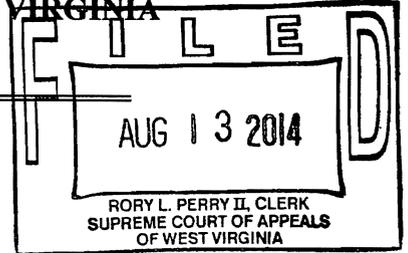


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 14-0100



JOHN D. PERDUE, Plaintiff Below,

Petitioner,

vs.

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

Respondents.

**On appeal from the Circuit Court of Putnam County in:
Perdue v. Monumental Life Insurance Co., Case No. 12-C-294; and
Perdue v. Transamerica Life Insurance Co., Case No. 12-C-361**

**RESPONDENTS' BRIEF OF MONUMENTAL LIFE INSURANCE
COMPANY AND TRANSAMERICA LIFE INSURANCE COMPANY**

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Respondents Monumental Life Insurance Company (“Monumental”) and Transamerica Life Insurance Company (“Transamerica”) hereby respond to Petitioner’s Brief.¹

I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises out of a mass filing by the State Treasurer of *sixty-nine* individual lawsuits against sixty-nine different life insurance companies doing business in West Virginia. Through these lawsuits, the Treasurer attempts to accelerate the time when life insurance proceeds become reportable under the West Virginia Uniform Unclaimed Property Act, W. Va. Code §§ 36-8-1 *et seq.* (the “UPA” or “Act”). According to the Treasurer, life insurers are legally obligated by the Act to search the government’s Death Master File (“DMF”) annually to determine if any of its insureds have died. To support this unprecedented theory, the Treasurer argues, contrary to the express language of the Act, that life insurance proceeds become payable to the State three years after the date of death. Consistent with every other court to have considered the issue, the Circuit Court rejected the Treasurer’s legal theory and properly dismissed the complaints.

The identical complaints in each case allege that a life insurance company has a “statutorily imposed” obligation under the Act to conduct “an annual examination of life insurance policy holders to determine if they are deceased.” Complaint ¶¶ 3, 21 (A.1202, A.1207).² More specifically, the complaints assert that “[f]or many years,” a government

¹ Monumental and Transamerica were defendants in two of the sixty-nine individual lawsuits filed by the Treasurer in the Circuit Court of Putnam County against various life insurance companies.

² Citations in the form “A. ___” are to pages in the Appendix to Petitioner’s Brief. The Complaint filed against Monumental is located at A.1201, and the Complaint filed against Transamerica is at A.1381. For ease of reference, citations are to the Monumental Complaint.

database known as the “DMF” has been available (along with “other reliable databases”) to determine whether policyholders have died. Complaint ¶ 22 (A.1207).³ According to the Treasurer, the Act requires a life insurance company to access and search the DMF for deceased insureds, but defendants “routinely fail to utilize DMF information.” Complaint ¶ 24 (A.1208). As a result of the alleged failure to search the DMF, the complaints allege violations of the Act, including the failure to accurately report and pay sufficient unclaimed property to the State. Complaint ¶¶ 25-26 (A.1208). The complaints go so far as to demand “injunctive relief” to force all life insurance companies to “immediately implement” annual DMF searching. *See* Complaint ¶ 38 (A.1211).

The Circuit Court properly rejected the Treasurer’s unsupportable legal theory. The DMF has existed since 1980, while the UPA was enacted in 1997. But nowhere does the UPA even mention the DMF, let alone require life insurers to search the DMF for deceased insureds. Indeed, the Treasurer’s legal argument is directly contrary to the Act. The Act specifically addresses when life insurance proceeds are “presumed abandoned” and must be paid to the State. In the case of policies “payable upon proof of death,” if for some reason the insurance company does not receive proof of an insured’s death, the insurance proceeds are presumed abandoned “*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) (emphasis added).⁴ Thus, as the Circuit Court found, the Act “explicitly provides a mechanism for

³ The “DMF” refers to the “Death Master File” maintained by the Social Security Administration (“SSA”). The DMF consists of a partial list of deaths reported to the SSA. “The SSA does not have a death record for all persons; therefore, [the] SSA does not guarantee the veracity of the file.” <https://www.ssdmf.com> (last visited Aug. 2, 2014).

⁴ The “limiting age” of a mortality table is the age by which the entire population is assumed to have died. *See* E.F. Spurgeon, *Life Contingencies* at 3 (2011). For life insurance policies issued on or after January 1, 2009, this State requires use of the 2001 Commissioners’

unclaimed life insurance proceeds to be remitted to West Virginia in the event the insurer never receives due proof of death from a claimant.” Order at 8 (A.00170). The Treasurer’s contention that the Circuit Court’s ruling “essentially excludes life insurance proceeds from the Act” is baseless. Petitioner’s Brief at 1 (“Pet. Br.”).

Rather than ensure compliance with the Act, the Treasurer’s lawsuits seek to rewrite the UPA. Specifically, the Treasurer would like the Act to provide that life insurance proceeds become “presumed abandoned” under the Act and subject to reporting *three years after the date of death*. See Transcript of Hearing at 90, Sept. 6, 2013 (“Tr.”) (Treasurer’s counsel: “all property which is a life insurance policy is due three years after the time of death”) (A.00205). But the Act says no such thing. Consequently, there is no statutory basis (or logical reason) for the Treasurer’s argument that insurers must go searching for insureds who might have died. The Act provides a “limiting age” backstop to ensure that all unclaimed life insurance proceeds are ultimately paid to the State. W. Va. Code § 36-8-2(a)(8). The Treasurer’s argument, however, would render the “limiting age” provision of Section 36-8-2(a)(8) meaningless.

Had the Legislature intended to provide that life insurance proceeds became “presumed abandoned” three years after the date of death, or if the Legislature intended to require companies to search the DMF, it could have said so in plain English. It did not. Because the Legislature expressly addressed the subject of when life insurance proceeds become “presumed abandoned,” and did not include the Treasurer’s “date of death/DMF” theory, the Circuit Court

Standard Ordinary (CSO) Mortality Table (permitting usage of such table effective May 6, 2005), which changed the limiting age from 100 to 121. See W. Va. Ins. Regs. 114-69-1 and -3, Sections 1.1, 3.1 and 3.2; C.S. DesRochers et al., *Life Insurance/Modified Endowments Under Internal Revenue Code Sections 7702 and 7702A* (2004), at 62 (“Under the 2001 CSO Table, the terminal age of the mortality table has been extended to 121, compared to age 100 under the 1980 CSO.”); see also W. Va. Ins. Dep’t Informational Letter 152 (2005) (prior to adoption of the 2001 CSO Table, West Virginia required use of the 1980 CSO Table).

was entirely correct in dismissing the complaints and declining to rewrite the statute. *See* Order at 4 (A.00166) (“Courts are not free to read into the language what is not there, but rather should apply the statute as written.”) (quoting *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994)).

As the Circuit Court recognized, uniform unclaimed property acts have existed for over half a century, “yet no court has ever held that any version of the Uniform Act requires a person to search the DMF.” Order at 15 (A.00177) (footnote omitted). Moreover, the National Conference of Insurance Legislators (“NCOIL”) recently adopted the “Model Unclaimed Life Insurance Benefits Act” (the “Model Act”), designed specifically to require insurers to periodically compare the insureds under their in-force life insurance policies against the DMF.⁵ At least fifteen states have recently enacted a variation of the Model Act or their own DMF legislation, and bills are pending in at least three additional states.⁶ If the Uniform Unclaimed

⁵ NCOIL is a national organization comprised of the most knowledgeable state legislators regarding insurance legislation and regulation. “Many legislators active in NCOIL either chair or are members of the committees responsible for insurance legislation in their respective state houses across the country.” NCOIL: History and Purpose, *available at* <http://www.ncoil.org/ncoilinfo/about.html> (last visited Aug. 12, 2014). The Model Unclaimed Life Insurance Benefits Act was adopted in November of 2011 and amended in July, 2012 and July, 2013. <http://www.ncoil.org/other/MLRlife.html>. (last visited Aug. 3, 2014).

⁶ *See* Ala. Code § 27-15-53 (requiring DMF comparison by Jan. 1, 2019 and no less frequently than every three years thereafter); Ga. Code Ann. § 33-25-14 (eff. Jan. 1, 2015); Idaho Admin. Code r. 54.03.01 (eff. June 15, 2014); Ind. Code § 27-2-23-1, *et seq.* (eff. after June 30, 2015); Iowa Code § 507B.4C (eff. July 1, 2015); Ky. Rev. Stat. Ann. § 304.15-420 (eff. July 15, 2014); Md. Code Ann., Ins. § 16-118 (eff. Oct. 1, 2013); Miss. S.B. 2796, Reg. Sess. (eff. July 1, 2015); 2013 Mont. Laws Ch. 119 (eff. Jan. 1, 2014); Nev. Rev. Stat. § 688D.090 (eff. July 1, 2014); N.M. Stat. Ann. § 59A-16-7.1 (eff. July 1, 2013); N.Y. Comp. Codes R. & Regs. tit. 11, §§ 226.0–226.6 (filed as an emergency measure, originally eff. May 14, 2012); N.Y. Ins. Law § 3240 (eff. June 15, 2013); N.D. Cent. Code § 26.1-55-02 (eff. Aug. 1, 2013); R.I. Gen. Laws § 27-80-1, *et seq.* (eff. Jan. 1, 2016); Tenn. Code Ann. § 56-7-3201, *et seq.* (S.B. 2516) (eff. July 1, 2015); 27 Vt. Stat. Ann. § 1244a (eff. July 1, 2013). Bills are pending in Illinois (S.B. 3660, 98th Gen. Assemb. (Ill. 2014)), North Carolina (H.B. 761, 2013 Sess. (N.C. 2013)), and Pennsylvania (H.B. 1937, Reg. Sess. (Pa. 2014)).

Property Acts already required insurers to conduct DMF searches, there would be no need for states to be enacting entirely new statutes to create such an obligation.

The Circuit Court’s Order applied the UPA as written and properly recognized that rewriting the Act to create new statutory obligations and to accelerate when life insurance is “presumed abandoned” is a job for the Legislature, not for the court.

B. The Uniform Unclaimed Property Act

The first unclaimed property statute including insurance policies was enacted over seventy years ago.⁷ In 1954, the first of four Uniform Unclaimed Property Acts was released. All four versions of the Uniform Unclaimed Property Act contain provisions that specifically address when the proceeds of a life insurance policy are deemed “abandoned” for purposes of escheat to the State.⁸ *None* of these uniform acts requires (and no case has ever held that one of the uniform acts requires) a life insurance company to independently perform searches of the DMF (or any other database) in order to determine if any of its insureds are deceased.

In 1997, West Virginia adopted the 1995 Uniform Unclaimed Property Act. W. Va. Code §§ 36-8-1 *et seq.* Under the Act, only a “holder of property presumed abandoned” is required to report or pay unclaimed property to the State. *See* W. Va. Code §§ 36-8-7, 36-8-8. The Act defines “property” with respect to insurance policies as “[a]n amount *due and payable under the terms of an annuity or insurance policy*, including policies providing *life insurance*,

⁷ “The first statute which included insurance policies as abandoned property was enacted in 1939.” *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 542 n.1 (1948).

⁸ *See* Uniform Disposition of Unclaimed Property Act § 3 (1954); Revised Uniform Disposition of Unclaimed Property Act § 3 (1966) (revision of 1954 act); Uniform Unclaimed Property Act § 7 (1981); Uniform Unclaimed Property Act § 2(a)(8) (1995); *see also Haven Sav. Bank v. Zanolini*, 3 A.3d 608, 614 (N.J. Super. Ct. 2010) (“The 1995 Uniform Act superseded its predecessor uniform acts: the 1954 Uniform Disposition of Unclaimed Property Act (1954 Uniform Act); its revisions in 1966 (1966 Uniform Act); and the 1981 Uniform Unclaimed Property Act (1981 Uniform Act).”).

property and casualty insurance, workers' compensation insurance, or health and disability insurance." W. Va. Code § 36-8-1(13)(vi) (emphasis added). In addition, the Act specifically addresses *when* an amount under a life insurance policy is presumed abandoned. W. Va. Code § 36-8-2(a)(8). Nowhere does the Act state that life insurance benefits are "presumed abandoned" three years after the date of death. Nor does the Act state (or in any way suggest) that a life insurer must go outside its own business records to search external databases for insureds who might have died.

Under the UPA, the Treasurer is permitted upon reasonable notice to examine the records of any person to determine compliance with the Act. W. Va. Code § 36-8-20(b). In addition, the Treasurer may require a person whom the Treasurer believes may have filed an inaccurate report to file a verified report. W. Va. Code § 36-8-20(a). If an examination results in the disclosure of property reportable under the Act, the Treasurer may be entitled to certain costs of the examination as limited by the Act. W. Va. Code § 36-8-20(e). Prior to filing the lawsuits involved in this appeal, the Treasurer did not request any verified report or perform any examination of these defendants, and no examination is alleged in the complaints.

C. Procedural History

From September 30, 2012 to December 28, 2012, the Treasurer filed in the Circuit Court of Putnam County sixty-nine separate lawsuits against life insurance companies.⁹ As the Circuit Court noted, the complaints were identical except for the name of the company and an allegation of market share. Order at 2 (A.00164). The complaints purport to be brought "pursuant to

⁹ The sixty-nine actions were filed in five groups. Ten actions were filed on September 30, 2012; ten more on October 16, 2012; ten more on November 14, 2012; ten more on November 21, 2012; and finally, the Treasurer filed an additional 29 cases on December 28, 2012. A schedule of all cases showing the companies involved in each case is attached to Monumental's Motion to Dismiss as Exhibit A. A.01221-01225.

statutory authority given the state treasurer under [the UPA].” *See* Complaint ¶ 1 (A.01201). Based on the alleged statutory authority, the complaints claim that every life insurer has a “duty to act in good faith . . . with respect to all aspects of [its] insurance contracts,” including the duty to annually examine the DMF for deceased policyholders. *Id.* ¶¶ 3, 21 (A.01202, A.01206-07). Indeed, the complaints seek an injunction requiring every defendant to search the DMF (or another database approved by the Treasurer) annually. *Id.* ¶ 38 (A.01211). Each complaint also inexplicably “demands to examine the records of the defendant,” and “demands the defendant file a verified report,” although the Treasurer never made any such request to the defendants. *Id.* ¶¶ 31-32 (A.01209-10).

The complaints allege in conclusory fashion that the defendant companies failed to pay the proper amount of “unclaimed property” to the State, and that they filed inaccurate reports, but the only factual allegation as to why any defendant purportedly violated the Act is the alleged failure to search the DMF for deceased policyholders. Based on this purported “failure to use readily available information,” the Treasurer contends that the defendants violated the Act by not paying over money that “rightfully should have been paid to the West Virginia Unclaimed Property Fund,” and by filing inaccurate reports under the Act. Complaint ¶¶ 25-26 (A.1208).

On April 1, 2013, Monumental and Transamerica filed motions to dismiss the complaints arguing, among other things, that West Virginia law imposed no legal duty to search the DMF for deceased policyholders, and that the Treasurer was attempting to rewrite the UPA through litigation. A.01214-64, 01393-1473. The Treasurer responded on August 20, 2013 (A.00047), and the defendants replied on August 30, 2013 (A.01349, A.01558). The Circuit Court heard oral argument on the motions to dismiss on September 6, 2013. A.00183-214. Notwithstanding

the absence of any statutory support, at the hearing the Treasurer confirmed his position that life insurance should be “presumed abandoned” three years after the date of death:

MS. MURRAY [Treasurer’s Counsel]: ... Property in life insurance in West Virginia is presumed abandoned at the time of maturity. Under the Insurance Code, maturity is at the time of death. *So, all property which is a life insurance policy is due three years after the time of death.*

Tr. 90 (A.00205) (emphasis added). The Treasurer also confirmed that, prior to filing his sixty-nine lawsuits, he never issued any regulations to provide notice of his new position that use of the DMF was required under the Act. *See* Tr. 122-23 (A.00213).

D. Circuit Court’s Order

On December 27, 2013, the Circuit Court ruled on all pending motions to dismiss in these cases and entered a single Order dismissing the complaints with prejudice. A.00164. The Circuit Court recognized that “[t]he threshold question of law in this matter is whether or not the [Act] creates a statutory duty obligating life insurance companies to periodically search the DMF or other similar database to determine if any of their policy holders have died.” Order at 3 (A.00165).

The Circuit Court acknowledged this Court’s precedent holding that interpretation of a statute “presents a purely legal question,” and that a court should apply a statute as written. Order at 4 (A.00166) (quoting Syl. Pt. 2, *Tribeca Lending Corp. v. McCormick*, 231 W.Va. 455, 745 S.E.2d 493 (2013)). The Circuit Court turned first to the UPA itself and reviewed the relevant provisions, including the Act’s definition of “property,” the requirements to report and pay to the administrator property that is “presumed abandoned,” and the Act’s specific definition of when life insurance proceeds are “presumed abandoned.” Order at 5-6 (A.00167-68). The Circuit Court noted that the UPA defined “property” as “[a]n amount due and payable under the

terms of an annuity or insurance policy, including policies providing life insurance....” Order at 5 (A.00167) (quoting W. Va. Code § 36-8-1(13)(vi)) (emphasis added).

The Circuit Court noted the extensive regulation of insurance policies under the Insurance Code, including the requirement that policies be filed with and approved by the Insurance Commissioner, and that certain standard provisions be contained in all policies, including a provision that all life insurance policies issued for delivery in the state condition an insurer’s obligation to pay death benefits on the “receipt of due proof of death.” Order at 6 (A.00168) (quoting W. Va. Ins. Code § 33-13-14). The Circuit Court noted the well established maxim that “[s]tatutes which relate to the same subject matter should be read together and applied together” Order at 7 (A.00169). The Circuit Court concluded that the Treasurer’s interpretation of “property” was contrary to both the UPA and the Insurance Code, and that both statutes “are unambiguous and consistent with one another.” Order at 7-9 (A.00169-171).

The Circuit Court reasoned that if the Legislature had intended to deviate from the Insurance Code’s “receipt of due proof of death” standard, which it enacted in 1957, when it passed the UPA in 1997, it would have done so with more specific language. Order at 7 (A.00169). The Circuit Court also found that the Treasurer’s argument that the UPA imposes a duty on insurers to search the DMF was inconsistent with the UPA’s “limiting age” escheatment trigger, which explicitly provides a mechanism for escheatment when no claim has been presented. Order at 8 (A.00170). The Circuit Court noted that “other courts interpreting provisions very similar to the UPA have held that insurers lack any obligation to search the DMF.” *Id.*

The Circuit Court also examined, and squarely rejected, additional arguments by the Treasurer. First, the Circuit Court rejected the Treasurer’s argument that subsection (e) of

Section 36-8-2 could be used to completely rewrite the definition of “property” and the definition of when life insurance proceeds are “presumed abandoned.” Order at 10 (A.00172) (“§ 36-8-2(e) does not purport to change the definition of property as it relates to life insurance proceeds or to override the Insurance Code”). The Circuit Court held that “the ‘due proof of death’ requirement is not a mere administrative requirement for collecting an obligation that is already fixed and certain. Rather it is an essential ingredient for creating the obligation (*i.e.* the ‘property’) in the first place.” Order at 11 (A.00173).

The Circuit Court also rejected the Treasurer’s argument that the reference to “good faith” in Section 36-8-10 of the UPA should be interpreted to require insurers to search the DMF. Order at 13 (A.00175). Rather, the provision relied on by the Treasurer “creates a standard of good faith for a very specific purpose – namely relieving a holder from liability when they made a good faith effort to comply with the UPA.” *Id.* The Circuit Court also rejected another argument by the Treasurer that the reference to “reasonable commercial standards” in another section of the UPA required insurers to conduct DMF searches. Order at 13-14 (A.00175-76). Likewise, the Circuit Court ruled that the implied covenant of good faith and fair dealing could not “be used to impose an obligation on the insurance companies to search the DMF.” Order at 14-15 (A.00176-77).

Lastly, the Court found further support for its decision in the fact that multiple states have recently enacted versions of the NCOIL Model Unclaimed Life Insurance Benefits Act specifically to require DMF searching, including five states that operate under the 1995 Uniform Unclaimed Property Act. Order at 15-16 (A.00177-78). The Circuit Court found that this legislation further demonstrated that DMF search requirements do not exist under the existing UPA. *Id.* The Court further rejected the Treasurer’s contention that his arguments under the Act

must be accepted because he is entitled to judicial deference. Order at 17 (A.00179). The Circuit Court concluded by stating that it expressed “no opinion on the social utility of a duty to search the DMF” and that “the remedy sought [by the Treasurer] lies with the Legislature, not with this Court.” Order at 18 (A.00180).

II. SUMMARY OF THE ARGUMENT

The sixty-nine identical complaints filed by the Treasurer against the life insurance industry constitute a blatant attempt to legislate through litigation. The complaints are not based on any genuine alleged violation of the UPA. Rather, the complaints are based on the legal theory that life insurance companies have a statutory obligation to search the DMF (or some other unidentified database) for deceased insureds in order to properly report “property presumed abandoned” under the UPA. W. Va. Code § 36-8-7(a). The Circuit Court correctly held that no such obligation exists under current law. Because all of the violations of the UPA alleged in the complaints were based solely on the failure to search the DMF, the Circuit Court properly dismissed the complaints in their entirety.

Contrary to the Treasurer’s suggestion, the Circuit Court did not hold that the UPA “was subject to” the Insurance Code, and did not “graft[]” the Insurance Code onto the UPA. Pet. Br. at 8, 16. Rather, the Circuit Court conducted a proper statutory analysis and analyzed the plain language of the UPA, including the specific definition of “property” with respect to insurance, Sections 7 and 8 of the Act governing reporting and payment obligations, and the specific definition of when life insurance proceeds become “presumed abandoned.” The Circuit Court recognized that the UPA defined “property” with respect to life insurance as “[a]n amount due and payable *under the terms of an . . . insurance policy.*” Order at 5 (A.00167) (quoting W. Va. Code § 36-8-1(13)(vi)). Applying the well established rule that “[s]tatutes which relate to the same subject matter should be read and applied together,” the Court stated its intention to read

the UPA and Insurance Code “in conjunction with one another to the extent that they are consistent and capable of being applied in a uniform manner” Order at 7 (A.00169) (citing Syl. Pt. 3, *University Commons Riverside Home Owner’s Ass’n v. University Commons Morgantown, LLC*, 230 W. Va. 589, 741 S.E.2d 613 (2013)).

Applying these rules, the Circuit Court properly rejected the Treasurer’s strained attempt to rewrite the definition of “property” and to accelerate the time when life insurance benefits become “presumed abandoned” under the UPA. The Circuit Court noted that Section 38-6-2(a)(8) of the UPA provides a three year dormancy period and specifically defines when life insurance proceeds become “presumed abandoned. There is nothing in the plain language of this section to support the Treasurer’s argument that life insurance proceeds become presumed abandoned three years after the insured’s death. To the contrary, “in the case of a [life insurance] policy ... payable upon proof of death,” if the insurance company never receives proof of death, the insurance proceeds become presumed abandoned three years after the “limiting age.” See W. Va. Code § 36-8-2(a)(8). The Circuit Court correctly concluded that the Treasurer’s argument would rewrite the statute and render the “limiting age” provision of § 36-8-2(a)(8) meaningless.

The Treasurer has offered not a single case in support of this appeal, because no court has ever held that an insurer has a duty to search the DMF (or any external database). Rather, every court to have considered the issue, has soundly rejected the notion that an insurer has a legal obligation to proactively search the DMF. The Circuit Court cited *Total Asset Recovery Services, LLC v. Metlife, Inc.*, Case No. 2010-CA-3719 (Fla. Cir. Ct. Aug. 20, 2013), in which the plaintiff, Total Asset Recovery Services (“TARS”), brought suit on behalf of the State of Florida against several insurers, arguing that the insurers failed to escheat life insurance proceeds

allegedly due the State pursuant to Florida's unclaimed property act (a version of the 1981 Uniform Act). Order at 8 (A.00170). The *TARS* court held that "Florida has not adopted a law requiring [the insurer] to consult the Death Master File" or any law "imposing an obligation on [the insurer] to engage in elaborate data mining of external databases." The Circuit Court also cited the federal district court's decision in *Feingold v. John Hancock Life Insurance Co. (USA)*, No. 13-10185, 2013 WL 4495126, at *2 (D. Mass. Aug. 19, 2013), *aff'd*, 753 F.3d 55 (1st Cir. 2014), which similarly rejected an insurer's obligation to search the DMF. Order at 15 (A.00177). Recently, the federal Court of Appeals affirmed *Feingold*, holding that there was no source "whether it be a statute or common law, that requires Hancock proactively to search public death records for policyholders' names rather than wait for submission of proof of death in accordance with its insurance policy provisions." *Feingold*, 753 F.3d at 61 n.6.

Even more recently, the Florida First District Court of Appeal squarely held under the 1981 Uniform Unclaimed Property Act that there was no statutory duty on the part of life insurers to search the DMF. *Thrivent Fin. for Lutherans v. Fla. Dep't of Fin. Servs.*, No. 1D13-5299, 2014 WL 3819476 (Fla. Dist. Ct. App. Aug. 5, 2014).¹⁰ In *Thrivent*, the Florida Department of Financial Services ("DFS") made the same arguments that the Treasurer makes here. The appellate court reversed the DFS's administrative interpretation of the 1981 Uniform Act because it was "clearly erroneous" and "ignore[d] the plain language of the statute." *Id.* at *1. Similar to the Circuit Court here, the *Thrivent* court held, "nothing in the plain language of [the Act] imposes an affirmative duty on insurers to search these death records DFS asks this court to rewrite the statute based on policy considerations. However, this Court may not rewrite statutes contrary to their plain language." *Id.* at *3 (quotations and citation omitted).

¹⁰ The *Thrivent* decision was unanimous. The time for rehearing expires on August 20, 2014. Fla. R. App. P. 9.340(a).

Thrivent and the other cases that have addressed the DMF issue all support the Circuit Court's decision here.

The Circuit Court also properly rejected the Treasurer's reliance on subsection (e) of Section 36-8-2 to rewrite the rules governing when life insurance is "presumed abandoned." *See* Pet. Br. at 19-22. The Treasurer argues that, by virtue of subsection 36-8-2(e), life insurance benefits become "due and payable" immediately upon death of the insured and are presumed abandoned three years after death. This same argument was expressly rejected by the court in *Thrivent* under the 1981 Uniform Unclaimed Property Act. *See Thrivent*, 2014 WL 3819476, at *3. The Circuit Court properly rejected it here based on well established rules of statutory construction. Subsection (e) is a general rule that is not specific to insurance, and it cannot be used to rewrite the plain language of the specific rule under Section 36-8-2(a)(8) that governs exactly when life insurance becomes "presumed abandoned." In addition, the Treasurer's interpretation of subsection (e) would render the "limiting age" provision of § 36-8-2(a)(8) meaningless.

In the Circuit Court below, and again on appeal, the Treasurer argues that a duty of "good faith" found in Section 36-8-10 of the UPA creates an affirmative obligation on the part of all life insurance companies to search the DMF. This argument is devoid of merit. First, Section 36-8-10 addresses an entirely different topic. Section 36-8-10 provides immunity from liability to "[a] holder who pays or delivers property to the administrator *in good faith*," and requires the administrator to indemnify the holder from certain third party claims if the holder pays or delivers the property to the administrator in good faith. W. Va. Code § 36-8-10(b) (emphasis added), (f). Section 36-8-10 does not remotely address searching the DMF.

Second, § 36-8-10(a) does not impose any general good faith requirement applicable to “the entire Act.” Pet. Br. at 25. Section 36-8-10 addresses when a payment or delivery to the administrator will be considered to have been made in “good faith” for purposes of immunity and indemnification. Section 36-8-10 states: “*In this section*, payment or delivery is made in ‘good faith’ if ... [among other things] the payment or delivery was made in a reasonable attempt *to comply with this article.*” W. Va. Code § 36-8-10(a)(1) (emphasis added). Thus, the good faith defined in § 36-8-10 is applicable only for purposes of “this section.” As the Circuit Court held, “§ 36-8-10 creates a standard of good faith *for a very specific purpose*,” a purpose that has nothing to do with searching the DMF. Order at 13 (A.00175).

Moreover, there is no statutory basis for the Treasurer’s reasoning as to why a “good faith” obligation to search the DMF should exist. An insurer is only required to report life insurance proceeds that are “presumed abandoned,” and the proceeds of a policy payable upon proof of death do not become “presumed abandoned” until three years after the insured attained or would have attained the limiting age. *See* W. Va. Code §§ 36-8-2(a)(8), 36-8-2(c). Insurers can determine when an insured would have attained the limiting age, and when life insurance proceeds become “presumed abandoned,” based upon their own records. There is no need to search any third party database for potentially deceased insureds. The Circuit Court properly held that there is no requirement in the UPA that obligates an insurer to search the DMF or other third-party database for deceased insureds. Order at 15 (A.00177).

The Treasurer’s proposed obligation to search the DMF is designed not to *search* for reportable property under current law, but to *create* a new category of “presumed abandoned” property where none currently exists. To the extent the Treasurer would like to impose on life insurers a requirement to search the DMF, the proper course is to propose appropriate legislation.

The NCOIL Model Unclaimed Life Insurance Benefits Act was developed by leading insurance state legislators for precisely this purpose. Over a dozen states have recently adopted a version of the NCOIL Model Act or their own DMF legislation in order to require insurers to periodically review the DMF and compare it to their in force policies. Virtually all of these states had previously adopted one of the Uniform Unclaimed Property Acts, and several had adopted the 1995 Uniform Act. The enactment of DMF legislation in these states demonstrates that no such obligation to undertake DMF searching exists under the current UPA, and the proper method for creating such an obligation is through legislation not litigation. The Circuit Court properly recognized this principle when it refused to rewrite the statute based on the Treasurer's policy arguments. Order at 18 (A.00180) ("the Court expresses no opinion on the social utility of a duty to search the DMF, the remedy sought lies with the Legislature, not with this Court"). The Circuit Court's thorough and well reasoned opinion should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner has requested a Rule 20 oral argument. Pursuant to Rule 20(a), this case may be suitable for a Rule 20 oral argument because the Treasurer's unprecedented (and unsupportable) legal theory presents an issue of first impression in this Court. W. Va. R. App. P. 20(a). No other court in history has interpreted any of the four Uniform Unclaimed Property Acts to require a life insurer to search the DMF or any other third party database. This case is important because it presents an egregious abuse of agency power and an attempt to legislate through the filing of mass litigation. The principles of law necessary to interpret the statute and resolve this case are well established and were properly applied by the Circuit Court. This Court should apply those same principles in a written memorandum decision affirming the Circuit Court's well reasoned opinion.

IV. ARGUMENT

A. Standard of Review

This appeal presents the review of an Order granting a motion to dismiss as a matter of law. Accordingly, this Court's standard of review is *de novo*. Syl. Pt. 1, *Posey v. City of Buckhannon*, 228 W. Va. 612, 614, 723 S.E.2d 842, 844 (2012) (stating that the Circuit Court's grant of a motion to dismiss is subject to *de novo* review); Syl. Pt. 1, *Elam v. Med. Assurance of W. Va.*, 216 W. Va. 459, 462, 607 S.E.2d 788, 791 (2004) (per curiam) ("It is well settled that this Court reviews *de novo* a circuit court's order granting a motion to dismiss . . .").

Regarding the UPA, it is well established that "[i]nterpreting a statute . . . presents a purely legal question." *Banker v. Banker*, 196 W. Va. 535, 543, 474 S.E.2d 465, 473 (1996) (citation omitted). When interpreting a statute, "it is the duty of the courts not to construe but to apply the statute." *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 675, 600 S.E.2d 565, 572 (2004). "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Div. v. Pub. Serv. Comm'n*, 182 W. Va. 152, 156, 386 S.E.2d 650, 654 (1989). "Even if this Court viewed the position advocated by [the Treasurer] as wise from a public policy standpoint, [the Court's] duty is not to retool the statute but merely to apply its provisions" *Burrows*, 215 W. Va. at 675, 600 S.E.2d at 572.

It is well established that the UPA is in derogation of the common law. "UUPA (1995) and its predecessor Acts are designed to change the common law and the law of escheat pertaining to abandoned intangible personal property." Unclaimed Property Act Summary, National Conference of Commissioners on Uniform State Laws, *available at* <http://www.uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act> (last visited Aug. 10, 2014). Because the "UUPA (1995) and its predecessors essentially abolish the common law"

(*id.*), the Act should be strictly construed. *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007) (“It is a long-standing maxim that ‘[s]tatutes in derogation of the common law are strictly construed.’”) (quoting *Kellar v. James*, 63 W. Va. 139, 59 S.E. 939 (1907)). Contrary to the Treasurer’s argument, the UPA is not subject to a “liberal interpretation.” Pet. Br. at 10, 15.¹¹ Even if applicable, which it is not, the rule of liberal construction applies only when there is an ambiguity,¹² and in any event, a liberal construction does not allow a statute to be rewritten.¹³

¹¹ When intended, the Legislature knows how to provide that a statute should be liberally construed. *See, e.g.*, W. Va. Code § 46A-6-101(1) (providing that article 6 of the West Virginia Consumer Credit and Protection Act “shall be liberally construed so that its beneficial purposes may be served”). Nor did the National Conference of Commissioners on Uniform State Laws provide for any such construction.

¹² Indeed, in *Raynes v. Nitro Pencil Co.*, 132 W. Va. 417, 419, 52 S.E.2d 248, 249 (1949), this Court explained, “the rule permitting the liberal construction of remedial statutes” is “not applied where the language under construction carries a plain meaning.” *See also Private Ind. Council of Kanawha Cnty. v. Gatson*, 199 W. Va. 204, 207, 483 S.E.2d 550, 553 (1997) (the “liberality rule” is not used “when its application would require us to ignore the plain language of the statute”); 82 C.J.S. *Statutes* § 523 (2014) (“While a remedial statute is to be liberally construed, ambiguity is a prerequisite to judicial construction, and the rule ... is inapplicable when the language of the relevant statute is not ambiguous.”). The only case cited by the Treasurer in support of his argument is a New Jersey case which did not address the 1995 Uniform Act and in which “the Court [was] confronted with an ambiguity”. *See Clymer v. Summit Bancorp.*, 171 N.J. 57, 66, 792 A.2d 396, 402 (2002), *cited in* Pet. Br. at 15-16.

¹³ The UPA is not a “remedial” or “consumer protection” statute, but regardless, “courts may not read into a remedial statute something that is not within the manifest intention of the lawmaking body,” and “[a] liberal construction ... does not authorize the court ... to depart from the plain and obvious meaning of the language used.” 73 Am. Jur. 2d *Statutes* § 176 (2014); *cf. Liberty Mut. Ins. Co. v. Morrissey*, No. 13-0195, 2014 WL 2695524, at *10 (W. Va. June 11, 2014) (per curiam) (although the West Virginia Consumer Credit Protection Act is to be liberally construed, “the statute does not provide this Court the autonomy to construe and rewrite the Crash Parts Act”).

B. The Circuit Court Did Not “Subject The UPA To The Insurance Code”; Rather, The Circuit Court Examined The UPA, Found No Conflict Between The UPA And The Insurance Code, And Properly Rejected The Treasurer’s Argument That The UPA Requires Life Insurers To Search The Death Master File

1. The Circuit Court properly analyzed the UPA and construed the definition of “property” consistent with the Insurance Code

The Treasurer’s first substantive argument attempts to fabricate error by mischaracterizing the Circuit Court’s Order. The Circuit Court did not err by “subjecting the Unclaimed Property Act” to the Insurance Code. Pet. Br. at 16. Pursuant to a proper statutory analysis, the Circuit Court first turned to the UPA itself and examined the express language of the statute. *See* Order at 5-6 (A.00167-68). The Circuit Court noted that “[t]he UPA contains a list of definitions and specific provisions defining what kind of property is subject to the UPA,” and with respect to insurance proceeds, “property is defined specifically as ‘[a]n amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance.’” Order at 5 (A.00167) (quoting W. Va. Code § 36-8-1(13)(vi)). After reviewing Sections 7 and 8 of the Act, which govern reporting and payment obligations, the Circuit Court correctly recognized that “only property that is ‘presumed abandoned’ must be reported and ultimately paid or delivered to the administrator.” *Id.*

The Court also recognized that the UPA did not define when life insurance proceeds were “due and payable under the terms of [the] insurance policy.” W. Va. Code § 36-8-1(13)(vi). The Insurance Code, however, for forty years prior to enactment of the UPA, has required that life insurance contracts issued in this state contain a provision as follows:

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 and, at the insurer's option, surrender of the policy and/or proof of the interest of the claimant. If an insurer shall specify a particular period prior to the expiration of which settlement shall be made, such period shall not exceed two months from the receipt of such proofs.

W. Va. Code § 33-13-14 (“Payment of claims”) (emphasis added). Consequently, the terms of life insurance policies issued in this state require *due proof of death* before a claim is “due and payable under the terms of [the] insurance policy.” W. Va. Code § 36-8-1(13)(vi). As the Circuit Court noted, these provisions make proof of death a condition to the insurer’s liability for payment of death benefits. Order at 6 (A.00168) (quoting *Petrice v. Fed. Kemper Ins. Co.*, 163 W. Va. 737, 739-40, 260 S.E.2d 276, 278 (1979)); see also *Hanford v. Metro. Life Ins. Co.*, 131 W. Va. 227, 236-37, 46 S.E.2d 777, 782 (1948) (when a life insurance policy provides for proof of disability or loss, furnishing such proof is a condition precedent to the liability of the insurer under the policy).

The Circuit Court cited this Court’s precedent holding that “[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Order at 7 (A.00169) (quoting Syl. Pt. 3, *University Commons Riverside Home Owner’s Ass’n Inc. v. University Commons Morgantown, LLC*, 230 W. Va. 589, 741 S.E.2d 613 (2013)); see also *Mangus v. Ashley*, 199 W. Va. 651, 656, 487 S.E.2d 309, 314 (1997) (“It is axiomatic that a court must whenever possible read statutes dealing with the same subject matter *in pari materia* so that the statutes are harmonious and congruent, giving meaning to each word of the statutes, and avoiding readings which would result in a conflict in the mandates of different statutory provisions.”); *Subcarrier Commc’ns, Inc. v. Nield*, 218 W. Va. 292, 298, 624 S.E.2d 729, 735 (2005) (“Statutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.”) (quotations and citations omitted). Based on this precedent, the Circuit Court concluded that “the UPA and the Insurance Code should be read in conjunction with one another to the extent that they are consistent and capable of being applied

in a uniform manner in order to ascertain true legislative intent.” Order at 7 (A.00169). And the Court stated its intention to “conduct its analysis following this premise.” *Id.*

Applying these principles, the Circuit Court rejected the Treasurer’s convoluted argument to rewrite the definition of “property” for life insurance in a manner that conflicted with the Insurance Code and was inconsistent with the plain language of the UPA itself. *See* Order at 8 (A.00170). Instead, the Court found that “the provisions of the UPA and the Insurance Code are unambiguous and consistent with one another.” Order at 9 (A.00171).

2. The Circuit Court properly found that the Treasurer’s proposed obligation to search the DMF is absent from and conflicts with the Uniform Unclaimed Property Act

The Treasurer expends significant energy arguing about the definition of “property,” but he virtually ignores the most significant provision of the UPA, which expressly defines when life insurance is “presumed abandoned”—Section 36-8-2(a)(8). He also ignores the Circuit Court’s explicit finding that his DMF searching theory “is inconsistent with the UPA’s ‘limiting age’ trigger” in § 36-8-2(a)(8). Order at 8 (A.00170). Under the UPA, only “property *presumed abandoned*” is reportable and payable to the administrator. W. Va. § 36-8-7 (emphasis added); W. Va. § 36-8-8. As the Circuit Court recognized, Section 36-8-2(a) of the Act “defines exactly” when particular types of property are “presumed abandoned.”¹⁴ Order at 5 (A.00167). Subsection (8) of 36-8-2(a) expressly addresses when life insurance proceeds are presumed abandoned:

Section 36-8-2, entitled “Presumptions of Abandonment” provides, in relevant part:

(a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below *for the particular property*:

¹⁴ Section 36-8-2(a) sets forth rules for 17 different categories of property, including for example, traveler’s checks, money orders, stock, gift certificates, and life insurance proceeds. *See* W. Va. Code § 36-8-2(a)(1)-(17).

* * *

(8) Amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, 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) (emphasis added). Thus, with respect to life insurance policies that are “payable upon proof of death,” if an insured dies and beneficiaries do not file a claim, the insurance benefits would become presumed abandoned “*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.* (emphasis added).¹⁵ The Treasurer would like to rewrite this provision to say that life insurance proceeds are presumed abandoned *three years after the date of death*. But the UPA says no such thing. Moreover, the Treasurer’s argument would render the “limiting age” language superfluous. *See* Syl. Pt. 3, *Jackson v. Kittle*, 34 W. Va. 207, 207, 12 S.E. 484, 485 (1890) (“A statute ought to be construed as a whole, and each section should be so construed that, if possible, no clause, sentence, or word should be superfluous, void, or insignificant.”).¹⁶

Under the plain language of the UPA, “in the case of a policy ... *payable upon proof of death*,” if proof of death is never provided to the insurer, the trigger for the three year dormancy period is the date when the insured “would have attained if living, the limiting age.” W. Va.

¹⁵ For the definition of “limiting age,” *see supra* note 4.

¹⁶ The Treasurer also argues, contrary to well established insurance law, that life insurance benefits are automatically presumed abandoned three years after the date of death because a life insurance policy automatically “matures” and the “obligation to pay” arises on the date of the insured’s death, even if no claim is filed. This argument would similarly render the “limiting age” provision meaningless. The Treasurer’s proposed interpretation would turn the UPA on its head and result in escheatment where there is nothing “due and payable” and no “obligation to pay” arose, contrary to the plain language of sections 36-8-1(13)(vi) and 36-8-2(a)(8).

Code § 36-8-2(a)(8). The trigger is not the date of death. If the life insurance benefits remain “unclaimed” for three years *after the limiting age*, they become “presumed abandoned,” and at that time, become reportable under the UPA. The Circuit Court correctly found that the Treasurer’s DMF theory is inconsistent with the “limiting age trigger” set forth in the Act:

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

Order at 8 (A.00170). Because death is not a triggering event that creates “presumed abandoned” property, there is no statutory basis for the Treasurer’s DMF theory. The Treasurer’s theory attempts to rewrite the statute to create a new category of “presumed abandoned” life insurance proceeds.

In *Burrows v. Nationwide Mutual Insurance Co.*, 215 W. Va. 668, 600 S.E.2d 565 (2004), this Court considered a statute that provided three triggers for when an automobile insurer was required to make an offer of underinsured motorist insurance coverage to its insured. Plaintiffs argued that the Court should construe the statute to include a fourth trigger - “the death of the named insured.” *See id.* 215 W. Va. at 670, 600 S.E. 2d at 567. Relying on the “familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another,” the Court rejected plaintiffs’ position and refused to read into the statute an additional unstated duty to offer coverage. *See id.* 215 W. Va. at 675, 600 S.E. 2d at 572. The Court explained that “it is the Legislature’s sole prerogative to designate the circumstances upon which an insurer’s statutory duty to offer optional insurance coverage . . . is triggered.” The Court refused to “retool the statute,” explaining further: “We prefer to leave for the

Legislature the decision to amend this statute, should it so desire, rather than to improperly effect such an amendment through an opinion of this Court.” *Id.*

Here, the UPA expressly sets forth in unambiguous terms when life insurance proceeds become “presumed abandoned,” and when they must be reported and paid to the administrator. W. Va. Code §§ 36-8-2(a)(8), 36-8-2(c), 36-8-7, 36-8-8. The statute does not provide that life insurance proceeds are presumed abandoned three years after the date of the insured’s death; nor does the statute state anything about a duty to search the DMF. The Circuit Court properly rejected the Treasurer’s effort to rewrite the statute to create such a duty. *See Burrows*, 215 W. Va. at 675-76, 600 S.E.2d at 572-73. “Courts are not free to read into the language what is not there, but rather should apply the statute as written.” *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994). “[I]t is not for this Court arbitrarily to read into a statute that which it does not say.” *Phillips v. Larry’s Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007) (brackets, quotations, and citations omitted); Syl. Pt. 1, *Consumer Advocate*, 182 W. Va. at 156, 386 S.E.2d at 654 (“A statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”).¹⁷

¹⁷ Countless additional examples exist where courts have refused to rewrite statutes to add provisions not included by the legislature. *See also, e.g., Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1076 (2011) (“If all three [grounds for liability] were intended to be preserved [in the statute], it would be strange to mention specifically only two, and leave the third to implication.”); *Lucas v. Fairbanks Capital Corp.*, 217 W. Va. 479, 486-87, 618 S.E.2d 488, 495-96 (2005) (“Plainly, there is nothing in [W. Va. Code § 38-1-3] upon which to base a requirement that a trustee ascertain the amount of the outstanding debt prior to foreclosing on the subject property.”); *West Virginia v. General Daniel Morgan Post No. 548 Veterans of Foreign Wars*, 144 W. Va. 137, 146, 107 S.E.2d 353, 359 (1959) (“The remedy for the omission from the statute of all or any executive, legislative, judicial, or ministerial officers, other than state officers of that character, and members of the legislature, if need of a remedy there be, may be obtained from the legislature but not from the courts.”).

3. The Circuit Court's Order is supported by every other court decision addressing whether an insurer has a duty to search the DMF

Despite filing this appeal, the Treasurer has failed to cite a single case holding that an insurer has a statutory or contractual duty to search the DMF. On the other hand, the Circuit Court noted that other courts have held that insurers lack any obligation to search the DMF. Order at 8 (A.00170). Contrary to the Treasurer's argument, these cases fully support the Circuit Court's opinion. In *Andrews v. Nationwide Mutual Insurance Co.*, No. 97891, 2012 WL 5289946 (Ohio Ct. App. Oct. 25, 2012), the appellate court directly addressed whether a life insurance company had an obligation to search the DMF as a matter of contractual good faith. The court declined to create any such duty because it would "conflict with the parties' contracted terms":

It is clear from the contracts, as well as from the case law, that the standard language used places the burden on the claimant or the beneficiary to produce the proof of death. In the absence of legislative or administrative regulatory action, we will not import additional unspoken duties and obligations onto Nationwide that will conflict with the parties' contracted terms.

Andrews, 2012 WL 5289946, at *5. Although the Treasurer contends that the *Andrews* decision is distinguishable because it involved a "private claim" (Pet. Br. at 23), the Treasurer argued below that his DMF theory was supported by "the insurer's duty to deal with the policy and the payment of policy proceeds in good faith and in fairness." Plaintiff's Omnibus Opposition to Defendants' Motion to Dismiss at 16 (A.00088). The appellate court in *Andrews* squarely held that there is *no requirement* arising under the insurance contract that would compel an insurer to conduct searches of the DMF.

In *Total Asset Recovery Services, LLC v. Metlife, Inc.*, Case No. 2010-CA-3719 (Fla. Cir. Ct. Aug. 20, 2013), the plaintiff brought suit on behalf of the State of Florida against several insurers, including Prudential, claiming that the insurers failed to escheat life insurance proceeds

allegedly due the State of Florida pursuant to Florida's unclaimed property law. *See* Order Granting Prudential Financial, Inc's Motion to Dismiss at 4 (A.01376). The court held that Total Asset Recovery ("TARS") failed to establish that the unclaimed property law imposed any obligation on Prudential to search the DMF in fulfilling its reporting obligations:

TARS has not alleged facts showing the occurrence of either of the two statutory conditions specified in [Section 717.107, Fla. Stat. (Disposition of Unclaimed Property, Funds Owing Under Life Insurance Policies)] as to any Prudential life insurance policy. Florida has not adopted a law requiring Prudential to consult the Death Master File, averred by TARS, in connection with payment or escheatment of life insurance benefits. Likewise, Florida has adopted no law imposing an obligation on Prudential to engage in elaborate data mining of external databases. . . in connection with payment or escheatment of life insurance benefits.

Order at 4. Similarly, West Virginia "has adopted no law" imposing an obligation to search external databases for deceased insureds.

The Circuit Court also cited the federal district court's decision in *Feingold v. John Hancock Life Insurance Co. (USA)*, No. 13-10185, 2013 WL 4495126 (D. Mass. Aug. 19, 2013), *aff'd*, 753 F.3d 55 (1st Cir. 2014). Order at 15 (A.00177). In *Feingold*, the plaintiff had argued that John Hancock acted unreasonably in failing to utilize the DMF to determine whether the plaintiff's mother, a Hancock insured, had died. Plaintiff sought declaratory relief requesting that Hancock be required to use the DMF or other reasonably available systems to identify unclaimed property. The district court held that under "established principles of insurance law," an insurance policy "may require a beneficiary to furnish 'due proof of loss,' in this case proof of death, before paying policy proceeds." 2013 WL 4495126, at *2. Consequently, the court held that Hancock's practice of requiring proof of death before paying life insurance proceeds comported with both Massachusetts and Illinois law. After the Circuit Court's Order, the U.S. Court of Appeals affirmed the district court in *Feingold*, holding that the plaintiff failed to

identify any source “whether it be a statute or common law, that requires Hancock proactively to search public death records for policyholders’ names rather than wait for submission of proof of death in accordance with its insurance policy provisions.” *Feingold*, 753 F.3d at 61 n.6.

Recently, on August 5, 2014, the Florida First District Court of Appeal addressed the issue of whether the 1981 Uniform Unclaimed Property Act (the “FL Act”) created a duty on the part of life insurers to search the DMF. In *Thrivent Financial for Lutherans v. Florida Dep’t of Fin. Services*, No. 1D13-5299, 2014 WL 3819476 (Fla. 1st Dist. Ct. App. Aug. 5, 2014), the Florida Department of Financial Services (“DFS”) had issued a declaratory statement taking the same position as the Treasurer here. The DFS had ruled that life insurance proceeds were “due and payable” immediately upon the insured’s death, “at which time the dormancy period is automatically triggered,” creating “an affirmative duty on insurers to use due diligence in searching databases, such as the Social Security Administration’s Death Master File, in order to determine if any of its insureds has died.” *Id.* at *2. The appellate court reversed, holding that the DFS’s interpretation of the FL Act was “clearly erroneous because it ignores the plain language of the statute.” *Id.* at *1.

The court held that “[n]othing in the plain language of the [the FL Act] supports DFS’ interpretation that funds become ‘due and payable’ at the moment the insured dies.” *Id.* at *2. Moreover, the court noted that, “if life insurance funds were automatically ‘due and payable’ at the time of death ... that would render meaningless subsection (3) [of Fla. Stat. § 717.107], which provides alternative means by which a contract ‘not matured by actual proof of the death’ may be ‘deemed matured and the proceeds due and payable.’” *Id.*¹⁸ Like the Circuit Court here,

¹⁸ Among other things, subsection (3) of Fla. Stat. § 717.107 provides that a life insurance policy that is “not matured by actual proof of the death of the insured ... is deemed matured and the proceeds due and payable if” the insured “attain[s], or would have attained if he

the *Thrivent* court also soundly rejected the state’s argument that insurers were required to search external databases for deceased insureds:

Finally, DFS argues this court should impose an affirmative duty on insurers to search death records in order to ascertain whether any insured has died. At oral argument, DFS indicated that insurers could fulfill this duty by searching databases such as Google, LexisNexis, or the Death Master File. However, nothing in the plain language of [the FL Act] imposes an affirmative duty on insurers to search these death records. DFS asks this court to rewrite the statute based on policy considerations. However, “this Court may not rewrite statutes contrary to their plain language.” *Hawkins v. Ford Motor Co.*, 748 So.2d 993, 1000 (Fla. 1999). “[P]olicy concerns ... must be addressed by the Legislature.” *Id.*

Thrivent, 2014 WL 3819476, at *3. The *Thrivent* court’s decision, and those of the other courts that have addressed the issue, strongly support the Circuit Court’s decision that no statutory duty exists under current law obligating an insurer to search the DMF or other databases.¹⁹

4. The Treasurer’s reliance on subsection (e) of Section 36-8-2 is misplaced and does not create a duty to search the DMF

Without any supporting case law, the Treasurer attacks the Circuit Court’s Order with a convoluted argument based on subsection (e) of Section 36-8-2.²⁰ *See* Pet. Br. at 19-22. The Treasurer relies on this subsection to argue that life insurance benefits become “due and payable”

or she was living, the limiting age under the mortality table on which the reserve is based.” Fla. Stat. § 717.107(3) (emphasis added).

¹⁹ Xerox Unclaimed Property Clearinghouse (“Xerox”) filed an *amicus* brief in this appeal relying heavily on the now-reversed declaratory statement issued by the DFS in *Thrivent*. Xerox Amicus Br. at 6-10. Xerox also cited to *Chiang v. American Nat’l Ins. Co.*, No. 34-2013-000144517 (Cal. Super. Ct. Oct. 9, 2013), a California trial court opinion which provides no useful statutory analysis and simply grants a preliminary injunction, in the nature of a motion to compel production of documents, ordering a company to participate in an unclaimed property examination. This case does not involve a company’s refusal to participate in an examination under the UPA, and *Chiang* is irrelevant.

²⁰ Subsection (e) provides: “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.” W. Va. Code § 36-8-2(e).

immediately upon the death of the insured and are presumed abandoned three years after death. The Treasurer's argument is the same argument made by the state in *Thrivent* and rejected by the court as clearly erroneous under the 1981 Uniform. See *Thrivent*, 2014 WL 3819476, at *3 ("DFS relies on section 717.102, Florida Statutes, to support its interpretation that life insurance is due and payable at the time of death, even if no claim is made.")²¹ The Circuit Court properly rejected this argument because it conflicts with the plain language of the UPA and is inconsistent with well established principles of statutory construction.

First, subsection (e) is a general rule that is not specific to insurance, and it cannot be used to rewrite the specific rule of when life insurance becomes "presumed abandoned." "A specific section of a statute controls over a general section of the statute." Syl. Pt. 4, *Porter v. Grant Cnty. Bd. of Educ.*, 219 W.Va. 282, 284, 633 S.E.2d 38, 40 (2006). Subsection (a) of Section 36-8-2 governs presumptions of abandonment, and subsection (a)(8) provides the specific rule for life insurance:

(a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below *for the particular property*:

* * *

(8) Amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, 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) (emphasis added). On the other hand, subsection (e), which appears at the end of Section 36-8-2, does not even mention life insurance. Moreover, the Treasurer's proposed use of subsection (e) (to create a rule that life insurance is presumed abandoned three

²¹ Section 717.102 of the FL Act contains virtually the same language as subsection (e) of W. Va. Code § 36-8-2. See *Thrivent*, 2014 WL 3819476, at *3 (quoting Fla. Stat. § 717.102(2)).

years after the insured's death) would rewrite § 36-8-2(a)(8) beyond recognition, and render the "limiting age" presumption of abandonment meaningless.

Following well established principles of statutory construction, the Circuit Court correctly rejected the Treasurer's erroneous reasoning:

"The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Here, the Legislature spoke clearly and unambiguously when it specifically defined "property" arising from life insurance as "an amount due and payable under the terms of an ... insurance policy," and further defined when life insurance proceeds were "presumed abandoned." Therefore, life insurance proceeds are reportable when they become presumed abandoned under W. Va. Code § 36-8-2(a). Any attempt to rewrite the statute by creating a new category of presumed abandoned property should be addressed to the Legislature and not to the Court.

Order at 11 (A.00173) (citation omitted); *see also Thrivent*, 2014 WL 3819476, at *3 ("Section 717.102 is titled a 'general rule,' but that general rule does not control over section 717.107, which deals specifically with '[f]unds owing under life insurance policies.'").

In addition, not only is subsection (e) merely a general rule, but as the Circuit Court noted, "§ 36-8-2(e) does not purport to change the definition of property as it relates to life insurance proceeds or to override the Insurance Code." Order at 10 (A.00172). Contrary to the Treasurer's suggestion, there is no "evidence" (*see* Pet. Br. at 21) that this provision was intended to create a new rule that life insurance becomes presumed abandoned three years after the date of the insured's death.²² Subsection (e) makes no effort to amend the time when

²² Nowhere in the Comment to Section 2 of the 1995 Uniform Act do the drafters remotely suggest that they intended to change the trigger for the presumption of abandonment for life insurance to the date of the insured's death. *See* Uniform Unclaimed Property Act (1995), National Conference of Commissioners on Uniform State Laws, Comment to § 2 at 10-11 ("1995 UPA Comments") (Section 2 "provides in a single section for all the various periods of abandonment that were separately stated in several sections of the 1981 Act. With limited exceptions this reorganization does not alter the bases for presuming abandonment of the

particular property is presumed abandoned, which is set forth in subsection (a). Read in context, subsection (e) simply makes clear that, if property is otherwise “presumed abandoned,” it is still reportable “notwithstanding the owner’s failure to make demand or present an instrument or document otherwise required to obtain payment.” W. Va. Code § 36-8-2(e). *See* 1995 UPA Comments at 12 (“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.”) (emphasis added).

Finally, the Treasurer seeks support for his DMF theory in the U.S. Supreme Court’s decision in *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), which is cited within the comments to the 1995 Uniform Act. *See* Pet. Br. at 21-22. *Moore* arose from a challenge to the constitutionality of Article VII of the New York Abandoned Property Law, which was enacted in 1943. The narrow issue before the Court was the constitutionality of the Abandoned Property Law as applied to policies of life insurance that were issued for delivery in New York on the lives of residents of New York by companies incorporated in other states. *Moore*, 333 U.S. at 542. The Court upheld the New York law against a challenge under the Contracts Clause, but nothing in the decision imposes any obligation on an insurer to affirmatively determine whether an insured is deceased prior to receiving any notice of death. *Moore* does not change the plain meaning of the statute, nor does it have any bearing on *when* life insurance benefits become presumed abandoned under the UPA.

property from that established in the 1981 Act, but merely restates those standards in a unified section, more easily applied, with less repetition.”).

C. The Circuit Court Correctly Rejected The Treasurer’s Arguments That Life Insurers Are Required To Search External Databases For Deceased Insureds Based Upon A Statutory Obligation Of “Good Faith”

1. The UPA does not create a good faith duty to search the DMF

The Circuit Court correctly held that “there is no provision in the UPA which specifically requires life insurance companies to use the DMF.” Order at 12 (A.00174). Unable to point to any language in the Act that obligates an insurer to affirmatively search the DMF for deceased policyholders, the Treasurer instead attempts to craft a new obligation based on “good faith.” According to the Treasurer, the source of this “good faith” is Section 36-8-10(a). Pet. Br. at 25. “Under this provision,” the Treasurer argues, “it is clear that good faith and reasonableness are required in the searching, reporting and payment of unclaimed property under the Act.” *Id.* The Treasurer contends that the reference to “good faith” in section 36-8-10(a) applies to “this article,” which is “the entire Act.” *Id.* The Circuit Court properly rejected this argument.

First, a plain reading of section 36-8-10 reflects that it is entirely irrelevant. Section 36-8-10 provides that “[a] holder *who pays or delivers property to the administrator in good faith* is relieved of all liability arising thereafter with respect to the property.” W. Va. Code § 36-8-10(b) (emphasis added). This section also requires the administrator to indemnify a holder from certain third party claims if the holder pays or delivers property to the administrator in good faith. W. Va. Code § 36-8-10(f). Section 36-8-10 has absolutely nothing to do with “searching” the DMF. Indeed, this section does not use any version of the word “search” and does not purport to address the searching of anything. Section 36-8-10 does not come close to creating an obligation for life insurance companies to search the DMF.

Second, the argument that the phrase “good faith” in § 36-8-10(a) imposes some kind of universal good faith requirement applicable to “the entire Act” is frivolous. Pet. Br. at 25. Section 36-8-10 begins with the statement: “*In this section, payment or delivery is made in*

‘good faith’ if” W. Va. Code § 36-8-10(a) (emphasis added). The remainder of Section 36-8-10(a) establishes three conditions that must be satisfied in order for “*payment or delivery*” to be deemed made in “good faith” for purposes of “this section.” W. Va. Code § 36-8-10(a) (emphasis added). One of those conditions is that “the payment or delivery was made in a reasonable attempt *to comply with this article.*” W. Va. Code § 36-8-10(a)(1) (emphasis added). The reference to compliance with “this article” plainly applies to the “payment or delivery” for purposes of establishing “good faith” *under Section 36-8-10*. There is no basis for arguing that this section creates some kind of “good faith” requirement to comply with every section of the UPA.²³ As the Circuit Court found, “§ 36-8-10 creates a standard of good faith *for a very specific purpose* – namely relieving a holder from liability when they make a good faith effort to comply with the UPA.” Order at 13 (A.00175) (emphasis added).

More fundamentally, the Treasurer’s proposed “good faith” obligation to search the DMF makes no sense because there is no statutory reason *why* an insurer would need to search the DMF in order to properly report unclaimed life insurance benefits. An insurer is only required to report life insurance proceeds that are “presumed abandoned” as defined under Section 36-8-2(a)(8). The death of an insured does not trigger the three year dormancy period under § 36-8-2(a)(8) applicable to life insurance, and life insurance does not become “presumed abandoned” three years after the date of death. The Treasurer’s proposed requirement to search the DMF is based on an attempt to *create* a new category of presumed abandonment, not to search in good faith for property which is defined as presumed abandoned under current law. The Circuit Court properly held “that there is no good faith requirement in the UPA that requires insurance

²³ The UPA contains a “Definitions” section where terms are defined for purposes of the entire Act. *See* W. Va. Code § 36-8-1 (defining terms “[a]s used in this article”). “Good faith” is not included in § 36-8-1.

companies to search the DMF or other third-party database to determine when an insured has died.” Order at 15 (A.00177).

2. The NCOIL Model Act and recent enactment of DMF legislation by numerous states belie the Treasurer’s arguments

In light of recent legislative developments, the Treasurer’s argument that the existing UPA contains a legal duty requiring life insurers to search the DMF is disingenuous. In 2011, the National Conference of Insurance Legislators (“NCOIL”), *see supra* note 5, adopted the Model Act. The Model Act contains provisions requiring insurers to periodically compare the insureds under their in-force life insurance policies against the DMF. There would have been no need for the Model Act if, as the Treasurer argues, existing law already required DMF searching. At least fifteen states have recently enacted a variation of the Model Act or other similar DMF legislation, and at least three additional bills are pending in other states. *See supra* note 6. As noted by the Circuit Court, “[f]ive of the states enacting this new DMF legislation—Alabama, Nevada, New Mexico, Montana, and Vermont—like West Virginia, operate under the 1995 Uniform Unclaimed Property Act. Such legislation would be redundant or unnecessary if a duty to search already existed in the UPAs adopted by these states.” Order at 16 (A.00178) (footnote omitted).²⁴

D. The Circuit Court Correctly Held, As A Matter Of Law, That The UPA Does Not Require A Life Insurer To Search The DMF, And As A Result, Properly Dismissed The Complaints In Their Entirety

The Treasurer does not dispute that the question of whether a life insurer has a statutory duty under the UPA to search the DMF (or other third party database) is a question of law for the Court. The Treasurer’s brief, however, criticizes the Circuit Court for focusing “only” on “the

²⁴ Since the Circuit Court Order, a sixth state operating under the 1995 Uniform Unclaimed Property Act has also enacted DMF legislation. *See* 27 Vt. Stat. Ann. § 1244a (eff. July 1, 2013).

issue of the duty to investigate the death of policyholders via the DMF or another related database.” Pet. Br. at 13, 28. According to the Treasurer, the complaints should not have been dismissed in their entirety because they contained other “broad allegations” that the defendants were failing to comply with the Act. Pet. Br. at 14, 29. The so-called “broad allegations,” identified by the Treasurer, however, are nothing more than conclusory legal allegations *based on the alleged failure to search the DMF*.

For example, the Treasurer contends that the complaints “broadly allege” that defendants violated the UPA by (1) failing to use prudent procedures to “fully identify all West Virginia unclaimed insurance policy proceeds,” (2) failing to “truthfully comply with the reporting requirements” of the UPA, and (3) failing “to make good faith and commercially standard payments” under the UPA by “failing to report the full extent of unclaimed life insurance proceeds.” Pet. Br. at 5; *id.* at 29 (alleging “untruthful reports”). However, the only *facts* alleged to support these purported violations of the UPA are that the defendants have a legal obligation to search the DMF and have failed to conduct annual DMF searching. The complaints allege that, “[a]s a result of the failure to use readily available information [from the DMF],” the defendants violated the Act by not paying over money that “rightfully should have been paid to the West Virginia Unclaimed Property Fund,” and by filing inaccurate reports under the Act. Complaint ¶¶ 25-26 (A.1208) (emphasis added). No other factual basis is offered to support these allegations. Because the Circuit Court properly rejected the Treasurer’s only legal theory, the complaints were properly dismissed as a matter of law.

Notwithstanding rejection of his only liability theory, however, the Treasurer argues that dismissal of the complaints “prior to allowing any discovery” was not proper. Pet. Br. at 28. But the Treasurer articulates no reason how discovery could affect the legal conclusion that life

insurers have no statutory duty to search the DMF for deceased insureds. In addition, the Treasurer never served or requested any discovery, and never articulated any plausible basis as to why discovery would produce facts supporting his legal theory of liability. The Treasurer's belated attempt to save his complaints with a demand for discovery does not satisfy the legal standard set forth by this Court in *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996).²⁵

V. CONCLUSION

For the reasons set forth above, the Circuit Court was entirely correct in deciding as a matter of law that life insurance companies have no legal duty under the UPA to search the DMF (or other third party databases). The Circuit Court's Order should be affirmed in all respects.

**MONUMENTAL LIFE INSURANCE
COMPANY and TRANSAMERICA LIFE
INSURANCE COMPANY**



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²⁵ In *Harrison*, this Court held that, “where a plaintiff opposes a Rule 12(b)(6) motion to dismiss and claims that discovery would enable him or her to oppose such a motion, the plaintiff may request a continuance for further discovery pursuant to Rule 56(f).” *Harrison*, 197 W. Va. at 662-63, 478 S.E.2d at 115-16. In order to succeed on such a claim, “the plaintiff must, at a minimum, ‘(1) articulate some plausible basis for the [plaintiff’s] belief that specified “discoverable” material facts likely exist which have not yet become accessible to the [plaintiff]; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.’” *Id.* (citation omitted).

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

JOHN D. PERDUE, Plaintiff Below,

Petitioner,

vs.

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

Respondents.

CERTIFICATE OF SERVICE

I, Bruce M. Jacobs, hereby certify that on August 13, 2014, I served a true and correct copy of the foregoing Respondents' Brief of Monumental Life Insurance Company and Transamerica Life Insurance Company via First Class U.S. mail, postage prepaid, upon the counsel and/or parties of record as shown on the attached list.



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