



Break-Out Track A: Banking and Insurance Issues

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Banking and Insurance Issues

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A. CFPB Enforcement Update and CFPB UDAAP Guidance

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CFPB Enforcement

- On November 20, 2013 the CFPB executed a consent order with Cash America International, Inc.
 - First enforcement action against a payday lender.
 - The consent order arises out of conduct and information that the CFPB learned during an examination.

CFPB Enforcement

- Cash America and/or its subsidiary, Enova, allegedly violated UDAAP and the Military Lending Act.
- The cost: \$8 million in redress penalties plus \$5 million in civil monetary penalties.
- This enforcement action displays the importance of not being evasive during an examination. According to the consent order:
 - Enova failed to preserve all materials responsive to the CFPB's first day letter notwithstanding that the CFPB instructed it to do so.

CFPB Enforcement

- Enova failed to suspend routine data and document destruction procedures notwithstanding that the CFPB's first day letter instructed it to do so.
- During the examination, Enova managers failed to provide certain information relevant to the examination regarding Enova's call center sales activities by:
 - Instructing the call center employees to provide evasive or incomplete responses to the CFPB's questions during the examination.
 - Removing materials concerning marketing, sales and collections materials.

CFPB Enforcement

- Compliance and internal controls also played a significant role. According to the CFPB:
 - Cash America's legal assistants manually stamped the collections department manager's signature on balance-due and military-status affidavits without the manager's prior review of the affidavits or supporting documentation.
 - The collections department's in-house collections attorney directed the collections department manager and legal assistants to stamp the in-house collections attorney's signature, or to manually sign the attorney's name, on certain pleadings without the attorney's prior review.

CFPB Enforcement

- Cash America failed to conduct adequate internal compliance audits.
- Cash America also violated the MLA by imposing a military annual percentage rate above 36 percent in connection with consumer credit extended to an active member of the military or their spouse or dependent.

CFPB Enforcement

- Nonmonetary penalties included the following:
 - Written record retention requirements that comply with the CFPB's directives.
 - Ongoing education and training in Federal consumer financial law and reporting requirements.
 - A formal consumer compliance risk review process before introducing or implementing new or changed products or services.

CFPB Enforcement

- Updating of the compliance plan at least annually to reflect changes in laws, regulations and business strategies.
- The Board must be involved with the implementation and continued adherence with the compliance plan.

CFPB UDAAP Guidance – July 2013

- The CFPB issued two bulletins on July 10, 2013 concerning the same general subject—UDAAP in the context of debt collection practices.
 - What is unfair?
 - (a) It causes or is likely to cause substantial injury to consumers.
 - (b) The injury is not reasonably avoidable by consumers.

CFPB UDAAP Guidance – July 2013

- What is unfair? (cont'd)
- If you answer “yes” to any of these questions, then the injury is not reasonably avoidable:
 - Does the act or practice interfere with or hinder a consumer’s ability to make informed decisions?
 - Did the transaction occur without a consumer’s knowledge or consent?
 - Can the injury only be avoided by spending large amounts of money or other significant resources?

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- What is unfair? (cont'd)
 - (c) The injury is not outweighed by countervailing benefits to consumers or to competition.

CFPB UDAAP Guidance – July 2013

- What is deceptive?
 - In general, an act or practice is deceptive when:
 - (a) The act or practice misleads or is likely to mislead the consumer.
 - (b) The consumer's interpretation is reasonable under the circumstances.
 - (c) The misleading act or practice is material.

CFPB UDAAP Guidance – July 2013

- What is deceptive? (cont'd)
 - Deceptive acts or practices can be a statement or omission.
 - Make sure there is support for the statements made.
 - The communication will be considered from the perspective of a reasonable member of the target audience.
 - A statement that conveys multiple meanings may be deceptive if one of those meanings is false.

CFPB UDAAP Guidance – July 2013

- What is deceptive? (cont'd)
 - Anything that affects the consumer's decision making process is material.
 - With respect to disclosures, ask yourself the following questions:
 - Is the disclosure prominent enough for a consumer to notice?
 - Is the information presented in a clear and easy to understand format?
 - Is the information prominently placed near the information related to the other claims it qualifies?

CFPB UDAAP Guidance – July 2013

- What is abusive?
 - (a) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
 - (b) Takes unreasonable advantage of –
 - (1) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;
 - (2) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or
 - (3) a consumer's reasonable reliance on a covered person to act in his or her interests.

B. Unclaimed Property: Will 2014 be a Watershed Year?



Overview

- Litigation Developments
- Update on Unclaimed Property Audits, Market Conduct Exams and Settlements for Life Insurers
- Legislative and Regulatory Developments

Litigation Overview

- In 2014-15: At least six appellate court decisions expected. Key issues on appeal:
 - When do life insurance policy proceeds become unclaimed property?
 - Are life insurers required to seek out information about possible deaths of insureds using the Social Security Administration's Death Master File ("DMF") or a similar database?
 - Is that duty retroactive?
 - Are there limits on the scope of information that a state auditor may request from a life insurer during an unclaimed property audit?

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Only Pre-2014 Appellate Court Decision

- *Andrews v. Nationwide* – Ohio Court of Appeals
 - No duty to search the DMF – "Settlement shall be made on *receipt* of due proof of death"
 - Court refused to "import additional unspoken duties and obligations onto [the insurer] that will conflict with the parties' contracted term," holding that the insurer had not breached its duty of good faith and fair dealing by failing to search the DMF "when it is not contractually or legally obligated to do so."
 - Ohio Supreme Court declined to review (Slip Op. No. 2013-Ohio-0155, April 24, 2013)

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Feingold

- *Feingold v. John Hancock* (D. Mass. August 19, 2013), *aff'd* (1st Cir. May 27, 2014)
 - District Court: No duty to search the DMF
 - According to “established principles of insurance law,” “[a]n insurance policy may require a beneficiary to furnish ‘due proof of loss,’ in this case proof of death, before paying policy proceeds.”
 - The practice of requiring beneficiaries to submit proof of death “comports with both Massachusetts and Illinois law.”

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Feingold

- *Feingold v. John Hancock* (D. Mass. August 19, 2013), *aff'd* (1st Cir. May 27, 2014)
 - Court of Appeals: No duty to search the DMF
 - Proof of death requirement is reasonable and comports with Illinois law
 - No private right of action under multi-state Global Resolution Agreement

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More Appellate Guidance on the Way

- Favorable Trend – Ohio, Massachusetts, Illinois, Florida, West Virginia
 - *State of West Virginia ex. rel Perdue* (on appeal to W. Va. Ct. App.)
 - *Total Asset Recovery Serv's v. Metlife Inc.* (on appeal to Fla. 1st Dist. Ct. App.)

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Perdue

- *West Virginia ex. rel John D. Perdue*
 - 63 insurers moved to dismiss the Treasurer's complaint, arguing:
 - Unclaimed Property Act imposes no duty to search the DMF.
 - Treasurer's alleged duty to search violates: insurance code; insurance regulations; case law.
 - Treasurer lacks authority to bypass legislature by imposing, through litigation, his vision of legislative policy.
 - Treasurer violates insurers' Due Process rights by punishing legal conduct.
 - Trial court granted MTDs with prejudice.
 - State's opening brief before W. Va. Ct. App. filed May 28, 2014. Oral argument expected Winter 2014-15.

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Florida Litigation

- *Total Asset Recovery Services, LLC v. MetLife, Inc.* (Fla. Cir. Ct. August 20, 2013)

“Florida has not adopted a law requiring [the insurer] to consult [the DMF] . . . in connection with payment or escheatment of life benefits. Likewise Florida has adopted no law imposing an obligation on [the insurer] to engage in elaborate data mining of external databases . . . in connection with payment or escheatment of life insurance benefits.”

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Florida Litigation

- *Thrivent v. Fla. Dep't Financial Serv's* (DFS):
 - 10/4/13 DFS declaratory statement that insurers must use the DMF
 - “A simple exercise of due diligence – reference to the DMF maintained by the Social Security Administration or comparable national databases – would reveal whether there was any potential for benefits to be due under an existing life insurance contract.”
 - DFS also ruled that dormancy period begins on date of death.
 - On appeal before the same court as the *TARS* case (Fla. 1st Dist. Ct. App).

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California Audit Litigation

- *Chiang v. American National Insurance Company*
 - Active policies not produced. Issues raised:
 - What is reportable property?
 - What company records are subject to unclaimed property audit?
 - Cal. Sup. Ct. granted Controller's request for PI and ordered production of information on in-force policies:
 - The insurer "is depriving the State of the ability to review the company's records to identify escheatable property," because "California's auditor does not, and need not, accept [the insurer's] word that it has, on its own, correctly identified and segregated its own 'in-force policies.'"

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Challenge to NCOIL Statute

- Kentucky statutory challenge (Kemper cases)
 - Declaratory judgment action in KY State Court alleging newly-enacted DMF statute violates rules against retroactive application and impairs vested contractual rights
 - April 1, 2013 – statute upheld; insurers appeal to Kentucky Court of Appeals.
 - Similar statutory challenge pending in Maryland.
 - Kemper and affiliates have filed separate declaratory judgment actions in IL, PA and FL arising out of Verus multi-state market conduct examinations.

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Audits, Exams and Settlements

- Multi-state unclaimed property audits are being conducted by Verus, UCPH and Kelmar
 - First settlement announced in April 2011 with Verus as auditor
 - In some cases, the three contingent-fee auditors are auditing the same company
 - Audit may include general ledger
- Verus is also conducting market conduct exams
 - Coordinated by NAIC Executive Level Task Force (10 states) (FL, CA, IL, NH, PA)
 - Work papers of unclaimed property audits are work paper for MC exams
 - Potential conflict of interest
- Actual basis audits = massive data inquiries stretching back 15-20 years
 - Detailed inquiries into IT systems
 - Focus on various blocks of business, on claims processes, on use of Social Security Death Master File (DMF) and on unclaimed property processes
- Single state inquiries – Minnesota, New York and MA Attorneys General

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Audits and Exams

- Controversial positions of regulators
 - Asymmetrical use of DMF is an “unfair” claims practice:
 - If insurers use the DMF to stop payouts, they should use it to search for deaths that trigger death benefit payments
 - What if a company never used the DMF?
 - Dormancy period begins on date of death:
 - Not when insurer “knows” of a death, receives a claim or “proof of death”
 - Some insurers are pushing back
 - “Fuzzy” matches with the DMF are actionable:
 - What constitutes a DMF match?
 - Compressed time frames:
 - When an insurer “learns” of a death (such as by a DMF match), it must search out and use “best efforts” to find beneficiaries. But unclaimed property settlements give insurers very little time to find and pay beneficiaries before escheating the proceeds.

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General Ledger Audits – Additional Exposure

- Very different than Verus-type audits
- Different scope of property and information requests
 - May ask for 20+ years of financial data, bank account statements, canceled checks, general ledger accounts
- Looking for unclaimed property taken into income
 - Uncashed checks – voided, reissued
 - Suspense accounts
 - Agent credit balances
- Auditors – use of estimation techniques

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Multi-State Settlements

- 18 Unclaimed Property Settlements (GRAs)
 - Most involve Verus as auditor
 - Company to provide data; Verus provides reports listing deaths, matured annuities, dormant retained asset accounts
 - Company has a very limited time to find beneficiaries, make payments or otherwise escheat
- 13 Insurance Regulatory Settlements (RSAs)
 - Call for DMF searches (mostly monthly) and procedures for a “thorough search” for beneficiaries for one year, otherwise escheat
 - Procedures for dealing with annuities and life policies approaching maturity

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Summary of GRAs and RSAs

COMPANIES THAT HAVE SIGNED UNCLAIMED PROPERTY GRAs AND RSAs (AS OF 2-14-2014)			
Company	GRA	RSA	Florida DFS Agreement
AIG	Yes (Oct. 2012)	Yes (Oct. 2012)	Yes (Oct. 2012)
Aviva	No	Yes (Oct. 2013)	Yes (Nov. 2013)
Forethought	Yes (Oct. 2012)	No	No
Genworth	Yes (June 2013)	Yes (Jan. 2014)	Yes (Jan. 2014)
Hartford	Yes (June 2013)	No	No
ING	Yes (June 2013)	Yes (Aug. 2013)	Yes (Aug. 2013)
John Hancock	Yes (Apr. 2011)	Yes (Nov. 2012)	Yes (May 2011)
Lincoln	Yes (Dec. 2012)	Yes (Nov. 2013)	Yes (Dec. 2013)
MetLife	Yes (Apr. 2012)	Yes (Apr. 2012)	Yes (Apr. 2012)
Midland	Yes (June 2013)	Yes (Nov. 2013)	No
Nationwide	Yes (Oct. 2012)	Yes (Oct. 2012)	Yes (Oct. 2012)
New York Life	Yes (June 2013)	Yes (Oct. 2013)	Yes (Oct. 2013)
Northwestern	Yes (June 2013)	No	No
Pacific Life	Yes (June 2013)	No	No
Prudential	Yes (Dec. 2011)	Yes (Feb. 2012)	Yes (Feb. 2012)
Symetra	Yes (June 2013)	No	No
TIAA-CREF	Yes (June 2013)	Yes (June 2013)	Yes (June 2013)
Transamerica	Yes (June 2013)	Yes (Sept. 2013)	Yes (Sept. 2013)
Western & Southern	Yes (June 2013)	No	Yes (Nov. 2013)

NB. MassMutual and USAA were the subjects of multistate market conduct exams regarding their historical SSDMF usage that concluded in August 2013 and February 2014, respectively. In both cases, the examiner found that it had "no concerns to report respecting [] compliance with the Model Acts or the laws of New Hampshire or the other States."

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Multi-State Settlements

- Settlements pose multiple challenges
 - Agreements have overlapping, disparate requirements without regulatory guidance
 - "Rules-based" procedures for claims, unclaimed property
 - Short time frames for locating beneficiaries
 - Reporting challenges: Monthly UPRs, quarterly RSA
- We'll likely see some more settlements in 2014
 - Variety of reasons why companies settle
 - Variety of reasons why some companies choose not to settle

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Minnesota Settlements

- Three settlements:
 - Prudential (May 2013)
 - MetLife (May 2014)
 - Transamerica (May 2014)
- Combine elements of GRAs and RSAs
- Add data cleanup requirement

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State Regulatory Developments

- December 2013 - NAIC (A) Committee approved a charge on December 4th for 2014 that:
 - The Life Insurance and Annuities (A) Committee should undertake a study to determine if recommendations should be made to address unclaimed death benefits.
- Possibility of some form of guidance to the industry by state insurance regulators, but tension between those who want to pursue settlements and those interested in model regulation
- Insurance regulator guidance unlikely to have impact on unclaimed property administrators

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Wisconsin – First Crack in the Wall?

Wisconsin Department of Revenue's Unclaimed Property - Life Insurers and DMF Searches Fact Sheet 6100:¹

The dormancy period under Wisconsin's unclaimed property insurance law begins when the life insurer knows that the insured or annuitant has died. An insurer knows of a death when it learns through any method utilized that the insured or annuitant has died.

* * *

[T]here is no . . . requirement under Wisconsin's unclaimed property law to use the DMF or other public database to determine whether an insured or annuitant has died.

* * *

Knowledge of death could be the same date as the search of the DMF or other public database is conducted. However, the date of search of the DMF or other public database does not necessarily equal knowledge of death due to imprecise matches.

¹http://www.revenue.wi.gov/taxpro/fact/6100ucp_life_dmf.pdf (updated 4/21/14)

Idaho – Beyond Regulatory Authority

- June 15, 2014 – temporary rule adopted
- Upon receipt of notice that insured or annuitant has died, Insurer must make good faith effort to confirm death occurred
 - Insurer has 90 days to comply
 - Notice undefined
- August 20, 2014 – deadline to request public hearing (25 persons)
- August 27, 2014 – deadline for comments

State Legislative Developments

- About a dozen states have amended insurance statutes to require insurers to use the DMF – unclaimed property statutes unaffected
 - New York Regulation 200
 - NCOIL Model Law Adoption: Not uniform
 - Run the DMF against some portions of their business
 - Make “good faith” efforts to locate beneficiaries
 - Escheat proceeds if beneficiary cannot be found or does not file a claim
 - NCOIL working on a new model
 - NCOIL Unclaimed Property Task Force

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Adopted State DMF Legislation

State	"Compliance" Effective Date	Frequency of Required DMF Matches	Retroactive/Prospective
Alabama	1/1/2019	Every three years	New policies only
Georgia	7/1/2015	Semi-Annual	New policies only
Indiana	1/1/2016	Semi-Annual	Existing and new policies
Iowa	1/1/2016	Semi-Annual	Existing and new policies
Kentucky	4/1/2013	Semi-Annual	Existing and new policies
Maryland	4/1/2014	Semi-Annual	Existing and new policies
Mississippi	1/1/2016	Semi-Annual	New policies only
Montana	7/1/2014	Semi-Annual	Existing and new policies
Nevada	1/1/2015	Semi-Annual	Existing and new policies
New Mexico	1/1/2014	Semi-Annual	Depends on prior DMF usage
New York	9/15/2013	Quarterly	Existing and new policies
North Dakota	11/1/2014	Semi-Annual	Existing and new policies
Tennessee	1/1/2016	Semi-Annual	New policies only
Vermont	1/1/2014	Semi-Annual	Existing and new policies

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Pending State DMF Legislation

State (*on governor's desk)	"Compliance" Effective Date	Frequency of Required DMF Matches	Retroactive/Prospective
Illinois	Upon Enactment	Quarterly	Existing and new policies
Massachusetts	TBD	Semi-Annual	Existing and new policies
Pennsylvania	TBD	Quarterly	Existing and new policies
Rhode Island	7/1/2015	Semi-Annual	Existing and new policies

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Legislative Outlook

- Expect that NCOIL and the NAIC leadership will be talking on this issue in 2014
 - Changes to unclaimed property laws are not NCOIL's charge
 - Uniform Law Commission asking if NCOIL Act should be included in any revised Unclaimed Property Act
 - Unclear how NCOIL and the NAIC will work together

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Bipartisan Budget Bill of 2013

- Commerce Department – cannot release new DMF death records for 3 years after death, except to certified persons
 - To be certified, a person must demonstrate:
 - Legitimate fraud prevention purpose
 - Legitimate business purpose pursuant to law, rule, reg or fiduciary duty
 - IRC § 6103(p)(4) security procedures in place
 - Pitfalls to insurer certification
 - Impact on:
 - Settlement obligations
 - NCOIL requirements
 - Audits
 - Litigation

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C. Unclaimed Property Litigation Update: Appellate Guidance on Key Issues Expected in 2014

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Unclaimed Property Litigation Update: Appellate Guidance on Key Issues Expected in 2014

By Phillip E. Stano, Steuart H. Thomsen, Wilson G. Barmeyer, Tracey K. Ledbetter, and David W. Arrojo

Amidst ongoing multistate unclaimed property audits of many life insurers, and despite many regulatory settlements, the insurance industry and state regulators continue to disagree over the application of unclaimed property laws governing life insurance. These disagreements have been percolating in the lower courts and have now advanced to state and federal appellate proceedings.

Appellate courts are poised to decide a number of cases in 2014—while other cases continue to be litigated in lower courts—and any trends resulting from these decisions could have national implications. Some key questions expected to be addressed include:

1. When do life insurance policy proceeds become unclaimed property?
2. Do life insurers have a legal duty to use the Social Security Death Master File (DMF) to search for information about their insureds' deaths?
3. Are there any limits on the scope of information a state auditor may request from a life insurer during an unclaimed property audit?

1. When do life insurance policy proceeds become unclaimed property?

This is perhaps the key issue in dispute between regulators and the industry, because it defines when the dormancy period is triggered for life insurance policy proceeds and therefore when (or if) the proceeds are presumed abandoned. Unclaimed property and insurance regulators

generally take the position that the dormancy period begins at the date of the insured's death, regardless of whether the beneficiary has filed a claim or whether the insurer is even aware of a death. Insurers generally contend that the dormancy period begins to run upon the insurer's receipt of proof of death or, in some states, knowledge of death. Two state appellate courts could decide this issue in 2014.

First, the Florida First District Court of Appeals is slated to review a declaratory administrative statement issued by the Florida Department of Financial Services (DFS).

The case arose when Thrivent Financial for Lutherans filed a petition in an administrative proceeding with DFS, seeking a declaration that insurance contracts become "due and payable" only after Thrivent has received due proof of death. In its On October 4, 2013 Declaratory Statement in response, the DFS stated that, under Florida law, the dormancy trigger begins to run on the date of the insured's death, regardless of the insurer's receipt of proof of death. *In re: Petition for Declaratory Statement of Thrivent Financial for Lutherans*, Case No. 137963-13-DS.

DFS takes the position that a life insurance policy "becomes a claim" upon the death of the insured, without more, and that the claim is "due and payable" under the unclaimed property statute—thus triggering the dormancy period—regardless of whether a beneficiary has filed an actual claim with the company. Therefore, according to DFS, the proceeds are presumed abandoned five years after the date of death and must be reported to the state. The insurer appealed the administrative ruling to the Florida Court of Appeals and oral argument has been set for July 15, 2014. The Thrivent case could result in the first appellate decision to directly address the issue of when life insurance proceeds are reportable as unclaimed property.

Second, the West Virginia State Treasurer is appealing the dismissal of 63 separate but virtually identical cases filed against life insurers alleging violation of the 1995 Uniform Unclaimed Property Act as adopted in West Virginia. *State of West Virginia ex rel. John D. Perdue*, Nos. 12-C-287 et al. (W. Va. Cir. Ct. Dec. 27, 2013). Among other issues, the court rejected the Treasurer's claim that the dormancy period for life insurance began running upon the date of the insured's death, as opposed to the date of proof of death. Reading the UPA together with the state's insurance code, the court noted that "the Insurance Code 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." In the court's view, "[t]he provisions of the UPA and the Insurance Code are unambiguous and consistent with one another . . . Defendants have no obligation to surrender the life insurance proceeds under the UPA 'until the obligation to pay arises - either upon receipt of due proof of death or once the insured reaches the statutorily imposed limiting age.'" Observing that the "due proof of death" requirement is "an essential ingredient for creating the obligation (i.e., the 'property') in the first place,"

the court concluded that, “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.” These cases are now pending before the West Virginia Supreme Court of Appeals, the state’s only appellate court, with parties expected to complete briefing by September 2014.

2. Do life insurers have a legal duty to use the DMF to search for information about their insured’s deaths?

Another core substantive issue is whether insurers have a legal duty under state law to use the DMF to search for information about possible deaths of insureds and then take affirmative steps to reach out to beneficiaries, or whether it is a beneficiary’s responsibility to contact the insurance company and file a claim.

Since 2011, fourteen states have passed model legislation drafted by the National Conference of Insurance Legislators (“NCOIL”), now known as the Unclaimed Life Insurance Benefits Act, or NCOIL Model Act, which expressly requires insurers to use the DMF to search for information on possible deaths of insureds. Several affiliated insurers are pursuing a constitutional challenge to Kentucky’s version of the legislation by filing a declaratory judgment action, arguing that the law violates rules against retroactive application and impairs vested contractual rights. *See, e.g., United Ins. Co. of Amer. et al. v. Kentucky*, No. 12-CI-1441 (Franklin Cir. Ct., Kentucky, April 1, 2013). On April 1, 2013, a Kentucky state trial court rejected the insurers’ argument that the statute applies only prospectively to policies issued after the statute’s effective date and not retroactively to in-force policies. The court held that, because the statute merely confirms beneficiaries’ rights to proceeds based on premiums already paid by insureds, the statute must be construed as a remedial or procedural requirement not subject to the prohibition against retroactive legislation. And although insurance companies have a reasonable expectation that the state will not alter its contractual obligations, the court further stated that a company “has no reasonable expectation that the state will not impose reasonable regulatory requirements designed to enforce the pre-existing contract rights of insureds and beneficiaries.” The insurers have appealed the trial court’s ruling to the Kentucky Court of Appeals, and oral argument is currently scheduled for July 22, 2014. Meanwhile, a similar statutory challenge is

pending in Maryland.

Simultaneously, the Uniform Law Commission is currently considering whether any revision to the Uniform Unclaimed Property Act should result in “a new duty imposed on the life insurer to perform DMF matching on a regular basis, and if so, how often.”

These legislative developments notwithstanding, many state regulators have previously taken the position that existing laws already require insurers to conduct such searches, even in states that have not adopted new DMF search legislation. Several appellate courts will be given the opportunity to consider this issue in 2014.

This issue is likely to be addressed both in the insurer’s appeal of the DFS ruling in Florida and in the West Virginia cases, discussed above. In Florida, the DFS administrative ruling stated that Florida’s unclaimed property statute requires life insurers to use the DMF to seek out information on potential deaths of insureds. According to the DFS, requiring insurers to search the DMF “is consistent with the manifest purpose of [the unclaimed property statute]” and mandated by a statutory due diligence obligation. Thrivent argues on appeal to the Florida Court of Appeals that the plain reading of Florida’s unclaimed property and insurance law do not support this position.

Also in Florida, but in a separate case, the same Florida Court of Appeals will review a lower court decision which held, contrary to the DFS administrative decision, that the Florida unclaimed property statute does not impose on insurers a duty to search the DMF. *See Total Asset Recovery Servs. LLC, v. Metlife, Inc.*, Case No. 2010-CA-3719 (Fla. Cir. Ct. Aug. 20, 2013). Parties will complete briefing before the Florida District Court of Appeals by July 2014; the case has not yet been scheduled for oral argument.

In the West Virginia appeals, the appellate court is expected to consider the trial court’s holding that “there is no general good faith requirement in the UPA [West Virginia Unclaimed Property Act] that requires insurance companies to search the DMF or other third-party database to determine when an insured has died.” *State of West Virginia ex rel. John D. Perdue*, Nos. 12-C-287 et al. (W. Va. Cir. Ct. Dec. 27, 2013). The lower court rejected several of the Treasurer’s positions as policy arguments more properly considered by the legislature, noting that the recent adoption of DMF legislation in several other states suggested that no

such duty existed until such legislation was enacted.

Meanwhile, one appellate court—the U.S. Court of Appeals for the First Circuit—has already addressed the DMF question this year. In the case below, a federal district court in Massachusetts, in *Feingold v. John Hancock Life Insurance Co.*, No. 1:13-cv-10185-JLT, 2013 WL 4495126 (D. Mass. Aug. 19, 2013), rejected claims by a private plaintiff that an insurer must affirmatively search the DMF. The putative class action complaint accused the insurer of using the DMF asymmetrically, by allegedly routinely searching the database to end payments to annuity clients but not using it to promptly notify beneficiaries of life policies when a policy- holding relative dies, and thus “avoiding payment of life insurance policy death benefits that are owed to beneficiaries.” The complaint asserted that the insurer was liable for damages to policy holders and beneficiaries because of these alleged asymmetric practices.

The district court granted the insurer’s motion to dismiss, which argued that the complaint sought to discard settled law by requiring payment or reporting of life insurance proceeds absent a claim on the policy by beneficiaries. Noting the case depended on “established principles of insurance law,” the court observed that “[a]n insurance policy may require a beneficiary to furnish ‘due proof of loss,’ in this case proof of death, before paying policy proceeds.” The court held that the insurer’s practice of requiring the beneficiary to submit proof of death before payment of any policy proceeds “comports with both Massachusetts and Illinois law.” The court also rejected plaintiff’s attempt to support his claims based on the multi-state Global Resolution Agreement (“GRA”) between the insurer and multiple states.

On May 27, 2014, the U.S. Court of Appeals for the First Circuit affirmed the insurer’s practice of requiring life insurance policy beneficiaries to submit proof of death before making any payments under the policy at issue. Citing Illinois precedent for the proposition that the proof of death requirement was a “reasonable requirement in an insurance policy,” the Court of Appeals held that this “proof of death notice requirement complies with Illinois law” and is “in accord with Illinois’s unclaimed property statute, which acknowledges that life insurance proceeds are not payable without proof of death.” The Court of Appeals also rejected plaintiff’s argument that the GRA imposed any duties on the insurer that could be enforced by plaintiff. Observing that the beneficiary

only had authority to enforce the terms of the GRA if he were a third-party beneficiary of that contract, the court noted the absence of language showing that “the GRA was intended directly to benefit anyone other than the signatory states negotiating Hancock’s obligations with respect to their unclaimed property programs.”

In affirming the district court’s dismissal, the First Circuit rejected the beneficiary’s argument that the insurer was required to consult the DMF to check whether life insurance policy holders were deceased. Regarding the beneficiary’s allegation that the insurer had such a duty because it allegedly consulted the same database to check whether annuity holders had died, the court noted that the beneficiary had not identified “any source outside of the GRA, 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.”

It remains to be seen how the *Feingold* ruling will affect unclaimed property litigation pending against Illinois and other states. Affiliates of the Kemper Corporation have filed a declaratory judgment action against the Illinois Insurance Commissioner in connection with a multi-state market conduct examination being conducted by Verus Financial and for which Illinois is the lead state. In the complaint, filed on September 4, 2013, the insurers seek (1) a declaration that life insurers have no obligation to search the DMF under Illinois insurance laws, (2) a declaration that Verus and the states cannot obtain policy records for the purpose of comparing them against the DMF to identify deceased insureds and thereby necessitate further action by the insurers, and (3) a declaration that a insurers have no obligation to investigate, settle, and pay claims until receipt of a claim and due proof of death, and not based on a DMF match. Affiliates of Kemper have filed similar actions in Pennsylvania and Florida

3. What information must be provided in an audit?

Several insurers have resisted providing information requested by unclaimed property auditors, and at least one case is now before an appellate court in California. In the court below, in the first litigation stemming from ongoing insurer unclaimed property audits, a California Superior Court issued a preliminary injunction in October 2013 ordering an insurer to furnish state auditors with all data and documents

requested by the State in the course of an audit. *Chiang v. American National Insurance Company*, Case No. 34-2013-00144517 (Sup. Ct. Sacramento Cal. Oct. 9, 2013).

The state's Controller initially challenged the insurer's alleged refusal to produce records on its "currently in-force" policies, thereby preventing the Controller from having access to records allegedly necessary to complete the unclaimed property audit. Specifically, the Controller's complaint alleged that the company had "failed to take reasonable steps to determine whether the insureds under their life insurance and annuity products are deceased," and alleged that "these practices have resulted in both substantial delays in the escheatment of amounts due from the life insurance industry . . . and the failure to escheat such amounts at all." Nearly simultaneously, the Controller moved for a preliminary injunction seeking to enjoin the insurer's alleged refusal to allow "a full, complete and accurate examination of all its books and records" in response to data requests from the Controller and his auditor. Characterizing the refusal to produce certain information as "dilatatory tactics," the Controller claimed that it "does not, and need not, accept the insurer's word that it has, on its own, correctly identified and segregated its own in-force policies."

In response, the insurer argued that the information at issue—data on in-force policies— could not constitute reportable unclaimed property and was therefore entirely irrelevant to the audit. The insurer also filed a four-count cross-complaint seeking a declaratory judgment that (1) the Controller is not entitled to obtain in-force policy data, (2) the Controller lacks the authority to enforce any DMF-searching obligation, (3) the Controller lacks authority to challenge or change the company's contractual relationships with its insureds as part of the audit, and (4) that death is not the dormancy trigger under California law.

In its rulings, the trial court granted the preliminary

injunction and ordered the insurer to produce information on in-force policies. The court stated that the insurer "is depriving the State of the ability to review the company's records to identify escheatable property," because "California's auditor does not, and need not, accept [the insurer's] word that it has, on its own, correctly identified and segregated its own 'in-force policies.'" The Court also dismissed, without leave to amend, counts 2 – 4 of the insurer's cross-complaint for declaratory judgment, which sought to present substantive legal issues regarding the DMF and applicable dormancy trigger. The court held that these issues were not ripe for review and stated that the court would not "speculate as to what the Controller's audit will reveal" or "express an opinion on the validity and scope of such hypothetical exactions."

The insurer has appealed the trial court's rulings to the Third Appellate District of the California Court of Appeals and will submit its opening brief in July 2014. An appellate court ruling in late 2014 or early 2015 may provide guidance on the scope of information that an auditor may request in an unclaimed property audit. Meanwhile, the California Controller has also filed suit against other companies arising out of audit issues.

Conclusion

2014 may be the year when appellate court rulings provide some clarity in the interpretation of key unclaimed property and insurance statutes. Any court decisions in the industry's favor may provide companies under audit with ammunition to challenge positions being taken by state unclaimed property administrators. In addition, the outcome of these pending suits may also affect whether the ongoing scrutiny by state insurance regulators of insurance industry practices regarding DMF use spills over into further litigation.

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Lewis Wiener, an experienced trial attorney with more than 25 years of trial and counseling experience, brings creativity and energy to his representation of corporate entities and individuals in state and federal court litigation throughout the United States. Lew heads Sutherland's Financial Services Litigation Team, is co-chair of the firm's TCPA defense practice, and is a member of the firm's executive committee. His extensive civil litigation and trial experience includes serving as class action defense counsel and as arbitration counsel, conducting large internal investigations, handling complex litigation matters, and defending entities in connection with investigations and enforcement actions brought by government agencies. Lew also represents clients in eminent domain/inverse condemnation, environmental and land-use litigation before state and federal trial and appellate courts.

A former trial lawyer with the U.S. Department of Justice, Lew draws on his experience representing executive branch agencies to represent clients in court and to advise clients on regulatory, compliance and enforcement matters at the federal and state level. While at the Department of Justice, Lew was twice recognized by the Attorney General for special achievement in the handling of significant litigation matters on behalf of the United States, and he was lead government counsel in the largest class action ever filed against the United States. Lew also serves as pro bono partner for Sutherland's Washington, D.C. office.

Lew holds prominent leadership positions in national and local organizations including serving as co-chair of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, as president of the United States Court of Federal Claims Bar Association, and as a member of the Board of Trustees of the State University of New York at Albany. Lew also chairs the investment committee at Norwood School and is a member of the Norwood School Board of Trustees and the Board of Directors of Washington Hebrew Congregation.

Practices / Industries

- Litigation
- Class Action Defense
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- Appellate
- White Collar Defense
- Environmental
- Natural Resources
- Construction
- Director & Officer Liability
- Insurance
- Consumer Financial Services
- Crisis Management
- Telephone Consumer Protection Act (TCPA)

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