

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

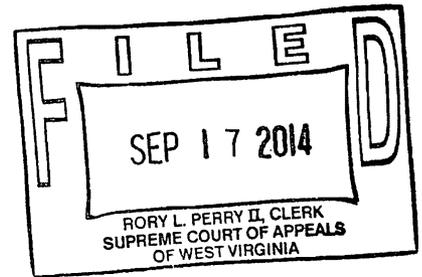
JOHN D. PERDUE, Plaintiff Below,

Petitioner,

v.

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

Respondents.



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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 Respondent life insurance companies continue in their attempts to justify retaining millions of dollars from unclaimed life policies even when publicly available databases like the Social Security Administration’s “Death Master File” (“DMF”) would establish that the insured has died.

In this case, in spite of the fact that the applicable complaints adequately pled facts that support the Petitioner’s claims for relief, the trial court improperly failed to construe those complaints as this Court has required – in the light most favorable to the Petitioner.

The Respondents continue to attempt to engraft irrelevant provisions of the insurance code into the provisions of the Act, which serves a wholly different remedial purpose. Simply put, the explicit provisions of the Act do not require a claimant to file a claim with a life insurer prior to the policies becoming subject to the Act’s remedial requirements. And the Respondents, any of whom who use the DMF and other similar databases to determine when to cut off annuities that are payable until death, have a duty under the Act to use those same databases to determine which of their life insurance policy

holders have died. This Court should correct the errors in the opinion below and remand for discovery and trial.

ARGUMENT

A. THE CIRCUIT COURT ERRED IN FINDING THAT LIFE INSURANCE PROCEEDS DO NOT BECOME PROPERTY UNDER THE ACT UNLESS A CLAIM HAS BEEN MADE BY IMPROPERLY SUBJECTING THE UNCLAIMED PROPERTY ACT TO THE REQUIREMENTS OF THE INSURANCE CODE.

1. Policy Proceeds from Life Insurance Policies Constitute Property under the Act upon the Death of the Insured.

The Act broadly defines the term property to include “a fixed and certain interest in intangible personal property that is *held, issued or owed* in the course of a holder's business.” W.Va. Code § 36-8-1(13). As noted previously, Pet. Brief at 17, the broad definition is supplemented by stating that “[t]he 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). Contrary to Respondents’ suggestions, the Act does not require the submission of a claim or proof of death before insurance policy proceeds become reportable.

Respondents argue that no obligations under the Act are triggered before the policy proceeds become “property” under this definition, which, according

to them requires the filing of a claim. This interpretation is clearly inconsistent with the Act.

Respondents overstate the requirement that interests in intangible property be “fixed and certain” to constitute “property” under section 36-8-1(13). Indeed, the very cases cited belie Respondents’ arguments.

In *Revenue Cabinet v. Blue Cross and Blue Shield of Kentucky, Inc.*, 702 S.W.2d 433, 434-35 (Ky.1986), the Court explicitly held that uncashed checks for premium refunds and schedule benefits constitute unclaimed property under the Kentucky act. *Id.* The Court recognized that while offers of settlement in property damage or personal injury cases were not sufficiently fixed and certain to meet the definition of unclaimed property, obligations by “a insurance company, a health insurance company, or a disability insurance company in payment of a fixed or scheduled benefit,” were distinguishable from offers to pay claims and were sufficiently “certain and liquidated” to constitute property under the Kentucky act. 702 S.W.2d at 435. Moreover, the Court in *Revenue Cabinet* rejected the insurer’s attempt to tie obligations under the unclaimed property act to other statutory provisions dealing with the insurer’s obligations to private parties:

Further, we reject the appellee's arguments based on the Uniform Commercial Code. Revenue Cabinet does not seek to collect the checks, but rather to escheat the underlying obligations which the checks represent. The issue is not whether BC/BS is obliged to honor the checks per se after all the intervening years.

The issue is whether BC/BS is obliged to honor the debt which the checks represent. BC/BS recognizes its continuing obligation to pay the amount stated in the check by maintaining the account in question and paying whenever the demand for payment is made. The policy obligations are plain from the record. The issue presented is not whether BC/BS has continuing obligation to pay, but whether it should be entitled to keep the money if no demand is ever made. It is, as Revenue Cabinet describes it, simply a question of whether there should be public escheat as provided in KRS Chapter 393 or private escheat as claimed by BC/BS. We hold that the fact situation presented is covered by the public escheat system.

702 S.W.2d at 436. Like the checks that were subject to public escheat in *Revenue Cabinet* notwithstanding the provisions of the UCC, the life insurance policies with their “fixed and scheduled benefits” constitute property subject to the Act upon the death of the insured.

Similarly, the second case relied on by Respondents, *Employers Ins. of Wausau v. Smith*, 154 Wis.2d 199, 453 N.W.2d 856 (1990), which construed the Act to require “a minimum degree of certainty in the holder’s obligation to the owner,” 453 N.W.2d at 860-61, explicitly rejected the claim that the ability to contest the claim was inconsistent with the minimum degree of certainty standard. *Id.* at 862-63. Indeed, relying on the *Connecticut Mutual Life Ins. Co. v. Moore* cases, the *Wausau* Court, found analogous the situation presented in the instant cases:

Our analysis of the obligation represented by the uncashed checks is also consistent with other courts’ application of unclaimed property statutes to situations where payment of a claim does not preclude the holder’s right to litigate liability on the

claim. The New York Court of Appeals and the United States Supreme Court recognized many years ago that a life insurance company holding funds payable under a life insurance contract came within the abandoned property law, even though the insurer may, after the death of the insured, contest its liability. See *Connecticut Mutual Life Ins. Co. v. Moore*, 297 N.Y. 1, 74 N.E.2d 24 (1947); 333 U.S. 541, 68 S.Ct. 682, 92 L.Ed. 863 (1948). See also *Connecticut Mutual Life Ins. Co. v. Moore*, 187 Misc. 1004, 65 N.Y.S.2d 143, 15-159 (1946), *aff'd* 271 A.D. 1002, 69 N.Y.S.2d 323 (1947).

453 N.W.2d at 862-63.

As the above citations to *Wausau* and *Revenue Cabinet* make clear, the uncertainty over the amount of the obligation of the insurer is different with respect to liability insurance and property damage claims where liability and valuation issues exist. When, like the life insurance policies at issue here, the claim is subject to a certain schedule of benefits, thereby removing most debate over the amount of benefits due, the proceeds from the policies are sufficiently certain to constitute property under the Act. Finally, as *Revenue Cabinet* noted, the characterization of life insurance policies after death as falling within the definition of property under the Act does not deprive an insurer of the right to contest whether individual policies should be subject to public escheat under the Act. 702 S.W.2d at 435 (“In any event, this case was disposed of on summary judgment. In the event that the conclusion appropriate from the general nature of the policies in question is not

appropriate to any particular check, on remand BC/BS should offer evidence to overcome the prima facie case presented by the record.”).

2. A Requirement that a Claim be Filed after the Death of the Insured is Inconsistent with the Explicit Provisions of Section 36-8-2(e) of the Act which Imposes Obligations on Holders in the Absence of Receipt of a Demand or a Document Otherwise Required to Obtain Payment.

Boiled down to its essence, Respondents’ argument is that the *Unclaimed Property Act* requires a claim because of provisions in the insurance code that apply to the relationship between claimants and the insurers must be incorporated into the Act. Incorporating the insurance code into the Act and requiring a *claim* as a prerequisite to imposing duties under the Act is simply inconsistent with the Act’s express provisions excusing these kind of requirements from the duties over *unclaimed* property.

Contrary to Respondents’ suggestions, the Legislature did provide specific language in the Act itself which negates any supposed requirement that a claim be filed prior to the policy becoming property under the Act. 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” that is excused by subsection (e).

Respondents' argument is that subsection (e) only applies once a claim has been filed which then transforms the obligation. This argument ignores the entirety of the Act and its purposes.

First, as noted above, a life insurance policy following death is sufficiently certain to meet the Act's definition of property.

Moreover, the argument that a claim is required before life insurance becomes property is inconsistent with the Act's reporting requirements. The Act explicitly imposes reporting requirements on Respondents for "property presumed abandoned." W.Va. Code § 36-8-7(a). Life insurance proceeds are presumed abandoned either: (1) "three years after the obligation to pay arose" or (2) "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." *Id.* at § 36-8-2(a)(8).

The argument that life insurance is not "property" under the Act until a claim is filed eliminates the second trigger for reporting out of the Act because it is only "property" as defined by the Act that is subject to the definition of presumed abandoned and subjected to the Act's reporting requirements. W.Va. Code § 36-8-2(a) ("*Property* is presumed abandoned if it is unclaimed" (emphasis added)); W.Va. Code § 36-8-7(a) ("A holder of *property* presumed abandoned shall make a report to the administrator concerning the *property*."

(emphasis added)). If life insurance does not constitute property under the Act prior to a claim being filed, even if an insurer continues to hold life insurance proceeds “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,” *id.* at § 36-8-2(a)(8), the insurance policies would not have to be reported or transferred because they are not property. The Act’s requirements only apply to “property” presumed abandoned. *See, e.g.,* W.Va. Code § 36-8-7(a). Thus, the Act’s explicit inclusion into the definition of presumed abandoned instances where life insurance proceeds are held in the absence of a claim is an explicit recognition that there is no claim requirement for life insurance to constitute property.¹

Moreover, the theoretical ability of an insurer to contest a policy based on policy defenses like fraud, suicide, lack of insurable interest and the inclusion of a contestability policy do not mandate the conclusion that subsection (e) does not apply to a life insurance policy and excuse the requirement of a claim. Indeed, all of these same defenses are available to the insurer who holds a policy more than three years after the limiting age. Yet,

¹Contrary to Respondents’ suggestions, this interpretation does not render this second trigger for reporting under the Act meaningless. While in some cases the insured will die prior to reaching the limiting age and reasonable procedures such as searching the DMF will discover this, it is still possible that either the death will not be discovered or the insured will live past the limiting age. In these cases the second trigger still will apply.

Respondents do not contest their obligation to report and pay over policy proceeds in that same situation in the absence of a claim.²

Subsection (e) clearly applies to render life insurance after death property under the Act notwithstanding the absence of a claim. However, if there is any doubt, the legislative history of the uniform act set forth in its comments clearly supports this conclusion. As noted in Petitioner's initial brief, in the comments to the Act the Uniform Commissioners explicitly use life insurance as an example of property that is subject to the Act to by virtue of subsection (e) without regard requirements by property owners to make a demand. Petitioner's Brief at 21-22 (citing *Moore*, 333 U.S. at 545-46).

Respondents argue that because the comments originally appeared in connection with the 1981 version of the model act that was never adopted in West Virginia, they are irrelevant to the interpretation of the 1995 version of the Act actually adopted here. Respondents make this argument notwithstanding the fact that the Uniform Commissioners decided to include

²It is for these same reasons that the Respondents derivative rights argument fails. Simply, in spite of the derivative rights doctrine, the Act requires the reporting and paying over of proceeds by holders in situations where the owners would not be entitled to the funds. See *Revenue Cabinet*, 702 S.W.2d at 436 (checks subject to public escheat notwithstanding the provisions of the UCC applicable to claims by owners); *Moore*, 333 U.S. at 547 ("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.").

the very same comments in 1995 as they did in 1981 underscoring their intent for the two acts to be interpreted in the same manner. *See* 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)).

Respondents attempt to distinguish the New York act in *Moore* from the West Virginia laws applicable here. Respondents claim that West Virginia law requires a claim with proof of death. These were precisely the same grounds at issue in *Moore*. *Moore*, 333 U.S. at 545, 68 S.Ct. at 685 (noting that New York Court of Appeals opinion below required escheat notwithstanding defenses of “the statute of limitations, noncompliance with policy provisions calling for proof of death or of other designated contingency and failure to surrender a policy”). To be clear, Petitioner is not claiming that the *Moore* decisions are precedent for the interpretation of the model act; instead, it is the Commissioners’ citation of *Moore* that evidences the intent to apply subsection (e) to require reporting and paying over life insurance proceeds on death in spite of the lack of a claim or proof of death.

Finally, subsection (e) is not a general rule subjected to the supposedly more specific provisions of § 36-8-2(a)(8). Subsection (e) is contained as the final subsection of the provision detailing property presumed abandoned. Its placement there indicates an intent that is to be broadly applied to the entire

section and all classes contained therein. Indeed, the explicit provisions of the subsection (e) apply, not just to section 2, but “for the purposes of this article,” further indicating a broad intent to apply its provisions to the entire act.

3. The Authorities Relied upon by Respondents are Distinguishable.

Respondents rely on a series of decisions from other jurisdictions which, while they may superficially support their positions are readily distinguishable.

First, for the reasons set forth above, the obligations on a holder to report and pay over property under the Act are simply not analogous to the obligations the same holder has with respect to private parties. The remedial purpose of the Act is to protect 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). Thus, while there may be no obligation on the part of a bank to transfer the contents of a safe deposit box back to its owner on the expiration of the lease on the box, the Act includes the tangible property in such a box in the definition of property presumed unclaimed which subjects the property to the Act’s provisions. W.Va. § 36-8-3. Similarly, while there is no contractual duty on the part of utility companies holding deposits

owed to customers, governmental agencies holding tax refunds, or merchants selling gift certificates to seek out and pay the beneficial owners of such property, the Act considers all of these and others as property presumed unclaimed and subject to reporting requirements. *Id.* at § 36-8-2(a)(7), (11), (13).

Thus, decisions such as *Andrews v. Nationwide Mut. Ins. Co.*, 8th Dist. App. Ct. No. 97891, 2012 WL 5289946 (Ohio Oct. 25, 2012) and *Feingold v. John Hancock Life Ins. Co.*, U.S. Dist. Ct. No. 13-10185-JLT, 2013 WL 4495126 (D. Mass., August 19, 2013), *aff'd*, 753 F.3d 55 (1st Cir. 2014), each of which involved private plaintiffs bringing class actions are of no precedential value. That an insurer is not “contractually or legally obligated” to use the DMF and pay claims to policyholders with receipt of proof of death from the insured or beneficiary, *Andrews*, ¶¶ 25, 28, does not shed light on its duties under the Unclaimed Property Act which are greater and different than the insurers’ obligations owed to policyholders. Critically, the Ohio court based its decision on the passive nature of the words “receipt of” proof of death – words that are not in the abandonment provision of the West Virginia Unclaimed Property Act regarding life insurance.

The decision in *Total Asset Recovery Servs., LLC v. MetLife*, 2013 WL 4586450 (Leon Cty., Florida, Aug. 20, 2013), a summary trial court opinion, is also of limited precedential value. In TARS, 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. *Id.* at p. *1. Significantly, the Court's finding was that it lacked subject matter jurisdiction over the action. *Id.* After finding that it lacked jurisdiction, the Court's other conclusory statements interpreting the Florida acts at issue are beyond dicta.

Finally, *Thrivent Financial for Lutherans v. State, Dept. of Financial Services*, 2014 WL 3819476 (Fla.App. 1 Dist. 2014), interprets Florida statutes that are materially different from the West Virginia Act. Under the Florida act, with respect to policies not matured by "actual proof of death," unclaimed property requirements are only triggered by the insured reaching the limiting age or if the insurer "*knows* the insured ... has died." *Id.* at p*1 (quoting Fla. Stat. § 717.107(3)) (emphasis by court).

The West Virginia Act contains no such specific statutory provisions limiting the duties of an insurer. Moreover, in the Florida decision these statutory provisions were significant given the fact that the insurer did not otherwise use the DMF as part of its insurance business. *Thrivent, supra*,

Appellant's Brief at p. 46, n.12 (reproduced at <http://tinyurl.com/q64cttg>); *see also* Petition, p. 11, n.3 (reproduced at <http://tinyurl.com/kq89xha>).³

In this case, Petitioner specifically alleged that Respondents routinely used the DMF to determine the death status of annuity policy holders or beneficiaries. App. 00007 at ¶ 23. In addition to issuing life insurance policies, Respondents also issue annuity policies which provide policy holders periodic payments until death. *Id.* Thus, in order to prevent payments to policy holders after death, Petitioner alleged that Respondents "routinely use the DMF to determine deaths of annuity policy holders." *Id.* The improper dismissal of the complaints in this case was undertaken without any discovery into these allegations or the allegations that the Respondents were systematically underreporting unclaimed funds to the Petitioner.

B. AN INSURER WHO USES THE DMF OR OTHER SIMILAR DATABASES HAS RECEIVED SUFFICIENT PROOF OF DEATH TO TRIGGER OBLIGATIONS UNDER THE ACT.

The Circuit Court improperly defined "due and payable" by referring 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

³The few contrary and distinguishable cases cited by Respondents are in direct contrast to the millions in dollars in settlements that some of them have paid in resolving these exact claims in other jurisdictions. *See infra* at p. 23.

death of the insured settlement shall be made upon receipt of due proof of death."). Respondents continue to press this improper argument.

First, contrary to Respondents' arguments, W.Va. Code § 33-13-14 is a pro-insured provision that 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.⁴ And nothing in the Act authorizes, let alone requires reference to the provisions of the insurance code which exist to govern the relationship between an insurer and its customers and claimants rather than the duties owed to Petitioner under the Act. *Cf. Moore*, 333 U.S. at 545-46 (noting differences in relationship between insurer and claimant and insurer and unclaimed property administrator). Moreover, even assuming that these provisions of the insurance code are even applicable, an insurer that receives notice that the insured has died by virtue of the DMF is certainly has in its possession sufficient "proof of death" for the remedial purposes of the Act.⁵

⁴Similarly, Respondents attempt to rewrite W. Va. Code § 33-13-4, which mandates that policies be "uncontestable" after two years to grant them a right to contest an insurance. Contrary to their suggestions, the provision places a two-year limit on any right to contest that might otherwise exist. It does not grant a right to contest the issuance of a policy. In any event, discovery will likely establish that the vast majority of the policies at issue here are outside the two-year window for any right to contest.

⁵ Respondents contend that because that Act is in derogation of the common law, it must be strictly construed. This is not the law. Most all remedial statutes are in derogation of the common law. It is precisely for this reason that they are enacted

Respondents do not contest that under West Virginia case law, 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). Nor do respondents contest that 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).

Generally, the purpose for requiring a proof of loss is to afford the insurer an adequate opportunity to investigate the claim and formulate an estimate of its liabilities. *Petrice v. Federal Kemper Ins. Co.*, 163 W.Va. at 740-741, 260 S.E.2d at 278. As contrasted with the liability claims at issue in *Petrice*, the need for formal proofs is not as strong as the liabilities known at the time of

and, under this Court's established precedent must be strictly construed. *State Farm Fire & Cas. Co. v. Prinz*, 231 W.Va. 96, 101, 743 S.E.2d 907, 912 (2013) (statutes that are remedial are to be construed liberally even when in derogation of the common law) (citing *Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995)); *see also* Petitioner's Brief at 18, & n. 5.

issuance of a life insurance policy are. The only variable is the interest to be paid relative to the date of death. For purposes of the Act, receipt of DMF-type information informing the insurer of the insured's death is sufficient to meet the purposes of the Act which by its very nature has long been recognized as limiting an insurer's ability to make policy defenses to these long-ago, issued policies. As the United States Supreme Court has noted in the decision relied upon by the Uniform Commissioners in promulgating the Uniform Act:

[The insurers] 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. . . .

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. . . . 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.

Moore, 333 U.S. at 545-46.

Based on this record, using DMF-type information is sufficient to constitute proof of death consistent with West Virginia's liberal laws regarding proof of loss. Thus, for the purposes of the Act, to the extent that Respondents were purchasing the DMF and/or related data lists of deaths, these lists

provide sufficient notice of their policyholders' deaths and/or claim under the liberal West Virginia standard.

C. THE CIRCUIT COURT ERRED IN REFUSING TO FIND THAT THE ACT IMPOSES THE DUTY OF GOOD FAITH AND REASONABLENESS UPON RESPONDENTS AS HOLDERS OF UNCLAIMED PROPERTY.

Respondents continue to support the Circuit Court's rejection of Petitioner's claims that Respondents have a duty of "good faith" under the Act requiring them to actively search for deceased policyholders. Respondents' arguments continue to disregard 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.

Respondents continue to argue that these provisions are only 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. If the Legislature had intended that the provision apply as narrowly as Respondents contend, it would not have expressly encompassed good faith compliance with the entire article.

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. Respondents do not contest the argument that good faith payment made as a result of reasonable attempts to comply necessarily implies that the search was conducted in good faith. This interpretation is consistent with the rules of liberal construction applicable to the Act. *See* Petitioner’s Brief, p. 2 & n. 1.

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 Complaint pleads that Respondents likely used the DMF to search for the deaths of annuitants in payout phase. App. 00007, Complaint at ¶ 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. Petitioner has alleged that Respondents should have been using the DMF

timely and fully, rather than selectively apparently for Respondents' benefit. *Id.* at ¶¶ 25-26. If used, the DMF and other comparable databases allow Respondents to search easily and in good faith for "held" property due under the UUPA in West Virginia and throughout the U.S. 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 Act requires the reporting and payment according to reasonable commercial standards of practice. Petitioner alleged that use of the DMF and other comparable databases either directly by Respondents or indirectly by means of a third party contractor established the reasonable commercial standard of practice. *Id.* at ¶ 18. In response, Respondents argue that the DMF is inaccurate. Like many of Respondents' factual assertions, this is not an argument that can be decided on review of an order granting motions to dismiss which require allegations to be viewed in a light most favorable to the plaintiff. *Bowden v. Monroe County Com'n*, 750 S.E.2d 263, 269 (W.Va. 2013). Moreover, the allegation that Respondents consider the DMF inaccurate is troubling given the allegations in the Complaint that they use the DMF to discontinue payments to recipients of annuities.⁶

⁶In addition, as noted *infra*, p. 22, on a going forward basis, a number of Respondents have reached administrative settlements under which they have specifically agreed to use the DMF.

D. THE PROPER INTERPRETATION OF THE ACT BY THIS COURT IS NEITHER A USURPATION OF THE LEGISLATURE NOR A VIOLATION OF RESPONDENTS' RIGHTS TO DUE PROCESS.

One theme of Respondents, both below and in this Court, is that the judicial adoption of Petitioner's proper interpretation would be a usurpation of the Legislature or a violation of their rights to due process. The premise of this argument is that, in interpreting the Act, this Court would be creating rights and obligations that did not exist prior to the interpretation.

First, the legal premise of Respondents' argument is false. The proper interpretation of a legislative enactment is the judiciary's role. This Court has held that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). When, as is the case here, a statute is ambiguous, "a court often must venture into extratextual territory in order to distill an appropriate construction." *McCoy v. VanKirk*, 201 W.Va. 718, 725, 500 S.E.2d 534, 541 (1997). In this case, this Court certainly has the power construe and interpret the Act and conclude that the construction advanced by Petitioner is the one that is most in accord with the Legislature's intent.

Second, this Court regularly construes statutes – even remedial statutes with penalty provisions. *See, e.g., Barr v. NCB Management Services, Inc.*, 227

W.Va. 507, 711 S.E.2d 577 (W.Va. 2011) (interpreting WVCCPA private right of action to apply to debt collectors); *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981) (finding private right of action for violation of unfair claims settlement practices).

Third, the fact that some legislatures have seen fit to clarify their statutes is not dispositive to the proper prior interpretation of those acts. Legislatures regularly clarify statutes without intending to change the enactments. *Cf.* W. Va. Code § 5-1-16a (“The amendment to this section during the fourth extraordinary session of the Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to clarify the intent of the Legislature as to existing law regarding expungement.”); W. Va. Code § 7-12-7 (intent of amendment was clarification not change); W. Va. Code § 8-22-25 (same).

Finally, the interpretation of the Act advanced by Petitioner is not novel. The entire industry is engaged in regulatory settlements under which the insurers agree with regulators in nearly every state to use the DMF. *See, e.g.*, Wilson-Bilik, Mary Jane (Partner, Sutherland Asbill & Brennan LLP), Unclaimed Insurance Benefits Challenges – Still Intensifying (July 18, 2013), (reproduced at <https://www.acli.com/Events/Documents/Thur071813>). In addition, many of these Respondents have entered into large settlements with unclaimed property administrators in over forty-two states across the country:

Metlife Inc., paying nearly \$500 million to settle a multi-state probe into its failure to pay death benefits to the state as unclaimed property because of its refusal to use the Social Security Death Master File to identify owners. (App. 00125);

John Hancock agreeing to pay \$3 million dollars to the State of Florida for its failure to undertake due diligence when ascertaining owners under the Social Security Death Master file. (App. 00126);

Prudential Insurance Company of American agreeing to pay a national \$17 million settlement related to its failure to utilize Social Security Death Master File when ascertaining owners of unclaimed life insurance policies. (App. 0026).

The fact that these settlement have been made in a wide variety of states apparently without regard to the differences in state laws is strong evidence that the duties imposed by the Act are as set forth by the Administrator.

E. THE CIRCUIT COURT ERRED IN DISMISSING THE COMPLAINT IN ITS ENTIRETY PRIOR TO ANY DISCOVERY BEING UNDERTAKEN.

Contrary to Respondents' arguments, Petitioner sought the opportunity to do discovery in opposition to Respondents' motions. *See, e.g.*, App. 00089-00090 ("Although the Treasurer reasonably anticipates that discovery will yield the extent to which such information was available, the very nature of the DMF vests either the Defendants or their agents with the notices of death. Whether, when and how the Defendants looked at the database for reportable funds does not negate the fact that reasonable commercial standards would have led to the possession or access of the DMF or other reliable database (sic)

and that good faith required such searches for reportable funds be run.”); App. 00090 (“Discovery will reveal the nature and extent of the use of the death information. The Treasurer looks forward to discovering the full breadth of this notice and its use by these Defendants.”).

Respondents now contend that discovery was unnecessary for the determination of the legal issues involved in this case. While the determination here is indeed a legal one, when this Court is being asked to determine the scope of a duty, a complete understanding of the factual background is important. Indeed, even at summary judgment, this Court has recognized that when an “inquiry concerning the facts is . . . desirable to clarify the application of the law,” judgment is not appropriate. Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, *cite*; *Blessing v. National Engineering & Contracting Co.*, 222 W.Va. 267, 269, 664 S.E.2d 152, 154 (2008) (“the test we apply is to examine . . . whether further inquiry regarding the facts is desirable to clarify application of the law”). The analysis of the question of whether to impose a duty of good faith under the circumstances of this case would be enhanced if this Court and the court below had a proper record of relevant facts such as the nature of the DMF, the Respondents’ access to it, the Respondents’ use of the DMF for annuities, the experiences of Respondents using the DMF following the settlements noted above, and other fact that will only be revealed in discovery.

Finally, it is clear that the Petitioner pled other claims that should have survived regardless of whether the decision below was correct. With terms such as “good faith,” “reasonable attempt to comply” and “reasonable commercial standards” underscoring the enforcement of the UUPA, the Treasurer should have been permitted 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)).

Respondents acknowledge that Complaints contained broad allegations that the Respondents were failing to comply with the Act. App. 00008 at ¶ 26. (alleging that “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.”).

Respondents argue that these claims for relief were tied to the issue of the use of the DMF. This crabbed interpretation of the Complaint is inconsistent with the applicable pleading standard: “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 broad allegations in paragraph 26 of the complaint do not even mention the DMF. App. 00008. It merely states that the insurers have failed to use readily available information to search for proof of death and report unclaimed or abandoned life insurance policy proceeds.” *Id.* Likewise, Par. 18 which delineates the negligence of Respondents, never mentions the DMF. App. 00005-6. Furthermore, the relief actually sought in paragraphs 31-40 only mentions the DMF in the request for injunctive relief. App. 00011 at ¶ 38.

Finally, there was no basis for denying the treasurer’s demand to examine the books of the insurers on the basis that he believed they were underreporting. That is a right clearly provided by the statute. W.Va. Code § 36-8-20.

Petitioner pled that Respondents are underreporting proceeds due to the State. Petitioner is aware of the industry’s use of the DMF as one tool to determine the living status of annuitants and insureds. It is critical for this Court to appreciate that the DMF is the tool of which the Petitioner is aware but that the pleadings encompass the Respondents’ practices as a whole and whether the reports submitted to the Petitioner have been inaccurate and/or incomplete. Petitioner reasonably believes and accordingly pled that Respondents are underreporting property to the State and sought injunctive

relief to ensure at a minimum that the Respondents are referencing the DMF to determine what properties are due and payable.

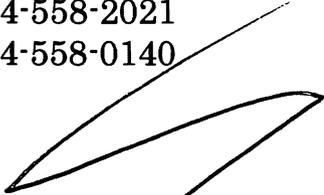
The Respondents do not contest that the Circuit Court recognized the broad allegations in the Complaints. App. at 00164. (“The Complaints further allege that the Defendants have breached their statutory duties of good faith and fair dealing by failing to conduct annual examinations of life insurance 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.”). Even assuming that the substance of the Circuit Court’s order was correct, it should have retained jurisdiction and permitted discovery on these remaining claims.

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.

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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

On this the 17th day of September, the undersigned hereby certifies that the attached "PETITIONER'S REPLY BRIEF" was served upon counsel of record as identified in the attached Service List by placing a true copy thereof in the United States Mail, postage pre-paid, first-class, as follows:



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