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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0100

STATE OF WEST VIRGINIA ex rel. JOHN D. PERDUE

Plaintiff Below, Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY, et al.,

Defendants Below, Respondents

Hon. Joseph Reeder, Judge
Circuit Court of Putnam County
Civil Action Nos. 12-C-287, etc.

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This lawsuit is yet another in a series of litigations premised on the incorrect theory that state unclaimed property laws require life insurers to cross-reference their millions of policy records against the Social Security Administration's Death Master File ("DMF") to determine whether any insureds might have died for the purpose of escheating unclaimed funds to the state. Every court that has addressed the question, including the court below, has concluded that state unclaimed property laws do not impose any such obligation on life insurance companies.

Petitioner John Perdue, Treasurer of the State of West Virginia ("Treasurer" or "Petitioner"), filed suit against sixty-nine life insurance companies[1] doing business in the State of West Virginia ("Respondents") on the same theory, namely that the insurers violated West Virginia's Unclaimed Property Act, W. Va. Code §§ 36-8-1, *et seq.* (the "UPA"), by failing to search the DMF for potentially deceased insureds. The complaints - which are identical except for the name of the defendant and its market share - request fines, penalties, interest, attorney fees, and an injunction. (A.R. at 00165).

The Treasurer's theory has no support in the text of the UPA and directly conflicts with the West Virginia Insurance Code, W. Va. Code, §§ 33-1-1 *et seq.* (the "Insurance Code"), which governs the highly regulated insurance industry in West Virginia and makes clear that life insurance companies have no obligation to pay policy proceeds until a beneficiary has submitted a claim and due proof of death. Respondents moved to dismiss, and the Circuit Court correctly dismissed the Treasurer's complaints with prejudice, observing that it is not the province of the

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[1] This brief is submitted on behalf of Respondent Nationwide Life Insurance Company and other Respondents listed in Exhibit A to this brief.

courts "to read into the language" of a statute "what is not there." (A.R. at 00166). Petitioner now appeals.

B. THE CIRCUIT COURT'S ORDER

The Circuit Court, as it must on a motion to dismiss, construed the complaints' allegations in a light most favorable to the Treasurer, but ruled that whether the UPA imposes the duties ascribed to it by the Treasurer is a question of law. (A.R. at 00165-00166). The Circuit Court held: (1) under the UPA's life insurance provisions, property is "presumed abandoned" either "three years after the obligation to pay arose" or "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;"[2] (2) the question of when an "obligation to pay" arises under a life insurance policy is governed by the Insurance Code, which provides that "settlement shall be made upon receipt of due proof of death;"[3] (3) under this Court's established *in pari materia* doctrine, the UPA and Insurance Code should be read and applied together because they concern the same subject matter; and (4) interpreting the UPA in accordance with its own provisions and in light of the Insurance Code and applicable case law, "there is no 'property' subject to or reportable under the UPA until the beneficiary has made a valid claim and submitted proof of death or the insured obtains the limiting age." (A.R. 00167-00172).

In making its ruling, the Circuit Court properly rejected the Treasurer's arguments:

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[2] The "limiting age" is the age at which an insurance company presumes that an insured person is deceased, as determined by the applicable mortality table. *See* W. Va. Code § 36-8-2(8).

[3] *See Petrice v. Federal Kemper Ins. Co.*, 163 W. Va. 737, 739-40, 260 S.E.2d 276, 278 (1979) (in auto insurance context, "the furnishing of a proof of claim" is a "condition precedent to recovery").

First, it properly rejected his argument that the Circuit Court should ignore the *in pari materia* rule of statutory construction and exclude from its consideration the provisions of the Insurance Code establishing when life insurance proceeds become the "property" of beneficiaries. The Circuit Court observed that this Court "has consistently held that '[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.'" (A.R. 00169 (citation omitted)). Accordingly, the Circuit Court appropriately read the Insurance Code and the UPA "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," (A.R. at 00169), and concluded that the "the obligation to pay" is dictated by the provisions of the Insurance Code and that such an obligation arises only upon receipt of a claim and due proof of death. *Id.*

Second, the Circuit Court correctly rejected the Treasurer's argument that it should read into the UPA a general "good faith" requirement that obligates life insurers to adopt reasonable commercial standards of practice which include searching the DMF to identify deceased insureds. The Circuit Court held that the statutory reference to "good faith" identified by the Treasurer, W. Va. Code § 36-8-10, is limited to circumstances in which a life insurance company seeks to be relieved from liability for erroneous but good-faith delivery of policy proceeds to the Treasurer:

> . . . W. Va. Code § 36-8-10 creates a standard of good faith for a very specific purpose — namely relieving a holder from liability when they make a good faith effort to comply with the UPA. The Legislature's express limitation of this "good faith" standard to "this section" of the UPA evidences that intent. Moreover, establishing "good faith" would be relevant as an affirmative defense necessary for the insurance company to secure the benefits provided for in W. Va. Code § 36-8-10. Hence, the Court is not

> persuaded that this specific provision creates a general "good faith" requirement applicable throughout the entire UPA.

(A.R. 00175) (footnote omitted). In other words, there is absolutely nothing in the UPA to support any rational conclusion that the Legislature intended to impose a general "good faith" standard on life insurance companies arising from language limited to circumstances where a holder seeks immunity for the erroneous transmittal to the Treasurer of unclaimed property.

The Circuit Court also denied the Treasurer's request to take discovery because the Circuit Court's legal determination that the UPA does not impose a duty to search the DMF or other similar third-party databases extinguished any basis for factual inquiry by the Treasurer.

Accordingly, because the Circuit Court concluded that the case "rises or falls on a single question – whether a legal obligation exists under the UPA to search the DMF or other third-party databases to determine an insured under a life insurance policy has died" – and because the Circuit Court found that no such legal obligation existed, it dismissed the Treasurer's Complaints with prejudice. (A.R. 00180).

II. SUMMARY OF ARGUMENT

The Circuit Court correctly held that the UPA imposes no duty to search the DMF or other third-party databases to determine whether an insured under a life insurance policy has died. (A.R. 00180). For several reasons, this conclusion was based on a proper construction of West Virginia's statutory scheme governing life insurance policies and unclaimed property and should be upheld by this Court.

First, as the Circuit Court held, the provisions of the UPA addressing escheatment of life insurance proceeds expressly incorporate insurance principles, including policy terms, to determine when life insurance proceeds become the "property" of a beneficiary. The UPA

defines "property" to include proceeds "due and payable under the terms of an annuity or insurance policy." (*See* (A.R. 00172-00173; W. Va. Code § 38-6-1(13)(vi)). Applying the established doctrine of *in pari materia*, under which statutes addressing the same subject matter – here, the question when insurance proceeds become a beneficiary's "property" – must be read together, the Circuit Court appropriately looked to the Insurance Code in determining when proceeds become payable "under the terms of an annuity or insurance policy" within the meaning of the UPA. *Id.* The Circuit Court correctly concluded that the Insurance Code dictates the claims provisions that must be included in every policy issued in West Virginia and conditions payment of life insurance proceeds on receipt of a claim and due proof of death. The Circuit Court further concluded that the terms of the UPA with regard to escheatment of life insurance proceeds are consistent with the Insurance Code. (A.R. at 00169). By expressly providing that life insurance proceeds are "property" under W. Va. Code § 36-8-1(13), reportable only three years after they became "due and payable under the terms of a . . . policy," the UPA expressly contemplates that the insurance policy terms dictate when proceeds become unclaimed and policy terms likewise are mandated by the insurance laws.

The Treasurer attempts to circumvent this statutory definition by transforming it from an obligation on the part of the claimant into an obligation on the part of the insurer, arguing that mere access to the DMF is sufficient notice of a claim to make proceeds "due and payable." Such a reading runs contrary to established law requiring life insurance beneficiaries to submit proof of death before payment. Moreover, there is nothing in the UPA, which was enacted more than 10 years after the DMF was created and 40 years after the Insurance Code was enacted, indicating any intention to override the Insurance Code. No other court has interpreted a state's

similar unclaimed property law as containing a requirement to search the DMF, and fifteen state legislatures have taken actions explicitly to amend their insurance or unclaimed property statutes to institute new requirements that insurance companies undertake DMF searches.

Seeking to read into the statutory scheme an obligation to search the DMF, the Treasurer argues that a single provision providing that "[p]roperty 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), displaces the due proof of death requirement for all purposes under the UPA. The Treasurer's argument ignores that W. Va. Code § 36-8-2(e) applies only to "property" as defined in the UPA – meaning, in the life insurance context, amounts "due and payable under the terms of a[] . . . policy" – and cannot be read to create an exception to that definition. Further, the Treasurer's reading runs afoul of the canon of statutory construction that meaning should be given to all provisions of a statutory scheme. The Treasurer's suggested interpretation would, in contradiction to insurance law and insurance policies, obligate a life insurer proactively to determine which insureds may have died, thus eliminating the well-established requirement that a claimant provide due proof of death to obtain payment. In addition, the Treasurer's interpretation risks rendering superfluous W. Va. Code § 36-8-2(a)(8) of the UPA, under which life insurance proceeds are presumed abandoned – even where no due proof of death has been received – three years after the limiting age has been reached. This section, which clearly contemplates cases in which no claim is ever submitted, could become obsolete if the statute as written required companies to conduct annual DMF searches to determine whether any insured had died. The Treasurer's reading cannot be squared

with West Virginia's statutory and regulatory scheme requiring claimants to submit a claim and due proof of death to receive life insurance proceeds.

Second, the Circuit Court properly considered persuasive authority from courts outside West Virginia that have considered, but rejected, similar arguments that a life insurer has a duty to search the DMF. These courts, interpreting unclaimed property laws similar to the UPA, have uniformly rejected claims that unclaimed property law imposes on insurers a duty to search the DMF or other similar third-party databases. The Treasurer's attempts to distinguish some of those decisions on the grounds that they involved "individuals," rather than a state official, are wholly unavailing since the underlying legal principles those courts applied in rejecting a DMF search requirement do not vary based on the identity of the plaintiff. (Pet. Br. at 23).

Third, as the Circuit Court correctly determined, the UPA contains no good-faith requirement to search the DMF. By its plain language, the good-faith standard articulated in the UPA is limited to a context not relevant here, that of "relieving a holder from liability when they make a good faith effort to comply with the UPA." (A.R. 00175). The Treasurer's assertion that the Legislature "expressly included good faith compliance for the whole Act" (Pet. Br. at 26) – and thus imposes on insurers an unnamed duty to search the DMF – is wholly unsupported by the text of the statute or any case law. The Circuit Court thus correctly declined to create from W. Va. Code § 36-8-10's limited provision a broad duty of good faith that imposes substantive requirements not specified anywhere in the statute.

Finally, because the Treasurer's lawsuit was based on a fundamentally flawed interpretation of the UPA, the Circuit Court properly dismissed his actions with prejudice and without opportunity for discovery. Because this case hinges on the purely legal question of

whether the UPA imposes on life insurers a duty to search the DMF or other third-party database to determine whether an insured has died, there were no "broader" issues that the Circuit Court ignored, and the Treasurer was not entitled to discovery.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although the issues presented by the Treasurer's appeal may involve issues of first impression in West Virginia, they are not issues of first impression in this area of law, as other courts have considered and rejected the Treasurer's arguments. The Treasurer's statement that its suits involve "substantial sums of taxpayer funds" (Pet. Br. at 14) is also incorrect. The policies at issue here are private life insurance policies. Three years after the date an individual insured would have reached the limiting age but no proof of death has been submitted, or three years after the date due proof of death was submitted but no beneficiary located, policy funds are paid into the unclaimed property fund for the benefit of the intended private beneficiaries of those policies, not for the State's benefit.

In any event, although the Treasurer's appeal could be resolved by the simple application of well-settled rules of statutory interpretation to the plain language of the UPA - either supporting resolution of the case without argument or limited argument under Rule 19 - Respondents do not oppose argument under Rule 20 if the Court so desires.

IV. ARGUMENT

A. STANDARD OF REVIEW

All three of the Treasurer's assignments of error involve issues of statutory interpretation. Either the UPA imposes the duties asserted by the Treasurer or, as the Circuit Court held in dismissing the Treasurer's complaints, it does not. Accordingly, the standard of

review is *de novo*. Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995); *see also* Syl. pt. 2, *State* ex rel. *McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.").

B. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT UNDER WEST VIRGINIA'S COMPREHENSIVE STATUTORY SCHEME, LIFE INSURANCE PROCEEDS BECOME PAYABLE ONLY AFTER LIFE INSURANCE COMPANIES RECEIVE A CLAIM AND PROOF OF DEATH AND THAT LIFE INSURANCE COMPANIES ARE NOT REQUIRED TO SEARCH THE DMF.

The Treasurer seeks to overturn established law by imposing on life insurers a duty to search for potentially deceased insureds and to use the results of those searches to report life insurance proceeds as abandoned property. The Circuit Court correctly held that this alleged duty has no basis in West Virginia's UPA and is inconsistent with West Virginia law generally.

The Treasurer's appeal requires this Court to address the dual legal questions of when life insurance proceeds become the "property" of a beneficiary and when such property can be said to be "abandoned." The former question is governed by the West Virginia Insurance Code, which is the primary source of law governing the highly regulated insurance industry in West Virginia. The latter question is governed by the West Virginia UPA, which explicitly refers to the terms of – and obligations arising under – life insurance policies. This Court "has consistently held that '[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.'" (A.R. 00169) (quoting Syl. pt. 3, *Univ. Commons Riverside Home Owner's Ass'n, Inc. v. Univ. Commons Morgantown, LLC*, 230 W. Va. 589, 741 S.E.2d 613 (2013) (internal citation omitted)).

Under settled law, an insurance company has no obligation to pay the proceeds of a life insurance policy unless and until a beneficiary provides the insurer with notice and "due proof of death"[4] – typically, a death certificate. The Insurance Code, the Unfair Trade Practices Act, and the UPA all incorporate this established principle. The Treasurer's attempt to impose a duty on life insurers to search the DMF for potentially deceased insureds is contrary to West Virginia's comprehensive statutory scheme for life insurance providers, the elements of which must be read and applied together. The plain language of the UPA, read in light of that statutory scheme, makes clear that the life insurance proceeds at issue in this case are neither "property" nor "abandoned" within the meaning of the UPA.

1. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT WEST VIRGINIA INSURANCE LAW DOES NOT REQUIRE USE OF THE DMF.

The Insurance Code provides that "settlement [of a life insurance policy] 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." W. Va. Code § 33-13-14. The Code requires insurers doing business in the state to include this provision in all life insurance policies sold in West Virginia and requires such policies to be pre-approved by the West Virginia Insurance Commissioner.[5] As the statute makes clear, "the furnishing of a proof of claim" is a "condition precedent to recovery." *Petrice v. Federal Kemper Ins. Co.*, 163 W. Va. 737, 739-40, 260 S.E.2d 276, 278 (1979); *see also Hanford v. Met. Life Ins. Co.*, 131 W. Va. 227, 237, 46 S.E.2d 777, 782

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[4] W. Va. Code § 33-13-14.

[5] W. Va. Code §§ 33-13-14, 33-6-8; *see also* 33-13-2 ("No policy of life insurance . . . shall be delivered or issued for delivery in West Virginia unless it contains in substance all of the provisions required by sections three to fifteen . . . .").

(1948) (in case of claim for benefits under total disability provisions of life insurance policy, "furnishing of [due proof] is a condition precedent to the liability of the insurer to pay the disability benefits under the policy").

The Circuit Court correctly concluded that W. Va. Code § 33-13-14 "conditions an insurer's liability upon the presentation of a claim, which requires that a claimant provide an insurer with notice giving rise to liability under a policy." (A.R. 00168). Contrary to the Treasurer's unsupported assertion (Pet. Br. at 18), the purpose of requiring proof of a claim is not to protect the policyholders and their beneficiaries but rather "to allow the insurer to adequately investigate the claim and to formulate an estimate of its liabilities." *Petrice*, 163 W. Va. at 739, 260 S.E.2d at 278; *see also Crotty v. Union Mut. Life Ins. Co.*, 144 U.S. 621, 626 (1892) (due proof of death is notice that "put[s] the insurance company in possession of the facts concerning the death or loss as claimed by the beneficiary or insured upon which it is to base its determination as to making or refusing payment . . ."). As such, the requirement that a claim be presented may be waived only by the insurer. *Cf. Gill v. Provident Life & Accident Ins. Co.*, 131 W. Va. 465, 469, 48 S.E.2d 165, 168 (1948) ("[P]rovision which requires indorsement of a change of beneficiary is for the benefit and the protection of the insurer and may be waived by the insurer.").

Notably, the Ohio Court of Appeals and the United States Court of Appeals for the First Circuit recently invoked virtually identical statutory language in the Ohio and Illinois insurance codes to reject claims that life insurance companies had an obligation to search the DMF. *Andrews v. Nationwide Mut. Ins. Co.*, No. 97891, 2012 WL 5289946, at *1 n.1, *4 (Ohio Ct. App. Oct. 25, 2012), *further appeal denied*, 135 Ohio St. 3d 1415, 986 N.E.2d 31 (Apr. 24, 2013) (holding

that, where Ohio Insurance Code required all policies to be payable "upon receipt of due proof of death" - language identical to West Virginia's statute - obligating a life insurance company "to solicit or gather information pertaining to an insured's death would be contrary to the terms contained in the insurance policy"); *Feingold v. John Hancock Life Ins. Co. (USA)*, No. 13-cv-10185, 2013 WL 4495126, at *2 (D. Mass. Aug. 19, 2013) (memorandum decision) ("John Hancock's practice of requiring the life insurance policy beneficiary to submit proof of death before payment comports with both Massachusetts and Illinois law."), *aff'd, Feingold v. John Hancock Life Ins. Co. (USA)*, No. 13-2151, 753 F.3d 55 (1st Cir. May 27, 2014) (The "proof-of-death notice requirement complies with Illinois law . . . [and] is also in accord with Illinois's unclaimed property statute, which acknowledges that life insurance proceeds are not payable without proof of death."). No court has reached a contrary conclusion.

The Insurance Code provisions applicable to claim settlement practices also condition an insurer's liability upon the presentation of a claim for benefits and require that a claimant provide an insurer with notice of an occurrence giving rise to liability under a policy. *See* W. Va. Code §§ 33-11-4(9)(c), (f) (providing that an insurer must "adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies"); W. Va. Code R. § 114-14-2(2.11) (defining "claim" as a "communication *by a claimant to an insurer* or its agent which reasonably apprises the insurer or agent of an occurrence which might give rise to liability under a policy or contract of insurance") (emphasis added). This provision imposes no obligation to investigate a claim or pay policy proceeds until a claimant provides the insurer with notice of a claim.

The Treasurer attempts to turn on its head the notice-of-claim requirement by transforming it from an obligation *on the part of a claimant* to notify the insurer of a claim under a policy to an obligation *on the part of the insurer* to conduct research to identify potential claims and to notify the beneficiary. The Treasurer's theory is that mere access to the DMF – a massive and unverified database that may or may not contain information regarding an insured, much less accurate information – constitutes notification of a claim under a policy pursuant to *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 542 S.E.2d 869 (2000).[6] (Pet. Br. at 18-19). This theory is contrary to established law and unsupported by the Treasurer's own authorities. *Colonial Insurance* did not dispense with the requirement of a notice of claim as the Treasurer contends; it held only that such notice under a liability insurance policy could be provided by a person injured by a policyholder rather than the policyholder himself. 208 W. Va. at 708, 711, 542 S.E.2d at 871, 874 (cited at Pet. Br. at 18). Nor does *Colonial Insurance* stand for the proposition that an insurer has an affirmative obligation to investigate whether proceeds are payable under the policy without receipt of due proof of death. None of the other authorities on which the Treasurer purports to rely even pertains to notification of a claim, much less stands for the proposition that the very existence of this requirement – which is firmly enshrined in West Virginia law – is

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[6] The DMF contains over 89 million records of individual deaths that have been reported to the Social Security Administration. Neither the Social Security Administration nor the National Technical Information Service ("NTIS"), the authorized official provider of the DMF, guarantees the accuracy of the data it includes. NTIS provides the following disclaimer on its website: "SSA authorizes the use of this database as a death verification tool, but notes that the Death Master File (DMF) may contain inaccuracies. Thus, SSA cannot guarantee the accuracy of the DMF." U.S. Dep't of Commerce, Social Security Administration's Death Master File (DMF), available at http://www.ntis.gov/products/ssa-dmf.aspx (last visited Aug. 12, 2014). NTIS further warns that "it is possible for the records of a person who is not deceased to be included erroneously in the DMF." *Id.*

subject to question and should be discarded by having it "liberally construed in favor of the insured."[7]

Lastly, fifteen other state legislatures have recently amended their insurance or unclaimed property statutes to include a requirement that life insurers undertake periodic searches of the DMF, which further demonstrates that the imposition of such a requirement is a legislative function because it represents a change in the existing statutory scheme.[8] Given the flaws in the

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[7] Pet. Br. at 18 (citing Syl. pt. 2, *Marson Coal Co. v. Ins.*, 158 W. Va. 146, 210 S.E.2d 747 (1974) (ambiguous and irreconcilable policy terms regarding pilot's eligibility for coverage should be construed in favor of insured); *Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 21, 576 S.E.2d 261, 266 (2002) (same as to term "household"); *Gill v. Provident Life & Accident Ins. Co.*, 131 W. Va. 465, 48 S.E.2d 165 (1948) (policyholder's attempt to change beneficiary designation constituted substantial compliance); *Petrice*, 163 W. Va. at 740, 260 S.E.2d at 278 (insurer waived objection to sufficiency of policyholder's proof of loss)).

[8] *See* Ala. Code § 27-15-53 (2014) (passed May 15, 2012); Ga. Code Ann. § 33-25-14 (2014) (passed April 15, 2014); Ind. Code §§ 27-2-23 *et seq.* (2014) (passed March 25, 2014); Iowa Code Ann. § 507B.4C (passed May 30, 2104); Ky. Rev. Stat. Ann. § 304.15-420 (2012) (passed Apr. 13, 2012); Md. Code Ann., Ins. § 16-118 (2013) (passed May 2, 2012); 2014 Miss. Laws WL No. 128 (S.B. 2796) (West) (to be codified at Miss. Code Ann. § 89-12-37) (passed Mar. 24, 2014); Mont. Code Ann. §§ 33-20-1601 *et seq.* (passed Mar. 29, 2013); Nev. Rev. Stat. Ann. § 688D.090 (2013) (passed June 10, 2013); N.M. Stat. Ann. § 59A-16-7.1 (2013) (passed Apr. 1, 2013); N.Y. Comp. Codes R. & Regs. tit. 11, §§ 226.0–226.6 (2012) (eff. June 14, 2012, filed as an emergency measure); N.Y. Ins. Law § 3240(f) (2012) (passed Dec. 17, 2012); 2013 N.D. Cent. Code § 26.1-55-01 *et seq.* (2013) (passed Apr. 26, 2013); R.I. Gen. Laws §§ 27-80-1 *et seq.* (passed June 30, 2014); 2014 Tenn Laws Pub. Ch. 974 (S.B. 2516) (West) (to be codified at Tenn. Code Ann. § 56-7-3401 *et seq.*) (passed May 19, 2014); 2014 R.I. Pub. Laws Ch. 183 (H.B. 7031); 2014 R.I. Pub. Laws Ch. 209 (S.B. 2308) (to be codified at § 27-80-1 *et seq.*) (passed May 21, 2013). One state has opted not to institute a requirement through statutory amendment, but rather to promulgate a rule detailing when an insurer has knowledge that an insured has died and when the period for determining if benefits are unclaimed begins to run. *See* Idaho Admin. Code r. 54.03.01.022, "Life and Endowment Insurance Policies and Annuity Contracts" (temporary rule, eff. June 15, 2014). This rule was explicitly considered to be "a compromise position" between the proposal of the Uniform Law Commission and insurers doing business in the state. *See* Office of the State Treasurer, Notice of Rulemaking, 54.03.01 - Idaho Unclaimed Property Administrative Rules (July 11, 2014), available at http://sto.idaho.gov/Resources/Docs/IDAPA54_UCPAdministrativeRule.pdf.

These varying statutory schemes highlight the many considerations inherent in crafting a search requirement - considerations appropriately weighed by a legislative body. For example, the statutes sometimes include specific provisions addressing group life insurance, for which insurers may or may not provide recordkeeping services. *See, e.g.*, Ala. Code § 27-15-23(a)(2) (requiring confirmation of possible death with respect to group life insurance only in specific circumstances). In addition, the laws may exclude a number of policy types entirely. *See, e.g.*, Iowa Code Ann. § 507B.4C (defining "policy" to

DMF and the lack of support in West Virginia unclaimed property law and insurance law for the Treasurer's position, any decision to impose a DMF search requirement on insurers clearly lies with the legislature.[9] It should not be done, as the Treasurer urges, by a judicial re-writing of the law. As the Circuit Court correctly found, "[a]ny attempt to rewrite the statute by creating a new category of presumed abandoned property should be addressed to the Legislature, and not the Court." (A.R. 00173).

2. THE CIRCUIT COURT CORRECTLY HELD THAT THE WEST VIRGINIA UPA DOES NOT REQUIRE USE OF THE DMF.

The UPA was enacted in 1997, more than 10 years after the DMF was created and 40 years after the life insurance provisions of the Insurance Code were enacted.[10] Yet the UPA neither mentions the DMF nor articulates any intention to override the Insurance Code's well-

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exclude, *inter alia*, policies under an ERISA plan and policies of accidental death insurance). In requesting the Court to read into the UPA a requirement to search the DMF, the Treasurer neglects even to attempt to explain what kind of requirement he thinks exists, or the nuances necessary to address the varied types of life insurance policies held by West Virginians.

[9] Even amicus National Association of Unclaimed Property Administrators recognizes that the legislature is the appropriate body to institute such a change, as demonstrated by its advocacy efforts relating to proposed revisions to the 1995 Uniform Unclaimed Property Act, which it urges should (a) "clarify that the dormancy period for benefits that mature upon death begins to run on the date of death of the insured;" and (b) include a new requirement that insurers perform periodic checks of their records against the DMF." *See* Nat'l Ass'n of Unclaimed Property Administrators, Memorandum to Drafting Committee to Revise the Uniform Unclaimed Property Act, Uniform Law Commission (May 9, 2014), available at http://www.uniformlaws.org/Committee.aspx?title=Revise%20the%20Uniform%20Unclaimed%20Property%20Act (Comments – National Association of Unclaimed Property Administrators, Attachment 9).

[10] *Compare* Joint Comm. on Taxation, Technical Explanation of the Senate Comm. on Finance Chairman's Staff Discussion Draft of Provisions to Reform Tax Administration, JCX-16-13, 2013 WL 6147879, at B.1 (Nov. 20, 2013) ("The DMF was first created and published as part of a settlement of a lawsuit under the Freedom of Information Act ('FOIA'), in which an individual attempted to determine whether pension benefits were being fraudulently claimed on behalf of individuals who had died. The suit was resolved with a consent judgment entered in 1980, which remains in effect.") and W. Va. Code § 33-13-14 (effective 1957) *with* W. Va. Code § 36-8-1 (effective 1997).

established statutory scheme for determining when life insurance proceeds become the property of a beneficiary. The Treasurer's suit fails on this basis alone as West Virginia law requires that a legislative act's "plain meaning is to be accepted and applied without resort to interpretation," thereby precluding this Court from imposing new requirements on insurers. Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).

The UPA defines "property" as "a fixed and certain interest in intangible personal property." W. Va. Code § 36-8-1(13). With respect to life insurance, property is defined as "[a]n amount due and payable under the terms of an annuity or insurance policy." W. Va. Code § 36-8-1(13)(vi). The UPA provides two routes to escheatment of unclaimed life insurance proceeds: (i) amounts "owed" under a life insurance policy are presumed abandoned three years after the "obligation to pay" arose and (ii) if no claim on the proceeds is ever made, then the proceeds escheat "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) ("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").

By defining property in the life insurance context with reference to amounts "due and payable *under the terms of a[]... policy*," and by starting the dormancy clock when the "obligation to pay" arises, the UPA expressly contemplates that the terms of an insurance policy determine

when life insurance proceeds become "property" for purposes of the UPA.[11] Under these circumstances, it is entirely appropriate to incorporate established insurance law in construing the UPA. Syl. pt. 3, *State* ex rel. *Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958) ("Statutes *in pari materia* must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect."). The Circuit Court correctly concluded that whether amounts are "due and payable" under the terms of a policy, and when an "obligation to pay" arises, are "determined by the 'receipt of due proof of death' language required to be in every life insurance policy sold in the State." (A.R. 00169). In reaching this conclusion, the Circuit Court noted that the UPA was enacted nearly 40 years after the life insurance provisions of the Insurance Code. (A.R. 00169). The Circuit Court reasoned: "[I]f the Legislature had intended a standard different from 'receipt of due proof of death' [in the Insurance Code] to apply to the 'obligation to pay' standard [in the UPA], it would have done so with more specific language." (A.R. 00169).

Two Florida courts have reached the same conclusion with regard to virtually identical language in Florida's unclaimed property law. In *Thrivent Financial for Lutherans v. State of Florida, Department of Financial Services*, No. 1D13-5299 (Fl. Dist. Ct. App. Aug. 5, 2014),[12] the

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[11] The Treasurer glosses over the determinative statutory language through its conclusory assertion that "life insurance [is] one of the types of property subject to the State's jurisdiction." (Pet. Br. at 1).

[12] The opinion was issued on August 5, 2014 and will not be final until August 20, 2014. Because the amicus briefs filed in support of the Treasurer's brief extensively discuss the Florida Department of Financial Services' Declaratory Statement, Respondents believe that it is appropriate to discuss the Florida District Court of Appeal's opinion reversing that statement in this brief rather than waiting to file a supplemental document after the opinion becomes final. (*See* Amicus Curiae Brief of Xerox State & Local Solutions, Inc. d/b/a/ Xerox Unclaimed Property Clearinghouse In Support of Petitioner-Plaintiff, John D. Perdue, etc. and for reversal of the Circuit Court's Order of Dismissal ("Xerox Amicus Brief") at 6-8; Proposed Amicus Brief of National Association of Unclaimed Property Administrators in Support of

Florida First District Court of Appeal held that the Florida Department of Financial Service's interpretation of Florida's unclaimed property law to require insurers to search the DMF was clearly erroneous. Like the Circuit Court here, the Florida First District Court of Appeal held that because Florida's insurance code provided that payment of life insurance proceeds would be "made upon receipt of due proof of death and surrender of the policy," under the "plain language" of Florida's unclaimed property law, "the records of the insurance company do not establish funds as 'due and payable' under [the UPL] until the insurer receives proof of death and surrender of the policy." [13] *Id.* at *5; *accord Total Asset Recovery Servs., LLC v. MetLife, Inc.*, No. 2010-CA-3719, 2013 WL 4586450, at *2 (Fla. Cir. Ct. Aug. 20, 2013) (appeal pending) ("Florida has adopted no law imposing an obligation on Prudential to engage in elaborate data mining of external databases, such as TARS alleges it performed, in connection with payment or escheatment of life insurance benefits.").

The Treasurer attempts to avoid this conclusion by arguing that the UPA reaches all intangible property in which an owner has a "fixed and certain interest" and that the reference in the UPA's definition of property to "amounts due and payable" under a life insurance policy is merely an "example." (Pet. Br. at 17). The corollary of this argument appears to be that the Treasurer can also collect amounts that are *not* due and payable under a life insurance policy – an untenable position that would flip the entire statutory scheme governing life insurance in West

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John D. Perdue ("NAUPA Amicus Brief") at 7). Respondents will notify this Court if a motion for rehearing is filed or if the opinion becomes final.

[13] Fla. Stat. Section 717.107 provides that "(1) Funds held or owing under any life or endowment insurance policy or annuity contract which has matured or terminated are presumed unclaimed if unclaimed for more than 5 years after the funds became due and payable as established from the records of the insurance company holding or owing the funds . . . ."

Virginia and require escheatment of amounts that are not owed to any beneficiary. This argument makes no sense and is contrary to the express language of the UPA. There is no practical difference in the life insurance context between the requirement of a "fixed and certain interest" in policy proceeds and the requirement that proceeds be "due and payable" under the terms of a policy: both require that the property be owed to a beneficiary under the terms of a policy.[14] As the Circuit Court correctly held, "for life insurance proceeds, there is no 'property' subject to or reportable under the UPA until the beneficiary has made a valid claim and submitted proof of death or the insured obtains the limiting age." (A.R. 00172). The interest of a beneficiary in a life insurance policy thus becomes "fixed and certain" only upon receipt of due proof of death demonstrating that a death occurred when a policy was in force and under qualifying circumstances.

For several independent reasons, the Treasurer's argument that this straightforward interpretation "effectively removes life insurance" (Pet. Br. at 23) from the UPA reflects a lack of understanding of the life insurance claims process. *First*, life insurance proceeds may escheat prior to the limiting age in a variety of circumstances, including for example if a family member notifies the insurance company of a claim under a policy but the proper beneficiary cannot be identified or located within the dormancy period.

Second, as the Circuit Court correctly concluded, the UPA "explicitly provides a mechanism for unclaimed life insurance proceeds to be remitted" to the State in those

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[14] Furthermore, even if there were a practical difference between a "fixed and certain" interest in life insurance proceeds and amounts "due and payable" under a policy, the Treasurer's interpretation of "fixed and certain" ignores the fundamental rule of statutory construction frequently reemphasized by this Court "that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. pt. 1, *UMWA by Trumka v. Kingdon,* 174 W. Va. 330, 325 S.E.2d 120 (1984).

circumstances where no claim is submitted. (A.R. 00170). Under W. Va. Code § 36-8-2(a)(8), life 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." § 36-8-2(a)(8) (emphasis added). The Treasurer's interpretation of the UPA risks reading this language out of the statute. This Section expressly contemplates that an insured may die before reaching the limiting age without the insurance company receiving notice of the insured's death and that the insurance company's obligation to escheat arises only at the limiting age in that circumstance. However, if life insurance companies were required to search the DMF for escheatment purposes and deem it to be dispositive proof of death, this provision could become mere surplusage. *See Liberty Mut. Ins. Co. v. Morrisey*, No. 13-0195, __ S.E.2d __, 2014 WL 2695524, at *8 (W. Va. June 12, 2014) (per curiam) ("Our rules of statutory construction require us to give meaning to all provisions in a statutory scheme, if at all possible."); *see also Thrivent Financial for Lutherans*, No. 1D13-5299 at *5 ("[I]f life insurance funds were automatically 'due and payable' at the time of death under subsection 717.107(1), that would render meaningless subsection (3) which provides alternate means by which a contract 'not matured by actual proof of the death' may be deemed matured and the proceeds due and payable.").

3. THE TREASURER'S INTERPRETATION OF THE UPA IS INCORRECT AND WOULD UNDERCUT WEST VIRGINIA'S COMPREHENSIVE STATUTORY SCHEME REGARDING LIFE INSURANCE PROCEEDS.

The Treasurer also attempts to upend this entire statutory scheme through an incorrect reading of a single provision of the UPA, W. Va. Code § 36-8-2(e), which provides that "[p]roperty 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 Treasurer reads this provision to displace all other requirements based upon "due proof of death" in the UPA and the Insurance Code, arguing that it "supplies clear direction as to the insurer's duty to [sic] with respect to unclaimed property when the insured has not filed a claim" and removes any requirement that due proof of death be provided. (Pet. Br. at 19). A proper reading of the UPA, however, in accordance with the canon of statutory construction that the Treasurer urges this court to uphold, demonstrates that W. Va. Code § 36-8-2(e) is entirely consistent with the Circuit Court's holding that notice and due proof of death is required unless the limiting age is reached.

W. Va. Code § 36-8-2(e) addresses when "property" is reportable and therefore embeds the definition of "property" discussed above - *i.e.*, a "fixed and certain" interest in intangible property, including in the life insurance context proceeds that are "due and payable" under policy terms. As the Circuit Court held, life insurance proceeds are "inherently different from other types of unclaimed property" because "[t]he threshold question of whether the insurer has any liability is contingent upon the happening of an event, the occurrence of which must be proven." (A.R. 00172). A life insurer has no liability to pay unless and until the claimant shows that the insured has died of a non-excluded cause while the policy was in force and that no other defenses apply. As a result, for life insurance proceeds, "there is no 'property' subject to or reportable under the UPA until the beneficiary has made a valid claim and submitted proof of death or the insured obtains the limiting age." *Id.* By contrast, for certain other types of property addressed by the UPA, such as savings accounts and uncashed checks, ownership is not in doubt, and the term "property" is defined by sheer passage of time. W. Va. Code § 36-8-2(e)

dispenses with the need for the Treasurer to present proof of ownership to collect unclaimed savings accounts or other items of undisputed ownership, but it cannot be read to override the entire definition of "property" as applied to contingent liabilities under life insurance policies.

Taken to its logical conclusion, the Treasurer's reading would mean that, contrary to W. Va. Code § 33-13-14, insureds and beneficiaries would have no obligation under *any* circumstances to provide a company with notice of loss. *Id.* (providing that "settlement is payable upon receipt of due proof of death"). Instead, an insurer would be required to undertake any number of proactive measures to attempt to determine whether an insured has died, with unclear standards as to what evidence would render policy proceeds potentially payable or escheatable. This interpretation would rewrite the Insurance Code and defy common sense.

Contrary to the Treasurer's assertion, *Connecticut Mutual Life Insurance Company v. Moore,* 333 U.S. 541 (1948), does nothing to salvage his claims.[15] In *Moore*, the Court rejected a constitutional challenge brought by life insurance companies under the Contract Clause to a New York Abandoned Property Law that the companies believed dispensed with certain contractual conditions for payment.[12] *Id.* at 545-46. The West Virginia UPA does not dispense with the policy terms, required by the West Virginia Insurance Code, that policy proceeds be "due and payable" before they become "property." Indeed, the UPA makes those terms an explicit part of the *definition* of property subject to the Act. *Moore* merely held that New York's unclaimed

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[15] The amicus briefs filed in support of the Treasurer also argue at length that the Supreme Court's decision in *Moore* warrants reversal of the Circuit Court's opinion. (*See* NAUPA Amicus Brief at 4-5; Xerox Amicus Brief at 7-8). However, for all of the reasons stated above, the *Moore* decision neither supports the Treasurer's interpretation of the UPA nor provides any basis for imposing an affirmative obligation to search the DMF.

property law did not violate the Contracts Clause of the U.S. Constitution, and there is nothing in *Moore* to suggest that West Virginia's unclaimed property statute dispenses with contractual conditions. As noted by the Circuit Court in addressing *Moore*: "West Virginia's UPA has different statutory provisions and definitions tha[n] the New York statute that was challenged in *Moore*," and unlike in *Moore*, the present case "presents a discrete issue of statutory interpretation" rather than a constitutional challenge to the enforceability of the statute. (A.R. 00174)

In any event, *Moore* does not remotely suggest that an insurer is required to affirmatively search the DMF for deceased insureds. Throughout the opinion, the Court presumes that the statute was being applied to insurance policies under which a claimant had submitted a notification of claim. *See Moore*, 333 U.S. at 547 (statute gives the state custody of "abandoned claims"). This is unsurprising given that, as a practical matter, the only way an insurer could learn of an insured's death in 1947, when *Moore* was decided, was through the receipt of notice of a claim.

Nor, for several independent reasons, does the commentary by the National Conference of Commissioners on Uniform State Laws regarding the Uniform Unclaimed Property Act of 1995, on which the West Virginia UPA is based, support the Treasurer's interpretation. As a threshold matter, the commentary to the Uniform Unclaimed Property Act cannot override West Virginia's statutory scheme for life insurance providers. Moreover, the commentary makes clear that W. Va. Code § 36-8-2(e) applies only to "property" as defined in the UPA and therefore cannot plausibly be read to create an exception to that definition. *See* Nat'l Conference of Commissioners on Uniform State Laws, Uniform Unclaimed Property Act (1995) § 2, cmt.

(noting that "*property* is reportable notwithstanding that the owner . . . fails to present to the holder evidence of ownership or make a demand for payment"). Consistent with that limitation, the commentary makes clear that the UPA does not apply to "unliquidated claims," such as "disputed tort claims," but only to "fixed and certain" interests in property (such as amounts "due and payable" under a life insurance policy). Nat'l Conference of Commissioners on Uniform State Laws, Uniform Unclaimed Property Act (1995) § 1, cmt. There is therefore no basis for the Treasurer's suggestion that W. Va. Code § 36-8-2(e) overrides and expands the UPA's definition of property, requires escheatment of insurance proceeds that are not "property," or imposes a duty to search the DMF. Instead, W. Va. Code § 36-8-2(e) is entirely consistent with the UPA's definition of property and with the Circuit Court's interpretation of the statute.[16]

Even other state legislatures with unclaimed property statutes based on the same 1995 Uniform Act as that upon which West Virginia's statute is based have recognized that their statutes did not contain a DMF search requirement. Thus, Alabama, Montana, Nevada, New Mexico, and Vermont - all of which previously enacted unclaimed property laws including language to the effect that "[p]roperty is payable or distributable for purposes of this part notwithstanding the owner's failure to make demand or present an instrument or document

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[16] The NAUPA Amicus Brief's argument based on the Commissioners' commentary fails for the same reason. NAUPA relies on commentary stating that "no possible harm" can result from requiring holders to turn over "property" as defined in the UPA when the owner has not presented proof of ownership because holders who escheat in good faith are indemnified against claims of improper escheatment by rightful owners. This commentary applies only to "property" and necessarily presumes that any insurance proceeds at issue were in fact the "property" of the rightful owner, which is the only circumstance in which the indemnification provision comes into play. It cannot be read to require escheatment of life insurance proceeds that are not the "property" of a beneficiary within the meaning of the UPA, much less to impose a duty to search the DMF.

otherwise required to obtain payment," *see* Ala. Code § 35-12-72(e); Mont. Code Ann. § 70-9-803(5); Nev. Rev. Stat. Ann. § 120A.500(5); N.M. Stat. Ann. § 7-8A-2(E); Vt. Stat. Ann. tit. 17, § 1242(e) – have recently enacted laws requiring insurers to undertake periodic DMF searches.[17]

Lastly, other courts have also reached the same conclusion as the Circuit Court in similar circumstances. For instance, in *Thrivent Financial for Lutherans*, the court determined that there was no support in Florida's unclaimed property law that funds became "due and payable" at the moment the insured died, and that such a reading would render meaningless a section of the statute providing for when policies "not matured by actual proof of death" would nonetheless be "deemed matured." No. 1D13-5299, at 5-6; *see also id.* at 6 (rejecting reliance upon a section of the Florida law parallel to W. Va. Code § 36-8-2(e) because a general rule that property may be payable notwithstanding the owner's failure to make a demand does not control over a more specific section addressing funds owing under life insurance policies). Similarly, in *Total Asset Recovery*, a Florida state court dismissed a complaint brought by a private relator on behalf of the State after observing that Florida has not adopted a law requiring an insurer to consult the DMF in connection with the payment or escheatment of life insurance proceeds; the court further held that a life insurance company had no obligation to consult the DMF to meet its responsibility under Florida's Unclaimed Property Law. Fla. Stat. § 717.107; *Total Asset Recovery Servs., LLC v. MetLife, Inc.*, No. 2010-CA-3719, 2013 WL 4586450 (Fla. Cir. Ct. Aug. 20, 2013). The Treasurer's efforts to distinguish *Total Asset Recovery* (Pet. Br. at 23) are unavailing: while the

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[17] The 1981 Uniform Unclaimed Property Act, adopted by Georgia and Rhode Island (neither of which adopted the 1995 Uniform Act) also contained a provision similar to W. Va. Code § 36-8-2(e). *See* Ga. Code Ann. § 44-12-193; R.I. Gen. Laws § 33-21.1-2(b). These states have also now adopted requirements that insurers undertake DMF searches. *See supra*, n.7.

court did hold that the *qui tam* action was barred, the court also held as an independent basis for dismissal that Florida's Unclaimed Property Law does not require DMF searching – an outcome that should follow here as well.[18]

C. THE UPA IMPOSES NO GOOD-FAITH REQUIREMENT TO SEARCH THE DMF.

The Circuit Court correctly held that the good-faith standard set forth in W. Va. Code § 36-8-10 does not impose a duty on insurers to search the DMF for deceased insureds. (A.R. 00175). By its plain language, the good-faith standard is limited to a context not relevant here, that of "relieving a holder from liability when they make a good faith effort to comply with the UPA." *Id.* Specifically, W. Va. Code § 36-8-10 defines when a payment or delivery under the UPA is made in "good faith,"[19] and then states two principles to which that definition is relevant: (1) "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), and (2) "If a holder pays or delivers property to the administrator in good faith . . . the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability . . . ." W. Va. Code § 36-8-10(f).

The Treasurer's assertion that the Legislature "refused to limit 'good faith' to [W. Va. Code § 36-8-10]" and "expressly included good faith compliance for the whole Act" – and thus

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[18] Additionally, the Treasurer attempts to distinguish *Andrews* and *Feingold* as cases involving individuals, Pet. Br. at 23, but nothing in the UPA suggests that the definition of property turns on who the recipient is.

[19] The statute states: "(a) In this section, payment or delivery is made in 'good faith' if: (1) Payment or delivery was made in a reasonable attempt to comply with this article; (2) The holder was not then in breach of a fiduciary obligation with respect to the property and had a reasonable basis for believing, based on the facts then known, that the property was presumed abandoned . . . ; and (3) There is no showing that the records under which the payment or delivery was made did not meet reasonable commercial standards of practice."

imposes on insurers an unnamed duty to search the DMF (Pet. Br. at 26) – is wholly unsupported by the text of the statute or any case law. To the contrary, the first three words of W. Va. Code § 36-8-10 make crystal clear that the good-faith definition applies only "*[i]n this section.*" W. Va. Code Ann. § 36-8-10(a) (emphasis added). The "reasonable commercial standards of practice" described within W. Va. Code § 36-8-10's definition of good faith likewise apply "*[i]n this section.*" W. Va. Code § 36-8-10(a), (a)(3) (emphasis added).

The Treasurer himself acknowledges that the statutory good-faith requirement is relevant only in the context of protecting a former holder of abandoned property who *already* has escheated that property to the state. (*See* Pet. Br. at 26 ("In other words, if the holder wants to be held harmless *for payments made to the Treasurer*, the compliance with [UPA] must have been in good faith.") (emphasis added)). The Circuit Court thus correctly declined to create from W. Va. Code § 36-8-10's limited provision a broad duty of good faith that imposes substantive requirements not specified anywhere in the statute. *See Cavalry SPV I, LLC v. Morrisey*, 232 W. Va. 325, 752 S.E.2d 356, 364 (2013) ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.") (internal citations omitted).

Moreover, the Treasurer's argument that the Circuit Court improperly relied on *Andrews,* 2012 WL 5289946, and *Feingold*, 2013 WL 4495126, *aff'd*, 753 F.3d 55 (1st Cir. 2014), in reaching its conclusion about the UPA's "reasonable commercial standards of practice" provision (Pet. Br. at 27) completely mischaracterizes the Circuit Court's opinion. The Court relied on *Andrews* and *Feingold* in support of its ruling on an entirely separate issue, the

Treasurer's alternative argument that insurers' failure to search the DMF constituted a breach of policies' implied covenant of good faith and fair dealing. The Court considered and rightly rejected the Treasurer's alternative argument on this point, and the Treasurer does not even challenge this ruling on appeal. The Court's reliance on *Andrews* and *Feingold* was unrelated to the Treasurer's claims regarding the "good faith" provisions of W. Va. Code § 36-8-10.

The Circuit Court's ruling on the Treasurer's alternative argument that the implied covenant of good faith and fair dealing present in contract formation imposes no duty on insurers to search the DMF is undoubtedly correct. (A.R. 00176). As the Circuit Court aptly observed, "there is no such duty absent a breach of contract," *id.*, and moreover, the Treasurer – who is not a party to any of the insurance contracts at issue – lacks standing to assert any such breach. *See Elmore v. State Farm Mut. Auto Ins. Co.*, 202 W. Va. 430, 434, 504 S.E.2d 893, 897 (1998) (declining to recognize a third-party bad faith insurance claim based on the implied covenant of good faith and fair dealing). The Circuit Court noted that while this was, at the time, an issue of first impression in West Virginia, both Ohio and the United States District Court for the District of Massachusetts (in *Andrews* and *Feingold*, respectively), had considered the issue and declined to hold that insurers are obligated to search the DMF as a matter of contractual good faith. (A.R. 00176-00177). The Circuit Court properly cited *Andrews* and *Feingold* as persuasive authority, and the Treasurer's mischaracterization of the Circuit Court's application of these cases should be summarily rejected.

D. THE CIRCUIT COURT PROPERLY ENTERED A FINAL ORDER DISMISSING THE TREASURER'S ACTIONS AND THE TREASURER WAS NOT ENTITLED TO DISCOVERY.

The Treasurer argues that the Circuit Court erroneously entered a final order of dismissal based solely on its finding that Respondents had no duty to use the DMF to identify deceased

insureds while ignoring the allegations of the complaints purportedly asserting "broader" violations of the UPA. (Pet. Br. at 28). The Treasurer also argues that dismissal was erroneous because he was not granted an opportunity to obtain discovery in support of those "broader" allegations of wrongdoing. *Id.*[20]

In arguing that the complaints contain "broader" allegations that Respondents failed to comply with the UPA, the Treasurer points to conclusory statements alleging, for instance, that Respondents filed "untruthful" reports under the UPA in "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." (Pet. Br. at 29). This argument fails for several independent reasons. *First*, these statements are not well-pleaded factual allegations and do not establish an independent violation of the UPA. "A trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Forshey v. Jackson*, 222 W. Va. 743, 756, 671 S.E.2d 748, 761 (2008) (internal quotation marks and alterations omitted); *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014).

Second, the language cited by the Treasurer falls within the section of the complaints, entitled "Acts in Violation of the West Virginia Uniform Unclaimed Property Act," that describes how Respondents' alleged failure to use the DMF to identify deceased insureds resulted in the "untruthful" reporting. Compl. ¶¶ 21-29.[21] In this section, the Treasurer alleges

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[20] The Treasurer's contention that Respondents failed to challenge "these other allegations," (Pet. Br. at 28), is inaccurate. The common brief filed by Respondents identified each of the areas of relief sought by the Treasurer. (A.R. 00028-00029).

[21] The complaints are largely identical and are all located in the Appendix to Petitioner's Brief. An exemplar complaint is found at (A.R. 00001-00012).

that Respondents purportedly had access to the DMF, used the DMF in connection with the sale of annuity contracts, failed to use the DMF to search for deaths of insureds, and converted policy proceeds into premium payments after the insured had died. This section concludes by stating that *"as a result of the failure to use readily available information"* from the DMF, Respondents untruthfully reported unclaimed property. *Id.* ¶ 26 (emphasis added). Thus, the language of the Treasurer's complaints makes clear that the more general statements asserting violations of the UPA are premised entirely on the specific allegation that Respondents should have and failed to use the DMF to identify deceased insureds with unclaimed policy proceeds.

The Treasurer also failed to establish that the Circuit Court erroneously dismissed the actions without affording the Treasurer an opportunity to conduct discovery. In *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996), this Court set forth the standard that a party must satisfy to successfully oppose a motion to dismiss on the grounds that it should have been granted discovery. As an initial matter, the Treasurer was required formally to have requested a continuance to obtain discovery in order to oppose the motion. *Id.* at 115-16. Here, the Treasurer did not seek a continuance of the hearing on Respondents' motions to dismiss to obtain discovery and did not make any sort of formal request that it be provided an opportunity to take discovery. The Treasurer argues that he "specifically requested" an opportunity to take discovery in his Complaint. (Pet. Br. at 28). However, the sections of the complaints and W. Va. Code § 36-8-20(a) and (b) cited in the Treasurer's brief simply refer to the Treasurer's enforcement rights under the UPA which include requiring a holder who has filed false or inaccurate reports to submit a verified report and authorizing the Treasurer to examine the

records of a holder.[22] The cited sections do not reflect any requests for discovery by the Treasurer.

Moreover, to assert a right to discovery as a basis for opposing a motion to dismiss, the Treasurer was required, "at a minimum [to] "(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." *Harrison,* 197 W. Va. at 663, 478 S.E.2d at 116 (internal quotation marks and alterations omitted); *see also Rizzo v. Rizzo*, No. 12-0966, 2013 WL 2157695, at *2 (W. Va. Sup. Ct., May 17, 2013) (unpublished memorandum decision) (affirming dismissal finding that "petitioners are unable to demonstrate a right to discovery under the standard [governing requests for a discovery continuance]"). The Treasurer has not even attempted to establish that he satisfied this four-part test, nor could he.

First, the Treasurer has not provided a plausible explanation of what facts he expects to discover and how those facts establish an independent violation of the UPA separate and apart from his claim that Respondents failed to search the DMF. The Treasurer also has not explained

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[22] The Xerox Amicus Brief argues that the Treasurer is entitled to examine the records of insurers to determine whether they have complied with the UPA and cites *Chiang v. Am. Nat'l Ins. Co.*, No. 34-2013-000144517 (Cal. Super. Ct. Oct. 9, 2013) as support for this proposition. However, the Treasurer does not argue that he attempted to examine the records of any of the defendant insurers and that they refused to permit such an examination. On the contrary, the Treasurer never even attempted to exercise his examination rights under West Virginia Code § 36-8-20(a). Thus the *Chiang* opinion is not only irrelevant because it is premised on California law, but it also addresses an entirely different factual situation – *i.e.*, where the insurer purportedly refused to comply with an already commenced unclaimed property audit.

why those facts were not previously accessible to him given his broad examination rights under the UPA.

Second, the Treasurer could not possibly obtain discovery in some "reasonable additional period of time." The Treasurer has not served discovery on any Respondent and would have to serve discovery requests and review individual responses relating to 69 different insurance companies. *Third*, the Treasurer has not explained what material facts he expects to discover that will permit him to amend his complaints to allege valid claims against each of the Respondents. The Treasurer's vague assertion that he should have been granted an opportunity to explore the specific facts and circumstances relating to each Respondent's "search for, reporting of and payment of proceeds under the UPA" falls far short of identifying material facts.

Finally, the Treasurer cannot demonstrate good cause for having failed to conduct the discovery earlier. As noted, the Treasurer did not serve a single set of discovery on any Respondent. And, the Treasurer's failure to exercise its examination rights under W. Va. Code § 36-8-20(b) prior to filing suit against Respondents - which provided him an opportunity to discover facts relating to any individual insurer's reporting practices under the UPA - renders his assertion that he was improperly deprived of discovery to oppose the motion unsustainable.[23]

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[23] The Treasurer cites *Bowden v. Monroe County Comm'n*, 232 W. Va. 47, 750 S.E.2d 263 (2013) (per curiam) for the proposition that the Circuit Court should not have dismissed his case without allowing him "to conduct additional discovery and develop the evidence." (Pet. Br. at 29). In *Bowden*, however, the plaintiff had filed a motion to amend her complaint before the court issued its ruling on the motion to dismiss and the trial court nonetheless dismissed the case without considering plaintiff's proposed amendment. The appellate court found that the trial court erred in failing to consider the motion to amend and further found that the amended complaint alleged facts that, if proven, overcame defendants' assertion of a statutory immunity defense which was the sole basis for the trial court's dismissal order. *Id.* at 53-54, 750 S.E.2d at 269-70. By contrast, the Treasurer did not file a motion to amend his complaint and has not demonstrated, as discussed above, that he could allege new and different facts that would entitle him to relief.

In sum, because the Treasurer's complaints are based entirely on the erroneous assertion that Respondents violated the UPA by failing to search the DMF to identify deceased insureds, and because this theory fails as a matter of law, the Circuit Court properly entered a final order dismissing the Treasurer's claims. The Circuit Court did not err in refusing to afford the Treasurer an opportunity to seek discovery given that his theory of liability is premised on a fundamentally flawed interpretation of the UPA. *See Appalachian Reg'l Healthcare, Inc. v. W. Va. Dep't of Health & Human Res.*, 232 W. Va. 388, 398, 752 S.E.2d 419, 429 (2013) ("This is not a question of dismissing a case because it is doubtful that [plaintiff] would prevail; this dismissal is based upon the absence of a statutory basis upon which to pursue any claims. [Plaintiff] argues that dismissal of its complaint prior to discovery left contested material facts unresolved. We disagree and we affirm the circuit court's dismissal of [plaintiff's] complaint.").

V. CONCLUSION

WHEREFORE, Respondents respectfully request that the dismissal of the Petitioner's complaints be affirmed.

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