

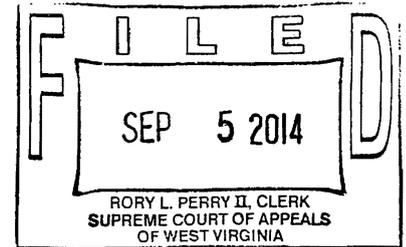


**SPILMAN THOMAS & BATTLE, PLLC**

ATTORNEYS AT LAW

Alexander Macia  
Direct: 304.340.3835  
amacia@spilmanlaw.com

September 5, 2014



**VIA HAND DELIVERY**

Rory L. Perry, II, Clerk  
WV Supreme Court of Appeals  
State Capitol, Room E-317  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

Re: *Perdue v. Nationwide Life Ins. Co.*, Case No. 14-0100  
Notice of Additional Authority

Dear Mr. Perry:

Since Respondents submitted their briefs to the Court, there has been a decision that directly relates to the issues in this appeal. To that end, pursuant to Rule 10(i) of the West Virginia Rules of Appellate Procedure, 18 Respondents<sup>1</sup> hereby submit this letter and the attached supplemental authority to the Court.

Rule 10(i) of the West Virginia Rules of Appellate Procedure, *Notice of additional authorities*, reads as follows:

Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in the party's

<sup>1</sup> The 18 Respondents submitting this Notice are: New York Life Insurance Company (Circuit Court No. 12-C-293); Lincoln National Life Insurance Company (Circuit Court No. 12-C-296); Erie Family Life Insurance Company (Circuit Court No. 12-C-325); New York Life Insurance and Annuity Corporation (Circuit Court No. 12-C-329); The Western and Southern Life Insurance Company (Circuit Court No. 12-C-331); Western-Southern Life Assurance Company (Circuit Court No. 12-C-355); Primerica Life Insurance Company (Circuit Court No. 12-C-356); Farm Family Life Insurance Company (Circuit Court No. 12-C-359); Employees Life Company (Mutual) (Circuit Court No. 12-C-362); Ohio National Life Assurance Corporation (Circuit Court No. 12-C-372); ReliaStar Life Insurance Company (Circuit Court No. 12-C-381); Physicians Life Insurance Company (Circuit Court No. 12-C-421); Horace Mann Life Insurance Company (Circuit Court No. 12-C-423); Provident Life & Accident Insurance Company (Circuit Court No. 12-C-425); Pacific Life Insurance Company (Circuit Court No. 12-C-429); Colonial Life & Accident Insurance Company (Circuit Court No. 12-C-431); American Family Life Assurance Company of Columbus, GA (Circuit Court No. 12-C-441); and The Lafayette Life Insurance Company (Circuit Court No. 12-C-446).



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brief, the party may briefly inform the Court by letter, with copy provided to opposing parties. If the Court desires any further briefing or argument, it will so instruct by order.

The Kentucky Court of Appeals' recent ruling in *United Insurance Company of America et al. v. Commonwealth of Kentucky, Department of Insurance*, No. 2013-CA-000612-MR (Ky. Ct. App. Aug. 15, 2014), further supports two key positions advanced by Respondents in their earlier briefing.

First, receipt of notice and proof of death from a beneficiary or claimant is a condition precedent to an insurer's payment obligations under its life insurance policies. In *United*, the parties did not dispute—and the Kentucky Court of Appeals agreed—that the notice and proof of death requirements in appellant insurers' policies created a condition precedent for payment of death benefits, and that “[u]ntil that condition precedent is met, the insurer has no contractual obligation to investigate a claim or to make payments.” (Slip op. at 7-8.)

Second, existing West Virginia law does not require insurers to affirmatively seek out evidence of possible deaths from the DMF or any other commercially-available database. As the Kentucky Court of Appeals recognized, Kentucky's “duty to search the DMF” requirement—which “clearly imposes new and substantive requirements which affect the contractual relationship between insurer and insureds”—only arose through affirmative legislation (“the Act”). (*Id.* at 9.) “Most notably, the Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and estate to the insurer,” which necessarily indicates that insurers did not bear the burden to obtain evidence of their insureds' deaths prior to the Act's passage. (*Id.*) Because of the Act's substantive impact on insurer contracts, the Kentucky Court of Appeals construed the new legislation to apply prospectively, and only to newly issued life insurance policies.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Very truly yours,



Alexander Macia

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cc: *Counsel for Petitioner*  
Timothy C. Bailey, Esq. (via hand delivery)  
Dan Greear, Esq. (via hand delivery)  
Anthony J. Majestro, Esq. (via hand delivery)  
Patrick Morrissey, Esq. (via hand delivery)

*Counsel for Amici Curiae*  
Lynden Lyman, Esq.  
Sandra B. Harrah, Esq.  
Robert P. Kenkowitz, Esq.

*Counsel for Respondents*  
Thomas A. Clare, Esq.  
Seth P. Hayes, Esq.  
Stephen M. LaCagnin, Esq.  
Ellen M. Dunn, Esq.  
Lee Murray Hall, Esq.  
Ancil G. Ramey, Esq.  
William E. Galeota, Esq.  
Carrie Goodwin Fenwick, Esq.  
Thomas J. Hurney, Jr., Esq.  
Michael M. Fisher, Esq.  
Edwin G. Schallert, Esq.  
John M. Aerni, Esq.  
John H. Tinney, Esq.  
Bruce M. Jacobs, Esq.  
Markham R. Leventhal, Esq.  
Irma Rebozo Solares, Esq.  
Roger B. Cowie, Esq.  
Taylor F. Brinkman, Esq.  
Jason P. Gosselin, Esq.  
Douglas A. Scullion, Esq.  
Laura Leigh Geist, Esq.

Terrence D. O'Hare, Esq.  
Timothy O'Driscoll, Esq.  
Matthew I. Lewis, Esq.  
Maeve O'Connor, Esq.  
Jeffrey M. Wakefield, Esq.  
Danielle Waltz Swann, Esq.  
Thomas F. A. Hetherington, Esq.  
Blair Bruns Johnson, Esq.  
Robert L. Massie, Esq.  
Barry Chasnoff, Esq.  
M. McLean Pena, Esq.  
Avi Schick, Esq.  
Melanie Anne McCammon, Esq.  
Angela D. Herdman, Esq.  
Mary Jane Pickens, Esq.  
Andrew S. Dornbos, Esq.  
Frank E. Simmerman, Jr, Esq.  
Chad L. Taylor, Esq.  
Katherine J. Evans, Esq.  
Jared M. Tully, Esq.

Enc.

RENDERED: AUGUST 15, 2014; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000612-MR

UNITED INSURANCE COMPANY OF  
AMERICA; THE RELIABLE  
INSURANCE COMPANY; AND RESERVE  
INSURANCE COMPANY

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 12-CI-01441

COMMONWEALTH OF KENTUCKY,  
DEPARTMENT OF INSURANCE; AND  
SHARON P. CLARK, IN HER OFFICIAL  
CAPACITY AS COMMISSIONER  
OF THE KENTUCKY DEPARTMENT  
OF INSURANCE

APPELLEES

OPINION  
REVERSING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: ACREE, CHIEF JUDGE, MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: United Insurance Company of America, Reliable Life Insurance  
Company and Reserve National Insurance Company (collectively “the

Appellants”) appeal from a declaratory judgment by the Franklin Circuit Court in favor of the Commonwealth of Kentucky, Kentucky Department of Insurance, and Sharon P. Clark, in her official capacity as Commissioner of the Kentucky Department of Insurance (collectively, “the Department”). The Appellants challenge the retroactive application of the Unclaimed Life Insurance Benefits Act to policies which were issued prior to its effective date. They argue that the Act was not expressly intended to be retroactive, and that retroactive application of the Act’s requirements would unconstitutionally modify their rights and obligations under existing contracts. We conclude that the Act does not provide for retroactive application, nor can it be construed to apply to insurance policies which were in force as of its effective date. Hence, we reverse.

There are no disputed facts in this case. The Appellants have been licensed to issue life insurance policies in Kentucky for several decades. They have a combined total of 9,098 policies in force in Kentucky. Of these policies, the Appellants have approximately 3,000 non-premium paying policies in force with insureds over 70 years old. The Appellants’ life insurance policies contain provisions which condition payment of death benefits upon their receipt of “due proof of death” from a beneficiary or the insured’s estate.

In 2012, the General Assembly enacted the Unclaimed Life Insurance Benefits Act. KRS 304.15-420 (the Act).<sup>1</sup> The Act requires all insurers to conduct

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<sup>1</sup> Kentucky’s Act is based upon the Model Unclaimed Life Insurance Benefits Act propounded by the National Conference of Insurance Legislators (NCOIL) in 2011. To date, 14 states, including Kentucky, have adopted a version of the Model Act including the provisions at issue. <http://unclaimed-property.keaneco.com/states-proposing-ncoil-unclaimed-life-insurance->

a comparison of its insureds' in-force life insurance policies against the Social Security Administration's Death Master File (DMF) on at least a quarterly basis.

KRS 304.15-420(3)(a). For those potential matches which are identified as a result of such a search, KRS 304.15-420(3)(b) further requires:

(b) For those potential matches identified as a result of a Death Master File match, the insurer shall within ninety (90) days of a Death Master File match:

1. Complete a good-faith effort, which shall be documented by the insurer, to confirm the death of the insured or retained asset account holder against other available records and information; and
2. Determine whether benefits are due in accordance with the applicable policy or contract and, if benefits are due in accordance with the applicable policy or contract:
  - a. Use good-faith efforts, which shall be documented by the insurer, to locate the beneficiary or beneficiaries; and
  - b. Provide the appropriate claims forms or instructions to each beneficiary to make a claim, including the need to provide an official death certificate if applicable under the policy or contract.

In essence, the Act requires insurers to make a good-faith effort to learn of the deaths of its insureds through periodic reviews of the DMF. Within 90 days of identifying a match, the insurer must make a good-faith effort to verify that the deceased is among their insureds, confirm the death, and determine whether benefits are due. If death is confirmed and benefits are payable, the insurer must take good-faith steps to locate and to give notice to potential beneficiaries within that same 90-day period. Once such notice is given, the claims process would

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benefits-act (accessed June 24, 2014). In 2014, the General Assembly enacted several amendments to the Act, which are not at issue in this appeal. 2014 *Ky. Laws* Ch. 60 § 3.

otherwise proceed as usual. Any beneficiaries must still provide proof of the insured's death and file the appropriate claim. The Act further provides that, if no beneficiary steps forward to file a claim within three years of a match against the DMF, any unclaimed life insurance benefits or retained asset account shall escheat to the Commonwealth. KRS 304.15-420(5)-(7). Finally, the insurer must document the steps which it took to comply with each of these requirements.

The Act became effective as of January 1, 2013. Shortly before that date, the Appellants brought this action for a Declaration of Rights pursuant to KRS 418.040, challenging the application of the Act as applied to life insurance policies issued prior to the Act's effective date. The Appellants first argued that the Act does not expressly provide that it is to be retroactively applied. In the alternative, the Appellants argued that retroactive application of the obligations imposed by the Act would be unconstitutional because it alters the substantive contractual relations between the insured and the insurer. In response, the Department also sought declaratory relief holding that the Act may be constitutionally applied to policies issued prior to its effective date.

The parties conducted some discovery and then filed cross-motions for summary judgment. After considering the briefs and hearing arguments of counsel and *amici curiae*, the trial court entered an opinion and order on April 1, 2013 which granted the Department's motion for summary judgment. The court first found that the Act is remedial and does not violate the rule against retroactive application. Next, the trial court found that the Act is not unconstitutional because

it does not impair any vested contractual right. And finally, the trial court concluded that even if the Act impairs a contractual right, it is justified by a significant and legitimate public purpose. This appeal followed.

The Appellants argue that the trial court erred in granting summary judgment for the Department and that they were entitled to judgment on their claims for declaratory relief. The “proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

As noted above, there are no factual issues in dispute. Matters of statutory and constitutional interpretation are issues of law, which we review *de novo*. *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky. 2007). Furthermore, it is well-established that the courts will “refrain from [addressing] constitutional issues when other, non-constitutional grounds can be relied upon.” *Louisville/Jefferson County Metro Government v. TDC Group, LLC*, 283 S.W.3d 657, 660 (Ky. 2009) quoting *Baker v. Fletcher*, 204 S.W.3d 589, 597-98 (Ky. 2006). Therefore, we shall address the non-constitutional claim first.

The Appellants concede that the General Assembly has the authority to require insurers to comply with the Act's requirements on policies issued after the Act's effective date. But as the Appellants correctly note, 446.080(3) provides that "no statute shall be construed to be retroactive, unless expressly so declared." *See also Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 166–67 (Ky. 2009). This fundamental principle of statutory construction in Kentucky creates a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result. *Commonwealth Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000).

KRS 304.15-420 does not specifically provide for retroactive enforcement to insurance contracts issued prior to its effective date. Although no "magic words" are required, "[w]hat is required is that the enactment make it apparent that retroactivity was the intended result." *Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006). Retroactive effect or retrospective application of an act will not be given or made "unless the intent that it should be is clearly expressed or necessarily implied." *Taylor v. Asher*, 317 S.W.2d 895, 897 (Ky. 1958).

In this case, the Act requires insurers to conduct a periodic comparison of "in-force life insurance policies and retained asset accounts" against the DMF. KRS 304.15-420(3)(b). Likewise, the Act's definition of "policy" includes "any policy or certificate of life insurance that provides a death benefit." KRS 304.15-420(2)(d) (*emphasis added*). Although this broad language could

imply that the Act applies to all life insurance policies which were in force as of the January 1, 2013, such an interpretation is not *necessarily* implied from the text of the statute. In the absence of a clearer expression of the General Assembly's intention, we cannot presume that the requirements of the Act apply retroactively to policies issued before its effective date.

But as the trial court recognized, "remedial" statutes do not come within the scope of the rule requiring express language to be retroactively applied. *Vinson*, 30 S.W.3d at 169. "Remedial" means no more than the expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy. *Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000). Conversely, substantive amendments to the law, *i.e.*, "[a]mendments which change and redefine the out-of-court rights, obligations and duties of persons in their transactions with others ... come within the rule that statutory amendments cannot be applied retroactively to events which occurred prior to the effective date of the amendment." *Moore v. Stills*, 307 S.W.3d 71, 80 (Ky. 2010), *quoting Vinson*, 30 S.W.3d at 168.

In this case, the trial court concluded that the requirements of the Act did not alter the contractual obligations of the parties, but only operated as a remedy to enforce the pre-existing contractual rights of insureds and beneficiaries. Arguing against this interpretation, the Appellants maintain that the notice and proof of death requirements in its insurance contracts create a condition precedent for payment of death benefits. Until that condition precedent is met, the insurer

has no contractual obligation to investigate a claim or to make payments. *See Andrews v. Nationwide Mutual Insurance Co.*, 2012 WL 5289946 at 5 (Ohio App. 8<sup>th</sup> Distr. 2012).

While Kentucky has never applied this particular application of condition precedent, it is a reasonable interpretation of the contracts at issue. By definition, a condition precedent is an event which must occur before performance under a contract becomes due. *Restatement (Second) of Contracts*, § 224 (1981). The parties agree that the insurers' obligations under the contract arise only upon receipt of notice and due proof of death. However, the Act now requires insurers to actively investigate potential claims and provide notice to beneficiaries before any notice or proof of death is provided. The Appellants contend that these new requirements alter the substantive obligations between the insurers and their insureds by shifting the performance of the condition precedent from the insured to the insurer.

The Department urges that the Act does not alter the insurer's contractual obligations to its insureds or their beneficiaries. The Department argues that the Act simply imposes an additional requirement on insurers to check the DMF on a quarterly basis against their list of insureds and to attempt to notify listed beneficiaries of a *potential* claim. The Department correctly notes that the burden of providing such proof and making a claim remains with the potential beneficiary or the estate, and the Act does not alter the insurer's contractual obligation to pay death benefits only upon receipt of proof of death.

We agree with the Department that the Act's requirements are primarily regulatory and do not directly alter the operation of any conditions precedent for coverage under the insurance contracts. Nevertheless, the Act clearly imposes new and substantive requirements which affect the contractual relationship between insurer and insureds. Most notably, the Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and estate to the insurer.

By itself, this provision does not alter the operation of any condition precedent to performance. Nevertheless, it is a substantial obligation. Moreover, KRS 304-15-420(5)-(7) provides that insurers must surrender death benefits or retained asset accounts three years after identification of a potential match to the DMF. The insurer's identification of the match commences the time for payment or discharge of the insurers' obligations even in the absence of a filed claim or proof of death. Although this may be a valid exercise of the state's regulatory authority, it is a substantive and not a remedial alteration of the contractual relationship between insurers and insureds.

Consequently, the Act falls within the rule prohibiting retroactive application to contracts in effect prior its effective date. Having reached this conclusion, we need not discuss the constitutional issues raised by Appellants. Therefore, we conclude that the Act's requirements may only be applied to policies executed after January 1, 2013.

Accordingly, the declaratory judgment by the Franklin Circuit Court  
is reversed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Mark D. Hopson  
Brian P. Morrissey  
Washington, DC

Carol Lynn Thompson  
San Francisco, CA

Scott Heyman  
Chicago, IL

Sheryl G. Snyder  
Joseph L. Ardery  
Jason P. Renzelmann  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLANTS:

Sheryl G. Snyder

BRIEF FOR APPELLEES:

Peter F. Ervin  
Latash Buckner  
Public Protection Cabinet  
Office of Legal Services  
Frankfort, Kentucky

Shaun T. Orme  
Kentucky Department of Insurance  
Insurance Legal Division  
Frankfort, Kentucky

ORAL ARGUMENT FOR  
APPELLEES:

Peter F. Ervin

BRIEF FOR AMICI CURIAE  
LIFE INSURERS COUNCIL  
AND THE NATIONAL ALLIANCE  
OF LIFE COMPANIES:

Virginia Hamilton Snell  
Louisville, Kentucky

Mark D. Overstreet  
Frankfort, Kentucky