumer business practice," a practice that "was clearly intended as a mechanism to profit off of unredeemed money transfers without [customer]s' knowledge. *Id.*, 2013 WL 6920449 at *13 and *9. The reasons underlying that injunction mirror those for unclaimed insurance benefits:

> [T]he injunctive relief provides for notice of unclaimed deposits to its customers within a time period where a customer's address and contact information is more likely to be current and therefore it is more likely that the customer will actually know that his money was not successfully transferred. By creating a significant likelihood that customers will seek a refund within months, instead of years, after their money transfers fail, it will substantially thwart a business practice that deprived class members of hundreds of millions of dollars of their own money. This allows class members, rather than Western Union, to recognize the time value of that money. In addition, it substantially prevents Western Union from assessing millions of dollar of service fees that were previously assessed beginning on the date of the uncompleted money transfers until the funds are either returned to customers or escheated.

Id., 2013 WL 6920449 at *10. Just as insurers are known to exhaust the cash value of policies after the non-payment of accruing premiums because of the death, the notice requirements of the injunction "substantially prevents Western Union from recouping these service fees from the

initial deposits prior to redemption or escheatment to the detriment of its customers who are never notified that such fees are accruing." *Id.*, 2013 WL 6920449 at *11.

Hence, principles of equity and fairness to both insurance beneficiaries and the State as their conservator or trustee call for rejection of the insurer's challenges, just as those made in *Western Union.*

CONCLUSION

This *Amicus* respectfully urges that the Circuit Court's order dismissing the State Treasurer's Complaint should be reversed, and this matter should be remanded for further proceedings.

Respectfully submitted,

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