

2014
Round Up 
Texas Association of
Life & Health Insurers

Unclaimed Property Developments

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BEIJING BOSTON BRUSSELS CHICAGO DALLAS GENEVA HONG KONG HOUSTON LONDON LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.



Recent Unclaimed Property Developments Affecting Life Insurance Companies

Michael P. Goldman

TALHI Round Up
August 13, 2014

Unclaimed Life Insurance Proceeds Issues Arise on Multiple Fronts

- A. Treasurer/Unclaimed Property Agency Audits, Many Using Third-Party Auditors
- B. Insurance Regulatory Activity and Developments
 - 1. Individual State Market Conduct Exams
 - 2. NAIC Activities
 - NAIC Task Force (2011)
 - UCP Working Group (2014)
- C. Legislative Activity
 - 1. NCOIL Model Act
 - 2. Individual State Laws and Interpretive Regulations
- D. Litigation

Treasurer/Unclaimed Property Agency Audits

A. Eighteen insurance companies or groups have entered into a Global Resolution Agreement (GRA) with the state treasurers/unclaimed property agencies/unclaimed property auditors

- AIG
- Forethought
- Genworth
- Hartford
- ING
- John Hancock
- Lincoln National
- MetLife
- Midland
- Nationwide
- New York Life
- Northwestern Mutual
- Pacific Life
- Prudential
- Symetra
- TIAA-CREF
- Transamerica
- Western & Southern

B. Numerous are in progress

C. Some audits have spawned litigation

Insurance Regulatory Activity and Developments

- A. As of January 2014, thirteen insurance companies or groups had entered into a Regulatory Settlement Agreement (RSA) with the state insurance regulators (often through NAIC Task Force):
 - AIG, Aviva, Genworth, ING, John Hancock, Lincoln National, MetLife, Midland, Nationwide, New York Life, Prudential, TIAA-CREF and Transamerica
- B. MassMutual and USAA were found to be “in compliance” in their use of the DMF.
- C. The NAIC lead states’ press releases indicated they were pursuing the “Top 40” life and annuity insurers.
- D. The remainder of the “Top 40” are thought to be still under examination or in discussions with the departments of insurance or the NAIC task force.
- E. Companies beyond the “Top 40” have had examinations instituted.

NAIC Activities

A. Original Task Force (2011)

1. Investigated claims settlement practices
2. Oversaw multi-state market conduct examinations, originally relating to “asymmetric” use of DMF

B. Unclaimed Life Insurance Benefits Working Group (2014)

1. Its charge is to “study” the death master file issues “to determine if a recommendation should be made.”
2. Wording of the charge itself was hotly debated
3. Time frame may be attenuated. Because of the wording of the charge, this working group can only “determine whether to make a recommendation” to the “A” committee. Any further substance would need to be the subject of further deliberation by “A” or another working group.
4. Some states believe any action by the working group, or by States in enacting unclaimed life insurance benefits laws, will “impair” existing RSAs.
5. Outcome is uncertain. Some of the initial activity has been in “regulator-only” meetings.

Legislative Activity

- A. NCOIL Model Act drafted in 2012, amended in 2013; further amendments are being considered in 2014
 - 1. Key feature: Retroactivity
 - 2. Requires an insurer to compare its in-force life insurance policies against the DMF on a semi-annual basis.
 - 3. States have varied it in a number of respects

- B. Between 2012 and 2014, Fifteen States Enacted Laws
 - 1. Ten laws are retroactive: IA, IN, KY, MD, MT, ND, NV, NY, RI, VT
 - 2. Three laws are prospective: AL, GA, MS
 - 3. Two laws address “asymmetric” use of DMF:¹ NM, TN

¹ These laws apply prospectively, *but only* for insurers that did not previously use the DMF for annuity business while failing to use it for life insurance business.

Legislative Activity (Cont.)

C. New York has a law and a regulation, not based on the NCOIL Model

New York issued a 308 letter in 2011 requiring all 172 New York authorized life insurers to cross-check all life, annuity, and retained asset business against the DMF. New York enacted a regulation in 2012 and a statute in 2012, which it amended in 2013.

D. Wisconsin published interpretative guidance²

“There is no such requirement under Wisconsin’s unclaimed property law to use the DMF or other public database to determine whether an insured or annuitant has died.”

However, if an insurer does search the DMF, knowledge of death “could be” the same as the date of the DMF search. But the Guidance recognizes that “the date of search...does not necessarily equal knowledge of death due to imprecise matches.”

² Department of Revenue Fact Sheet #6100 dated April 21, 2014.

Litigation

A. California suits arising out of Treasurer's audits and initiated by Treasurer

1. ANICO, Thrivent, Kemper, Fidelity & Guaranty
2. Treasurer seeks insurer's records, including full policyholder information
3. Insurers respond or file counterclaims on numerous grounds, including records issues and scope of the audits.

Litigation (Cont.)

B. Suit brought by West Virginia Treasurer against 60+ insurers, 2013³

1. Suit alleging insurers failed to use the DMF to ascertain whether insureds had died and the proceeds of policies could be escheated to the state.
2. The Court surveyed the existing law and noted with approval a Florida case⁴ holding that life insurers have “no obligation...to proactively search the DMF.”
3. The West Virginia Court stated the Treasurer’s “argument that the UPA imposes a duty on insurers to search the Death Master File (DMF) is inconsistent with the UPA’s ‘limiting age’ trigger, which explicitly provides a mechanism for unclaimed life insurance proceeds to be remitted to West Virginia in the event the insurer never receives due proof of death from a claimant.”
4. Instead, the Court held that the insurers had “no obligation to surrender the life insurance proceeds...until the obligation to pay arises—either upon receipt of due proof of death or once the insured reaches the statutorily imposed limiting age.”

³ *West Virginia ex rel. Perdue v. Nationwide Life Ins. Co., et al.*, No. 12-C-287-447 (W. Va. Cir. Ct. Dec. 27, 2013). On appeal.

⁴ See [Total Asset Recovery](#) below.

Litigation (Cont.)

C. Challenges to Specific Legislation

1. Kemper Suits in KY⁵ and MD⁶.

- Raising constitutional issues with retroactive laws
- Seeking declarations of “no duty” to seek out deceased insureds

⁵ United Ins. Co. of Am. v. Kentucky, No. 12-CI-1441 (Ky. Cir. Ct. Apr. 1, 2013). Dismissed on procedural grounds. On appeal.

⁶ United Ins. Co. of Am. et al. v. Maryland Insur. Admin., Case No. 02-C-179785 (Anne Arundel Cnty. Cir. Ct., Maryland 2013); dismissed on procedural grounds. On appeal.

Litigation (Cont.)

D. “Pure play” suits relating to existing (contractual, common law or regulatory) law:

1. Massachusetts / Illinois Case, 2013⁷

The District Court dismissed a putative class action alleging that Hancock had an obligation “stemming from a regulatory agreement” to discover deaths of its insureds and notify beneficiaries.

The District Court dismissed for failure to state a claim, holding first that the plaintiff was not a direct beneficiary of the regulatory settlement agreement and was, at most, an incidental beneficiary.

The Court next held that the case depended on “established principles of insurance law” and that a policy may “require a beneficiary to furnish ‘due proof of loss’...before paying policy proceeds,” and that the insurer’s practice of holding policy proceeds “until receiving proof of [the insured’s] death” comports with the terms of the insurance policy and state law.

⁷ Feingold v. John Hancock Life Ins. Co., 2013 U.S. Dist. LEXIS 117070 (D. Mass. Aug. 19, 2013). Final.

Litigation (Cont.)

2. Ohio Case, 2012⁸

Policyholders filed a putative class action alleging that Nationwide breached its duty of good faith and fair dealing by failing to search the Death Master File in order to independently determine whether any of its insureds had died. Noting the express provisions in Nationwide's life insurance policies that required the insurer to pay death proceeds to the beneficiary upon receiving "due" or "satisfactory" proof of death, the Court of Common Pleas granted Nationwide's motion to dismiss.

In its decision, the Court of Appeals recognized that "obligating [an insurer] to solicit or gather information pertaining to an insured's death would be contrary to the terms contained in the insurance policy."

The Court also acknowledged the insurer's "passive role in establishing an insured party's proof of death; they do not connote an obligation to procure such information."

Furthermore, "in the absence of legislative or administrative regulatory action, we will not import additional unspoken duties and obligations onto Nationwide that will conflict with the parties' contracted terms."

⁸ Andrews v. Nationwide Mut. Ins. Co., 2012-Ohio-4935, 2012 Ohio App. LEXIS 4318; discretionary appeal not allowed, 2013-Ohio-1622, 135 Ohio St. 3d 1415, 986 N.E.2d 31. Final.

Litigation (Cont.)

3. Florida Qui Tam Action, 2013⁹

TARS sought recovery under the False Claims statute in Florida.

The Court held that plaintiff had not alleged facts to show a violation of the False Claims statute, which depended on the defendant “knowingly” avoiding an “obligation” to pay money to the state. Finding that the Florida Statutes defined an “obligation” to mean “an established duty, fixed or otherwise, arising from...statute or regulations...,” the Court stated that Florida has not adopted a law requiring insurers to consult the Death Master File.

The Court dismissed the complaint and held that an insurer does not have an obligation to “engage in elaborate data mining of external databases” such as the Death Master File “in connection with payment or escheatment of life insurance benefits.”

⁹ Total Asset Recovery Services, LLC v. MetLife, Inc. et al., 2010-CA-3719, 2013 WL 4586450 (Fla. Cir. Ct. 2d. Dist., August 20, 2013). On appeal.

Litigation (Cont.)

4. Thrivent's Request for a Declaratory Statement¹⁰ from the Florida Department of Financial Services that insurance proceeds are due and payable when insurer receives a proof of death and a claim for benefits.

Instead, DFS states that under the UCP Law, a policy “becomes a claim upon the death of the insured.” DFS suggests that use of DMF is a “simple exercise of due diligence.”

¹⁰ In Re: Petition for Declaratory Statement of Thrivent Financial for Lutherans, Case No. 137963-13-DS (Order Issued October 4, 2013). On appeal to the Florida First District Court of Appeal, 1 D13-5299.

Litigation (Cont.)

5. Kemper cases in CA,¹¹ FL,¹² IL,¹³ and PA¹⁴

CA: counterclaim in dispute regarding production of policyholder data

IL: Dispute regarding production of policyholder data and seeking declaration that no existing law requires searches for deceased policyholders

FL and PA: Seeking declarations that no existing law requires searches for deceased policyholders

¹¹ Chiang v. Kemper Corp. et al., Case No. 34-2013-00148154 (Sup. Ct. for Cnty. of Sacramento, Calif. 2013).

¹² United Ins. Co. of Am. v. McCarty, No. 2013-CA-2514 (Leon County Circuit Ct. Sept. 4, 2013).

¹³ United Ins. Co. of Am. v. Boron, Case No. 13CH 20383 (Cir. Ct. Cook Cnty., Ill. 2014).

¹⁴ United Ins. Co. of Am. v. Pennsylvania, No. 447-MD-2013 (Comm. Ct. of Pa. Sept. 4, 2013).

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U.S. CHAMBER

Institute for Legal Reform

About ILR

- Established in 1998
- Comprehensive campaign to advance legal reform
- Diverse membership



Unclaimed Property

- Why unclaimed property?
- Private audit firms
- Similar to state attorneys general contingency-fee contracts
- “Cash for contracts”



Best Practices Guide

Transparency

- Competitive bidding and publicly available contracts

Fee Arrangements

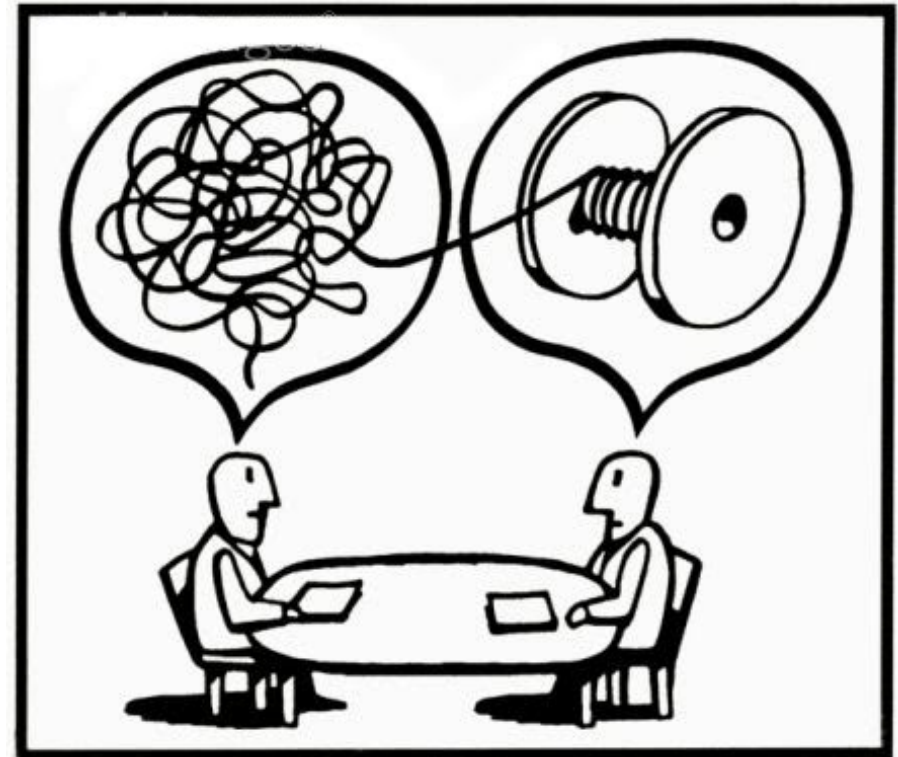
- Contingency-fee prohibition

Contract Reforms

- Ensure state control

Voluntary Disclosure Program

- Effectively induces participation



Post-Publication Progress

- Encouraging continued public discussion through earned media
- Working with the State Financial Officers Foundation (SFOF)
- Engaging NCOIL and ULC during model legislation drafting
- Advocating for legislative solutions



The Time Is Now . . .



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