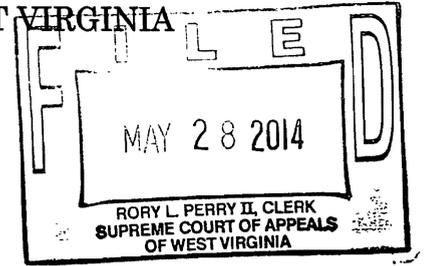


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 14-0100



JOHN D. PERDUE, Plaintiff Below,

Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY, et al.  
Defendants Below,

Respondents.

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**PETITIONER'S BRIEF**

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## INTRODUCTION

The West Virginia Unclaimed Property Fund (“Fund”) was established by the West Virginia Uniform Unclaimed Property Act (“Act”). Petitioner, the West Virginia Treasurer is the Fund’s Administrator. The Act explicitly includes life insurance as one of the types of property subject to the State’s jurisdiction. The Respondent insurers, however, have been regularly retaining millions of dollars from unclaimed life policies even where their records show insureds who are decades beyond their life expectancy. The insurers here have kept these proceeds despite the fact that they have access to monthly lists compiled by the government and others of those who have passed away. The insurers purchase these lists and use them to determine which of their annuitants have died so that they can cease paying them. In spite of the fact that they possess these death lists, insurers continue to retain and profit from the life insurance policies of the dead.

The Treasurer brought these actions to force the insurers to pay over the life insurance proceeds from policyholders who have died without filing a claim. Prior to any discovery being undertaken, the Circuit Court dismissed the complaints. In spite of the fact that the Act explicitly required payment to the Fund regardless of the fact the owner has not made a demand or filed a claim, the Court below improperly resolved disputed factual issues, engrafted into the Act provisions from the Insurance Code, and then improperly found that the Act requires a claim or notice of death before life insurance policies are even subject to the Act. This error essentially excludes life insurance proceeds from the Act. Reversal is required.

## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED IN SUBJECTING THE UNCLAIMED PROPERTY ACT TO THE REQUIREMENTS OF THE INSURANCE CODE AND THEREAFTER CONCLUDING THAT LIFE INSURANCE PROCEEDS DO NOT BECOME UNCLAIMED PROPERTY UNDER THE UNIFORM UNCLAIMED PROPERTY ACT UNLESS A CLAIM HAS BEEN MADE AND NOTICE OF DEATH HAS BEEN RECEIVED BY THE INSURER.
2. THE CIRCUIT COURT ERRED IN REFUSING TO FIND THAT THE UNIFORM UNCLAIMED PROPERTY ACT IMPOSES THE DUTY OF GOOD FAITH AND REASONABLENESS UPON THE RESPONDENT INSURERS AS HOLDERS OF UNCLAIMED PROPERTY TO USE COMMERCIALY REASONABLE AVAILABLE LISTS TO DETERMINE IF POLICY HOLDERS HAVE DIED.
3. THE CIRCUIT COURT ERRED IN DISMISSING THE COMPLAINTS IN THEIR ENTIRETY PRIOR TO ANY DISCOVERY BEING UNDERTAKEN WHERE PETITIONERS ALLEGED NUMEROUS VIOLATIONS OF THE UNIFORM UNCLAIMED PROPERTY ACT WHICH WERE NEVER DISPUTED BY THE RESPONDENT INSURERS.

## **STATEMENT OF THE CASE**

Petitioner, the Honorable John D. Perdue, is the Treasurer of the State of West Virginia and the Administrator (“Treasurer” or “Administrator”) of the West Virginia Unclaimed Property Fund (“Fund”). W.Va. Code § 36-8-1(1). The West Virginia Uniform Unclaimed Property Act (“Act”) was enacted in 1997<sup>1</sup> and serves as a consumer protection act that protects owners who have lost contact with their property. As the Administrator for the Fund, the Treasurer holds all unclaimed

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<sup>1</sup> West Virginia previously enacted earlier versions of the Uniform Unclaimed Property Act. The current version is the 1995 Uniform Unclaimed Property Act. The West Virginia legislature enacted the 1995 UUPA in its entirety.

property for the benefit of owners, until they come forward to claim it. To date, the Treasurer has returned over \$113 million to West Virginia individuals and businesses.

The Act requires holders of unclaimed and abandoned property to file annual reports and pay over to the Fund certain types of property. The Act specifically defines property to include the proceeds from “an annuity or insurance policy, including policies providing life insurance.” W.Va. Code § 36-8-1(13)(vi).

Insurance proceeds are presumed abandoned and, therefore subject to the Act’s requirements, when the particular life insurance policy or annuity is unclaimed either “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 would have attained if living, the limiting age under the mortality table on which the reserve is based.”<sup>2</sup> W.Va. Code § 36-8-2(a)(8). Property presumed to be abandoned is subject to the Act’s requirements that the property be reported to the Administrator and the proceeds paid over to the Fund. W.Va. Code §§ 36-8-7, 36-8-8.

Under the Act, if an insurance company reports and pays to the Treasurer unclaimed life insurance policy proceeds, and a legitimate claim is later made to the insurance company, the State Treasurer is required to reimburse the insurer for the money paid by the insurer to the person making the claim if the original payment to

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<sup>2</sup>The term “limiting age” in this context refers to the oldest age reflected in the relevant mortality table. For older policies, the limiting age was set at 99 or 100 years. For more recent policies, the limiting age is 120 years or more.

the State Treasurer as unclaimed property was made in "good faith." W.Va. Code §36-8-10. A "good faith" payment is the result of a search for and a report of unclaimed property under the Act. As defined under the Act, a payment is made in "good faith" only if the payment was made in a "reasonable attempt to comply with this article" and if "[t]here is no showing that the records under which the payment or delivery was made did not meet reasonable commercial standards of practice." W.Va. Code § 36-8-10(a)(1), (a)(3). The inclusion of this language in the Act demonstrates the Legislature's intent that the reporting and payment requirements under the Act be made in good faith using reasonable commercial standards of practice.

In this case, sixty-nine individual complaints were filed against the Respondent life insurers.<sup>3</sup> Each of the complaints contained the allegations that follow which, for the purposes of the motion to dismiss for failure to state a claim, should be taken as true.<sup>4</sup>

Respondents are all registered, licensed and authorized to sell life insurance and/or annuities in the State of West Virginia. App. 00002 at ¶ 2. The Complaints specifically plead that Respondents are "holder[s] of abandoned property" which under the Act are required "to be turned over to the State Treasurer in his role as

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<sup>3</sup>Motions to Dismiss were filed by the defendants in sixty cases. In the remaining cases where motions to dismiss were not filed, those cases have been stayed for reasons unrelated to the merits of this appeal.

<sup>4</sup>The record citations of the allegations below are from the complaint in *State ex rel. Perdue v. Nationwide Life Ins. Co.*, Civil Action 12-C-287, the lead case in this appeal. See App. 00001. Each of the other complaints at issue in this appeal contains the same allegations. The other complaints are reproduced in the Appendix. See App. at Vol. 2, Vol. 3.

Administrator for placement in the Unclaimed Property Fund accounts.” App. 00003-4 at ¶ 11.

The Complaints also broadly allege that Respondents all “failed to reasonably and in good faith comply with the requirements of the West Virginia Uniform Unclaimed Property Fund Act” by, among other things:

- a. Failing to use reasonably prudent policies and procedures to accurately and fully identify all West Virginia unclaimed insurance policy proceeds it holds and which are property of West Virginians or the State of West Virginia;
- b. Failing to completely and truthfully comply with the reporting requirements of the West Virginia Uniform Unclaimed Property Act; and,
- c. Failing to make good faith and commercially standard payments under the West Virginia Uniform Unclaimed Property Act by under-reporting or failing to report the full extent of unclaimed life insurance proceeds it holds related to West Virginia policy holders.

App. 00005-6 at ¶ 18.

The Complaints allege that the Respondents had available lists identifying the deaths of their policyholders created by the United States Department of Commerce utilizing data from the Social Security Administration entitled the “Death Master File” (“DMF”). App. 00007 at ¶ 22. In addition to that government DMF list, there are other reliable databases available for use through third-party providers using the DMF information. *Id.*

The Complaints further allege that Respondents had actual possession of the DMF information for use in their business operations. In addition to issuing life insurance policies, Respondents also issue annuity policies which provide policy

holders periodic payments until death. App. 00007 at ¶ 23. Thus, in order to prevent payments to policyholders after death, Respondents “routinely use the DMF to determine deaths of annuity policy holders.” *Id.* Life insurance, on the other hand, is not payable until death. App. 00007-8 at ¶ 24. Thus, Respondents had an incentive to ignore the evidence of life policyholder death they possessed by way of the DMF files. The Respondent “life insurers routinely fail to utilize DMF information to discover precisely when life insurance policy proceeds are payable.” *Id.*

The obvious result of the failures of the Respondents to comply with the Act is that Respondents “either failed to truthfully report abandoned or unclaimed property to the State Treasurer as required by statute or paid into the Unclaimed Property Fund amounts less than actually due the State under the Act.” App. 00008 at ¶ 26. The Complaints allege that the untruthful reports have taken the form of reports not filed at all, reports filed without all the unclaimed life insurance policy proceeds identified, and reports filed undervaluing the amount the life insurance policy proceeds. *Id.*

A second consequence of the Respondents’ actions is that the failure to report and pay over the life insurance proceeds allowed them to convert unclaimed life insurance policy proceeds into policy premium payments. The Complaints alleged that Respondents’ life insurance policies include provisions that if policy premiums are not paid, then accrued cash value of those insurance policies is automatically used to continue premium payments to the defendant itself. App. 0008 at ¶ 27.

Thus, by failing to recognize that deaths had occurred Respondents were able to erode the policy proceeds available to beneficiaries by paying themselves premiums.

*Id.*

The Complaints in these regulatory actions each sought extensive relief from all respondents including an order:

- Requiring Respondents to file a verified report setting forth the amount of unclaimed life insurance proceeds for West Virginia policy holders currently held by them, the precise manner and method by which they determine the unclaimed life insurance proceeds reported on an annual basis to the administrator, including any database utilized by Respondents to make such an inquiry and how long such inquiry policy or process has been utilized. App. 00009 at ¶ 30 (citing W.Va. Code § 36-8-20(a)).
- Allowing the Administrator to examine Respondents' records to determine if Respondents have fully and truthfully complied with the West Virginia Uniform Unclaimed Property Act, including records related to the policies and procedures and the information used by them to annually determine and report life insurance policy proceeds which may be payable either to West Virginia beneficiaries of policy holders or to the West Virginia Unclaimed Property Fund. App. 00009 at ¶ 31 (citing W.Va. Code § 36-8-20(b)).
- Requiring the payment of examination costs, App. 00010 at ¶ 32 (citing W.Va. Code § 36-8-20(e)), attorney fees, App. 00010 at ¶ 33 (citing W.Va. Code § 36-8-22), interest on the value of the life insurance proceeds accruing from the date the proceeds first became reportable and payable, App. 00010 at ¶ 34 (citing W.Va. Code § 36-8-24(a)), and civil penalties. App. 00010-11 at ¶¶ 35-37 (citing W.Va. Code § 36-8-24(b)-(d))

Finally, the Complaints each sought injunctive relief requiring Respondents “to immediately implement and adopt policies and procedures utilizing the DMF or other similar databases (if approved by the State Treasurer), to annually identify

unclaimed life insurance policy proceeds for reporting and payment under the Act.” App. 00011 at ¶ 38.

Following the filing of the Complaints, Respondents sought or joined in motions seeking dismissal of the Complaints in their entirety. *See, e.g.*, App. 00013, 00230, 00270. The focus of the motions was whether the Respondents had a duty to use the DMF or other similar database. *See, e.g.* App. 00014-15, 00230, 00270. The Treasurer filed a consolidated response in opposition to the motions. App. 00047. Respondents filed Replies. App. 00127, 00744, 00801, 00958, 00985, 01023, 01065, 01112, 01162, 01349, 01558. A hearing on the motions was held on September 6, 2013. App. 00183 (transcript). After receiving proposed orders, on December 27, 2013, the Circuit Court, Reeder, J., entered an order granting the motions and dismissing the case in its entirety. App. 00151.

The Court held that the Act was subject to the provisions of the West Virginia Insurance Code under which life insurance proceeds are allegedly payable to a claimant or insured only after a claim is filed. App. 00168 (citing W.Va. Code § 33-13-14). According to the Circuit Court’s reasoning, reading these two Acts together, insurance policy proceeds cannot become unclaimed property under the Act because the obligation to pay the policy proceeds does not arise prior to filing a claim as allegedly required by the insurance code. App. 00169-171. Based on this premise, the Court rejected the Treasurer’s arguments that the Respondents had either a good faith duty to obtain DMF data or, once they obtained DMF data for use to cut

off annuity payments, they had a good faith duty to conduct a search matching the DMF information with the list of life insurance policies. App. 00175-177.

The Court focused on the DMF arguments. It did so in spite of the fact that it acknowledged the broad allegations regarding the Respondents' general failures to comply with the Act. App. 00164 ("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."). While such a showing would have been inappropriate in connection with a motion to dismiss, Respondents never submitted any evidence that they were otherwise complying with the Act.

No discovery was conducted prior to the dismissal. As such, the full extent of Respondents' knowledge of the deaths of their policyholders, their failure to utilize the DMF or other similar data (whether available to them or actually in their possession), and their failure to comply with the reporting and payment obligations of the Act remains unknown.

In the end, without any discovery being conducted at all, Respondents were given a complete pass to continue to violate the Act by failing to report and pay over to the Administrator life insurance policies. For the reasons identified below, the order dismissing these actions should be reversed.

## SUMMARY OF ARGUMENT

The Uniform Unclaimed Property Act serves the remedial purpose of protecting consumers who have been separated from their property by transferring custody of the property to the State. As such, the Act should have been given a liberal interpretation in favor of the State Treasurer.

The Act broadly subjects various types of property to regulation in broad general terms. Included in the general definition of property under the Act are all “fixed and certain interests in intangible personal property.” W.Va. Code § 36-8-1(13). In addition to the general definition, the definition section also gives examples of interests constituting property under the Act. One example included is “amounts due and payable under the terms of a life insurance policy.” The Circuit Court improperly treated this example of policy proceeds “due and payable” as the only manner in which insurance proceeds could constitute property under the Act. This determination improperly elevated the inclusive example into an exclusive requirement. Such a limitation is contrary to this Court’s precedent that the Legislature’s use of the word “includes” is a clear indication that the Legislature was giving an illustrative definition, and not an exclusive definition.

The Circuit Court, citing W.Va. Code § 33-13-14, then improperly defined “due and payable” with reference to the Insurance Code provisions requiring the insurer to pay upon receipt of proof of death. This was error. West Virginia Code § 33-13-14 does not require the submission of a formal claim by the claimant. Thus, an insurer that receives notice that the insured has died by virtue of the

government-issued list of deaths is in receipt of “proof of death” under either statute. This is especially true given that compliance with notice requirements is liberally construed in favor of the insured or the beneficiary. Under West Virginia law, notice of loss can be provided by any source, including third-parties.

More importantly, however, it was unnecessary for the Circuit Court to even look to the Insurance Code as the Act itself supplies clear direction as to the insurer’s duty to with respect to unclaimed property when the insured has not filed a claim. W.Va. Code § 36-8-2(e) is explicit and on point: “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.” The claim forms allegedly required by W.Va. Code § 33-13-14 clearly constitute the “instrument or document otherwise required to obtain payment” that are rendered unnecessary by virtue of West Virginia. W.Va. Code § 36-8-2(e).

The National Conference of Commissioners on Uniform State Laws, which promulgated the statute upon which the West Virginia Act is based, specifically rejected the theory that the determination of whether property is reportable and payable under the Uniform Unclaimed Property Act is dependent on the owner’s actions in filing a claim. There is evidence this provision was specifically intended to apply to life insurance claims. In explaining this section, the Conference specifically referred to precedent on unclaimed property in the context of life insurance addressing the exact issues raised here.

In reaching its decision, the Circuit Court improperly relied upon out of state cases that are distinguishable on the grounds that they involve litigation by *individuals* who were either the actual parties to the contract or beneficiaries of a contract. The courts in those cases considered themselves constrained by the terms of the contracts under which the plaintiffs were required to make a claim. In contrast, here W.Va. Code § 36-8-2(e) removes this requirement when the issue is unclaimed property rather than a private claim.

Finally, the Circuit Court's interpretation of property effectively removes life insurance from the Act's consumer protections. If a claim is required to subject life insurance proceeds to the unclaimed property Act, there will never be any unclaimed life insurance. As such, the Circuit Court's interpretation violates the rule of statutory construction that significance and effect must, if possible, be given to every section, clause, word or part of the statute.

\* \* \* \*

The Circuit Court erred in rejecting Petitioner's claims that Respondents have a duty of "good faith" under the Act requiring them to actively search for deceased policyholders. Under the Act, payments or deliveries by holders of unclaimed property are made in *good faith* if: payment or delivery was made in a reasonable attempt to comply with this *article* and there the records under which the payment or delivery was made meets *reasonable commercial standards of practice*.

Good faith and reasonableness are required in the searching, reporting and payment of unclaimed property under the Act. The Circuit Court rejected this claim finding that the duty was relevant only to the determination of whether the holder might be entitled to immunity or indemnification under W.Va. Code § 36-8-10. Section 36-8-10(a)(1)'s application, however, is broader than the indemnity provisions in that section as the provisions relate to good faith in compliance with the entire "article" which includes the entire Act and its reporting provisions. This interpretation is consistent with the rules of liberal construction applicable to the Act.

The DMF is a publically available database. Respondents used the DMF to search for the deaths of annuitants in the payout phase to allow the immediate cessation of annuity payments. The Act's good faith and reasonable commercial practices requirements required the Respondents to have been using the DMF timely and fully, rather than selectively apparently solely for the insurers' benefit.

\* \* \* \*

The Circuit Court's order dismissing these cases was explicitly a final order that dismissed the entire action. While the Court's memorandum opinion only purported to address the issue of the duty to investigate the death of the policyholders via the DMF or another related database, the Complaints, however, were much broader. In dismissing the cases prior to allowing any discovery the Court in effect rejected these other allegations and improperly presumed these facts in favor of the Respondents.

The Complaints contained broad allegations that the Respondents were failing to comply with the Act. The Circuit Court's order even recognized the broad allegations in the Complaints. As such, this blanket dismissal was error. When a plaintiff alleges facts that, when viewed in a light most favorable to him entitle him to relief, the plaintiff has alleged facts sufficient to entitle him to conduct additional discovery and develop the evidence. The Circuit Court's order dismissing this case in its entirety was in clear contravention of these established rules and should be reversed.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners request a Rule 20 oral argument pursuant to Revised Rule of Appellate Procedure 20(a)(2). It is respectfully submitted that the interpretation of the Uniform Unclaimed Property Act involves important questions of first impression in this Court. In addition, the substantial sums of taxpayer funds at stake in the case qualify this case as involving issues of fundamental public importance. Following briefing and argument Petitioners believe that the appropriate disposition of this case would be a signed opinion reversing the dismissal order entered by the Circuit Court below.

### **ARGUMENT**

#### **A. STANDARD OF REVIEW.**

This Court reviews an order granting a motion to dismiss *de novo*, applying the same standard applicable in the Circuit Court. Because the "purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test

the sufficiency of the complaint, [a] trial court considering a motion to dismiss under Rule 12(b)(6) must *liberally* construe the complaint so as to do substantial justice.” *Cantley v. Lincoln County Comm’n*, 655 S.E.2d 490, 492 (W.Va. 2007) (emphasis added). “Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint *in the light most favorable to the plaintiff*, taking all allegations as true.” *Sedlock v. Moyle*, 668 S.E.2d 176, 179 (W.Va. 2008) (emphasis added). “The 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 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Chapman v. Kane Transfer Co.*, Syl. Pt. 3, 236 S.E.2d 207 (W.Va. 1977).

Finally, in interpreting the Act, it is important to recognize that the Act serves the remedial purpose of protecting consumers who have been separated from their property by transferring custody of the property to the State. *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F.Supp.2d 556, 580 (D.N.J. 2010); *Memo Money Order Co., Inc. v. Sidamon-Eristoff*, 754 F.Supp.2d 661, 677 (D.N.J. 2010). As such, “because of the remedial effect of the custodial scheme, the prevailing custodial statutes have been given a liberal interpretation in favor of the State.”<sup>5</sup> *Clymer v. Summit Bancorp.*, 171 N.J. 67, 63, 792 A.2d 396

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<sup>5</sup>While this Court has not addressed the issue in the context of unclaimed property, the doctrine of liberal construction of remedial statutes is well established in this State. See, e.g., *Cava v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 753 S.E.2d 1, 8-9 (W.Va. 2013) (liberally construing W.Va. Code § 55-2-18(a) to allow person who timely filed an

(2002) (quoting *Safane v. Cliffside Park Borough*, 5 N.J.Tax 82, 88 (1982) (internal citations omitted)).

For the reasons noted below, the Circuit Court failed to properly construe the law and ignored the Petitioner's factual allegations that, if proven, would have entitled him to relief.

**B. THE CIRCUIT COURT ERRED IN SUBJECTING THE UNCLAIMED PROPERTY ACT TO THE REQUIREMENTS OF THE INSURANCE CODE AND THEREAFTER CONCLUDING THAT LIFE INSURANCE PROCEEDS DO NOT BECOME UNCLAIMED PROPERTY UNDER THE UNIFORM UNCLAIMED PROPERTY ACT UNLESS A CLAIM HAS BEEN MADE AND NOTICE OF DEATH HAS BEEN RECEIVED BY THE INSURER.**

Led astray by the arguments of Respondents, the Circuit Court unnecessarily turned to the West Virginia Insurance Code and grafted the statutory requirements that govern the private relationship between life insurers and the beneficiaries of the life insurance policies onto the Act. The resulting interpretation in essence acts to exclude life insurance from the definition of property subject to the Act.

The Act broadly subjects various types of property to regulation in its definition of the term property. The definition begins with a broad general definition:

"Property" means tangible personal property described in section three of this article or a fixed and certain interest in intangible personal property that is held, issued or owed in the course of a

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action to have case decided on merits); syl. pt. 6, *Davis v. Hix*, 140 W.Va. 398, 84 S.E.2d 404 (1954) ("Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof."); syl. pt. 6, *Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 582 S.E.2d 841 (2003) ("West Virginia Code § 46A-5-101(1) (1996) (Repl.Vol.1998) is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts.").

holder's business, or by a government, governmental subdivision, agency or instrumentality, and all income or increments therefrom.

W.Va. Code § 36-8-1(13). The definition then continues with some examples. With respect to insurance the following is offered as an example: "The term [property] includes property that is referred to as or evidenced by: . . . An amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance, property and casualty insurance, workers' compensation insurance, or health and disability insurance." *Id.* at § 36-8-1(13)(vi).

The Circuit Court treated the *example* of policy proceeds "due and payable" in subsection (13)(vi) as the only manner in which insurance proceeds could constitute property under the Act. This improperly elevated the inclusive example in subsection (13)(vi) into an exclusive requirement. *Shepherdstown Observer, Inc. v. Maghan*, 226 W.Va. 353, 358, 700 S.E.2d 805, 810 (2010) ("we find that the Legislature's use of the word 'includes' in its definition . . . to be a clear indication that the Legislature was giving an illustrative definition, and not an exclusive definition. We have previously recognized that the term 'includes' is not exclusive."). The broad definition of property includes any "fixed and certain interest in intangible personal property." W.Va. Code § 36-8-1(13). The beneficiary of a life insurance policy after the death of the policyholder certainly has a fixed and certain interest in the policy proceeds regardless of whether a claim has been filed.

The Circuit Court improperly defined due and payable with reference to the Insurance Code provisions requiring the insurer to pay upon receipt of proof of death. App. 00168 (citing W.Va. Code § 33-13-14 which provides "There 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 was error in several respects.

First, W.Va. Code § 33-13-14 is a protection for the insureds – not the insurer. The provision requires an insurer to include policy provisions requiring payment “upon receipt of proof of death.” Nothing in the statute requires the submission of a formal claim by the claimant. An insurer that receives notice that the insured has died by virtue of the DMF is certainly in receipt of “proof of death” at least for the remedial purposes of the Act.

In addition, compliance with notice requirements is liberally construed in favor of the insured or the beneficiary (in whose shoes the Treasurer stands as conservator in this matter). *See, e.g., Marson Coal Co. v. Insurance Co.*, 210 S.E.2d 747, Par. Two of Syllabus (W.Va. 1974); *Farmers Mut. Ins. Co. v. Tucker*, 576 S.E. 2d 261, 266 (W.Va. 2002). In fact, as it relates to insurance beneficiaries, substantial compliance, not strict compliance, is all that is necessary to successfully file a claim. *Gill v. Provident Life & Acc. Ins. Co.*, 48 S.E.2d 165 (W.Va. 1948); *Petrice v. Federal Kemper Ins. Co.*, 163 W.Va. 737, 260 S.E.2d 276, 278 (1979). Under West Virginia law, notice of loss can be provided by any source, including third-parties. *Colonial Ins. Co. v. Barrett*, 542 S.E.2d 869 (W.Va. 2000). This West Virginia precedent makes it clear that DMF-type information either utilized or available to insurers is perfectly acceptable as notice of loss. Thus, to the extent that Respondents were purchasing the DMF and/or related data lists of deaths,

their receipt of the notice of their policyholders' deaths is sufficient notice of the death and/or claim under this liberal West Virginia standard.

More importantly, however, it was unnecessary for the Circuit Court to even look to the Insurance Code as the Act itself supplies clear direction as to the insurer's duty to with respect to unclaimed property when the insured has not filed a claim. The Circuit Court held 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." App. 00169. However, the Legislature did provide specific language in the Act itself. West Virginia. Code § 36-8-2(e) is explicit and on point: "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." The claim forms allegedly required by W.Va. Code § 33-13-14 clearly constitute an "instrument or document otherwise required to obtain payment" rendered unnecessary by virtue of W.Va. Code § 33-13-14.

The Circuit Court rejected this argument after concluding that the example in § 36-8-1(13)(vi) overrides the clear language of § 36-8-2(e). App. 00167. Contrary to the Circuit Court's holding, the example in § 36-8-1(13)(vi) is neither inconsistent with nor more specific than § 36-8-2(e)'s command that that "the owner's failure to

make demand or present an instrument or document otherwise required to obtain payment” is irrelevant to the determination of when or whether the property is payable for purposes of unclaimed property. The provisions read together merely make submission of a claim form irrelevant to trigger the reporting and payment under the Act.

The reference to “article” in subsection (e) also makes it clear that the commands of the subsection apply to the entirety of the Act, which is set forth in Article 8 of the Code. Similarly, the direction in subsection (e) to apply the subsection to the provisions of the entire Article 8 is inconsistent with the implication that the notice of claim provisions of W.Va. Code § 33-13-14 were intended to apply instead. Nor is there any inconsistency between these two provisions because subsection (e) applies to unclaimed property and § 33-13-14 applies when the private claimant is making a claim. Petitioner’s interpretation is the proper application of the doctrine of the specific governing the general. *Cf.* App. 00173 (citing syl. pt 4, *In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010)).

The National Conference of Commissioners on Uniform State Laws, which promulgated the statute upon which the West Virginia Act is based, specifically rejected the theory that the determination of whether property is reportable and payable under the Uniform Unclaimed Property Act is dependent on the owner’s actions in filing a claim. National Conference of Commissioners on Uniform State Laws, *Uniform Unclaimed Property Act (199\_)*, Prefatory Notes and Comments, 15, Ins. 39-42 (1995) (citing subsection (e)).

Contrary to the Circuit Court's conclusion, there is evidence this provision was specifically intended to apply to life insurance claims. The Conference specifically cited U.S. Supreme Court precedent for its position that what is reportable as unclaimed or abandoned property for purposes of unclaimed property statutes will not be limited or constrained by underlying contract law related to such property:

Subsection (e) is intended to make clear that property is reportable notwithstanding that the owner, who has lost or otherwise forgotten his or her entitlement to property, fails to present to the holder evidence of ownership or to make a demand for payment. *See Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948), in which the Court stated: "When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties."

*Id.* at p.15, lns. 42-46.

The *Moore* Court specifically addressed the exact concerns with Petitioner's interpretation of subsection (e) raised by the Circuit Court here:

In support of their first contention, appellants note that the policy terms provide that the insurer shall be under no obligation until proof of death or other contingency is submitted and the policy surrendered. They contend that in dispensing with these conditions the statute transforms an obligation which is merely conditional into one that is liquidated. They further claim that unless proof of death or other contingency is submitted, they will have difficulty in establishing other complete or partial defenses, such as the fact that the insured understated his age in his application for insurance, that the insured died as a result of suicide, military services, or aviation, and that the insured was not living and in good health when the policy was delivered. We assume that appellants may find it more difficult to establish other defenses, but we do not regard the statute as unconstitutional because of these enforced variations from the policy provision.

Unless the state is allowed to take possession of sums in the hands of the companies classified by § 700 as abandoned, the insurance companies would retain moneys contracted to be paid on condition and which normally they would have been required to pay. We think that the classification of abandoned property established by the statute described property that may fairly be said to be abandoned property and subject to the care and custody of the state and ultimately to escheat. The fact that the claimants against the companies would under the policies be required to comply with certain policy conditions does not affect our conclusion. The state may more properly be custodian and beneficiary of abandoned property.

333 U.S. at 545-546. The Circuit Court attempted to distinguish *Moore* as a case addressing the constitutionality of the New York unclaimed property laws where the interpretation of the statute was not directly at issue. App. 00174. The significance of *Moore* here, however, is that the Uniform Commissioners' citation to *Moore* as an example of the application of subsection (e) establishes that the Commissioners intended the Uniform Act to be interpreted in the same manner as the New York laws at issue in *Moore*.<sup>6</sup>

In reaching its decision, the Circuit Court improperly relied upon three cases: *Andrews v. Nationwide Mut. Ins. Co.*, 8th Dist. App. Ct. No. 97891, 2012 WL 5289946 (Ohio Oct. 25, 2012), *Feingold v. John Hancock Life Ins. Co.*, U.S. Dist. Ct. No. 13-10185-JLT, 2013 WL 4495126 (D. Mass., August 19, 2013), and *Total Asset Recovery v. MetLife*, Circuit Court of the 2nd Jud. Cir. No. 2010-CA-3719 (Leon Cty., Florida, Aug. 20, 2013). Examining all three cases, they are distinguishable on the facts and the law.

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<sup>6</sup>The definition of property in the New York act at issue in *Moore* is not materially different from the Act here. See 333 U.S. at 543 & n.2.

The first two cases involve litigation by *individuals* who were either the actual parties to the contract as in *Andrews* or beneficiaries of a contract as in *Feingold*. In those cases, the courts found that the plaintiffs were constrained by the terms of the contracts in order to make a claim. In contrast, the cases herein involve the process by which unclaimed property is reported to the State of West Virginia. Unlike the insureds and their beneficiaries in those cases, W.Va. Code § 36-8-2(e) removes this requirement when the issue is unclaimed property rather than a private claim.

*Total Asset Recovery* is readily distinguishable as well. In that matter, a company brought a *qui tam* action on behalf of the State of Florida. The court in that case found the *qui tam* action was barred because the State of Florida was already a party in a settlement with the defendant life insurer. In other words, the State of Florida had already pursued the claim which the third party was asserting as a false claims act case. In this case, in contrast, the West Virginia Treasurer acting as Administrator of the Unclaimed Funds Division is expressly empowered by the Act to pursue this matter. W.Va. Code § 36-8-22.

Finally, the Circuit Court's interpretation of property effectively removes life insurance from the Act's consumer protections. As such, the Circuit Court's interpretation violates the "cardinal rule of statutory construction ... that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999). As this Court has noted repeatedly, "[i]t is presumed that

the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.” *Jackson v. Belcher*, 753 S.E.2d 11, 16 (W.Va. 2013) (quoting syl. pt. 7, *Ex parte Watson*, 82 W.Va. 201, 95 S.E. 648 (1918)). If a claim is required to be filed in order to transform life insurance into unclaimed property subject to the Act, life insurance proceeds will never be reported and paid over as unclaimed property as the proceeds cannot be unclaimed property if a claim has been filed. Such an interpretation renders the provisions of W. Va. Code § 36-8-2(a)(8) -- which specifically subject life insurance to the Act -- irrelevant.<sup>7</sup> This interpretation should be rejected for that reason alone.

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<sup>7</sup>The Circuit Court conceded:

“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 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). . . 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).

App. 00167-168. Contrary to the Circuit Court’s suggestion, because W. Va. Code § 36-8-2(e), removes any requirement that a claim has to be filed, the death of the policyholder is the trigger that creates the obligation to pay under this provision. Alternatively, if W. Va. Code § 36-8-2(a)(8) does not provide the trigger, the catch all trigger in § 36-8-2(a)(17) would be applicable which applies to “[a]ll other property, five years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs.”

**C. THE CIRCUIT COURT ERRED IN REFUSING TO FIND THAT THE UNIFORM UNCLAIMED PROPERTY ACT IMPOSES THE DUTY OF GOOD FAITH AND REASONABLENESS UPON THE RESPONDENT INSURERS AS HOLDERS OF UNCLAIMED PROPERTY TO USE COMMERCIALY REASONABLE AVAILABLE LISTS TO DETERMINE IF POLICY HOLDERS HAVE DIED.**

The Circuit Court rejected Petitioner's claims that Respondents have a duty of "good faith" under the Act requiring them to actively search for deceased policyholders. The Court's conclusion is wrong in that it disregards the language and purpose of the Act.

The Act defines "good faith" in the context of reporting. In W.Va. Code § 36-8-10(a), the Legislature defines what constitutes a "good faith" payment or delivery of property under the Act: "Payments or deliveries are made in *good faith* if: (1) Payment or delivery was made in a reasonable attempt to comply with this *article*; \*\*\* (3) There is no showing that the records under which the payment or delivery was made did not meet *reasonable commercial standards of practice*." Emphasis added.

Under this provision, it is clear that good faith and reasonableness are required in the searching, reporting and payment of unclaimed property under the Act. The Circuit Court rejected this claim finding that the duty was relevant only to the determination of whether the holder might be entitled to immunity or indemnification under W.Va. Code § 36-8-10. App. 00175.

Section 36-8-10(a)(1)'s application, however, is broader than the indemnity provisions in that section as the provisions relate to good faith in compliance with the entire "article" which includes the entire Act with its reporting provisions. The

Legislature not only refused to limit “good faith” to this subsection, it expressly included good faith compliance for the whole Act, that is, Article 8. In other words, if the holder wants to be held harmless for payments made to the Treasurer, the compliance with the Act must have been in good faith. Respondents cannot argue that a payment or delivery made in good faith could be the result of a less than a good faith search for property due to the State or a beneficiary. Good faith payment made from a reasonable attempt to comply implies that the search was conducted in good faith. This interpretation is consistent with the rules of liberal construction applicable to the Act. *See, supra* p. 2 &n. 1.

As noted *supra*, the DMF is a publically available database. Available since 1980, users purchase the data and then search it to determine the living status of individuals. The Complaints plead that Respondents likely used the DMF to search for the deaths of annuitants in payout phase. App. 00007 ¶ 23. If an annuitant’s SSN was discovered in the DMF, annuity payments ceased immediately. *Id.* The insurers turned a blind eye, however, to the use of the same information for their customers with life insurance. *Id.* at ¶24. The Treasurer has alleged that Respondents should have been using the DMF timely and fully, rather than selectively apparently for the insurers’ benefit. *Id.* at ¶¶ 25-26. If used, the DMF and other comparable databases allow the Defendants to search easily and in good faith for “held” property due under the UUPA in West Virginia and throughout the United States. The Complaint pled that Respondents have utilized the DMF directly or through a third party to determine whether sectors of their insurance

business were affected by death. The Treasurer rightfully expects (and the Act requires) that insurers utilize this readily available information in reasonably and seasonably complying with the Act.

The Act requires the reporting and payment according to reasonable commercial standards of practice. The Treasurer alleged that use of the DMF and other comparable databases either directly by the Defendants or indirectly by means of a third party contractor established the reasonable commercial standard of practice. App. 00005-6 at ¶ 18.

In rejecting this argument, the Circuit Court relied again on *Andrews* and in *Feingold*. App. 00176-177. But the basis for the ruling in those cases was that the fact that, as between the insurer and the claimant, the policy's requirement that a claim be filed governed over a general duty of good faith. Again, unlike the insureds and their beneficiaries in those cases, W.Va. Code § 36-8-2(e) removes this requirement when the issue is unclaimed property rather than a private claim. The question is not whether the insureds have filed a claim. The question here is whether the Respondents have met their duty to discover and report all unclaimed property they are holding – a duty that is independent of whether a claim has been filed. W.Va. Code § 36-8-2(e).

The Treasurer's allegations as to these standards were clearly sufficient to withstand dismissal under Rule 12(b)(6), and the Circuit Court's rulings to the contrary were in error.

**D. THE CIRCUIT COURT ERRED IN DISMISSING THE COMPLAINTS IN THEIR ENTIRETY PRIOR TO ANY DISCOVERY BEING UNDERTAKEN WHERE PETITIONERS ALLEGED NUMEROUS VIOLATIONS OF THE UNIFORM UNCLAIMED PROPERTY ACT WHICH WERE NEVER DISPUTED BY THE RESPONDENT INSURERS.**

The Circuit Court's order dismissing these cases was explicitly a final order that dismissed the entire action. App. 00180. The Court's memorandum opinion only purported to address the issue of the duty to investigate the death of the policyholders via the DMF or another related database. The Complaints, however, were much broader. In moving to dismiss, Respondents did not challenge these allegations. In dismissing the case prior to allowing any discovery, the Court in effect rejected these other allegations and improperly presumed these facts in favor of the Respondents. This constituted error.

As an initial matter, Petitioner believes that the determinations of whether the Respondents had a duty to search the DMF or having obtained the DMF for use in cutting off annuities, whether Respondents were then on notice of the deaths of its life insureds), should have been resolved on a complete record after discovery. With terms such as "good faith," "reasonable attempt to comply" and "reasonable commercial standards" underscoring the enforcement of the UUPA, the Treasurer clearly had the right to explore in discovery the facts and circumstances of Respondents' search for, reporting of, and payment of proceeds under the Act. This relief was specifically requested in the Complaints, and was specifically authorized under the Act. App. 00009 at ¶¶ 30-31 (citing W.Va. Code §§ 36-8-20(a), (b)).

Moreover, the Complaints contained broad allegations that the Respondents were failing to comply with the Act. For example, the Complaints further alleged that the “untruthful reports have taken the form of reports not filed at all, reports filed without all the unclaimed life insurance policy proceeds identified, and even if reported, an undervalued amount of life insurance policy proceeds.” *Id.*

The Circuit Court recognized the broad allegations in the Complaints. App. at 00164. (“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.”).

This blanket dismissal was error. As this Court recently emphasized:

As this Court has previously noted, motions to dismiss under Rule 12(b)(6) are “viewed with disfavor and [should be] rarely granted.” *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978). More specifically, “[t]he trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings.” *Id.* (citing Wright & Miller, *Federal Practice and Procedure: Civil* § 1216 (1969).) . . . .

*Bowden v. Monroe County Com'n*, 750 S.E.2d 263, 269 (W.Va. 2013). When a plaintiff alleges facts that, when viewed in a light most favorable to him entitle him to relief, the plaintiff has “alleged facts sufficient to entitle h[im] to conduct additional discovery and develop the evidence.” *Id.* The Circuit Court’s order

dismissing this case in its entirety was in clear contravention of these established rules and should be reversed.

### CONCLUSION

The Circuit Court improperly granted the motions to dismiss filed by the Respondents in this case. Reversal of its order and a remand for discovery and trial is necessary to allow the Treasurer to enforce the provisions of the Act in the manner in which the Legislature intended.

**JOHN D. PERDUE, Petitioner**  
**By Counsel**



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 14-0100**

JOHN D. PERDUE, Plaintiff Below,

Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY, et al.,  
Defendants Below,

Respondents.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the attached "PETITIONER'S BRIEF" was served upon the attached counsel of record by USPS, postage prepaid, on this the 28<sup>th</sup> day of May, 2014.



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