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1. Unclaimed property overview
   a. Basic concepts and terms
i. Unclaimed property: any intangible personal property that is held, issued or owing in the ordinary course of business and has remained unclaimed by the apparent owner for a specified period of time after it became payable or distributable is presumed abandoned.

ii. Examples of reportable property
   1. Accounts payable (vendor checks, credit balances)
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iii. Holder: person obligated to hold for the account of, or deliver or pay to, the owner of property subject to unclaimed property (see 1995 UUPA §1(6))

iv. Owner: person who has legal or equitable interest in property or the person’s legal representative (see 1995 UUPA § 1(11))

v. Dormancy Period: also known as an abandonment period, it refers to the specified time period during which an owner takes no action regarding his or her property (see 1995 UUPA § 2)
   1. Property is presumed abandoned if the dormancy period is met
   2. Key is whether the owner of the property has taken any affirmative action of the property (automatic deposits, deductions, etc. likely will not constitute activity)
   3. Must distinguish between acts of the holder versus those of the owner
   4. Some statutes specifically state that a lack of return mail constitutes activity
5. Although not explicitly provided for in most statutes, most states accept electronic activity (but need to ensure that sufficient data is retained and is detailed enough to link the owner to the specific activity and account)

vi. Due Diligence: the holder of property must conduct due diligence and attempt to return the property by contacting the owner (see New Jersey Retail Merchants Ass’n v. Sidamon-Eristoff, 2012 WL 19385 (3rd Cir. Jan. 5, 2012))

1. Wide variety of state requirements, but generally:
   a. Account value thresholds for notice vary from $50-$100
   b. Not required if most recent address is known to be bad
   c. Notice usually mailed up to 120 days before escheatment
   d. Some state laws allow companies to recoup service charges for mailing costs, but majority do not

2. Some states require holder to file affidavit regarding due diligence mailings

3. Most unclaimed property administrators recommend due diligence records be maintained for 10 years

vii. Reporting responsibilities

1. File annual reports

2. Perform due diligence to find owner prior to remitting property to the state
   a. Although unclaimed property laws have immunity provisions that release the holder of liability, that immunity does not apply if the holder fails to comply with the due diligence requirements
   i. See generally Vondjidis v. Hewlett Packard, 85 Cal. Rptr. 3d 806 (Cal. Ct. App. 2008) (holder liable to owner for property loss when owner’s address was in a former employee database maintained by the holder)
   b. Although statutes vary, most require the due diligence notice to include
      i. What will happen if no action is taken
      ii. Inform owner that state is only acting as the custodian
      iii. Provide deadline for contacting the company
      iv. Contact information of the company (not the state’s contact information)
   c. Statutes dictate when the letter(s) need to be sent out
   d. Many statutes prevent the state from passing the due diligence fee on to the individual

3. Remit property
   a. Where to remit the property?
      i. State of owner’s last known address
      ii. If owner’s address not known, then state of holder’s incorporation or domicile
      iii. If owner’s address is in a foreign country, then state of holder’s incorporation or domicile
   b. Some states, such as Florida, require a “negative report” indicating that there is no unclaimed property reportable.
Other states, such as Indiana, highly encourage negative reporting
i. See, e.g.,

4. Maintain supporting documentation (1995 UUPA § 21 says 10 years to maintain the records)
5. Protect the funds until transferred to the state

b. Basic structure of unclaimed property statutes
i. Although often referred to as escheatment, most state statutes are not true escheatment in that the state does not take title to the property, but instead simply serves as a custodian for the owner
1. Originated from English common law
   a. Escheat referred to the reversion of land ownership to the feudal lord when the owner died without heirs
   b. ‘Bona vacantia’ (vacant goods) was the term for the ownerless property subject to claim by the Crown...premised on proposition that possession by the Crown was more equitable than that of a stranger
2. Statutes are custodial in nature
   a. Upon delivery to the state, holder is no longer liable to the property owner
   b. The state steps into the shoes of the owner, holds the property for the owner, and tries to reunite the owner with the property
   c. Not an escheatment in the traditional sense, more of a custodial role for the state
   d. If the owner does not come forward, the state keeps the property

ii. Uniform Unclaimed Property Acts
1. Most states have adopted some version of the uniform act, but many of these states have modified the language over time
   a. All 50 states, plus D.C., Puerto Rico, Guam and U.S. Virgin Islands have unclaimed property statutes
   b. Six states (DE, KY, MA, NY, OH & TX) have not adopted one of the Uniform Acts, although many of these states have similar language to the model acts
2. 1954 Uniform Disposition of Unclaimed Property Act (UDUPA)
3. The 1954 UDUPA was amended in 1966
   a. Most widely adopted version – 25 states
5. 1995 Act
   a. Only adopted by 14 states
6. A new version may be released in the coming years

iii. Supreme Court Case Law
iv. Statutory Penalties

1. In general, most statutes impose the following types of penalties
   a. Interest often 10%-25% of the property value
   b. Civil and criminal penalties for failing to report/remit/deliver OR for filing a fraudulent report
      i. $100-$200/day (often a $10,000 maximum)
      ii. Varies from $1,000-$25,000 fine plus some states assess additional 25% of the value of the property
      iii. In some states, it can be a misdemeanor

2. Limited ability to appeal assessments made by unclaimed property office
   a. Only a few state statutes explicitly provide a holder with standing to sue
   b. Companies must thus either prove a violation of a state or federal constitutional right (which is challenging absent a documented interest in the property) or seek equitable relief (which is challenging if the company is in violation of the unclaimed property laws to some degree)
   c. The result is that there is a thin body of case law
   d. Common defenses used by the states
      i. Sovereign immunity in those states where company has not been granted permission to sue
      ii. Unclean Hands, where company has violated unclaimed property statutes
      iii. Failure to state a claim entitled to relief
   e. Common defenses/arguments used by the holder
      i. Property is reportable to another state
         ii. Traditionally the property was not considered unclaimed property and the statutes have not been amended to provide the company notice of any change in policy
         iii. Under the UCC, the holder had become the owner of the property before the dormancy period had run, such that the property never became unclaimed property
            2. But see, e.g. Minn. Stat. § 345.46 stating that the expiration of a limitations period on the owner’s right to receive the property does not preclude the property from being presumed abandoned
      iv. Barred by unclaimed property statute of limitations where holder has provided proper notice to trigger SOL
         1. See, e.g., 12 Del. Code § 1158
2. *But see, e.g.* Minn. Stat. § 345.46 whereby the SOL is tolled unless the holder specifically identifies the property in a report filed with the state, or gives express notice of a dispute regarding the property.

v. Auditors’ extrapolation methods are based on erroneous data and assumptions


vi. Unlawful taking without just compensation

vii. Due process violation


v. Interaction with Federal Laws

1. Failure to properly account for an unclaimed property liability could be a violation of GAAP, thereby implicating Section 302 of Sarbanes-Oxley

2. ERISA – case law varies, but some courts have held that ERISA preempts state unclaimed property laws

   a. Seventh Circuit has held that Illinois’ unclaimed property law, as applied to a self-funded ERISA plan, is preempted by 29 U.S.C. §1144(a). *Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999). Court determined that the statute placed the state, rather than the plan administrator, in possession of funds which constituted plan assets under the plan’s terms until distributed to beneficiaries.


   c. *But see Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989). Court held that ERISA does not preempt Connecticut’s unclaimed property law as it applies to uncollected employee benefits which are held in reserve by an insurance company in an insured plan. Court held the unclaimed property effects on the plan administration were insubstantial and inconsequential and thus did not “relate to” an ERISA plan. The Michigan Court of Appeals ruled similarly in *Attorney general v. Blue Cross and Blue Shield of Michigan*, 168 Mich. App. 372, 424 N.W. 54 (1988)
3. Changes to SEC Rule 17Ad-17
   a. (see http://www.sec.gov/rules/final/2013/34-68668.pdf)
   b. Result of Dodd-Frank requirements
   c. Effective date March 25, 2013; compliance date of January 23, 2014
      i. Now requires brokers and dealers to search for “lost securityholders” (previously, the duty was limited to recordkeeping transfer agents)
         1. Lost securityholder – return mail received and no new address information received from securityholder (can resend within 1 month and if not returned, then deemed not to be lost)
         2. Must exercise reasonable care to ascertain the correct address and to conduct certain database searches for them
         3. Applies to brokers and dealers that have customer security accounts (i.e. carrying firms – thus usually the larger broker and dealer firms)
      ii. Paying agents must provide a single written notification to a “missing security holder” notifying he/she that a check has not yet been negotiated
         1. SEC rule chose to use language of “unresponsive payee” to distinguish between a lost person and an unresponsive person
         2. Must be sent no later than seven months after sending the not yet negotiated check
         3. “missing securityholder” is an individual where a check is not negotiated before the earlier of the paying agent sending the next regularly scheduled check of the elapsing of six months after the sending of the not yet negotiated check
         4. “paying agent” includes “any issuer, transfer agent, broker, dealer, investment adviser, indenture trustee, custodian, or any other person that accepts payments from the issuer of a security and distributes the payments to the holders of the security”
         5. Exception for checks less than $25
         6. Not intended to conflict with state escheatment laws (SEC refused to interpret that provision as Congress’ intention to preempt state law)
   vi. Who oversees state unclaimed property
      1. State Treasurer – 35 states (includes D.C.)
      2. Department of Revenue – 6 states
      3. Comptroller – 4 states
      4. State Lands Board – 2 states
      5. Department of Commerce – 2 states

"Unclaimed Property: Navigating a Regulatory Quagmire"
2. Recent regulatory focus on the insurance industry
   a. General timeline
      i. July 2008: California Office of the Comptroller begins audits of the life insurance industry (thirty-four states ultimately participated in the investigation of at least two dozen insurers)
      ii. April 2011: Florida Office of Insurance Regulation announces a multi-agency settlement with John Hancock (note, the John Hancock settlement appears to be somewhat of an outlier as compared to subsequent multi-state settlements)
      iii. April 2011: Connecticut Department of Insurance commences investigation
      iv. May 2011: California Insurance Department and Florida Office of Insurance Regulation hold public hearings and subpoena Met Life and Nationwide. Stated purpose of the hearings was to determine if companies:
         1. Had information indicating that customers were deceased with active policies or accounts, but had failed to act upon that information, except when it was in their best interest to do so (i.e. stopping payouts)
         2. Failed to pay death benefits or “escheat” unclaimed death benefits in situations where the insurance company had information that individuals had died with in-force policies or accounts, but beneficiaries had not filed claims because they are not aware of the policies.
         3. Had adequate controls to monitor when RAAs had been dormant for years, so they could locate the account holder or “escheat” the proceeds if the owner could not be found. RAAs are demand accounts established by insurers as a settlement option for death benefits, instead of paying a lump sum benefit.
         4. Failed to pay out annuity contracts after their maturity date or report and remit unclaimed benefits to the states in cases where the owners could not be located.
      v. May 2011: State insurance regulators, working through National Association of Insurance Commissioners, form task force (members include California, Florida (chair), Illinois, Iowa, Louisiana, New Hampshire, New Jersey, North Dakota, Pennsylvania, and West Virginia)
      vi. July 2011: New York Department of Financial Services issues a letter under Section 308 of the NY Insurance Law advising insurers to cross-check all life insurance, annuity contracts and RAAs that were in force any time after January 1, 1986
April 2012: Multi-state settlements with MetLife

October 2012: Multi-state settlements with AIG and Nationwide

b. Regulatory settlements
   i. Although settlements vary (often significantly), they do share some common characteristics
      1. Two separate settlements
         a. A Global Resolution Agreement (GRA) settlement between the auditor (on behalf of the state’s unclaimed property agency) and the company
         b. A Regulatory Settlement Agreement (RSA) between the state departments of insurance and the company
     2. General characteristics of the GRAs
        a. Covers policies that were in-force anytime after 1/1/1992
        b. For the life of the settlement agreement, the auditor will routinely provide list of policies that the auditor believes has a payable claim – company has limited exceptions to rebut the auditor’s ‘match’, and must do so within 10 days
        c. Dormancy period calculated from date of death
        d. Must remit the proceeds, plus 3% interest, compounded annually, calculated from the date of death
        e. Must remit annuity proceeds that have reached maturity and satisfied the dormancy period
        f. Sets out priority rules for determining which state to remit to
        g. Sets out specific rules for determining “matches” – very detailed ‘fuzzy’ logic requirements

   3. General characteristics of the RSAs
       a. Requires companies to compare policy records against the DMF (for the most part, on a monthly basis)
       b. Requires the use of fuzzy logic
       c. Includes retained asset accounts, in-force life insurance policies and annuities, and lapsed/terminated/expired policies (look-back varies: some tied to dormancy period while others require 18 months following lapse)
       d. Upon receiving a match against the DMF, must commence a “Thorough Search” for beneficiaries
          i. Must commence within 120 days after date of death (or 45 days if match is received more than 120 days after death)
          ii. Multiple attempts at written outreach
          iii. Secondary outreach if returned mail (using data locator tools such as Accurint to find updated address)
          iv. Telephone calls
          v. Emails
       e. Must share search results across entire company
       f. Dormancy triggered by date of death
       g. Must take certain outreach steps for annuities approaching maturity date (trying to prevent automatic maturity extension)
h. Includes fine based on market share (ranged from $7.2 million for Nationwide to $40 million for MetLife)

i. Company agrees to provide states quarterly reports for the next 3 years, and thereafter, consent to a targeted market conduct exam to determine if company complied with the settlement agreement

c. Multi-state audits

i. Each state is granted the authority by statute to examine the records of any company to determine whether the company has complied with the provisions of its unclaimed property law

ii. The prevailing practice is for states to contract with private auditing firms (on a contingency basis ≈ 10-15%). Different state agencies may use different auditing firms. A company could be subject to a DOI market conduct exam by one auditor, while subject to an unclaimed property audit by the same state but by a different auditing firm

iii. Key private auditing firms

1. Verus Financial LLC
2. Xerox Unclaimed Property Clearinghouse (“UPCH” – formerly ACS)
3. Kelmar Associates LLC
4. Asset Quest, LLC
5. Rackerman, Sawyer & Brewster, P.C.

iv. Again, the vast majority of states do not have a formal review or appeal process built into the unclaimed property audit or reporting process

1. Delaware enacted a law in 2010 that provides for an administrative review process at the conclusion of an unclaimed property exam

v. State may try to use estimation and extrapolation methods to calculate amounts due and owning

1. See, e.g. 12 Del. C. § 1155
2. In McKesson Corp. v. Cook, the auditor disregarded years of available actual data and insisted on an extrapolation method where it expanded $19,337 of what the company believed it owed into a claim of $4.5 million
3. An example of an Auditor’s extrapolation formula is:
   \[ \text{(Determined Liability for Base Year(s) with Records) / (Revenue for Base Year(s)) = Escheat Percentage} \]
   \[ \text{(Escheat Percentage) x (Revenue for Years with Insufficient or No Records) = Projected Liability} \]

It is important to note that the “Determined Liability for Base Years with Records” is not only the property escheated to the state of incorporation in the base, but also includes: unclaimed property that was reported to any State during the base period; items discovered during the audit and considered abandoned property reportable to any State and returned to the rightful owner during the audit; and items that could be abandoned property reportable to any State, but for an applicable exemption provided by the State to which the property otherwise would be reportable.
3. Recent developments
   a. New statutes
      i. Unclaimed Property Statutory trends
         1. Shorter dormancy periods
         2. Different triggers for dormancy
         3. Expanding the types of property that are included
      ii. New insurance-related statutes requiring the use of the Death Master File
         1. NCOIL Model Act – general provisions
            a. Quarterly comparison of in-force policies and RAAs
            b. 90 days to complete and document good faith efforts to confirm death, determine if benefits are due, and send claims form to beneficiary
            c. Regulators have expressed concerns; perhaps worried it will preempt ongoing exams and audits or undermine their legal argument that the DMF was previously required
            d. Some in the industry have expressed concern as to whether the model act provides sufficient detail and guidance
         2. Kentucky
            a. Kentucky Revised Statute § 304.15-420 - effective 1/1/2013
         3. New York
            a. Emergency Reg. 200 (11 NYCRR § 226), signed 11/13/12; renewed 2/6/13 and 4/3/13 (formal rulemaking process likely to begin in coming months)
            b. 28 NY Ins. § 3213-a – effective 6/15/2013
               i. Amended by A01831 in March 2013
         4. New Mexico
            a. Senate Bill 312 - effective 7/1/2013
         5. Maryland
            a. Senate Bill 77 - effective 10/1/2013
            b. Md. Insurance Code Ann. § 16-118
         6. Montana
            a. Senate Bill 0034 - effective 1/1/2014
         7. Alabama
            a. House Bill 126 - effective 1/1/2014
     b. Litigation
        i. False Claim Act
           1. Potential for both state suits as well as private qui tam plaintiffs.
              a. Proof of specific intent to defraud not typically required
              b. Liability attaches for ‘knowingly’ presenting a false statement to obtain money from the government
           2. See, e.g.
              a. Total Asset Recovery Services, LLC, on behalf of the State of Illinois v. MetLife, Inc. d/b/a Metropolitan Life Insurance Company d/b/a MetLife Associates, LLC d/b/a MetLife Group, Inc. and all subsidiaries and affiliates, and Prudential Financial Inc. d/b/a The Prudential Insurance Company of America d/b/a
ii. Reverse false claim clauses impose liability for knowingly making or using a false record or statement to conceal, avoid, or decrease an obligation to transmit money to a government entity.

1. See *Harris v. Old Republic Title Co.*, 23 Cal. Rptr.3d 529 (Cal. 1 Dist. 2005). Defendant was a title insurer and at times had funds that the customers had failed to instruct as to disbursement, or who had failed to cash the disbursement check. These funds were swept from the escrow account into the general fund. California claimed the right to these funds under unclaimed property statute. Defendant was held liable for treble the amount of interest the state would have earned had the funds been timely remitted, plus fines, attorneys’ fees, and costs.

iii. Practice Pointer: be alert to whether a regulator has the authority to release false claims act liability in a regulatory consent order. The Florida False Claims Act provides that only the Florida Department of Legal Affairs may settle claims, and that settlement requires court review and approval.

iv. Recent and Ongoing Litigation

1. John Hancock class action
   a. Putative class action filed against John Hancock in Massachusetts federal court on January 30, 2013. Motion to dismiss filed by Defendants (see attached materials)

2. Ohio Court of Appeals
   a. Upheld dismissal of lawsuit by contract owner asking court to require Nationwide to search the DMF, and that its failure to do so constituted a breach of the good faith and fair dealing

3. West Virginia
   a. In Fall 2012, WV Treasurer initiated multiple lawsuits against a total of 69 different insurance companies
   b. Treasurer alleges that companies failed to search the DMF and thus failed to properly remit proceeds to the state
   c. Seeks back interest as well as penalties up to $25,000 for each unreported policy, as well as the underlying proceeds

4. Kentucky
   a. Industry challenge to Kentucky DMF statute (KRS § 304.15-420), arguing that it was an unlawful retroactive regulation and violated Contracts Clause
   b. On April 1, 2013 Court ruled on cross-motion for summary judgment in favor of the state
   c. Opinion attached
v. Future whistleblower activity possible?

4. Compliance challenges and considerations
   a. Considerations when setting up an unclaimed property program
      i. Establishing an unclaimed property working group or committee that includes personnel from compliance, risk management, legal, business, finance, internal audit, tax director, treasurer, upper management, IT and unclaimed property department
         1. Benefits of centralization
            a. Uniformity of procedures
            b. Submitting consolidated reports
            c. One voice to communicate with state
            d. Greater efficiency in customer research and due diligence
         2. Challenges to centralization
            a. Ensuring you have full support of various internal business partners
            b. Keeping track of all new product offerings
            c. Tracking regulatory changes and reporting requirements for variety of property types
            d. Disconnect from the day-to-day business operations
      ii. Accounting for unclaimed property in any third party administrator agreements you have
      iii. Determining potential exposure (consider whether you want to do so under privilege)
      iv. Developing and maintaining centralized, detailed policies and procedures regarding unclaimed property
          1. Periodic generation of reports for outstanding items
          2. Research methods for identifying unclaimed property
          3. Description of methods for resolving items
          4. Procedures for reporting and remitting property to the appropriate states
          5. Record maintenance standards
          6. Method for maintaining and updating compliance requirements
          7. Time table with key milestone dates
      v. Establishing retention policies and retaining documents concerning contact with account owners
      vi. Establishing retention policies to ensure compliance with state unclaimed property statutes, but also to respond to audits
          1. Acts are usually silent on what records must be maintained
             a. Consider whether and how to retain the following
                i. Verification of reversals
                ii. Evidence of reporting and timely reporting
                iii. Evidence of due diligence (including certified mailing if required)
          vii. Review procedures for handling return mail, address changes and how systems are updated to reflect address changes
          viii. Identifying who within the organization will assume responsibility for monitoring changes in the laws and communicating that to the rest of the organization

"Unclaimed Property: Navigating a Regulatory Quagmire"
ix. Whether to include unclaimed property under your internal audit program
x. Determining if third parties hold any unclaimed property you need to report
xi. Maintaining documentation of any reversals or triggers that reset the dormancy period

b. Potential challenges to be aware of

i. Effective November 1, 2011, the SSA stopped disclosing protected state records of deaths. 4.2 million records were removed from the public files and are now only available to federal agencies. Of the 2.8 million deaths reported to the DMF, only 1 million will likely be available to the public
ii. Implementing fuzzy logic (how, when, and for what policies)
iii. Deciding whether to build compliance systems geared toward the settlement agreements or the statutes/regulations:
   1. Some overlap and similarities between the two
   2. Although the settlement agreements provide specific requirements, the statutes require “good faith” efforts and/or “reasonable efforts”
   3. How many follow-up letters to send?
   4. Should telephone outreach be part of the process? Email?
   5. Changing forms to comply with statutes such as NY that require more detail about beneficiaries, insureds and owners
   6. Most important – Document all of the above

iv. Compliance challenges
   1. Keeping track of all changes to different property types in different states
   2. Reconciling record retention guidelines that may conflict with Tax and Legal
   3. Integrating product development to ensure compliance with new products

v. Common audit triggers (based on presentations by unclaimed property administrators)
   1. Presence in or incorporated in the state, but no reports have been filed
   2. Holder is big enough to warrant scrutiny by state of incorporation
   3. Amounts reported appears small given size of holder
   4. Gaps in reporting history
   5. No reach back in initial reporting
   6. High rate of claims from state (indicative of inadequate due diligence)
   7. History of mergers, acquisitions, reorganizations, liquidations, dissolutions
   8. High volume of financial transactions (e.g. retailers)
   9. Unique property types (gift cards, IRAs)
   10. Not reporting property types that are common in your industry

vi. Whether to use a state’s voluntary disclosure program
   1. Many states offer amnesty or voluntary disclosure agreement (VDA) programs; some are formal while others are informal or on a temporary basis
   2. Once contacted for an audit, usually not eligible for the VDA
   3. Often used by first-time filers or for companies with gaps in their reporting history
4. Primary benefit is that you may avoid the steep penalties and interest, which often make up 75% of the award during an audit.

5. Cautionary tale...not all VDAs end well
   a. See generally, CA, Inc. v. Pfeiffer, Case Nos. 4111-CC, 4195-CC (Del. Ch. Feb. 12, 2010)
      i. In an effort to come into compliance, CA, Inc., voluntarily entered Delaware’s VDA program, which advertises that interest and penalties may be avoided by conducting a self-audit. CA, with the assistance of independent consultants, initially determined its unclaimed property to be approximately $700,000. That assessment was rejected by Delaware. CA later recalculated the amount to approximately $2.3 million. However, Delaware again rejected CA’s assessment, claiming approximately $7.6 million, which it increased to approximately $8.2 million (Delaware added penalty interest despite the VDA when CA disputed the $7.6 million assessment). Unable to come to agreement after four years of audit, the parties sued each other, finally settling a year later for approximately $17.65 million.
      ii. Note, CA had used a high-level non-attorney consultant to generate assessments regarding potential liability as well as strategies for reducing that liability. Delaware was able to acquire that information via discovery, underlying the need to consider using outside counsel as a means of invoking privilege.
      i. Staples voluntarily entered Delaware’s VDA program in 2000, under which Staples paid the amount of deficiency, and Delaware released Staples from all claims for reporting years prior to 2000. Staples, thereafter, regularly reported its unclaimed property to Delaware without ever receiving a notice of deficiency. In 2005, Delaware hired a contingent fee audit firm to audit Staples on its behalf. Based on the audit firm’s extrapolation methods, and in disregard of its VDA agreement with Staples, Delaware demanded over $3.96 million ($800,000 of which was interest penalties). Staples filed a complaint seeking injunctive and declaratory relief on April 30, 2010. The Court ruled in favor of the state, holding that the rebates were escheatable even though the owner’s right to claim the property had expired.

(1) The General Assembly declares the purpose of this section shall be to require recognition of the escheat statute, as found in KRS 393.062, and to require complete and proper disclosure, transparency, and accountability relating to any method of payment for life insurance death benefits regulated by the Department of Insurance.

(2) As used in this section:

(a) "Contract" means an annuity contract. The term "contract" shall not include an annuity used to fund an employment-based retirement plan or program where the insurer is not committed by terms of the annuity contract to pay death benefits to the beneficiaries of specific plan participants;

(b) "Death Master File" means the United States Social Security Administration’s Death Master File or any other database or service that is at least as comprehensive as the United States Social Security Administration’s Death Master File for determining that a person has reportedly died;

(c) "Death Master File match" means a search of the Death Master File that results in a match of the Social Security number or the name and date of birth of an insured, annuity owner, or retained asset account holder; and

(d) "Policy" means any policy or certificate of life insurance that provides a death benefit. The term "policy" shall not include:

1. Any policy or certificate of life insurance that provides a death benefit under:
   a. An employee benefit plan, subject to the Employee Retirement Income Security Act of 1974, as defined by 29 U.S.C. sec. 1002(3);
   b. A governmental plan as defined by 29 U.S.C. sec. 1002(32);
   c. A church plan as defined by 29 U.S.C. sec. 1002(33); or
   d. Any federal employee benefit program;

2. Any policy or certificate of life insurance that is used to fund a preneed funeral contract or prearrangement as defined in KRS 304.12-240(1)(a); or

3. Any policies or certificates of insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction, or any group policy issued to a creditor to insure the lives of the creditor's debtors and any certificates issued under such policies.

All other terms used in this section shall be interpreted in a manner consistent with the definitions used in KRS Chapter 304.

(3) (a) An insurer shall perform a comparison of its insureds’ in-force life insurance policies and retained asset accounts against a Death Master File, on at least a quarterly basis, to identify potential matches of its insureds.

(b) For those potential matches identified as a result of a Death Master File match, the insurer shall within ninety (90) days of a Death Master File match:
1. Complete a good-faith effort, which shall be documented by the insurer, to confirm the death of the insured or retained asset account holder against other available records and information; and

2. Determine whether benefits are due in accordance with the applicable policy or contract and, if benefits are due in accordance with the applicable policy or contract:
   a. Use good-faith efforts, which shall be documented by the insurer, to locate the beneficiary or beneficiaries; and
   b. Provide the appropriate claims forms or instructions to each beneficiary to make a claim, including the need to provide an official death certificate if applicable under the policy or contract.

(c) With respect to group life insurance, insurers are required only to confirm the possible death of an insured when the insurers provide full recordkeeping services to the group policy holder.

(d) To the extent permitted by law, the insurer may disclose minimum necessary personal information about the insured or beneficiary to a person who the insurer reasonably believes may be able to assist the insurer locate the beneficiary or a person otherwise entitled to payment of the claims proceeds.

4. An insurer shall not charge insureds, account holders, or beneficiaries for any fees or costs associated with a search or verification conducted pursuant to this section.

5. The benefits from a life insurance policy or a retained asset account, plus any applicable accrued interest, shall first be payable to the designated beneficiaries or owners and, in the event those beneficiaries or owners cannot be found, shall escheat to the state as unclaimed property pursuant to KRS 393.062.

6. An insurer shall notify the State Treasurer upon the expiration of the statutory time period for escheat that:
   a. A life insurance policy beneficiary or retained asset account holder has not submitted a claim with the insurer; and
   b. The insurer has complied with subsection (3) of this section and has been unable, after good-faith efforts documented by the insurer, to contact the retained asset account holder or any beneficiary.

7. Upon such notice, an insurer shall immediately submit the unclaimed life insurance benefits or unclaimed retained asset accounts, plus any applicable accrued interest, to the State Treasurer.

8. Failure to meet any requirement of this section shall constitute a violation of Subtitle 12 of KRS Chapter 304.

9. This section shall be known as the Unclaimed Life Insurance Benefits Act.

Effective: January 1, 2013


Legislative Research Commission Note (1/1/2013). The internal numbering of subsection (3)(b) of this statute has been modified by the Reviser of Statutes from the way it appeared in 2012 Ky. Acts ch. 58, sec. 1, under the authority of KRS 7.136(1). The words in the text were not changed.
§ 16-118. Failure to search death master file (Section effective October 1, 2013.)

(a) Definitions. --

(1) In this section the following words have the meanings indicated.

(2) "Credit life insurance" has the meaning stated in § 13-101 of this article.

(3) "Death master file" means:

   (i) the Social Security Administration's Death Master File; or

   (ii) any other database or service that is at least as comprehensive as the Social Security Administration's Death Master File for determining that an individual reportedly has died.

(4) "Death master file match" means a match, resulting from a search of a death master file, of a Social Security number or a name and date of birth of an individual on the death master file with the Social Security number or the name and date of birth of an insured, annuitant, or retained asset account holder.

(5) "Pre-need insurance contract" means a life insurance policy or certificate, annuity contract, or other insurance contract that, by assignment or otherwise, has as a purpose the funding of an agreement relating to the purchase or provision of specific funeral or cemetery merchandise or services to be provided at the time of death of an individual.

(6) "Retained asset account" has the meaning stated in § 16-117(a) of this article.

(b) Applicability of section. -- This section does not apply to:

(1) an annuity contract that:

   (i) is used to fund an employment-based retirement plan or program; and

   (ii) does not require the insurer under the annuity contract to pay death benefits to the beneficiaries of specific plan or program participants;

(2) a policy or certificate of life insurance that provides a death benefit under:

   (i) an employee benefit plan subject to the federal Employee Retirement Income Security Act of 1974; or
(ii) any federal employee benefit program;

(3) a pre-need insurance contract;

(4) a policy or certificate of credit life insurance; or

(5) a policy or certificate of accidental death and dismemberment insurance.

(c) Duty to perform periodic cross-check of death master file against insurer's policies and contracts.

(1) An insurer that issues, delivers, or renews a policy of life insurance or an annuity contract in the State shall perform a comparison of the insurer's in-force life insurance policies, annuity contracts, and retained asset accounts against the latest version of a death master file to identify any death benefit payments that may be due under the policies, contracts, or retained asset accounts as a result of the death of an insured, annuitant, or retained asset account holder.

(2) An insurer shall perform the comparison required under paragraph (1) of this subsection:

(i) at regular intervals, on at least a semiannual basis; and

(ii) in good faith, using criteria reasonably designed to identify individuals whose death would require the payment of benefits by the insurer under a life insurance policy, annuity contract, or retained asset account.

(3) For a group life insurance policy, an insurer is not required to perform the comparison required under paragraph (1) of this subsection unless the insurer provides full record-keeping services to the group life insurance policy holder.

(d) Duties on finding death master file match with insured.

(1) If a comparison performed by an insurer under subsection (c) of this section results in a death master file match with an insured, annuitant, or retained asset account holder, the insurer, within 90 days after the comparison was performed, shall:

(i) conduct a good faith effort to confirm the death of the insured, annuitant, or retained asset account holder using other available records and information;

(ii) determine whether benefits are due under the applicable life insurance policy, annuity contract, or retained asset account; and

(iii) if benefits are due under the policy, contract, or retained asset account:

1. use good faith efforts to locate the beneficiary; and

2. provide to the beneficiary the appropriate claims forms and instructions necessary to make a claim.

(2) An insurer shall document the good faith efforts made to:

(i) confirm the death of an insured, annuitant, or retained asset account holder under paragraph (1)(i) of this subsection; and

(ii) locate a beneficiary under paragraph (1)(iii)1 of this subsection.

(3) To the extent permitted by law, an insurer may disclose the minimum necessary personal information about an insured, an annuitant, a retained asset account holder, or a beneficiary to a person that the insurer reasonably believes may be able to assist the insurer in locating a beneficiary.
as required under paragraph (1)(iii)1 of this subsection.

(e) Charging fees or costs prohibited. -- An insurer may not charge an insured, an annuitant, a retained asset account holder, a beneficiary, or any other person for any fees or costs incurred by the insurer in connection with complying with subsections (c) and (d) of this section.

(f) Regulations. -- The Commissioner may adopt regulations to implement this section.

HISTORY: 2012, ch. 171.
AN ACT to amend the insurance law, in relation to unclaimed life insurance benefits, relating to clarifying certain provisions

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 3213-a of the insurance law, as added by chapter 495 of the laws of 2012, is amended to read as follows:

S [3213-a] 3240. Unclaimed benefits. (a) Definitions. For the purposes of this section:

(1) "Account" means: (A) any mechanism, whether denoted as a retained asset account or otherwise, whereby the settlement of proceeds payable to a beneficiary under a policy is accomplished by the insurer or an entity acting on behalf of the insurer [where the proceeds are retained by the insurer pursuant to a supplementary contract] PLACING THE PROCEEDS INTO AN ACCOUNT WHERE THE INSURER RETAINS THOSE PROCEEDS AND THE BENEFICIARY HAS CHECK OR DRAFT WRITING privileges; OR (B) ANY OTHER SETTLEMENT OPTION RELATING TO THE MANNER OF DISTRIBUTION OF THE PROCEEDS PAYABLE UNDER A POLICY.

(2) "Death index" means the death master file maintained by the United States social security administration or any other database or service that is at least as comprehensive as the death master file maintained by the United States social security administration and that is acceptable to the superintendent.

(3) "Insured" [includes] MEANS an individual covered by a policy or an
when the annuity contract provides for benefits to be paid or other monies to be distributed upon the death of the annuitant. (4) "Insurer" means a life insurance company or fraternal benefit society. EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

1 (5) "Lost policy finder" means a service made available by the department on its website or otherwise developed by the superintendent either on his or her own or in conjunction with other state regulators, to assist consumers [in] WITH locating unclaimed life insurance benefits.

1 (6) "Policy" means a life insurance policy[, including policies that have lapsed or been terminated,]; AN annuity contract[, or]; a certificate under a life insurance policy or annuity contract[,]; or a certificate issued by a fraternal benefit society[,]; under which benefits are to be paid upon the death of the insured, INCLUDING A POLICY THAT HAS

1 Lapsed OR BEEN TERMINATED.

1 (b) Applicability. (1) This section shall apply to A POLICY:

1 [(1) Every policy] (A) issued by a domestic insurer and any account established under or as a result of such policy; [and] OR

1 [(2) Every policy] (B) delivered or issued for delivery in [New York] THIS STATE by an authorized foreign insurer and any account established under or as a result of such policy.

1 [(3)] (2) Notwithstanding [paragraphs] PARAGRAPH one [and two] of this subsection[,]:

1 (A) with respect to a policy delivered or issued for delivery outside this state, a domestic insurer may, in lieu of the requirements of this section, implement procedures that meet the minimum requirements of the state in which the INSURER DELIVERED OR ISSUED THE policy [was delivered OR issued], provided that the superintendent [concludes] DETERMINES that
such other requirements are no less favorable to the [policyowner] POLICY OWNER and beneficiary than those required by this section[.]; AND

[(4) Notwithstanding the provisions of paragraphs one and two of this subsection,] (B) this section shall not apply to A lapsed or terminated [policies] POLICY with no benefits payable that [were] WAS searched within the [three hundred sixty-five days] EIGHTEEN MONTHS preceding the effective date of this section or that [were] WAS searched more than eighteen months prior to the most recent search conducted by the insurer.

(c) Identifying information. (1) Except as set forth in paragraph two of this subsection, at no later than policy delivery or the establishment of an account and upon any change of insured, owner, ACCOUNT HOLDER, or beneficiary, [every] AN insurer shall request information sufficient to ensure that all benefits or other monies are distributed to the appropriate persons upon the death of the insured or account holder, including, at a minimum, the name, address, social security number, date of birth, and telephone number of every owner, ACCOUNT HOLDER, insured, and beneficiary of such policy or account, as applicable.

(2) Where an insurer issues a policy or provides for an account based on data received directly from an insured's employer, the insurer may obtain the beneficiary information described in paragraph one of this subsection BY COMMUNICATING WITH THE INSURED after receiving the data from the insured's employer.

(d) Standards for cross-checking policies. (1) [Every] AN insurer shall use the death index to cross-check every policy and account subject to this section no less frequently than quarterly, except as specified in subsection (g) of this section. An insurer may perform the cross-check using the updates made to the death index since the date of
the last cross-check performed by the insurer, provided that the insurer performs the cross-check using the entire death index at least once a year. The superintendent may promulgate rules and regulations that allow an insurer to perform the cross-checks less frequently than quarterly,

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provided, however, the insurer must not be allowed to perform such cross-checks BUT NOT less FREQUENTLY than semi-annually.

(2) The cross-checks shall be performed using: (A) the INSURED OR ACCOUNT HOLDER'S social security number; OR (B) WHERE THE INSURER DOES NOT KNOW THE INSURED OR ACCOUNT HOLDER'S SOCIAL SECURITY NUMBER, the name[,] and date of birth of the insured or account holder.

(3) If an insurer only has a partial name, social security number, date of birth, or a combination thereof, of the insured or account holder under a policy or account, THEN the insurer shall use the available information to perform the cross-check.

(4) [Every] AN insurer shall implement reasonable procedures to account for common variations in data that would otherwise preclude an exact match with a death index.

(e) Multiple policy search procedures. (1) Upon receiving notification of the death of an insured or account holder or in the event of a match made by a death index cross-check pursuant to subsection (d) of this section, an insurer shall search every policy or account subject to this section to determine whether the insurer has any other policies or accounts for the insured or account holder.

(2) [Every] AN insurer that receives a notification of the death of [the] AN insured or account holder, or identifies a death index match, shall notify each United States affiliate, PARENT, OR SUBSIDIARY, and any entity [that] WITH WHICH the insurer contracts [with which] THAT may maintain OR CONTROL records relating to policies OR ACCOUNTS covered by this section, of the notification or verified death index match[,
shall then perform the search required by paragraph one of this subsection. AN INSURER SHALL TAKE ALL STEPS NECESSARY TO HAVE EACH AFFILIATE, PARENT, SUBSIDIARY, OR OTHER ENTITY PERFORM THE SEARCH REQUIRED BY PARAGRAPH ONE OF THIS SUBSECTION. 

(f) Standards for locating claimants. (1) AN insurer shall establish procedures to reasonably confirm the death of an insured or account holder and begin to locate beneficiaries within ninety days after the identification of a potential match made by a death index cross-check or by a search conducted by the insurer pursuant to subsection (e) of this section. If the insurer cannot locate beneficiaries within ninety days after the identification of a potential match, THEN the insurer shall continue to search for beneficiaries until the benefits escheat [to the] IN ACCORDANCE WITH APPLICABLE state LAW. 

(2) Once the beneficiary or beneficiaries under the policy or account have been located, the insurer shall provide to the beneficiary or beneficiaries the information necessary to make a claim pursuant to the terms of the policy or account. The insurer shall process all claims and make prompt payments and distributions in accordance with all applicable laws, rules, and regulations. 

(3) Nothing herein shall prevent an insurer from requiring satisfactory proof of loss, such as a death certificate, for the purpose of verifying the death of the insured, PROVIDED THAT IF A BENEFICIARY CANNOT OBTAIN A DEATH CERTIFICATE, THEN AN INSURER SHALL ACCEPT AN ALTERNATE FORM OF SATISFACTORY PROOF OF LOSS. 

(g) This section shall not apply to: 

(1) A group [policies] POLICY ADMINISTERED BY THE GROUP POLICYHOLDER where the insurer does not maintain OR CONTROL THE records [on its administrative systems] containing the information necessary to comply with the requirements of this section; OR 

(2) [any policy or certificate that provides a death benefit under an]
employee benefit, government or church plan subject to or as defined A. 1831
under the Employee Retirement Income Security Act of 1974 (29 USC 1002),
as periodically amended, or under any Federal employee benefit program;
(3) any other circumstance as determined to be appropriate by the
superintendent IN A REGULATION.
(h) Lost policy finder. (1) The superintendent shall develop and
implement a lost policy finder to assist requestors [in] WITH locating
unclaimed life insurance benefits. The lost policy finder shall be
available online and via other means, including but not limited to the
department's toll free telephone number. The superintendent shall assist
a requestor [in] WITH using the lost policy finder, including informing
the requestor of [what] THE information an insurer may need to facilitate responding to the request.
(2) As soon as practicable, but no later than thirty days after receiving a request from a requestor via the lost policy finder, the superintendent shall:
[(i) (A) forward the request to all insurers deemed necessary by the
superintendent in order to successfully respond to the [consumer's]
request; and
[(ii)] (B) inform the requestor in writing that the SUPERINTENDENT RECEIVED THE request [has been received] and forwarded THE REQUEST to
all insurers deemed necessary by the superintendent in order to success-
fully respond to the request.
(3) Upon receiving a request forwarded by the superintendent through a
lost policy finder [application], [every] AN insurer shall search for
policies and any accounts subject to this section that insure the life
of, or are owned by, an individual named as the decedent in the request
forwarded by the superintendent.
(4) Within thirty days of receiving the request referenced in para-
29 graph two of this subsection, OR WITHIN FORTY-FIVE DAYS OF RECEIVING THE
30 REQUEST WHERE THE INSURER CONTRACTS WITH ANOTHER ENTITY TO MAINTAIN THE
31 INSURER'S RECORDS, the insurer shall:
32 [(i)] (A) report to the superintendent through the lost policy finder
33 the findings of the search conducted pursuant to paragraph three of this
34 subsection;
35 [(ii)] (B) for each identified policy and account insuring the life
36 of, or owned by, the [named insured] INDIVIDUAL NAMED AS THE DECEDENT IN
37 THE REQUEST, provide to a requestor who is:
38 (I) also the beneficiary of record on the identified policy or account
39 the information necessary to make a claim pursuant to the terms of the
40 policy or account; AND
41 [(iii) for each identified policy and account insuring the life
42 of, or
43 owned by, the named insured, provide to a requestor who is]
44 (II) not the beneficiary of record on the identified policy or account
45 the requested information to the extent permissible to be disclosed in
46 accordance with any applicable law, rule, [and] OR regulation and [to]
47 take such other steps necessary to facilitate the payment of any benefit
48 that may be due under the identified policy or account[; and].
49 (5) The superintendent shall, within thirty days of receiving from all
50 insurers the information required in subparagraph [(i)] (A) of paragraph
51 four of this subsection, inform the requestor of the results of the
52 search.
53 (6) When a beneficiary identified in paragraph four of this subsection
54 submits a claim or claims to an insurer, the insurer shall process such
55 CLAIM OR claims and make prompt payments and distributions in accordance
56 with all applicable laws, rules, and regulations.
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1 (7) Within thirty days of the final disposition of the request,
2 AN insurer shall report to the superintendent through the lost policy
3 finder any benefits paid and any other information requested by the
4 superintendent.
(8) Every AN insurer shall establish procedures to electronically receive the lost policy finder [application] request from, and make reports to, the superintendent as provided for in this section. When transmitted electronically, the date that the superintendent forwards the request shall be deemed to be the date of receipt by the insurer [unless]; PROVIDED, HOWEVER, THAT IF the [day] DATE is a Saturday, Sunday, or a public holiday, as defined in section [twenty-five] TWEN-12 TY-FOUR of the general construction law [and, in such case], THEN the date of receipt shall be as provided in section twenty-five-a of the general construction law. The superintendent may promulgate rules and regulations that allow an insurer to apply for an exemption from the requirement that it electronically receive the lost policy finder request AND REPORT ANY BENEFITS PAID OR OTHER INFORMATION THE SUPERINTENDENT REQUESTS PURSUANT TO SECTION THREE HUNDRED SIXTEEN OF THIS CHAPTER.

(i) Reports. Every AN insurer subject to this section shall include in the report required under section seven hundred three of the abandoned property law any information on unclaimed benefits due pursuant to this section AND the number of policies and accounts that the insurer has identified pursuant to this section for the prior calendar year under which any outstanding monies have not been paid or distributed by December thirty-first of such year, except potential matches still being investigated pursuant to paragraph one of subsection (f) of this section. A copy of the report ALSO shall [also] be filed with the superintendent.

(j) The superintendent is authorized to promulgate any rules and regulations necessary to implement the provisions of this section in accordance with the provisions of the state administrative procedure act.
S 2. This act shall take effect on the same date and in the same manner as chapter 495 of the laws of 2012, takes effect.
JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-756463

BEFORE: Celebrezze, J., Blackmon, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 25, 2012
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FRANK D. CELEBREZZE, JR., J.:

{¶1} Plaintiffs-appellants, Stanley Andrews and Donald C. Clark (collectively “appellants”), appeal the judgment of the Cuyahoga County Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss of defendants-appellees, Nationwide Mutual Insurance Company and Nationwide Life Insurance Company (collectively “Nationwide”). After careful review of the record and relevant case law, we affirm the judgment of the trial court.

{¶2} In 1992 and 1947, respectively, appellants Andrews and Clark entered into written life insurance contracts with Nationwide. On their face, appellants’ insurance contracts expressly provide that Nationwide is required to pay death proceeds to the beneficiary of the policy on receiving “due” or “satisfactory” proof of the insured’s death.1 In addition to these provisions requiring “receipt” of proof of death, appellants’ insurance contracts contain terms permitting Nationwide to investigate the insured’s death before paying death benefit proceeds. Specifically, the insurance contracts allow Nationwide to investigate, among other things, whether the insured committed suicide, whether the death benefit must be reduced by unpaid premiums or indebtedness, and whether there has been any misrepresentation of the insured’s age or sex. These provisions are specifically designed to avoid fraud.

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1 In Ohio, all life insurance policies are required to include a provision stating that “when a policy becomes a claim by the death of the insured, settlement shall be made upon receipt of due proof of death, or not later than two months after receipt of such proof.” R.C. 3915.05(K). Thus, payment is not due merely on the death of an insured, but, rather, on “receipt of proof of death.”
When claims on a life insurance policy can be brought due to an insured’s death and satisfaction of other policy requirements, some unaware beneficiaries fail to file claims, resulting in benefit proceeds going unpaid.

Appellants filed this class action complaint against Nationwide on May 31, 2011, seeking injunctive and declaratory relief. Their complaint alleges that Nationwide has breached its duty of good faith and fair dealing by failing to make reasonable attempts to determine when the beneficiaries of a life insurance policy are entitled to death benefit proceeds. As a result, appellants now seek to force Nationwide to search the Death Master File (hereinafter referred to as “the DMF”) and independently determine on an annual basis whether members of the purported class have died prior to Nationwide receiving proof of death from beneficiaries or claimants. Appellants contend that by doing this, Nationwide will be meeting their duties of good faith and fair dealing by determining which of its policy holders are deceased, and thereby determining when

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2 Appellants’ purported class is defined as: “Policy holders of life insurance policies, which 1) are currently in force or have been wrongfully cancelled by [Nationwide] prior to the payment of death benefits, 2) were held within the period that commenced 15 years prior to the filing of this action, 3) were issued by [Nationwide], 4) where the premiums were either a) paid up, or b) the accumulated cash value of the policy was used to make ongoing premium payments, and 5) where the insureds’ age at any time during which the policies were in force actuarially indicated a 70% probability of death, or such lesser probability of death as the Court should order.”

3 The Death Master File is a computer database file made available by the United States Social Security Administration. The file contains information about persons who had Social Security numbers and whose deaths were reported to the Social Security Administration from 1962 to the present.
beneficiaries of the appellants and other class members are rightfully entitled to death benefit proceeds.

§5 On July 13, 2011, Nationwide moved to dismiss on four grounds: (1) appellants’ lack of standing; (2) appellants’ failure to state a legally cognizable claim under the plain terms of their insurance contracts and Ohio law; (3) appellants are inadequate representatives of the class because they lack the requisite element of common interest and injury; and (4) appellants’ complaint failed to allege facts in support of material elements of each alleged cause of action.

§6 By order entered on January 23, 2012, the trial court granted Nationwide’s motion to dismiss, finding that (1) appellants lacked the requisite standing to file this action, and (2) the claims alleged in appellants’ complaint were barred by the plain language of their insurance policies.

§7 Appellants appeal the judgment of the trial court, raising three assignments of error for review:

I. The trial court erred in concluding that the terms of plaintiffs’ life insurance contracts create a clear and unambiguous condition precedent which precludes the use of readily available electronic databases.

II. The trial court erred in concluding that plaintiffs lack standing to seek declaratory and injunctive relief as to Nationwide’s refusal to make the same inquiry of its life insureds as it does for the payees of its annuities.

III. The trial court should have allowed for a complete development of the record.

Law and Analysis
In challenging the trial court’s dismissal pursuant to Civ.R. 12(B)(6), appellants argue that the court erred in concluding that the terms of their life insurance contracts create a clear and unambiguous condition precedent. Further, appellants contend that the trial court erred in concluding that they lack standing to seek declaratory and injunctive relief as to Nationwide’s refusal to utilize the DMF.

Assuming, without finding, that appellants have standing to bring this class action, we find that the trial court did not err in granting Nationwide’s motion to dismiss based on the express terms of appellants’ life insurance contracts.

Standard of Review


In ruling on a Civ.R. 12(B)(6) motion, a trial court “cannot resort to evidence outside the complaint to support dismissal [except] where certain written
instruments are attached to the complaint.’” Brisk v. Draf Indus., 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10, quoting Park v. Acierno, 160 Ohio App.3d 117, 2005-Ohio-1332, 826 N.E.2d 324, ¶ 29 (7th Dist.). Rather, “[i]f a Civ.R. 12(B)(6) movant relies on evidence outside of the complaint and its attachments, then Civ.R. 12(B) specifies that the motion must either be denied or converted to a summary judgment motion, which would proceed under Civ.R. 56.” Id. at ¶ 30, citing Petrey v. Simon, 4 Ohio St.3d 154, 156, 447 N.E.2d 1285 (1983).

{¶12} An appellate court employs “a de novo standard of review for motions to dismiss filed pursuant to Civ.R. 12(B)(6).” Grey at ¶ 3, citing Greeley v. Miami Valley Maint. Contrs., Inc., 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). Under de novo analysis, we are required to “accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party.” Grey at ¶ 3, citing Byrd v. Faber, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991).

{¶13} Here, the trial court granted Nationwide’s motion to dismiss based on the language in the life insurance contracts underlying appellants’ claims. The life insurance contracts are attached to appellants’ complaint and, therefore, could be considered by the trial court for purposes of Nationwide’s Civ.R. 12(B)(6) motion. Brisk; Miller v. Cass, 3d Dist. No. 3-09-15, 2010-Ohio-1930 (a copy of a written instrument attached to a pleading is a part of the pleading for all purposes and thus can be considered for purposes of a motion to dismiss); Adlaka v. Giannini, 7th Dist. No. 05 MA 105, 2006-Ohio-4611, ¶ 34 (“If the plaintiff decides to attach documents to his complaint, which he claims
establish his case, such documents can be used to his detriment to dismiss the case if they along with the complaint itself establish a failure to state a claim”). Thus, to the extent the language in the purported life insurance contracts clearly foreclose appellants’ claims against Nationwide, the trial court could properly dismiss those claims under Civ.R. 12(B)(6). Denlinger v. Columbus, 10th Dist. No. 00AP-315, 2000 Ohio App. LEXIS 5679 (Dec. 7, 2000). See Allstate Ins. Co. v. Blaum, 4th Dist No. 1490, 1988 Ohio App. LEXIS 4800 (Dec. 2, 1988) (“if a written instrument is attached to the complaint, it should be construed together with the averments of the complaint in determining whether there is any possible set of facts which would entitle the plaintiff to relief”).

Appellants’ Life Insurance Contracts


¶15 In insurance policies, as in other contracts, words and phrases are to be given their plain and ordinary meaning unless there is something in the contract that would indicate a contrary intention. Olmstead v. Lumbermens Mut. Ins. Co., 22 Ohio St.2d 212, 216, 259 N.E.2d 123 (1970). Where the provisions of an insurance policy are
clear and unambiguous, courts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties. *Gomolka* at 168.

{¶16} However, where the provisions of a contract of insurance are reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), paragraph one of the syllabus.

{¶17} In the case at hand, appellants argue that the trial court erred in concluding that they were “foreclosed from pursuing this class action based on the express terms of the parties’ life insurance contracts and Ohio law.” Specifically, appellants contend that their insurance policies fail to identify who is required to provide “proof of death” and are thereby ambiguous. Thus, appellants submit that the trial court was required to look beyond the four corners of the complaint to determine the plain meaning of the disputed life insurance provision, a procedure improper in determining a Civ.R. 12(B)(6) motion. For the following reasons, we disagree.

{¶18} The operative contract provisions, in this case, between Nationwide and appellants are expressly contained in the parties’ insurance contracts. Andrews’s insurance contract states, in relevant part:

We agree to pay the Death Proceeds to the Beneficiary *upon receiving proof* that the Insured has died while this Policy is in force and before the Maturity Date.

* ***
[Nationwide] will pay the Death proceeds to the Beneficiary after we receive at our Home Office proof of death satisfactory to us and such other information as we may reasonably require. (Emphasis added).

Similarly, Clark’s contract provides, in relevant part:

Insurance Company Columbus, Ohio AGREES TO PAY the sum of ONE THOUSAND (1,000) Dollars Less any unpaid premium or premiums to the end of the then current policy year, and less any indebtedness on or secured by this Policy To ELLEN FISHER CLARK, Mother, if living; Otherwise to JOHN LAWRENCE CLARK, Father, the Beneficiary, at its Home Office, immediately upon receipt of due proof of death of DONALD CHARLES CLARK, the Insured, during the continuance of this Policy. (Emphasis added).

¶19 After review of the pertinent contract provisions, we find no merit in appellants’ assertion that their life insurance contracts are ambiguous because the contracts “are silent as to the party upon whom the responsibility for providing proof falls.” The terms “receipt” and “receiving” demonstrate Nationwide’s passive role in establishing an insured party’s proof of death; they do not connote an obligation to procure such information. *Webster’s New Collegiate Dictionary* 964 (1990) (“Receipt” is defined as “the act or process of receiving”). Thus, a finding obligating Nationwide to solicit or gather information pertaining to an insured’s death would be contrary to the terms contained in the insurance policy.
Moreover, Ohio law indicates that the burden of furnishing proof of death lies with appellants’ beneficiaries or claimants. In a related case dealing with automobile insurance, the court held that “the policyholder who believes that he or she is entitled to reimbursement must make the insurance company aware of the claim and give it the opportunity to pay.” Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207. Similarly, the Sixth Circuit has observed that, “[u]nder traditional principles of contract law * * * the notice provision of an insurance policy creates a condition precedent, non-compliance with which precludes recovery by the insured.” Am. Emps. Ins. Co. v. Metro Regional Transit Auth., 12 F.3d 591, 592 (6th Cir.1993), citing Kornhauser v. Natl. Sur. Co., 114 Ohio St. 24, 150 N.E. 921 (1926).

In evaluating the “proof of death” provision in appellants’ insurance contracts, the trial court relied on Natl. Acc. & Health Ins. Co. v. Edrez, 19 Ohio Law Abs. 202, 1935 Ohio Misc. LEXIS 1321 (9th Dist.1935). In Edrez, the court dealt with a similar complaint based on a similar insurance contract provision. In Edrez, the plaintiff failed to submit proof of death according to the requirements of his accidental death insurance policy. As a result, the defendants did not pay out benefits on the policy. Like the present case, the plaintiff argued that it was not necessary for him to file a proof of death under the accident provision of the policy. The Edrez court relied on the life insurance contract, which provided, in relevant part:

4. Written notice of injury or of sickness on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability
from such sickness. In event of accidental death immediate notice thereof must be given to the company.

{¶22} The *Edrez* court found that this provision of the life insurance contract required the beneficiary to provide proof of death to the insurer as a condition precedent for the claim to be honored. Because the plaintiff did not comply with this condition precedent, the court entered final judgment in favor of the defendants.

{¶23} In challenging the application of *Kincaid* and *Edrez* to the case at hand, appellants contend that life insurance policies are distinguishable from other forms of insurance policies because, unlike automobile or accidental death insurance policies where the triggering event is not certain to occur, the death of a party with a life insurance policy is certain to occur. While we understand that the death of an insured party is an inevitable fact, we are not persuaded that such certainty places an additional duty on Nationwide beyond what is expressed in the life insurance contracts, and appellants provide no case law to support such a proposition. *See DeHart v. Aetna Life Ins. Co.*, 8th Dist. No. 42932, 1982 Ohio App. LEXIS 13478 (July 15, 1982) (finding the insurer had no implied duty to inform insureds on reaching an age where they were likely disabled that the insureds had a right to stop making premium payments if disabled).

{¶24} Accordingly, we find that, as in *Kincaid* and *Edrez*, appellants’ life insurance contracts create a clear and unambiguous condition precedent, in accordance with Ohio law, that requires, among other things, that appellants provide Nationwide with proof of death for their life insurance claims to be honored. It is clear from the contracts, as well as from the case law, that the standard language used places the burden on the
claimant or the beneficiary to produce the proof of death. In the absence of legislative or administrative regulatory action, we will not import additional unspoken duties and obligations onto Nationwide that will conflict with the parties’ contracted terms.

The Duty of Good Faith and Fair Dealing

{¶25} We further find no validity to appellants’ allegations that Nationwide has breached the implied covenant of good faith and fair dealing by failing to utilize the DMF for the benefit of its life insureds.

{¶26} Under Ohio law, because a fiduciary relationship exists in the context of insurance contracts, the insurer has a duty to act in good faith in handling the claims of the insured. Hoskins v. Aetna Life Ins. Co., 6 Ohio St.3d 272, 275, 452 N.E.2d 1315 (1983). Such duty is grounded on the fundamental principle that in every contract there is an implied covenant “that neither party shall commit any act that shall destroy or injure the rights of the other party to enjoy the fruits of the contract.” Anthony’s Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 471, 583 N.E.2d 806 (1991), quoting Druker v. Roland Wm. Jutras Assoc., Inc., 370 Mass. 383, 385, 348 N.E.2d 763 (1976).


¶28 As discussed, the provisions contained in appellants’ life insurance contracts with Nationwide expressly require “receipt” of “proof of death,” in compliance with R.C. 3915.05(K). Importantly, the contracts do not impose a duty on Nationwide to search the DMF to determine whether their insureds are deceased. Accordingly, we are unable to conclude that Nationwide has breached its duty of good faith and fair dealing by failing to incorporate the DMF into its account servicing practices when it is not contractually or legally obligated to do so.

¶29 Based on the foregoing, we find that the trial court did not err in granting Nationwide’s motion to dismiss. Appellants’ first assignment of error is overruled. Therefore, the issue raised in appellants’ second assignment of error regarding their standing to bring this action is rendered moot.

**Discovery**

¶30 Finally, appellants argue that the trial court erred in preventing the complete development of the record in this matter. We disagree. As stated, the trial court did not err in granting Nationwide’s motion to dismiss. Therefore, appellants were not entitled to develop the record through discovery.

¶31 Appellants’ third assignment of error is overruled.
 Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA A. BLACKMON, A.J., and
JAMES J. SWEENEY, J., CONCUR
INTRODUCTION

This action is before the Court on Cross-Motions for Summary Judgment. The case arises out of a facial challenge to KRS § 304.15-420, which requires life insurance companies to make a good faith effort to determine whether benefits are due based on the Social Security Administration’s Death Master File, and if so, attempt to locate beneficiaries and inform them of the claims procedure. Plaintiffs are insurance companies that argue the statute amounts to an unlawful retroactive regulation of their pre-existing life insurance contracts, which were formed without contemplating these requirements. Plaintiffs further argue that the statute violates the Contracts Clause of the Kentucky and United States Constitution. The Department of Insurance and Commissioner Sharon Clark argue that the statute is a valid exercise of the state’s police power, and that the legislation is a necessary and appropriate measure to protect the interests of consumers, policyholders and beneficiaries. The Department further argues that the Plaintiffs
have failed to show any impairment of a vested or substantive right. Having reviewed the record, heard the arguments of counsel, and otherwise being sufficiently advised, this Court hereby GRANTS summary judgment for the Commonwealth for reasons more fully discussed below.

FACTUAL BACKGROUND

This case arises out of a dispute over whether insurance companies that are licensed to sell coverage in Kentucky should be required to check their list of insureds against the Social Security Administration’s Death Master File. If a match is identified, the insurer must make a good faith effort to determine any benefits due, and locate the beneficiaries to inform them of the claim procedures. KRS § 304.15-420.

The Plaintiffs, life insurance companies¹ that do business in Kentucky, have “roughly 11,000 policies in force...from age zero to age 100.” (Myers Deposition, p. 100) Currently they have about 3,000 non-premium paying policies in force in the State of Kentucky with insureds older than 70. In order to comply with this new statute, Plaintiffs:

“would need to acquire the Death Master File. We would need to perform the match, and based on potential matches, go through steps outlined in 1 and 2 of the statute, which is more than we do today. So we would likely need to hire personnel, train personnel to do the search; one, to confirm the death, two, to locate beneficiaries and to evaluate whether or not the individual potential matches are actually our insured. And then to confirm the death.” (Myers Testimony, P.94-95)

Plaintiffs testified that “the database itself is not expensive to acquire, and the number of policies we have in force would not be costly to run the match against.” (Myers Testimony, p. 96-97) After running the search, the Plaintiffs estimate “statute is likely to more than double the

¹ Plaintiff insurance companies are smaller companies who do business mainly in Kentucky. National life insurance companies have engaged in multi-state global settlement with the government that requires them to check the Death Master File and notify beneficiaries of deceased insureds. (http://www.lifehealthpro.com/2012/11/19/john-hancock-companies-settle-with-6-states) Plaintiffs’ in-force policies have lower face amounts than those offered by many other, national life insurance companies. The average face amount of United and Reliable’s life insurance policies in force is approximately $4,800 with a $16 monthly premium, and Reserve’s average is about $8,000 with a $37 monthly premium. (Plaintiffs’ Motion for Summary Judgment, p. 4)
effort required to adjudicate policies as defined. So my rough guess is we likely would spend probably about 20 hours per match in order to meet the requirements of the statute.” (Myers Testimony, P. 98-99) This would result in an estimated $20,000 to $40,000 cost, although the estimates in time and cost were admitted by Plaintiffs as being based purely on speculation of IT and senior management. (Schallhorn Testimony, p. 80; p. 93) Regardless of its application to existing policies, the companies will still be required to put the technology and procedures in place to access the Death Master File for prospective application. (Schallhorn Testimony, p. 97)

Plaintiffs current claims procedures upon receipt of notice of death is to ask the person who contacted them to provide a copy of the death certificate, as well as a statement surrounding the death, and the original policy form. (Schallhorn Deposition, p. 38) In most cases, the only information the insurance companies have for beneficiaries is their name. (Myers Testimony, P. 96) In order to locate beneficiaries of a claimed insurance policy, Plaintiffs “first of all, talk to whoever it was that filed the claim and try to find out from them if they ... knew any information about the beneficiary... and then if they were unsuccessful there, they would probably do an internet search just to look for the beneficiary.” (Schallhorn Deposition, p. 106-107) When asked if Schallhorn thought that would constitute a good faith effort, he responded “Yes.” (Id.) The Plaintiffs interpret the law to require them “to go search for deaths...and claims. It puts the burden of proving death in order to pay a claim on the company instead of on the policyholder of the beneficiary, which could open the company up to all sorts of other potential litigation, I would think.” (Schallhorn Testimony, p. 120). The Department of Insurance, in oral arguments, stated its interpretation of the law is not to require companies to prove the death with a death certificate, but rather merely to make a good faith effort to learn of deaths through the Death Master File and make a good faith effort to attempt to give notice to potential beneficiaries. The
claims process would remain otherwise unchanged, which would require any beneficiary to follow the company’s procedures detailed above.

Plaintiffs have brought an action in this Court for a Declaration of Rights to declare the law unconstitutional. The Plaintiffs argue the statute is facially invalid because no law can be retroactive in application under KRS § 446.080(3). They argue that the law effectively re-writes the terms of the contract to shift the burden in the claims process described above from the client to the insurer. In the alternative, they argue that the statute is unconstitutional under the Kentucky and United States’ Constitution’s Contracts Clause, which prohibits a law from substantially impairing a contractual relationship unless it serves a significant public purpose and is a narrowly tailored means of achieving that purpose. The Commonwealth disputes these arguments and submits that the statute is a valid exercise of the state’s regulatory power over the business of insurance, and that it is an appropriate means of protecting the interests of consumers who are the beneficiaries of these insurance policies. (Defendant’s Cross-Motion for Summary Judgment, p. 2)

STANDARD OF REVIEW

Summary judgment is granted when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Only when it appears from the facts that the nonmoving party cannot produce evidence at trial in favor of a judgment on his behalf should summary judgment be granted. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476 (Ky. 1991). The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Id. A summary judgment movant has the initial burden of showing that no genuine of material fact exists,
whereupon the burden shifts, as a party opposing supported summary judgment motion cannot
defeat it without presenting at least some affirmative evidence showing that there is a genuine
issue of material fact for trial. Hibbits v. Cumberland Valley Nat’l Bank and Trust Co., 977
S.W.2d 252 (Ky. Ct. App. 1998).

Any statute in the Commonwealth “carries a presumption of constitutionality.”
Commonwealth v. Halsell, 934 S.W.2d 552, 554 (Ky. 1996); Brooks v. Island Creek Coal
Company, 678 S.W.2d 791, 792 (Ky. App. 1984). When a court reviews the constitutionality of a
statute, it is obligated “to give it, if possible, an interpretation which upholds its constitutional
validity.” Halsell, at 554–555, citing American Trucking Ass’n v. Com., Transp. Cab., 676
S.W.2d 785, 789 (Ky. 1984); Gurnee v. Lexington-Fayette Urban County Gov’t, 6 S.W.3d 852,
856 (Ky. Ct. App. 1999). “To succeed in a typical facial attack, [a plaintiff] would have to
establish that no set of circumstances exists under which [the statute] would be valid, or that the
statute lacks any plainly legitimate sweep.” Disc. Tobacco City & Lottery, Inc. v. United States,
citations and quotation marks omitted). Facial challenges are disfavored by the courts because
they often rest on speculation, thereby risking “premature interpretatio[n] of statutes on the basis
of factually barebones records.” Id.

The Supreme Court has established a three part test to determine whether a state statute
violates the Contracts Clause. First, the court must evaluate “whether the state law has, in fact,
operated as a substantial impairment of a contractual relationship.” Energy Reserves Group, Inc.
increase the level of scrutiny. Id. “Total destruction of contractual expectations is not necessary
for a finding of substantial impairment. On the other hand, state regulation that restricts a party to
gains it reasonably expected from the contract does not necessarily constitute a substantial impairment.” Id. (internal citations removed) “In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.” Id.

If the contractual relationship has been substantially impaired by the state regulation, the state must have a “significant and legitimate public purpose” to justify the regulation, such as remedying a broad and general social or economic problem. Id. The Court has indicated the public purpose need not address an emergency or temporary situation. Id. at 412. Finally, if a legitimate purpose exists, the court must determine whether the adjustment of contractual rights and responsibilities is based on reasonable conditions and “of a character appropriate to the public purpose justifying the legislation’s adoption.” Id. Unless the state itself is a contracting party, courts defer to legislative judgment as to the necessity and reasonableness of a particular measure. Id. at 413.

DISCUSSION

1. Statute Does Not Violate the Rule Against Retroactive Application

This statute does not alter the substantive contractual relations between the insured and the insurance company. Rather, it imposes regulatory (or remedial) obligations for the insurance company to identify and notify beneficiaries after the death on an insured. The expressed legislative purpose of the Act ("to require complete disclosure, transparency and accountability") is a valid exercise or the police or regulatory power of the state. Such remedial requirements "do no impair the rights a party possessed when he or she acted or give past conduct or transactions new substantive legal consequences, [and thus] they do not

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2 KRS 304.15-4200(1).
operate retroactively." *Moore v. Sills*, 307 S.W.3d 71, 81 (Ky. 2010). While the insurance company has a reasonable expectation that the state will not alter its contractual obligations, it 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.

Here, the legislature has sought to remedy the problem of insurance companies holding on to funds that should be paid to beneficiaries upon the death of an insured. The traditional industry practice allows insurance companies to stick their heads in the sand and ignore publicly available data regarding the deaths of their insureds, to the detriment of the beneficiaries (and the public). This statute remedies the problem by requiring insurance companies to check publicly available data bases and to take "good faith" steps to notify beneficiaries. While the statutory scheme enacted by our legislature may or may not be the best or most efficient way to achieve that goal, it is well within the scope of the legislature's police powers to regulate the business of insurance.

Applying such a remedial statute to claims that are pending at the time of its enactment does not violate the prohibition against retroactive legislation. *Thornsberry v. Aero Energy*, 908 S.W.2d 109 (Ky.App. 1995). As the Court of Appeals has explained, "when a statute is purely remedial or procedural and does not violate a vested right, but operates to further a remedy or confirm a right, it does not come within the concept of retrospective law nor the general prohibition against the retrospective operation of statutes." *Miracle v. Riggs*, 918 S.W.2d 745, 747 (Ky.App. 1996). Here, the statute remedies a significant problem in the regulation of the business of insurance, a business which is highly regulated in all aspects.
The statute merely confirms the right of beneficiaries to the money the insured's premiums have already paid for, and thus the statute must be construed as a remedial or procedural requirement not subject to the prohibition against retroactive legislation. The regulatory requirements of the statute do not impair the vested rights of the parties to the contract of insurance. No insurer will be required to pay more than it is already contractually obligated to pay, and no beneficiary will receive more than the insured paid premiums to obtain. But by operation of this statute, beneficiaries will obtain the funds to which they are entitled in a more timely fashion, a classic protection of the rights of consumers that is well within the legislature's power.

2. The Statute Does Not Impair Any Vested Contractual Right.

The Plaintiffs' claim that the statute unconstitutionally impairs the obligations of contracts must be reviewed in light of well established case law that provides that the language of the contracts clause is subject to "the inherent police power of the state 'to safeguard the vital interests of its people.'" Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400, 410 (1983) (citing Home Bldg' & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934)). Here, the Court finds that the legislation is well within the regulatory power of the legislature.

Plaintiffs cannot show that any vested right is abridged by KRS § 304.15-420. Without an abridgement of a vested right, Plaintiffs cannot claim a contractual impairment. "A right is vested, for these purposes, only if it has ripened into a secure entitlement to present or future enjoyment. The mere expectation of enjoyment is not enough." King v. Campbell County, 217 S.W.3d 862 (Ky. App. 2006). Although Plaintiffs argue they have a vested right in a potential beneficiary's burden of notice, their argument is based on a right to future enjoyment of
insurance premium investments made as the custodian of money otherwise properly payable to the beneficiaries of deceased insureds. A right, "in order to be vested (in the constitutional sense) must be more than a mere expectation of future benefits or an interest founded upon an anticipated continuance of existing general laws." *Louisville Shopping Center, Inc. v. City of St. Matthews*, 635 S.W.2d 307, 310 (Ky. 1982).

In effect, the Plaintiffs' expectation was that the legislature would not disturb the traditional industry practice of ignoring publicly available data about the deaths of insureds, and that the legislature would not impose any regulatory requirement to find or notify beneficiaries. The Supreme Court has decided similarly that a taxpayer had no vested right in the Internal Revenue Code as written. In a highly regulated industry such as insurance, companies should be aware that their rights are always subject to the regulatory power of the state to enact consumer protections such as the one at issue here. Such changes in statute do not violate vested rights, or due process. *United States v. Carlton*, 512 U.S. 26 (1994).

The beneficiaries of the deceased insured's policy have the ability to submit proof of death at any time, and Plaintiffs have no contractual right to continued custody of the funds at all. In fact, Plaintiffs never have a guarantee as to how long they would have custody of the funds or what benefit they would receive from them. (Plaintiff's Cross-Motion for Summary Judgment, p. 11). While Plaintiffs may have had some expectation that some percentage of the insurance payments would be left for an extended term, there was never any guarantee they would receive such a benefit. The regulatory requirement that the Plaintiffs make a good faith effort to identify and give notice to potential claimants does not impair a vested right.

The Plaintiffs' argument suggests that notice is a required condition precedent to coverage under the policies in question, and that the statute substantially alters this requirement.
(Plaintiff’s Motion for Summary Judgment, p. 16). Yet, notice is never mentioned in the contracts. Further, both Myers and Schallhorn Depositions concede that notice may be received from any source. When notice is material to the contract, it is provided for expressly. The contractual obligation that forms the basis for these insurance contracts is proof of death, not a notice of claim (Schallhorn Dep., p. 119). Plaintiffs rely on Andrews v. Nationwide Mutual Ins., 2012 WL 5289946 for support of their position that the notice and proof of death requirement creates additional, non-contractual duties. However, this interpretation of the term “confirm the death” is the worst case scenario. The Department of Insurance does not take the position that insurance companies would be required to provide a death certificate upon request to “confirm the death,” nor is such a strained reading of the statute justified.

The statute in question here may be read to allow the burden of proof of death to remain on any potential beneficiary. The statute imposes on insurance companies a requirement to check the Death Master File on a quarterly basis against their list of insureds and to attempt to notify listed beneficiaries. Regardless of the source of notice of the death of an insured, the current process insurance companies use to locate potential beneficiaries could be consistent with the statute’s requirement to make a good faith effort to provide notice. The worst-case scenario of exorbitant costs of tracking down death certificates is entirely speculative. Such speculative injury is insufficient to sustain a facial challenge to the statute. Because notice is not a duty assigned to either party in any of the Plaintiffs contracts, there is no impairment of any contractual right in the statute’s requirement for insurance companies to make a good faith effort to locate and notify beneficiaries of their right to receive funds.

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3 The Andrews case is an unpublished Ohio Appeals Court decision. Unpublished decisions, even within this jurisdiction, “shall not be cited or used as binding precedent in any other case in any court of this state...” CR 76.28. While the case may be cited in limited circumstances, the Court does not find it persuasive.
3. Even if the statute impairs a contractual right, it is justified by a significant and legitimate public purpose

Although this Court finds there is no contractual right to be impaired, even if the additional procedural step of periodically checking the Death Master File and notifying insured clients is considered to be a contractual impairment, this burden is justified by a significant and legitimate public purpose, as explained by the Supreme Court in *Kansas Power & Light Co.* As the Court held there, "[i]n determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. ... The Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them.'" 459 U.S. at 411. There are few industries more highly regulated than the insurance industry, and all insurance companies have notice that the state may impose requirements on their operations to provide for the protection of policyholders and beneficiaries.

Many Kentucky citizens pay for insurance to help them plan for end of life costs. For insurance companies to attempt to keep the money through willful ignorance of the death of the insured amounts to unjust enrichment at the expense of some of the least privileged citizens in this state. On average, the life policies are for burial amounts of $4,800 with monthly premiums of $16. (Myers Deposition, p. 5). All but 42 of the policies at issue were sold door to door to people in lower socio-economic classes. (Id.) This Court finds legislative judgment on the necessity and reasonableness of this particular matter was well justified. In addition, the statute is narrowly tailored to serve the purpose of ensuring that beneficiaries who are lawfully entitled to these funds receive their money in due course.

This statute does not require the insurance companies to complete the claims process, despite Plaintiffs’ argument to the contrary. The statute is narrowly tailored to give notice to
potential beneficiaries, but leaves intact the contractual burden of proving the death. This statute serves a significant public interest, and is narrowly tailored to address that interest. It cannot be considered a major impairment of any contractual right.

The Court has indicated the public purpose need not address an emergency or temporary situation. Id. at 412. Finally, if a legitimate purpose exists, the court must determine whether the adjustment of contractual rights and responsibilities is based on reasonable conditions and “of a character appropriate to the public purpose justifying the legislation’s adoption.” Id. Unless the state itself is a contracting party, courts defer to legislative judgment as to the necessity and reasonableness of a particular measure. Id. at 413.

The requirement to consult the Death Master File and give notice to beneficiaries does not shift any burden under these policies because no burden of notice was ever assigned in these contracts. Further, the claimants must still file a proof of death. When possible, a statute should be construed to be constitutional. Here the Court interprets the statute to require insurance companies to take reasonable steps to provide notice to potential beneficiaries; it does not require contractual rights regarding proof of death to be disturbed.

CONCLUSION

For the reasons stated above, the Commonwealth’s Motion for Summary Judgment is GRANTED and the Plaintiffs’ Motion for Summary Judgment is DENIED. In order to allow any party adversely affected by this ruling to seek post-judgment relief or obtain interlocutory relief regarding enforcement of the requirements of the statute, the Court sua sponte ORDERS:

1. Enforcement of the requirements of KRS 304.15-420 against the Plaintiffs in this action shall be STAYED pursuant to CR 62 for a period of ten (10) days from the entry of this
Opinion and Order to allow Plaintiffs to file any post-judgment motions or to seek interlocutory relief;

2. This stay of enforcement shall automatically dissolve at close of business on April 11, 2013 unless extended by the filing of a post-judgment motion under CR 59 or CR 60, or through relief under CR 62 or CR 65 by an appellate court of competent jurisdiction. So ORDERED this 1st day of April, 2013. This is a final and appealable order and there is no just cause for delay.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD FEINGOLD, individually
and as a representative of a class of
similarly-situated persons,

Plaintiff,

v.

JOHN HANCOCK LIFE INSURANCE
COMPANY (USA) and JOHN HANCOCK
LIFE & HEALTH INSURANCE
COMPANY,

Defendants.

CIVIL ACTION
No.

CLASS ACTION COMPLAINT

Plaintiff, RICHARD FEINGOLD ("Plaintiff"), brings this action on behalf of himself
and all other persons similarly situated, through his attorneys, and except as to those allegations
pertaining to Plaintiff or his attorneys, which allegations are based upon personal knowledge,
alleges the following upon information and belief against Defendants JOHN HANCOCK LIFE
INSURANCE COMPANY (USA) and JOHN HANCOCK LIFE & HEALTH INSURANCE
COMPANY ("Defendants").

PRELIMINARY STATEMENT

1. This case is a class action and arises from Defendants' pattern and practice of
avoiding payment of life insurance policy death benefits that are owed to beneficiaries.

2. Defendants have access to several sources to determine when their policy holders
have died. The Death Master File ("DMF") of the Social Security Administration ("SSA") is a
publicly available database containing millions of death notices for individuals enrolled in the
United States Social Security program since 1936. Insurance companies like Defendants can and
do routinely consult the DMF to determine whether or not particular policy holders have died. Defendants also subscribe to services or have direct access to court filings in multiple jurisdictions which would enable Defendants to ascertain when estates for policy holders have been opened. These are additional sources to determine when a policy holder has died.

3. However, Defendants have used the DMF and court access solely for their own advantage. Specifically, Defendants have consulted the DMF for their own benefit. For example, Defendants have accessed the DMF regarding clients with annuities to provide a basis for Defendants to stop making annuity payments, but Defendants have not equally used the DMF to the benefit of insureds or beneficiaries to determine when benefits are payable.

4. For determining when regular life insurance policy benefits are payable, Defendants have all but ignored the DMF and court filings.

5. Defendants disregarded the DMF and court access for purposes of determining when to make life insurance benefit payments to beneficiaries despite touting – and contracting – that beneficiaries would receive payment upon the death of the insured.

6. This practice enables Defendants to collect and enjoy interest on unclaimed benefits, charge against policy benefits, and otherwise benefit from holding unclaimed benefits.

7. As a result of this industry wide practice life insurance companies, including Defendants, have been and are the subject of numerous investigations by State regulators.

8. Defendants’ pattern and practice of handling unclaimed property in such a manner as to not pay benefits and/or not timely escheat the unclaimed property to a State has affected thousands of policy holders and beneficiaries in each of the states in which Defendants market life insurance policies.
9. As a result of an investigation and audit into Defendants' pattern and practice of handling unclaimed property by approximately 30 States and the District of Columbia, and without admitting liability, Defendants entered into a Global Resolution Agreement in approximately June 2011, to alter their handling of unclaimed property. A true and correct copy of the Global Resolution Agreement is attached hereto as Exhibit A.

10. Further as a result of those investigations, Defendants have settled with several States individually, including Florida and California, to create new policies for handling unclaimed property and for the payment of fines for failing to adhere to unclaimed property laws.

11. Entering into the Global Resolution Agreement and settlements with individual States does not shield Defendants from liability for damages owed to Plaintiff and the Class who were not parties or signatories to the agreement or settlements and did not receive compensation from the Global Resolution Settlement.

12. Defendants' pattern and practice of handling unclaimed property has directly resulted in damages to Plaintiff and the Class and the damages are ongoing.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(a) and (d). On information and belief the Class claim that is asserted is $5,000,000 or more, and Plaintiff and members of the Class are residents of different States than Defendants.

14. Venue in this district is proper under 28 U.S.C. § 1391. Defendants' principal place of business is in Massachusetts, Defendants conduct substantial business in this District, Defendants' corporate control group is located in this District, Defendants make their strategic business decisions in this District, and a substantial part of the actions and omissions giving rise to the action occurred in this District.
PARTIES

15. Plaintiff is an individual that resides in Lake County, Illinois. Plaintiff is the beneficiary of a life insurance policy marketed and sold by Defendants to Plaintiff’s mother.

16. John Hancock insurance products are issued by JOHN HANCOCK LIFE INSURANCE COMPANY (USA) and JOHN HANCOCK LIFE & HEALTH INSURANCE COMPANY. Included in the many John Hancock insurance products sold are life insurance policies.

17. JOHN HANCOCK LIFE INSURANCE COMPANY (USA) is a Michigan corporation with its principal place of business in Boston, Massachusetts. Defendant entered into a Global Resolution Agreement regarding its unclaimed property practices on or about June 2011.

18. JOHN HANCOCK LIFE & HEALTH INSURANCE COMPANY is a Delaware corporation with its principal place of business in Boston, Massachusetts. Defendant entered into a Global Resolution Agreement regarding its unclaimed property practices on or about June 2011.

FACTS

19. In approximately 1945, Plaintiff’s mother, Mollie Feingold, purchased a life insurance policy from Defendants.

20. On or about December 19, 2006, Plaintiff’s mother passed away. Plaintiff was unaware of the life insurance policy his mother had purchased in 1945. The policy was likely lost or misplaced by Plaintiff’s mother over the years.

21. Plaintiff first became aware the Defendants owed money to Plaintiff’s mother approximately four years after her death in late 2010 from the Illinois Treasurer’s unclaimed
funds website “CashDash”. Plaintiff investigated the unclaimed funds with the State of Illinois and was informed that $459 was the full payment of money remitted from dividends and there was no money escheated from any life insurance policy.

22. The investigation with the State of Illinois took some time, during which Plaintiff was always informed that the $459 was the full amount owed from Defendants and that money was only for “dividends.” Following several procedural steps, including obtaining necessary documentation, Plaintiff finally received the $459 from the State in December of 2011.

23. Beginning in January 2012, Plaintiff contacted Defendants and requested a copy of any insurance policy and sought information regarding the unclaimed funds arising from dividends and including whether there were any life insurance proceeds. Plaintiff was initially told there was no life insurance policy purchased by his mother. Shortly thereafter Defendants found the policy Plaintiff’s mother purchased and Defendants sent Plaintiff forms to be filled out while still refusing to provide any other information.

24. After providing all requested information and documents Plaintiff again requested a copy of the life insurance policy his mother purchased but Defendants again still refused.

25. Through May of 2012, Plaintiff remade the request for a copy of the policy, including making written requests to Defendants in Massachusetts, to no avail.

26. Without providing a copy of the policy on June 1, 2012, Defendants sent Plaintiff a check for $1,349.71 without explanation as to why this money was not escheated to the State of Illinois when the dividend monies were escheated or explaining with any degree of certainty what the check was for.

27. Plaintiff never received a copy of the insurance policy, never received an explanation or accounting for the amount paid to him of $1,349.71, never received an
explanation of why the $459 was escheated to the State but the $1,349.71 was not, and never received an explanation of why the information forming the basis to stop making dividend payments was not shared to effect the life insurance policy benefits.

Massachusetts Law

28. Massachusetts’ substantive laws will be constitutionally applied to the claims of Plaintiff and the Class Members under the Due Process Clause, 14th Amend, § 1, and the Full Faith and Credit Clause, art. IV., § 1, of the U.S. Constitution.

29. Defendants’ headquarters and principal places of business are located in Massachusetts. Massachusetts has a paramount interest in regulating Defendants’ conduct, and Defendants’ decisions to locate their principal places of business in Massachusetts and avail themselves of Massachusetts courts and laws render the application of Massachusetts law to the claims at hand constitutionally permissible.

30. Massachusetts is the place where decisions regarding the conduct complained of in this Complaint were made, and Massachusetts is the place where most of the injury occurred.

31. Similarly, Massachusetts is the place where the policies of Defendants were set which gave rise to the misconduct alleged herein and the conduct causing the injury occurred in Massachusetts.

32. Further, Massachusetts law is appropriately applied to the putative Class here because Massachusetts is the place where the putative Class was to communicate with Defendants regarding the unclaimed property at issue.
CLASS ACTION ALLEGATIONS

33.  *Class Definition.* Plaintiff brings this action individually and on behalf of the following class of similarly situated persons (the “Class”), including subclass, of which Plaintiff is a member:

**(b)(2) Injunctive Relief Class:**

All persons who are owners or beneficiaries to the proceeds of death benefits, policies, contract or accounts of John Hancock which have gone unclaimed.

**(b)(3) State Sub-Class:**

All persons who are owners or beneficiaries to the proceeds of death benefits, policies, contract or accounts of John Hancock which have gone unclaimed.

*[Alternative] (b)(3) Specific State Sub-Class:*

All persons in Massachusetts and Illinois, who are owners or beneficiaries to the proceeds of death benefits, policies, contract or accounts of John Hancock which have gone unclaimed.

Excluded from the Class(es) are Defendants and any of their officers, directors or employees, the presiding judge, and any member of their immediate families. Plaintiff hereby reserves the right to amend the above class definition based on discovery and the proofs at trial.

34.  *Numerosity.* The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least thousands of persons in the Class.

35.  *Commonality.* There are questions of law or fact common to the Class including, *inter alia,* the following:

a.  Whether Defendants violated Massachusetts, Illinois or other various state laws by failing to timely return customers’ monies that were unredeemed;
b. Whether Defendants were unjustly enriched by failing to timely return unclaimed property and/or generating income for themselves on those unredeemed funds and/or charging a fee for holding funds while generating monies off of the funds and/or not sharing those monies generated with the rightful owner of those funds;

c. Whether by failing to timely return unclaimed property amounts to conversion of Plaintiff’s and the Class’ money for Defendants’ own benefit;

d. Whether Plaintiff and Class have been damaged by Defendants’ conduct and, if so, what is the proper measure of such damages;

e. Whether Defendants breached a fiduciary duty owed Plaintiff and the Class by failing to notify them in a timely manner using the best practicable notice that their funds had gone unclaimed and they were in fact owed money. Whether Defendants further breached their fiduciary duties owed to Plaintiff and the Class by failing to timely return unclaimed property and/or generating income for themselves on those unredeemed funds and/or charging a fee for holding funds while generating monies off of the funds and/or not sharing those monies generated with the rightful owner of those funds.

36. Typicality. The claims or defenses of Plaintiff are typical of the claims of the Class, alleged herein. Plaintiff, the same as every class member, was the rightful owner of unclaimed property, those funds went unredeemed and Defendants failed to inform Plaintiff of the unredeemed funds, generated monies through the use of those funds which Defendants did not share with Plaintiff, and charged an administrative charge before returning the unredeemed transfer several years later even though Defendants generated interest and profit as a result of this practice.

37. Adequacy. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has retained undersigned counsels who are competent and experienced in the prosecution of complex class action litigation. The interests of the Plaintiff are aligned with, and not antagonistic to, those of the Class.

38. Fed. R. Civ. P. 23(b)(2) Requirements. The prerequisites to maintaining a class action for injunctive and equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) exist as Defendants
acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole.

39. The prosecution of separate actions by members of the Class would create a risk of establishing incompatible standards of conduct for Defendants. For example, one court might decide that the challenged actions are illegal and enjoin them, while another court might decide that those same actions are not unlawful. Individual actions may, as a practical matter, be dispositive of the interest of the Class, who would not be parties to those actions.

40. Defendants’ actions are generally applicable to the Class as a whole, and Plaintiff seeks, *inter alia*, equitable remedies with respect to the Class as a whole.

41. Defendants’ alleged uniform scheme and common course of conduct make declaratory relief with respect to the Class as a whole appropriate.

42. *Fed. R. Civ. P. 23(b)(3) Requirements.* This case satisfies the prerequisites of Fed. R. Civ. P. 23(b)(3). The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy.

43. The likelihood that individual members of the Class will prosecute separate actions is remote due to the extensive time and considerable expense necessary to conduct such litigation, especially in view of the relatively modest amount of monetary, injunctive and equitable relief at issue for each individual Class member.

44. This action will be prosecuted in a fashion to ensure the Court’s able management of this case as a class action on behalf of the Class.
COUNT I
(Violation of Massachusetts Consumer Protection Act;
Alternatively, Violation of Various State Consumer Protection Laws)

45. Plaintiff repeats and realleges the allegations of the foregoing paragraphs as if fully set forth herein.

46. At all times hereto, there was in full force and effect the Massachusetts Regulation of Business Practices for Consumer Protection, Chapter 93A, et seq. ("the Massachusetts Act").

47. Plaintiff and other Class members are owners or beneficiaries to the proceeds of policies, contracts or accounts of John Hancock which have gone unclaimed, are consumers within the meaning of the Massachusetts Act given that Defendants’ business activities involve trade or commerce, are addressed to the market generally and otherwise implicate consumer protection concerns.

48. The Massachusetts Act renders unlawful the use or employment of any deception [including the] concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce.

49. Defendants intended that the Plaintiff and the class would rely on the deception of Defendants’ policies regarding unclaimed property including but not limited to:

(a) that should money go unclaimed Defendants would neither notify the owner or beneficiary nor return the money in a timely fashion;

(b) that Defendants would use funds from unclaimed property to generate income that Defendants would keep for themselves;

(d) that Defendants would deduct administrative charges for holding onto unclaimed property without making an effort to return that property.

This conduct constitutes consumer fraud within the meaning of the Massachusetts Act.
50. If Defendants had disclosed the above facts to Plaintiff and the Class, they could have (and would have) prevented economic injury by collecting all such unclaimed funds, rather than having them remain in Defendants’ coffers.

51. Defendants’ conduct alleged herein is furthermore unfair insofar as it offends public policy; is so oppressive that the consumer has little alternative but to submit; and causes consumers substantial injury.

52. Defendants knew or should have known that passively holding unclaimed property was unfair to the owners of that unclaimed property.

53. The omission of a material fact, such as that alleged here, impacts the public as actual or potential consumers of Defendants’ services. As a direct and proximate result of the above-described breach, Plaintiff and the Class have been damaged in an amount to be proven at trial.

**COUNT II**
(Unjust Enrichment)

54. Plaintiff repeats and realleges the allegations of the foregoing paragraphs as if fully set forth herein.

55. Defendants have been unjustly enriched by enjoying the benefits of Plaintiff’s and the Class’ monies obtained from unclaimed property, including using those funds to generate income for themselves. Defendants were further unjustly enriched by reducing Plaintiff’s and Class members’ property by imposing an administrative charge on those unclaimed funds.

56. Under the circumstances, it is inequitable for Defendants to retain any of these benefits, at the expense and to the detriment of Plaintiff and Class.

57. Such conduct sounds in equity under the common law of unjust enrichment, or money had and received, and constructive trust.
58. Plaintiff and the Class have no adequate remedy at law.

59. As a direct and proximate result of the above, Plaintiff and the Class have been damaged in an amount to be proven at trial.

**COUNT III**  
(Conversion)

60. Plaintiff repeats and realleges the allegations of the foregoing paragraphs as if fully set forth herein.

61. Defendants accepted the original purchase of the policies, contracts or accounts knowing full well those policies, contracts or accounts would one day, on a date certain, become payable to persons such as Plaintiff and the Class.

62. Equally to Plaintiff and the Class, on the dates certain when those policies, contract or accounts were to pay out, or after a reasonable time of when those policies, contracts or accounts were to pay out, Defendants exercised dominion and control over those pay outs directly and indirectly through their policy of unclaimed property.

63. Defendants could have promptly notified Plaintiff and Class of the existence of unclaimed property, or could have promptly taken other reasonable steps to turn over the unclaimed property. Instead, and as a benefit of its own policy regarding unclaimed property, Defendants enjoyed the use of the unclaimed funds as if they were their own.

64. Defendants’ dominion and control over the unclaimed property amounted to conduct which improperly deprived Plaintiff and Class of the rightful access to and use of their money, and constitutes an unlawful conversion of Plaintiff’s and Class’s monies.

65. As a direct and proximate result of the above, Plaintiff and the Class have been damaged in an amount to be proven at trial.
COUNT IV
(Breach of Fiduciary Duty)

66. Plaintiff repeats and realleges the allegations of the foregoing paragraphs as if fully set forth herein.

67. Defendants, by virtue of the policies, contracts or accounts entered into an arrangement whereby for a fee, Defendants were obligated to make pay outs on those policies, contracts or accounts to Plaintiff and the Class. Defendants are fiduciaries to the Plaintiff and the Class based on their relationship with Plaintiff and the Class. Defendants are fiduciaries by reason of their holding of death benefits (funds) for their policy holders’ beneficiaries, heirs, executors and estates. Defendants are fiduciaries by reason of their holding unclaimed property. Defendants are fiduciaries by reason of their exercising the right to control claims within the insureds’ policies (such as when or if claims are even made). Defendants are fiduciaries by reason of the trust and confidence placed in Defendants (and Defendants’ knowledge of the placing of that trust and confidence) for Defendants’ holding of proceeds due pursuant to death benefits, policies, contracts or accounts. By and through operation of this relationship, Defendants acted as a fiduciary to Plaintiff and the Class.

68. Defendants breached one or more of those fiduciary duties by, including but not limited to: holding onto death benefits (funds) and/or unclaimed property, failing to notify Plaintiff and the Class Defendant were so holding death benefits (funds) and/or unclaimed property, using the death benefits (funds) and/or unclaimed property for their own benefit, earning and retaining interest on the death benefits (funds) and/or unclaimed property, and charging administrative fees to hold on to the death benefits (funds) and/or unclaimed property without undertaking reasonable efforts to locate the Plaintiff and the Class so that they may
receive the death benefits (funds) and/or unclaimed property eliminating the need for the ongoing administrative fees.

69. Defendants did not make the payouts to Plaintiff and the Class, which fact Defendants did not disclose. Plaintiff and the Class were not made aware that their rights pursuant to the policies, contracts or accounts had been triggered.

70. Defendants had the means to take reasonable steps to notify Plaintiff and the Class of the proceeds owed them on policies, contracts or accounts. Defendants breached their fiduciary duty to Plaintiff and the Class by failing to notify them of the proceeds owed, among other breaches.

71. As a proximate result of Defendants’ actions, Plaintiff and Class have suffered damages in the form of (i) lost income and/or lost interest or other use of the unclaimed funds; and (ii) the charging of administrative fees when the fiduciary benefitted from possession of the funds.

72. Defendants’ breach of fiduciary duty was a direct cause of the Plaintiff’s and the Class’ damages. Had Defendants made reasonable and timely efforts to provide notice of the unclaimed property to Plaintiffs and the Class, they would not have lost out on generating income and profits on the funds themselves, and would not have lost the portion of the principal that Defendants deducted as an administrative charge.

73. Instead, Defendants waited to notify Plaintiff and the Class, if at all. During this substantial time, Plaintiff and Class were without their money and Defendants had in fact been using the money for their own benefit to generate income for themselves. Defendants’ conduct improperly deprived Plaintiff and the Class of the rightful access to and use of their money.
74. As a direct and proximate result of the above, Plaintiff and the Class have been damaged in an amount to be proven at trial.

COUNT V
(Declaratory Relief Pursuant to 28 U.S.C. § 2201)

75. Plaintiff repeats and realleges the allegations of the foregoing paragraphs as if fully set forth herein.

76. There is an actual controversy between Defendant and Plaintiff and the Class concerning whether Defendants should be permitted to hold on to unclaimed property without notification to Plaintiff and the Class within a reasonable time.

77. Defendants engaged in, and continues to engage in inequitable, unfair and fraudulent conduct concerning their practice of holding unclaimed property without notifying the owner of those funds within a reasonable period of time after Defendants knew or should have known pay outs were due pursuant to the underlying policies, contracts or accounts, all the while keeping the income and interest by use of the unclaimed property, and unfairly imposing an administrative charge that is deducted directly from the funds before they are refunded to Plaintiff and the Class.

78. Defendants, on the other hand, believe they have complied with all obligations and duties arising from their legal relationship with Plaintiff and the Class as documented in the Global Resolution Agreement Defendants entered into with several states.

79. These opposing views create adverse legal interests over an actual controversy of to whom the money belongs, including those funds earned historically off the unclaimed property, and fees charged historically to hold on to the unclaimed property. A declaratory
judgment is proper to declare the rights of the Plaintiffs, Class and Defendants in this controversy.

80. The foregoing facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

81. Pursuant to 28 U.S.C. § 2201 this Court may "declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." These declarations are being sought under the law supporting the causes of action set forth above.

82. Defendants are wrongfully holding on to money rightfully owned by the Class, without notifying the Class it is holding the money, or offering to return the money, all the while using those funds for its own benefit. By granting declaratory relief, the Court would avoid multiplicity and inconsistency of actions by declaring in one action the rights and obligations of the litigants.

83. Accordingly, Plaintiff and the Class seek the following declarations:

(a) **Declaration I**: That Defendants be prohibited from holding onto funds owned by the Class.

(b) **Declaration II**: That the Class be declared the true owner of the monies generated from use of the unclaimed funds and of the fees charged to hold onto the unclaimed funds.

(c) **Declaration III**: That Defendants be required to disgorge all of the unclaimed property funds in their possession to the true owners within thirty days of a final judgment, plus pre-judgment interest.
(d) **Declaration IV.** That Defendants be required, within thirty days of a final judgment, to return to Class members funds that they have escheated to any state or jurisdiction within the United States.

(e) **Declaration V.** That Defendants, on a going forward basis, be required to use address updating and person locating, web based lists and all other reasonably available systems to ensure accurate notifications of unclaimed property.

(f) **Declaration VI:** That Defendants’ practice of retaining possession of all unclaimed property breaches its fiduciary duty and creates a constructive trust for the benefit of the Class.

(g) **Declaration VII:** That Defendants be required to disgorge any fees it has charged class members for possessing, notification, refund, or escheat of unclaimed property.

(h) **Declaration VIII:** That Defendants be required to disgorge all income it has earned from unclaimed property funds.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, RICHARD FEINGOLD, individually and on behalf of all others similarly situated, demands judgment in his favor and against Defendants, JOHN HANCOCK LIFE INSURANCE COMPANY (USA) and JOHN HANCOCK LIFE & HEALTH INSURANCE COMPANY, jointly and severally, as follows:

A. Declare this action to be a proper class action pursuant to Fed. R. Civ. P. 23, appoint Plaintiff as the Class representative, and appoint Plaintiff’s counsel as counsel for the Class;

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B. Award Plaintiff and the members of the Class payments of benefits owed and payments of interest and fees owed for the period that the benefits were withheld;

C. Award Plaintiff reasonable costs, including attorney’s fees; and

D. Award such equitable/ injunctive or other relief that the Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

RICHARD FEINGOLD, individually and as the representative of a class of similarly-situated persons

By: /s/Alan L. Cantor
    One of Plaintiff’s Attorneys

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case No.: 1:13-CV-10185

RICHARD FEINGOLD, Individually and as
Representative of a Class of Similarly-Situated
Persons,

Plaintiffs,

v.

JOHN HANCOCK LIFE INSURANCE
COMPANY (USA) and JOHN HANCOCK
LIFE & HEALTH INSURANCE COMPANY,

Defendants.

DEFENDANTS’ MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS THE COMPLAINT
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N.Y. Ins. Dep’t, Request for Special Report Pursuant to Section 308 of the New York Insurance Law, July 5, 2011

Restatement (Second) of Conflict of Laws
Defendants John Hancock Life Insurance Company (U.S.A.) and John Hancock Life & Health Insurance Company (together, “John Hancock”) respectfully submit this memorandum in support of their motion to dismiss plaintiff’s Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Under settled insurance law, proceeds of a life insurance policy are payable after a beneficiary provides notice and “due proof of death” – typically a death certificate – to a life insurer. R. Keeton, Basic Text on Insurance Law, 445-451 (West 1971). Uniform unclaimed property laws like those in Illinois reflect this principle by deeming proceeds of a life insurance policy to be abandoned if unpaid more than five years after they became payable “by actual proof of death of the insured.” 765 ILCS 1025/3(b). Although the Complaint alleges that John Hancock followed a “practice of avoiding payment of life insurance policy death benefits” or not timely escheating such amounts, plaintiff admits that he was “unaware of the life insurance policy his mother had purchased in 1945” and thus never contacted John Hancock about the policy until January 2012. (Complaint ¶¶ 1, 8, 20, 23) After plaintiff subsequently provided documentation to John Hancock, it sent plaintiff a payment. (Id. ¶¶ 24, 26.) The Complaint seeks to discard settled law by requiring payment or escheatment of life insurance proceeds where a beneficiary has made no claim on the policy.

Plaintiff’s claim under the Massachusetts Consumer Protection Act, Massachusetts General Law chapter 93A (“ch. 93A”), should be dismissed for three reasons. First,
plaintiff is an Illinois resident suing as a beneficiary to a life insurance policy issued in Illinois to his mother, an Illinois resident, whose death in Illinois was a precondition to payment of benefits under the policy. Ch. 93A does not apply to such an out-of-state plaintiff. Second, even if Massachusetts law did apply to this dispute, plaintiff failed to comply with the mandatory pre-suit demand provisions of ch. 93A. Third, in light of established law, John Hancock did not engage in any “deception” under ch. 93A by not paying or escheating benefits before plaintiff contacted John Hancock about his mother’s policy.

The Complaint’s common law counts are also undermined by settled insurance law and should be dismissed on the following additional grounds. Plaintiff’s claim for unjust enrichment should be dismissed because he has adequate remedies at law. Plaintiff’s claim of conversion fails where he alleges only a conditional right to a general debt or obligation, rather than an unconditional right to specific chattel. Plaintiff’s fiduciary duty claim fails because, as a matter of law, insurers owe no such duty to their insureds or the beneficiaries of those insured. Finally, this Court should exercise its discretion to dismiss plaintiff’s request for declaratory relief where that request is focused on past harms and seeks a declaration contrary to established state law.

**BACKGROUND**

**A. Factual Allegations**

The John Hancock defendants are successors in interest to John Hancock Mutual Life Insurance Company, which issued a life insurance policy to plaintiff’s mother in
Plaintiff’s mother was an Illinois resident when she applied for and purchased the industrial policy.\(^1\) Plaintiff’s mother died in December 2006. \((Id. \ ¶ 20)\)

Plaintiff was unaware of his mother’s life insurance policy.\(^2\) \((Id. \ ¶ 20)\) He alleges that he first became aware of money owed by John Hancock to his mother in late 2010 from the Illinois Treasurer’s unclaimed property website “CashDash.” \((Id. \ ¶ 21)\) Plaintiff alleges that he was informed that $459 represented “dividends” – not money escheated from any life insurance policy. \((Id.)\) John Hancock Mutual Life Insurance Company had converted from a mutual life insurance company to a publicly owned life insurance company through a process known as demutualization in 1999 and 2000, and as part of that process had distributed stock or cash to policyholders. \*See Tierney v. John Hancock Mut. Life Ins. Co., 791 N.E.2d 925 (Mass. App. Ct. 2003).\* The “dividends” were actually demutualization proceeds.\(^3\)

In January 2012, plaintiff contacted John Hancock seeking to determine whether there were any life insurance proceeds. \((Compl. \ ¶ 23)\) He was told that plaintiff’s mother had purchased a policy, and John Hancock sent plaintiff forms to be filled out to make a

\(^1\) A copy of the life insurance application of plaintiff’s mother as well as the likely form of policy issued to her are attached as Exhibits A and B to the Affirmation of Patricia A. Carli (“Carli Aff.”). The Court may properly consider these documents on a motion to dismiss as “documents incorporated into the complaint by reference.” \*Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).\* John Hancock did not retain copies of individual industrial policies. Carli Aff., \ ¶ 3.

\(^2\) Additionally, plaintiff was not listed as a beneficiary on Ms. Feingold’s application. Ms. Feingold’s husband (plaintiff’s father) was the only named beneficiary of the policy. \*Id., Ex. B.\*

\(^3\) Ms. Feingold received $459, which was the economic equivalent of 27 shares at a price of $17 per share. \*Id., \ ¶ 7.\*
claim.  (*Id.*) After providing the requested information and documentation to John Hancock, plaintiff received a payment of $1,349.71 but not a copy of the policy.  (*Id. ¶¶ 24, 26*)

Plaintiff does not allege that he failed to receive any particular sum owed to him under the policy. He does not allege that he was deprived of any funds by John Hancock’s escheatment of “dividends” to the State, which plaintiff admittedly recovered through the procedures provided by the Illinois Treasury. Finally, plaintiff does not allege that John Hancock was ever made aware of his existence prior to his contacting the Company in 2012 or that the Company, through its escheatment of demutualization proceeds, could have ascertained his existence as a beneficiary.

B. The Applicable Legal Framework

Under the law of Illinois and other states, life insurance benefits are payable only upon receipt of “due proof of death” from a beneficiary to an insurer. *Winkfield v. Am. Continental Ins. Co.*, 249 N.E.2d 174, 177 (Ill. App. Ct. 1969) (“The sole question concerning [insurer’s payment obligations under] the life policy is whether the required forms of due proof of death of the insured were filed with the defendant.”); *see also Minh Tu v. Mut. Life Ins. Co. of N.Y.*, 136 F.3d 77, 79-80 (1st Cir. 1998) (under Massachusetts

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4 John Hancock sent plaintiff the check for $1,349.71 on June 1, 2012. (Compl. ¶ 26). A copy of the check stub shows this payment reflected $470.48 of death benefit, $91.80 of additional benefit, $528.11 of additional paid up benefit, $12.26 of settlement dividend, and $247.06 of interest on policy claim. Carli Aff., ¶ 6, Ex. C. *See supra* note 1; *see also Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996) (stating a court “may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint, even though not attached to the complaint, without converting the motion [to dismiss] into one for summary judgment”), *abrogated on other grounds by 15 U.S.C. § 78-4(b)(2).*
law “due proof is the proof furnished to the insurer [that] shows on the whole that the claim is of a class within the protection of the policy, so that if the proofs should be accepted as true the insurer reasonably might pay the claim.”) (internal citations and quotations omitted); Howe v. National Life Ins. Co., 72 N.E.2d 425, 427 (Mass. 1947) (“The purpose of furnishing the defendant with due proof [of death] is to enable it to form an intelligent estimate as to whether the death came within the terms of the policy.”); O’Reilly v. The Guardian Mut. Life Ins. Co., 60 N.Y. 169, 172 (N.Y. 1875) (“notice and proof of death required as conditions precedent to a right of action upon the contract”); Keeton at 445-51.

Illinois law governing insurance claims settlement practices also conditions an insurer’s liability upon the presentation of a claim to benefits. E.g., 215 ILCS 5/154.6(i) (“Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed [constitutes an improper claims practice].” (emphasis added)); ILL. ADMIN. CODE tit. 50 § 919.40 (“Notification of Loss shall mean communication, as required by the policy or that is otherwise acceptable by the insurer, from a claimant or insured to the insurer which identifies the claimant or insured and indicates that a loss has occurred or is about to occur.”). The policy issued to plaintiff’s mother is consistent with this principle. Carli Aff., Ex. A.

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5 For the reasons provided below, Illinois law applies to claims handling and escheatment of proceeds of a life insurance policy in Illinois. Nevertheless, Massachusetts claims settlement practices law is virtually identical to that in Illinois in these respects. See, e.g., M.G.L. ch. 176D § 3(9)(e) (applies to “[f]ailing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed”) (emphasis added).
The Illinois Uniform Disposition of Unclaimed Property Act ("IUDUPA") in addressing funds owed under life insurance policies reflects the established rule by defining "unclaimed funds" held by life insurance companies as "all moneys held and owing by any life insurance corporation unclaimed and unpaid for more than 5 years after the moneys became due and payable . . . ." 765 ILCS 1025/3(b) (emphasis added). Where a life insurance policy is "not matured by actual proof of the death of the insured," the IUDUPA provides that the policy is "deemed" to be "due and payable" only if such policy was in force when the insured attained the applicable limiting age, a circumstance not present here. Id.⁶

The IUDUPA, like many states, treats the escheatment of demutualization proceeds in a wholly separate provision. See 765 ILCS 1025/3a. Rather than tying escheatment to the date that policy proceeds become "due and payable" by way of the submission of a claim or the attainment of the limiting age, Illinois law provides for escheatment "2 years after the date of the demutualization . . . if the funds remain unclaimed." 765 ILCS 1025/3a(a)(1). Thus, the delivery of demutualization funds to the State has no bearing on the timing of escheatment of life insurance proceeds.

Neither of these statutory schemes imposes a duty on John Hancock to undertake affirmative outreach to beneficiaries, or to the heirs of beneficiaries, prior to the submission of a claim.⁷

⁶ Massachusetts' Unclaimed Property Law, M.G.L. ch. 200A, § 5A is substantively identical to the provision of Illinois law quoted above.

⁷ Notably, New York – but not Illinois or Massachusetts – recently enacted a statute designed legislatively to alter this state of affairs. See, e.g., N.Y. Ins. L. § 3213-a(f)("Every insurer
C. Procedural Background

Plaintiff filed suit on January 30, 2013. At no time prior to the filing of this suit was John Hancock provided with statutorily required pre-suit demand pursuant to Massachusetts General Laws ch. 93A, § 9(3).

STANDARD OF REVIEW AND APPLICABLE LAW

To survive a Rule 12(b)(6) motion, a plaintiff must allege sufficient facts “to raise a right to relief above the speculative level” and must provide “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). Although the Court must accept as true all of the factual allegations contained in the Complaint, mere labels and conclusions or a formulaic recitation of the elements of a cause of action will not suffice. Twombly, 550 U.S. at 555. Legal conclusions are not entitled to an assumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

A federal court sitting in diversity applies the substantive law, including choice of law principles, of the forum state. Artuso v. Vertex Pharm., Inc., 637 F.3d 1, 5 (1st Cir. 2011). Plaintiff’s allegation that Massachusetts law applies to all claims is an incorrect legal conclusion and entitled to no weight. Iqbal, 556 U.S. at 679. Massachusetts follows shall establish procedures to reasonably confirm the death of an insured or account holder and begin to locate beneficiaries within ninety days after the identification of a potential match [against the Social Security Death Master File] . . . . Nothing herein shall prevent an insurer from requiring satisfactory proof of loss, such as a death certificate, for the purpose of verifying the death of the insured.”). The New York Insurance Department had previously announced that it had to amend existing regulations to impose such requirements. N.Y. Ins. Dep’t, Request for Special Report Pursuant to Section 308 of the New York Insurance Law, July 5, 2011, available at http://www.dfs.ny.gov/insurance/life/section_308.htm; see also 11 N.Y. Comp. Codes R. & Regs. 226.0 (describing common practice by life insurers prior to enactment of new regulations).
the “functional” choice of law approach set forth in the Restatement (Second) of Conflict of Laws, including section 192 of the Restatement, addressing principles applicable to disputes concerning insurance contracts, and the more general principles contained in sections 6, 145-46 and 186-88, each applying a “most significant relationship” analysis. 

See Bushkin Assocs. v. Raytheon Co., 473 N.E.2d 662, 668-72 (Mass. 1985) (applying these principles to, *inter alia*, claims arising under M.G.L. ch. 93A). “Absent an express choice of law, a life insurance policy is governed by the law of the state where the insured was domiciled when the contract was applied for unless another state has a more significant relationship . . . .” Carrieri v. Liberty Life Ins. Co., No. 09-12071, 2011 WL 3794893, at *2 (D. Mass. Aug. 26, 2011) (applying Massachusetts choice of law rules); see also Prudential Ins. Co. of Amer. v. Athmer, 178 F.3d 473, 477 (7th Cir. 1999) (“In the case of life insurance, that rule picks the law of the state where the insured was domiciled when the policy was applied for, hence in this case Illinois, unless some other state has a more significant relationship.”)

Here, the insured was domiciled in Illinois, and the parties to the contract contemplated that the law of the state where the policy was issued and delivered would govern. See Carli Aff., Ex. A at 2 (“If any provision of this policy conflicts with the statutes of the State in which this policy is issued or delivered, such provision shall be construed to conform thereto.”). No other state has a more significant relationship to the dispute than Illinois, where any alleged injury occurred and where both the insured and the named beneficiary resided at the time of contracting and at the time of their respective
ARGUMENT

I. Plaintiff's Ch. 93A Claim Should Be Dismissed

Plaintiff’s claim under ch. 93A should be dismissed for three reasons. First, ch. 93A is designed for the protection of Massachusetts residents. Where the alleged impact of a Massachusetts’s corporation’s actions falls on out-of-state residents, Massachusetts courts will not apply ch. 93A to the resolution of that dispute. See, e.g., Faherty v. CVS Pharmacy, Inc., No. 09-cv-12102, 2011 WL 810178, at *5 (D. Mass. 2011) (declining to certify a nationwide class in part because state consumer protection laws, including ch. 93A, could not be applied to the claims of out-of-state class members); see also In Re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 83 (D. Mass. 2005) (“The conclusion that the home state of the consumer has a more significant relationship to the alleged fraud than the place of business of the defendant is in accordance with the principles of Restatement § 6, since state consumer protection statutes are designed to protect consumers rather than to regulate corporate conduct.”).

Second, even assuming that ch. 93A could apply to plaintiff’s claims, plaintiff has failed to either plead or actually comply with the mandatory demand provisions of that statute. Section 9(3) of ch. 93A provides that, “[a]t least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall

deaths. (Plaintiff, apparently an heir to the third-party beneficiary of that contract, is also an Illinois resident.) For all of these reasons, Illinois law should apply.
be mailed or delivered to any prospective respondent.” M.G.L. ch. 93A, § 9(3). Failure to comply with this demand requirement is fatal to the Complaint. Rodi v. Southern New England School of Law, 389 F.3d 5, 19 (1st Cir. 2004) (“The statutory notice requirement is not merely a procedural nicety, but, rather, a prerequisite to suit.”) (internal quotation marks omitted); Entrialgo v. Twin City Dodge, Inc., 333 N.E.2d 202, 204 (Mass. 1975) (“A demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved.”).

Third, there is no deception based on John Hancock’s following settled law. In order to constitute an unfair or deceptive trade practice, the Court must assess whether the alleged practice falls within the “penumbra of some common-law, statutory, or other established concept of unfairness; . . . whether it is immoral, unethical, oppressive, or unscrupulous; . . . [or] whether it causes substantial injury to consumers (or competitors or other businessmen).” PMP Assocs., Inc. v. Globe Newspaper Co., 321 N.E.2d 915, 917-18 (Mass. 1975). Because John Hancock’s practices follow statutory schemes that affirmatively permit life insurance companies to require due proof of death prior to settling a claim and that affirmatively permit a life insurance company to escheat only upon proceeds becoming “due and payable” by reference to “actual proof of death,” no such finding is possible as a matter of law. See M.G.L. ch. 93A, § 3 (“Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by

8 This provision “shall not apply if . . . the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth.” Id. Plaintiff admits that this exemption does not apply. See Compl. ¶ 29 (“Defendants’ headquarters and principal places of business are located in Massachusetts.”).
any regulatory board or officer acting under statutory authority of the commonwealth or of the United States’’); see also Riccio v. Ford Motor Credit Co., 238 F.R.D. 44, 48 (D. Mass. 2006) (“The [Massachusetts] Department of Revenue regulations affirmatively permit Ford Credit to include the excise tax in the amount on which the sales tax is assessed. Ford Credit’s actions are exempt under section 3 of chapter 93A.’’); Bierig v. Everett Square Plaza Assocs., 611 N.E.2d 720, 728 (Mass. App. Ct. 1993) (“This was not a situation where there was a mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, the Act, the regulations, and the evidence at the motion hearing clearly established that the rents charged were permitted by the regulatory scheme; the owner is therefore exempt from judgment under [M.G.L. ch. 93A § 3].”)(internal quotations and citations omitted).

II. The Complaint’s Common Law Counts Should Be Dismissed

A. Plaintiff’s Unjust Enrichment Claim Should Be Dismissed in Light of Adequate Legal Remedies and for Failure to Plead Either an “Impoverishment” or that John Hancock’s Actions Lacked Justification

To state a claim for unjust enrichment under Illinois law, plaintiff must adequately allege that “(1) plaintiff has no adequate remedy at law, (2) the defendant has unjustly retained a benefit to plaintiff’s detriment, and (3) that retention violates fundamental principles of justice, equity, and good conscience.” Martinell v. Navistar Intern. Corp., No. 11 C 8707, 2012 WL 2503964, at *6 (N.D. Ill. Jun. 28, 2012) (citing HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., 545 N.E.2d 672, 679 (Ill. 1989)).
Plaintiff purports to be a beneficiary to an insurance contract, and as such, his claims are governed by contract. *Olson v. Etheridge*, 686 N.E.2d 563, 566 (Ill. 1997) (“The well-established rule in Illinois is that if a contract is entered into for the direct benefit of a third person, the third person may sue for a breach of the contract in his or her own name, even though the third person is a stranger to the contract and the consideration.”). Illinois law is clear that “[u]njust enrichment is unavailable where a specific contract governs the relationship of the parties.” *In re Aqua Dots Prods. Liabil. Litig.*, 270 F.R.D. 377, 386 (N.D. Ill. 2010); see also Bd. of Mgrs. of Hidden Lake Townhome Owners Assoc. v. Green Trails Improvement Assoc., 934 N.E.2d 636, 644 (Ill. App. Ct. 2010) (“Unjust enrichment is based on an implied contract, and the theory does not apply where there is a specific contract that governs the relationship of the parties.”). Cf. *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 891 (7th Cir. 2011) (applying Indiana law and holding that “the existence of an express contract precludes recovery under the theory of unjust enrichment . . . [b]ecause [plaintiffs] had written insurance policies . . . their unjust enrichment claim is not actionable”) (internal quotations and citations omitted). The allegations in the Complaint make clear that plaintiff’s relationship with John Hancock is governed by contract – his mother’s insurance policy. Compl. ¶¶ 19-26, 54. As a result, he cannot sustain a claim for unjust enrichment. See *The Sharrow Grp. v. Zausa Dev. Corp.*, No. 04 C 6379, 2004 WL 2806193, at *3 (N.D. Ill. Dec. 6, 2004) (granting motion to dismiss unjust enrichment claim where complaint included allegations that an express contract governed the parties’ relationship).
Dismissal of plaintiff’s unjust enrichment claim is also warranted because plaintiff fails to adequately plead that John Hancock retained any benefit, to plaintiff’s detriment, insofar as he alleges neither that he paid premiums to John Hancock nor any facts demonstrating that proceeds owed to plaintiff were in fact withheld. Finally, the circumstances under which John Hancock held the proceeds that were ultimately paid to plaintiff are plainly not “unjust” where John Hancock’s actions, as alleged, comply with the requirements of both the claims settlement practices and unclaimed property laws of the State of Illinois. See In re Murray, 276 B.R. 869, 878 (Bankr. N.D. Ill. 2002) (finding dismissal of unjust enrichment claim appropriate where defendant’s “conduct in following the relevant statutes” was not “unjust or wrongful,” as required by Illinois law).

B. Plaintiff’s Conversion Claim Fails as a Demand for a Conditional and General Debt

Plaintiff’s claim for conversion should be dismissed because the Complaint fails to identify the allegedly converted assets and fails to plead that plaintiff had any immediate and unconditional right to insurance benefits, as required by Illinois law. Van Diest Supply Co. v. Shelby Cty. State Bank, 425 F.3d 437, 439 (7th Cir. 2005) (“In order to recover for conversion in Illinois, plaintiff must show: (1) a right to property; (2) an absolute and unconditional right to immediate possession of property; (3) a demand for possession; and (4) that the defendant wrongfully and without authorization assumed control, dominion, or ownership over property.”) (citing Cirrincione v. Johnson, 703 N.E.2d 67, 70 (Ill. 1998)).

9 Plaintiff also asserts in the paragraphs setting forth Count II of the Complaint that John Hancock “impos[ed] an administrative charge on [Plaintiff’s] unclaimed funds.” Compl. ¶ 55. Plaintiff offers no factual basis for this conclusory allegation.
Plaintiff seeks the return of a general debt rather than a specific chattel, barring recovery for conversion under Illinois law. Illinois law provides that “[a]s a general rule, an action for conversion cannot be maintained when the action seeks the return of money.” *Triumph Packaging Grp. v. Ward*, No. 11 C 7927, 2012 WL 5342316, at *6 (N.D. Ill. Oct. 29, 2012) (internal quotations and citations omitted). Claims for conversion based on money may only be sustained where the allegedly converted funds are “specific chattel... a specific fund or specific money in coin or bills”; claims for a general debt will not suffice. *Horbach v. Kaczmarek*, 288 F.3d 969, 978 (7th Cir. 2002) (internal quotations and citations omitted) (emphasis added). Rather than alleging the conversion of some specified fund provided by plaintiff to John Hancock, the Complaint demands the repayment of an unspecified debt to be paid upon the fulfillment of an insurance policy’s claims requirements. *Compare Bill Marek’s The Competitive Edge, Inc. v. Mickelson Grp., Inc.*, 806 N.E.2d 280, 286 (Ill. App. Ct. 2004) (permitting a claim for conversion where “the funds were the specific funds transferred to defendant from an outside source” rather than “a portion of [defendant’s] own assets that defendant was obligated to use to satisfy a debt to plaintiff”) with Compl. ¶¶ 62-64 (basing conversion claim on unspecified unpaid proceeds owed under insurance policies).

Plaintiff’s conversion claim also fails because plaintiff had no “immediate and unconditional right” to insurance proceeds. Rather, plaintiff’s right to funds was conditioned on numerous steps – at a minimum, his submission of a claim to John Hancock and John Hancock’s investigation and verification of that claim. The conditional nature of plaintiff’s right to the funds precludes his claim for conversion. *See Jensen v.*
Chicago & W. Ind. R.R. Co., 419 N.E.2d 578, 593 (Ill. App. Ct. 1981) (for a claim of conversion, plaintiff must show “a right to immediate possession which is absolute and unconditional and not dependent upon the performance of some act”).

C. Plaintiff’s Claim for Breach of Fiduciary Duty Fails Because John Hancock Owes No Fiduciary Duty and Plaintiff Does Not Alleged a Breach of Any Purported Duty

Plaintiff’s claim for breach of fiduciary duty fails because plaintiff has not pleaded the existence of a fiduciary duty or that John Hancock’s conduct constituted a breach of any purported duty. Gross v. Town of Cicero, Ill., 619 F.3d 697, 709 (7th Cir. 2010).

Under Illinois law, a third-party beneficiary, plaintiff has no greater rights under contract than the party under which she claims.”).

Plaintiff’s vague and conclusory allegations – including that John Hancock became a fiduciary “by reason of their holding unclaimed property,” Complaint ¶ 67 – do not establish the existence of a fiduciary relationship. See Phillips, 2011 WL 5915148, at *5 (“While it is true that the common law trustee’s most defining concern . . . has been the payment of money in the interest of the beneficiary, applying [‘trustee status’] to an insurer/insured relationship would transform an insurance company into a trustee in every situation in which it pays benefits.”) (internal quotations and citations omitted).

Moreover, even if plaintiff could plausibly plead the existence of a fiduciary relationship, John Hancock’s adherence to the normal claims process, consistent with Illinois claims settlement practice and unclaimed property law, would not constitute a breach of any such duty. First Amer. Discount Corp. v. Jacobs, 756 N.E.2d 273, 285 (Ill. App. Ct. 2001) (dismissing breach of fiduciary duty claim where defendant’s allegedly wrongful conduct was in conformance with regulatory scheme).

D. The Court Should Exercise Its Discretion to Decline to Entertain Plaintiff’s Declaratory Judgment Count

“The purpose of declaratory judgment under 28 U.S.C. § 2201, is to allow the parties to understand their rights and liabilities so that they can adjust their future action to avoid unnecessary damages.” Sprint Spectrum LP v. Town of Easton, 982 F. Supp. 47, 52 (D. Mass. 1997) (quoting Rockwell Int’l Corp. v. IU Int’l Corp., 702 F. Supp. 1384, 1388 (N.D. Ill. 1988)). The exercise of the Court’s power to entertain a request for declaratory

The plaintiff’s proposed Declarations should be dismissed because they seek no relief designed to settle *future* disputes or to avoid future “uncertainty and insecurity” as between the parties. *See Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc.*, 697 F.3d 59, 66 (2d Cir. 2012) (declaratory judgments are designed “to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships”); *see also Sprint Spectrum*, 982 F. Supp. at 52 (dismissing request for declaratory judgment where “Plaintiff is seeking declarations that Defendant’s past conduct... violated federal and state law”). Indeed, even the sole proposed Declaration purporting to apply “on a going forward basis,” Declaration V, merely reflects the necessary outcome in the event that plaintiff were to succeed, for example, on a contract claim. *Cf. Debnam v. FedEx Home Delivery*, No. 10-11025, 2011 WL 1188437, at *1 (D. Mass. Mar. 31, 2011) (“Clearly a controversy exists as to whether the plaintiff was an employee or independent contractor under the appropriate laws, but declaratory relief would add nothing to the coercive claim the plaintiff has made.”).

In any event, declaratory relief is improper where plaintiff’s claims are premised on the incorrect assertion that John Hancock, rather than the plaintiff or another claimant under Ms. Feingold’s policy, was obligated to initiate the claims settlement process. Further, plaintiff’s demand that John Hancock return escheated funds is completely improper absent any plausible allegations that such funds were wrongfully escheated.
These claims run counter to established insurance and unclaimed property law and should be denied as a basis for declaratory relief.

CONCLUSION

For the reasons stated above, John Hancock respectfully requests that the Court dismiss the Complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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Date: February 26, 2013
CERTIFICATE OF SERVICE

I, Myles W. McDonough, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ Myles W. McDonough
Myles W. McDonough
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD FEINGOLD, individually and as a representative of a class of similarly-situated persons, v.

JOHN HANCOCK LIFE INSURANCE COMPANY (USA) and JOHN HANCOCK LIFE & HEALTH INSURANCE COMPANY, Defendants.

CIVIL ACTION No. 1:13-CV-10185

PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS THE COMPLAINT

Plaintiff, RICHARD FEINGOLD (“Plaintiff”), on behalf of himself and all other persons similarly situated, responds in opposition to JOHN HANCOCK LIFE INSURANCE COMPANY (USA) and JOHN HANCOCK LIFE & HEALTH INSURANCE COMPANY’s (“Defendants”) Motion to Dismiss (Doc. 9, 10), and in support states as follows:

Introduction and Background

1. General Background

This case is a class action and arises from Defendants’ pattern and practice of avoiding payment of life insurance policy death benefits that are owed to beneficiaries. This practice enables Defendants to collect and enjoy interest on unclaimed benefits, charge against policy benefits, and otherwise benefit from holding unclaimed benefits. Defendants’ pattern and practice of handling unclaimed property in such a manner as to not pay benefits and/or not timely escheat the unclaimed property to a State has affected thousands of policy holders and
beneficiaries in each of the States in which Defendants market life insurance policies. (Doc. 1, par. 8).

Plaintiff’s Complaint alleges Violation of Massachusetts or, alternately, Various States’ Consumer Protection Laws (Count I); Unjust Enrichment (Count II); Conversion (Count III); Breach of Fiduciary Duty (Count IV); and Declaratory Judgment (Count V).

2. Factual Background

Plaintiff’s mother purchased a life insurance policy from Defendants in 1945. (Doc. 1, par. 19). Plaintiff’s mother passed away in December 2006. (Doc. 1, par. 20). Subsequently, in 2009, Defendants converted from a mutual to a publicly traded company. This meant Plaintiff’s mother was entitled to “dividends” or “demutualization proceeds” from her mutual ownership interest in Defendants and payment of the benefits of her life insurance policy. (Doc. 1, pars. 22, 26). In other words, Defendants owed Plaintiff money from two different parts of their companies: the people who pay the “dividends” and the people who pay life insurance proceeds. Plaintiff was unaware of the life insurance policy his mother purchased from Defendants in 1945. (Id.).

Sometime before 2010, Defendants’ ‘people who pay dividends’ escheated Plaintiff’s mother’s dividend money to the State of Illinois. (Doc. 1, par. 21). In contrast, Defendants ‘people who pay life insurance proceeds’ held on to the policy benefits of Plaintiff’s mother’s policy. (Doc. 1, pars. 20-26). Quite simply, one part of Defendants’ company determined they had to escheat money regarding Plaintiff’s mother and another part of Defendants’ company reached the direct opposite decision.
3. The Global Resolution Agreement

Defendants’ failure to pay or escheat death policy benefits, just like Defendants’ failure to pay or escheat Plaintiff’s mother’s death benefits, has resulted in several States investigating Defendants’ practices regarding payment of death benefits. (Doc. 1, pars. 7-10). The audit performed as part of the investigation resulted in Defendants entering into a Global Resolution Agreement. (Doc. 1, par. 9). The Global Resolution Agreement was entered into before Defendants paid Plaintiff’s mother’s life policy benefits to Plaintiff. (Doc. 1, pars. 9, 26). The Global Resolution Agreement required certain “Business Improvements” on the part of Defendants that included, but was not limited to:

4. Business Improvements

A. Death Benefits

(i) John Hancock agrees that within one hundred and twenty (120) days following the Effective Date of this Agreement it shall implement policies and procedures for performing a comparison of its insureds under its in force life insurance policies, Annuity Contract owners and annuitants under Annuity Contracts against the SSDI Update File on at least a quarterly basis using comparison criteria reasonably calculated to identify potential matches of its insureds and annuitants.

(Doc. 1, Ex. A pg. 16). Had Defendants implemented those “policies and procedures” as agreed to, then Plaintiff’s mother’s policy would had been swept up and escheated to Illinois along with the dividend payment. But instead, Defendants wrongfully held on to those funds – the exact scenario the Global Resolution Agreement was meant to eliminate. By the fact that the Global Resolution Agreement was even drafted, and by the fact that Defendants settled with several States individually, including Florida and California, Defendants were aware that their “normal
practices” were ineffective in timely paying or escheating life policy benefits. (Doc. 1, pars. 9-10). Therefore, Defendants’ breach of the Global Resolution Agreement and/or default to pre-Global Resolution Agreement practices forms the factual foundation for Plaintiff’s claims.

4. The Timeline of Life Policy Benefits

Life insurance policy benefits under a Defendants’ life policy are rightfully held by the Defendants until the insured passes away. Following the death of an insured there are two general scenarios dependent upon a timely claim by a beneficiary. If within a reasonable amount of time following the death of an insured a claim is made for the policy proceeds, Defendants still rightfully hold on to those funds until that claim followed through to payment. But if no claim is made within a reasonable amount of time following the death of an insured, then it becomes a question of fact as to when Defendants should escheat those funds. The point in time when Defendants should escheat those funds is the same exact point in time that Defendants can no longer rightfully hold those funds.

The primary function of the Global Resolution Agreement was to define by agreement just what is a reasonable amount of time for Defendants to hold on to the benefits of a life insurance policy if no claim was made for those benefits. Pursuant to the Global Resolution Agreement, Defendants were to “on a quarterly basis” check the SSDI, the Social Security Death Index, for the names of any of its insureds. (Doc. 1, Ex. A pg. 16). If the name of an insured appears on the SSDI list, it starts the clock on that reasonable amount of time. Consequently, once the reasonable amount of time has passed and Defendants are still holding onto the funds, they are wrongfully in possession of those funds. Here, a question of fact exists as to whether Defendants held on to the benefits from Plaintiff’s mother’s life policy after the running of that reasonable time period.
Moreover, pursuant to a reasonable interpretation of the Illinois Uniform Disposition of Unclaimed Property Act ("IUDUPA"), a question of fact exists as to whether that reasonable time period was reduced, making the time period by which Defendants wrongfully held on to those funds even longer. Specifically, 765 ILCS 1025/3(b) provides: "Moneys otherwise payable according to the records of the corporation are deemed due and payable although the policy or contract has not been surrendered as required." Therefore, when one part of Defendants’ enterprise properly determined the need to escheat Plaintiff’s mother’s money to the State, it should have triggered all other parts of Defendants’ enterprise to escheat as well. As such, a reasonable inference of the complaint (and one that Plaintiff is entitled to on a Rule 12(b)(6) motion to dismiss) is Defendants were required to escheat the life insurance policy benefits at the same time as they escheated the “demutualization proceeds.”

Irrespective of which reasonable time period applies (two years or five years), once that time period lapses Defendants were wrongfully in possession of those funds. Defendants’ wrongful possession of those funds forms the factual predicate for several counts alleged. Once Defendants should pay or escheat those funds, and upon failure to do so, then Defendants incur liability for Unjust Enrichment (Count II), Conversion (Count III), and/or Breach of Fiduciary Duty (Count IV).

**Argument**

1. **Standards For Rule 12(b)(6) Motion To Dismiss**

When considering a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the plaintiff's complaint and construe all reasonable inferences in favor of the plaintiffs. *Schwartz v. Brodsky*, 265 F.Supp.2d 130, 131 (D. Mass. 2003) *(citing Fed.R.Civ.P. 12(b)(6); Gorski v. New Hampshire Dep't of Corrections*, 290 F.3d 466, 473 (1st Cir.2002);
Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir.2001); Estate of Soler v. Rodriguez, 63 F.3d 45, 53 (1st Cir.1995)). Dismissal is warranted if it is clear no relief could be granted under any set of facts that could be proved consistent with the allegations. Id. at 131-32 (citing Gorski, 290 F.3d at 473; Roma Const. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir.1996)). The allegations must be enough to raise a right to relief above the speculative level and must be enough to “raise a reasonable expectation that discovery will reveal evidence” that supports plaintiffs’ claim. Bell Atlantic Corporation v. Twombly, 127 S. Ct. 1955, 1965 (2007). That is even if actual proof of the facts is improbable. D.D.S. Industries, Inc. v. C.T.S., Inc., 2012 WL 2178962, *1 (D. Mass. June 13, 2012). Also, on a Rule 12(b)(6) motion, the court may consider public records and other documents referred to in the complaint, without treating the motion as one under Rule 56. Chatman v. Gentle Dental Center of Waltham, 973 F.Supp. 228, 231 n. 6 (D. Mass. 1997)(citing Watterson v. Page, 987 F.2d 1, 3 (1st Cir.1993)).

2. The Global Resolution Agreement

The gravamen of Plaintiff’s complaint is Defendants agreed with and made contractual promises to the States of Illinois, Massachusetts and others on how Defendants would handle unclaimed life insurance policy benefits. Those contractual promises were contained in the Global Resolution Agreement and arose from an audit of unclaimed life insurance benefits held by Defendants. Those contractual promises put duties and obligations on Defendants above and beyond the normal claims processes and unclaimed property laws. Defendants move to dismiss Plaintiff’s complaint by arguing that Defendants only have to meet their duties and obligations by following those normal claim processes and unclaimed property laws without recognizing their additional duties and obligations arising from the Global Resolution Agreement. In fact,
Defendants don’t even mention the Global Resolution Agreement in their Motion to Dismiss. (Doc. 10).

Taking true the facts as alleged, and all reasonable inferences therewith, Defendants failure to adhere to the added duties and obligations created by the Global Resolution Agreement warrants relief to Plaintiff and the putative class. Based upon the audit which lead to the Global Resolution Agreement, more than a reasonable expectation exists that discovery will reveal evidence to support Plaintiff’s and the class’ claims.

3. **Count I – Plaintiff’s Ch. 93A Claim**

Count I pled Violation of Massachusetts or alternately Various States Consumer Protection Laws. Defendants argue that Count I should be dismissed because: M.G.L. ch. 93A does not apply to out-of-state residents, Plaintiff failed to make a pre-suit demand, and Defendants actions were proper pursuant to 93A. (Doc. 10, pgs. 9-11). Defendants make no other argument to dismiss Count I. Defendants further argue that Illinois law applies to this case. (Doc. 10, pgs. 4–6, 8-9). The allegations set forth in Count I, in combination with Defendants’ argument that Illinois law applies make inescapably clear that Count I based on Illinois’ consumer protection law survives. Accordingly, Defendants’ Motion to Dismiss Count I should be denied as Illinois consumer protection law applies to Count I.

4. **Count II – Unjust Enrichment**

Defendants claim Plaintiff’s unjust enrichment claim is barred because of the existence of the insurance contract, and because Defendants complied with normal pre- Global Resolution Agreement claims settlement practices. Defendants are wrong on both arguments.

Under Illinois law, quasi-contractual relief is available when one party has benefited from the services of another under circumstances in which, according to the dictates of equity and good conscience, he ought not to retain such a benefit, but plaintiff may not pursue a quasi-contractual
claim where there is an enforceable express contract between the parties. *Cromeans, Holloman, Sibert, Inc. v. A.B. Volvo*, 349 F.3d 376 (7th Cir. 2003). Under Illinois law, the existence of an express contract will bar a claim under the implied contract theory only where the two alleged contracts cover the same thing. *Luis Glunz Beer, Inc. v. Martlet Importing Co., Inc.*, 864 F.Supp. 810, 818 (N.D. Ill. 1994)(emphasis added).

There is no contract in this case which deals with the holding of life insurance proceeds after the moment in time when Defendants should have paid or escheated those funds pursuant to the Global Resolution Agreement. In other words, the moment in time when Defendants should have paid or escheated those funds is the moment the insurance contract was over, and therefore the insurance contract cannot be relied upon to protect Defendants from their wrongful retention of those funds. *See Board of Directors v. Western National Bank of Cicero*, 139 Ill.App.3d 542, 547 (1st Dist. 1985)(noting that the general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests.) Since there is no contract for the holding on to proceeds from life insurance policies after the moment in time that those funds should have been paid or escheated pursuant to the Global Resolution Agreement, the Motion to Dismiss should be denied. Defendants should not be entitled to a windfall for holding onto those funds past the moment in time when they were to pay or escheat those funds.

5. **Count III – Conversion**

Defendants argue Plaintiff’s conversion claims fails because under Illinois law a conversion claim cannot be made for the return of money and Plaintiff’s claim to the insurance proceeds was conditioned on numerous steps making Plaintiff’s claim conditional. Again, both of Defendant’s arguments fail.

The defect in Defendants’ argument that an Illinois conversion claim cannot be made for money is demonstrated in Defendants’ second argument. As conceded in Defendants’ second
argument, Plaintiff’s claim was not for money but for “insurance proceeds.” It is well settled in Illinois that “insurance proceeds” are distinguishable from money and therefore “insurance proceeds” fall outside of the restriction on barring conversion claims for money.  


Regarding Defendants’ second argument, based upon the facts alleged, especially Exhibit A to the complaint, under the specific scenario when a beneficiary fails to make a claim, those insurance proceeds are to be escheated to the state.  Defendants’ argument that Plaintiff failed to make a claim therefore has no merit.  Defendants cannot enter into an agreement to escheat policy funds when no claim is made and then, when Defendants fail to escheat those policy funds as required, justify not escheating those policy funds because no claim was made.  The terms of the Global Resolution Agreement dispose of Defendants’ impermissibly inconsistent argument.

6. **Count IV – Breach of Fiduciary Duty**

Defendants argue that Plaintiff has not pled the existence of a fiduciary duty.  However, it is well established that “[a]t common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries.”  _Pegram v. Herdrich_, 120 S.Ct. 2143, 2155 (2000).  Moreover, at the motion to dismiss stage, Illinois courts are not willing to deny a breach of fiduciary duty claim without the benefit of discovery:

Plaintiffs do not allege that a fiduciary relationship existed with defendants as a matter of law.  Instead, they argue that they trusted defendants and that defendants dominated and influenced the entire relationship. While Illinois courts have been reluctant to find fiduciary relationships in the business context, _Gutfruend_, 658 F.Supp. at 1395; _McErlean v. Union National Bank_, 90 Ill.App.3d 1141, 1148–49, 414 N.E.2d 128, 134, 46 Ill.Dec. 406, 412 (1st Dist.1980); _Carey Elec.,_ 74 Ill.App.3d at 238, 392 N.E.2d at 763–64, 30 Ill.Dec. at 108–09, these courts have not foreclosed the finding of such relationships under the appropriate circumstances.  _See, e.g., Farmer City State Bank_, 139 Ill.App.3d at 424, 487 N.E.2d at 764, 94 Ill.Dec. at 7 (fiduciary relationship could exist between guarantor and creditor in a particular
We note that this is a motion to dismiss and the record is undeveloped. Taking all plaintiffs' allegations as true, and viewing reasonable inferences in the light most favorable to plaintiffs, we find that plaintiffs may be able to prove some set of facts, by clear and convincing evidence, that a fiduciary relationship existed. Consequently, we find that plaintiffs could state a claim under Illinois law and deny defendants' motion to dismiss.


Here, pursuant to the Global Resolution Agreement, a point in time by which Defendants were to pay or escheat life insurance proceeds was agreed to. By not paying or escheating those monies by the end of that time period Defendants were making decisions regarding distributing assets to beneficiaries and thus incurring common law fiduciary duties. In other words, by deciding to hold onto those funds post the time they were to be paid or escheated, and thereby concealing their obligation to pay or escheat those funds, Defendants’ incurred fiduciary obligations to those to whom those funds were to be paid.

The complaint in in paragraphs 67 and 68 sets this out in detail:

67. Defendants, by virtue of the policies, contracts or accounts entered into an arrangement whereby for a fee, Defendants were obligated to make pay outs on those policies, contracts or accounts to Plaintiff and the Class. Defendants are fiduciaries to the Plaintiff and the Class based on their relationship with Plaintiff and the Class. Defendants are fiduciaries by reason of their holding of death benefits (funds) for their policy holders’ beneficiaries, heirs, executors and estates. Defendants are fiduciaries by reason of their holding unclaimed property. Defendants are fiduciaries by reason of their exercising the right to control claims within the insureds’ policies (such as when or if claims are even made). Defendants are fiduciaries by reason of the trust and confidence placed in Defendants (and Defendants’ knowledge of the placing of that trust and confidence) for Defendants’ holding of proceeds due pursuant to death benefits, policies, contracts or accounts. By and through operation of this relationship, Defendants acted as a fiduciary to Plaintiff and the Class.

68. Defendants breached one or more of those fiduciary duties by, including but not limited to: holding onto death benefits (funds) and/or unclaimed property, failing to
notify Plaintiff and the Class Defendant were so holding death benefits (funds) and/or unclaimed property, using the death benefits (funds) and/or unclaimed property for their own benefit, earning and retaining interest on the death benefits (funds) and/or unclaimed property, and charging administrative fees to hold on to the death benefits (funds) and/or unclaimed property without undertaking reasonable efforts to locate the Plaintiff and the Class so that they may receive the death benefits (funds) and/or unclaimed property eliminating the need for the ongoing administrative fees.

(Doc. 1). Allegations which, taken as true they must be pursuant to a Rule 12(b)(6) motion, establish more than just a speculative possibility that a fiduciary duty was created when Defendants failed to escheat policy funds to the State.

Defendants’ argument to dismiss Count IV rests solely upon the defense that Defendants adhered to pre-Global Resolution Agreement normal claim processes and unclaimed property law. (Doc. 10, pg. 16). Plaintiffs’ complaint, and all reasonable inferences made therefrom, alleges the Global Resolution Agreement modified those normal claim processes and Defendants’ obligations pursuant to those unclaimed property laws. Plaintiff’s allegations that Defendants breached the Global Resolution Agreement then establishes a valid claim by which, if proved, Plaintiff and the putative class would be entitled to relief.

7. Count V – Declaratory Judgment

Defendants argue the Declaratory Judgment count should be dismissed because Plaintiff seeks no future relief. (Doc. 10, pg. 17). Further, Defendants defend against the Declaratory Judgment by arguing Plaintiff is alleging Defendants were “obligated to initiate the claims settlement process.” (Id.).

On the contrary, Plaintiff alleges Defendants incurred duties and obligations to Plaintiff and the putative class by reason of the Global Resolution Agreement. (Doc. 1, par. 78). Plaintiff further alleges Defendants are in breach of the Global Resolution Agreement in that they are holding onto money rightfully owned by the putative Class. (Doc. 1, par. 82). Plaintiff and the
putative class seek declarations for Defendants to be prohibited from wrongfully holding onto these funds on a go forward basis. (Doc. 1, par. 83). The duties and obligations of Defendants pursuant to the Global Resolution Agreement, especially to the extent those duties and obligations affect the putative Class, forms the proper basis for a declaratory judgment claim.


Conclusion

Taken as true, the allegations in the complaint set forth facts which could prove Plaintiff and the putative class are entitled to relief. The gravamen of Plaintiff’s complaint is Defendants incurred duties and obligations above and beyond the normal claims processes and unclaimed property laws from the Global Resolution Agreement. Defendants move to dismiss on the basis Defendants have met their duties and obligations by following the normal claim processes and unclaimed property laws without recognizing their additional duties and obligations arising from the Global Resolution Agreement. By not adhering to their duties and obligations arising from the Global Resolution Agreement, Defendants wrongfully held on to
money owed to Plaintiff and the class, a holding that results in Defendants’ liability under one or more of the claims in the complaint.

Defendants’ Motion to Dismiss should be denied.

WHEREFORE, Plaintiff, RICHARD FEINGOLD, on behalf of himself and all other persons similarly situated, prays this Court enter an Order denying Defendants’ motion to dismiss, and for all other relief deemed necessary.

DATED: March 12, 2013

RICHARD FEINGOLD, individually and as the representative of a class of similarly-situated persons

By: s/Brian J. Wanca
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I HEREBY CERTIFY THAT ON March 12, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/Brian J. Wanca

14
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case No. 1:13-CV-10185

RICHARD FEINGOLD, individually and as a representative of a class of similarly-
situated persons,

Plaintiffs,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (USA) and JOHN HANCOCK
LIFE & HEALTH INSURANCE COMPANY,

Defendants.

DEFENDANTS’ REPLY MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS THE COMPLAINT

LEAVE TO FILE GRANTED ON MARCH 29, 2013
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John Hancock respectfully submits this reply to Plaintiff’s Response in Opposition to Defendants’ Motion to Dismiss the Complaint (hereinafter “Plaintiff’s Opposition” or “Pl. Opp.”).\(^1\)

**PRELIMINARY STATEMENT**

Plaintiff’s Opposition seeks to impose obligations that are inconsistent with Illinois insurance and unclaimed property laws. Plaintiff admits that the Complaint goes “above and beyond the normal claims processes and unclaimed property laws” by relying on provisions of the Global Resolution Agreement (“GRA”) – a regulatory settlement between John Hancock and various states. Pl. Opp. at 6 (emphasis in original).

However, plaintiff cannot sue for any alleged breach of GRA, nor does the invocation of the GRA cure any of the flaws in the claims alleged in the Complaint.

Plaintiff does not even attempt to dispute the well-established principles of Illinois law that are fatal to the Complaint: life insurance proceeds are payable only upon receipt of “due proof of death” from a beneficiary; an insurer’s liability under a policy is conditioned upon presentation of a claim to benefits; life insurance proceeds become “unclaimed funds” five years after the moneys became “due and payable”; by contrast, unclaimed demutualization proceeds are subject to escheatment two years after the date of the demutualization. JH Br. at 4-6.

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\(^1\) This reply uses the same defined terms and abbreviations as Defendants’ Memorandum in Support of Their Motion to Dismiss the Complaint, filed Feb. 26, 2013 (“JH Br.”).
Plaintiff nonetheless repeatedly alleges requirements that contradict these settled principles. For example:

- Plaintiff asserts that “Defendants were required to escheat the life insurance policy benefits at the same time as they escheated the ‘demutualization proceeds.’” Pl. Opp. at 5.

To the contrary, Illinois law prescribes entirely different triggering events and time periods for escheating life insurance proceeds as opposed to demutualization proceeds. JH Br. at 6.

- Plaintiff asserts that, “when one part of Defendants’ enterprise properly determined the need to escheat Plaintiff’s mother’s money to the State, it should have triggered all other parts of Defendants’ enterprise to escheat as well.” Pl. Br. at 5.

Again, Illinois law prescribes entirely different triggering events and time periods for escheating demutualization proceeds as opposed to life insurance proceeds. JH Br. at 6.

- Plaintiff asserts that, “if no claim is made within a reasonable amount of time following the death of the insured, then it becomes a question of fact as to when Defendants should escheat those funds.” Pl. Opp. at 4.

To the contrary, it is a matter of settled law that -- in the absence of a claim that includes “proof of the death of the insured,” 765 ILCS 1025/3(b) -- John Hancock had no obligation to escheat life insurance proceeds unless and until the insured had attained the applicable limiting age. JH Br. at 6.²

² The “limiting age” is the age at which an insurance company presumes that a person is deceased, as determined by the limiting age under the applicable mortality table. See 765 ILCS 1025/3(b); IRS Internal Revenue Manual, Part 4, Chapter 42, Section 4.42.4.6.1.4 (05-29-2002), http://www.irs.gov/irm/part4/irm_04-042-004.html (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”).
Plaintiff’s Opposition is based not on “normal claim processes and unclaimed property laws.” Pl. Br. at 6. Rather, plaintiff concedes that the “gravamen” of his Complaint relies on “additional duties and obligations arising from” the GRA (id.) – a regulatory settlement agreement attached as Exhibit A to the Complaint that became effective June 1, 2011. Compl. Ex. A § 2.A. While plaintiff admits that promises in the GRA go “above and beyond the normal claim processes and unclaimed property laws” (Pl. Br. at 6 (emphasis in original)), he claims that John Hancock’s alleged “failure to adhere to the added duties and obligations” warrants relief. Id. at 7.

While plaintiff has no right of action for breach of a regulatory settlement, the Complaint did not even allege any violation of the GRA. Plaintiff’s arguments concerning the GRA are invalid for this reason alone. See Marini v. Dragados USA, Inc., Civ. A. No. 11–11316, 2012 WL 4023674, at*1 (D. Mass. Sept. 11, 2012) (in response to plaintiff's new claim raised for the first time in response to the motion to dismiss, “courts generally only consider those facts alleged in the complaint itself”) (citing Mihos v. Swift, 358 F.3d 91, 99 (1st Cir. 2004) (“When a motion to dismiss is based on the complaint…the facts alleged in the complaint control.”)). Nor does the Complaint contain any factual allegations that are “enough to raise a right to relief above the speculative level” under the GRA. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The Complaint alleged that defendants had entered into the GRA and also alleged that entering into the GRA did not “shield” defendants from liability to damages. Compl. ¶¶ 9, 11.
In any event, plaintiff’s belated assertion of an alleged violation of the GRA cannot salvage the Complaint. The GRA is an agreement between John Hancock and various signatory states. Plaintiff, as a private individual who is not a party to the agreement, may not enforce it. *See Wilfong v. L.J. Dodd Const.*, 930 N.E.2d 511, 524 (Ill. 2010) (“An individual who is not a party to a contract may enforce the contract only where the contracting parties intentionally entered into the contract for the individual’s direct benefit.”). An intention to permit third-party beneficiaries to enforce a contract “must be shown by an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs.” *Martis v. Grinnell Mutual Reinsurance Co.*, 905 N.E.2d 920, 924 (2009) (“There is a strong presumption that the parties to a contract intend that the contract’s provisions apply only to them, and not to third parties”). The contract’s language must show that “the contract was made for the direct, not merely incidental, benefit of the third person.” *Id.* The Complaint contains no allegation that Plaintiffs or members of the putative class were intended beneficiaries of the contract, and the GRA contains no such provision. Neither plaintiff nor members of the putative class can enforce any GRA obligations against John Hancock. *See Ball Corp. v. Bohlin Bldg. Corp.*, 543 N.E. 2d 106, 108 (Ill.

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4 *See Laguer v. Onewest Bank, FSB.*, No. MICV 2010-03353, 2013 WL 831055 (Mass. Super. Feb. 27, 2013) (citing cases, and noting that “as a general proposition, public citizens are not intended third-party beneficiaries to government contracts despite the fact that such contracts are usually intended to benefit the public in some way.”).
App. Ct. 1989) (holding that the unequivocal language of the contract sought to impose obligations and benefits solely between the parties to the contract itself).

Moreover, precisely because the GRA goes above and beyond any requirements of existing law, it does not change the legal principles that apply and preclude plaintiff’s claims. The Ohio Court of Appeals recently invoked the Ohio Insurance Code to reject a claim that a life insurance company should be obligated to periodically check the Social Security Administration’s Death Master file (“DMF”) – the same allegation plaintiff now makes in his opposition. Pl. Opp. at 4. See Andrews v. Nationwide Mut. Ins. Co., No. 97891, 2012 WL 5289946, at 4-5 (Ohio Ct. App. Oct. 25, 2012). Like Illinois law, the Ohio Insurance Code requires all life insurance policies to be payable “upon receipt of due proof of death.” Ohio Rev. Code Ann. 3915.05(K). In affirming the dismissal of a complaint, the court in Andrews held that “a finding obligating [the life insurer] to solicit or gather information pertaining to an insured’s death would be contrary to the terms contained in the insurance policy.” 2012 WL 5289946, at *4.

ARGUMENT

5


Count I of the Complaint repeatedly invokes the Massachusetts Regulation of Business Practices for Consumer Protection statute, Chapter 93A. Compl. ¶¶ 46-49. Yet, in response to John Hancock’s motion to dismiss, plaintiff does not dispute that the claim

5 Throughout the Opposition, Plaintiff relies upon citations to Illinois law, effectively conceding John Hancock’s position on which state’s law should apply. JH Br. at 7-8.
fails under Massachusetts law. Instead, plaintiff makes an alternative allegation that John Hancock has violated Illinois consumer protection law. Pl. Opp. at 7. However, just as plaintiff failed to state a claim under Massachusetts law, the Complaint also fails to state a claim under Illinois law.

John Hancock has already set forth the reasons why no claim arises under Massachusetts law. JH Br. at 10-11. Similarly, no claim arises under the Illinois Consumer Fraud Act (“ICFA”) based on John Hancock’s following settled law. See Swanson v. Bank of Am., N.A., 566 F. Supp. 2d 821, 828 (N.D. Ill. 2008) (ICFA does not prohibit conduct “specifically authorized by laws administered by any regulatory body … [or] conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency.”); see also Fiore v. First Am. Title Ins. Co., No. 05-CV-474-DRH, 2006 U.S. Dist. LEXIS 60952, at *9-11 (S.D. Ill. Aug. 28, 2006). Not only do John Hancock’s practices fully satisfy the requirements of Illinois insurance and unclaimed property laws, but the Complaint fails even to allege any violation of those laws. JH Br. at 4-6. Thus, Plaintiff’s claim under either the Illinois or Massachusetts consumer laws must fail.

Plaintiff has also failed to meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. A complaint alleging a violation of the Illinois consumer fraud law must be pled with the same particularity and specificity as that required under common law fraud. Greenberger v. GEICO Gen. Ins. Co., 631 F.3d 392, 399 (7th Cir. 2011) (noting that ICFA claims are subject to the heightened pleading standards of Fed. R. Civ. P. 9(b)). Not only are plaintiff’s allegations pleaded in only the vaguest of terms, but the
Complaint fails even to mention the elements of an ICFA claim. As a result, the
Complaint fails to satisfy Twombly, much less Rule 9(b)’s particularity requirement.
See, e.g., N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 14
(1st Cir. 2009).

2. The Complaint’s Common Law Claims Should Be Dismissed.

A. Plaintiff’s Unjust Enrichment Claim Should Be Dismissed in Light of Adequate Legal Remedies and for Failure to Plead Either an “Impoverishment” or that John Hancock’s Actions Lacked Justification.

Plaintiff argues that he may assert an unjust enrichment claim against John Hancock because the life insurance contract does not “cover the same thing” as the quasi-contract claim that he seeks to assert. Pl. Opp. at 8. Plaintiff asserts that no contract “deals with the holding of life insurance proceeds after the moment of time when Defendants should have paid or escheated those funds pursuant to the [GRA].” Id. This argument fails for several reasons.

First, Illinois law mandates that insurance policies contain a provision requiring that policy proceeds may not be settled until “receipt of due proof of death,” and the policy at issue contained such a clause. See 215 ILCS 5/224(1)(j); 215 ILCS 5/229(1)(k); Carli Aff. Ex. A (“The Company will pay the amount of Insurance due hereunder to the beneficiary … upon receipt of due proof … of the death of the Insured…”). The life insurance policy at issue thus specifically contemplated that John Hancock would hold life insurance proceeds until 2012, when plaintiff submitted due proof of death. In any
event, plaintiff’s relationship with John Hancock is governed by contract – his mother’s life insurance policy – so no claim for unjust enrichment exists. JH Br. at 12.

Moreover, there is no allegation that there was any actual detriment to Plaintiff, nor any facts demonstrating that proceeds owed to plaintiff were actually withheld. Id. at 13. Finally, the circumstances alleged in the complaint are plainly not “unjust” because at all times John Hancock’s actions were in conformity with Illinois law. Id.

B. Plaintiff’s Conversion Claim Fails as a Demand for a Conditional and General Debt.

The Complaint’s conversion claim fails because plaintiff’s right to the proceeds of the insurance policy was conditional upon his making a claim. JH Br. at 5. The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held. In re Thebus, 483 N.E.2d 1258, 1260 (Ill. 1985); cf. Fonda v. Gen. Cas. Co. of Ill., 665 N.E.2d 439, 442, 446 (Ill. Ct. App. 1996) (plaintiff had “automatic right” to proceeds from an insurance policy as a “loss payee,” and conversion claim arose when insurer actually delivered specific proceeds to a third party, rather than plaintiff). Putting aside the fact that the GRA did not create any enforceable obligations as to plaintiff, to the extent any party had a “right to [] immediate possession” of the insurance proceeds as a result of the GRA, it was the state and not plaintiff who was entitled to the funds. See Pl. Opp. at 9 (“[u]nder the specific scenario when a beneficiary fails to make a claim, those insurance proceeds are to be escheated to the state.”). In the absence of a claim providing notice and due proof of death, plaintiff had no right to the funds.
Plaintiff’s attempt to draw a distinction between insurance proceeds and a general debt (Pl. Opp. at 9) must also fail. In *Fonda*, a secured creditor had an absolute interest in specific insurance proceeds that had already been paid by the insurance company to the beneficiary. See *Fonda*, 665 N.E.2d at 444 (defining “proceeds” as “Insurance payable by reason of loss or damage to the collateral” (emphasis added)). Under Illinois law, life insurance proceeds are not *payable* until a claim is made. JH Br. at 5. Thus, they remain a general debt, and a conversion claim cannot stand. See *id.* at 14-15.

C. **Plaintiff’s Claim for Breach of Fiduciary Duty Fails Because John Hancock Owes No Fiduciary Duty and Plaintiff Does Not Allege a Breach of Any Purported Duty.**

Plaintiff cites no authority indicating that a fiduciary obligation may be created under the circumstances alleged in the Complaint and fails to address authority to the contrary. See *Phillips v. Prudential Ins. Co. of Am.*, No. 11-cv-0058, 2011 WL 5915148, at *5 (S.D. Ill. Nov. 28, 2011) (“applying [‘trustee status’] to an insurer/insured relationship would transform an insurance company into a trustee in every situation in which it pays benefits.”); cf. Pl. Opp. at 9 (citing *Pegram v. Herdrich*, 530 U.S. 211, 231 (2000) (discussing common law fiduciary obligations of a trustee)).

Plaintiff cannot dispute that under Illinois law he has no claim for breach of fiduciary duty. Instead, in an attempt to circumvent the settled law under which John Hancock’s claim-settlement practices are entirely lawful, plaintiff argues that as a result of the GRA, at an unspecified time, an obligation arose for John Hancock to escheat money to the state, and failure to do so created a fiduciary duty running between John Hancock and plaintiff. Pl. Opp. at 10-11 (“the [GRA] modified … normal claim
processes and Defendant’s obligations pursuant to those unclaimed property laws”). However, the Complaint fails to allege that the GRA modified any duties between John Hancock and plaintiff, and in any event the GRA creates no additional duties running from John Hancock to plaintiffs. See Restatement Second of Contracts § 302 cmt. e (1981) (“unless the third person is an intended beneficiary … no duty to him is created”).

By arguing that a fiduciary duty arose here, plaintiff is asking this Court to create a broadly applicable obligation that does not exist under Illinois law. However, “[t]he only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning.” Belfield v. Coop, 134 N.E. 2d 249, 256 (Ill. 1956). To the extent that states wish to impose an obligation to search the DMF, their legislatures are free to do so. In fact, recognizing that their laws did not create an obligation to search the DMF, four states have recently amended their Insurance Codes expressly to create an obligation to do so.6 Neither Illinois nor Massachusetts has followed suit.

D. The Court Should Exercise Its Discretion to Decline to Entertain Plaintiff’s Declaratory Judgment Count.

Plaintiff has offered no legitimate reason why the Court should entertain the proposed declarations. Plaintiff’s declaratory judgment claims should be dismissed because they seek relief to address only whether John Hancock’s past conduct violated the law. See JH Br. at 16-18; *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 52 (D. Mass. 1997) (dismissing request for declaratory judgment where “Plaintiff is seeking declarations that Defendant’s past conduct…violated state or federal law”). Plaintiff argues that his claims are appropriate because John Hancock’s “conduct pursuant to the [GRA] affects the future rights of the putative class” (Pl. Opp. at 11-12), but none of plaintiff’s proposed declarations are addressed to the GRA, and furthermore, as a matter of law, plaintiff has no rights under the GRA. The rights of plaintiff and the putative class are circumscribed by Illinois law, with which John Hancock’s actions were and continue to be in full conformity. The declarations proposed in the Complaint will be determined as a matter of course in addressing Plaintiff’s other claims. See JH Br. at 16-18. Thus, the Complaint’s declaratory judgment claims should be dismissed.
CONCLUSION

For the foregoing reasons, John Hancock’s motion to dismiss the Complaint with prejudice should be granted.

/s/ Myles W. McDonough
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Date: March 29, 2013
CERTIFICATE OF SERVICE

I, Myles W. McDonough, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ Myles W. McDonough
Myles W. McDonough
GLOBAL RESOLUTION AGREEMENT

This Resolution Agreement sets forth the terms and conditions intended to resolve the ongoing unclaimed property audit that Verus Financial LLC ("Verus") is conducting of Prudential Financial, Inc. and its predecessors, successors, and assigns and subsidiaries, including the Prudential Insurance Company of America, Pruco Life Insurance Company, Pruco Life Insurance Company of New Jersey, Prudential Retirement Insurance and Annuity Company, and Prudential Annuities Life Assurance Corporation (formerly known as America Skandia Life Assurance Corporation) ("Prudential" or the "Company") on behalf of the states identified in the attached Schedule A (the "Participating States").

WHEREAS, during the course of the audit, Verus, on behalf of the Participating States, has identified what it considers to be Proceeds that are required to be reported and remitted to the Participating States;

WHEREAS, the Company disputes that some of the Proceeds identified by Verus should be considered subject to reporting and remittance to the Participating States;

WHEREAS, the Company has fully cooperated with the Participating States and Verus by making its books and records available for examination, and its personnel and agents available to assist as requested by the Participating States and Verus, and maintains that at all times relevant to this Agreement, the Company and its officers, directors, employees, agents, and representatives, acted in good faith and in a manner they believed to be in the best interest of the Company’s policy holders and contract owners;

WHEREAS, Prudential maintains that it has robust policies and procedures in place to ensure payment of valid claims to beneficiaries and to report and remit unclaimed property to
Participating States in accordance with each Participating State’s Unclaimed Property (“UP”) Laws;

WHEREAS, Prudential represents that, in anticipation of a potential demutualization, it undertook efforts beginning in 1998 to update policyholder information to provide them with notice of the potential reorganization and, in furtherance of those efforts, hired a vendor to conduct an extensive address research project through which the addresses for Prudential’s intermediate and weekly policies ("IWP") were updated by reference to the Social Security Death Master File ("DMF");

WHEREAS, through this demutualization research, Prudential represents that it ultimately discovered 26,000 deceased IWP policyholders, and that it paid or remitted to the states $49 million in death benefits and interest for which no claim had been made previously;

WHEREAS, beginning in 2002, Prudential represents that it undertook an initiative to systematically cross-check its in-force individual life and individual annuity files against the DMF, and created the Prudential claim file for quarterly cross-checks of claims-made against its various lines of business, resulting in the discovery of over 107,000 previously unreported individual life and annuity claims and the payment or remittance of approximately $370 million in death benefits and interest;

WHEREAS, beginning in 2003, Prudential represents that it began periodic checks against the DMF annual updates of its group life insurance files for which it provided record-keeping services;

WHEREAS, Prudential represents that it has continued to perform periodic checks, no less than annually, of its individual life insurance files, individual annuity files, and group life insurance files for which Prudential provides record-keeping services, against the DMF annual
updates, resulting in the discovery and payment or remittance of certain death benefits for which no claim had been made previously;

WHEREAS, disputes have arisen between the Parties hereto with regard to the Company’s obligation to report and remit certain Proceeds pursuant to the Participating States’ UP Laws; and

WHEREAS, the Company denies any wrongdoing or activities that violate any applicable laws of a Participating State or any other applicable laws and, further, denies any liability related to the disposition of unclaimed or other property, but in view of the complex issues raised and the probability that long-term litigation and/or administrative proceedings would be required to resolve the disputes between the Parties hereto, the Company and the Signatory States desire to resolve differences between the Parties as to the interpretation and enforcement of UP Laws and all claims that the Signatory States have asserted:

NOW, THEREFORE, the Parties agree as follows:

1. **Definitions.** Solely for purposes of this Agreement, capitalized terms have the meanings set out below:

   (a) “Agreement” means the Resolution Agreement entered into among the Signatory States and the Company, which is also signed by Verus as the authorized third party auditor for the Signatory States.

   (b) “Annuity Contract” means a fixed or variable annuity contract, other than a fixed or variable annuity contract issued (1) in connection with an employment-based plan subject to the Employee Retirement Income Security Act of 1974 or (2) to fund an employment-based retirement plan where the life insurer is not
committed by the terms of the annuity contract to pay death benefits to the
beneficiaries of specific plan participants.

(c) “Audit” means the unclaimed property audit that Verus has been conducting on
the Company, on behalf of the Participating States, which Audit is being resolved
with respect to the Signatory States pursuant to this Agreement.

(d) “Beneficiary” means the person or entity entitled to receive Proceeds from a life
insurance policy (including any group life insurance certificate issued thereunder),
Annuity Contract, or retained asset account.

(e) “Company” means Prudential.

(f) “Death Master File” or “DMF” means the Social Security Administration’s
Death Master File.

(h) “Dormancy Period” means the period of years provided for by a Signatory
State’s UP Laws upon the expiration of which the Proceeds must escheat to the
Signatory State.

(i) “Duration of the Audit” means the period concluding upon completion of all
processing related to the last Unclaimed Property Report issued by Verus
pursuant to the terms of this Agreement.

(j) “Effective Date” means the date provided for in Section 2.

(k) “Lead Signatory States” means California, Massachusetts and Pennsylvania.

(l) “Maturity Age” means, for purposes hereof, the age of maturity or age of
endowment set forth in the terms of a life insurance policy. If a life insurance
policy does not specify an age of maturity or age of endowment, Maturity Age
shall mean the limiting age under the life insurance policy. The limiting age of a
life insurance policy is the terminal age of the mortality table specified in the policy for calculating reserves and/or non-forfeiture values, or, if the policy does not reference a mortality table for policy reserves and/or nonforfeiture values, then the limiting age is the terminal age of the mortality table used in calculating the cost of insurance for the policy.

(m) “Maturity Date” means the date in an Annuity Contract that annuity payments are scheduled to begin, unless the records of the Company indicate that the Maturity Date has been extended in accordance with the terms of the Annuity Contract or the Annuity Contract owner has taken action within the Dormancy Period in respect to the Annuity Contract at issue that is inconsistent with a desire to annuitize.

(n) “Participating States” means those state agencies identified in the attached Schedule A.

(o) “Parties” means the Signatory States and the Company; and “Party” shall mean any one of the Parties.

(p) “Proceeds” means money payable under a life insurance policy, group life insurance certificate, Annuity Contract, or retained asset account within the Scope of the Audit.

(q) "Record keeper" means those circumstances under which the Company obtains and maintains in its own systems the information necessary to process and to pay a claim under a group insurance contract (or a line of coverage thereunder), including information about the insured and beneficiary, coverage eligibility, benefit amount and premium payment.
“Scope of the Audit” means all unclaimed property that is required to be reported and remitted to a Signatory State with respect to life insurance policies, Annuity Contracts, and retained asset accounts that were in-force at any time during the period January 1, 1992 through December 31, 2010, regardless of whether they are currently listed as active, and including, but not limited to, policies identified as lapsed, expired, matured, remitted, reported and remitted to a Signatory State (escheated), rescinded, or terminated. Notwithstanding any of the foregoing, the Scope of the Audit shall exclude: 1) Proceeds payable under a policy provision or rider covering accidental death; 2) Servicemembers’ and Veterans’ Group Life Insurance policies established pursuant to federal law, 38 U.S.C. §§ 1965-79, and retained asset accounts relating to those policies; and 3) Proceeds due under group life insurance policies (including group life insurance certificates issued thereunder) for which the Company is not the Record keeper, except for group life insurance claims received for which the Company, from information in its administrative systems and/or the group policy claim form, is able to determine that a benefit is due and is able to determine the benefit amount, but such claims have not been fully paid or escheated.

“Signatory State” means one or more of the Participating States that have executed this Agreement.

Unclaimed Property Report (“UPR”) means a report prepared and submitted to the Company by Verus to identify property that Verus has determined to be payable to a Signatory State by the Company. The UPRs will be delivered by Verus according to the formats described in Schedule C.
(u) “UP Laws” means the Unclaimed Property/Escheat Laws of the Signatory States, as applicable.

(v) “Verus” means Verus Financial LLC.

2. Effectiveness

A. Effective Date

This Agreement shall not become effective until executed by the Company, the three (3) Lead Signatory States, and seventeen (17) additional Participating States. The Agreement shall initially be executed by the Company and Verus, as the authorized third party auditor for the Participating States, no later than December 9, 2011, followed by the Lead Signatory States, and seventeen (17) additional Participating States, which shall take place no later than January 27, 2012. The “Effective Date” of this Agreement shall be the date upon which Verus provides notice to all Parties that this Agreement has been executed by twenty (20) Participating States, including all of the Lead Signatory States, and the notice shall occur promptly following those executions. If this Agreement is not signed by the Lead Signatory States and the minimum required Participating States by January 27, 2012, then the Company shall have the right to opt out of the Agreement by providing written notice of its intent to exercise this right no later than February 10, 2012, in which case the Agreement shall not take effect. If the Company does not exercise its right to opt out of the Agreement pursuant to this section, the Effective Date shall be February 10, 2012, as to those Participating States that have signed the Agreement by that date.

B. Signatory States

The Signatory States shall be limited to those Participating States set forth on Schedule A as of the date that the Company executes the Agreement. Participating States identified on Schedule A may become Signatory States by signing the Agreement at any time prior to the completion of processing of all UPRs pursuant to Schedule D of this Agreement (subject to the
Company’s right to opt out of the Agreement as set forth above). If any state or jurisdiction not identified on Schedule A enters into an agreement with Verus for an unclaimed property audit of the Company prior to the completion of processing of all UPRs pursuant to Schedule D of this Agreement, then the Company shall offer to resolve the audit by entering into an agreement with that state or jurisdiction containing the same terms as this Agreement. If the Company enters into an agreement to resolve an unclaimed property audit conducted by Verus on behalf of an additional state or jurisdiction, Verus shall not submit to the Company any unclaimed property reports pursuant to the terms of that agreement until the last group of UPRs provided to the Company pursuant to Schedule D under this Agreement is reconciled by the Company and Verus, unless the Company elects to receive those UPRs at an earlier time agreed to between the Company and Verus.

3. Remittance of Proceeds Payable to Signatory States

A. Proceeds Escheatable By Reason of Death

(i) The following shall be the procedures for reporting and remitting Proceeds that are escheatable by reason of death.

(ii) Verus will submit UPRs to the Company in accordance with Schedule D identifying life insurance policies (including group life insurance certificates issued thereunder), Annuity Contracts, or retained asset accounts where a death has been identified by Verus in accordance with Schedule B, and for which Verus has determined that Proceeds may be payable. All UPRs that Verus provides to the Company with respect to life insurance policies (including group life insurance certificates issued thereunder), Annuity Contracts, or retained asset accounts shall identify deaths of the Company’s insureds, Annuity Contract owners or annuitants, and retained asset account owners that Verus has identified in the course of matching the Company’s records against the DMF. The UPRs will be delivered in the format described in Schedule C.
(iii) Pursuant to Section D herein and **Schedule D, Section II**, the Company shall provide Verus with exceptions to the UPR and state the grounds thereof. Where such grounds are based on documents or data that have not been provided to Verus previously, the Company shall provide such data or documentation within a reasonable time period following the Company's response to the UPR, not to exceed ten (10) days. The sole grounds for exceptions shall be one or more of the following: (a) the individual identified on the UPR is not dead; (b) the individual is not an insured, eligible to be an insured under a group life insurance certificate, an annuitant, an Annuity Contract owner, or a retained asset account owner; (c) the life insurance policy (including any group life insurance certificate issued thereunder), Annuity Contract, or retained asset account was not in force upon death; (d) there was no benefit payable upon death (e.g., the life insurance policy, group insurance certificate, Annuity Contract, or retained asset account had no value at death or was not payable at death); (e) a benefit is not payable due to the application of a relevant contestability period or suicide exclusion period; (f) the Dormancy Period has not expired; (g) all benefits payable upon death have in fact been remitted to a Beneficiary or escheated as unclaimed property; (h) a claim for the value of any benefits payable upon death is in the process of being paid by the Company to a Beneficiary in accordance with **Schedule D**; (i) for claims received under non-Record keeper group life insurance contracts (including group life insurance certificates issued thereunder), the Company lacks and/or is unable to obtain sufficient information necessary to determine that a life insurance benefit is due or is unable to determine the benefit amount; (j) all benefits payable upon death are remittable to a non-Signatory State or are the subject of pending litigation; or (k) the life insurance policy (including any group life insurance certificate issued thereunder), Annuity Contract or retained asset account is not within the Scope of the Audit. The Company shall
further provide notice to Verus if it believes the date of death is different than the date of death provided by Verus if the Company contends such difference affects the Proceeds payable under the life insurance policy (including any group life insurance certificate issued thereunder), Annuity Contract, or retained asset account. The list of exceptions shall be provided by the Company no later than the times specified in Schedule D, Section II.

(iv) For purposes of this Section, the Dormancy Period commences upon the date of death as reflected in the DMF and expires after the requisite number of years has passed under the UP Laws of the applicable Signatory State. The running of the Dormancy Period shall not be tolled for any reason other than: (i) pending litigation to resolve claims to the Proceeds brought by a person or entity claiming the Proceeds, (ii) pending litigation instituted by the Company to determine whether a benefit is due or to otherwise determine the rightful owner of the Proceeds including as the stakeholder in an interpleader action intended to resolve a dispute where more than one claimant has made claim to the Proceeds, or as the moving party in a declaratory judgment action; or (iii) otherwise as expressly allowed by the Signatory States. In the event the Dormancy Period has been tolled, the Dormancy Period shall begin to run upon the termination of the litigation or as expressly allowed by the Signatory States.

(v) If the Company locates the Beneficiary or the Beneficiary’s authorized representative before the Proceeds are required to be reported and remitted to a Signatory State in accordance with Schedule D, the Company will make a written notation in its records indicating the date of the contact, the person contacted, and the address, telephone number or e-mail address of the contacted person.
(vi) Proceeds shall be determined without deduction of any fees other than those permitted by the Annuity Contract or life insurance policy. Further, the Company agrees that it will not charge Beneficiaries costs associated with this Agreement.

(a) Proceeds under life insurance policies shall be determined in accordance with the policy terms as of the date of death, and shall include a reversal of any amounts deducted from the policy after death, including, but not limited to, amounts deducted for premium payments, loans, and/or service charges, and of any amounts added to the policy for interest or dividends. Notwithstanding the above, charges incurred before the insured’s date of death but accruing after the date of death shall not be reversed.

(b) Proceeds under Annuity Contracts with a death benefit shall be determined according to the contract terms, except that: (i) with respect to those Proceeds that remain in variable annuities, the Company shall determine Proceeds based on the value of assets maintained in the relevant separate accounts as of the date Proceeds are remitted to a Signatory State; and (ii) with respect to those proceeds that remain in fixed annuities, the Company shall determine Proceeds based on the values of the account as of the date the Proceeds are remitted to a Signatory State.

(c) Proceeds under retained asset accounts shall be the value of the account as of the date the Proceeds are remitted to a Signatory State.

(vii) The amount payable to a Signatory State shall include the Proceeds, plus interest at a rate of three (3) percent compounded annually from the date used to establish the death benefit values in accordance with Section 3A(vi)(a) and (b) above, or from January 1, 1995, whichever is later. However, interest shall not be payable with respect to the Proceeds of
retained asset accounts. With respect to Annuity Contracts where the death benefit values were placed in a suspense account or money market account earning less than 3% interest, then interest representing the difference between 3% and the interest received shall be payable on the Annuity Contract Proceeds compounded annually from the date the death benefit account values are established according to the contract terms or from January 1, 1995, whichever is later. If any Proceeds are not timely remitted as required under this Agreement, each Signatory State may seek to enforce the terms of this Agreement or initiate an action to vindicate any rights it may possess under that Signatory State’s UP Laws for failure to report, remit, or deliver unclaimed property on a timely basis. In the event an action is brought under a Signatory State’s UP Laws, nothing contained in this Agreement shall serve as an admission by either party in such action.

B. **Proceeds Payable Upon Maturity Age or Maturity Date**

(i) The following shall be the procedures for reporting and remitting Proceeds that are payable to a Signatory State upon reaching Maturity Age or Maturity Date.

(ii) Verus will submit UPRs to the Company in accordance with **Schedule D**, identifying life insurance policies (including any group life insurance certificates issued thereunder) and Annuity Contracts that Verus has determined have reached Maturity Age or Maturity Date, and for which the period of time elapsed since the Maturity Age or Maturity Date is beyond the Dormancy Period. The UPRs will be delivered in the format described in **Schedule C**.

(iii) Pursuant to Section D herein and **Schedule D, Section II**, the Company shall provide Verus with exceptions to the UPR and state the grounds thereof. Where such grounds are based on documents or data that have not been provided to Verus previously, the Company shall provide such data or documentation within a reasonable time period following
the Company’s response to the UPR, not to exceed ten (10) days. The sole grounds for exceptions shall be one or more of the following: (a) the life insurance policy (including any group insurance certificate issued thereunder) or Annuity Contract had not reached the Maturity Age or Maturity Date; (b) the policy, the group life insurance certificate, or Annuity Contract was not in force upon the Maturity Age or Maturity Date; (c) there was no benefit payable upon the Maturity Age or Maturity Date (e.g., the policy, group life insurance certificate, or Annuity Contract had no value at the Maturity Age or Maturity Date, the policy, group life insurance certificate, or Annuity Contract had been surrendered, the Maturity Date had been extended, the Annuity Contract owner or annuitant has taken affirmative action inconsistent with a desire to annuitize, or the policy, group life insurance certificate, or Annuity Contract was not payable at the Maturity Age or Maturity Date); (d) the Dormancy Period has not expired; (e) the value of any Proceeds payable upon the Maturity Age or Maturity Date has in fact been remitted to the Beneficiary or escheated as unclaimed property; (f) the value of any Proceeds payable upon the Maturity Age or Maturity Date is remittable to a non-Signatory State or is the subject of pending litigation; and/or (g) the terms of the Annuity Contract provide for an immediate forced annuitization at the Maturity Date and the Annuity Contract has been annuitized. The Dormancy Period shall not be deemed to have expired with respect to Proceeds if the Company has documented contact with the Beneficiary, Annuity Contract owner, annuitant, or the legal representative thereof, within the Dormancy Period regarding the policy or contract, including a request by the Beneficiary, Annuity Contract owner, annuitant, or the legal representative thereof, to change the designation of a Beneficiary, Annuity Contract owner or annuitant; a non-automated request to reallocate the value of a policy or Annuity Contract among variable investment options; or a non-automated request to renew or change a fixed interest guarantee.
period under the policy or Annuity Contract. The Company shall further provide notice to Verus if it has determined that the Maturity Age or Maturity Date is different than the Maturity Age or Maturity Date provided by Verus if the Company contends such difference affects Proceeds under the policy or Annuity Contract. The list of exceptions shall be provided by the Company no later than the time specified in Schedule D, Section II.

(iv) For purposes of this Section, the Dormancy Period commences upon the Maturity Age or Maturity Date of the policy, group life insurance certificate, or Annuity Contract. The running of the Dormancy Period shall not be tolled for any reason other than: 1) documented contact with a Beneficiary, or the legal representative thereof; 2) pending litigation to resolve claims to the Proceeds brought by a person or entity claiming the Proceeds; 3) pending litigation instituted by the Company to determine whether a benefit is due or to otherwise determine the rightful owner of the Proceeds including as the stakeholder in an interpleader action intended to resolve a dispute where more than one claimant has made claim to the Proceeds or as the moving party in a declaratory judgment action; or 4) otherwise expressly allowed by the Signatory States. In the event the Dormancy Period has been tolled due to institution of litigation, the Dormancy Period shall begin to run upon the termination of the litigation or as expressly allowed by the Signatory States.

(v) If the Company locates the Beneficiary or the Beneficiary’s authorized representative before the Proceeds are required to be reported and remitted to a Signatory State in accordance with Schedule D, the Company will make a written notation in its records indicating the date of the contact, the person contacted, and the address, telephone number or e-mail address of the contacted person.
(vi) Proceeds shall be determined without deduction of any fees other than those permitted by the contract. The Company agrees that it will not charge Beneficiaries costs associated with this Agreement.

(vii) Proceeds remitted by the Company to a Signatory State under an Annuity Contract shall include the current account value of the Annuity Contract as determined by the Company as of the date the Proceeds are remitted to a Signatory State or the Beneficiary. For purposes hereof, the Company shall calculate the account value as follows: (a) for a variable Annuity Contract, based on the value of assets held in the underlying separate account, and (b) for a fixed Annuity Contract, based on the account value, inclusive of any interest credited by the Company to the account value. Upon remittance, the Company shall have no further obligation to escheat Proceeds under the Annuity Contract.

(viii) All Proceeds of a life insurance policy or group life insurance certificate upon reaching Maturity Age shall be determined by the Company in accordance with the terms of the policy, or certificate, as appropriate, and interest shall be added to Proceeds due to the Signatory States from the later of the Maturity Age or January 1, 1995, at the interest rate of three (3) percent compounded annually. If any Proceeds are not timely remitted as required under this Agreement, each Signatory State may seek to enforce the terms of this Agreement or initiate an action to vindicate any rights it may possess under that Signatory State’s UP Laws for failure to report, remit, or deliver unclaimed property on a timely basis. In the event an action is brought under a Signatory State’s UP Laws, nothing contained in this Agreement shall serve as an admission by either party in any such action.
C. **Proceeds in Retained Asset Accounts**

(i) For all situations not otherwise governed by the provisions set forth in Section 3.A, the following shall be the procedures for reporting and remitting Proceeds payable from retained asset accounts to a Signatory State.

(ii) Verus will submit UPRs to the Company in accordance with **Schedule D**, identifying dormant retained asset accounts that Verus has determined may be payable. The UPRs will be delivered in the format described in **Schedule C**.

(iii) Pursuant to Section D herein and **Schedule D, Section II**, the Company shall provide Verus with exceptions to the UPR and state the grounds thereof. Where such grounds are based on documents or data that have not been provided to Verus previously, the Company shall provide such data or documentation within a reasonable time period following the Company’s response to the UPR, not to exceed ten (10) days. The sole grounds for exceptions shall be one or more of the following: (a) the owner of retained asset account identified in the UPR has taken affirmative action in respect to the account that is inconsistent with abandonment (automatic financial or administrative transactions, other than automated deposits or withdrawals prearranged by the account owner, and/or the non-receipt by the Company of returned mail shall not constitute “affirmative action” for this purpose, except to the extent that the Signatory State’s UP Laws specifically recognize that such activity is sufficient to prevent property from being presumed abandoned); (b) the Dormancy Period has not expired; and/or (c) the value of the retained asset account has in fact been remitted to the owner or escheated as unclaimed property. The list of exceptions shall be provided by the Company no later than the time specified in **Schedule D, Section II**. For purposes of this Section, the Dormancy Period shall not be deemed to have expired with respect to Proceeds of a retained
asset account if the Company has documented contact with the owner within the Dormancy Period.

(iv) If the Company locates the owner before the account is required to be reported and remitted to a Signatory State in accordance with Schedule D, the Company will make a notation in its records indicating the date of the contact, the person contacted, and the address, telephone number or e-mail address of the contacted person. The Company's contact with the account owner in the manner described above will result in the account not being subject to reporting and remittance in accordance with Schedule D.

(v) For purposes of this Section, the Dormancy Period commences upon the date of the most recent non-automatic financial or administrative transaction or other contact with the owner that is documented in the books and records of the Company.

(vi) Proceeds under retained asset accounts shall be the value of the account as of the date the Proceeds are remitted to a Signatory State or the Beneficiary. Proceeds shall be determined without deduction of any fees other than those permitted by the contract. The Company agrees that it will not charge Beneficiaries costs associated with this Agreement. If any Proceeds are not timely remitted as required under this section of the Agreement, each Signatory State may seek to enforce the terms of this Agreement or initiate an action to vindicate any rights it may possess under that Signatory State's UP Laws for failure to report, remit, or deliver unclaimed property on a timely basis. In the event an action is brought under a Signatory State's UP Laws, nothing contained in this Agreement shall serve as an admission by either party in any such action.
D. Resolving Disputes Regarding Exceptions to Unclaimed Property Reports

(i) The following shall be the procedures for resolving disputes regarding any exceptions to the UPRs that the Company provides to Verus.

(ii) If Verus disputes an exception, Verus shall provide notice to the Company within the time specified in Schedule D, Section II, and the notice shall be accompanied by the Company’s list of exceptions.

(iii) If Verus provides notice to the Company that it disputes an exception, then Verus and the Company shall meet to resolve the dispute and conclude the dispute resolution process within the time specified in Schedule D, Section II.

(iv) If there is no agreement after Verus and the Company meet, Verus shall provide notice to a Signatory State of the failure to reach agreement on the exception within the time specified in Schedule D, Section II. The exceptions shall then be referred for a determination of the Signatory State pursuant to that State’s laws.

(v) Verus shall provide notice to a Signatory State of all exceptions the Company has taken to a UPR and as to which Verus has agreed that no Proceeds are payable. Such determinations as to previously disputed UPRs shall be final and binding as to the Parties.

E. Priority and Disputes

(i) The Signatory States agree that in determining the appropriate state to report and remit Proceeds under this Agreement, the following rules shall apply:

(a) Proceeds shall be remitted to the state of the last known address of each single Beneficiary as shown in the Company’s books and records.

(b) If there is more than one known Beneficiary, Proceeds shall be reported and remitted to the states of the last known addresses of the Beneficiaries, based
upon the amounts payable to each under the applicable policy, group life insurance certificate, or contract for those Beneficiaries for whom a last known address is shown in the books and records of the Company. For those Beneficiaries for whom an address is not shown in the Company’s books and records, subsections E.(i)(c) and E.(i)(d) shall apply.

(c) With respect to property related to life insurance policies or Annuity Contracts due to a Beneficiary, if there is no last known address for any Beneficiary in the Company’s books and records, then Proceeds shall be reported and remitted to the state of the last known address of the insured or annuitant.

(d) If the Company’s books and records do not contain a last known address for the Beneficiary and do not contain a last known address for the insured, annuitant, or retained asset account owner, or if the last known addresses of the above are all outside the United States, then the Proceeds shall be reported and remitted to the state of incorporation of the relevant Company entity as of the time the state of incorporation’s Dormancy Period expired under the terms of this Agreement.

(ii) If Proceeds are reported and remitted to a Signatory State in accordance with the priority rules in this Section, then the Company shall be deemed to have made its remittance in good faith in accordance with the UP Laws of all Signatory States.

(iii) The existence of an unresolved dispute as to reporting and remitting Proceeds shall not affect the duty to report and remit Proceeds as to which no dispute exists.

F. Reporting and Remitting Proceeds

(i) The Company shall report and remit Proceeds as required by Schedule D.
(ii) The Company shall provide Verus with reasonable access to monitor the UPR review and the reporting and remittance processes being performed in accordance with Schedule D.

(iii) Upon the Company making all reports and remittances required by this Agreement at the conclusion of the Duration of the Audit, the Signatory States shall relieve the Company from any further duties under their UP Laws for life insurance policies (including any group life insurance certificates issued thereunder), Annuity Contracts, or retained asset accounts within the Scope of the Audit and the release of the Company from all claims arising under the Signatory States' UP laws as provided in Section 4 hereof shall be effective. Notwithstanding any other provision of this Agreement, such release is made only to the extent of the signatory officials and is not made pursuant to the authority of insurance regulators. In no event shall such release of the Company apply to contracts and Proceeds as to which the Company and a Signatory State have an unresolved dispute under the terms of this Agreement. Notwithstanding the foregoing, with respect to any Proceeds escheated by the Company, the Company shall be released from any further obligation with respect to those Proceeds.

(iv) Nothing contained in this Agreement shall preclude the Company from exercising any right it may have to seek indemnification, refunds or corrections of errors to the extent authorized by, and in accordance with, the UP Laws of the Signatory State to which the Company made a remittance or report in error.

(v) Nothing in this Agreement shall limit a Signatory State or a Participating State from auditing or making claims with respect to Proceeds, policies, contracts, or accounts that are not within the Scope of the Audit.
4. **General Provisions**

(i) This Agreement sets forth a process for identifying certain amounts to be escheated under its terms. Notwithstanding any of the terms, phrasing, or provisions used herein, nothing in this Agreement constitutes an admission that any amount or Proceeds described herein are past due, have been owing, or were improperly withheld or retained by the Company.

(ii) For the Duration of the Audit, the Company shall continue to provide Verus with the data reasonably requested by Verus to identify Proceeds that are within the Scope of the Audit.

(iii) For the Duration of the Audit, the Company shall continue to provide Verus with access to the Company’s administrative systems to obtain records relating to Proceeds within the Scope of the Audit in order to enable Verus to test the completeness and accuracy of all records provided by the Company. Such access shall include continued access to data and systems through a Prudential employee to respond to queries made by Verus’ personnel.

(iv) The Company agrees to provide all requested insured, annuitant, Annuity Contract owner, or retained asset account owner names parsed out as follows to the extent such data elements are captured in the Company’s systems: Prefix (Mr./Dr./ Maj./etc); First; Middle (full name or initial if full not in company records); Last; and Suffix (esq./Jr./III/etc.).

(v) Each Signatory State agrees to the following:

(a) To release, discharge, and indemnify the Company, and/or hold the Company harmless to the extent authorized by, and in accordance with, the UP Laws of the Signatory State, for “good faith” payment or delivery and reporting of unclaimed property, which are incorporated herein by reference. Nothing in this Agreement shall limit officials within a state agency other than those listed in Schedule A of this Agreement from conducting any examination or from making any claim or enforcing any
laws other than the UP laws of a Signatory State with respect to Proceeds, policies, contracts, or accounts.

(b) To release the Company from all claims, demands, interest (excepting such interest available under the terms of this Agreement), penalties, actions or causes of action that the Signatory State may have regarding or relating to any unclaimed property under a life insurance policy (including, without limitation, group life insurance contracts and certificates issued thereunder), annuity contract or retained asset account that was remittable prior to calendar years through and including report year 2010, provided, however, that nothing in this sentence shall apply to any unclaimed property with respect to any non-Record keeper group life insurance contracts (including group life insurance certificates issued thereunder) where a claim is received after calendar year 2010, regardless of the date of death giving rise to the claim.

(c) That the Company’s payment and delivery to a Signatory State of the property identified and reportable pursuant to paragraphs 3.A-3.C of this Agreement shall be in full and final satisfaction of any and all claims that the Signatory State has or may have under that Signatory State’s UP Laws with respect to unclaimed property under a life insurance policy (including, without limitation, group life insurance contracts and certificates issued thereunder), annuity contract or retained asset account that was remittable prior to calendar years through and including report year 2010, provided, however, that nothing in this sentence shall apply to any unclaimed property with respect to any non-Record keeper group life insurance contracts (including group life insurance certificates issued thereunder) where a claim is received after calendar year 2010, regardless of the date of death giving rise to the claim. The Participating States further
waive any right to audit or examine the books and records of the Company with respect to unclaimed property for which the Company has been released in the previous sentence.

(d) That the disclosures and assistance made by the Company in connection with this Audit satisfy the reporting requirements of its UP Laws for the applicable examination period regarding unclaimed property types identified and reportable pursuant to paragraphs 3.A-3.C, and the Signatory State hereby releases the Company from any additional reporting requirements under its UP Laws for or related to the Company’s reporting and remittance of unclaimed property types identified and reportable prior to calendar years through and including report year 2010 pursuant to paragraphs 3.A-3.C.

(e) To maintain the confidentiality of information voluntarily disclosed concerning identifying information and the business processes and trade secrets of the Company to the extent permissible under each Signatory State’s laws, and shall only disclose such information to the extent required under each Signatory State’s laws.

(f) To return or destroy confidential information within thirty (30) days after the Duration of the Audit, excepting work papers and other materials required to be retained by Verus pursuant to contracts with any Signatory State and those materials necessary to resolve any outstanding disputes.

(vi) This Agreement and its attachments constitute the entire agreement of the Parties with respect to the matters referenced herein and may not be amended or modified, nor may any of its terms be waived, except by an amendment or other written document signed by the Parties hereto; provided, however that the Company and a Signatory State may mutually
agree to a reasonable extension of time in order to carry out the provisions of this Agreement with respect to that Signatory State.

(vii) In the event that any portion of this Agreement is held invalid under a Signatory State’s laws, such invalid portion shall be deemed to be severed only with respect to that Signatory State and all remaining provisions of this Agreement shall be given full force and effect and shall not in any way be affected thereby. In addition, in the event that any state agency other than those listed in Schedule A of this Agreement objects in writing that one or more terms of this Agreement violate a provision of a state law within that state agency’s authority, the Company’s obligations under this Agreement with respect to the provision(s) objected to shall cease with regard to that Signatory State until such time as the objection has been resolved or withdrawn. In the event that such an objection is filed, the Signatory State shall have the right to opt out of this Agreement at any time prior to the objection being resolved or withdrawn, and take any action it deems appropriate under that Signatory State’s UP Laws regarding the reporting, remittance and delivery of unclaimed property by the Company.

(viii) Neither this Agreement, nor any act performed or document executed in furtherance of this Agreement, is now or may be deemed in the future to be an admission of or evidence of liability or wrongdoing by the Company or any of its current or former affiliates, subsidiaries, officers, directors, employees, agents, or representatives with respect to the subject matter of the investigation.

(ix) The Company shall be excused from its performance under this Agreement, shall not be deemed to have breached this Agreement, and shall not be liable in damages or otherwise, in the event of any delay or default in performing the Agreement’s terms resulting from a circumstance not within the reasonable control of the Company including, but
not limited to, damage to or destruction of Prudential’s property, systems or facilities. Notwithstanding such circumstances, the Company shall exercise reasonable diligence to perform its obligations under this Agreement and shall take reasonable precautions to avoid the effects of such circumstances to the extent that they may cause delay or default with respect to the Company’s ability to perform its obligations under this Agreement.

(x) This Agreement shall not confer any rights upon any person or entities other than the parties to it and is not intended to be used for any other purpose. Nor shall the Agreement be deemed to create any intended or incidental third party beneficiaries, and the matters addressed herein shall remain within the sole and exclusive jurisdiction of the Participating States.

(xi) The Parties may mutually agree to any reasonable extensions of time that might become necessary to carry out the provisions of this Agreement.

(xii) Each Signatory State agrees that the individual signing this Agreement on its behalf has authority to do so.
(xiii) This Agreement may be executed in counterparts, but shall not be effective except as provided for pursuant to Section 2 above. Signatory States will execute this Agreement by signing a signature page in the form set out as Schedule F hereto.

PRUDENTIAL

By: ________________________________ Date: ________________________________
    [name]

Its: [title of Company Signatory]

VERUS FINANCIAL LLC

By: ________________________________ Date: 12/09/11
    [Signature]

Its: Chief Executive Officer
Exhibits Index

Schedule A: Participating States
Schedule B: DMF Methodology
Schedule C: Unclaimed Property Report Information and Format
Schedule D: Reporting and Remittance Procedures
Schedule E: Non-Disclosure Agreement dated November 12, 2009
Schedule F: Form of Signatory State Signature Page
SCHEDULE A

PARTICIPATING STATES

The following is a list of the state unclaimed property departments or divisions (collectively the “Participating States”) participating in the unclaimed property audit that Verus is conducting of Prudential:

The Arizona Department of Revenue (“Arizona”)
The Arkansas Auditor of State (“Arkansas”)
The California State Controller’s Office (“California”)
The Colorado Office of the State Treasurer (“Colorado”)
The Delaware Department of Finance, Division of Revenue (“Delaware”)
The District of Columbia Office of the Chief Financial Officer (“District of Columbia”)
The Florida Department of Financial Services (“Florida”)
The Idaho State Treasurer’s Office, Unclaimed Property Program (“Idaho”)
The Treasurer of the State of Illinois (“Illinois”)
The Office of the Indiana Attorney General (“Indiana”)
The Kentucky State Treasury (“Kentucky”)
The State of Louisiana, Department of the Treasury, Division of Unclaimed Property (“Louisiana”)
The State of Maine, Office of the State Treasurer (“Maine”)
The Comptroller of Maryland, Compliance Division, Unclaimed Property Unit (“Maryland”)
The Commonwealth of Massachusetts, Office of the State Treasurer, Abandoned Property Division (“Massachusetts”)
The State of Michigan, Department of the Treasury, Unclaimed Property Division (“Michigan”)
The Office of the Treasurer of the State of Mississippi (“Mississippi”)
The Missouri Office of the State Treasurer, Unclaimed Property Division (“Missouri”)
The Montana Department of Revenue, Business and Income Tax Division (“Montana”)
The Nebraska State Treasurer’s Office (“Nebraska”)
The Nevada Office of the State Treasurer (“Nevada”)
The New Hampshire State Treasury, Abandoned Property Division (“New Hampshire”)
The North Dakota Department of State Lands, Unclaimed Property Division (“North Dakota”)
The Ohio Department of Commerce, Division of Unclaimed Funds (“Ohio”)
The Oklahoma State Treasurer, Unclaimed Property Program (“Oklahoma”)
The Oregon Department of State Lands (“Oregon”)
The Pennsylvania Treasury, Bureau of Unclaimed Property (“Pennsylvania”)
The Rhode Island General Treasurer (“Rhode Island”)
The South Dakota Office of the State Treasurer, Unclaimed Property Division (“South Dakota”)
The State of Tennessee, Treasury Department (“Tennessee”)
The Texas Comptroller of Public Accounts, Unclaimed Property Division (“Texas”)
The Utah Treasurer’s Office, Unclaimed Property Division (“Utah”)
The Vermont Office of the State Treasurer (“Vermont”)
The State of Washington, Department of Revenue, Unclaimed Property Section (“Washington”)
The Wisconsin State Treasurer (“Wisconsin”)
The State of Wyoming, Wyoming State Treasurer’s Office, Unclaimed Property Division (“Wyoming”)

Sch. A-1
SCHEDULE B

RULES FOR IDENTIFYING DEATH MATCHES

In comparing Prudential’s records of its insureds, annuitants, Annuity Contract owners, and retained asset account owners against the DMF, the governing principle to be followed shall be establishing whether or not a unique biological individual identified on Prudential’s data is the same as a unique biological individual identified on the DMF in a case where a benefit is due and payable. In comparing Prudential’s records of its insureds, annuitants, Annuity Contract owners, and retained asset account owners against the DMF, Verus shall divide the matches it identifies into three categories in accordance with the rules set forth below.

Category 1: SSN Match

A Category 1 Match occurs in any of the following circumstances:

1. There is a four-way exact match of the First Name, Last Name, Date of Birth, and Social Security Number contained in the data produced by Prudential against data contained in the DMF;
2. The First Name matches in accordance with the Fuzzy Match Criteria listed below and the Last Name, Date of Birth, and Social Security Number match exactly.

Category 2: SSN Match

A Category 2 Match occurs when:

1. There is a four-way match of the First Name, Last Name, Date of Birth, and Social Security Number such that the Social Security Number contained in the data produced by Prudential matches exactly to the Social Security Number contained in the DMF, and the First Name, Last Name, and Date of Birth match either exactly or in accordance with the Fuzzy Match Criteria listed below.

Category 3: Non-SSN Match

A Category 3 Match occurs in any of the following circumstances:

1. The Social Security Number contained in the data produced by Prudential matches in accordance with the Fuzzy Match Criteria listed below to the Social Security Number contained in the DMF, and the First and Last Names, and Date of Birth match either exactly or in accordance with the Fuzzy Match Criteria listed below.

Sch. B-1
2. The records produced by Prudential do not include a Social Security Number or where the Social Security Number is incomplete (less than 7 digits) or otherwise invalid (i.e. 000000000, 999999999, 000006789), and there is a First Name, Last Name, and Date of Birth combination in the data produced by Prudential that is a match against the data contained in the DMF where the First and Last Names match either exactly or in accordance with the Fuzzy Match Criteria listed below and the Date of Birth matches exactly, subject to paragraph 3 immediately below.

3. If there is more than one potentially matched individual returned as a result of the process described in paragraph 1 above, then Verus shall run the Social Security Numbers obtained from the DMF for the potential matched individuals against Accurint for Insurance or an equivalent database. If a search of those databases shows that the Social Security Number is listed at the address provided by Prudential for the insured, then a Category 2 Match will be considered to have been made.

**Fuzzy Match Criteria:**

1. A First Name fuzzy match includes one or more of the following:
   a. "First Name" “Nick Names:" "JIM" and "JAMES." Verus utilizes the pdNickname database from Peacock Data, Inc. as well as publicly available lists of names and nicknames to identify matching First Names where a nickname is used on one or both sides of the match.
   b. "Initial" instead of full first name: "J FOX" and "JAMES FOX"
   c. "Metaphone" (a recognized and accepted phonetic name matching algorithm created by Lawrence Philips and originally published in 1990): "BUDDY" and "BUDDIE."
   d. Data entry mistakes with a maximum difference of one character with at least five characters in length: "HARRIETTA" and "HARRIETA."
   e. If First Name is provided together with Last Name in a “Full Name” format and “First Name” and “Last Name” cannot be reliably distinguished from one another: "ROBERT JOSEPH," Both "JOSEPH ROBERT" and "ROBERT JOSEPH."
   f. Use of interchanged “First Name” and “Middle Name:" “ALBERT E GILBERT” and “EARL A GILBERT.”
   g. Compound “First Name:" “SARAH JANE” and “SARAH,” or “MARY ANN” and “MARY.”
   h. Use of “MRS.” + “HUSBAND’S First Name + Last Name:" “MRS DAVID KOOPER” and “BERTHA KOOPER” where the “Date of Birth” and “Social Security Number” match exactly and the Last Name matches exactly or in accordance with the Fuzzy Match Criteria listed herein.

2. A “Last Name” fuzzy match includes one or more of the following:
   a. "Anglicized” forms of last names: “MACDONALD” and “MCDONALD.”
   b. Compound last name: “SMITH” and “SMITH-JONES.”
   c. Blank spaces in last name: “VON HAUSEN” and “VONHAUSEN.”

Sch. B-2
d. “Metaphone” (a recognized and accepted phonetic name matching algorithm created by Lawrence Philips and originally published in 1990): “GONZALEZ” and “GONZALES.”

e. If First Name is provided together with Last Name in a “Full Name” format and “First Name” and “Last Name” cannot be reliably distinguished from one another: “ROBERT JOSEPH,” Both “JOSEPH ROBERT” and “ROBERT.”

f. Use of apostrophe or other punctuation characters in “Last Name:” “O’NEAL” and “ONEAL.”

g. Data entry mistakes with a maximum difference of one character for Last Name: “MACHIAVELLI” and “MACHIAVELI.”

h. Last Name Cut-off: A match will be considered to have been made where due to the length of the Last Name, some of the last letters were not saved in the database. Examples include: “Brezzinnows” and “Brezzinnowski” and “Tohightower” and “Tohightowers.”

i. Married Female “Last Name” Variations: A fuzzy “Last Name” match will be considered to have been made even though the data does not match on the Last Name of a female, if the “Date of Birth” and “Social Security Number” matches exactly and the First Name matches exactly or in accordance with the Fuzzy Match Criteria listed herein.

3. A “Date Of Birth” fuzzy match includes one of the following:
   a. Two dates with a maximum of one digit in difference: “03/27/1945” and “03/27/1946”
      i. NOTE: “03/27/1949” and “03/27/1950” are not a match under Rule 3(a)(i).
      ii. Only 1 entry mistake per full date is allowable: “03/27/1945” and “03/28/1946” are not a match.
   b. Transposition of “Month” and “Date” portion of the “Date of Birth:” “05/11/1935” and “11/05/1935.”
   c. If either Prudential’s systems or the DMF does not contain a complete “Date of Birth,” then a “Date of Birth” exact match will be found to exist where the data that is available on Prudential’s systems does not conflict with the data contained in the DMF. By way of example, if Prudential’s systems only contain a month and year of birth, an exact “Date of Birth” match will exist if the DMF record contains the same month and year of birth.
   d. If the Prudential provided First and Last Name match, either exactly or in accordance with the Fuzzy Match Criteria listed herein, and the Prudential provided Social Security Number matches exactly against the DMF, then the Date of Birth will be a fuzzy match if the Prudential provided Date of Birth is within 2 years (either before or after) the DMF listed Date of Birth.
   e. For all industrial policies (known internally at Prudential was “intermediate and weekly policies” or “IWPs”), if the Prudential provided First and Last Name match exactly and there is an inaccurate, missing or incomplete SSN, a match will be considered made if:
The Prudential supplied Date of Birth is a default Date of Birth (e.g., 1/1/1915) and the DMF year of birth is either an exact match or DMF Date of Birth is within one year either before or after the insurer provided Date of Birth. [Examples: 1/1/1915 & 2/25/1915 or 1/1/1915 & 2/25/1916]

The Prudential supplied Date of Birth matches exactly with the DMF month and day of birth and the DMF year of birth are within five years before to five years after the insurer supplied Date of Birth. [Examples: 2/25/1915 & 2/25/1913 or 2/25/1915 & 2/25/1916]

The Prudential supplied Date of Birth matches exactly with the DMF month and year and the DMF day of birth is not a match. [Examples: 2/25/1915 & 2/15/1915 or 2/25/1915 & 2/7/1915]

The DMF Date of Birth is within 5 years +/- of the Prudential supplied Date of Birth and a search of that individual’s First and Last Name and Social Security Number (listed on the DMF) in Accurint for Insurance or an equivalent database, results in an address matching a Prudential address for that Contract.

A “Social Security Number” fuzzy match includes one of the following:
   a. Two Social Security Numbers with a maximum of two digits in difference, any number position: “123456789” and “123466781.”
   b. Two consecutive numbers are transposed: “123456789” and “123457689.”
   c. If a Social Security Number is less than nine digits in length (with a minimum of seven digits) and is entirely embedded within the other Social Security Number: “1234567” and “0123456789.”

Reports of Matches

Verus shall only include Category 1 Matches, Category 2 Matches, and Category 3 Matches in a UPR upon verifying that it believes a benefit may be payable based upon the data that Verus was provided.

Other Matches and Mismatches

Notwithstanding the fact that a life insurance policy (including a group life insurance certificate issued thereunder), Annuity Contract, or retained asset account is listed as a match, the Parties agree that there will not be a reportable match if Prudential is able to produce evidence sufficient to establish that the unique biological individual identified on Prudential’s data is not the same as a unique biological individual identified on the DMF or such individual is not dead. Additionally, notwithstanding the fact that a policy is not found to be a match in accordance with the foregoing rules, Verus may submit, in a separate report to be provided concurrently with the
provision of Verus’ next due UPR, evidence sufficient to establish that a unique biological individual identified on Prudential’s data is the same as a unique biological individual identified on the DMF. Once a match is submitted by Verus pursuant to the preceding sentence, no other such matches shall be submitted for the individual so identified. In the event that Prudential and Verus are unable to resolve any disputes related to what constitutes a reportable match, such disputes shall be subject to the dispute resolution provisions of the Agreement set forth in Schedule D. Verus and Prudential agree to meet in order to evaluate whether the matching process is producing satisfactory data. If the matching process is not producing satisfactory data (i.e., a large number of false positives are reported based on the current criteria), Verus and Prudential agree to use best efforts to develop new criteria for Verus’ identification of matches.
SCHEDULE C

UNCLAIMED PROPERTY REPORT INFORMATION AND FORMAT

Report Information:

UPRs will only include property that Verus believes to be payable in accordance with the terms of this Agreement. All UPRs provided by Verus to Prudential shall exclude life insurance policies, Annuity Contracts and retained asset accounts where the data provided by Prudential to Verus indicates that (i) the property has already been paid, (ii) the property has already been escheated, (iii) the policy or Annuity Contract was not in force on the date of death, Maturity Age or Maturity Date, (iv) a match identified in accordance with Schedule B is the death of a first insured under a survivorship policy, (v) the applicable dormancy period has not expired or (vi) a benefit is not otherwise payable.

Report Formats:

Verus shall provide Prudential with UPRs in various formats depending on the property type. Attached hereto is the specific data that Verus shall provide for each of the property types specified below (with each data element representing a column heading on a report):

- **Schedule C-1**: Life Insurance Policy – DMF Death Match
- **Schedule C-2**: Life Insurance Policy – Maturity Age
- **Schedule C-3**: Annuity Contract – DMF Death Match
- **Schedule C-4**: Annuity Contract – Maturity Date
- **Schedule C-5**: Retained Asset Account – DMF Death Match or Dormant Account

On each of the schedules set forth above, data elements that represent Prudential data are indicated with a “(P),” data elements that represent Verus data are indicated with a “(V),” and data elements that represent DMF data are indicated with a “(DMF).”
## SCHEDULE C-1

### Life Insurance Policy – DMF Death Match

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Sch. C-1-1
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## SCHEDULE C-2

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SCHEDULE C-3

Annuity Contract – DMF Death Match

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**SCHEDULE C-4**

**Annuity Contract – Maturity Age**

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# Schedule C-5

Retained Asset Account – DMF Death Match or Dormant Account

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<td>DMF First Name (DMF)</td>
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<td>P Account Holder Last Name (P)</td>
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<td>Due Diligence Category (V)</td>
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</table>

Sch. C-5-1
SCHEDULE D

REPORTING AND REMITTANCE PROCEDURES

All UPRs shall be subject to the following process for reviewing, resolving disputes, and reporting and remitting Proceeds due to a Signatory State under the terms of the Agreement:

I. ISSUANCE OF UNCLAIMED PROPERTY REPORTS

Separate UPRs shall be issued for: (i) Proceeds payable under life insurance policies upon an event of death or upon reaching the policy Maturity Age (the “Life Insurance Reports”); (ii) Proceeds payable under group life certificates upon an event of death or upon reaching Maturity Age (the “Group Life Insurance Reports”); (iii) Proceeds payable under Annuity Contracts upon an event of death or upon reaching the Maturity Date (the “Annuity Reports”); and (iv) unclaimed Proceeds in dormant retained asset accounts or where the retained asset account owner is deceased (the “Retained Asset Account Reports”). Upon the Effective Date of the Agreement, Verus shall deliver a new Life Insurance Report, Group Life Insurance Report, Annuity Report, and Retained Asset Account Report on the first day of every calendar month,¹ according to the following schedule:²

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Up to 8,000 records</td>
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<tr>
<td>5 and after</td>
<td>Up to 12,000 records</td>
<td>Up to 3,000 records</td>
<td>Up to 2,000 records</td>
<td>Up to 1,000 records</td>
</tr>
</tbody>
</table>

The UPRs shall identify only one unique individual per certificate, contract or policy. In the event that the procedures set forth in Schedule B result in more than one individual being identified as a possible insured, annuitant, Annuity Contract owner, or retained asset account owner, the UPR shall identify only that unique biological individual identified using the data with the most exact matching criteria which is most likely to be the individual identified on Prudential’s data, as determined using the matching procedures of Schedule B. Once a match is submitted by Verus, no other matches shall be submitted for that certificate, contract, or policy unless it is based on

¹ All references in this Schedule D to the number of days by which an action is to take place are to be calculated in calendar days. If the last day on which an action is to take place is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

² It is contemplated that, in any event, the audit will be completed no later than 24 months from the effective date of this agreement and that Verus will use its best efforts to submit on each monthly UPR, the maximum number of records permitted under the schedule above. The parties agree to modify schedules in good faith in order to complete the audit within that period of time.

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additional information that is received from Prudential or information uncovered by Prudential as a result of Prudential’s UPR review.

The records submitted on the UPRs will track the categories outlined in Schedule D, Section III.A.1.

Excluding certificates, policies and contracts falling under Schedule D, Section III.A.1.i, Verus will use best efforts to ensure that each Life Insurance Report (i) includes Proceeds that Verus has identified as being escheatable to no more than 10 Signatory States per report, (ii) includes a combination of records from Prudential’s various systems, and (iii) includes a mixture of in-force and terminated policies, with the combinations and mixtures referred to in (ii) and (iii) approximating the occurrence of such records across potential matches identified by Verus across all reports. It is understood that if the UPRs are not provided in the above manner, Prudential’s ability to respond timely could be impacted adversely.

II. REVIEW AND RECONCILIATION OF UNCLAIMED PROPERTY REPORTS

A. Review of Unclaimed Property Report

Prudential shall have up to one calendar month to review each UPR in order to identify all Proceeds that it agrees are subject to escheatment as well as any exceptions it may have to a UPR, provided, however, that Prudential shall have up to forty (45) days to review each Group Life Insurance Report. Once Prudential has completed its review of each UPR, within five (5) business days following the last day of that month, or within five (5) business days following the end of the review period for Group Life insurance reports, it shall provide Verus with a list identifying: (i) all Proceeds that it agrees are subject to escheatment in accordance with Sections III and IV; and (ii) the exceptions for Proceeds that Prudential has determined do not meet the criteria for escheatment, together with the specific reasons for its determinations.

B. Review and Reconciliation of List of Exceptions

Within twenty (20) days after Prudential has provided Verus with its list of exceptions, Verus shall determine whether it disputes any exception contained in Prudential’s list of exceptions.

If Verus disputes an exception to a UPR, then Verus and Prudential shall meet in good faith to resolve the dispute within twenty (20) days after Verus notifies Prudential of its intent to dispute any listed exceptions. All property that Prudential agrees is due to be escheated following reconciliation shall then be subject to applicable post-reconciliation processes described in Sections III. and IV. below. All exceptions that remain unreconciled twenty (20) days after Prudential and Verus first meet to discuss each UPR may be referred by either Prudential or Verus for the dispute resolution process described in Section D of the Agreement. At the conclusion of the Audit (or in accordance with any instructions provided to Verus by a Signatory State), Verus shall provide notice to a Signatory State of all exceptions Prudential has taken to a UPR and as to which Verus has agreed that no Proceeds are payable.
III. POST RECONCILIATION PROCESSING FOR PROCEEDS TO BE REMITTED TO SIGNATORY STATES

Prudential agrees that all Proceeds identified on a UPR that are due to be reported and remitted to one of the Signatory States pursuant to Section II, shall be subject to the following due diligence.

A. Due Diligence

1. Due Diligence for Property Due: (i) Upon An Event of Death Under Life Insurance Policies (including group life insurance certificates issued thereunder), Annuity Contracts, or retained asset accounts; (ii) Upon Life Insurance Policies Reaching Maturity Age; and (iii) Under Retained Asset Accounts

   i. Proceeds due under life insurance policies (including group life insurance certificates issued thereunder), Annuity Contracts, or retained asset accounts where: (a) the owners were identified by Prudential as policyholders or contract owners who could not be located at the time of demutualization, the insureds or annuity contract owners or annuitants were deceased as of the time of demutualization, and the owners and insureds or annuitants are the same (or they are different but have the same last known address); or (b) Prudential previously matched its records to a person listed on the DMF in connection with any of the DMF matching processes it has conducted.3

For Proceeds within this category, Prudential shall be deemed to have already conducted reasonable due diligence based on the previous searches it has conducted. Prudential may elect to write one letter and send one email to the beneficiary, insured or annuitant based on information contained in the Company’s files for that policy or contract, but all property within this category immediately shall be subject to the procedures for reporting and remittance to the appropriate Signatory State in accordance with Section III.B. below after allowing ten days for the Company to calculate the amounts payable under each policy or contract. In no event may property under this subsection be excluded from reporting and remittance pursuant to Section III.B. below unless Prudential has made confirmed contact with a Beneficiary, or the legal representative of a Beneficiary prior to the termination of the reporting and remittance process after which no further changes will be made to the report. For the purposes of this subsection, “confirmed contact” means Prudential has made contact with a

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3 The DMF matching processes that Prudential has conducted include the Death Claim Project, its annual DMF matching process implemented in 2002 for Annuity Contracts and life insurance policies other than group life insurance policies and certificates, the DMF Matching process it conducted between 2003 and 2008 with respect to group life insurance policies and certificates, and any other business as usual DMF matching of its life insurance files, annuity files, and group insurance files conducted prior to January 1, 2011, as represented in the Agreement’s WHEREAS clauses.
Beneficiary or a Beneficiary’s legal representative, and has begun to collect the documentation and information necessary to process the claim. Thereafter, Prudential shall pay the Beneficiary within two calendar months following the end of the calendar month during which Prudential makes contact with the Beneficiary or the Beneficiary’s legal representative. Prudential shall make payment of the claim per the terms of the applicable policy or contract following contact with a Beneficiary, or the legal representative of a Beneficiary. If at the end of this two calendar month period Prudential has not paid the claim, the Proceeds shall be subject to reporting and remittance to the appropriate Signatory State in accordance with Section III.B. below.

If Prudential makes confirmed contact with the Beneficiary or the Beneficiary’s legal representative but is unable to pay the Proceeds within the two calendar month period following confirmed contact, Proceeds shall be reported and remitted based on the last known address on Prudential’s books and records, as of the time it receives the UPR, for the Beneficiary, or the last known address of the insured or annuitant or account holder if there is no last known address for the Beneficiary.

ii. Property due under life insurance policies (including group life insurance certificates issued thereunder), Annuity Contracts, or retained asset accounts that do not fall within Subsection (i) above.

Except as set forth below, there is no limitation on the amount or means of outreach Prudential may conduct to contact the Beneficiary for Proceeds within this category. Prudential will have a two calendar month due diligence period to make confirmed contact with a Beneficiary or confirmed contact with the legal representative of a Beneficiary, commencing at the end of the calendar month during which Prudential has confirmed that the property is subject to escheatment under Section II(A). For purposes of this subsection, “confirmed contact” means Prudential has made contact with a Beneficiary or a Beneficiary’s legal representative, and has begun to collect the documentation and information necessary to process the claim. If Prudential has not made confirmed contact by the end of the two calendar months due diligence period, the Proceeds shall be subject to the procedures for reporting and remittance to the appropriate Signatory State in accordance with Section III.B. below. If Prudential has made confirmed contact within the two calendar month due diligence period, Prudential shall pay the Beneficiary within two calendar months from the expiration of the due diligence period. If at the end of this second two calendar month period Prudential has not paid the claim, the Proceeds shall be subject to the procedures for reporting and remittance to the appropriate Signatory State in accordance with Section III.B. below. Prudential shall make payment of the claim per the terms of the applicable policy or contract following contact with a Beneficiary, or the legal representative of a Beneficiary.

If Prudential does not make confirmed contact with the Beneficiary or the Beneficiary’s legal representative by the end of the two calendar month due diligence period, or pay the Proceeds within the two calendar month period following confirmed contact, Proceeds shall be reported and remitted based on the last known address on Prudential’s books and records, as of the time it receives the UPR, for the Beneficiary, or the last known address of the insured or annuitant or account holder if there is no last known address for the Beneficiary.
2. Due Diligence for Property Due Upon Annuity Contracts Reaching the Maturity Date

Prudential shall send one or more notification letters to, and may otherwise attempt to notify, the annuity contract owner. If there is no response to a notification letter within 180 days after the initial notification letter is sent and the property is not paid to the owner in accordance with the terms of the Agreement, the property shall be subject to the reporting and remittance process described in Section III.B. below.

At least one letter shall be sent to the last known address on Prudential’s books and records, as of the time it receives the UPR, for the annuity contract owner. If at any time prior to the expiration of the 180 day period described above, Prudential determines that the owner cannot be located, the property shall be subject to the reporting and remittance process described in Section III.B. below.

B. Reporting and Remittance of Property

1. Results of Due Diligence

Within five (5) business days following the end of each calendar month, Prudential shall provide Verus with a list of all property that it has paid out as a result of the due diligence process, all property for which confirmed contact with a Beneficiary or a Beneficiary’s legal representative has been made but the property remains to be paid out, and all property that is to be remitted to a Signatory State. Verus may perform appropriate audit techniques to confirm that Prudential fully paid the Proceeds to the Beneficiary following the due diligence process.

2. Payment of Property

Records of Property to be escheated will be generated on the last day of the calendar month. Payment of all Proceeds to be reported and remitted shall be delivered as of the 10th day of the month following the end of the applicable due diligence period.

Prudential shall provide Verus with the methodology used to calculate Proceeds due to be remitted, as well as access to the physical documentation (e.g., calculation worksheets) and/or digital files that are created or edited during the death benefit calculation for each escheatable policy. Such documentation shall include a breakdown of all post date of death debit/charges or additions to the account, including but not limited to loans, premiums, service fees, interest, dividends, etc. Verus may test a reasonable percentage of such Proceeds to ensure that the correct calculations have been made. Any disputes regarding the amount of benefits due shall be subject to the same reconciliation and resolution process described in Section II above.

IV. REPORT DELIVERY PROTOCOL

Prudential agrees that all Proceeds to be reported and remitted to a Signatory State pursuant to this Agreement shall be reported by Prudential to a Signatory State with a
notation indicating that the report is made pursuant to the Audit, and shall be remitted by Prudential to the Signatory State either through Verus or in accordance with Verus’ instructions. Further, Prudential agrees that it shall provide to Verus a copy of all such reports and remittances. Prudential further agrees that no Proceeds to be reported and remitted to a Signatory State pursuant to this Agreement shall be included in any annual filings or any supplemental filings made by Prudential to the Signatory States. Nothing in this Agreement, however, shall prohibit Company from identifying and remitting Proceeds to a Beneficiary if permitted or required by a Signatory State’s UP Laws. At such time as the Company provides notice of remittance to a Beneficiary under a Signatory State’s UP Laws, the Company shall provide a copy of the notice of remittance to Verus. The Signatory State and Verus shall have access to all relevant records documenting the identification of the Beneficiary and the remittance of Proceeds pursuant to this section.

Verus and Prudential mutually agree to deliver all notices and reports required under the Agreement according to the following protocols.

Reports provided to Prudential shall be delivered in electronic, encrypted, password protected, unlocked (to permit sorting) Excel format (or such other format as Verus and Prudential mutually agree in writing) to Rick Radice. Prudential may designate in writing to Verus one or more persons to receive such reports instead of Rick Radice.

Reports provided to Verus shall be delivered in electronic, encrypted, password protected, unlocked (to permit sorting) Excel format (or such other format as Verus and Prudential mutually agree in writing) to Mr. Steven Haley, at shaley@verusfinancial.com.

Where Verus is to provide notice to a Signatory State under Section D of the Agreement or this Schedule D, the date of notice is the date on which notice is sent by Verus. Where a Signatory State is to provide notice or a report to Prudential under Section D of the Agreement or this Schedule D, the date of notice is the date on which notice is sent by the Signatory State to Prudential.

Report delivery protocol questions, issues, concerns, or disputes shall, in the first instance, be addressed to Rick Radice, of Prudential, or Mr. Haley, of Verus, for resolution.
SCHEDULE E

NON-DISCLOSURE AGREEMENT DATED NOVEMBER 12, 2009
NONDISCLOSURE AGREEMENT

This NonDisclosure Agreement ("Agreement") is entered into as of the later of the two signature dates below (the "Effective Date") by and between Prudential Financial, Inc. and its subsidiaries and affiliates including Prudential Insurance Company of America, Prudential Life Insurance Company, Prudential Life Insurance Company of New Jersey, Prudential Retirement Insurance and Annuity Company, and Prudential Annuities Life Assurance Corp. (collectively, "Prudential") and [Recipient].

In connection with an unclaimed property audit and examination of Prudential being conducted by the Recipient on behalf of any Participating State as defined by and limited to those states included on Exhibit A to this Agreement, and a targeted market conduct examination to be conducted by Recipient on behalf of the Pennsylvania Department of Insurance (collectively the "Examinations"). Prudential will be disclosing certain information to the Recipient some of which is confidential, constitutes trade secrets and otherwise is proprietary to Prudential. After this Agreement is executed, no state can be added as a Participating State unless agreed to in writing by Prudential. The foregoing shall not be construed to preclude Recipient from representing other states unclaimed property agencies or departments or other regulatory agencies that have or may retain Recipient to conduct examinations of Prudential.

To the extent that any of the information that may be required to be disclosed in connection with any such examination may overlap with the information disclosed in this Examination, Recipient shall not be precluded from requesting, receiving or using such information by virtue of Recipient having entered into this Agreement.

In consideration of Prudential's disclosures of said information to the Recipient, Recipient agrees as follows:

1. Information. As used in this Agreement, Information means any information disclosed by Prudential or Prudential's agents or third party custodians or contractors in connection with the parties' furtherance of the purpose identified above (including, without limitation, books, records, documents, software, electronic files and databases, audited and interim financial statements, general ledgers and journals, internal and external audit reports and options, unclaimed property reports and Securities and Exchange Commission reports, National Association of Insurance Commissioners reports, and federal and state tax returns), and Personal Information, as defined below, whether disclosed orally, in writing, or in some other form. Notwithstanding the foregoing, information does not include any information, however designated, that (i) has been in the public domain before it was disclosed to the Recipient; (ii) enters the public domain after the Effective Date other than through a breach of this Agreement; (iii) is or has been disclosed to the Recipient by a third party which does not owe a duty of confidentiality to Prudential; or (iv) was developed independently by the Recipient without use of information in violation of this Agreement. Information will not be deemed to have been developed independently if, after the Effective Date of this Agreement, the Recipient accesses such information by utilizing Freedom of Information Act requests to obtain information which was provided to the Recipient's client states in the Recipient's workpapers. The foregoing exceptions do not apply to the disclosure of Personal Information, which shall not be disclosed without Prudential's prior written consent unless required by law. "Personal Information" means information provided by or at the direction of Prudential, to which access is provided to Recipient that (a) identifies an individual (by name, signature, address, telephone number or other unique identifier), or (b) that can be used to authenticate that individual (excluding, without limitation, passwords or PINs, biometric data, unique identification numbers, answers to security questions, or other personal identifiers). An individual's social security number, even in isolation, is Personal Information. Personal business contact information is not by itself Personal Information.

2. Restrictions on Disclosure and Use. The Recipient will (a) disclose information only to the appropriate personnel at the Participating States and the Recipient's employees, agents and representatives who have a need to know it for the purpose specified above and who, by virtue of a written confidentiality agreement or other legally binding, regulatory or statutory prohibition, are obligated to respect the confidentiality of the Information, provided that said agents and representatives are identified to Prudential prior to disclosure of any information, and that said agents or representatives have executed a copy of this NonDisclosure Agreement; (b) not disclose or transfer, directly or indirectly, the Information to any country outside of the United States; (c) use commercially reasonable efforts to maintain the confidentiality of the Information, but in no event less than those efforts the Recipient uses to maintain the confidentiality of its own Information of a similar nature; (d) use the information solely for the purpose described above; (e) store the information in any manner which is adverse to Prudential, including, without limitation, the representation of any third party in any legal, regulatory or other action against Prudential that involves, or is related to the Information, beyond findings made in connection with the unclaimed property Examination or any other authorized examination being conducted by Recipient; and (f) not benefit from a third party's use of the Information. The foregoing shall not be construed to preclude Recipient from representing other states in connection with an unclaimed property Examination or any other authorized examination being conducted by Recipient.

3. Requested Disclosure. If the Recipient is served with a judicial or other governmental order or request seeking production of the Information, including but not limited to any request under a Freedom of Information Act or similar state provision, it will use reasonable efforts to (a) assure that the information is maintained in confidence, and (b) notify Prudential of the existence of the order or request within two business days and prior to production of any information.
and cooperate with Prudential in its efforts to obtain a protective order or other judicial relief.

4. Accidental Disclosure. The Recipient will promptly notify Prudential upon discovery of any accidental or unauthorized use or disclosure of any Information and will cooperate with Prudential to regain control of or otherwise safeguard the Information, to minimize the effects of its unauthorized use or disclosure, and to prevent its further unauthorized use or disclosure.

5. Damages. This Agreement does not grant Recipient any license or other right with respect to any information or trade secrets. Notwithstanding the foregoing, nothing in this Agreement shall preclude Recipient or the Participating States from retaining information contained in its workpapers and reports provided to the Participating States to the extent required by law.

6. Remedies. The Recipient acknowledges that Prudential would suffer irreparable harm if the Information were disclosed or used in violation of this Agreement, and that monetary damages would be an insufficient remedy for such unauthorized disclosure or use. Accordingly, in addition to whatever right Prudential may have to obtain an award of damages or other relief upon the breach of this Agreement, Prudential may obtain an injunction or other equitable relief to protect its Information disclosed or used in violation of this Agreement. Additionally, should the Recipient be found to have breached this agreement it acknowledges that it will be required to reimburse Prudential for reasonable legal fees and costs incurred to enforce the agreement. Recipient may also be required to reimburse Prudential for reasonable legal fees, costs and damages. Prudential is found to have breached as a result of the breach.

7. Privacy. Recipient shall notify Prudential, promptly and without unreasonable delay, in the event that the Information received by the Recipient was obtained from a source other than the Recipient's employees or third parties related to the security incident, including but not limited to providing Prudential with physical access to the facilities and operations affected, facilitating interviews with employees and others involved in the matter, and making available all relevant records, logs, files, and data; (c) cooperate with Prudential in any litigation or other formal action against third parties deemed necessary by Prudential to protect its rights; and (d) promptly use its best efforts to prevent a recurrence of any such Security Incident.

8. General. (a) This Agreement will be binding upon and inure to the benefit of each party's heirs, successors and permitted assigns; provided, however, that the Recipient may not assign this Agreement (whether by operation of law, sale of securities or assets, merger, or otherwise) or transfer its rights or delegate its duties under this Agreement to parties other than those identified in Section 2(a) below. This Agreement may be enforced by any party to this Agreement, and waives all objections to placing venue before them. Those prevailing in any litigation arising under or related to this Agreement may be entitled to recover its reasonable attorney's fees and costs from the other party. (b) Notwithstanding the foregoing, nothing in this Agreement shall be construed to be binding on any of the Participating States participating in an authorized audit being conducted by the Recipient. (c) If any provision of this Agreement is held to be illegal, invalid or unenforceable, the remaining provisions will remain in full force and effect. (d) Any notice required under this Agreement shall be in writing and must be sent by registered or certified mail, return receipt requested, or express courier (e.g., Federal Express) to the Recipient at the address indicated below. If sent domestically, a notice will be deemed given three (3) business days after sent by express courier. If sent internationally, a notice will be deemed given five (5) business days after sent by registered or certified mail or three (3) business days after sent by express courier. Either party may change its address for notices under this Agreement by giving the other party notice of the change in the manner just specified. (e) This Agreement constitutes the entire agreement between the parties with respect to its subject matter, and it supersedes all prior communications, understandings and agreements related to its subject matter.

[SIGNATURES ON NEXT PAGE]
EXHIBIT A

Participating States as of December 9, 2011:

- Arkansas
- Arizona
- California
- Colorado
- District of Columbia
- Delaware
- Florida
- Idaho
- Illinois
- Indiana
- Kentucky
- Louisiana
- Massachusetts
- Maryland
- Maine
- Michigan
- Missouri
- Mississippi
- Montana
- North Dakota
- Nebraska
- New Hampshire
- Nevada
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Washington
- Wisconsin
- Wyoming
SCHEDULE F

FORM OF SIGNATORY STATE SIGNATURE PAGE

The undersigned Participating State, as identified in the attached Schedule A, agrees to enter into the Settlement Agreement as a Signatory State.

[SIGNATORY STATE]

By: ______________________________ Date: __________________

Its: ______________________________
REGULATORY SETTLEMENT AGREEMENT

This Regulatory Settlement Agreement (“Agreement”) is entered into by and between those state insurance Departments whose signatures are shown on the signature page of this agreement (collectively referred to herein as the “Departments”), and The Prudential Insurance Company of America, Pruco Life Insurance Company, Pruco Life Insurance Company of New Jersey, Prudential Retirement Insurance and Annuity Company, and Prudential Annuities Life Assurance Corporation (formerly known as American Skandia Life Assurance Corporation), (collectively (“Prudential” or “the Company”) (the Departments and Company are collectively referred to herein as the (“Parties”) as of this 27th day of January 2012.

RECITALS

WHEREAS, the Departments have regulatory jurisdiction over the business of insurance transacted in their respective states, including the authority to conduct market conduct examinations;

WHEREAS, the Departments, in each of their respective capacities, have undertaken a joint market conduct examination of the Company’s settlement practices, procedures and policy administration relating to claims, including the Company’s efforts to identify the owners and beneficiaries of unclaimed Proceeds (the “Multi-State Examination”);

WHEREAS, as part of the Multi-State Examination, the Departments have reviewed numerous documents and information obtained during the course of the Multi-State Examination;

WHEREAS, the Departments have identified concerns regarding the adequacy of the Company’s policies and procedures to ensure that life insurance and endowment policies, annuities, Retained Asset Accounts and other funds are timely paid out to Beneficiaries, and are
timely reported or remitted in accordance with the Unclaimed Property Laws and the Insurance Laws.

WHEREAS, the Company has fully cooperated with the Departments in the course of the Multi-State Examination by making its books and records available for examination, and its personnel and agents available to assist as requested by the Departments and Prudential represents that at all times relevant to this Agreement, the Company and its officers, directors, employees, agents, and representatives acted in good faith and in a manner they believed to be in the best interest of the Company’s Policyholders;

WHEREAS, Prudential represents that it has policies and procedures to ensure payment of valid claims to Beneficiaries or, in the event that the Company’s search identifies no living Beneficiary, to report and remit unclaimed Proceeds to the appropriate states in accordance with state unclaimed property laws;

WHEREAS, Prudential represents that, in anticipation of a potential demutualization, the Company undertook efforts beginning in 1998 to update Policyholder information to provide Policyholders with notice of the potential reorganization and, in furtherance of those efforts, hired a vendor to conduct an extensive address research project through which the addresses for Prudential’s intermediate and weekly policies ("IWP") were updated by reference to the Social Security Death Master File ("DMF"), and ultimately 26,000 deceased IWP policyholders were identified, and Prudential paid $49 million in previously unpaid death benefits;

WHEREAS, beginning in 2002, Prudential represents that it undertook an initiative to systematically check its in-force individual life and individual annuity files against the DMF, and created the Prudential claim file for quarterly cross-checks of claims-made against its various lines of business, resulting in the discovery of over 107,000 previously unclaimed individual life and annuity death benefits and the payment or remittance of approximately $370 million in death benefits and interest;
WHEREAS, beginning in 2003, Prudential represents that it began periodic checks against the DMF annual updates of its group life insurance files for which it provided Recordkeeping services;

WHEREAS, as a result of the audit currently being conducted by Verus on behalf of several state departments or divisions of unclaimed property, Prudential represents it is undertaking efforts to match records within the scope of that audit against the DMF;

WHEREAS, Prudential represents that it has continued to perform periodic checks, no less than annually, of its individual life insurance files, individual annuity files, and group life insurance files for which Prudential provides Recordkeeping services, against the DMF annual updates, resulting in the discovery and payment or remittance of certain death benefits for which no claim had been made previously and;

WHEREAS, the Company denies any wrongdoing or activities that violate any Insurance Laws in the state of each Department or any other applicable laws, but in view of the complex issues raised and the probability that long-term litigation and/or administrative proceedings would be required to resolve the disputes between the Parties hereto, the Company and the Departments desire to resolve differences between the Parties as to the interpretation and enforcement of Insurance Laws and all claims that the Departments have asserted or may assert with respect to the Company’s claim settlement practices:

NOW, THEREFORE, the Parties agree as follows:

1. **Defined Terms.** Solely for the purpose of this Agreement, those capitalized terms in this Agreement not otherwise defined in the text shall have the following meanings:

   a. **“Agreement”** means this Regulatory Settlement Agreement entered into among the Departments and Prudential.

   b. **“Annuity Contract”** means a fixed or variable annuity contract, other than a fixed or variable annuity contract issued to fund an employment-based retirement plan where Prudential is not committed by the terms of the annuity
contract to pay death benefits to the beneficiaries of specific plan participants.

c. “Beneficiary” or “Beneficiaries” means the party or parties entitled to receive Proceeds payable pursuant to a Policy, Annuity Contract or Retained Asset Account.

d. “Death Master File” or “DMF” means a version of the United States Social Security Administration’s Death Master File or any other database or service that is at least as comprehensive as the United States Social Security Administration’s Death Master File for determining that a person has reportedly died. The Death Master File must include at least one full version of the file and may include update files.

e. “Date of Death” means the date on which a Policyholder identified by the DMF or any other source or record maintained by or located in the Company’s records has died.

f. “Date of Death Notice” means the date the Company first has actual notice of the Date of Death of a Policyholder. For purposes of this Agreement and subject to Schedule A hereto, actual notice shall include, but not be limited to, information provided in the DMF or an equivalent database containing the same information as the DMF, or any other source or record maintained by or located in the Company’s records.

g. “Death Master File Match” means a search of the Death Master File that results in a match of a unique biological individual under the criteria provided in the attached Schedule A.

h. “Effective Date” means the date this Agreement has been executed by the Company, and 20 Departments, including each of the Lead Departments.

i. “Future Settlement Agreement” means any settlement agreement entered into by any other insurer and the Departments concerning the subject matter of this
j. "Insurance Laws" means the Insurance Code, Rules, and Regulations in effect in each Department's state, and any official guidance issued by each Department.


l. "Maturity Age" means the age of maturity or age of endowment set forth in the terms of a Policy. If a Policy does not specify an age of maturity or age of endowment, Maturity Age shall mean the limiting age under the Policy. The limiting age of the Policy is the terminal age of the mortality table specified in the Policy for calculating reserves and/or non-forfeiture values, or, if the Policy does not reference a mortality table for Policy reserves and/or non-forfeiture values, then the limiting age is the terminal age of the mortality table used in calculating the cost of insurance for the Policy.

m. "Policy" means any individual life policy or group policy or certificate of life insurance that is administered on Prudential's administrative systems for which Prudential performs Recordkeeping services and that provides a death benefit. The term "Policy" shall not include: 1) any policy or certificate of life insurance that provides a death benefit under any Federal employee benefit program, including without limitation the Servicemembers Group Life Insurance and Veterans Group Life Insurance Programs; 2) any life insurance policies or certificates where the determination as to whether a benefit is payable is contingent on the cause and manner of death; 3) those life insurance policies or certificates for which the applicable contestability period or suicide exclusion period has not expired at the time of the insured's death; 4) group life insurance policies, or certificates issued thereunder, where Prudential does not perform Recordkeeping functions; or 5) any benefits payable under health coverages
such as disability and long term care arising from the reported death of an insured person under such coverages.

n. "Policyholder" means an insured, annuitant, Retained Asset Account Owner or Annuity Contract Owner whose death results in the payment of Proceeds.

o. "Proceeds" means the money payable under a Policy, Annuity Contract or Retained Asset Account of the Company.

p. "Prudential Records" means Policyholder information maintained on Prudential’s administrative systems concerning the Company’s in-force Policies, Annuity Contracts, and Retained Asset Accounts, as well those Policies that lapsed and that are still within the applicable state dormancy period as measured from Date of Death.

q. "Recordkeeping" means information routinely obtained and maintained by Prudential in its administrative systems that permits it to determine its liability for, and to pay a claim on a Policy without being required to consult a third party, including without limitation, insured full name, date of birth, Social Security Number, coverage amount, coverage eligibility, premium payment status, and Beneficiary information.

r. "Retained Asset Account" means any mechanism whereby the settlement of proceeds payable under a Policy or individual Annuity Contract including, but not limited to, the payment of cash surrender value, is accomplished by the insurer or an entity acting on behalf of the insurer establishing an account with check or draft writing privileges, where those proceeds are retained by the insurer, pursuant to a supplementary contract not involving annuity benefits.

s. "Thorough Search" means the minimum Company efforts to identify, locate and contact the Beneficiaries of a Policy, Retained Asset Account, or Annuity Contract after receiving a Date of Death Notice that indicates that the Policyholder has been
reported as dead. A Thorough Search shall include any methodology believed likely to locate a Beneficiary and, at a minimum:

(i) The Company shall use its best efforts to identify the Beneficiary and determine a current address for the Beneficiary based upon Prudential Records;

(ii) The Company shall make at least three (3) attempts to contact the Beneficiary in writing at the address in (i) above; provided that, if such writing is returned as undeliverable, the Company will not be required to send any additional mailings to that address and will within thirty (30) days attempt to locate Beneficiaries using online search or locator tools, such as Lexis Nexis Accurint;

(iii) If the Company obtains an updated address using online search or locator tools as described in (ii) above, the Company shall make at least three (3) attempts in writing to contact the Beneficiary at that address;

(iv) In the event that no response is received to the writings sent pursuant to ii. and iii. above, or a writing sent pursuant to ii. and iii. above is returned as undeliverable, the Company shall attempt to contact the Beneficiary at least three (3) times at the most current telephone number contained in Prudential Records or obtained through the Company’s use of online search or locator tools.

(v) In the event that no response has been received to the attempted contacts described above, the Company shall attempt to contact the Beneficiary at the most current available email address, if any;

(vi) The Company shall maintain documentation of all attempts described in (i)-(v) to contact the Beneficiary.

Notwithstanding the above, the Company’s obligation to conduct a Thorough Search
shall cease upon documented contact with a Beneficiary. In the event the Company fails to locate a Beneficiary, including through the efforts described above, the Company shall report and remit the policy proceeds in accordance with applicable state unclaimed property laws.

2. **Business Reforms.** In accordance with the implementation schedule described in Schedule B, Prudential will compare Prudential Records against the Death Master Update File every month and against the Complete Death Master File at least annually to identify Death Master File Matches for potential unclaimed death benefits. Prudential shall have no responsibility for errors, omissions or delays in information contained in the Death Master File. Furthermore:

   a. The Company shall commence a Thorough Search within 120 days following the Date of Death, unless the Company receives a Date of Death Notice more than 120 days after the Date of Death, in which case the Company shall commence a Thorough Search within: (i) 45 days following its receipt of the Date of Death Notice for all group life insurance policies, or certificates issued thereunder; and (ii) 30 days following its receipt of the Date of Death Notice for all other Policies, Annuity Contracts and Retained Asset Accounts.

   b. No further action will be required under this Agreement if at any point following a DMF match, Prudential determines that: (i) the Policyholder is not deceased; (ii) the unique biological individual identified on the Death Master File is not the Policyholder as reflected in a competent source or record maintained by or located in Prudential Records; or (iii) that no Proceeds are due under the applicable Policy, Annuity Contract, or Retained Asset Account.

   c. In the event that a line of business conducts checks of its Policyholders against the DMF for Death Master File Matches at intervals more frequent than those provided for in this Agreement and such Death Master File Match results in action being taken with respect to a Policy, Annuity Contract, or Retained Asset
Account, then that line of business shall share the relevant Policyholder information among applicable lines of business.

d. In the event that Prudential locates the Beneficiary following a Thorough Search, Prudential shall provide the appropriate claims forms or instructions, if required, to the Beneficiary to make a claim, including instructions as to the need to provide an official death certificate if consistent with law and the Policy, Annuity Contract, or Retained Asset Account. Prudential reserves the right to require satisfactory confirmation of death, including a death certificate, as due proof of death, before Proceeds are paid to a Beneficiary or a Beneficiary’s legal representative if consistent with law and the Policy, Annuity Contract, or Retained Asset Account. Nothing in this Agreement shall be construed to supersede Prudential’s obligation to maintain effective procedures and resources to deter and investigate fraudulent insurance acts as required by applicable law.

e. The obligation to conduct a Thorough Search under the terms of this Agreement shall not abrogate the obligation of the Company to complete any due diligence within the timeframe required by any applicable law.

f. Prudential shall implement policies and procedures for conducting a Thorough Search.

g. To the extent permitted under applicable law, Prudential may disclose the minimum necessary personal information about a Policyholder or Beneficiary to a person whom Prudential reasonably believes may be able to assist Prudential locate the Policyholder or Beneficiary or a person otherwise entitled to payment of the claims Proceeds.

h. The Company shall conduct a Thorough Search for group life insurance policies, including group life insurance certificates issued thereunder, where a group life insurance claim is received for which the Company, from information in its administrative systems and/or the group policy claim form, is
able to determine that a benefit is due and is able to determine the benefit amount, but the beneficiary cannot be identified and/or located.

3. **Multi-State Examination Payment.** Without admitting any liability whatsoever, the Company agrees to pay the Departments the amount of $17 million (the “Payment”) for the examination, compliance, and monitoring costs associated with the Multi-State Examination. The Lead Departments shall be responsible for allocating the Payment to the Departments. To be eligible to participate in the Payment allocation, a Department must sign the Agreement by March 31, 2012. The Company agrees to make Payment within ten (10) days after the Effective Date and the receipt of the allocation from the Departments, which will extinguish the Company’s financial obligation to the Departments arising from the Multi-State Examination, except as set forth below in paragraphs 4(c) and 4(d).

4. **Regulatory Oversight.** Each of the Departments shall maintain independent regulatory oversight over the Company’s compliance with the terms of this Agreement and in furtherance thereof, Prudential agrees to the following:

   a. For a period of thirty-six (36) months following the Effective Date, the Company shall provide to the Lead Departments quarterly reports on the implementation and execution of the requirements of this Agreement. Each report shall be delivered to each of the Lead Departments within forty five (45) days following the end of the applicable reporting period.

   b. The Company may petition a Department to terminate or modify this Agreement in that state. Such a petition may include, but not be limited to, the following grounds: (i) the Agreement’s terms, in whole or in part, are inconsistent with the statutes, rules or regulations then in effect in that state; (ii) that a Future Settlement Agreement with a company possessing substantial market share is more favorable than the Agreement; or (iii) Future Settlement Agreements have not been entered
into with companies possessing substantial market share. A Department will not unreasonably withhold its consent to the relief requested by the Company in its petition. Once made by the Company, the Multi-State Examination Payment, as allocated to each Department, is final and non-recoverable under any circumstances including the termination of this Agreement.

c. In addition to the payments set forth in Section 3, the reasonable costs and expenses of the Departments related to the monitoring of the Company’s compliance with the Agreement, including the costs and expenses of conducting any reviews or examinations permitted by the Agreement, as well as participating in any meetings, presentations or discussions with the Company, shall be borne by the Company.

d. The monitoring of Company for compliance with the terms of this Agreement constitutes an ongoing examination by each of the Departments pursuant to each of their respective state laws. Consistent with applicable law, each Department shall accord confidential treatment to the work papers, recorded information, documents, copies of work papers, and documents produced by, obtained by or disclosed by Company.

5. **Company Covenants.** The Company covenants and agrees with each of the Departments that it shall comply in all respects with the following terms and conditions:

a. Proceeds under a Policy shall be determined in accordance with the Policy terms.

b. Proceeds under Annuity Contracts shall be determined in accordance with the contract terms.

c. The value of a Retained Asset Account shall be the value of the account as of the date the Proceeds are paid to the Beneficiary.

d. Prudential shall not charge Beneficiaries for any fees or costs associated with a
search or verification conducted pursuant to this Agreement.

6. **Miscellaneous.**

a. This Agreement shall not confer any rights upon any persons or entities other than the parties to it and is not intended to be used for any other purpose. Nor shall the Agreement be deemed to create any intended or incidental third party beneficiaries, and the matters addressed herein shall remain within the sole and exclusive jurisdiction of the Departments.

b. This Agreement does not impair, restrict, suspend, or disqualify Prudential from engaging in any lawful business in any jurisdiction based upon, or arising out of, the Multi-State Examination regarding any alleged act or omission of Prudential.

c. The Parties agree that this Agreement contains the entire agreement between them with regard to the Company’s settlement practices or procedures as they relate to, and policy administration relating to, the matching of Policyholders against the DMF or any similar database and that there are no other understandings or agreements, verbal or otherwise, between the Parties, except as set forth herein. There have been no representations not set forth herein that any Party has relied upon in entering into this Agreement.

d. Neither this Agreement, nor any act performed or document executed pursuant to or in furtherance of this Agreement, is now or may be deemed in the future to be an admission of or evidence of liability or any wrongdoing by the Company.

e. The Parties represent and warrant that the person executing this Agreement on behalf of each Party has the legal authority to bind the Party to the terms of this Agreement.

f. Each Department agrees to release the Company from all claims, demands, interest, penalties, actions or causes of action that each Department may have
by reason of any matter, cause or thing whatsoever, regarding or relating to the Company’s claims settlement practices as they relate to matching Policyholders against the DMF or any similar database. Nothing in this Agreement shall preclude the Departments from conducting a Multi-State Examination to assess the Company’s compliance with this Agreement. In addition to the payments set forth in Section 3, the cost of such an examination shall be borne by the Company in accordance with the Lead Departments’ respective Insurance Law.

If the state of any Department adopts any Insurance Law addressing insurance companies’ use of the Death Master File (or its equivalent) in connection with insurance companies’ procedures concerning the payment of Proceeds to Beneficiaries, then Prudential’s compliance with the terms of such Insurance Law of that state after the Effective Date of this Agreement shall be deemed to comply with those terms of this Agreement (i) which relate solely to the use of the Death Master File, and (ii) for the purposes of compliance herewith for that state alone.

In the event that any portion of this Agreement is enjoined or held invalid under the laws of a Department’s state, such enjoined or invalid portion shall be deemed to be severed only for the duration of the injunction, if applicable, and only with respect to that Department and its state, and all remaining provisions of this Agreement shall be given full force and effect and shall not in any way be affected thereby.

No later than five years following the Effective Date, the Lead Departments will complete the Multi-State Examination with a final review concerning the Company’s compliance with the Agreement. If that review confirms that the Company has fulfilled its obligations under the Agreement, the Multi-State Examination will be closed. The Agreement will terminate eight years following the Effective Date (the “Termination Date”), contingent upon closure of the Multi-State Examination and the Company’s submission of its
prospective policies and procedures for DMF matching and beneficiary outreach, to be used after the Agreement ends. This submission shall be made to the New Jersey Division of Banking and Insurance six calendar months prior to the Termination Date.

j. Nothing in this Agreement shall be construed as an admission of any party’s position as to the preemptive effect of the Employee Retirement Income Security Act of 1974, as periodically amended, on state laws as applied to employment based plans.

k. This Agreement does not abrogate obligations undertaken by the Company under any agreement with unclaimed property officials.

l. This Agreement may be executed in counterparts.

7. **Enforcement.** The failure to comply with any provision of this Agreement shall constitute a breach of the Agreement and a violation of an Order of each Department, and shall subject the Company to such administrative and enforcement actions and penalties as each Department deems appropriate, consistent with each Department’s respective state laws.

[SIGNATURE PAGE IMMEDIATELY FOLLOWS]
In Witnesses Whereof, the parties to this Regulatory Settlement Agreement have each caused their signatures to be set forth below on the date first set forth below.

PRUDENTIAL

By: Ann Kappler
Vice President, Chief Legal Officer, Corporate Services

DATED: January 27, 2012
FLORIDA OFFICE OF INSURANCE REGULATION
BY: ________________________
KEVIN M. McCARTY
COMMISSIONER
DATE______________________

NEW JERSEY DEPARTMENT
OF BANKING AND INSURANCE
BY: ________________________
THOMAS B. CONSIDINE
COMMISSIONER
DATE______________________

CALIFORNIA DEPARTMENT
OF INSURANCE
BY: ________________________
DAVE JONES
COMMISSIONER
DATE______________________

NORTH DAKOTA INSURANCE
DEPARTMENT
BY: ________________________
ADAM HAMM
COMMISSIONER
DATE______________________

ILLINOIS DEPARTMENT
OF INSURANCE
BY: ________________________
ANDREW BORON
DIRECTOR
DATE 2-1-12

PENNSYLVANIA INSURANCE
DEPARTMENT
BY: ________________________
MICHAEL F. CONSEDEINE
COMMISSIONER
DATE______________________

NEW HAMPSHIRE INSURANCE
DEPARTMENT
BY: ________________________
ROGER A. SEVIGNY
COMMISSIONER
DATE______________________
FLORIDA OFFICE OF INSURANCE REGULATION

BY: __________________________

KEVIN M. McCARTY
COMMISSIONER

DATE _______________________

NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE

BY: __________________________

THOMAS B. CONSIDINE
COMMISSIONER

DATE 1/30/12

CALIFORNIA DEPARTMENT OF INSURANCE

BY: __________________________

DAVE JONES
COMMISSIONER

DATE _______________________

NORTH DAKOTA INSURANCE DEPARTMENT

BY: __________________________

ADAM HAMM
COMMISSIONER

DATE _______________________

ILLINOIS DEPARTMENT OF INSURANCE

BY: __________________________

ANDREW BORON
DIRECTOR

DATE _______________________

PENNSYLVANIA INSURANCE DEPARTMENT

BY: __________________________

MICHAEL F. CONSEDINE
COMMISSIONER

DATE _______________________

NEW HAMPSHIRE INSURANCE DEPARTMENT

BY: __________________________

ROGER A. SEVIGNY
COMMISSIONER

DATE _______________________

Page 15A of 20
SCHEDULE A

RULES FOR IDENTIFYING DEATH MATCHES.

In comparing Prudential Records against the DMF, the Company shall use the methodology below as the minimum standard for determining what constitutes a match. The Company shall use the same match rules for Annuity Contracts, Policies and Retained Asset Accounts.

**Category 1:** "Exact Social Security Number Match" occurs when the Social Security Number contained in the data found in the Company's records matches exactly to the Social Security Number contained in the DMF.

**Category 2:** "Non-Social Security Number Match" occurs in any of the following circumstances:

1. The Social Security Number contained in the data found in the Company's records matches in accordance with the Fuzzy Match Criteria listed below to the Social Security Number contained in the DMF, the First and Last Names match either exactly or in accordance with the Fuzzy Match Criteria listed below and the Date of Birth matches exactly.

2. The Company's records do not include a Social Security Number or where the Social Security Number is incomplete (less than 7 digits) or otherwise invalid (i.e. 111111111, 999999999, 123456789), and there is a First Name, Last Name, and Date of Birth combination in the data produced by the Company that is a match against the data contained in the DMF where the First and Last Names match either exactly or in accordance with the Fuzzy Match Criteria listed below and the Date of Birth matches exactly.

3. If there is more than one potentially matched individual returned as a result of the process
described in paragraphs 1 and 2, immediately above, then the Company shall run the Social Security Numbers obtained from the DMF for the potential matched individuals against Accurint for Insurance or an equivalent database. If a search of those databases shows that the Social Security Number is listed at the address in the Company's records for the insured, then a non-Social Security Number Match will be considered to have been made only for individuals with a matching address.

Fuzzy Match Criteria:

1. "First Name" fuzzy match includes one or more of the following:
   a. "First Name" "Nick Names:" "JIM" and "JAMES." the Company utilize the pd Nickname database from Peacock Data, Inc. or an equivalent database, to identify matching First Names where a nickname is used on one or both sides of the match.
   b. "Initial" instead of full first name: "J FOX" and "JAMES FOX"
   c. Data entry mistakes with a maximum difference of one character with at least five characters in length: "HARRIETTA" and "HARRIETA"
   d. If First Name is provided together with Last Name in a "Full Name" format and "First Name" and "Last Name" can't be reliably distinguished from one another: "ROBERT JOSEPH," _ Both "JOSEPH ROBERT" and "ROBERT JOSEPH"
   e. Use of interchanged "First Name" and "Middle Name:" "ALBERT E GILBERT" and "EARL A GILBERT"
   f. Compound "First Name:" "SARAH JANE" and "SARAH," or "MARY ANN" and "MARY"

2. A "Last Name" fuzzy match includes one or more of the following:
   a. Compound last name: "SMITH" and "SMITH-JONES"
   b. Blank spaces in last name: "VON HAUSEN" and "VONHAUSEN"
   c. Use of apostrophe or other punctuation characters in "Last Name:" "O'NEAL" and "ONEAL"
3. "Date Of Birth" fuzzy match includes one of the following:
   a. Two dates with a maximum of one digit in difference: "03/27/1945" and "03/27/1946"
      i. NOTE: "0312711949" and "031271/1950" are not a match under Rule 3(a)i.
      ii. Only 1 entry mistake per full date is allowable: "03/27/1945" and "03/28/1946" are not a match
   b. Transposition of "Month" and "Date" portion of the "Date of Birth:" "05/11/1935" and "11/05/1935"
   c. If The Company's systems do not contain a complete "Date of Birth," then a "Date of Birth" exact match will be found to exist where the data that is available on The Company's systems does not conflict with the data contained in the DMF. By way of example, if The Company's systems only contain a month and year of birth, an exact "Date of Birth" match will exist if the DMF record contains the same month and year of birth.

4. "Social Security Number" fuzzy match includes one of the following:
   a. Two Social Security Numbers with a maximum of two digits in difference, any number position: "123456789" and" 123466781"
   b. Two consecutive numbers are transposed: "123456789" and" 123457689"
   c. If a Social Security Number is less than nine digits in length (with a minimum of seven digits) and is entirely embedded within the other Social Security Number: "12345678" and "012345678."
SCHEDULE B

The Company’s implementation of Business Reforms involving the frequency, and use of, the matching methodology described in Schedule A, shall proceed in the following manner:

(1) No later than twelve calendar months following the Effective Date, the Company shall confirm to the Lead Departments that it has completed the process required to effectuate the matching methodology contained in Schedule A (the “Confirmation Date”). During this twelve calendar month period, the Company will continue matching its in-force individual life policies, individual annuity contracts, and group life policies for which it provides recordkeeping services against the DMF update file according to its existing procedures. At present, the following products are matched: (i) on an annual basis -- individual life policies, individual annuities in accumulation phase and group universal and group variable universal life insurance issued to employer and association groups; and (ii) on a monthly basis -- individual annuities in a payout phase, Group life term life insurance issued to employer and association groups for which it provides full recordkeeping services, Group variable universal life non- corporate, trust and business owned policies (COLI, TOLI and BOLI), as well as policies on waiver of premium and Retirement Services’ payout annuities attributable to defined benefit plans, as well as its structured settlements. Currently, Prudential’s matching criteria requires an exact SSN, DOB and Last Name.

If a match is attained, Prudential will continue to share the applicable Policyholder information among its various lines of business according to existing procedures of conducting quarterly cross-checks of confirmed deaths against its various lines of business. Thereafter, Prudential then conducts due diligence to locate the beneficiary or next of kin and initiates the claims process to confirm the insured or contract owner’s death, including the obtainment of a death certificate. If the death and liability is confirmed and a beneficiary is not located, Prudential remits the death payment to the applicable state in accordance with state unclaimed property laws.

In addition to the above, during the twelve calendar month period following the Effective Date, Prudential will be receiving monthly reports identifying matches as part of the resolution of its multi-state unclaimed property audit.

(2) Commencing on the Confirmation Date, the Company shall begin using Schedule A’s matching methodology to compare Prudential Records against the DMF update file on a quarterly basis and perform Thorough Searches on any matches obtained during this process. Once a match is attained, the Company will continue to share applicable Policyholder information among its various lines of business according to existing procedures of conducting quarterly cross-checks of confirmed deaths against its various lines of business. Thereafter, Prudential then conducts due diligence to locate the
beneficiary or next of kin and initiates the claims process to confirm the insured or contract owner’s death, including the obtainment of a death certificate. If the death and liability is confirmed and a beneficiary is not located, Prudential remits the death payment to the applicable state in accordance with state unclaimed property laws.

In addition to the above, during the twelve calendar month period following the Confirmation Date, Prudential will be receiving monthly reports identifying matches as part of the resolution of its multi-state unclaimed property audit.

(3) At the end of the fourth quarter following the Confirmation Date, the Company shall use Schedule A’s matching methodology to compare Prudential Records against the full DMF file and perform Thorough Searches on any matches obtained during this process.

(4) No later than thirteen calendar months following the Confirmation Date, the Company shall begin using Schedule A’s matching methodology to compare Prudential Records against the DMF update file on a monthly basis and perform Thorough Searches on any matches obtained during this process.

(5) No later than twenty-four calendar months following the Confirmation Date, the Company shall use Schedule A’s matching methodology to compare Prudential Records against the full DMF file and perform Thorough Searches on any matches obtained during this process.