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Via katie.robinson@uniformlaws.org

Rex Blackburn, Co-Chair
Michael Houghton, Co-Chair
Charles A. Trost, Reporter & Draftsman
Drafting Committee To Revise the *Uniform Unclaimed Property Act*
c/o Katie Robinson
Uniform Law Commissioners
111 N. Wabash Avenue, Suite 1010
Chicago IL 60602

RE: Preliminary Comments Regarding Revision of the *Uniform Unclaimed Property Act*

Dear Messrs. Blackburn, Houghton, Trost & Members of the Committee:

Thank you for the opportunity to participate in the first meeting of the Uniform Law Commissioners Drafting Committee on February 21-22. The meeting was a general review of issues to be considered in revising the Uniform Unclaimed Property Act (UUPA). Neither the commissioners nor observers had specific recommendations for model amendments before them for evaluation. At the conclusion of the meeting, you solicited comments from interested parties to help you develop the first draft of amendments, which will become the basis for further progress. The ACLI here focuses on a paramount concern to the life insurance industry: there should not be a requirement within the *Uniform Unclaimed Property Act* for life insurers to use the Social Security Death Master File (DMF) for purposes of determining abandoned property related to life insurance and annuity contracts. This is because:

1. To the extent there is or should be a requirement for insurers to use the Death Master File, the requirement should be lodged in state insurance law, not unclaimed property law.
2. States are addressing Death Master File requirements as a matter of insurance law, not unclaimed property law.
3. Judicial evaluations are concluding that no requirement existed for insurers to use the Death Master File prior to enactment of modern requirements based upon the 2011 *Model Unclaimed Life Insurance Benefits Act* of the National Conference of Insurance Legislators (NCOIL).
4. Unclaimed property law should not materially alter the substantive law of contract upon which insurance policies and annuity contracts are based.
5. Inclusion of a Death Master File requirement in the *Uniform Unclaimed Property Act* will alter materially the very laws upon which insurance is offered.
6. Inclusion of a Death Master File requirement in the *Uniform Unclaimed Property Act* will create an adversary relationship between state unclaimed property and insurance authorities, creating a chaotic regulatory environment for insurers.
7. Inclusion of a Death Master File requirement will diminish the likelihood of uniform adoption of a revised *Uniform Unclaimed Property Act*.

Background for the discussion

The Drafting Committee is familiar with some of the background of the extraordinary experience of the life insurance industry related to unclaimed life insurance benefits. This experience began in February, 2011, on the occasion of a "global settlement" between one insurance company and numerous state treasury officials.[1] With two exceptions, the information thus far presented to the Drafting Committee members conveys some useful background, as far as it goes.[2]

However, the background information thus far presented does not go far enough. The fact is that the settlements extracted from insurance companies by government officials have been accomplished without clear legal justification. Rather, they are based on a thin patina of legal rationale and a heavy application of raw enforcement power including incessant audits, extraordinary document demands, inflammatory press releases and threats of licensure revocation.

> The tool that regulators and elected officials are using to increase escheatment of unclaimed life insurance proceeds is the Social Security Administration's publicly available Death Master File – a partial database of deaths recorded in the United States.[3] The focus on the DMF by state officials began in 2009, when a private audit firm began a series of audits on behalf of state comptrollers seeking to identify unreported funds. Through these audits, state officials learned that some life insurance companies had been searching the DMF to determine whether annuitants had died to assess their contractual obligations to make life contingent payments. Those companies, in some cases, had not been searching the DMF on the life insurance side to determine whether life insurance benefits should be paid. Although there were legitimate reasons why this "asymmetric" DMF searching made sense and was consistent with the underlying life insurance and annuity contracts, regulators and private actors seized upon the opportunity to demand that life insurers conduct similar searches with respect to life insurance benefits.
>
> When these audits began, there were no laws on the books in any state that affirmatively required life insurance companies to search the DMF for deceased policyholders. Nevertheless, enforcement efforts have broadened significantly as unclaimed property regulators, insurance departments, and private auditors have recognized the potential of DMF searching to increase escheatment revenue – and, for private auditors, contingency fees – by identifying deaths that had not yet been reported to a life insurance company and corresponding benefits that had been "abandoned." These officials and private auditors have adopted two unprecedented positions with respect to unclaimed insurance proceeds: (1) life insurers must use the DMF at regular intervals and across all lines of business in order to identify potentially deceased policyholders or annuitants; and (2) life insurers must begin to "count down" to escheatment beginning on the date of death as reflected on the DMF as opposed to the date on which an insurance company is notified of a death or claim.[4] Despite the novelty of these positions, state officials have pushed insurers to pay examination and monitoring costs based on alleged failures to adhere to these new standards in the past.[5]

Since 2011, a frenzy of treasury audits and insurance examinations pertaining to unclaimed life insurance benefits has engulfed the life insurance industry.[6] The companies that settled understandably decided to mitigate regulatory risk and reputational risk from biased headlines generated by self-interested parties.

Although it has been commercially available for more than two decades, prior to 2009, the states had never used the Death Master File in aid of their unclaimed property audits. Nor had the states claimed the dormancy period for life insurance begins on the date of death rather than maturation of the policy as defined in state insurance laws.[7] The current positions of state officials became known publicly only in the wake of highly publicized settlement agreements with life insurers subject to the state treasurers' audits.[8] The fact that some insurance companies entered into settlement agreements following market conduct exams or audits does not provide state officials with legal support for their position, or with a basis for unilaterally changing the law.

Ambiguity about what Government is Asking of the Uniform Law Commissioners

Now state officials have signaled their intention to seek ratification of at least some of their revolutionary theories by amending the *Uniform Unclaimed Property Act*. It is unclear how far they will go in their appeal to the Uniform Law Commissioners since any appeal for ratification is an admission that authority is lacking for the propositions upon which their settlement demands are based.

The original premise of the government auditor was that an insurance company termination of annuity payments based upon the appearance of a name in the Death Master File that matched a name on the annuity contract was an admission it had "proof of death" of the measuring life. Hence it could be held to have "proof of death" for any insurance policy it also issued. State treasury officials now are expanding their demands and logic to include:

- Every insurance company should be obligated to use the Death Master File for comparisons to all individuals to whom it has issued annuity contracts, insurance policies or retained asset accounts, even if the company does not use the Death Master File.
- The absence of a Death Master File match does not relieve an insurer of duty; rather government has the authority to invent logic by which to interpret Death Master File fuzzy matches sufficiently to presume the death of a insured.
- There is no statute of limitations for a contract claim and hence the government can demand to audit decades of data.
- The government need not demonstrate direct evidence of a failure to report unclaimed life insurance benefits but rather can estimate funds to be escheated.
- Corporate separation of annuity business from life insurance business is irrelevant and all entities, even separate corporations, will be aggregated for unclaimed property reporting liabilities if the entities are within a single insurance holding company system.
- Annuity contracts are functionally equivalent to life insurance contracts for unclaimed property reporting requirements.
- The appearance of a name in the Death Master File constitutes proof of death.
- The appearance of a name in the Death Master File invalidates any insurance or annuity contract provision that might exclude reporting of the contract death benefit as unclaimed property.

There is no basis in law for these government demands or logic. Appended to this submission is a document released by the U.S. Chamber Institute for Legal Reform entitled *Land Rush! The Latest Legal Frontier of Unclaimed Property Enforcement and Litigation* (October, 2012). This document provides the Drafting Committee a deeper understanding of the revolutionary interpretation of unclaimed property laws being pressed upon the life insurance industry by numerous state treasury and insurance officials. Also appended to this submission is a new document recently released by the U.S. Chamber Institute for Legal Reform entitled *Unclaimed*

Property: Best Practices for State Administrators and the Use of Private Audit Firms. This document provides updated information on the extraordinary demands of the government auditors, the weaknesses in their positions, and the resistance by life insurers generating litigation in turn establishing the lack of authority for the governments' positions. The ACLI is preparing a study at this time that will complement and update the Chamber publications. The ACLI will share its study with the Drafting Committee when it is available.

The immediate ACLI comment presumes that state treasury and unclaimed property authorities will recommend to the Drafting Committee that its first draft of revisions expressly include a requirement that life insurers use the Death Master File for purposes relating to the identification of unclaimed life insurance benefits. The ACLI hopes that it is wrong since, by being wrong, the life insurance industry will then be more comfortably positioned to contribute to the further progress of the modernization of the *Uniform Unclaimed Property Act* in cooperation with unclaimed property authorities.

The life insurance industry takes this opportunity to note its objection to any suggestion that the appearance of a name on the Death Master File constitutes proof of death. The appended, new Chamber document discusses the many problems with the accuracy of the Death Master File. Later in this letter the ACLI objection to state treasury officials' invention of "property" for purposes of increasing government revenue is explained, further indicating why a Death Master File match cannot constitute proof of death. As is explained immediately below, the expert insurance law-makers of the National Conference of Insurance Legislators (NCOIL) understand that a Death Master File match, at most, might trigger an obligation to investigate a possible death of an insured life but it cannot function as a surrogate for proof of death supplanting the need of a death certificate or other duties satisfying fundamental conditions of the insurance contract.

Death Master File requirements should be a matter of insurance law, not unclaimed property law.

Cause for optimism that state treasury officials will refrain from an over-reaching appeal to the Uniform Law Commissioners arrived on April 7, 2014, when the National Association of Unclaimed Property Administrators (NAUPA) commented upon proposed amendments to the NCOIL *Model Life Insurance Benefits Act*. The NAUPA letter is appended. In it, NAUPA reminds us that it fully supported the NCOIL Model Act as it was adopted in 2011. It advocates to NCOIL that any amendments to the NCOIL Model Act not undercut its purpose to require life insurance industry use of the Death Master File to help ensure that all benefits are paid to deceased insureds in a timely manner.

The ACLI agrees with these basic points and is glad that NAUPA looks to NCOIL for continued leadership in the formulation of legislative guidance respecting life insurance company duties. In its letter, NAUPA pointedly observes that

> …[S]ome insurance companies have suggested the [NCOIL] Model Act be amended to address issues that clearly fall within the scope of NAUPA member-state officials' responsibilities in carrying out their obligation to ensure compliance with their respective unclaimed property laws, such as how states compensate their unclaimed property auditors or what standards must be met before property is required to be escheated. NAUPA strongly opposes any such amendments as being beyond the intended scope of the Model Act. As noted above, through enactment of the [NCOIL] Model Act, states may impose requirements on insurance companies that will prevent unpaid death benefits

> from becoming unclaimed property. The [NCOIL] Model Act, however, must not attempt to abrogate the ability of unclaimed property administrators in enforcing the unclaimed property laws to the extent that insurance companies are unable to find and pay the beneficiaries of such policies.[9]

The Uniform Law Commissioners Drafting Committee need not consider including Death Master File requirements for life insurers in the amendments to the *Uniform Unclaimed Property Act* for these very reasons.

To the extent there is or should be a requirement for insurers to use the Death Master File, the requirement should be lodged in state insurance law, not unclaimed property law. There appears to be a broad-based consensus among all interested parties including unclaimed property authorities that insurance company Death Master File requirements should be articulated as a matter of insurance law. NCOIL quickly realized the importance of creating a foundation in law for the novel ideas of the unclaimed property auditor and approved its Model in 2011, the year the first global settlements were announced between a small number of large insurers and the states.

The NCOIL Unclaimed Property Task Force met March 7, 2014, to review the NCOIL Model Act and consider strengthening consumer protections related to unclaimed life insurance benefits. NCOIL leaders requested that all proposed amendments be submitted in markup form by April 8. All of the proposals submitted respect the basic notion that insurance companies should utilize the Death Master File to enhance identification of deceased insureds and as a basis of additional duties to search for beneficiaries, though scope of Death Master File comparisons to in force business is controversial. The Task Force will deliberate upon these matters during the NCOIL 2014 Summer Meeting in Boston.

Separately, the National Association of Insurance Commissioners (NAIC) this year established an Unclaimed Life Insurance Benefits Working Group, which first met on March 31, 2014.[10] Many interested parties urged the NAIC Working Group to endorse the NCOIL Model Act. An alternative view suggested that NAIC use the regulatory settlements reached between several large life insurance companies and numerous state insurance officials. These regulatory settlements – much like the unclaimed property audit global settlements – require the settling insurance companies to use the Death Master File in specific ways. Naturally, the NAIC guidance is expected to rely upon insurance regulatory jurisdiction to achieve its goals.

States are addressing Death Master File requirements as a matter of insurance law, not unclaimed property law.

Eleven states have adopted modern laws requiring insurance companies to use the Death Master File to diminish unclaimed life insurance benefits: Alabama, Indiana, Kentucky, Maryland, Mississippi, Montana, Nevada, New Mexico, New York, North Dakota, and Vermont.[11] Another two states' legislatures (Georgia and Tennessee) have approved bills and sent them to their respective governor's for enactment, where they are pending.[12] Except for one, the new state laws are based upon the NCOIL Model Act (the New York law is not considered technically to be based on the NCOIL Model but nonetheless includes similar Death Master File requirements). Of the modernizing states, only Vermont anomalously amended its unclaimed property laws – all the other states respected the NCOIL intention that its guidance be embedded within state insurance codes. For reasons explained below, it should be preferable public policy to amend state insurance laws with the modern guidance, as intended by NCOIL.

Another six state legislatures have in 2014 considered or are considering the NCOIL Model Act to modernize their insurance laws. They are Iowa, Louisiana, Massachusetts, Oklahoma, Pennsylvania, and Rhode Island.[13] Only one of the legislatures is contemplating amending its unclaimed property laws to require Death Master File comparisons by life insurance companies (Tennessee; see *infra* at page 9).

A consensus public policy is emerging. The new laws are consistent with the long-standing practice, imposed by insurance statute, requiring submission of a claim and proof of death before life insurance proceeds become payable. This does not necessarily mean that modifications to traditional administrative processes are unnecessary. Life insurers share the regulators' stated goal of ensuring that all proceeds are paid to proper beneficiaries. The legislative process – contrary to the adversarial process characteristic of regulatory audits – provides a forum for developing a reasoned solution. This process is well under way throughout the country.

No requirement existed for insurers to use the Death Master File prior to the new, NCOIL Model Act laws.

Although several life insurers have acceded to the demands of regulators in order to resolve unclaimed property audits and market conduct examinations, no court has yet cast aside the traditional proof of death requirement, and no court has adopted the state treasurers' position that dormancy begins automatically upon the insured's death. To the contrary, courts around the country have considered and rejected these claims.

For example, a Florida court last year rejected the position anticipated from the treasury officials here. In *Total Asset Recovery Services, LLC v. MetLife, Inc., et al.*, No. 2010-CA-3719, at *4 (Fla. 2d Cir. Ct. 2013), appeal docketed, No. 1DCA-4420 (Fla. 1st DCA 2013), plaintiff Total Asset Recovery Services asserted claims against the life insurers under Florida's False Claims Act, § 68.081, et seq., Florida Statutes, claiming the insurers failed to search the Death Master File and remit life insurance proceeds to the state. The court found that the claims were without merit.

In dismissing Total Asset's claims, the court stated that "Florida has not adopted a law requiring [the insurer] to consult the Death Master File." Nor has Florida adopted "a 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." In other words, in the absence of some concrete obligation to search the Death Master File, which theoretically could lead to "knowledge" of death, there is no escheatment obligation under § 717.107 Fla. Statutes or similar state laws. The government contention that a life insurance policy automatically becomes a claim that is "due and payable" upon the death of the insured for purposes of § 717.107 cannot be squared with the decision in *Total Asset*.

The recent decision in *Perdue v. Nationwide Life Ins. Co.,* Civ. No. 12-c-287 (W.V. Cir. Ct. Dec. 27, 2013) is also highly instructive. In that case, West Virginia's treasurer, John Perdue, filed separate lawsuits against 69 life insurers. Perdue alleged that the insurers had a duty to search for deceased insureds and that knowledge of those deaths would trigger the dormancy period under West Virginia's *Unclaimed Property Act*. The court rejected Treasurer Perdue's position and granted the insurers' motions to dismiss.

As in Florida, West Virginia's insurance statute provides that life insurance policies shall have a provision requiring settlement to be made "upon receipt of due proof of death." W. Va. Code

Ann. § 33-13-14. The court in *Perdue* stated that this provision "conditions an insurer's liability upon the presentation of a claim, which requires that a claimant provide an insurer with notice…" *Perdue*, No. 12-c-287 at 6. The court noted that applying West Virginia's unclaimed property law to life insurance proceeds before they met the definition of "property" and before they were "presumed abandoned" was contrary to the "receipt of due proof of death" language required to be in every life insurance contract sold in the State. The "due proof of death" requirement was "an essential ingredient of unclaimed property law." Id. at 11.

The court also rejected Perdue's claim of an implied duty under West Virginia's unclaimed property statute[14] requiring insurers to use the Death Master File to identify deceased insureds. The court found the purported "duty to search" inconsistent with the "limiting age" trigger, which "explicitly provides a mechanism for unclaimed life insurance proceeds to be remitted" to the state if the insurer never receives proof of death. The court thus held there was no obligation to remit life insurance proceeds as unclaimed property until the obligation to pay arose – i.e., "until the beneficiary has made a valid claim and submitted due proof of death or the insured obtains the limiting age." Indeed, the court chastised West Virginia's treasurer for attempting "to rewrite the statute by creating a new category of presumed abandoned property." *Perdue*, No. 12-c-287 at 11.

Two other courts have addressed these issues in lawsuits filed by private litigants, and those courts have reached similar conclusions: there is no independent duty to search the Death Master File and thus no obligation to remit proceeds under the unclaimed property statute. For example, in *Andrews v. Nationwide Mutual Ins. Co.,* No. 12-97891, 2012 WL 5289946 (Ohio Ct. App. Oct. 25, 2012), the plaintiff sued an insurer in a putative class action for failing to use the Death Master File to determine when beneficiaries of life insurance proceeds were entitled to the death benefits. The Ohio Court of Appeals affirmed the dismissal of the suit, holding that the life insurance contracts sold in Ohio expressly required "receipt" of "proof of death" from the claimant.[15]

Similarly, a recent decision by the U.S. District Court for the District of Massachusetts also held that, in the context of unclaimed life insurance benefits litigation, the insurance laws of Massachusetts and Illinois do not require life insurance companies to affirmatively seek potentially deceased policyholders.[16]

Unclaimed property law should not alter the substantive law of contract upon which insurance is based.

It is appropriate for government auditors to hunt for and discover unclaimed property but improper for them to invent property for purposes of declaring it abandoned. Unclaimed property laws today apply to broad categories of intangible property and financial instruments, including life insurance proceeds. These statutes universally incorporate the "proof of death" requirement found in state insurance laws.

While unclaimed property statutes vary, they generally reflect one of three model unclaimed property acts promulgated by the Uniform Law Commissioners.[17] The model laws establish that the State's role is purely custodial: "[T]he State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." The State has no greater right than the owner of the abandoned property.[18]

Under the model laws, dormancy begins upon the submission of actual proof of death or upon another explicit triggering event. For example, under the original 1954 Model Act, "[u]nclaimed

funds" referred to "all moneys held and owing by any life insurance corporation" for more than seven years "after the moneys became due and payable." *See Uniform Unclaimed Property Act* (1954) at §3(b). The 1954 Model Act also provided that a "life insurance policy not matured by actual proof of death of the insured" is nevertheless presumed to be matured if the policy remains in force "when the insured attained the limiting age under the mortality table on which the reserve is based." Id. (Emphasis added).[19] In other words, the 1954 Model Act contained two triggers – maturation by actual proof of death or, if the policy remained in force, presumptive maturation to the limiting age.

Many states' unclaimed property statute reflects the 1981 Model Act, which also incorporates the principle that life insurance benefits are not payable in the absence of due proof of death. See, e.g., § 717.107 through 717.1401, Florida Statutes (2013); 1981 Model Act § 7(c). Florida's statute acknowledges that "maturity" generally occurs upon "actual proof of death of the insured." However, Florida's statute identifies two additional circumstances when a policy may be deemed matured: when the "company knows the insured or annuitant has died" and when the insured "has attained, or would have attained if he or she were living, the limiting age under the mortality table on which the reserve is based." § 717.107(3)(a) and (b), Fla. Stat. (2013).

These laws are typical of other states' laws. They have always been read in a manner to make consistent and unambiguous insurance and unclaimed property statutes. Based upon the plain meaning of those statutes, the courts are finding that insurers have no obligation to surrender the life insurance proceeds under the uniform unclaimed property acts until the obligation to pay arises — either upon receipt of due proof of death or once the insured reaches the statutorily imposed limiting age. *See Perdue*, id. at p. 9.

There is no authority for government to create "property" under state unclaimed property laws – or under the *Uniform Unclaimed Property Act*. The analysis of the court in *Perdue*, for example, describes the correct relationship of unclaimed property and insurance laws. In *Perdue*, the court found that W. Va. Code § 36-8-2(e) states that "property is payable or distributable for purposes of this article notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment." However, the state unclaimed property law defines the term "property" as it relates to life insurance benefits as "an amount owed by an insurer on a life or endowment insurance policy . . . three years after the obligation to pay arose." West Virginia insurance law, in turn, expressly requires life insurance to contain a provision conditioning payment upon the insurer's "receipt of due proof of death." W. Va. Code § 33-13-14. Therefore, for life insurance proceeds, there is no "property" subject to or reportable under the unclaimed property law until the beneficiary has made a valid claim and submitted proof of death or the insured attains the limiting age.

West Virginia unclaimed property law does not purport to change the definition of property as it relates to life insurance proceeds or to override the Insurance Code. By contrast, the unclaimed property law defines the term "property" as it relates to savings accounts, negotiable instruments, and other types of property based on sheer passage of time, without any demand by the owner. *See, e.g.,* W. Va. Code § 36-8-2(a)(1) *et seq*. Such property is reportable as unclaimed by the express terms of the unclaimed property law even if the owner would be required to present a check or money order to the reporting company in order to claim the property directly.

> Insurance death benefits, however, are inherently different from other types of unclaimed property. The threshold question of whether the insurer has any liability is contingent upon the happening of an event, the occurrence of which must be proven.

> Instead, a claimant must show that the insured has died while the policy is in force arising from a cause that is not excluded from coverage. See W. Va. Code § 33-13-25 (listing limitations that may be included in insurance contracts conditioning the insurance companies' responsibility to pay proceeds to a beneficiary, such as in the case of suicide). As a result, the "due proof of death" requirement is not a mere administrative requirement for collecting an obligation that is already fixed and certain. Rather, it is an essential ingredient for creating the obligation (i.e. the "property") in the first place.

Perdue at p. 11.

Inclusion of a Death Master File requirement in the *Uniform Unclaimed Property Act* will alter materially the very laws upon which insurance is offered.

Hence, any recommendation that Death Master File requirements for insurance companies be amended into the *Uniform Unclaimed Property Act* should be rejected as beyond the scope of the Act. After decades of experience – including recent experience – it is clear that (1) there is no practical need to expressly require Death Master File use in the unclaimed property laws to accomplish the auditor's goals to persuade insurers to use it; and (2) amending unclaimed property laws with Death Master File requirements will create ambiguity within state laws as to the nature of the "property" in review, upsetting well-settled, consistent precedents of interpretation and statutory conciliation.

Indeed, any recommendation by government to mandate insurance company use of the Death Master File should be seen as a calculated effort to create property for purposes of escheatment and to embed unclaimed property auditors into insurance operations in a manner to compel insurers to tithe funds to the states beyond authentically custodial purposes.

The threat is real. As this letter is being written, treasury officials and auditor lobbyists are advocating amendments to NCOIL Model Act legislation which, if accepted, will establish authority for treasury officials to interfere with insurance regulatory supervision of insurance contracts. For example, deliberations on Oklahoma H. 3287, which will modernize the administration of unclaimed life insurance benefits by amending the insurance code with the support of the insurance industry, stalled over the following Senate floor amendment (indicated in italics and underlined):

> A. The Unclaimed Life Insurance Benefits Act shall require recognition of the escheat or unclaimed property statutes of the State of Oklahoma, specifically Section 653 of Title 60 of the Oklahoma Statutes, *and allow the Office of the State Treasurer or its agent to match all life policies, annuities, and retained asset accounts of an insurer against the death master file, without limitation as to the issue date of such life policies, annuities, or retained asset accounts, for the purpose of identifying unclaimed property.* This act requires the complete and proper disclosure, transparency and accountability relating to any method of payment for life insurance death benefits regulated by the state's Insurance Department; provided, however, neither the Insurance Commissioner nor the State Treasurer shall promulgate rules or issue bulletins that impose, or interpret this act to impose, additional duties and obligations on insurers, beyond those set forth in this act, or otherwise attempt to expand the requirements of this act.

The amendment cannot be squared with the fundamentally contingent nature of insurance contracts. Neither can it be squared with the insurance commissioner's fundamental authority

to approve insurance contracts and protect policy owner and beneficiary rights pursuant to insurance market examination. To the contrary, it invites the treasurer and his auditor to muscle inside the insurance contract, ignore its contingencies, and invent "property" for the purpose of escheating it to the state. It clearly is not motivated by any good faith sense of custodial duty because it is proposed to operate before a beneficiary even has a chance to make a claim, much less take solace from a period of bereavement.

It is well-documented that a few states have a long tradition of disrespect for the custodial mission of escheated funds. The misuse of power to extract funds from the life insurance industry now underway is creating a new standard of disrespect. The Uniform Law Commissioners should not become party to it. Rather, the Uniform Law Commissioners should defend the ancient principles upon which unclaimed property law is established. Those principles and every version of the *Uniform Unclaimed Property Act* have always based government authority on derivative rights and custodial duty specific to identifiable citizens and certain property.

Inclusion of a Death Master File requirement in the *Uniform Unclaimed Property Act* will create an adversary relationship between state unclaimed property and insurance authorities, creating a chaotic regulatory environment for insurers.

Thus far insurance officials have deferred substantially to their colleague treasury officials in explaining the new expectations that insurers will use the Death Master File for new, extra-contractual duties. The new laws naturally and properly rely upon the expert insurance regulators to detail regulatory expectations and improve the administration of insurance benefits in circumstances where a claim is not filed but a Death Master File match occurs. Should treasury officials now request new Death Master File requirements be amended into the *Uniform Unclaimed Property Act*, however, it will create an adversarial relationship among state officials as the treasurers attempt to expand the classification of insurance benefits for purposes of escheatment, hence diminishing the insurance commissioner's role as the preeminent regulator of the business of insurance.

The likelihood of creation of adversarial relationships among state unclaimed property and insurance authorities is displayed in the *Corrected Fiscal Note to Tennessee HB 2427 – SB 2516* (February 25, 2014). The *Corrected Fiscal Note* is appended to this letter in its entirety. The document displays how the legislature, in contemplating a modernization of the administration of unclaimed life insurance benefits, disappoints state treasury expectations "based on an estimate of the total number of policies written in Tennessee and the percentage of policies that have been reported" regarding "an additional $64 million dollars of unclaimed property in the form of proceeds and annuities where the policy owners are deceased." The legislation, based on the NCOIL Model Act, defers to insurance regulatory preeminence over insurance contract administration and, hence, "There will be *an increase in foregone revenue* (sic) to the [Unclaimed Property] Division, beginning in FY15-16, of $41 million." (Italics added; *see Appendix* Document 4.)

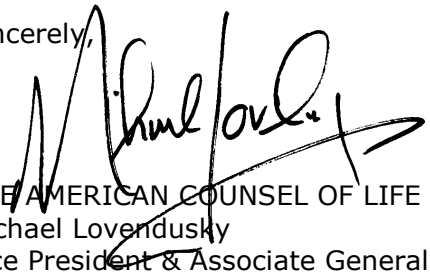
Multiple and varied Death Master File requirements in different codes of state law will compound compliance burdens for insurers. Indeed, the concern arises that the diversity of state unclaimed property laws has created a degree of ambiguity that emboldens government auditors to plough the seas of commerce as privateers armed with letters of marque justifying demands based on self-serving inventions of "property" and evaluations of the "moral obligations" of insurance companies.[20] It may be that the well-intended efforts of the Uniform

Law Commissioners and interested parties hoping to improve the uniformity of state laws instead are opening new opportunities for plunder and mischief.

Inclusion of a Death Master File requirement will diminish uniform adoption of a revised *Uniform Unclaimed Property Act*.

The American Council of Life Insurers represents approximately 300 member companies operating in the United States and abroad. The ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. The ACLI is actively opposing current legislative proposals to enact treasury official authority to compel use of the Death Master File for the purpose of inventing property to escheat for revenue. For these reasons, the ACLI opposes amendment of the *Uniform Unclaimed Property Act* to the same end. The ACLI hopes to be able to continue to support and contribute to the development of the revision undertaken by the Uniform Law Commissioners. Such an effort must respect ancient principles of government duty, well-established American precedent of the proper scope of government, the complementary roles of different government officials, and the essential value of sustaining the business of life insurance.

Sincerely,



THE AMERICAN COUNSEL OF LIFE INSURERS
Michael Lovendusky
Vice President & Associate General Counsel

Appendices

1. U.S. Chamber Institute for Legal Reform: *Land Rush! The Latest Legal Frontier of Unclaimed Property Enforcement and Litigation* (October, 2012)
2. U.S. Chamber Institute for Legal Reform: *Unclaimed Property: Best Practices for State Administrators and the Use of Private Audit Firms* (April, 2014)
3. Letter, National Association of Unclaimed Property Administrators to the National Conference of Insurance Legislators regarding the NCOIL *Model Life Insurance Benefits Act* (April 7, 2014)
4. *Corrected Fiscal Note to Tennessee HB 2427 – SB 2516* (February 25, 2014), Tennessee General Assembly Fiscal Review Committee.

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[1] See, e.g., Uniform Law Commissioners Co-Chairs Memo "Issues for Consideration in the Revision of the UUPA" (2/13/14) at pp. 46-48 ("Uniform Law Commissioners Memo").

[2] The particular matters to which ACLI takes exception appear in the Uniform Law Commissioners Memo at footnotes 169 and 170. Footnote 170 mischaracterizes the majority holding in the split decision in *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), in which "The judgment of the Court of Appeals of New York is affirmed except to issues specifically reserved" and "The Court of Appeals by its interpretation of the New York statute left open to the insurance companies all defenses except the statute of limitations, noncompliance with policy provisions calling for proof of death or of other designated contingency and failure to surrender a policy on

making a claim." It was the constitutionality of the New York statute that was at issue, and because "The state is acting as a conservator, not as a party to a contract" the majority "assume[d] that appellants [insurers] may find it more difficult to establish other defenses, but we do not regard the statute as unconstitutional because of these enforced variations from policy provisions." Hence the proposition asserted in the Uniform Law Commissioners memo ostensibly supported by Footnote 170 is wrong: the U.S. Supreme Court did *not* hold "that formal contractual obligations are not appropriate when applied to a state's custodial escheatment of property."

More troubling is the misinformation based upon and within Footnote 169. The ACLI is grateful to be able to participate as an Observer in the important effort to revise the UUPA. It believes that it is important that the members of the Drafting Committee receive objective information upon which to base their efforts – or at least that the members realize when they are receiving biased information that might be flawed. The very title of the Note constituting a supposed authority misinforms the members of the Drafting Committee that insurance companies have done something wrong. But no insurer has admitted to wrongdoing, no authority has imposed a fine or penalty, and no court has found any "failure to escheat" on the part of any insurance company. Appreciating this fact should alert the members that the Note evidences some degree of bias and error. Inasmuch as the misinformation in the Note becomes of profound importance to the life insurance industry because it has been presented to the ULC Drafting Committee as objective fact upon which the members might rely in their drafting, the ACLI is compelled to bring to the attention of the Committee the provenance of the Note. The Note was written by a law student. The student author is the son of the chief executive officer the auditing firm employed by 37 states to search insurance companies for unclaimed life insurance benefits. The Drafting Committee has been ill-served with regard to these matters, and the ACLI objects to the biased misinformation in the Note and the Memo.

[3] The DMF is a database maintained and made publicly available by the SSA containing over 89 million records of deaths and including information such as an individual's social security number, name, date of birth, date of death, state or country of residence and ZIP code of last residence. The DMF does not purport to contain records for every deceased individual, and the SSA does not guarantee the database's veracity. U.S. Department of Commerce, Social Security Administration's Death Master File, available at www.ntis.gov/products/ssa-dmf.aspx.

[4] With respect to this second position, regulators have insisted that the date of death reflected on the DMF should constitute the beginning of the applicable "dormancy period," i.e., the period of time after which property is deemed abandoned and must be escheated to the state. If proceeds are not escheated at the close of an applicable dormancy, the escheating company is subject to high rates of interest on the "late-escheated" property, as well as to additional fines and penalties.

[5] U.S. Chamber Institute for Legal Reform: *Land Rush! The Latest Legal Frontier of Unclaimed Property Enforcement and Litigation*, (October, 2012), p. 3, (appended).

[6] By May of 2011, one auditor had been hired by 37 states. Arthur D. Postal, *States Form Task Force, Hire Verus to Look at Unclaimed Property Procedures*, LIFEHEALTHPRO, May 11, 2011, available at http://www.lifehealthpro.com/2011/05/11/states-form-task-force-hire-verus-to-look-at-uncla
By June 2013, eleven life companies entered into multistate settlement agreements, with recent settlements closing unclaimed property audits underway in as many as 45 states. In California alone, the state Controller has reached settlements with approximately 18 life insurance companies since 2011. See Debbie Cai, *Update: California Controller Reaches $763 Million in Life Insurance Settlements*, WALL ST. J., (June 7, 2013) available at http://online.wsj.com/article/BT-CO-20130607-711965.html.

[7] See, e.g., FLA. STAT. ANN. § 717.107 (2013).

[8] See, e.g., John Hancock Life Insurance Company (U.S.A.) Settlement Agreement, May 18, 2011, http://www.floir.com/siteDocuments/JohnHancockLifeSettlementAgreement05182011.pdf.

[9] NAUPA Letter to NCOIL (April 4, 2014), p. 4 (letter appended).

[10] See http://www.naic.org/committees_a_unclaimed_life_benefits_wg.htm for information about the NAIC Working Group formation and activity.

[11] See ALA. CODE § 27-15-52 (2014), 2014 Indiana Senate Bill No. 220, Indiana One Hundred Eighteenth General Assembly - Second Regular Session (Indiana Unclaimed Life Insurance Benefits Act, Pub. L. No. 90 (March 20, 2014), KY. REV. STAT. ANN. § 304.15-420 (2014), MD. CODE ANN., INS. § 16-118 (2014), 2014 Mississippi Senate Bill No. 2796, Mississippi One Hundred Twenty-Ninth Legislative Session (Mississippi Unclaimed Life Insurance Benefits Act, (March 24, 2014), MONT. CODE ANN. § 33-20-1604 (2014), NEV. REV. STAT. §§ 688D.090 (2014), N.M. STAT. § 59A-16-7.1 (2014), N.Y. INS. LAW § 3240 (2014), N.D. CENT. CODE §§ 26.1-55-01 to -05 (2014), VT. STAT. ANN. tit. 27, § 1244a (2014).

[12] States awaiting Governor's Approval: **Georgia**: 2013 Georgia House Bill No. 920, Georgia One Hundred Fifty-Second General Assembly - 2013-2014 Regular Session) (sent to Governor, March 26, 2014); and **Tennessee**: 2013 Tennessee Senate Bill No. 2516, Tennessee One Hundred Eighth General Assembly - Second Regular Session (eligible for Governor's desk, April 21, 2014).

[13] **Iowa**: 2013 Iowa House File No. 2333, Iowa Eighty-Fifth General Assembly - 2014 Session (passed by House February 26, 2014); **Louisiana**: 2014 Louisiana House Bill No. 411, Louisiana Fortieth Regular Session (introduced March 10, 2014); **Massachusetts**: 2013 Massachusetts House Bill No. 20, Massachusetts One Hundred Eighty-Eighth General Court (introduced January 7, 2013); **Oklahoma**: 2013 Oklahoma House Bill No. 3287, Oklahoma Second Regular Session of the Fifty-Fourth Legislature (passed by Senate, April 15, 2014); **Pennsylvania**: H.B. 1937, 197th Gen. Assem., Reg. Sess. (Pa. 2014) (as introduced, January 6, 2014)); and **Rhode Island**: 2013 Rhode Island Senate Bill No. 2308, Rhode Island 2014 Legislative Session, 2013 Rhode Island Senate Bill No. 2056, Rhode Island 2014 Legislative Session, 2013 Rhode Island House Bill No. 7031, Rhode Island 2014 Legislative Session (passed by House February 11, 2014), 2013 Rhode Island House Bill No. 5452, Rhode Island 2013 Legislative Session..

[14] West Virginia's unclaimed property law is nearly identical to Florida's, although it does not include the "knowledge" trigger found in Fl. Stat. § 717.107(3)(a).

[15] The pertinent provision of Ohio's insurance statute, Ohio Rev. Code Ann. § 3915.05(K), is nearly identical to § 627.461 of the Florida Insurance Code requiring settlement upon due proof of loss. The *Andrews* court observed that "[t]he terms 'receipt' and 'receiving' demonstrate [the insurer's] passive role in establishing an insured party's proof of death; they do not connote an obligation to procure such information." Instead, the court held that the law "place[d] the burden on the claimant or the beneficiary to produce the proof of death." The contracts did "not impose a duty on [the insurer] to search the DMF to determine whether their insureds are deceased"; in fact, the insurer had no obligation "to solicit or gather information pertaining to an insured's death." Accordingly, the court concluded that the insurer did not breach any duty because it was "not contractually or legally obligated" to "incorporate the DMF into its account servicing practices." *See Andrews v. Nationwide Mutual Ins. Co.,* No. 12-97891, 2012 WL 5289946 (Ohio Ct. App. Oct. 25, 2012).

[16] See *Feingold v. John Hancock Life Ins. Co*., No. 13-10185, 2013 U.S. Dist. LEXIS 117070 (D. Mass. Aug. 20, 2013), a federal court in Massachusetts held that an insurer's practice of requiring the life insurance policy beneficiary to submit proof of death and a claim before payment comported with both Massachusetts and Illinois law. "Both the insurance policy and state law allowed [the insurer] to hold the policy proceeds until [the beneficiary] provided proof of [] death." The argument that the insurer impermissibly withheld payment failed.

[17] The Uniform Law Commissioners promulgated the first model act in 1954 (the "1954 Model Act") which was amended in 1966. Few states still follow either version. The 1954 Act was wholly revised in 1981 to become the Uniform Unclaimed Property Act (the "1981 Model Act"), which was revised again in 1995 (the "1995 Model Act").

[18] *See* Prefatory Note to 1995 Model Act. *See, also, e.g., Clymer v. Summit Bancorp*, 171 N.J. 57, 63 (N.J. 2002); *Cole v. National Life Ins. Co*., 549 So. 2d 1301, 1302 (Miss. 1989); *Ins. Co. of N. America v. Knight*, 291 N.E.2d. 40, 44 (Ill. 1972).

[19] The "limiting age," which is based on actuarial mortality tables, refers to the age at which an insurance company presumes that an insured is deceased. See *Feingold v. John Hancock Life Ins. Co*., No. 1:13-cv-10185, 2013 WL 3475996 at *n.2, (D. Mass. March 29, 2013) (equating "when the insured attains the terminal age of the mortality table" with "the age by which all insured individuals are assumed to have died"); see also Andrea G. Podolsky, *Insurer's Duty to Disclose the Existence of A Policy*, 76 COLUM. L. REV. 825, 835 (1976) ("The limiting age is the point at which the relevant mortality table assumes everyone in a given group, usually expressed in terms of one thousand, will have died.")

[20] See Letter of R. Birchum, Oklahoma Deputy Treasurer for Policy and Chief of Staff to Oklahoma Senator Gary Stanislawski re "Office of State Treasurer position regarding HB 3287 {NCOIL Model Act]" ("After much analysis and consultation with other state treasurers and unclaimed property experts, the Office of the Oklahoma State Treasurer cannot support a change in law that is only prospective in nature, thus relieving the insurance industry from its moral obligation to make a good-faith effort to identify and pay the beneficiaries of life insurance policies.") (April 21, 2014).