

14-0100

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

JAN 02 2014

v.

CIVIL ACTION NO. 12-C-287

NATIONWIDE LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-288

AMERICAN GENERAL LIFE AND  
ACCIDENT INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-289

AXA EQUITABLE LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-290

PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-291

HARTFORD LIFE AND ANNUITY  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-292

MASSACHUSETTS MUTUAL LIFE  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-293

NEW YORK LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-294

MONUMENTAL LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-295

METROPOLITAN LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-296

v.  
LINCOLN NATIONAL LIFE  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-322

v.  
AMERICAN GENERAL LIFE  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-323

v.  
GENWORTH LIFE AND ANNUITY  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-324

v.  
GUARDIAN LIFE INSURANCE  
COMPANY OF AMERICA,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-325

v.  
ERIE FAMILY LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-327

PRUCO LIFE INSURANCE  
COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-328

UNITED OF OMAHA LIFE  
INSURANCE COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-329

NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATION,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-331

THE WESTERN AND SOUTHERN  
LIFE INSURANCE COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-355

WESTERN-SOUTHERN LIFE  
ASSURANCE COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-356

v.  
PRIMERICA LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-357

v.  
BANKERS LIFE & CASUALTY  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-358

v.  
NATIONWIDE LIFE AND ANNUITY  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-359

v.  
FARM FAMILY LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

CIVIL ACTION NO. 12-C-360

v.  
LINCOLN BENEFIT LIFE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-361

TRANSAMERICA LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-362

EMPLOYEES LIFE COMPANY  
(MUTUAL),  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-363

METLIFE INVESTORS USA  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-364

PROTECTIVE LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-372

OHIO NATIONAL LIFE ASSURANCE  
CORPORATION,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-373

COMBINED INSURANCE COMPANY  
OF AMERICA,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-374

REASSURE AMERICA LIFE  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-376

NEW ENGLAND LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-377

RIVERSOURCE LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-378

WEST COAST LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-380

ALLSTATE LIFE INSURANCE  
COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-381

RELIASTAR LIFE INSURANCE  
COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-419

LIBERTY LIFE INSURANCE  
COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-420

LINCOLN HERITAGE LIFE  
INSURANCE COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE

Plaintiff,

v.

CIVIL ACTION NO. 12-C-421

PHYSICIANS LIFE INSURANCE  
COMPANY,

Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-422

MOTORISTS LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-423

HORACE MANN LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-424

GERBER LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-425

PROVIDENT LIFE & ACCIDENT  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-426

TEACHERS INSURANCE &  
ANNUITY ASSOCIATION OF  
AMERICA,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-427

SUN LIFE ASSURANCE COMPANY  
OF CANADA,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-429

PACIFIC LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-430

METLIFE INSURANCE COMPANY  
OF CONNECTICUT,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-431

COLONIAL LIFE & ACCIDENT  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-432

PRINCIPAL LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-433

GENERAL AMERICAN LIFE  
INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-434

BOSTON MUTUAL LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-435

AVIVA LIFE & ANNUITY COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-436

COLONIAL PENN LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-437

USAA LIFE INSURANCE COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-438

GENWORTH LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-440

OLD AMERICAN INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-441

AMERICAN FAMILY LIFE  
ASSURANCE COMPANY OF  
COLUMBUS, GEORGIA,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-442

MINNESOTA LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-443

PENN MUTUAL LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-444

BANNER LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-445

NORTH AMERICAN COMPANY FOR  
LIFE AND HEALTH INSURANCE,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-446

LAFAYETTE LIFE INSURANCE  
COMPANY,  
Defendant.

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STATE OF WEST VIRGINIA  
ex rel. JOHN D. PERDUE  
Plaintiff,

v.

CIVIL ACTION NO. 12-C-447

THE STATE LIFE INSURANCE  
COMPANY,  
Defendant.

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## ORDER

This matter comes before the Court pursuant to the motions to dismiss filed by the Defendants in the above-captioned cases. A hearing was held on the matter on September 6, 2013, where the Court heard arguments from the parties. Upon consideration of the motions, the parties' memoranda, arguments of counsel, and the law, the Court **FINDS** and **ORDERS** as follows:

### BRIEF OVERVIEW

From September 30, 2012, to December 28, 2012, the Plaintiff, John D. Perdue, Treasurer of the State of West Virginia (hereinafter "State Treasurer") filed sixty-nine (69) individual civil lawsuits against life insurance companies doing business in the State of West Virginia (collectively called the "Complaints"). Each complaint is identical except for the name of the defendant company and that Defendant's share of the West Virginia life insurance market. Complaints ¶ 2. These Complaints allege that the Defendants have failed to comply with the requirements of the West Virginia Uniform Unclaimed Property Act, W. Va. Code §§ 36-8-1 et seq. (the "UPA"); specifically, that they have failed to turn over unclaimed property, as defined by the UPA, to the State Treasurer. Complaints ¶ 18.<sup>1</sup> The Complaints further allege that the Defendants have breached their statutory duties of good faith and fair dealing by failing to conduct annual examinations of life insurance policy holders to determine if they are deceased or three years past the applicable limiting age that would make one's policy payable under the UPA. The State Treasurer asserts that this information is readily available by searching

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<sup>1</sup> The UPA gives the State Treasurer authority to pursue causes of action arising under the UPA as its administrator.

the Social Security Administration's Death Master File ("DMF") or other third-party database using the DMF. *Id.* at ¶¶ 21-22, 25.

Based on these alleged failures, the Complaints seek to assess fines, penalties, interest, and attorneys' fees against the Defendants for their willful, fraudulent, and/or negligent failure to comply with the UPA. *Id.* at ¶¶ 33-37. Additionally, the State Treasurer seeks "injunctive relief requiring [the Defendants] to immediately implement and adopt policies and procedures utilizing the DMF or other similar databases (if approved by the State Treasurer)." *Id.* at ¶ 38.

The Defendants, some collectively, others individually, have all filed motions to dismiss. The threshold question of law in this matter is whether or not the UPA creates a statutory duty obligating life insurance companies to periodically search the DMF or other similar database to determine if any of their policy holders have died.

### **STANDARD OF REVIEW**

A Rule 12(b)(6) motion to dismiss is designed to test the sufficiency of a complaint. When considering a Rule 12(b)(6) motion, the complaint must be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure. *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516, 522 (1995). "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978). The West Virginia Supreme Court of Appeals has further instructed that, "[t]he trial court, in appraising the sufficiency of a complaint on a Rule

12(b)(6) motion, should not dismiss the complaint unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 3, *Chapman v. Kane Transfer Company*, 160 W.Va. 530, 236 S.E.2d 207 (1977)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The Supreme Court has also instructed that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question." Syl. pt. 2, *Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 745 S.E.2d 493 (2013)(citation omitted).<sup>2</sup> When a statute is clear and unambiguous, "it is the duty of the courts not to construe but to apply the statute." *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 675, 600 S.E.2d 565, 572 (2004). "Courts are not free to read into the language what is not there, but rather should apply the statute as written." *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994); Syl. pt. 1, *Consumer Advocate Div. v. Pub. Serv. Comm'n*, 182 W.Va. 152, 156, 386 S.E.2d 650, 654 (1989) ("A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."). However,

[a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

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<sup>2</sup> See also Syl. pt. 6, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360 (2012) ("The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.")(citation omitted).

Syl. pt. 2, *State ex rel. Hall v. Schaegel*, 202 W.Va. 93, 502 S.E.2d 190 (1998)(quoting Syl. pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)).

## ANALYSIS

### A. Life Insurance and the West Virginia UPA

The West Virginia Legislature enacted the West Virginia Uniform Unclaimed Property Act (“UPA”) in 1997. The UPA contains a list of definitions and specific provisions defining what kind of property is subject to the UPA, and when certain property must be reported and paid or delivered to the administrator. With respect to insurance proceeds, the term “property” is defined specifically as “[a]n amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance.” W. Va. Code § 36-8-1(13)(vi).

Section 7 of the UPA provides that “[a] holder<sup>3</sup> of property presumed abandoned shall make a report to the administrator concerning the property.” W. Va. Code § 36-8-7(a). Section 8 of the UPA addresses when presumed-abandoned property must be paid or delivered to the administrator. W. Va. Code § 36-8-8. Accordingly, under the express provisions of the UPA, only property that is “presumed abandoned” must be reported and ultimately paid or delivered to the administrator.

W. Va. Code § 36-8-2(a) defines exactly when property is “presumed abandoned”. As it applies to life insurance proceeds, the property is presumed abandoned “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

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<sup>3</sup> The UPA defines “holder” as “a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this article.” W. Va. Code § 36-8-1(6).

would have attained if living, the limiting age under the mortality table on which the reserve is based.” W. Va. Code § 36-8-2(a)(8). Hence, the UPA specifically outlines when the proceeds from an insurance policy are “presumed abandoned.” Therefore, to the extent that a life insurance company is a holder of “property”, the company would have a statutory obligation to report that property to the Treasurer after the property satisfies the definition of “presumed abandoned” found in W. Va. Code § 36-8-2(a)(8).

Article 13 of the West Virginia Insurance Code governs life insurance in the State. W. Va. Code §§ 33-13-1 *et. seq.* The Insurance Code requires that all insurance policies delivered or issued for delivery in this State be filed with and approved by the Insurance Commissioner. W. Va. Code § 33-6-8(a). Additionally, it mandates that certain standard provisions be included in each policy sold in the State. See W. Va. Code § 33-13-2 (“[N]o policy of life insurance . . . shall be delivered or issued for delivery in West Virginia unless it contains in substance all of the provisions required by sections three to fifteen, inclusive, of this article”). Included in those requirements is a provision outlining the payment of claims.<sup>4</sup> W. Va. Code § 33-13-14 provides that “[t]here shall be a provision that when a policy shall become a claim by the death of the insured settlement shall be made upon receipt of due proof of death.” This provision in the Insurance Code conditions an insurer’s liability upon the presentation of a claim, which requires that a claimant provide an insurer with notice giving rise to liability under a policy. See *Petrice v. Federal Kemper Ins. Co.*, 163 W.Va. 737, 739-40, 260 S.E.2d 276, 278 (1979) (“the furnishing of a proof of claim” is a “condition precedent to recovery”).

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<sup>4</sup> W. Va. C.S.R. § 114-14-2(2.11) defines claim to mean “any communication by a claimant to an insurer or its agent which reasonably apprises the insurer or agent of an occurrence which might give rise to liability under a policy or contract of insurance.”

The West Virginia Supreme Court of Appeals has consistently held that “[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. pt. 3, *University Commons Riverside Home Owner’s Ass’n Inc. v. University Commons Morgantown, LLC*, 230 W.Va. 589, 741 S.E.2d 613 (2013)(citing Syl. pt. 3, *Smith v. State Workmen’s Compensation Comm’r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)). Therefore, the UPA and the Insurance Code should be read in conjunction with one another to the extent that they are consistent and capable of being applied in a uniform manner in order to ascertain true legislative intent. Thus, the Court will conduct its analysis following this premise.

The UPA was enacted in 1997, nearly forty years after the enactment of the life insurance provisions of the Insurance Code.<sup>5</sup> The Court finds that if the Legislature had intended a standard different from “receipt of due proof of death” it enacted in 1957 to apply to the “obligation to pay” standard it enacted in 1997, it would have done so with more specific language, as it is presumed that the Legislature would have known that it has already provided that an “obligation to pay” is to be determined by the “receipt of due proof of death” language required to be in every life insurance policy sold in the State. See Syl. pt. 5, *Pullano v. City of Bluefield*, 176 W.Va. 198, 342 S.E.2d 164 (1986)(citing Syl. pt. 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953)). The State Treasurer’s argument that the UPA applies to life insurance proceeds before those proceeds meet the definition of “property” and before they are “presumed abandoned” is contrary to this presumption.

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<sup>5</sup> See 1997 W. Va. Acts ch.1 and 1957 W. Va. Acts ch. 97.

Furthermore, the argument that the UPA imposes a duty on insurers to search the Death Master File (DMF) is inconsistent with the UPA's "limiting age" trigger, which explicitly provides a mechanism for unclaimed life insurance proceeds to be remitted to West Virginia in the event the insurer never receives due proof of death from a claimant. W. Va. Code § 33-13-14. In the absence of due proof of death, life insurance proceeds are not presumed abandoned under the UPA until three years after the insured reaches the applicable limiting age. *Id.* Under the UPA, the only two statutory triggers for the unclaimed property dormancy period are receipt of due proof of death and the limiting age. *Id.*

Moreover, other courts interpreting provisions very similar to the UPA have held that insurers lack any obligation to search the DMF. In *Total Asset Recovery Servs., LLL, v. Metlife, Inc.*, Case No. 2010-CA-3719 (Fla. Cir. Ct. Aug. 20, 2013), plaintiff, as relator for the Florida Department Financial Services, filed a complaint against a number of life insurance companies arguing that they had failed to comply with Florida's unclaimed property statute by failing to proactively search the DMF, the same argument that is being made in this case. The Florida court held there was no obligation on the part of insurance companies to proactively search the DMF. Specifically, the court found:

Florida has not adopted a law requiring Prudential to consult the Death Master File, averred by TARS, in connection with payment or escheatment of life insurance benefits. Likewise, Florida has adopted no law imposing an obligation on Prudential to engage in elaborate data mining of external databases . . . in connection with payment or escheatment of life insurance benefits.

*Id.*

Additionally, the Ohio Court of Appeals also upheld a decision dismissing a similar complaint alleging that life insurance companies operating in the state had an obligation to search the DMF to identify potentially deceased insureds. See *Andrews v. Nationwide Mut. Ins. Co.*, No. 97891, 2012 WL 5289946 (Ohio Ct. App. Oct. 25, 2012)(further appeal denied, 986 N.E.2d 31(Apr. 24, 2013)). As in West Virginia, the Ohio Insurance Code requires all life insurance policies payable “upon receipt of due proof of death.” Ohio R.C. § 3915.05(K). Therefore, the life insurance policies at issue contained terms requiring receipt of due proof of death before payment of death benefits, similar to the policies sold in West Virginia. In their ruling, the Ohio Court of Appeals held that “a finding obligating [the life insurance company] to solicit or gather information pertaining to an insured’s death would be contrary to the terms contained in the insurance policy.” *Andrews, supra*, at 4. Rather, the law “place[s] the burden on the claimant or the beneficiary to produce the proof of death.” *Id.*

The Court finds that the provisions of the UPA and the Insurance Code are unambiguous and consistent with one another. Based upon the plain meaning of those statutes, the Court finds that the Defendants have no obligation to surrender the life insurance proceeds under the UPA until the obligation to pay arises – either upon receipt of due proof of death or once the insured reaches the statutorily imposed limiting age.

**B. “Property” Payable Under West Virginia Code § 36-8-2(e)**

W. Va. Code § 36-8-2(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.” However, the UPA

defines the term “property” as it relates to life insurance benefits as “an amount owed by an insurer on a life or endowment insurance policy . . . three years after the obligation to pay arose.” West Virginia insurance law, in turn, expressly requires life insurance to contain a provision conditioning payment upon the insurer’s “receipt of due proof of death.” W. Va. Code § 33-13-14. Therefore, for life insurance proceeds, there is no “property” subject to or reportable under the UPA until the beneficiary has made a valid claim and submitted proof of death or the insured obtains the limiting age. W. Va. Code § 36-8-2(e) does not purport to change the definition of property as it relates to life insurance proceeds or to override the Insurance Code.

By contrast, the UPA defines the term “property” as it relates to savings accounts, negotiable instruments, and other types of property based on sheer passage of time, without any demand by the owner. See, e.g., W. Va. Code § 36-8-2(a)(1) (“Traveler’s Check, fifteen years after issuance”); § 36-8-2-(a)(2) (“Money order, seven years after issuance”); § 36-8-2(a)(12) (“Wages or other compensation for personal services, on year after the compensation becomes payable”). Such property is reportable as unclaimed by the express terms of the UPA even if the owner would be required to present a check or money order to the reporting company in order to claim the property directly.

Insurance death benefits, however, are inherently different from other types of unclaimed property. The threshold question of whether the insurer has any liability is contingent upon the happening of an event, the occurrence of which must be proven. Instead, a claimant must show that the insured has died while the policy is in force arising from a cause that is not excluded from coverage. See W. Va. Code § 33-13-25

(listing limitations that may be included in insurance contracts conditioning the insurance companies' responsibility to pay proceeds to a beneficiary, such as in the case of suicide). As a result, the "due proof of death" requirement is not a mere administrative requirement for collecting an obligation that is already fixed and certain. Rather, it is an essential ingredient for creating the obligation (*i.e.* the "property") in the first place.

In Syllabus Point 4 of *In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010), the Court restated, "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Here, the Legislature spoke clearly and unambiguously when it specifically defined "property" arising from life insurance as "an amount due and payable under the terms of an . . . insurance policy," and further defined when life insurance proceeds were "presumed abandoned." Therefore, life insurance proceeds are reportable when they become presumed abandoned under W. Va. Code § 36-8-2(a). Any attempt to rewrite the statute by creating a new category of presumed abandoned property should be addressed to the Legislature and not to the Court. "We prefer to leave for the Legislature the decision to amend this statute, should it so desire, rather than to improperly effect such an amendment through an opinion of the Court." *Burrows, supra* at 675, 600 S.E.2d at 572.

The State Treasurer references a decision by the United States Supreme Court in *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), in which the Court rejected a Contract Clause challenge by life insurance companies to a New York statute making life insurance proceeds subject to escheatment under certain specified

circumstances. The present case, however, presents a discrete issue of statutory interpretation and does not involve any Contract Clause challenge to the constitutionality of the West Virginia statute. Moreover, West Virginia's UPA has different statutory provisions and definitions than the New York statute that was challenged in *Moore*. Finally, nowhere in *Moore* is there any obligation imposed to proactively investigate whether "the insured has died," and it is undisputed that the DMF did not exist in 1948. For these reasons, the Court does not find this case analogous to the present situation, and thus does not find it controlling in this matter.

**C. "Good Faith" Requirement of West Virginia Code § 36-8-10**

Both plaintiff and defendant are in agreement that there is no provision in the UPA which specifically requires life insurance companies to use the DMF or other third-party database to search for information about the death of insureds. However, the State Treasurer purports that the UPA imposes a statutory duty of good faith that does require the companies to undertake such efforts.

The State Treasurer bases his argument on the language contained in W. Va. Code § 36-8-10, which provides in subsection (a) what qualifies as "good faith." This section of the UPA defines what is necessary for a holder who makes "payment or delivery" of abandoned property to establish the "good faith" requirement necessary to benefit from the immunity and/or indemnification provided for in this section.

Payment or delivery is made in good faith if: (1) it was made in a reasonable attempt to comply with the UPA; (2) the holder was not in breach of a fiduciary obligation with respect to the property and had a reasonable basis for believing the property was presumed abandoned; and (3) there is no showing in the records that the

payment or delivery did not meet reasonable commercial standards of practice. W. Va. Code § 36-8-10(a). Provided that these requirements of good faith are met, “[a] holder who pays or delivers property to the administrator . . . is relieved of all liability arising thereafter with respect to the property.” W. Va. Code § 36-8-10(b). Additionally, if a claim is made for the property after a holder has delivered it to the administrator in good faith, then the administrator will defend the holder against the claim and indemnify him from any liability resulting from payment or delivery of the property to the administrator. W. Va. Code § 36-8-10(f).

Based upon the plain meaning of the statute, the Court finds that W. Va. Code § 36-8-10 creates a standard of good faith for a very specific purpose – namely relieving a holder from liability when they make a good faith effort to comply with the UPA. The Legislature’s express limitation of this “good faith” standard to “this section” of the UPA evidences that intent.<sup>6</sup> Moreover, establishing “good faith” would be relevant as an affirmative defense necessary for the insurance company to secure the benefits provided for in W. Va. Code § 36-8-10. Hence, the Court is not persuaded that this specific provision creates a general “good faith” requirement applicable throughout the entire UPA.

Furthermore, for the same reasoning, the Court finds that the reference to “reasonable commercial standards” in W. Va. Code § 36-8-10(a)(3) does not create a statutory mandate to search the DMF. Rather, it is outlining a requirement for establishing good faith. This section does not purport to alter the definition of property

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<sup>6</sup> In further support of the Court’s interpretation is an explanation in Note, *Revisions in Abandoned and Unclaimed Property Legislation: A Look at the 1981 Uniform Unclaimed Property Act and West Virginia’s Revised Uniform Act*, 85 W.Va. Law Rev. 969, 984 (1983)(footnote omitted) which states that this section “is a critical provision which relieves the owner from liability . . . for property paid or delivered to the state in ‘good faith.’”

presumed abandoned, nor does it in any way create a duty to search the DMF. Instead, this section relieves the holder of liability for complying or attempting to comply with the UPA in good faith.

Nor can the duty of good faith and fair dealing be used to impose an obligation on the insurance companies to search the DMF. Under West Virginia law, there is no such duty absent a breach of contract: “[A]n implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim” and “[a]n implied contract and an express one covering the identical subject matter cannot exist at the same time.” Highmark West Virginia, Inc. v. Jamie, 221 W.Va. 487, 492, 655 S.E.2d 509, 514 (2007)(citations omitted).

While this is a matter of first impression in West Virginia, other states with similar statutes have considered the matter. Every court that has considered this issue has ruled that no implied duty arising from a life insurance policy imposes any obligation on a life insurance company to proactively search the DMF or other third-party database to determine whether an insured under an outstanding life insurance policy has died.

In *Andrews, supra*, plaintiffs instituted a class action alleging that “Nationwide has breached its 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.” *Id.* at ¶ 4. The Ohio Appellate Court, in their interpretation of Ohio R.C. § 3915.05(K), a statute nearly identical to W. Va. Code § 33-13-14, addressed whether a life insurance company had an obligation to search the DMF as a matter of contractual good faith. The Court held, “we are unable to conclude that Nationwide has 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.” *Id.* at ¶ 28.

Similarly, in *Feingold v. John Hancock Life Ins. Co. (USA)*, Civ. Action No. 13-10185-JLT, 2013 WL 4495126 at 2 (D. Mass. Aug. 19, 2013), a federal court in Massachusetts rejected an insured’s suit based upon an allegation that John Hancock had violated its duty of good faith and fair dealing by failing to use the DMF. The Court held instead that “John Hancock’s practice of requiring the life insurance policy beneficiary to submit proof of death before payment comports with both Massachusetts and Illinois law.” *Id.*

To date, this Court knows of no other jurisdiction that has held that a life insurance company has an affirmative legal duty to search the DMF based on an implied covenant of good faith and fair dealing. For this reason, and as explained previously, the Court finds that there is no general good faith requirement in the UPA that requires insurance companies to search the DMF or other third-party database to determine when an insured has died.

#### **D. Legislative Arguments and Recent Activity**

Strengthening the Court’s finding that there is no affirmative duty to search the DMF is the fact that Uniform Unclaimed Property Acts have been in existence for over fifty years<sup>7</sup> and yet no court has ever held that any version of the Uniform Act requires a person to search the DMF.<sup>8</sup> In addition, the National Conference of Insurance

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<sup>7</sup> The Treasurer and the Companies agree that West Virginia adopted the 1995 Version of the Uniform Unclaimed Property Act. “The 1995 Uniform Act superseded its predecessor uniform acts: the 1954 Uniform Disposition of Unclaimed Property Act (1954 Uniform Act); its revisions in 1966 (1966 Uniform Act); and the 1981 Uniform Unclaimed Property Act (1981 Uniform Act).” *Haven Sav. Bank v. Zanolini*, 3 A.3d 608, 614 (N.J. Super. Ct. 2010).

<sup>8</sup> Approximately fifteen states have substantially adopted the 1995 Uniform Unclaimed Property Act adopted by West Virginia. See Alabama-Ala. Code 1975, §§ 35-12-70 to 35-12-96.; Arizona-A.R.S. §§

Legislators (“NCOIL”) recently adopted the Model Unclaimed Life Insurance Benefits Act (the “Model Act”).<sup>9</sup> The Model Act is an entirely new statute that requires insurers to periodically compare the insureds under their in-force life insurance policies against the DMF. Many states have since enacted a variation of the Model Act or their own DMF legislation.<sup>10</sup> Five of the states enacting this new DMF legislation —Alabama, Nevada, New Mexico, Montana, and Vermont— like West Virginia, operate under the 1995 Uniform Unclaimed Property Act.<sup>11</sup> Such legislation would be redundant or unnecessary if a duty to search already existed in the UPAs adopted by these states. In contrast, the West Virginia Legislature has not enacted any legislation requiring insurers to search the DMF or any other third-party database. Furthermore, the Legislature’s command that the UPA “shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it” dictates rejection of contrary interpretations. W. Va. Code § 36-8-29. See *Total Asset Recovery*, Case No. 2010-CA-3719 (insurance companies have no obligation to proactively search the DMF).

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44-301 to 44-339; Arkansas-A.C.A. §§ 18-28-201 to 18-28-230; Hawaii-HRS §§ 523A-1 to 523A-30; Indiana-West’s A.I.C. 32-34-1-1 to 32-34-1-52; Kansas-K.S.A. §§ 58-3934 to 58-3980; Louisiana-LSA-R.S. 9:151 to 9:181; Maine-33 M.R.S.A. §§ 1951 to 1980; Michigan-MCLA §§ 567.221 to 567.265; Montana-Mont. Code Ann. §§ 70-9-801 to 70-9-829; Nevada-N.R.S. 120A.010 to 120A.750; New Mexico-NMSA 1978, §§ 7-8A-1 to 7-8A-31; North Carolina-G.S. §§ 116B-51 to 116B-80; Vermont-Vt. Stat. Ann. tit. 27, §§ 1241 to 1270; West Virginia-W. Va. Code §§ 36-8-1 to 36-8-32.

<sup>9</sup> NCOIL is an organization of state legislators who are primarily concerned with insurance legislation and regulation. “Many legislators active in NCOIL either chair or are members of the committees responsible for insurance legislation in their respective state houses across the country.” <http://www.ncoil.org> (last visited Aug. 27, 2013). The NCOIL Model Act was adopted in 2011 and amended in 2012 and 2013. <http://www.ncoil.org/other/MLRlife.html> (last visited Sept. 17, 2013).

<sup>10</sup> See, e.g., Ala. Code §§ 27-15-50 – 27-15-53 (effective Jan. 1, 2014); Ky. Rev. Stat. Ann. § 304.15-420 (effective Jan. 1, 2013); Md. Code Ann., Ins. § 16-118 (effective Oct. 1, 2013); N.Y. Ins. Law § 3240 (effective June 15, 2013); H.B. 1171, 63d Leg. (N.D. 2013); Vt. Stat. Ann. tit. 27, § 1244a (effective July 1, 2013); S.B. 34, 2013 Leg. (Mont. 2013); A.B. 226, 77th Sess. (Nev. 2013); S.B. 312, 51st Leg., 1st Sess. (N.M. 2013). Bills are pending in Massachusetts (H.B. 20, 2013 Leg. (Ma. 2013)) and Rhode Island (H.B. 5452, 2013 Leg., Jan. Sess. (R.I. 2013)).

<sup>11</sup> See Ala. Code Ann. § 35-12-71(11)(f); Mont. Code Ann. § 70-9-802(14)(a)(vi); Nev. Rev. Stat. § 120A.113(6); N.M. Stat. Ann. § 7-8A-1(13)(vi); Vt. Stat. Ann. tit. 27 § 1241(13)(F).

Despite the fact that other states in similar positions have found it necessary to enact additional legislation to create a duty for insurance companies to search the DMF or other similar database, the State Treasurer asserts that his interpretation should be accepted because it must be given deference, citing *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995). However, *Appalachian Power* does not stand for the proposition that absolute deference must be given to an agency's interpretation of a statute. Rather, in *Syllabus Point 3*, the Court held:

Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1981). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.

This present matter does not involve judicial review of an agency's "legislative rules." The West Virginia Legislature, unlike the state legislatures previously referenced, has not amended the UPA or enacted "legislative rules" through the process provided in the State Administrative Procedures Act. Furthermore, the Court believes that the Legislature has directly spoken on this precise issue. The definition of "property" under the UPA is clear and unambiguous, as is when such property becomes "abandoned." Therefore, no deference is due to the State Treasurer's interpretation at this stage, and

the Court can find no duty requiring the Defendants to use the DMF to determine whether an insured under an outstanding life insurance policy has died.

Finally, the State Treasurer has argued that because some of the named Defendants have entered into multi-state regulatory settlements, the Court should take judicial notice of said settlements. However, the details of those settlements are not before the Court and have no bearing on the issues presented here. The Court will not take judicial notice these settlements as the Court is no familiar with the circumstances surrounding those settlements and the issues before the Court involve pure questions of law. Moreover, the Court will not consider any additional policy arguments made by the State Treasurer because the Court finds that those are arguments that must be addressed to the Legislature. This Court is not the appropriate forum to address such arguments.

### **CONCLUSION**

The case rises or falls on a single question – whether a legal obligation exists under the UPA to search the DMF or other third-party databases to determine an insured under a life insurance policy has died. The Court concludes that it does not. Although the Court expresses no opinion on the social utility of a duty to search the DMF, the remedy sought lies with the Legislature, not with this Court.

**WHEREFORE**, for the reasons set forth in this Order, the Court **GRANTS** the Defendants' motions to dismiss and hereby **DISMISSES** those Complaints with prejudice. This is a **FINAL ORDER** and the Circuit Clerk is ordered to remove these matters from this Court's docket. The objections and exceptions of the parties are duly

noted. The Circuit Clerk is directed to provide a copy of this Order to the following counsel of record upon its entry:

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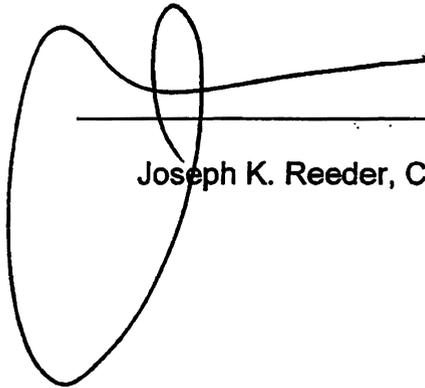
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ORDERED this 27<sup>th</sup> day of December, 2013.



\_\_\_\_\_

Joseph K. Reeder, Chief Judge

STATE OF WEST VIRGINIA  
COUNTY OF PUTNAM, SS:

I, Ronnie W. Matthews, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and the seal of said Court.

this 30 day of Dec, 2013  
  
\_\_\_\_\_  
Circuit Court  
Putnam County, W.Va. 